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Why the *Motorola Mobility* Decision was Good for Cartel Enforcement and Deterrence

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I. INTRODUCTION

I was pleased to have an article I wrote on the FTAIA cited and quoted from in the recent *Motorola Mobility* opinion.[2] I agree with the decision in *Motorola Mobility* and I also believe that the decision was a fair interpretation that reached the optimal outcome for strengthening international cartel enforcement.

The initial Seventh Circuit holding, that the conduct in question did not "have a direct, substantial and reasonably foreseeable effect" on U.S. commerce, could have seriously jeopardized the enforcement efforts of the Department of Justice's Antitrust Division ("Division"). The Court could have reached a decision allowing Motorola Mobility to seek damages in U.S. courts for purchases made overseas by a foreign subsidiary, but that could have created resentment of the United States as the world's only cartel cop that mattered. (*See* Section II, below.) The decision to hold only that Motorola Mobility's claim did not meet the FTAIA's "gives rise to" requirement was a wise compromise from a policy perspective. Here's why I think so.

II. INTERNATIONAL COOPERATION HAS LED TO THE EFFECTIVE PREVENTION, DETECTION, AND PROSECUTION OF CARTELS

While there are a few exceptions,[3] major private civil damage cases in the international cartel arena have generally been brought only after the Division has obtained guilty pleas or convictions. The Division's ability to obtain guilty pleas has been aided greatly by cooperation from foreign governments in global investigations. Numerous foreign governments filed *amicus* briefs in *Motorola Mobility* urging the Court not to reach a decision that would infringe on their sovereignty and undermine their own enforcement of competition laws. For purposes of prosecuting international cartels, as well as for follow-on civil actions, maintaining international cooperation is essential.

Cooperation among antitrust enforcers takes many forms, some public, some not: coordinated dawn raids, assistance in obtaining foreign-located evidence, sharing leads and other non-confidential information, adoption of Mutual Legal Assistance Treaties ("MLATs"), and

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[2] Judge Posner cited and quoted, *Repeal the FTAIA! (Or at Least Consider it Coextensive With Hartford Fire)*, 9(1) CPI ANTITRUST CHRON. (Sept. 2014), *available at* www.competionpolicyinternational.com/repeal-the-ftaia-or-at-least-considerit-as-coextensive-with-hartford-fire/ (Sept. 2014). The Court also cited and quoted a post in my blog, Cartel Capers, *Motorola Mobility and the FTAIA*, (Sept. 30, 2014) *available at* http://cartelcapers.com/bog/motorola-mobility-ftaia.

[3] *See e.g., In re Vitamin C Antitrust Litig.*, 904 F. Supp. 2d 310, 317-18 (E.D.N.Y. 2012).

reducing safe havens from extradition for those who do fix prices.[4] "While challenges remain in the area of international cooperation, cooperation among jurisdictions in anti-cartel enforcement continues to become more robust, sophisticated, and effective."[5]

The Division has observed that, with each passing day, the antitrust community learns of a foreign government that has enacted a new antitrust law, created a new cartel investigative unit, obtained a record antitrust fine, or adopted a new corporate leniency program. This shared commitment to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world, leading to more effective investigation and prosecution of international cartels.[6]

It is probably true that when the Division brought the international lysine price-fixing cartel case against ADM, there was under deterrence of international cartels. ADM was the "supermarket to the world," yet faced penalties in very few jurisdictions. The United States and European Union were the principal enforcers, imposing fines of just slightly more than $200 million cumulatively. While two ADM executives were sent to prison, no foreign executives were. Indeed, at that time, foreign executives had little to fear from cartel participation—extradition, red notices, and potential jail sentences in other jurisdictions were not yet a reality. More recently, by contrast, many foreign executives involved in the LCD cartel received jail terms as a result of Division prosecutions. Many currently believe jail is the greatest deterrent to cartel behavior.

Fines have also increased dramatically in the past decade. In the LCD cartel prosecution, AU Optronics alone was fined $500 million in the United States. LCD cartel enforcement actions have been taken by, among others, the United States, European Union, Canada, Korea, Japan, Brazil, and China, and this is likely not the full list. Global fines for price-fixing reached a record high in 2014 of $5.3 billion, which was a 31 percent increase over 2013's record-breaking total.[7] Fines in Asia were also at a record level of $1.7 billion.[8]

This dramatic expansion of cartel-fighting abilities on a worldwide scale took some time, as did developing a respect for differing views among nations. In the autumn of 1999, the Division hosted the first-ever international meeting of cartel investigators and prosecutors. More than 25 countries sent representatives. An international conference among enforcers has continued, in one form or another, ever since. The International Competition Network ("ICN"),

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[4] *See* Scott D. Hammond, Deputy Assistant Attorney Gen. Antitrust Division, U.S. Dep't of Justice, *An Update on the Antitrust Division's Criminal Enforcement Program* (Nov. 16, 2005), *available at* http://www.justice.gov/atr/public/speeches/213247.htm.

