

Antitrust & Competition

May 2015

Recent Developments in the Extraterritorial Application of the U.S. Antitrust Laws*

David M. Goldstein | Robert Reznick | Shannon Leong

Many Japanese companies and executives have experienced the nightmare of criminal and civil legal proceedings in the United States arising from allegations that they violated U.S. antitrust law—the Sherman Act¹—by participating in a price-fixing conspiracy. This includes, for example, a long-running group of cases in California involving electronics components such as dynamic random-access memory (DRAM), static random-access memory (SRAM), liquid crystal displays (LCD), cathode ray tubes (CRT), optical disc drives (ODD), lithium ion batteries, and capacitors. It also includes the many cases in Michigan involving automobile parts. These, and other cases, have resulted in criminal investigations in which Japanese companies have been compelled to pay fines to the U.S. government, and executives have been forced to serve prison sentences in the United States. In addition, Japanese companies have faced years of civil lawsuits and paid billions of U.S. dollars in settlements and legal fees to resolve private damages actions.

In light of these substantial potential liabilities, it is critical that Japanese companies and executives understand the extent to which the Sherman Act can be applied to conduct that takes place outside the United States, but has effects in the United States. The extraterritorial reach of the Sherman Act is limited by the Foreign Trade Antitrust Improvements Act (FTAIA),² which Congress passed in 1982. Since then, different appellate courts have applied the FTAIA in different ways. In 2014, long-awaited decisions from three different appellate courts addressed how the FTAIA limits application of the Sherman Act to non-U.S. conduct. Unfortunately, the decisions are not entirely consistent. This article attempts to provide some guidance by providing an overview of the Sherman Act and the FTAIA, giving a brief history of how courts have applied the FTAIA, analyzing the decisions issued in 2014 (one of which was significantly amended in January 2015), and offering some suggestions to reduce the risk of becoming ensnared in legal proceedings in the United States alleging violations of the Sherman Act.

* This article originally was published in Japanese as a two-part series in the JCA Journal in March 2015 and May 2015 (ISSN 03863042).

¹ 15 U.S.C. § 1 *et seq.*

² 15 U.S.C. § 6a.

THE SHERMAN ACT

Section 1 of the Sherman Act provides that, “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.”³ “The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. . . . the policy unequivocally laid down by the Act is competition.”⁴ Applied literally, the Sherman Act’s language could be construed to prohibit every contract that regulates trade or commerce,⁵ but the U.S. Supreme Court has made clear that Section 1 is limited to conduct that restricts competition unreasonably.⁶

The Sherman Act does not treat all agreements that restrain trade in the same manner. Some agreements that restrain trade can also promote competition, so they are subject to the “rule of reason,” which considers the procompetitive and anticompetitive effects of the conduct at issue. This is the usual framework for analysis under Section 1 of the Sherman Act.⁷

However, some agreements are considered to be so harmful to competition and unjustifiable that they are considered *per se* illegal—that is, the agreements automatically are considered to be a violation of the Sherman Act, with very few defenses available.⁸ Conduct that falls into this category includes agreements among competitors to fix prices, to limit output or production, to divide markets (for example, by geography or customer), or to fix bids for an opportunity, project or asset.⁹ These activities are the most serious violations of the Sherman Act, draw the most scrutiny from U.S. enforcement agencies, are most likely to result in criminal prosecution, and pose the greatest risk in private damages actions.¹⁰

The penalties for violating the Sherman Act can be severe. A company that is criminally convicted of violating the Sherman Act may be punished by a fine not exceeding \$100 million and a person can be fined up to \$1 million.¹¹ The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine.¹² For example, in the LCD price-fixing case AU Optronics was fined \$500 million. A person who is convicted also may be punished by imprisonment not exceeding ten years for each count of conviction.¹³

The primary U.S. enforcement agency for price-fixing violations, especially in cases involving foreign companies, is the Department of Justice (DOJ). Prosecuting companies and individuals that engage in price fixing is among the DOJ’s highest priorities. In recent years the DOJ has obtained prison sentences averaging 25 months, and

³ 15 U.S.C. § 1 *et seq.*

⁴ *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

⁵ *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

⁶ *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

⁷ *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“[T]his Court presumptively applies rule of reason analysis”).

