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Judicial Decision in Argentina Tackles the Interplay between Enforcing Patent Rights and Antitrust Law within the Dispute between Monsanto and the Argentine Government on the "GM soy-seed RR"

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I. INTRODUCTION

The conjunction between intellectual property rights and antitrust law has recently become a very important issue worldwide and Latin America is not an exception. Therefore, the relevance of this case, which is the first judicial decision on the topic in Argentina, cannot be overrated.

On September 30, 2008 the Federal Court of Appeals for Civil and Commercial Matters located in the city of Buenos Aires decided[2] to stop an antitrust investigation conducted by the National Commission for the Defense of Competition (or "CNDC" as it is known in Spanish[3]) against Monsanto Europe NV, Monsanto Technology LLC. and Monsanto Argentina SAIC (hereinafter all referred to as "Monsanto").

A preliminary phase within the administrative proceeding was initiated in early 2006 when the Argentine National Secretary of Agriculture, Livestock, Fishing and Food ("SAGPyA") accused Monsanto of abusing its dominant position and therefore of violating Argentine Antitrust Law No. 21,156. The argument was based on the fact that Monsanto had enforced the patent rights it held in Europe (the company did not hold any Argentine patent right on the technology at stake here).

According to a preliminary resolution issued by the CNDC in September 2007, the authority was of the opinion that there were sufficient grounds for dismissing the defensive arguments of the company and therefore for converting the preliminary phase

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[2] In re "Monsanto Company s/ Apelación Resolución Comisión Nacional de Defensa de la Competencia. Acumulada", file number 638/2008, issued by Chamber III.

[3] This is an administrative agency that depends on the Federal Government and should be replaced by an independent Tribunal according to the provisions of Argentine Antitrust Law.

of the proceeding into a full antitrust investigation. However, the resolution was overturned by the decision of the Court of Appeals; the result is analyzed below.

II. SOME OF THE RELEVANT FACTS OF THE CASE

As a brief introduction to the relevant facts of the case, it should be mentioned that in early 2005, Monsanto decided to stop negotiations with the Argentine Government (and other stakeholders) and take different measures to diminish the commercial damage caused by the fact that it could not realize almost any reasonable monetary value (i.e. private value) from the local commercialization of one of its most successful technologies (having huge social value for local farmers and the government), which had been denied patent protection in Argentina.[4]

The technology at stake is a genetically modified seed of soybean marketed as Roundup-Ready® that presents the characteristic of being resistant to glyphosate (this is an herbicide marketed by the company as Round-Up®). The technology offers huge comparative advantages compared to traditional soy plants in terms of much lower operating costs and much higher efficiencies.[5]

The dispute with the Argentine government started after Monsanto had complained that it was suffering damages due to the fact that almost 70 percent of the soy seeds commercialized in the country was not sold through "official channels" and therefore it was impossible to collect royalties upon the use of the technology.[6]

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[4] Around 1995 Monsanto sought patent protection through the filing of an importation (or revalidation) patent, which was a particular patent institute in force at that time according to article 2 of the former local Patent Law No. 111 in force since 1864 (revalidation patents were established in article 1.4 of the Paris Convention of 1883). The Argentine Patent Office rejected the application, which was appealed by the company but local tribunals including the Supreme Court upheld the decision.

Monsanto's seed, however, was registered under the local "sui generis" system of plant breeder's right according to Law No. 20,247, which follows the text of the International Convention for the Protection of New Varieties of Plants in its version of 1978. This version allows broad exception to breeder's right based on the right of farmers to save and replant seeds without having to pay for it.

