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**GCR INSIGHT**

# **PRIVATE LITIGATION GUIDE**

SECOND EDITION

**Editors**

Nicholas Heaton and Benjamin Holt

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SECOND EDITION

## **Editors**

Nicholas Heaton and Benjamin Holt

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# **PART 1**

## KEY ISSUES

## Territorial Considerations: the US Perspective

**Kevin Schwartz and Ilene Gotts<sup>1</sup>**

### Introduction

Treble damages and jail time for antitrust lawbreakers are hallmarks of the US competition regime. Long and deep experience with both public and private enforcement is another. Potentially severe and even catastrophic consequences for violators often bring to centre stage these questions: how far do the US antitrust laws reach? What conduct and sales outside the US can be subject to US antitrust scrutiny? Can individuals operating outside the US be subject to prosecution by the US Department of Justice? The answers to these questions begin with the first principle; the arm of US antitrust enforcement is long but not infinitely elastic. There are limits. But those limits, unfortunately, can be very hard to define. The controlling statutes are far from clear.

The first of these statutes is the Foreign Trade Antitrust Improvements Act (FTAIA), enacted in 1982. Containing vague language and double negatives, the statute nonetheless is the key to jurisdiction over billions of dollars in international commerce and the potential for criminal prosecution of international businesses and their executives. Analysed more fully below, the statute provides:<sup>2</sup>

*[US antitrust laws] 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*

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- 1 Kevin Schwartz and Ilene Gotts are partners at Wachtell, Lipton, Rosen & Katz. The authors acknowledge the contributions of James McGinnis and Bevin Newman of Sheppard Mullin, authors of the chapter 'Territorial Considerations: the US Perspective' in the first edition, on which this chapter is based.
  - 2 15 US Code Section 6(a). Conduct involving trade or commerce with foreign nations.

*(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 provisions of sections 1 to 7 of this title, other than this section.*

*If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.*

These are difficult concepts, to say the least. The analysis of the territorial reach of US law does not, however, end here. Other statutes and principles must also be considered. Perhaps most significantly, the US Supreme Court has grappled with the tension between the extraterritorial application of the US antitrust laws and the ever-murky principle of international comity – ‘whereby a country should take other countries’ important interests into account while conducting its law enforcement activities’<sup>3</sup> – for over a century.<sup>4</sup> The FTAIA is silent concerning the principle of international comity and offers no guidance as to how comity concerns might limit US courts’ application of the antitrust laws to foreign defendants based on foreign conduct. Thus, the courts have applied factors unconnected to the FTAIA in their decision-making. Finally, several other federal statutes garnering less attention than the FTAIA afford limited antitrust safe harbours to certain foreign conduct or otherwise limit the application of the US antitrust laws to foreign commerce. These include: Section 7 of the Clayton Act (mergers); the Foreign Sovereign Antitrust Recovery Act (limiting availability of treble damages); the Robinson-Patman Act (price discrimination); and the Webb-Pomerene Act and the Export Trading Company Act of 1982 (export transactions).

## **The Foreign Trade Antitrust Improvements Act**

The importance of the FTAIA has grown in tandem with the globalisation of the US economy and the movement offshore of manufacturing for US companies. At the same time, the laws and business traditions of other countries have been at serious risk of colliding with US antitrust laws in place since 1890. Some business practices abroad have at times embraced a famous saying of Sun Tzu, an ancient Chinese general revered in Asia and elsewhere: ‘If you know your enemy and you know yourself, you need not fear the result of one hundred battles.’<sup>5</sup> ‘Know your enemy’ in the US, by contrast, is the first step towards criminal prosecution. The Anglo-American view – first clearly articulated by Adam Smith in 1776 – could not be more at odds with Sun Tzu’s recommended strategy: ‘People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or some contrivance to raise prices.’<sup>6</sup> That attitude colours both public and private US antitrust enforcement.

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3 OECD Competition Committee, 2015 Inventory of Co-operation Agreements, Provisions on Negative Comity 1 (2015), <http://www.oecd.org/daf/competition/competition-inventory-provisions-negative-comity.pdf>.

4 *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). More recent examples abound. See, e.g., *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010).

5 *The Art of War*, Sun Tzu (5th Century B.C.E.).

6 *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith (1776).

The economy was not yet global when Congress enacted the FTAIA in 1982, and US companies were not typically manufacturing offshore or buying essential component parts from foreign manufacturers. Nevertheless, Congress intended the statute to define the limits of US jurisdiction in the expanding international trade environment. Instead, the courts have been tasked with making sense of the statute and applying it to fact patterns that did not exist in 1982. The resulting jurisprudence has not been completely successful in that effort.

Indeed, courts have not always applied the same analysis to the basic tests incorporated in the statute. Decisions have also been very fact-specific. However, there is agreement among courts that while jurisdiction over exclusively foreign harms is generally barred by the FTAIA, two definitive exceptions apply. First, import trade, which covers goods from abroad that are sold directly into the US, are not covered by the FTAIA and therefore are subject to US antitrust scrutiny. Second, courts have generally found an exception where there is a sufficiently proximate domestic injury. Where foreign conduct produces a direct, substantial, and reasonably foreseeable effect on domestic commerce that gives rise to a Sherman Act claim, courts will, in some instances, subject such extraterritorial conduct to antitrust scrutiny. However, without clear controlling Supreme Court precedent, lower courts differ in their application and interpretation of this exception. Other aspects of the FTAIA have proven to be far more complex and even confusing, including the more lenient way courts tend to treat enforcement actions brought by the US government under the FTAIA. A close analysis of the jurisprudence, therefore, is necessary.

## ***Empagran I and II***

The first important decision to analyse the FTAIA was *F. Hoffmann LaRoche Ltd. v. Empagran S.A. (Empagran I)*.<sup>7</sup> That case arose from international cartel cases involving the international manufacture and sale of vitamins. The facts were relatively simple: foreign purchasers of alleged price-fixed vitamins sought to bring Sherman Act claims in the US federal court but '[plaintiffs had] never asserted that they purchased any vitamins in the United States or in transactions in the United States commerce, and the question presented assume[d] that the "relevant transactions occur[ed] entirely outside U.S. commerce"'.<sup>8</sup>

The US Supreme Court ruled that the exclusively foreign claims could not be pursued in the US, explaining:

*The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act 'shall not apply to conduct involving trade or commerce . . . with foreign nations.' 96 Stat. 1246, 15 U.S.C. § 6a. It then creates exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters.*<sup>9</sup>

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7 542 U.S. 155 (2004).