⁸ See *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8-9 (1979).

⁹ See U.S. Dept. of Justice, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For* (revised Sept. 28, 2005), available at <http://www.justice.gov/atr/public/guidelines/211578.pdf>.

¹⁰ See, e.g., Bill Baer, Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice, *Prosecuting Antitrust Crime* (Sept. 10, 2014), available at <http://www.justice.gov/atr/public/speeches/308499.pdf>; see also Scott Hammond, Deputy Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice, *The Evolution of Criminal Enforcement Over the Last Two Decades* (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.htm>.

¹¹ 15 U.S.C. §§ 1, 2.

¹² 18 U.S.C. § 3571(d).

¹³ *Id.*

in each of 2012 and 2013 it recovered more than \$1 billion in fines in price-fixing investigations.¹⁴ Currently, the DOJ's most active cases involve the auto parts industry. As of January 2015, 33 companies—some of them Japanese—had pleaded guilty or agreed to plead guilty and had agreed to pay a total of more than \$2.4 billion in fines, and 50 individuals—again, some of them Japanese—have been criminally charged.¹⁵

Prosecution by the DOJ is only one area of concern. The other area is private damages actions brought by consumers (or companies) harmed by purchasing price-fixed products. The nature of class action litigation in the United States is well known: an individual consumer (or company) who alleges he purchased a price-fixed product in many cases can bring a lawsuit on behalf of all consumers (or companies) who also bought that product.¹⁶ In addition, in the past ten years there has been an increasing trend of companies who purchased price-fixed products to file their own lawsuits.

In lawsuits brought by private parties, damages generally are trebled and each party that engaged in the unlawful conduct is fully liable for all of the damages caused by the conduct, even damages flowing from the sales of co-conspirators.¹⁷ For example, assume five companies agree to fix prices for a product and the overall harm to purchasers of the product is \$100 million. That amount would be trebled to \$300 million, and each company would be potentially liable for the full \$300 million regardless of its size. Accordingly, if the smallest of the five companies received only \$5 million of the \$100 million, it still would be liable for the full \$300 million, although it would receive credits toward the \$300 million for amounts the other defendants pay in settlements.

Damages in private actions can be staggering. In the LCD price-fixing case, the consumer class action plaintiffs obtained a total settlement of \$1.1 billion, and the business class action plaintiffs obtained a settlement of \$473 million. Many large companies opted out of those settlements and obtained their own settlements totaling hundreds of millions of dollars.

The possibility of prison sentences and the tremendous potential financial liability for violating the Sherman Act prompt two questions. First, why does the Sherman Act apply to the conduct of companies and executives in Japan? The answer is that the United States seeks to protect its businesses and citizens from violations of the Sherman Act that have effects in the United States regardless of where the conduct took place. Second, are there any limits to the application of the Sherman Act to conduct that takes place outside the United States? The answer to that question is “yes,” and it is found in both court decisions and the FTAIA. Direct sales into the United States present the clearest cases for potential liability. But if products arrive in the United States indirectly, to prove a Sherman Act claim a U.S. plaintiff must demonstrate that the non-U.S. conduct had an effect in the United States and that the plaintiff's Sherman Act claim arises from that effect. The problem is that courts have issued inconsistent decisions in interpreting and applying the FTAIA, as explained below.

THE APPLICATION OF THE SHERMAN ACT TO NON-U.S. CONDUCT

Application of the Sherman Act to Non-U.S. Conduct Prior to the FTAIA

Prior to the FTAIA's enactment in 1982, the application of U.S. antitrust law to non-U.S. conduct was guided by court decisions. The U.S. Supreme Court first addressed the extraterritorial reach of the Sherman Act in 1909 in

¹⁴ Antitrust Division 2014 Criminal Enforcement Update, available at <http://www.justice.gov/atr/public/division-update/2014/criminal-program.html>.

¹⁵ http://www.justice.gov/atr/public/press_releases/2015/311396.htm.