[5] OECD Global Forum on Competition, *Improving International Co-Operation in Cartel Investigations*, (Contribution from the United States (DOJ)), *available at* http://www.justice.gov/atr/public/international/286282.pdf (Jan. 31, 2012).

[6] Scott D. Hammond, Deputy Ass't Att'y Gen, Antitrust Div., U.S. Dep't of Justice, *Recent Developments Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program*, *available at* http://www.justice.gov/atr/public/speeches/232716.htm (Mar. 26, 2008).

[7] *Global Fines for price-fixing hit $5.3 bn record high*, FINANCIAL TIMES (Jan. 6, 2015), *available at* http://www.ft.com/intl/cms/s/0/83c27142-95a8-11e4-b3a6-00144feabdc0.html#axzz3PN4JQQ9a.

[8] DW, *Asia antitrust watchdogs issue record fines*, *available at* http://www.dw.de/asia-antitrust-watchdogs-issue-record-fines/a-18176691 (Jan. 8, 2015).

has developed into a mature international organization with 126 agency members from 111 jurisdictions.[9] And today there are more than 100 competition agencies worldwide with some form of leniency program. Any cartelist facing government action has a long, and continually growing, list of countries where it must "make peace" if it has committed a cartel violation.

These statistics demonstrate that the Division has been spectacularly successful in exporting the view that "cartels are the supreme evil of antitrust." During the time I was with the Chief of the Philadelphia Field Office, we hosted delegations from Korea, Japan, and China, as well as had telephone discussions with many other jurisdictions regarding effective cartel enforcement. Other Division field offices did likewise and, of course, the main stop was always Main Justice in Washington, D.C.

Besides advocating condemnation of cartels, the Division also very effectively advocated for the adoption of leniency programs, which have now been adopted almost universally. Having invited the world to join the effort to prohibit and prosecute cartels, and that invitation having been enthusiastically accepted, it is good manners/policy that the competition regimes set up around the globe—which continue to develop—be given due respect and that the views of our partners be given serious consideration.

III. DAMAGE CLAIMS FOR VICTIMS ARE FOLLOWING A SIMILAR UPWARD TRAJECTORY

There has been something of a time lag in the international community's acceptance of mechanisms by which persons injured by cartels may be compensated for the damages suffered. The landscape, however, is changing rapidly on that front. Today, there is an ever-increasing ability for price-fixing victims to obtain damages. The European Union recently adopted a Directive that "makes it a lot easier for victims of antitrust violation to claim compensation."[10] And, damage actions can already be brought in the Member States.

A few examples of cartel members who have faced damage demands or civil proceedings in various EU Member States are gas-insulated switchgears, vitamins, rubber chemicals, elevators and escalators, cement, hydrogen peroxide, and rail.[11] So far, England, Germany, and the Netherlands have emerged as litigation hotspots. According to one report "Interestingly enough, a vying for the label of the best competition litigation forum for claimants in Europe seems to be evolving."[12]

As new cartel enforcers enter the picture, they are including victim redress as an enforcement goal. In India, for example, damages can be awarded to victims, but the system is completely different than the U.S. class-action system. Victims can make claims to the

[9] *See* Statement by Andreas Mundt, President of the Bundeskartellamt and ICN Chair, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc924.pdf.

[10] Competition Policy Brief, *The Damages Directive*, *available at* http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf (Jan. 2015). Member States must implement the decree by December 27, 2016.

[11] Stefan Rützel, Stephan Wilske, & Alexander Fritzsche, *Collective Redress in Cartel Damages Actions - Recent Developments in Europe*, *available at* http://whoswholegal.com/news/features/article/30916/collective-redress-cartel-damages-actions-recent-developments-europe (Oct. 2013).

[12] *Id.*

Competition Appellate Tribunal after the Competition Commission of India has successfully brought an action.[13] And China took an interesting tack against the LCD cartel members. Besides imposing fines, the six defendants were required to refund the overcharged amount directly to the Chinese TV makers. China also required the defendants to offer extended warranties to consumers of the price-fixed products.[14]

Collective redress or damage actions are proliferating, as cartel enforcement has, around the globe. To be sure, the regimes may be different; the U.S. class action system is not seen as a model to emulate. Some foreign regimes may be better than the U.S. system, some worse, and—in some jurisdictions—damage claims may still not be allowed at all. But as with cartel enforcement, allowing each jurisdiction to create its own system of enforcement in cooperation, not competition, may be the best long-term way to further increase worldwide cartel deterrence.

The *Motorola Mobility* opinion cited the Supreme Court warning that rampart extraterritorial reach of the Sherman Act "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."[15] The Seventh Circuit went on to state, "The position for which Motorola contends would if adopted increase the global reach of the Sherman Act, creating friction with many foreign countries and 'resent[ment at] the apparent effort of the United States to act as the world's competition police officer."[16]

Do I think that had the sovereignty interests of foreign governments (as expressed in their *amicus* briefs) been ignored in *Motorola Mobility,* these and other governments would have stopped cooperating in international cartel investigations? Would we return to the days of "blocking" statutes and "claw back" provisions? Probably not. But cooperation is a matter of degree and requires mutual trust and respect between partners. And it is required in a number of areas. The timing of dawn raids is currently a subject of effective international cooperation. Confidentiality of information is another key area of cooperation that have been essential to the proliferation of leniency programs. Even small areas of increased friction in these or other areas could help kill the golden goose—the governmental enforcement actions that precede civil damage cases. Optimal continued cooperation sometimes means respecting partners' views and processes, even though you're sure you know best.