[5] In 1996 Monsanto started commercializing this technology in Argentina after getting the approvals of the respective local sanitary agencies. The technology was licensed to local producers of soy seeds and it was immediately an amazing success as it increased the production of Argentine soybean in the following way: while in 1996/97 soybean represented 6 percent of the total area cultivated in the country, in 2002/2003 it represented 99.5 percent (according to the publication titled "Innovación y Propiedad Intelectual en mejoramiento vegetal y biotecnología agrícola", Estudios del CPI de la Universidad Austral Vol 1, Edit. Heliasta, Buenos Aires, 2006)

[6] Given that no patent existed in Argentina, the system to collect royalties for the use of the technology was based on contractual clauses. The main problem with this system is that most soy seeds commercialized in Argentina are brought to "unauthorized dealers." It should be taken into account that Argentina has been the third largest producer of soybeans (behind the United States and Brazil) and the main exporter of soy flour worldwide. This fact almost coincided with a time period when Argentina was recovering from the social and economic crisis (the end of 2001), which was followed by half a decade of continuing GDP growth at rates of almost 10 percent a year thanks to the rising international prices of soy, among other factors. Similar disputes were avoided in neighbor countries (especially Paraguay and Brazil) thanks to systems that reasonably distributed the social value derived from the technology, agreed upon by the different stakeholders (the company, provincials and the federal government, biotechnology companies, farmers, distributors, and the like).

Among the alternative measures taken by Monsanto to overcome this problem, (the measure relevant for the administrative proceeding), was enforcing its patent rights granted in Europe,[7] which included requesting preliminary injunctions and stopping freighters in order to seize and get samples of the products imported into Europe from Argentina. The legal argument used by Monsanto to enforce its patents was that the importation of soy flour and other products derived from soy (beans, meal, pellets, etc.) into Europe infringed patent rights and therefore those acts were illegal.

After the judicial and administrative proceedings against the companies importing these products started to move forward in many European countries (including England,[8] Netherlands, Denmark, and Spain), the Argentine government requested to be accepted as co-defendant in most of those proceedings. This was in order to assist the exporters in elaborating the legal defenses needed to allow the importation of Argentine soy products into Europe.

The main legal argument presented by the Argentine government and/or the importers accused of patent infringement was that, according to article 9 of the EU Biotech Directive, patent protection on genetically modified plants should not be extended to include products derived from plants.[9] Under this reasoning, the protection was limited to the products in which the patented gene performed its function (making the plant resistant to glyphosate) so the products derived from the seed should not be included.

Since 2007, different decisions on the merit of the cases have been issued and, at least in first instance, no infringement was declared by any European judge.[10] However, it would be extremely difficult to claim that the actions of the company were unreasonable or lacked legal basis as the trial at Dutch Courts gave, for the first time, a national European court the opportunity to refer to the European Court of Justice a case to interpret the scope of patent protection of plants according to the European Directive on Biotechnology.[11]

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[7] The European Patent "EP 0 546 090" was granted in 1996 claiming an isolated DNA of a plant like soy resistant to glyphosate, among others. That European patent was validated in some countries.

[8] A first decision was rendered in October 2007, which found the patent to be valid under U.K. law but not infringed, *see* "Monsanto Technology LLC v Cargill International SA & Anor" [2007] EWHC 2257 (Pat) (10 October 2007).

[9] Directive 98/44/EC of the European Parliament and the Council on the legal protection of biotechnological inventions was adopted on July 6, 1998. Article 9 states: "the protection conferred by a patent on a product containing or consisting of genetic information shall extend to all material…, in which the product is incorporated and in which the genetic information is contained and performs its function."

[10] The company stated publicly that it would appeal most of the decisions finding no patent infringement.

[11] Monsanto Technologies LLC v. Cefetra B.V., 249983 /HA ZA 05-2885 (Hague District Court 2008). The reference of the case pending at the Court of Justice of the European Communities is "Case C-428/08."

III. ANTITRUST PROCEEDING IN ARGENTINA.

After dismissing all the legal arguments presented by Monsanto to close the case, in September 2007 the CNDC resolved that there was sufficient legal basis to move forward with the investigation. Therefore, it served the company notice that the CNDC was going to conduct a full investigation to determine whether Monsanto had infringed Argentine Antitrust law when enforcing its patent rights in Europe.[12]

According to the CNDC resolution, Monsanto's activities could be considered as an abuse of its dominant position as long as the legal actions obstructed the commerce of "Argentine products" within Europe. This led Monsanto to seek the judicial revocation of the administrative resolution, which was granted by the Court of Appeals and held some very relevant points, some of which are briefly stated and described below.

