Through a Glass Darkly: A U Optronics and the Extraterritorial Application of the Sherman Act

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Can price-fixing abroad be prosecuted criminally under the U.S. Sherman Act? The antitrust bar might well raise an eyebrow at the question. Since international cartels became a focus of the Department of Justice's Antitrust Division (the "Division") in the 1990s, U.S. prosecutions of non-U.S. citizens for conduct occurring abroad have become routine. In 1999 the first non-U.S. citizen was sentenced to jail in the U.S. for a criminal violation of the Sherman Act. Between 1999 and 2011, 47 non-U.S. citizens were sentenced to prison by U.S. courts, compared to 102 U.S. citizens over the same period. Many of the major cartel prosecutions in recent years (marine hose, air transportation, liquid crystal display (TFT-LCD), and dynamic random access memory (DRAM)) have concerned conduct taking place mostly or entirely abroad.

Now several defendants in the TFT-LCD case, citing the Supreme Court's decision in *Morrison v. National Australia Bank,* ___ U.S. ___, 130 S. Ct. 2869 (2010), are arguing that the Sherman Act cannot be used to prosecute their conduct. As described in a brief filed by Taiwanese defendants Hui Hsuing and Hsuan Bin Chen, the participants in the TFT-LCD cartel were all Taiwanese and Korean manufacturers, and their meetings all took place in Taiwan. The initial purchasers of the TFT-LCD panels, who were either systems integrators or original equipment manufacturers (OEMs), were all located outside the United States.

Since 2008, the Division has racked up multiple convictions in its investigation of the alleged cartel. As of the end of 2012, eight companies had pleaded guilty or been convicted and had been sentenced to pay fines of more than $1.39 billion. Of 22 executives charged, 13 had been convicted or pleaded guilty and seven remained fugitives. Among those convicted were A U Optronics, Inc. ("A U Optronics"), which was sentenced to pay a $500 million fine, and its former executives Hsuing and Chen, who were sentenced to serve three years in prison and pay a $200,000 criminal fine.

Hsuing and Chen, buttressed by an amicus brief filed by Professor Andrew Guzman of the Berkeley School of Law (Boalt Hall), argue that the imposition of fines and imprisonment on the Taiwanese corporation and citizens is improper under *Morrison.* In *Morrison*, the Court overturned decades of lower-court precedent and held that § 10(b) of the Securities and Exchange Act and Rule 10b-5 did not apply extraterritorially. It instructed courts to rely on the longstanding presumption against extraterritorial application of U.S. law on the principle that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." 130 S. Ct. at 2877, *citing EEOC*

v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) ("*Aramco*"). A U Optronics and the Taiwanese Federation of Industries have joined in Hsuing and Chen's brief.[1]

There are serious hurdles to holding that the Sherman Act does not permit the criminal prosecution of extraterritorial conduct. First, Congress has arguably manifested an intent to apply the Sherman Act abroad, via the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. §6a, enacted in 1982. This statute seeks to assure that "restraints on export trade only violate the Sherman Act if they have a direct and substantial effect on commerce within the United States or a domestic firm competing for foreign trade." H.R. Rep. 97-686 at 7-8. The defendants and the amicus argue that the FTAIA was intended to limit the reach of the Sherman Act, not expand it, and that in any case it does not evidence a Congressional intent to apply Section 1 to prosecute conduct overseas.

Second, the Supreme Court itself has already stated 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." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96 (1993). Defendants argue, as they must, that *Hartford Fire* is inconsistent with *Morrison* and should be repudiated. They further note that *Hartford Fire* concerned a civil lawsuit, not the criminal charges at issue in the TFT-LCD prosecutions.

Assuming the question eventually reaches the Supreme Court, it would be rather daring for the Court to hold that Section 1 cannot be used to prosecute criminal conduct abroad. As the statistics quoted above show, the Department of Justice has used the Sherman Act aggressively to prosecute international cartels over the past 20 years; it would mark a very sharp change in legal practice, if not in controlling precedent, to hold that prosecutors had acted beyond their authority. By contrast, the conduct-and-effects test abrogated in *Morrison* had already circumscribed the extraterritorial reach of Section 10(b). The conduct at issue in *Morrison* involved misstatements concerning the prospects of an American subsidiary of an Australian bank, whose shares were traded exclusively on Australian exchanges. The district court and appeals court, as well as Justices Stevens and Ginsburg in their *Morrison* concurrence, all held that Section 10(b) would not apply under the conduct-and-effects test. 130 S. Ct. at 2895. Finally, of course, even if the Court does hold that Section 1 of the Sherman Act does not apply extraterritorially, it remains open for Congress to overrule the holding. For example, in *Aramco*, the Court held that Title VII of the Civil Rights Act of 1964 did not apply to U.S. employers of U.S. citizens abroad; Congress promptly amended the statute to make clear that it did. *See Aramco*, 499 U.S. at 246-47; *see* Civil Rights Act of 1991, § 109, 150 Stat. 1077 (overruling *Aramco*).

[1] In its own brief, A U Optronics additionally argues that (i) foreign price fixing is governed by the rule of reason, not the per se rule, and (ii) the alleged conspiracy was not aimed at the United States and did not have sufficient effects here to support the convictions.

About the Authors

Mr. Cohen is a partner and co-founder of the firm, and head of its Litigation & Arbitration practice group and its *Chambers USA* recognized White Collar Defense, Regulatory Enforcement and Internal Investigations practice group. He is a former Assistant United States Attorney for the Eastern District of New York. Mr. Cohen was recognized as a leading lawyer in his field by the 2013 edition of *Chambers USA*, the 2013 edition of *Benchmark Litigation,* and included as one of New York's *Super Lawyers* in 2008-2012.

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