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**GCR INSIGHT**

# **PRIVATE LITIGATION GUIDE**

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## Territorial Considerations: the US Perspective

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Treble damages and jail time for antitrust law breakers 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 in international markets 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 that 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 Improvement Act (FTAIA) enacted in 1982. Crammed with 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*  
*(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and*

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2 15 U.S. Code Section 6a. Conduct involving trade or commerce with foreign nations.

(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 Supreme Court has grappled with the tension between the extraterritorial application of the US antitrust laws and the ever-murky principle of international comity – ‘the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation’ – for over a century.<sup>3</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 Export Trading Company Act of 1982 (export transactions).

## **The Foreign Trade Antitrust Improvement 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>4</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>5</sup> That attitude colours both public and private US antitrust enforcement.

The economy was not yet global when the FTAIA was enacted in 1982 and US companies were not typically manufacturing offshore or buying essential component parts from foreign manufacturers. Nonetheless, the statute was intended to define the limits of US jurisdiction in increasingly international trade. A statute drafted today probably would be much more clear. 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.

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3 *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

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

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

Indeed, courts have not always applied the same analysis to the basic tests incorporated in the statute. Decisions have also been very fact-specific. Nonetheless, there has been broad agreement at least with respect to import trade. Goods from abroad that are sold directly into the US qualify as import trade. These products are not covered by the statute and therefore are subject to US antitrust scrutiny. Other aspects of the FTAIA have proven to be far more complex and even confusing. A close analysis of the jurisprudence, therefore, is necessary.

## Empagran I and II

The first important decision to analyse the FTAIA was *Hoffmann LaRoche Ltd. v. Empagran S.A.*, (*Empagran I*).<sup>6</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] have never asserted that they purchased any vitamins in the United States or in transactions in the United States commerce, and the question presented assumes that the "relevant transactions occur[ed] entirely outside U.S. commerce."<sup>7</sup>

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

*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, 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>8</sup>*

The Court then asked:

*. . . questions about the price-fixing conduct and the foreign injury that it causes. 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>9</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, and exception that applies (and makes the Sherman Act nonetheless applicable) where the conduct (1) has a "direct, substantial, and*

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6 542 U.S. 155 (2004)

7 *id.*, at 160.

8 *id.*, at 158.

9 *id.*

*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>10</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>11</sup> In *Empagran II*,<sup>12</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>13</sup>

### Post-Empagran circuit court decisions

In 2008, the Ninth Circuit reviewed the FTAIA in depth in *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*.<sup>14</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 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[e] rise to a [Sherman Act] claim’.<sup>15</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>16</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

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<sup>10</sup> *id.*, at 159.

<sup>11</sup> *id.*, at 175.

<sup>12</sup> 47 F.3d 1257 (D.C. Cir. 2003).

<sup>13</sup> *id.*, at 1271.

<sup>14</sup> 546 F.3d 981 (9th Cir. 2008).

<sup>15</sup> *id.*, at 985-986.

<sup>16</sup> *id.*, at 986.

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 Litig.*<sup>17</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.” Empagran II, 417 F.3d at 1271. 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.” 542 U.S. at 164, 124 S. Ct. 2359 see In re Monosodium Glutamate, 417 F.3d at 538; Empagran II, 417 F.3d at 1271.*<sup>18</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>19</sup>

The Third Circuit spoke on these same issues in *Animal Science Products, Inc. v. China Minmetals*.<sup>20</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 presents a merits test, not a subject-matter jurisdiction limitation. The Third Circuit instructed the district court on remand as follows:

*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.[note footnote 10] 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.*

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17 477 F.3d 535, 539 (9th Cir. 2007)

18 DRAM at 987.

19 id., at 987–988.

20 654 F.3d 462 (3d Cir. 2011).

*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>21</sup>

The Second Circuit was next to address the FTAIA in *Lotes Co., Ltd. v. Hon Hai Precision Industry Co., Ltd.*<sup>22</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 Second 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>23</sup> In so holding, the Third 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'. 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>24</sup> Following this analysis, the court upheld dismissal of the complaint 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>25</sup>

Since then, ever more complicated facts and distribution channels have proven challenging to analyse. For example, in *Minn-Chem, Inc. v. Agrium, Inc., et al.*,<sup>26</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*:

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21 *id.*, at 470.

22 753 F.3d 395 (2d Cir. 2014).

23 *id.*, at 398.

24 *id.*, at 411.

25 *id.*, at 414.

26 683 F.3d 845 (7th Cir. 2012).