¹⁶ Fed. R. Civ. P. 23.

¹⁷ 15 U.S.C. §§ 15, 15a.

American Banana Co. v. United Fruit Co., where the alleged anticompetitive conduct took place in Costa Rica.¹⁸ The Supreme Court said that it was a “startling proposition” that the Sherman Act would apply to conduct outside the United States.¹⁹ The Court declined to find a Sherman Act violation, explaining that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”²⁰ Two years later, however, the Supreme Court stepped back from this approach of strict territoriality. In *United States v. American Tobacco Co.*, the Court held that a U.S. court had jurisdiction over a Sherman Act claim based on market-division contracts executed in England.²¹ Subsequent court decisions further eroded *American Banana*, paving the way for the Second Circuit’s decision in *United States v. Aluminum Co. of America (“Alcoa”)*.²²

In *Alcoa*, the Second Circuit was the court of last resort because the Supreme Court did not have enough justices who could hear the case. The Second Circuit rejected the strict territorial approach in *American Banana* and established the “effects test” for determining whether foreign conduct gave rise to a Sherman Act claim in the United States. The U.S. government had brought a civil action against the defendant, a U.S. aluminum manufacturer, which had a Canadian subsidiary that had participated in a cartel with several European companies to limit the supply of aluminum into the United States. The court recognized the need to consider “limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the ‘Conflict of Laws.’”²³ However, the court also stated that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders”²⁴ Thus, the agreements “were unlawful, though made abroad, if they were intended to affect imports and did affect them.”²⁵ This gave birth to the “effects test,” which required that, in order for the Sherman Act to apply to foreign conduct, the conduct must have a direct and intended effect in the United States.

After *Alcoa*, courts developed different tests for determining the magnitude and type of direct, intended effect necessary to trigger the Sherman Act for conduct outside the United States. For example, the Second Circuit found that a “foreseeable and appreciable” domestic effect was necessary,²⁶ while the Third and Ninth Circuits implemented balancing tests weighing international comity concerns with the degree and significance of harm to U.S. commerce.²⁷

The FTAIA

This led the United States to adopt the FTAIA in 1982 to limit the circumstances in which the Sherman Act can be applied to foreign conduct. The language of the statute is very complicated even in English, so lawyers and judges usually use the U.S. Supreme Court’s explanation of the statute in its seminal FTAIA decision, *F. Hoffman-LaRoche Ltd. v. Empagran, S.A. (“Empagran”)*.²⁸ The Supreme Court explained that the FTAIA limits the reach of the Sherman Act, but first excludes from the FTAIA’s coverage conduct involving U.S. import

¹⁸ 213 U.S. 347, 357 (1909).

¹⁹ *Id.* at 355.

²⁰ *Id.* at 356.

²¹ 221 U.S. 106 (1911).

²² 148 F.2d 416 (2d Cir. 1945).

²³ *Id.* at 443.

²⁴ *Id.*

²⁵ *Id.* at 444.

²⁶ *Nat’l Bank of Canada v. Interbank Card Ass’n*, 666 F.2d 6 (2d Cir. 1981).

²⁷ *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979).

²⁸ 542 U.S. 155, 161-62 (2004).

trade or commerce (the “import commerce exclusion”).²⁹ In other words, conduct that involves U.S. import trade or commerce (in other words, a non-U.S. company’s direct imports into the United States) is subject to the Sherman Act.³⁰ For conduct that does not involve U.S. import trade or commerce, the FTAIA provides that the Sherman Act does not apply unless the conduct satisfies both parts of what is known as the FTAIA’s “domestic effects exception”: (1) the foreign conduct must have a “direct, substantial and reasonably foreseeable effect” on U.S. domestic or import commerce, *and* (2) that effect must “give rise to a [Sherman Act] claim.”³¹ Both parts of this test must be satisfied for non-U.S. conduct to be subject to the Sherman Act.

