Recalling First Principles: The Importance of Comity in Avoiding Antitrust Imperialism

J. Frank Hogue*

In his bestselling book *The World Is Flat*, Pulitzer Prize-winning journalist Thomas Friedman provides everyday examples of how globalization has re-shaped the commercial world over the course of the last two decades.[1] While Friedman's thesis is much larger than just the effect of globalization on commerce and the changes we have witnessed in the yet-young twenty-first century world, he devotes significant space to how foreign countries have helped shape the newly-flat world.[2] In particular, he examines how their companies have dramatically reorganized global supply chains and have become indispensable players in the modern commercial landscape.[3] Friedman recounts his experience in 2004 of ordering a notebook computer and the variety of countries and companies that he is linked to in this transaction.[4] He traces the supply chain that created his

* J. Frank Hogue is a senior associate in White & Case's Global Competition Group. He is a litigator whose work focuses on defending major international corporations against allegations that they violated U.S. antitrust and competition laws. He has represented companies in various U.S. federal courts, before the DOJ, FTC, SEC, and state antitrust enforcement agencies as well as in matters involving competition authorities in various foreign jurisdictions. This article is written in his personal capacity and the views expressed herein are his own.

1. *See generally* THOMAS L. FRIEDMAN, THE WORLD IS FLAT 3.0: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2007).

2. *See id.* at 127–66 (describing foreign countries' contributions to the world's "flattening" process).

3. *See id.* at 151–66 (discussing how foreign companies have influenced supply chains).

4. *See id.* at 580–85 ("Before I share with you the subject of this chapter, I have to tell you a little bit about the computer that I wrote this book on . . . . This book was largely written on a Dell Inspirion 600m notebook, service tag number 9ZRJP41.").

computer and identifies the various companies and countries that supplied components of his new computer.[5]

Friedman writes that "the total supply chain for my computer, including suppliers of suppliers, involved about four hundred companies in North America, Europe and primarily Asia, but with thirty key players."[6] The part-by-part breakdown dramatically shows the extent to which foreign countries increasingly supply the building blocks of electronics sold far from their own shores.[7]

Friedman highlights the complexity of Dell's supply chain and the diversity of component suppliers to make a geopolitical point.[8] An outbreak of armed conflict in East or Southeast Asia would "seriously unflatten" global commerce.[9] Friedman observes:

> [A]s the world flattens, one of the most interesting dramas to watch in international relations will be the interplay between the traditional global threats and the newly emergent global supply chains. The interaction between old-time threats (like China *versus* Taiwan) and just-in-time supply chains (like China *plus* Taiwan) will be a rich source of study for the field of international relations in the early twenty-first century.[10]

---

5. *See id.* at 580–85 (listing component manufacturers for each step in the supply chain).

6. *Id.* at 585.

7. *See id.* at 582–83 (identifying the Philippines, Costa Rica, Malaysia, China, Korea, Taiwan, Germany, Japan, Mexico, Singapore, Thailand, Indonesia, Ireland, India, and Israel as the locations of key suppliers who possibly supplied components for his notebook computer).

8. *See id.* at 585 (using the notebook computer story "to tell a larger story of geopolitics in the flat world" and indicating that "an outbreak of a good, old-fashioned, world-shaking, economy-destroying war" threatens to hold back or even reverse the flattening process).

9. *See id.*

> It could be China deciding once and for all to eliminate Taiwan as an independent state; or North Korea, out of fear or insanity, using one of its nuclear weapons against South Korea or Japan; or Israel and soon-to-be-nuclear Iran going at each other; or India and Pakistan finally nuking it out. These and other classic geopolitical conflicts could erupt at any time and either slow the flattening of the world or seriously unflatten it.

10. *Id.* at 586.

I would add a somewhat less apocalyptic source of conflict that may hamper the operation of global commerce: the overzealous extraterritorial application of antitrust laws. Each of the countries that supplied a part of Mr. Friedman's computer have their own laws and regulations that govern the conduct of companies doing business within their borders, among them competition laws that delineate what is and what is not permissible.[11] These regulations reflect the legal and commercial traditions unique to particular jurisdictions, and embody the differing choices made by these states. And, of course, the United States has its own innumerable laws that govern the conduct of commerce within its own borders.[12] These are the product of the U.S. and Western commercial heritage. As to all of the countries, it has long been established in international law that principles of sovereignty permit these nations to apply their laws to conduct occurring within their territory.[13] But conflict and friction in the international commercial system can occur when one nation seeks to apply its own laws to conduct that takes place within the borders of another nation.[14] The extraterritorial application of

---

11. *See* Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address at the 56th Annual Spring Meeting of the ABA Section of Antitrust Law: Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program 18 (Mar. 26, 2008), http://www.justice.gov/atr/public/speeches/232716.pdf ("Seemingly 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."); Andreas Mundt, Chair, Int'l Competition Network, Focus, Inclusiveness and Implementation—The ICN as a Key Factor for Global Convergence in Competition Law 2 (Sept. 5, 2013), http://internationalcompetitionnetwork.org/uploads/library/doc924.pdf (explaining that the International Competition Network is comprised of 126 agency members from 111 different jurisdictions).