8 *Id.*, at 160.

9 *Id.*, at 158.

The Court followed this explanation by asking questions concerning ‘price-fixing conduct’ and ‘foreign injury’ caused by said conduct, asking: ‘First, does that conduct fall within the FTAIA’s general rule excluding the Sherman Act’s application? That is to say, does the price-fixing activity constitute “conduct involving trade or commerce . . . with foreign nations?”’<sup>10</sup>

Having answered the foreign trade or commerce question in the affirmative, the Court necessarily continued its analysis by considering:

*[W]hether the conduct nonetheless falls within a domestic-injury exception to the general rule, an exception that applies (and makes the Sherman Act nonetheless applicable) where the conduct (1) has a ‘direct, substantial, and reasonably foreseeable effect’ on domestic commerce, and (2) ‘such effect gives rise to a [Sherman Act] claim.’ §§ 6a(1)(A), (2). We conclude that the exception does not apply where the plaintiff’s claim rests solely on the independent foreign harm.*<sup>11</sup>

While ruling that exclusively foreign injury was outside the scope of the US antitrust laws, the *Empagran I* Court nonetheless remanded the case to the DC Circuit to consider the plaintiffs’ argument that the foreign injury was sufficiently connected to the domestic effects as to establish jurisdiction under the ‘domestic injury exception of the FTAIA.’<sup>12</sup> In *Empagran II*,<sup>13</sup> the DC Circuit then ruled that the ‘gives rise to’ requirement was not satisfied because the elevated domestic prices were only the ‘but for’ cause of plaintiff’s injury. Instead, ‘proximate cause’ was required. The facts did not meet that standard because the plaintiff’s injuries were not directly caused by the domestic injury, an increase in US prices: the increased US prices were only an indirect cause of plaintiff’s foreign injury.<sup>14</sup>

## Post-*Empagran* Circuit Court decisions

### *The Ninth Circuit: DRAM*

In 2008, the Ninth Circuit reviewed the FTAIA in depth in *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*.<sup>15</sup> The plaintiff, Centerprise, alleged that a class of foreign purchasers of DRAM memory chips paid higher prices abroad because DRAM manufacturers elevated US prices that, in turn, allowed them to raise prices worldwide. The court began its analysis this way:

*[I]nitially lay[ing] down a general rule placing all (nonimport) activity involving foreign commerce outside the Sherman Act’s reach, [the FTAIA] then brings such conduct back within the Sherman Act’s reach provided that the conduct both (1) sufficiently affects American commerce, i.e., it has a ‘direct, substantial, and*

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10 *Id.*

11 *Id.*, at 159.

12 *Id.*, at 175.

13 417 F.3d 1267 (D.C. Cir. 2008).

14 *Id.*, at 1271.

15 546 F.3d 981 (9th Cir. 2008).

*reasonably foreseeable effect' on American domestic, import or (certain) export commerce, and (2) has an effect of a kind that antitrust law considers harmful, the 'effect' must 'give rise to a [Sherman Act] claim.'*<sup>16</sup>

The court summarised: 'The FTAIA thus clarifies that U.S. antitrust laws concern the protection of American consumers and American exporters, not foreign consumers or producers.'<sup>17</sup> As was true of the DC Circuit decision in *Empagran II*, the Ninth Circuit then focused on the question of whether the US domestic effect (fixed prices) 'gave rise to' the plaintiffs' foreign injury. The Ninth Circuit concluded that more than 'but for' consideration was required. In so holding, the Ninth Circuit followed the earlier decision of *Empagran II* and the Eighth Circuit's decision in *In re Monosodium Glutamate Antitrust Litigation*:<sup>18</sup>

*Like the D.C. Circuit and the Eighth Circuit, we conclude that 'but for' causation cannot suffice for the FTAIA domestic injury exception to apply and therefore adopt a proximate causation standard. As our sister circuits have explained, a proximate cause standard is consistent with principles of comity 'the respect sovereign nations afford each other by limiting the reach of their laws.'*<sup>19</sup>

The Supreme Court counseled in *Empagran I* that the principles of comity require us to 'ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations'.<sup>20</sup>

The Court also noted:

*Further, the Supreme Court said that 'the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce.' . . . If we were to adopt a 'but for' standard, we would indeed be expanding the Sherman Act's scope as applied to foreign commerce, notwithstanding Centerprise's contention to the contrary.*<sup>21</sup>

### *The Third Circuit: Animal Science Products*

The Third Circuit discussed these same issues in *Animal Science Products, Inc. v. China Minmetals Corp.*<sup>22</sup> In that case, a class of magnesite purchasers sued Chinese producers. The district court dismissed the claim, holding that the FTAIA deprived it of subject-matter jurisdiction. The Third Circuit first ruled that the FTAIA presented a merits test, not a subject-matter jurisdiction limitation. The Third Circuit instructed the district court on remand as follows:

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<sup>16</sup> *Id.*, at 985-86 (citing *Empagran I*, 542 U.S. at 162) (emphasis in original)..

<sup>17</sup> *Id.*, at 986 (internal citation omitted).

<sup>18</sup> 477 F.3d 535, 539 (8th Cir. 2007).

<sup>19</sup> 417 F.3d at 1271.

<sup>20</sup> 546 F.3d at 987 (citing 542 U.S. at 164).

<sup>21</sup> *Id.*, at 987-88.

<sup>22</sup> 654 F.3d 462 (3d Cir. 2011).