Although the FTAIA’s “domestic effects exception” was intended to clarify the extraterritorial application of the Sherman Act, how it could be satisfied remained unclear. In 1992, ten years after the FTAIA was passed, the Supreme Court said that “it is well established by now that the Sherman Act applies to foreign conduct that was meant to and did in fact produce some substantial effect in the United States,” but it was “unclear whether the [FTAIA]’s ‘direct, substantial, and reasonably foreseeable effect’ standard amends existing law or merely codifies it.”³² The Court determined that it did not need address the scope of the FTAIA in that case, but it did so twelve years later in *Empagran*.

Empagran involved a global vitamins price-fixing conspiracy. Plaintiffs were five foreign vitamin distributors outside the United States that purchased vitamins for delivery outside the United States. They asserted Sherman Act claims and the defendants asserted the FTAIA as a defense. The Supreme Court found that the FTAIA’s “domestic effects exception” did not apply because the plaintiffs’ claims “rest[ed] solely on [an] independent foreign harm.”³³ To satisfy the FTAIA and bring a Sherman Act claim, the foreign plaintiffs’ claims had to be based on an effect felt in the United States. The Court specifically rejected the plaintiff’s argument that the second part of the FTAIA’s test—the “gives rise to a claim” test—meant that a foreign purchaser could sue in the United States as long as the conduct gave rise to *another* party’s claim in the U.S.³⁴

The Court relied heavily on principles of international comity in its decision, noting that applying U.S. treble damages remedies to foreign conduct would undermine the judicial systems of these nations and encourage forum shopping. This analysis was informed by a brief that Japan’s Ministry of Economy, Trade, and Industry (“METI”) submitted to assist the Court’s consideration of the issues.³⁵ METI argued that permitting foreign purchasers of goods from foreign corporations in foreign markets to bring actions in U.S. courts would interfere with the Government of Japan’s ability to regulate its own economy and govern its own society. METI highlighted Japan’s existing antitrust legal framework and the bilateral cooperation agreements between the United States and Japan:

[The FTAIA] should not be interpreted to allow foreign purchasers of goods from foreign corporations in foreign markets to bring actions in the United States courts for alleged injuries under United States antitrust laws. ... Giving foreign purchasers the right to damages for purely foreign market transactions

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 & n.23 (1993).

³³ *Id.* 159.

³⁴ *Id.* 173-174.

³⁵ Brief of the Government of Japan as Amicus Curiae in Support of Petitioners, *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, No. 03-724, 2004 WL 226390 (S. Ct. Feb. 3, 2004). METI also joined a brief filed by other countries in the D.C. Circuit court case. Brief of the Federal Republic of Germany, United Kingdom of Great Britain and Northern Ireland, Japan, the Swiss Confederation, and the Kingdom of the Netherlands as Amici Curiae in Support of Defendants-Appellees, *Empagran, S.A. et al., v. F. Hoffman-La Roche Ltd.*, No. 01-7115, 2005 WL 3873712 (D.C. Cir. Mar. 9, 2005).

undermines the important principles of comity, respect due to a sovereign nation to regulate conduct within its own national territory. Such an interpretation of the FTAIA has international public policy implications which would adversely affect the ability of the government of Japan to regulate its own economy and govern its own society.³⁶

The Supreme Court understood these comity concerns, but did not consider them to preclude application of the FTAIA.³⁷

After the Supreme Court ruled, the case was returned to the lower court to consider the plaintiffs' alternative argument that their injuries were not in fact independent of the conspiracy's U.S. domestic effect. The plaintiffs maintained that the defendants' success in inflating foreign prices necessarily depended on their success in maintaining inflated prices in the United States, due to the global market and the fungible nature of vitamins. While the court considered this argument plausible, it ultimately rejected it, holding that this was not sufficient to satisfy the "gives rise to a claim" test.³⁸

Conflicts Among the Courts After Empagran

Although the Supreme Court provided guidance in Empagran, subsequent decisions from the appellate courts were inconsistent in applying both the "import commerce exclusion" and the "domestic effects exception." Some courts applied them strictly, which meant that plaintiffs could not satisfy them and the FTAIA applied to block their Sherman Act claims. Other courts applied them less strictly, which meant that plaintiffs could satisfy them and the FTAIA did not block their Sherman Act claims.