In short, deterrence against international cartels has increased substantially and will continue to do so as long as enforcement agencies cooperate. The recent cooperation of China with nations coordinating dawn raids in the relatively new international capacitor investigation is a deterrent development probably not yet fully appreciated. And the ability of price-fixing victims to assert damage claims is also on the rise.

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[13] In India the Competition Appellate Tribunal can "adjudicate on claim for compensation that may arise from the findings of the Competition Commission of India," *see* http://compat.nic.in/Introduction.html.

[14] *See, Chinese Cartel Busters Impose Record Fines on Foreign LCD Makers*, HOGAN LOVELLS (January 2013), *available at* http://www.hoganlovells.com/files/Uploads/Documents/13.01.07_ACER%20newsflash_LCD%20Decision%20.pdf.

[15] F. Hoffman-LaRoche Ltd. v. Empagran, 542 U.S. 155, 165 (2004).

[16] Motorola Mobility, *supra* note 2, at 8.

IV. OTHER POLICY CONCERNS THAT WARRANT RESPECT FOR ENFORCEMENT REGIMES OF OTHER COUNTRIES

A. What's Good for the Goose…

Another concern I have related to the reach of the FTAIA is "what's good for the goose is good for the gander." Many foreign companies do business in the United States, either directly or through subsidiaries. What would the reaction be of a U.S. company, for example, if it was hauled into court in China for sales made in the United States to a Chinese subsidiary because the subsidiary operating in the United States felt the laws (courts) in China would be more favorable? The quote below, while in relation to FCPA enforcement, expresses my concern better than I can:

> It's most certainly not good economics that one court jurisdiction gets to fine companies from all over the world on fairly tenuous grounds. Who would really like it if Russia's legal system extended all the way around the world? Or North Korea's? And I'm pretty sure that the non-reciprocity isn't good public policy either. Eventually it's going to start getting up peoples' noses and they'll be looking for ways to punish American companies in their own jurisdictions under their own laws. And there won't be all that much that the U.S. can honestly do to complain about it, given their previous actions.[17]

B. Cooperation in Areas Beyond Cartels

Continued cooperation among enforcement agencies isn't just important in the areas of cartels, but also in mergers and other competition conduct cases. Thomas O. Barnett, recent head of the Division, stated that global antitrust enforcement could create "burdensome requirements" if "procedures and substantive antitrust analysis diverge across countries, which can lead to inconsistent or even incompatible results."[18] And, in Europe, Joaquín Almunia, the former European Commissioner for Competition, voiced a similar concern, "In this setting, our ability to protect competition on the merits, foster innovation, and keep markets open and fair will depend on how well we manage to establish a common set of principles and goals for our enforcement work."[19]

If the United States is seen as a competition bully, the blowback in other areas besides cartels could be far reaching. Of course, core principles should not be abandoned. So, for example, the United States will likely continue to disagree with partners about the treatment of resale price maintenance. But the ability of a U.S. parent to stand in the shoes of its foreign subsidiary in order to press damages claims in the United States is not a core principle. In that area companies may have to simply "vote with their feet" and not set up foreign subsidiaries. An

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[17] Tim Worstall, *Isn't It Strange That The US Gets to Fine Alstom, A French Company, For Bribery Not In The US?*, FORBES (Dec. 22, 2014) *available at* http://www.forbes.com/sites/timworstall/2014/12/22/isnt-it-strange-that-the-us-gets-to-fine-alstom-a-french-company-for-bribery-not-in-the-us/.

[18] Thomas O. Barnett, Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, *Antitrust Update: Supreme Court Decisions, Global Developments, and Recent Enforcement*, (Feb. 29, 2008) *available at* http://www.justice.gov/atr/public/speeches/230627.htm.

[19] Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, *Competition policy and the global economy* (7 March 2014), *available at* http://europa.eu/rapid/press-release_SPEECH-14-192_en.htm.

even more simple solution, and simple is usually better, would be for the U.S. parent to make purchases if it does not want to have to seek antitrust remedies under the laws of the country in which its subsidiary is are operating.

V. CONCLUSION

The FTAIA is an ambiguous and confusingly written statute. It has proven difficult for courts to apply, and interpretation of the FTAIA seems to turn as much on policy considerations as statutory interpretation. The policy concerns expressed above are not the only policy considerations that are relevant to determining the extraterritorial reach of the Sherman Act. For example, there is legitimate concern that U.S. companies need to have foreign subsidiaries, and they may be subject to collusion without adequate recourse. But, there is an increasing trend towards extending damage remedies. It may be that having companies live with the remedies of the country in which they set up shop and make purchases is the best overall option for continued increased prevention, detection, and prosecution of international cartels.