First, the District Court correctly discerned that the import trade or commerce exception 'must be given a relatively strict construction.' *Carpet Group*, 227 F.3d at 72. The District Court erred, however, in holding that this 'strict construction' requires that the defendants function as the physical importers of goods. See *Animal Science*, 702 F.Supp.2d at 369 n. 52 ('Simply put, the FTAIA is wholly inapplicable to Plaintiffs' claims if and only if Defendants were, in fact, importers.'). Functioning as a physical importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite.<sup>23</sup> Rather, the relevant inquiry is whether the defendants' alleged anticompetitive behavior 'was directed at an import market.' *Turicentro*, 303 F.3d at 303 (quoting *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395 (2d Cir. 2002)) . . . Or, to phrase it slightly differently, the import trade or commerce exception requires that the defendants' conduct target import goods or services.<sup>24</sup>

### The Second Circuit: Lotes

The Second Circuit was next to address the FTAIA, in *Lotes Co., Ltd. v. Hon Hai Precision Industry Co., Ltd.*<sup>25</sup> The plaintiff Lotes was a Taiwanese corporation that designed and manufactured Universal Serial Bus (USB) connectors that were components in computers, smartphones, computer peripherals and other electronic devices. The defendants were a group of companies that competed with Lotes in the design and manufacture of USBs, but also produced devices (such as personal computers and peripherals) that incorporated USBs. Lotes and the defendants were members of a trade group that produced a technical standard for a new generation of USBs. All of the participants agreed to make available to all other members royalty-free, reasonable and nondiscriminatory licence terms for any patents required to satisfy the new standard. Lotes alleged that the defendants breached their obligations to provide such licences, tried to constrain Lotes as a potential competitor and achieved a dominant position that resulted in higher USB prices worldwide, including in the US.

The *Lotes* court agreed with the Third Circuit that the FTAIA is a substantive merits issue and not a procedural question. Further, the court held that the 'direct, substantial and reasonably foreseeable test' required a 'reasonably proximate causal nexus' between the conduct and the effect.<sup>26</sup> In so holding, the Second Circuit adopted the position of the US Department of Justice (DOJ) and the Federal Trade Commission (FTC), and rejected the Ninth Circuit's view that 'direct' means an 'immediate consequence.'<sup>27</sup> The court explained: 'To demand that any domestic effect must follow as an immediate consequence of a foreign defendant's foreign anti-competitive conduct would all but collapse the FTAIA's domestic effects exception into its separate import exclusion.'<sup>28</sup> Following this analysis, the court upheld dismissal of the complaint

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23 The Court elaborates, in a footnote, that earlier holdings imply that engaging in import or trade may satisfy the exception as well. *Id.*, at 470 n. 10.

24 *Id.*, at 470.

25 753 F.3d 395 (2d Cir. 2014).

26 *Id.*, at 398.

27 This approach was advocated by the DOJ and the FTC and adopted by the Seventh Circuit in *Minn-Chem*, 683 F.3d at 857.

28 *Id.*, at 411.

for failure to meet the FTAIA's 'gives rise to a claim' requirement. The court found that while the alleged conduct resulted in higher consumer prices in the US, the plaintiff suffered a different injury – exclusion from the market for USB connectors.<sup>29</sup>

### *The Seventh Circuit: Minn-Chem and Motorola Mobility LLC*

Following *Lotes*, ever more complicated facts and distribution channels have been analysed. For example, in *Minn-Chem, Inc. v. Agrium, Inc., et al.*,<sup>30</sup> the Seventh Circuit confronted claims stemming from alleged price-fixing in a worldwide market for potash. To drive up prices, the cartel members worked together in various ways, negotiated foreign prices and then used them to benchmark US prices. The ensuing US class actions included both direct and indirect purchasers.

The court first made clear that the FTAIA does not affect – and does not ban – import commerce, quoting *Empagran I*: 'Where the FTAIA does apply, it "remov[es] from the Sherman Act's reach . . . commercial activities taking place abroad, unless those activities adversely affect . . . imports to the United States".'<sup>31</sup>

Next, the court considered non-import, non-domestic commerce. Such commerce may be subject to US jurisdiction if it meets two criteria: 'The first criterion dictates the kinds of effects that truly foreign commerce must have in the US market. Conduct "involving trade or commerce . . . with foreign nations" must have "a direct, substantial, and reasonably foreseeable effect" on either [A] U.S. domestic commerce (phrased awkwardly as "trade or commerce which is not trade or commerce with foreign nations") or U.S. import commerce, or [B] the export trade or commerce of a U.S. exporter'.<sup>32</sup> Since the export trade criterion was not in issue, the court focused on the second question ' . . . that the direct, substantial and foreseeable effect shown under subject (1) must give rise to a substantive claim under the Sherman Act'.<sup>33</sup> Distinguishing *Empagran*, the court observed that '*Minn-Chem* plaintiffs were US, not foreign, purchasers as was the case in *Empagran*'.<sup>34</sup>

Applying these principles, the court noted that some of the commerce in issue clearly was import commerce and thus outside the FTAIA rules: US purchasers bought potash from foreign sellers.<sup>35</sup> But the court warned: 'That does not mean, however, that the plaintiffs are home free. Rather, we must still apply the rules governing import commerce for purposes of the antitrust laws' and determine whether 'the conduct produced a substantial intended effect in the United States'.<sup>36</sup> The court found that it clearly did: 5.3 million tons of potash were sold in the US in 2008 alone and prices increased 600 per cent from 2003 to 2008, and where producers of 71 per cent of the world's potash charged uniform prices, it was objectively foreseeable that there would be a worldwide effect, including in the US, by producers. In short, both the 'substantive' and 'foreseeable' requirements were met.<sup>37</sup>

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29 *Id.*, at 414.

30 683 F.3d 845 (7th Cir. 2012).

31 *Id.*, at 854.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*, at 855.

36 *Id.* (citing 509 U.S. 764, 797 (1993)).

37 *Id.*, at 856.