Examples of Strict Application of the FTAIA To Block Sherman Act Claims

Some courts construed the FTAIA "domestic effects exception" as a strict and exacting standard, which limited the ways plaintiffs could meet it. For example, in *United States v. LSL Biotechnologies*, the Ninth Circuit established a strict test for the requirement that an effect on U.S. commerce be "direct": "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity," proceeding "without deviation or interruption."³⁹ Under this standard, a break in the direct chain of causation would block a Sherman Act claim from proceeding. *LSL Biotechnologies* involved a joint venture between two companies to develop a genetically altered tomato seed that would produce tomatoes with a long shelf life. When the relationship fell apart, the parties entered litigation, eventually resolving their dispute by restricting one company from selling its long shelf life tomato seeds in North America. The Ninth Circuit found that the restriction on selling seeds in North America did not have a sufficiently direct effect on U.S. commerce.⁴⁰ The court explained that any effect on U.S. farmers and consumers depended on uncertain intervening events.⁴¹ Accordingly, the FTAIA applied and the Sherman Act claim could not go forward.

Similarly, the Eighth Circuit rejected Sherman Act claims based on an alleged global price-fixing cartel in *In re Monosodium Glutamate Antitrust Litigation*.⁴² In that case, the foreign purchaser plaintiffs alleged that

³⁶ Brief of the Government of Japan as Amicus Curiae, *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 2004 WL 226390, at *2

³⁷ See 542 U.S. at 165-75.

³⁸ *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

³⁹ 379 F.3d 672, 680 (9th Cir. 2004).

⁴⁰ *Id.* at 681.

⁴¹ *Id.*

⁴² 477 F.3d 535, 538 (8th Cir. 2007).

monosodium glutamate and nucleotides were fungible and marketed on a worldwide basis. The plaintiffs further alleged that the defendant manufacturers necessarily had to fix product prices in the U.S. market in order to sustain inflated prices in foreign markets; otherwise, foreign purchasers would buy the product directly from the U.S. market or from others selling products that they purchased in the United States. The Eighth Circuit rejected the Sherman Act claim because this constituted a “less direct causation standard” than proximate cause, and relied on the principle that comity requires avoiding unreasonable interference with the authority of sovereign nations.⁴³

Examples of Less Strict Application of the FTAIA To Allow Sherman Act Claims

However, other U.S. courts were more willing to allow Sherman Act claims based on foreign conduct to proceed. One of the most influential cases is the Third Circuit’s 2011 ruling in *Animal Science Products Inc. v. China Minmetals Corp.*, which addressed the “import commerce exclusion” and the “domestic effects exception.”⁴⁴ The plaintiffs were U.S. purchasers of magnesite alleging that Chinese producers engaged in a price-fixing conspiracy that affected U.S. commerce. The Third Circuit held that while the import commerce exclusion must be given a “relatively strict” construction, a defendant need not necessarily function as a physical importer to satisfy it.⁴⁵ Rather, the inquiry is whether the defendants’ alleged anticompetitive behavior was “directed at an import market.”⁴⁶ The court also held that the “domestic effects exception” does not contain a subjective intent requirement, as some had argued.⁴⁷ Instead, the court ruled that the “direct” and “substantial” effect must have been “foreseeable” to an “objectively reasonable person” in order for the FTAIA not to block a Sherman Act claim.⁴⁸

The Seventh Circuit also took a more permissive approach and allowed Sherman Act claims to proceed in *Minn Chem, Inc. v. Agrium Inc.*⁴⁹ In *Minn-Chem*, U.S. purchasers of potash alleged that defendants, who produced potash outside the United States, had conspired to fix the prices of their sales of potash outside the United States and that the inflated prices in those countries raised the price of potash defendants sold in the United States. The court concluded that the allegations satisfied the FTAIA’s “domestic effects” test, rejecting the Ninth Circuit’s narrower interpretation of “direct effect” in *LSL Biotechnologies*. The court held that: “the term ‘direct’ means only that ‘a reasonably proximate causal nexus’” exists between the conduct and the injury in the U.S., whether or not the effect is “immediate.”⁵⁰ Based on that standard, the court found that the plaintiff adequately alleged a direct, substantial and reasonably foreseeable effect on U.S. domestic commerce, that the FTAIA did not apply, and that the Sherman Act claim could go forward.⁵¹

Antitrust lawyers in the United States have been watching these and other FTAIA for several years to see whether the courts would reach complete agreement on critical FTAIA issues. They did not, and in two important cases, petitions have been filed asking the U.S. Supreme Court to resolve some of the disputed issues.