A. Extraterritorial application of Argentine Antitrust Law if the acts and/or the conducts that occurred abroad have effects in Argentina.

According to the text of the decision of the Court of Appeals, one of the legal defensive arguments used by Monsanto was that the litigation in Europe did not have an effect in Argentina so the principle of territoriality should apply, and no exception should be found. An exception to the principle of territoriality (as important in antitrust as in patent law) is found in Article 3 of Antitrust Law 25,156, which establishes that all the foreign acts, activities, and agreements of individuals and legal entities (public and private) that may have effect in Argentina are bound by the terms of said law.

Moreover, the company stated that the whole local proceeding at the CNDC could result in conflicting decisions with those of foreign competent authorities.

These arguments were not fully analyzed by the Court nor were they decisive in the outcome of the case. However, it is worth bearing in mind that Argentine antitrust law has extraterritorial effects, as happens in other jurisdictions.

B. Lack of evidence supporting that Monsanto had a dominant position

The Court noted the lack of any proof whatsoever produced by the CNDC to hold, even primarily, that Monsanto had a dominant position in the relevant market (which was not defined by the CNDC either).

In our opinion, this is not a minor issue since to find an abuse of dominant position in Argentina it should be first[13] determined whether the individual or legal

[12] Acts and conducts contrary to antitrust law No. 25,156 can be fined with up to 150 million local pesos (almost U.S. $50 million). Recently, the highest possible amount has been imposed on some companies pertaining to the cement industry for fixing prices and other cartel activities (judicial decision of second instance issued in August 2008 upholding a fine imposed by the CNDC in 2005 that has been appealed to the Supreme Court).-Other concurrent non monetary (e.g. compulsory licenses in the case of proceedings related to patents according to article 44 of Patent Law No. 24,481) sanctions could be imposed too.

[13] This is an issue that has been fully addressed and clarified by local case law in relation to patent rights. Our opinion is based on multiple factors that lay outside the scope of the present report.

entity investigated has a dominant position in the relevant market—which, in turn, requires defining the market of the relevant product and its geographical dimension.

Particularly in the case of the local market of soy seed, there are many difficulties to estimating the different economic factors that are needed to define the market of the relevant product as, for example, the high level of national commercialization through "gray channels." Nevertheless, within these administrative and the judicial proceedings, Monsanto produced different evidence stating that it did not have a dominant position in the soy seed Argentine market. Moreover, the company filed official statistics showing that the countries where it had enforced its patent rights were only around 36 percent of the total destinations of the soy flour exported from Argentina.[14]

It is worth noting that the Argentine Antitrust regime does not foresee acts and conducts as "per se" illegal, which does happen in other jurisdictions such as the United States. This is why it is always necessary to prove that the act or conduct constituting "an abuse of dominant position" at the same time harms the "general economic interest" according to article 1 of Law No. 25,156.

C. Doctrine "Noerr-Pennington" elaborated by the U.S. Supreme Court and recognized in Europe is applicable in Argentina

Monsanto argued that its activities in Europe were exempt from civil liability under Argentine antitrust law due to the legal doctrine elaborated by U.S. case law known as "Noerr-Pennington."[15] The application of this doctrine to the case was not even considered by the CNDC although it had already been applied by the CNDC in other cases and by local judges.

The Court followed the reasoning of Monsanto and concluded that petitioning to authorities was a "human right" recognized in the Constitution and International Treaties, which, in Argentina, have a higher hierarchy than Federal Laws, so these treaties should prevail in cases of normative conflicts.

According to the decision, this human right to petition authorities is limited by the doctrine of abuse of rights[16] so it should not be excepted from antitrust liability when the act of petitioning authorities is a mere sham to interfere with the legitimate rights of competitors, as it has been recognized in U.S. case law.[17] Nonetheless, the application of

[14] Monsanto also pointed out that there were other international markets where the technology protected by the European patents was in the public domain, including China, which was the destination of 76 percent of the exports of Argentine products derived from the technology Roundup-Ready®.