The court also ruled that 'direct' requires more than 'but for' cause. 'A reasonably proximate causal nexus' is necessary – as advocated by the DOJ.<sup>38</sup> The court explicitly rejected an 'immediate consequence' standard. Its reasoning was expressed in these terms:

*This understanding of the FTAIA should allay any concern that a foreign company that does any import business at all in the United States would violate the Sherman Act whenever it entered into a joint-selling arrangement overseas regardless of its impact on the American market. A number of safeguards exist to protect against that risk. If the hypothetical foreign company is engaged in direct import sales, it must naturally comply with U.S. law just as all of its domestic competitors do. If its foreign sales do not meet the threshold for 'effects' on import or domestic commerce established by cases such as Hartford Fire and Summit Health, then, for those transactions, it has nothing to worry about. If the hypothetical foreign company is engaged in the kind of conduct outside the United States that the FTAIA addresses, then its action can be reached only if there are direct, substantial, and reasonably foreseeable effects.*<sup>39</sup>

Applying those standards to the *Minn-Chem* complaint, the court held that 'as much of the complaint alleges straightforward import transactions' outside the parameters of the FTAIA, they are thus subject to US jurisdiction.<sup>40</sup> More complex issues stemmed from the complaint's allegations that a Canadian entity that did not sell directly into the US market nonetheless was liable for increased US prices. It had raised prices for Chinese purchasers and those prices to Chinese buyers in turn became benchmark prices that elevated US prices. The court ruled that those effects were 'direct' within the meaning of the statute. 'It is no stretch to say that the foreign supply restrictions, and the concomitant price increases forced upon the Chinese purchasers, were a direct – that is, proximate – cause of the subsequent price increases in the United States.'<sup>41</sup>

The Seventh Circuit reached a different result in *Motorola Mobility LLC v. AUO Optronics Corp.*<sup>42</sup> The continuing importance of this case merits extensive discussion and quotation. Motorola Mobility sought recovery for three kinds of purchases: liquid crystal display (LCD) panels bought directly from foreign manufacturers of LCD panels (1 per cent of purchases); LCD panels bought by Motorola's foreign subsidiaries as components for cellular telephones, then imported into the US by Motorola and sold to US consumers (42 per cent); and LCD panels purchased abroad by Motorola subdivisions and sold abroad (57 per cent).

There was no dispute that the panels purchased by Motorola directly and delivered to it in the US qualified as import commerce and were not subject to the limitations of the FTAIA. The other two categories were the subject of the interlocutory appeal from the district court's order granting partial summary judgment in favour of the defendants. Writing for a unanimous court, Judge Posner upheld the district court's order:

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38 *Id.*, at 857.

39 *Id.*, at 857–58

40 *Id.*, at 858.

41 *Id.*, at 859.

42 775 F.3d 816 (7th Cir. 2010).

*Had the defendants conspired to sell LCD panels to Motorola in the United States at inflated prices, they would be subject to the Sherman Act because of the exception in the Foreign Trade Antitrust Improvements Act for importing. That is the 1 percent, which is not involved in the appeal. Regarding the 42 percent, Motorola is wrong to argue that it is import commerce. It was Motorola, rather than the defendants, that imported these panels into the United States, as components of the cellphones that its foreign subsidiaries manufactured abroad and sold and shipped to it. So it first must show that the defendants' price fixing of the panels that they sold abroad and that became components of cellphones also made abroad but imported by Motorola into the United States had 'a direct, substantial, and reasonably foreseeable effect' on commerce within the United States. The panels – 57 percent of the total – that never entered the United States neither affected domestic U.S. commerce nor gave rise to a cause of action under the Sherman Act.<sup>43</sup>*

Thus, the second and third categories of sales did not qualify as import commerce, but Judge Posner agreed that fixing LCD panel prices in Taiwan would have had an effect on domestic US commerce. And that the effect was reasonably foreseeable because the manufacturers knew the panels were to be integrated into cellular telephones sold to US customers.<sup>44</sup> Judge Posner added that Motorola's distribution channel was unlike the channel that the *Minn-Chem* court ruled would not satisfy the 'direct' requirement – 'the situation in which action in a foreign country filters through many layers and finally causes a ripple in the United States'.<sup>45</sup> The Motorola situation was not 'many layers' and just 'a few ripples' in the US.<sup>46</sup> Nonetheless:

*What trips up Motorola's suit is the statutory requirement that the effect of anti-competitive conduct on domestic U.S. commerce give rise to an antitrust cause of action. 15 U.S.C. § 6a(2). The conduct increased the cost to Motorola of the cellphones that it bought from its foreign subsidiaries, but the cartel-engendered price increase in the components of cellphones that incorporated them occurred entirely in foreign commerce.<sup>47</sup>*

Moreover, Motorola's foreign subsidiaries – not Motorola – suffered the injury, and their independent status could not be ignored. Motorola's injury was derivative and barred by the indirect purchaser doctrine of *Illinois Brick Co. v. Illinois*.<sup>48</sup>

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43 *Id.*, at 818–19.

44 *Id.*, at 819.

45 683 F.3d at 860.

46 775 F.3d at 819.

47 *Id.*

48 431 U.S. 720 (1977).

The Seventh Circuit, however, was not finished criticising Motorola's case:

*There is still more that is wrong with Motorola's case. Nothing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers. [Secondary source citations omitted]. Even Motorola acknowledges 'that a substantial percentage of U.S. manufacturers utilize global supply chains and foreign subsidiaries to effectively compete in the global economy.' Some of those foreign manufacturers are located in countries that do not have or, more commonly, do not enforce antitrust laws consistently or uniformly, or whose antitrust laws are more lenient than ours, especially when it comes to remedies, notably punitive damages (such as the treble-damages antitrust remedy authorized by section 4 of the Clayton Act, 15 U.S.C. § 15). As a result, the prices of many products exported to the United States doubtless are elevated to some extent by price fixing or other anticompetitive acts that would be forbidden by the Sherman Act if committed in the United States. Motorola argues that 'the district court's ruling would allow foreign cartellists to come to the United States' and 'unfairly overcharge U.S. manufacturers.' Not true; the defendants did not sell in the United States and, if they were overcharging, they were overcharging other foreign manufacturers – the Motorola subsidiaries.<sup>49</sup>*

In short:

*Motorola's foreign subsidiaries were injured in foreign commerce-in dealings with other foreign companies – and to give Motorola rights to take the place of its foreign companies and sue on their behalf under U.S. antitrust law would be an unjustified interference with the right of foreign nations to regulate their own economies.<sup>50</sup>*

## Enforcement actions under the FTAIA

Courts have taken a slightly different approach in interpreting the FTAIA in the context of enforcement actions, granting the US government greater latitude in prosecuting regulatory actions than they may afford private plaintiffs for damages actions. The *Motorola Mobility* opinion included an important discussion of the DOJ's position expressed in an amicus brief.<sup>51</sup> The DOJ asked that the court 'hold that the conspiracy to fix the price of LCD panels had a direct, substantial and reasonably foreseeable effect on U.S. import and domestic commerce.'<sup>52</sup> Otherwise, the DOJ was concerned that its enforcement programme would be compromised. That concern was especially acute because the criminal prosecution of AUO for the same conspiracy was pending and also on appeal. The DOJ wanted to make clear that, while Motorola lacked a damages remedy, the DOJ's criminal enforcement should be unaffected. Judge Posner readily obliged, finding:

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49 775 F.3d at 824 (internal citations omitted).