⁴³ *Id.*

⁴⁴ 654 F.3d 462 (3d Cir. 2011).

⁴⁵ *Id.* at 470.

⁴⁶ *Id.*

⁴⁷ *Id.* at 471.

⁴⁸ *Id.*

⁴⁹ 683 F.3d 845 (7th Cir. 2012), *cert. dismissed*, 134 S. Ct. 23 (2013).

⁵⁰ *Id.* at 856-57.

⁵¹ *Id.* at 858.

The Circuit Court Decisions in 2014 Applying the FTAIA

The Second Circuit's Decision in Lotes Co v. Hon Hai Precision Industry

In *Lotes Co., Ltd. v. Hon Hai Precision Industry, Co., Ltd.*, the Second Circuit (which includes federal courts in New York) adopted the Seventh Circuit's construction of "direct" as requiring a "reasonably proximate causal nexus."⁵² *Lotes* was not a straightforward price-fixing case. Rather, *Lotes*, a Taiwanese corporation, asserted Sherman Act claims alleging that members of a standards-setting organization breached their licensing commitments and precluded *Lotes* from participating in the U.S. market for USB 3.0 connectors, which resulted in higher prices for U.S. consumers. Defendants asserted that the FTAIA blocked *Lotes*' claims. For the "direct effect" test, the Second Circuit adopted the Seventh Circuit's *Minn-Chem* test—a "reasonably proximate causal nexus"—rather than the Ninth Circuit's *LSL Biotechnologies* test—an "immediate consequence of the defendant's activity."⁵³ The court assumed this test was met. However, the court dismissed *Lotes*' claims based on its failure to satisfy the "gives rise to a claim" test, because even though *Lotes* alleged that the defendants' foreign conduct resulted in higher consumer prices in the United States, those prices were not the injury that *Lotes* allegedly suffered, which was being excluded from the market for USB 3.0 connectors.⁵⁴

The Ninth Circuit's Decision in Hsiung v. United States

Shortly after *Lotes* was decided, the Ninth Circuit (which includes federal courts in California) issued its decision in *Hsiung v. United States*, which addressed the "direct effect" test and the FTAIA's "import commerce exclusion."⁵⁵ *Hsiung* and his company, AU Optronics Corp., were convicted of participating in the liquid crystal display ("LCD") price-fixing conspiracy. They appealed their convictions, arguing that the FTAIA barred their prosecution because most of the price-fixed LCD panels were sold to third parties outside the United States. The Ninth Circuit reiterated the test it had adopted in *LSL Biotechnologies* that for an effect to be "direct," it must be the "immediate consequence" of the defendant's conduct.⁵⁶ The Ninth Circuit acknowledged that the Second Circuit in *Lotes* had disagreed with its *LSL Biotechnologies* decision, but said it was "not necessary to address this disagreement because we do not rely on the direct effects exception in affirming the convictions."⁵⁷ Instead, the court upheld the convictions because some of the price-fixed panels had been imported into the United States from the defendant and therefore fell within the FTAIA's "import commerce exclusion" and therefore the Sherman Act applied.⁵⁸

The defendants asked the full panel of Ninth Circuit judges to review the decision, but no judge voted to grant review so the petition was denied. At the same time, however, the court amended its original decision to address the "direct effect" test.⁵⁹ Because the panel issued its amended decision after the Seventh Circuit's final decision in the *Motorola Mobility*, we discuss it after first describing the *Motorola Mobility* decisions.

⁵² 753 F.3d 395 (2d Cir. 2014).

⁵³ *Id.* at 409-13.

⁵⁴ *Id.* at 413-15.