12. *See, e.g.*, Sherman Act, 15 U.S.C. § 1 (2012) (making illegal every contract, combination, or conspiracy "in restraint of trade or commerce among the several States, or with foreign nations"); Clayton Act, 15 U.S.C. § 12 (2012) (prohibiting anticompetitive conduct).

13. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 297 (6th ed. 2003) ("The starting-point in this part of the law is the proposition that, at least as a presumption, jurisdiction is territorial.").

14. *See* Brief for Ministry of Economy, Trade and Industry of Japan as Amici Curiae Supporting Appellees 3, Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015) (No. 14-8003) ("'[E]xcessive' extraterritorial application of competition law tends to bring about serious tension between the countries involved."); Brief for Belgian Competition Authority as Amicus Curiae

antitrust regulations is a potent example. Conflict is particularly possible when it is American antitrust law that is urged to reach foreign commerce and conduct.[15] While such an application can be permissible in certain circumstances, there are constraints on the extraterritorial application of American antitrust laws to alleviate such friction.[16] One such constraint, but certainly not the only one, is the Foreign Trade Antitrust Improvements Act (FTAIA).[17]

While the FTAIA initially enjoyed little celebrity, it has taken on an increased importance in debates over how far and to what conduct American courts should extend the reach of American antitrust law.[18] Increasingly, American courts have taken up the proper application of FTAIA to cases involving

---

Supporting Appellee 6, *Motorola Mobility*, 775 F.3d 816 (No. 14-8003) ("The proliferation of competition law systems can contribute significantly to a better functioning of markets. But without the necessary convergence and comity, conflicting policies may well become a significant obstacle to trade and investment, as recognized by nations across the globe.").

15. *See* F. Hoffmann–La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) ("No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs."); *Motorola Mobility*, 775 F.3d at 824 (stating that increasing "the global reach of the Sherman Act" would "creat[e] friction with many foreign countries").

16. *See Motorola Mobility*, 775 F.3d at 824 (emphasizing that the United States is not "the world's competition police officer").

17. 15 U.S.C. § 6a (2012)

> Sections 1 to 7 of this title [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 [Sherman Act].

18. *See* United States v. LSL Biotechnologies, 379 F.3d 672, 678 (9th Cir. 2004) ("Federal courts did not shower the FTAIA with attention for the first decade after its enactment."), *abrogated on other grounds by* United States v. Hui Hsiung, 758 F.3d 1074 (9th Cir. 2014).

foreign conduct, foreign commerce, and domestic claims.[19] So too has academia, producing a remarkable volume of scholarly research and shining much-needed light on a once-obscure statute.[20]

It is into this already-crowded field that Ms. Leonard bravely enters with her timely Note, *In Need of Direction: An Evaluation of the "Direct Effect" Requirement Under the Foreign Trade Antitrust Improvements Act*.[21] In her Note, Ms. Leonard seeks to identify the appropriate test to allow the FTAIA to play its proper role in the modern global economy.[22] Ms. Leonard focuses her analysis on a single aspect of the analysis with which courts engage when applying the FTAIA, namely the direct effect prong.[23] She skillfully dissects and analyzes two differing tests that courts have used in evaluating whether there is a sufficient link between foreign conduct and an alleged harm to domestic

---

19. *See*, *e.g.*, *Motorola Mobility*, 775 F.3d at 818–20 (considering the FTAIA's application to foreign conduct); Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 409–15 (2d Cir. 2014) (deciding whether defendant's foreign anticompetitive conduct gave rise to plaintiff's antitrust claim); Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 856–60 (7th Cir. 2012) (en banc) (analyzing whether the FTAIA applied to a foreign potash cartel); Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 470–72 (3d Cir. 2011) (discussing the FTAIA's text as it applies to the foreign defendant's foreign conduct); United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 952–53 (7th Cir. 2003) (en banc) (discussing whether the FTAIA applied to foreign behavior), *overruled on other grounds by Minn-Chem*, 683 F.3d 845 (overruling *United Phosphorus*'s holding that the FTAIA's requirements are jurisdictional in nature).

20. *See generally* Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Antitrust Improvements Act*, 44 HOUS. L. REV. 285 (2007); Robert D. Sowell, *New Decisions Highlight Old Misgivings: A Reassessment of the Foreign Trade Antitrust Improvements Act Following* Minn-Chem, 66 FLA. L. REV. 511 (2014); Joseph P. Bauer, *The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to American Banana?*, 65 ME. L. REV. 3 (2012); Ryan A. Haas, *Act Locally, Apply Globally: Protecting Consumers from International Cartels by Applying Domestic Antitrust Law Globally*, 15 LOY. CONSUMER L. REV. 99 (2003).