50 *Id.*

51 The views of US government agencies are discussed more fully, *infra*, at pp. 21.

52 *Id.*, at 825.

*As the government notes in its amicus filings, there is a difference between actions brought by the DOJ and private class action damages. Motorola Mobility can be decided in such [a] way as to recognize these differences. The court can find jurisdiction under the FTAIA for DOJ prosecutions while addressing the concerns raised by China, Japan, Korea, and Taiwan about an unduly expansive application of U.S. law [that] they claim would undermine principles of international comity . . . Finding jurisdiction for the United States to prosecute component price-fixing need not ignore the international comity concerns of foreign governments. No nation has objected to the DOJ's successful prosecution of foreign companies and even citizens of that country in the LCD panel investigation. As the United States notes in its brief, the DOJ seriously considers the view of foreign laws before bringing cases . . . [T]he comity considerations with private plaintiffs are quite different. '[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government'.<sup>53</sup>*

The court finally expressed the view that incorporating subsidiaries abroad should have legal consequences:

*It is fair to require foreign subsidiaries of American companies to seek remedy in the courts of the country in which they choose to incorporate. Companies operate overseas facilities to take advantage of many legal provisions of that country: labor law, environmental law, and tax law. In non-legal terms: 'You take the good with the bad.' By contrast, American consumers have no realistic choice but to buy finished goods that are assembled from components sold and assembled around the world. Therefore, the antitrust laws should be read - where possible - to allow governmental enforcement against international cartels that were meant to have, and have had, a substantial effect[] on domestic commerce. A foreign [subsidiary's] position is more akin to an American citizen living overseas who buys price-fixed goods but then must seek any remedies under the laws [of the] country she has chosen to live in.<sup>54</sup>*

The Ninth Circuit issued its closely related decision in *United States v. Hsiung* only two months later.<sup>55</sup> There, the court upheld the conviction of two individuals, AUO Optronics Corporation and its US subsidiary. The charged conspiracy was the same as the conduct evaluated in *Motorola Mobility*. The court upheld the convictions both because (1) import commerce was involved and (2) the conduct had a direct, substantial and reasonably foreseeable effect on US commerce.

The court also held that the government had satisfied the 'substantial and intended effect' test of *Hartford Fire* and, further, that prosecution was not foreclosed by the FTAIA. The jury found that prices were fixed in the LCD panel market and clearly 'targeted' for delivery to the US.

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<sup>53</sup> *Id.*, at 827 (citing *Empagran I* 542 U.S. at 17).

<sup>54</sup> *Id.*, at 827.

<sup>55</sup> 778 F.3d 738 (9th Cir. 2015).

The court reasoned that import trade was clearly involved by virtue of the direct sale of price-fixed LCD panels to purchasers in the US.<sup>56</sup> The 'domestic effects' test was satisfied because foreign LCD manufacturers sold price-fixed panels incorporated into finished consumer products ultimately sold in the United States.

The defendants had contended that the overseas conduct was too attenuated and not sufficiently direct – the intervening development, manufacture and sale resulted in a diffuse effect. Rejecting that argument, the Ninth Circuit held that a direct effect is one that follows as an 'immediate' consequence of the defendant's activity, citing its previous opinion in *LSL Technologies*.<sup>57</sup> The court also applied a proximate causation standard with respect to the 'gives rise to' requirement of the FTAIA. So there were different standards in play: 'immediate consequence', the 'direct requirement' and 'proximate causation for the "gives rise to" limitation'.<sup>58</sup>

The court then held that the government's proof satisfied the 'gives rise to plaintiffs' injury' requirement and, detailing the key reasons for its decision, the Ninth Circuit ruled:

*The constellation of events that surrounded the conspiracy leads to one conclusion – the impact on the United States market was direct and followed "as an immediate consequence" of the price fixing. To begin, the TFT-LCDs are a substantial cost component of the finished products – 70-80 percent in the case of monitors and 30-40 percent for notebook computers. One of the trial witnesses explained the correlation: "[I]f the panel price goes up, then it will directly impact the monitor set price.' The 'price stabilization' meetings, where the price fixing initially occurred, led to direct negotiations with United States companies, both domestically and overseas, on pricing decisions. As noted before, some of the panels were imported directly into the United States. Other panels were sold overseas, often to foreign subsidiaries of American companies or to systems integrators, and then incorporated into finished products. It was well understood that substantial numbers of finished products were destined for the United States and that the practical upshot of the conspiracy would be and was increased prices to customers in the United States.*<sup>59</sup>

Analysing the same conspiracy, these two opinions reached at least one key contrasting ruling. The Seventh Circuit in *Motorola Mobility* found that 99 per cent of the panel purchases did not qualify as import trade, yet the Ninth Circuit reached the opposite conclusion, and instead ruled that the LCD panels in issue did amount to import trade. That distinction can be very important. All of the cases agree that an 'import trade' conclusion removes the case from an otherwise complicated FTAIA analysis, and the sales are subject to US antitrust review. For that reason, many observers hoped the Supreme Court would grant the ensuing petitions for writs of certiorari from *AUO* and *Motorola Mobility*, and issue a clear and definitive opinion. Without comment, it did not.<sup>60</sup>

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56 *Id.*, at 755, 759.

57 379 F.3d at 680-81.

58 778 F.3d at 758.

59 *Id.*, at 759.

60 135 S. Ct. 2837 (2015).

## Conclusion

Recent district court decisions have not added clarity to the FTAIA analysis, in part because they have turned on very specific fact patterns.<sup>61</sup> Likewise, brightline tests or clear rules are not easy to discern from these cases. The facts probably will not fall easily into any of the distribution and sales patterns reported in the case law. Probably the most that can be said now in broad outline is that:

- products sold directly to US purchasers in the US are likely to qualify as ‘import trade’ and products billed to or shipped to the US likely will be subject to US antitrust analysis;
- price-fixed components of products sold into the US market may also be subject to US competition law, although the relative size of these products as a cost component may be important;
- products manufactured abroad and sold abroad by foreign companies or foreign subsidiaries of US companies are more likely to be free of US enforcement activity; and
- courts may be inclined to grant the US government more latitude for regulatory action than they may afford private plaintiffs for damages actions, and the views of the agencies will be carefully considered even in private cases.