[15] The Court recognized that this doctrine was established by the U.S. Supreme Court in the cases Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc. 365 U.S. 127 (1961) and United Mine Workers v. Pennington 381 U.S. 657 (1965). It also cited European decisions.

[16] Abuse of rights is a legal doctrine found in civil law jurisdictions that "…refers to the concept that the malicious or antisocial exercise of otherwise legitimate rights can give rise to civil liability…" (According to Elspeth Reid, *The Doctrine of Abuse of Rights: Perspective from a Mixed Jurisdiction*,(8.3) ELECTRONIC J. OF COMPARATIVE LAW, (October 2004).

[17] U.S. Supreme Court *in re* Professional Real Estate Investors Inc. v. Columbia Pictures No. 91-1043 (1993).

the caveat should be limited to exceptional cases where the facts are very clear and there is a direct intention to interfere in that way.

In this case the Court concluded that there was no evidence proving that the proceedings to enforce the patent rights in Europe were baseless, or even the possibility of such a thing occurring. Moreover, another relevant fact that, in our opinion, played an important role in dismissing any potential antitrust liability of Monsanto was the complexity of the technology protected by its European patents, which, as mentioned above, is an issue pending at the European Court of Justice.

D. Lack of damages to the exporters of soy products from Argentina.

In these proceedings, Monsanto also argued that the company should not lose its right to enforce the patents granted in Europe since the companies exporting these soy products from Argentina were, in most cases, international private companies having a clear goal of profiting from such transactions. This is another issue that we think played an important role in the decision as none of the companies importing the products into Europe joined publicly the investigation conducted by the CNDC.

Last but not least, the company stated that when enforcing its patents at European customs, it had not permanently stopped the freighters but had merely requested to seize samples of the products to analyze them and determine whether they were infringing patent rights.[18]

IV. CONCLUSION

The court finished by stating that its decision should not be considered as limiting the possibility that new evidence could prove that Monsanto committed an abuse of its rights or that new "acts and conducts that the company could take in the future" would result in its liability under local antitrust regulations. Moreover, the case has been appealed by the Argentine government so the case may reach the Supreme Court.[19] This is the first judicial case known in Argentina to tackle the increasingly important issue of the conjunction between antitrust law and patents rights.[20]

It should be noted that according to Argentine legislation, acts and conducts contrary to antitrust legislation can result not only in large fines but also in compulsory licenses if such acts and/or conducts are related to patent rights. Although the legislation is not absolutely clear and there is no case law addressing the issue, we are of the opinion that a compulsory license in such a case should only be granted if the patent

[18] According to that statement, the proceedings were based on European Directives on Customs and the company had given the necessary warranties like posting bonds for potential damages.

[19] Or it may not, given the procedural restrictions involved.

[20] However, there have been administrative and judicial decisions related to IP rights in proceedings handled by the CNDC related to the control of mergers and acquisitions.

holder has a dominant position and that exceptional measure is necessary (and effective) to terminate or reduce the harmful effects of the illicit act.

Last but not least, it is worth pointing out that during the last years, the number of judicial cases tackling the conjunction between patents and antitrust has risen in Latin American countries like Brazil,[21] Chile,[22] and Venezuela.[23]

[21] The first case was initiated in 2007 by the Association of Independent Auto-parts Producers (ANFAPE) against three companies that were original equipment manufacturers ("OEMs") after the latter had enforced their industrial designs on external auto parts.

[22] In July 2007, the Supreme Court upheld a resolution of the *Tribunal de Defensa de la Competencia* (the Antitrust Chilean authority) that had rejected the claims brought by the Chilean pharmaceutical company Recalcine against Novartis Chile SA. This is a very interesting case that addressed issues similar to those of the Monsanto case analyzed here. In May 2007, the authority also dismissed similar claims brought by the Latin American pharmaceutical company Tecnofarma against Sanofi Aventis.

[23] In December 2006, *Procompetencia* (the Antitrust Venezuelan Authority) fined Wyeth Laboratory (approximately U.S. $185,000) on the grounds of restrictive exclusionary practices (the company had sent cease and desist letters informing certain facts including the existence of patent rights related to the product commercialized by the competitor).