RECENT DEVELOPMENTS IN RELATION TO UNITED STATES EXTRATERRITORIAL CLAIMS

A paper prepared by the Government of the United Kingdom

Over the years there have been a number of instances where U.S laws have been applied to persons, things or conduct outside the United States apparently without regard for the legitimate interests of other countries. This paper outlines recent developments in two principal areas of concern.

Anti-Trust

The potential application of U.S anti-trust laws to conduct outside the United States is well-known. Even where the US Government may be sympathetic to the interests of other countries involved, a number of factors operate against the foreign company or companies. Private parties can bring treble damage actions. A defendant company may not recover its costs even where it successfully resists the action. Class actions are possible. Plaintiffs' lawyers often accept cases on a contingency fee basis. There is no formal mechanism for stopping private anti-trust suits even where the legitimate interests of other countries are affected.

The US administration has recently undertaken a review of a number of anti-trust issues. A task force has reported and the Administration has proposed five Bills to cover US anti-trust law. These are the Merger Modernization Act, The Anti-trust Remedies Improvements Act, the Interlocking Directorate Act, the Foreign Trade Antitrust Improvements Act and the Promoting Competition in Distressed Industries Act. Among other things the Bills deal with jurisdiction in foreign commerce cases, treble damages and costs. On jurisdiction, it is proposed that the Courts should be instructed to dismiss private anti-trust cases where the exercise of jurisdiction would be unreasonable in the light of six exclusive factors:

'(1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;

(2) the nationality of the parties and the principal place of business of corporations;

(3) the presence or absence of a purpose to affect United States consumers or competitors;

(4) the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad;

(5) the existence of reasonable expectations that would be furthered or defeated by the action; and

(6) the degree of conflict with foreign law.'

On treble damages, it is limiting claims for treble damages to overcharges and underpayments. So treble damages would only be awarded to persons who have paid higher prices to the defendants (or, as sellers, receive lower prices from the defendant) because of anti-trust violations. The recovery of other plaintiffs would be limited to full compensation - actual damages plus prejudgment interest, costs, and lawyers' fees.

On defendants' legal fees, the task force proposes that successful defendants should be able to recover legal fees where private plaintiffs' claims are 'frivolous, unreasonable, without foundation, or in bad faith'.

Whilst welcome in themselves these proposed changes do not appear to go far enough to eliminate the potential for major disputes. More preferable would be an executive power to compel dismissal of private suits for foreign policy considerations and an end to treble damage in all foreign commerce cases - as had been proposed in the Bill promoted (but now dead) by Senator De Concini.

Export Controls

The principal US export control is the Export Administration Act which claims re-export jurisdiction over certain US origin goods, technology and goods incorporating US components. That Act also enables regulations to be made which claim control over companies incorporated outside the US but 'controlled in fact' by a US company (EAA 1979 s.16(2)). The extraterritorial reach of these regulations can cause serious difficulties in practice to foreign companies re-exporting goods.

A recent development affects 'the distribution licence', a system of bulk licensing under the Export Administration Act allowing approved companies to export certain goods to certain destinations without individual transaction approval from the US Department of Commerce. There has been concern about the abuse of this system and the diversion of goods - consequently the regulations have been tightened. In particular stringent requirements are now imposed on foreign consignees to maintain an internal compliance programme to ensure adherence to US export controls and to submit to routine audit by US officials.

The implementation of an internal compliance programme imposes a severe administrative burden on the companies involved. The question of audit visits raises a separate issue, namely a danger of the US taking enforcement action against a foreign (for example UK) company that has been audited (or indeed another UK company) for an extraterritorial offence using information obtained during the audit.

In recent years the United States has, in pursuance of its foreign policy, purported to impose economic sanctions, including the freezing of foreign assets outside the United States. So in the past sanctions have been imposed in relation to Iran and Nicaragua, and most recently, Libya. The recent US regulations on Libya include a total ban on direct export and import trade service contracts and all other non-humanitarian transactions by US persons, including travel to Libya other than for journalism or evacuation. The Libyan regulations define 'US person' apparently to exclude foreign subsidiaries of US corporations and all non-US persons or entities acting outside the United States. By not including foreign subsidiaries in this definition the regulations relating to Libya recognise the concerns of countries, including the United Kingdom, relating to the extent of application of previous sanctions regulations.