## The US agencies’ position

In January 2017, the DOJ and FTC issued a comprehensive statement of their views concerning international enforcement, cooperation and jurisdiction in the *Antitrust Guidelines for International Enforcement and Cooperation*.<sup>62</sup> According to the agencies: ‘It is well established that the Federal antitrust laws apply to conduct that has a substantial and intended effect on the United States’ (citing the FTAIA).<sup>63</sup> Importantly, the agencies described several ‘illustrative examples’.

The first example (A) concerned import trade and commerce, which the agencies termed the ‘important commerce exclusion’. This import trade example posited two companies making a product outside the US, fixing prices and selling the product worldwide, including in the US. Since the companies were selling the product for delivery into the US, such sales would qualify as import commerce.<sup>64</sup> That is not a surprising conclusion. The civil cases are in accord.

Illustrative example (B) involved two shipping companies located abroad that fixed prices on selected routes, including to the US. That conduct, according to the agencies, would be closely connected to the importation of goods into the United States and therefore would constitute import commerce subject to US antitrust laws.<sup>65</sup>

The agencies also included examples pertaining to non-import foreign commerce. The ‘effects exception’, according to the agencies, brings conduct otherwise outside US enforcement ‘if the conduct has a direct, substantial and reasonable foreseeable effect on commerce within the United States, U.S. import and commerce of a U.S. exporter, and that effect gives rise to the

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61 *Costco v. Au Optronics Corp.*, 2016 WL 4017462 (W.D., Wash. 2016). *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2011 WL 5725008 (N.D. Cal. 2016). *In re Lithium Ion Batteries Antitrust Litigation*, 2017 WL 2021361 (N.D. Cal. 2017). *In re Capacitors Antitrust Litigation*, 2018 WL 4558265 (N.D. Cal. 2018).

62 2017 WL 282888 (13 January 2017).

63 *Id.*, at \*8.

64 *Id.*, at \*10.

65 *Id.*

claims'.<sup>66</sup> An effect is direct 'if there is a reasonably proximate causal nexus, that is, if the effect is proximately caused by the alleged anticompetitive conduct'<sup>67</sup> (citing *Lotes* and *Minn-Chem*, and rejecting the Ninth Circuit 'immediate consequence' test).<sup>68</sup>

For the direct effects issues, the agencies presented two illustrative examples. The first posited two foreign companies with factories abroad that fixed prices for component parts for high-tech hardware integrated into finished products abroad that were then sold into the US. The agencies first noted that the actual price-fixing took place abroad in foreign commerce. Thus, those sales would not be considered import commerce.

But what if there were a direct, substantial and reasonably foreseeable effect on US commerce? The agencies described that analysis as a 'fact intensive inquiry'.<sup>69</sup> They will collect and analyse evidence in order to ascertain whether there was an effect on US commerce. The next step will be to determine if the price was the proximate cause of the effects, if it were both substantial and the result was 'foreseeable to a reasonable person making business decisions'.<sup>70</sup> And the agencies offered some additional guidance:

- reasonable foreseeability is an objective standard;
- the relative size of the price-fixing cost component may be relevant but is not dispositive; and
- evidence that the price-fixers expected the conduct to affect US prices could be important, but its absence would fundamentally change the agencies' analyses.<sup>71</sup>

The agencies' final example was this: two foreign producers extract a mineral and supply non-US demand; by agreement, they reduce supply, driving up prices. A third company supplies all of US demand and begins to export product because of rising foreign prices. As a consequence, US supply is reduced and prices rise.<sup>72</sup> The agencies viewed the rising US prices in this example as a direct, substantial and foreseeable effect on US commerce. But the effect must also 'give rise' to a US antitrust claim:

*It is therefore appropriate for courts to distinguish among damages claims based upon the underlying transaction that forms the basis of the injury to ensure that each claim redresses injury consistent with the requirements of the antitrust laws, including the FTAIA. For example, when anticompetitive conduct affects commerce around the world, a plaintiff whose antitrust injury arises from that conduct's effect on U.S. import commerce may recover damages for that injury, but a plaintiff that suffers a foreign injury that is independent of, and not proximately caused by, the conduct's effect on U.S. commerce cannot recover damages under the U.S. antitrust laws.<sup>73</sup>*

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66 Id.

67 Id., at \*11.

68 Id., at 93.

69 Id., at \*11.

70 Id., at \*11.

71 Id.

72 Id., at \*12.

73 Id.

These tests are much easier to describe than to perform. Expert economic analysis nearly always is critical, both inside the agencies and for those being investigated.

## **International comity**

Long before enactment of the FTAIA, courts applied the principle of international comity in determining when to limit application of the US antitrust laws to foreign defendants based on foreign conduct.<sup>74</sup> The Supreme Court first explained the principle as, 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws.'<sup>75</sup> For its wide-reaching impact, the FTAIA offers no direction concerning when the courts or antitrust enforcement agencies should heed the principle of international comity and decline to exercise jurisdiction over disputes implicating the extraterritorial application of the US antitrust laws. In the absence of legislative clarity, the courts have articulated relevant factors, which the agencies have adopted and explained for determining whether the principle of international comity should prevail:

*(1) degree of conflict with foreign law or policy; (2) nationality of the parties; (3) relative importance of the alleged violation of conduct here compared to that abroad; (4) availability of a remedy abroad and the pendency of litigation there; (5) existence of intent to harm or affect American commerce and its foreseeability; (6) possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) whether the court can make its order effective; (9) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) whether a treaty with the affected nations has addressed the issue.'*<sup>76</sup>

The first of these factors has garnered the most focus both in the courts and the enforcement agencies in recent years. In *Hartford Fire*, the Court focused solely on the conflict factor and applied a narrow interpretation to conclude that international comity did not counsel against asserting jurisdiction where the foreign defendants could overcome purported conflicts

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<sup>74</sup> Questions regarding the extraterritorial application of US laws also arise outside of the antitrust context in a wide variety of areas in US jurisprudence. See *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010) (limiting the extraterritorial applications of US securities laws); *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016) (limiting the extraterritorial applications of US organized crime laws); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (limiting the jurisdictional reach of US federal courts to hear certain tort claims brought under customary international law).