⁵⁵ 758 F.3d 1074.

⁵⁶ *Id.* at 1094.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1091-92.

⁵⁹ *United States v. Hsiung*, No. 12-10492, 2015 U.S. App. LEXIS 1590 (9th Cir. Jan. 30, 2015).

The Seventh Circuit's Decision in Motorola Mobility v. AU Optronics

The most anticipated of the three 2014 decisions was issued by the Seventh Circuit in *Motorola Mobility LLC v. AU Optronics Corp.*⁶⁰ In that case, the Seventh Circuit (which includes federal courts in Illinois) affirmed the “direct effect” test it used in *Minn-Chem*—a “reasonably proximate causal nexus”—but suggested that it might be less favorable to plaintiffs than it had indicated in *Minn-Chem*. But rather than decide the case based on the “direct effect” requirement, it decided the case for the foreign defendants (including Japanese defendants) based on the “gives rise to a claim” requirement.

Motorola, a U.S. company, asserted claims resulting from the LCD price-fixing conspiracy based on (1) its purchases of LCD panels that were delivered directly to Motorola facilities in the United States (“Category I”); (2) purchases of LCD panels by Motorola’s foreign affiliates that were delivered to the foreign affiliates’ manufacturing facilities outside the United States, where they were incorporated into mobile phones that were later sold in the United States (“Category II”); and (3) purchases of LCD panels by Motorola’s foreign affiliates that were delivered to the foreign affiliates’ manufacturing facilities outside the United States and incorporated into mobile phones sold outside the United States (“Category III”). The district court ruled that the Category I sales constituted “import commerce” so those Sherman Act claims were not blocked by the FTAIA, and that the Category III sales affected only foreign commerce (the products never entered the United States) so the FTAIA blocked the Sherman Act claims based on those purchases. The Seventh Circuit agreed.⁶¹ The Category II sales served as the context for the court’s analysis of the meaning of the FTAIA.

Several governments, including Japan, through METI, submitted briefs to assist the court in its analysis of the Category II sales in light of comity concerns. Recognizing the U.S. government’s position that the FTAIA should not be construed to limit its criminal enforcement of the Sherman Act, METI’s brief focused on the role that international comity should play in allowing private damages actions allowed under the Sherman Act:

The Ministry of Economy, Trade and Industry of Japan is not in opposition to all extraterritorial application of countries’ competition laws by the respective country’s enforcement authority where anti-competitive conduct occurs outside their territories, provided that such application is reasonably limited.

...

The Ministry of Economy, Trade and Industry of Japan is, however, of the opinion that “excessive” extraterritorial application of competition law tends to bring about serious tension between the countries involved. In particular, not in the cases of enforcement by each country’s competition authorities, but in civil lawsuits based on injuries alleged to have been incurred as a result of foreign anticompetitive activities, plaintiffs often tend to insist on the remarkably enlarged scope of extraterritorial application.

...

⁶⁰ The Seventh Circuit first issued a decision in *Motorola Mobility* on March 27, 2014. *Motorola Mobility LLC v. AU Optronics*, 746 F.3d 842 (7th Cir. 2014). That decision received a great deal of commentary, including significant criticism, and the Seventh Circuit, on July 1, 2014, vacated its earlier decision and granted *Motorola Mobility*’s request for a rehearing. 2014 U.S. App. LEXIS 12704 (7th Cir. July 1, 2014). That resulted in the decision discussed in text, which was issued on November 26, 2014, and amended on January 12, 2015. *Motorola Mobility LLC v. AU Optronics*, No. 14-8003, 2014 U.S. App. LEXIS 22408 (7th Cir. Nov. 26, 2014), amended, Jan. 12, 2015, ECF No. 148, *petition for reh’g en banc denied*, Jan. 12, 2015, ECF No. 147.

⁶¹ *Id.* at *4-*9.

Japan has the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (“the Antimonopoly Act”), Act No. 54 of April 14, 1947, which is enforced by the Japan Fair Trade Commission. The Japanese law and the laws of many (if not all) countries other than the US do not provide for treble damage awards in antitrust claims. Treble damages would be viewed as punitive damages, mixing civil and criminal liability.