*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” Empagran, 542 U.S. at 161, 124 S.Ct. 2359.<sup>27</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>28</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>29</sup> Distinguishing *Empagran*, the court observed that *Minn-Chem* plaintiffs were US, not foreign, purchasers as was the case in *Empagran*.<sup>30</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>31</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 anti-trust laws’ and determine whether ‘the conduct produced a substantial intended effect in the United States,’<sup>32</sup> (citing *Hartford Fire Ins. Co. v. California*).<sup>33</sup> The court found that it clearly did: (1) 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 (2) 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 the US by producers. In short, both the ‘substantive’ and ‘foreseeable’ requirements were met.<sup>34</sup>

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>35</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*

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27 *id.*, at 854.

28 *id.*

29 *id.*

30 *id.*

31 *id.*, at 255.

32 *id.*

33 509 U.S. 764, 797 (1993).

34 *id.*, at 856.

35 *id.*, at 857.



*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>36</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 and thus subject to US jurisdiction.<sup>37</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>38</sup>

The Seventh Circuit reached a different result in *Motorola Mobility LLC v. AUO Optronics Corp.*<sup>39</sup> The continuing importance of this case merits extensive discussion and quotation. Motorola Mobility sought recovery for three kinds of purchases: (1) liquid crystal display panels (LCD panels) bought directly from foreign manufactures of LCD panels – (1 per cent of purchases); (2) 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 (3) 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 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 an unanimous court, Judge Posner upheld the district court’s order:

*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 cell-phones also made*

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36 *id.*

37 *id.*, at 858.

38 *id.*, at 859.

39 775 F.3d 816 (7th Cir. 2010).

*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 US commerce nor gave rise to a cause of action under the Sherman Act.<sup>40</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 effect was foreseeably because the manufacturers knew the panels were to be integrated into cellular telephones sold to US customers.<sup>41</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'. The Motorola situation was not 'many layers' and just 'a few ripples' in the US.<sup>42</sup> Nonetheless:

*What trips up Motorola's suit is the statutory requirement that the effect of anti-competitive conduct on domestic US commerce give rise to an antitrust cause of action. 15 U.S.C. § 6a(2). The conduct increased the cost to Motorola of the cell-phones 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>43</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*.

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 utilise 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 authorised 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*

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40 *id.*, a: 818.

41 *id.*, at 819.

42 *id.*

43 *id.*

in the United States. Motorola argues that “the district court’s ruling would allow foreign cartelists 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>44</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>45</sup>

The *Motorola Mobility* opinion included an important discussion of the DOJ’s position expressed in an *amicus* brief.<sup>46</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>47</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 damage remedy, the DOJ’s criminal enforcement should be unaffected. Judge Posner readily obliged:

*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 recognise 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 US 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.*

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44 *id.*, at 824.

45 *id.*

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

47 *id.*, at 825.

Government.” [citing *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, *supra*, 542 U.S. at 171, quoting Joseph P. Griffin, ‘Extraterritoriality in U.S. and EU Antitrust Enforcement,’ 67 *Antitrust L J* 159, 194 (1999)].<sup>48</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>49</sup>

The Ninth Circuit issued its closely related decision in *United States v. Hsiung* only two months later.<sup>50</sup> There, the court upheld the conviction of two individuals, AUO Optonics 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 satisfied the ‘substantial and intended effect’ test of *Hartford Fire* and, further, 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. 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>51</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*

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48 *id.*, at 827.

49 *id.*

50 778 F.3d 738 (9th Cir. 2015).

51 *id.*, at 755, 759.

*Technologies*.<sup>52</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>53</sup>

The court then held that the government’s proof satisfied the ‘give rise to plaintiffs’ injury’ requirements or 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>54</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 LCDs panel 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>55</sup>

Recent district court decisions have not added clarity to the FTAIA analysis, in part because they have turned on very specific fact patterns.<sup>56</sup>

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:

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<sup>52</sup> 379 F.3d at 680-81.

<sup>53</sup> *Hsiung*, at 758.

<sup>54</sup> *id.*, at 759.

<sup>55</sup> 135 S.Ct. 2827 (2015).

<sup>56</sup> *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).

- 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 (agencies) issued a comprehensive statement of their views concerning international enforcement, cooperation and jurisdiction: Antitrust Guidelines for International Enforcement and Cooperation.<sup>57</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>58</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>59</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>60</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 claims’.<sup>61</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>62</sup> (citing *Lotes* and *Minn-Chem*, and rejecting the Ninth Circuit ‘immediate consequence’ test).<sup>63</sup>

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57 2017 WL 282888 (13 January 2017).

58 *id.*, at \*8.

59 *id.*, at \*10.

60 *id.*

61 *id.*

62 *id.*, at \*11.

63 *id.*, at FN 93.

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>64</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>65</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 not fundamentally change the agencies' analyses.<sup>66</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>67</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 US 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 US commerce cannot recover damages under the US antitrust laws.<sup>68</sup>*

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.