<sup>75</sup> *Hilton v. Guyot*, 159 U.S. at 163-64.

<sup>76</sup> *In re Vitamin C Antitrust Litigation*, 837 F.3d 175, 184-85 (2d Cir. 2016) (citing *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3rd Cir. 1997), and *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d, 597, 614 (9th Cir. 1976)).



between US and foreign law.<sup>77</sup> In that case, foreign reinsurers argued that international comity considerations should preclude Sherman Act liability in connection with their alleged conspiracy to boycott certain primary insurers in order to affect desired changes to insurance coverage in the terms of the standard commercial general liability forms used in the United States. The Court rejected foreign defendants' comity arguments on the grounds that no conflict between US and foreign law existed without considering any of the other factors courts historically had applied.

*[The foreign reinsurers] assert that Parliament has established a comprehensive regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict. 'The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws', even where the foreign state has a strong policy to permit or encourage such conduct.*<sup>78</sup>

The Court concluded that comity would not be persuasive when, as there, the defendants did not argue that the foreign law 'requires them to act in some fashion prohibited by the law of the United States.'<sup>79</sup> The US Supreme Court's conclusion alludes to the importance of a closely associated doctrine – the doctrine of foreign state compulsion – and its importance to a comity analysis in this context. Under this doctrine, defendants will be shielded from antitrust liability when they engage in activity within the territorial limits of a foreign nation that, while illegal under US law, is legally required under that foreign nation's law. The relevant inquiry is whether such conduct is obligatory rather than optional under the foreign nation's law.

More recently, the Supreme Court has clarified whether courts must defer to a foreign government's interpretation or characterisation of its own law in answering this inquiry. The *Vitamin C Antitrust Litigation* began in 2005, when a class of purchasers sued Chinese sellers of vitamin C, alleging that sellers had formed a cartel to fix the prices and restrict output of vitamin C in violation of the Sherman Act. The Chinese sellers argued that the Chinese government had compelled their actions, which should thus be immune from application of the US antitrust laws under the doctrines of act of state and foreign sovereign compulsion, as well as principles of international comity. The Chinese Ministry of Commerce filed an amicus brief affirming that a pricing regime mandated by the Chinese government required the challenged conduct. The district court denied the defendants' motion to dismiss, acknowledging that, while it must afford substantial deference to a foreign government's statement of its own law, the court was not bound to accept it as conclusive evidence of defendants' compulsion.<sup>80</sup>

The Court of Appeals for the Second Circuit reversed the decision, holding that the court was bound to defer to the Chinese government's sworn statement regarding the construction and effect of its own laws. The Second Circuit held that based on the foreign government's

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<sup>77</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (holding that '[t]he only substantial question in this litigation is whether "there is in fact a true conflict between domestic and foreign law"' (internal citations omitted)).

<sup>78</sup> *Id.*, at 798–99.

<sup>79</sup> *Id.*

<sup>80</sup> *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008), rev'd, 837 F.3d 175 (2d Cir. 2016), *vacated and remanded sub nom, Animal Sci. Prod., Inc.*, 138 S. Ct. 1865 (2018).

statements, principles of international comity required the district court to abstain from exercising jurisdiction in the case because the sellers could not simultaneously comply with both Chinese and US laws.<sup>81</sup> The Supreme Court granted certiorari to resolve the narrow question of how much deference federal courts should give to the views presented by a foreign government describing its laws.<sup>82</sup> The Court vacated and remanded the case, holding that a federal court 'is not bound to accord conclusive effect to a foreign government's statement' and enumerating several '[r]elevant considerations' when assessing a foreign government's statement about its own laws, including '(1) the statement's clarity, thoroughness, and support; (2) its context and purpose; (3) the transparency of the foreign legal system; (4) the role and authority of the entity or official offering the statement; and (5) the statement's consistency with the foreign government's past positions.'<sup>83</sup> The Court further cautioned that where a foreign government has made conflicting statements as to its laws, or offers its statement in the context of litigation, there may be cause to treat the foreign government's submission with scepticism.

The US antitrust enforcement agencies charged with protecting US consumers and businesses from anticompetitive conduct in foreign commerce expressly embrace considerations of international comity and take the involvement of a foreign sovereign into account in enforcing the US antitrust laws. Specifically, the agencies 'take into account whether significant interests of any foreign sovereign would be affected' by the prosecution.<sup>84</sup> According to the agencies, the comity analysis includes several factors:

- 'the existence of a purpose to affect US commerce';
- 'the significance and foreseeability of the effect';
- 'the existence of conflict with the foreign jurisdiction's laws';
- 'potential conflicts with foreign enforcement and remedies'; and
- 'the effectiveness of foreign enforcement as compared to US enforcement'.<sup>85</sup>

Following the recent line of federal cases involving international comity considerations, the agencies place particular emphasis on the third factor – conflict with foreign law – and note that they view genuine conflicts that warrant abstention from prosecuting the US antitrust laws to be rare and to exclude circumstances where an affected party could comply with both the US and foreign laws.<sup>86</sup> In spite of the agencies' narrow view of the conflict factor, the agencies also rely on the doctrine of foreign state compulsion, acknowledging a 'limited defense against application of the US antitrust laws when a foreign sovereign compels the very conduct that the US antitrust law would prohibit', but only when the compulsion satisfies certain criteria.<sup>87</sup> The agencies' guidance may be instructive when considering how courts should apply principles of comity in private litigation.

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81 *Id.*

82 *Animal Sci. Prods. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 734 (cert. granted 12 January 2018).

83 138 S. Ct. at 1869.

84 Int'l Enforcement Guidelines at \*13.

85 *Id.*, at \*14.

86 *Id.*, at 28.

87 *Id.*, at 32 (citing *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (3d Cir. 1979); *Trugman-Nash, Inc. v. N.Z. Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1304 (D. Del. 1970)).