21. Claire L. Leonard, *In Need of Direction: An Evaluation of the "Direct Effect" Requirement Under the Foreign Trade Antitrust Improvements Act*, 73 WASH. & LEE L. REV. 489 (2016).

22. *See id.* at 493–96 (considering the question of when American antitrust law applies to purely foreign anticompetitive conduct).

23. *See id.* at 492 ("In a globalized economy, the precise meaning of direct becomes even more elusive—and more significant—in the face of complex corporate structures and elaborate supply chains that span numerous countries.").

American commerce.[24] And while Ms. Leonard's analysis is sound and her ultimate conclusion well-supported, fundamental principles of comity—a first principle when discussing foreign application of a nation's law—plays only a supporting role in her Note.[25]

But notions of international comity must not be relegated to such a secondary position. Courts, including the U.S. Supreme Court, have recognized that comity concerns play a prime role as a first principle in determining whether to extend the antitrust laws to foreign conduct.[26] Because, as the Court observed, "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?"[27]

As other countries have urged, "Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe."[28] Greater comity leaves other countries free to organize their economies and develop their own domestic industries in

---

24. *See id.* at 507–15 (analyzing the two diverging tests for a "direct effect" in the FTAIA: (1) the immediate consequence test and (2) the reasonably proximate causal nexus test).

25. *See id.* at 527–31 (devoting only a short section to discussing comity concerns).

26. *See* F. Hoffmann–La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 163–65 (2004)

> [T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations . . . . This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow. . . . This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.

(citations omitted).

27. *Id.* at 165.

28. Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 7, *F. Hoffman–La Roche*, 542 U.S. 155 (No. 03-724), 2004 WL 226389 (quoting Hunt v. T&N plc, [1993] 4 S.C.R. 289, 322 (Can.)).

accordance with the wishes of their own people.[29] As the government of Japan has put it, Japan "has significant economic, political, and legal interests in ensuring that companies based in Japan shall comply with the Japanese legal system, and that Japanese companies running businesses elsewhere shall comply with 'reasonable' jurisdictional requirements of other nations."[30] The United Kingdom, Ireland, and the Netherlands cited the U.S. Supreme Court to renowned scholar Vaughan Lowe in making the point that a faithful adherence to notions of international comity preserve to each country the ability to conduct its domestic affairs in accordance with that nation's own norms and priorities.[31] An overzealous extraterritorial application of U.S. antitrust laws, and failure to heed comity concerns, risks "fail[ing] to give proper consideration to the legitimate choices those nations have made concerning the regulation of their own commerce and competition in their own industries."[32]

Returning to Mr. Friedman's computer, each of the fifteen countries at issue in the supply chain has elected to regulate its company's activities in accordance with the social and political considerations unique to its respective nation.[33] A review of the list of countries reveals a number of societies that are climbing the ladder from second-world status to become important

---

29. *See id.* at 165 (acknowledging that applying American law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs").

30. Brief for the Government of Japan as Amicus Curiae in Support of Petitioners at 1, *F. Hoffman–La Roche*, 542 U.S. 155 (No. 03-724), 2004 WL 226390, at *1.

31. *See* Brief for the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners at 18, *F. Hoffman–La Roche*, 542 U.S. 155 (No. 03-724), 2004 WL 226597, at *18 (citing Lowe's observation that "[t]he legal rules and principles governing jurisdiction have a fundamental importance in international relations, because they are concerned with the allocation between States . . . of competence to regulate daily life—that is, the competence to secure the *differences* that make each State a distinct society" (quoting Vaughan Lowe, *Jurisdiction*, *in* INTERNATIONAL LAW 329, 330 (Malcolm D. Evans ed., 2003))).

32. Brief for the Federal Republic of Germany as Amicus Curiae in Support of Petition for a Writ of Certiorari at 7, F. Hoffmann–La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (No. 03-724), 2003 WL 22896686, at *7.

33. *See supra* note 7 and accompanying text (listing countries in the supply chain).

exporters and links in the global supply chain.[34] Courts in the United States should recognize and take heed of the different commercial decisions these foreign countries and their citizens have made and keep in mind comity considerations when interpreting the FTAIA when judging claimed violations of the antitrust laws.

Ms. Leonard demonstrates admirable courage and skill in delving into the technical nuances of the notoriously difficult FTAIA. I believe that the body of academic literature is richer with the contributions of her Note. I hope that she continues what she has begun and turns her future efforts to those fundamental principles that provide the foundation for the extraterritorial application of the antitrust laws.

34. *See supra* note 7 and accompanying text (listing countries in the supply chain).