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64 *id.*, at \*11.

65 *id.*, at \*11.

66 *id.*

67 *id.*, at \*12.

68 *id.*

## **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. 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>69</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>70</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 between US and foreign law.<sup>71</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.

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<sup>69</sup> *Hilton v. Guyot*, 159 U.S. 163-64.

<sup>70</sup> *In re Vitamin C Antitrust Litigation*, 837 F.3d 175,184-85 (2d Cir. 2016) (citing *Mannington Mills, Inc. v. Congleton Corp.*, 595 F.2d 1287, 1297-98 (3rd Cir. 1997) and *Traberling Lumber Co. v. Board of America, N.T. & S.A.*, 549 F.2d 537, 614 (9th Cir. 1976)).

<sup>71</sup> *Hartford Fire Ins. Co. v. California* 509 U.S. 754 (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).



*They 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>72</sup>

The Court concluded that comity would not be persuasive when, as here, 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>73</sup>

More recently, the Supreme Court has addressed what evidence a foreign entity could offer to establish a conflict with foreign law. 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 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 mandated 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>74</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 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>75</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>76</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

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72 *id.*, at 798–99.

73 *id.*

74 *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546 (D.D.N.Y. 2008), rev'd, 937 F.3d 175 (2d Cir. 2016), vacated and remanded *sub nom Animal Sci. Prod. Inc.*, 138 S. Ct. 1865 (2018).

75 *id.*

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

positions.<sup>77</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>78</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>79</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>80</sup> In spite of the agencies' narrow view of the conflict factor, the agencies acknowledge a 'limited defence 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>81</sup> The agencies' guidance may be instructive when considering how courts should apply principles of comity in private litigation.

## **Other federal statutes limiting the application of US antitrust laws to foreign commerce**

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>82</sup> and reaches 'trade or

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77 138 S.Ct. at 1869.

78 Int'l Enforcement Guidelines at \*13.

79 *id.*, at \*14.

80 *id.*, at 23.

81 *id.*, at 32 (citing *Marrington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (2d 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)).

82 15 U.S.C. Section 18.

commerce among the several States and with foreign nations'.<sup>83</sup> Private parties and state attorneys general may seek injunctive relief under the Clayton Act.<sup>84</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>85</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>86</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>87</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>88</sup> In contrast, Section 2(c), which prohibits parties to a sales transaction to 'pay or grant, or to receive or 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>89</sup>

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

Together, the Webb-Pomerene Act and Export Trading Company Act of 1982 (ECT 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>90</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

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83 *id.*, Section 12.

84 *id.*, Sections 15c, 26.

85 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.

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

87 16 U.S.C. Section 13.

88 16 U.S.C. Section 13(a). See, e.g., *Able Sales Co. v. Compania de Azucar*, 408 F.2d 55, 2605 (1st Cir. 2005). But, see *Oceanic Exportation Co. v. ComocoPhillips, Inc.*, 2006 U.S. Dist. LEXIS 72281 at n. 25 (D.D.C. 2006) (noting identical international reach of Sections 2(a) and 2(c)).

89 16 U.S.C. Section 13(c).

90 15 U.S.C. Sections 61-66 and 15 U.S.C. Sections 4011-4021.

back into compliance with the Act.<sup>91</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>92</sup> The DOJ has very rarely challenged an association's conduct.

Under the ECT Act, the Secretary of Commerce with the concurrence of the Department of Justice may grant a certificate of review conferring limited immunity from suit under both federal and state antitrust laws for activities within the scope of the certificate.<sup>93</sup> The Department of Justice 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>94</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>95</sup>

## **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.

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91 15 U.S.C. Section 65.

92 *id.*

93 15 U.S.C. Section 4306(2).

94 *International Enforcement Guidelines at 13.* In addition, the Department of Commerce has issued guidance for seeking a certificate of review. *Int'l Trade Admin. (US Dept. 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).

95 15 U.S.C. Section 4016(b).

# Appendix 1

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Jim McGinnis is a member of the antitrust and competition practice group in the firm's San Francisco office. A former Assistant United States Attorney, Mr McGinnis's complex litigation practice has focused for decades on parallel antitrust criminal and civil cases, and class actions, typically international in scope. He has served as US national counsel directing the defence of criminal and civil litigation for leading international businesses in a wide variety of industries. He has also led the defence of numerous antitrust class actions in the electronics industries. Recognised by *Chambers & Partners* and *Best Lawyers in America*, Mr McGinnis often has been selected by his peers and the courts as defence liaison counsel in complex multi-district class action litigation. He is an accomplished trial lawyer and has extensive first chair jury trial experience in complex civil and criminal matters and major mass tort cases. Mr McGinnis has tried 40 cases, 22 of which were trials in state or federal court.

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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.

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