## **Other federal statutes limiting extraterritorial application of US antitrust laws**

While the FTAIA and comity jurisprudence are critical for evaluating the reach of the US antitrust laws, other statutes also define the boundaries of the US antitrust laws.

### **Section 7 of the Clayton Act**

Merger activity involving foreign parties is governed by Section 7 of the Clayton Act, which prohibits any merger or acquisition of stock or assets ‘where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly’,<sup>88</sup> and reaches ‘trade or commerce among the several States and with foreign nations’.<sup>89</sup> Private parties and state attorneys general may seek injunctive relief under the Clayton Act.<sup>90</sup> The FTAIA on its face does not limit the application of Section 7 of the Clayton Act, but in their International Enforcement Guidelines, the US antitrust authorities set forth a policy to apply the principles embodied in the FTAIA when making enforcement decisions regarding mergers and acquisitions involving trade or commerce with foreign nations.<sup>91</sup>

### **The Foreign Sovereign Antitrust Recoveries Act**

The Foreign Sovereign Antitrust Recoveries Act amends Section 4 of the Clayton Act by limiting the right of foreign governments to recovery of actual, rather than trebled, damages. The limitation does not apply to ‘truly commercial enterprises’ of foreign sovereigns, so that a foreign state-owned entity may sue for trebled damages as long as it waives any claim of sovereign immunity it could otherwise raise in connection with claims it might face in the same action.<sup>92</sup>

### **The Robinson-Patman Act**

Section 2 of the Clayton Act as amended by the Robinson-Patman Act in 1936 addresses price discrimination that adversely impacts competition.<sup>93</sup> The primary provision of the Robinson-Patman Act, Section 2(a), applies to price discrimination affecting goods ‘sold for use, consumption, or resale within the United States’, and so applies only to transactions in which the discriminatorily priced goods are used or sold domestically, not to export sales.<sup>94</sup> In contrast, Section 2(c), which prohibits parties to a sales transaction to ‘pay or grant, or to receive or

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88 15 U.S.C. Section 18.

89 *Id.*, Section 12.

90 *Id.*, Sections 15c and 26.

91 US Dept. of Justice and Fed. Trade Comm’n Joint Antitrust Guidelines for International Enforcement and Cooperation (13 January 2017) (International Enforcement Guidelines), available at [www.ftc.gov/public-statements/2017/01/antitrust-guidelines-international-enforcement-cooperation-issued-us](http://www.ftc.gov/public-statements/2017/01/antitrust-guidelines-international-enforcement-cooperation-issued-us) at 18.

92 Pub. L. No. 97-393, 96 Stat. 1963 (1982), 15 U.S.C. Sections 15(b) and 15(c) (1994).

93 16 U.S.C. Section 13.

94 16 U.S.C. Section 13(a). See, e.g., *Able Sales Co. v. Compania de Azucar*, 406 F.3d 56, 2005 (1st Cir. 2005). But see *Oceanic Exploration Co. v. ConocoPhillips, Inc.*, 2006 U.S. Dist. LEXIS 72231 at n. 35 (D.D.C. 2006) (noting identical international reach of Sections 2(a) and 2(c)).

accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods', contains no such limitation and applies to both import and export sales.<sup>95</sup>

## **The Webb-Pomerene Act and the Export Trading Company Act of 1982**

Together, the Webb-Pomerene Act and the Export Trading Company Act of 1982 (ETC Act) afford registered exporters a narrow exemption from both government and private Sherman Act claims in connection with joint conduct relating solely to export activities that neither restrains trade within the US nor with respect to the export trade of US competitors.<sup>96</sup> The FTC maintains documentation of Webb-Pomerene export associations and has the authority to investigate an association and recommend adjustments to the association's operations to bring it back into compliance with the Act.<sup>97</sup> If an association fails to comply with the Commission's remedial recommendations, the Commission will refer the matter to the DOJ for law enforcement action.<sup>98</sup> The DOJ has very rarely challenged an export association's conduct.

Under the ETC Act, the Secretary of Commerce, with the concurrence of the DOJ, may grant a certificate of review conferring limited immunity from suit, under both federal and state anti-trust laws for activities within the scope of the certificate.<sup>99</sup> The DOJ will support a certificate of review with respect to export conduct that will:

- result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant;
- not unreasonably enhance, stabilise or depress prices in the United States of the class of goods or services covered by the application;
- not constitute unfair methods of competition against competitors engaged in the export of the class of goods or services exported by the applicant; and
- not include any act that may reasonably be expected to result in the sale for consumption or resale in the United States of such goods or services.<sup>100</sup>

Certificates of review shield export trading companies from criminal and trebled-damage liability under the US antitrust laws with respect to conduct covered by the certificate. Private parties and state governments may challenge certified conduct and obtain injunctive relief or single damages.<sup>101</sup>

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95 16 U.S.C. Section 13(c).

96 15 U.S.C. Sections 61-66 and 15 U.S.C. Sections 4011-21.

97 15 U.S.C. Section 65.

98 *Id.*


99 Internat'l Enforcement Guidelines at 13. In addition, the Department of Commerce has issued guidance for seeking a certificate of review. Int'l Trade Admin. (US Dep't of Commerce), The Export Trade Certificate of Review Program - The Competitive Edge for U.S. Exporters: Guidelines (2015), available at [http://trade.gov/mas/ian/etca/tg\\_ian\\_002140.asp](http://trade.gov/mas/ian/etca/tg_ian_002140.asp).

100 15 U.S.C. Section 4306(2).

101 15 U.S.C. Section 4016(b).

## **Conclusion**

The boundaries of US antitrust scrutiny are not firmly fixed, especially in the major international cartel cases that may matter the most to the litigants. A thorough understanding of complex sales and distribution channels is critical. Expert analysis likely will be the norm, not the exception. At the same time, review and enforcement by agencies abroad is increasingly vigorous, a development that adds to the importance of defining the boundaries of US antitrust laws. Similarly, private competition remedies elsewhere are growing in importance both for individual claims and collective actions. These advancements also add urgency to this analysis. In short, all of these pieces must be carefully reviewed for the full picture to emerge.



Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – explores in depth key themes such as territoriality, causation and proof of damages that are common to competition litigation around the world with jurisdictional overviews and Q&As. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as Brazil, Japan and Mexico.

As the editors of this publication note, ‘litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.’

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