...

Thus, the Ministry of Economy, Trade and Industry of Japan [is concerned] that the applicability of treble damages, which are not common outside US, will be expanded through excessive extraterritorial application of US competition law, and that, as a result, Japan’s ability to regulate its own commercial affairs will be interfered [with].⁶²

In other words, METI recognized the U.S. government’s interest in enforcing the Sherman Act against foreign defendants whose anticompetitive conduct has effects in the United States, but at the same time explained that allowing private damages actions in addition to U.S. government enforcement would in many cases seriously infringe upon Japan’s sovereignty.

The court developed an approach to accommodate these comity concerns while not interfering with the DOJ’s enforcement efforts. The court concluded that for Category II purchases, the price-fixed panels first were shipped to Motorola’s subsidiaries outside the United States, so the “import commerce exclusion” did not apply, and no Sherman Act claim could be stated. The court then assumed that for Category II purchases the “direct effect” test was satisfied, noting that there had been only one intermediate sale prior to importation of the finished product into the United States.⁶³ But the court also held that Motorola could not show that the “gives rise to a claim” requirement was satisfied for Category II purchases. This was because the original purchases of the price-fixed LCD panels took place outside the United States, and those purchases in foreign commerce could not give rise to a Sherman Act claim in the United States.⁶⁴ Explaining that Motorola’s foreign subsidiaries have remedies under foreign local law, the court characterized their U.S. parent’s efforts to litigate their dispute in more friendly U.S. courts as impermissible forum shopping.⁶⁵ The court concluded that the FTAIA blocked Motorola’s Category II claims for damages, but left untouched the DOJ’s ability to enforce the Sherman Act.

On March 16, 2015, Motorola asked the U.S. Supreme Court to review the Seventh Circuit’s decision with respect to its ruling on the “import commerce exclusion” and the “direct effects exception.”

The Ninth Circuit’s Amended Decision in Hsiung v. United States

As noted above, after the Seventh Circuit issued its final decision in *Motorola Mobility*, the Ninth Circuit issued an amended decision in *Hsiung*. In the amended decision, the Ninth Circuit decided to address the “domestic effects exception” rather than decide the case solely on the “import commerce exception.” The court explained

⁶² Amicus Curiae Brief of the Ministry of Economy, Trade and Industry of Japan in Support of Apellees, *Motorola Mobility LLC v. AU Optronics*, No. 14-8003 (7th Cir. Oct. 16, 2014), ECF No. 115.

⁶³ *Id.* at *9. The court also concluded that the “substantial” and “foreseeable” prongs of the domestic effects test might be satisfied. For example, if a price-fixed component was included in cell phones assembled overseas and sold to Motorola in the U.S. “there would be an effect on U.S. commerce,” which “could be substantial.” *Id.* at *9. Similarly, the court found the requirement that the effect be “foreseeable” was satisfied “because the defendants knew that finished products sold in the United States would incorporate price-fixed components sold abroad.” *Id.*

⁶⁴ *Id.* at *11-*12 (quoting *Minn-Chem*, 683 F.3d at 858).

⁶⁵ *Id.* at *8.

that all parties agreed that the price-fixing conduct was substantial and had a reasonably foreseeable effect in the United States, but defendants maintained that the effect in the United States was not sufficiently “direct,” relying on the test the Ninth Circuit had adopted in the *LSL Biotechnologies* case: “an effect is ‘direct’ ‘if it follows as an immediate consequence of the defendant[s]’ activity.”⁶⁶ The Ninth Circuit repeated that it disagrees with the Second Circuit’s decision in *Lotes* and the Seventh Circuit’s decision in *Minn-Chem*, both of which had applied the “reasonably proximate causal nexus” test (which the Seventh Circuit applied again in *Motorola Mobility*). The Ninth Circuit found that impact of the LCD price-fixing conspiracy “on the United States market was direct and followed ‘as an immediate consequence’ of the price fixing,” because (1) the conspiracy led to negotiations with U.S. companies both in the United States and overseas, (2) some panels were imported directly into the United States, and (3) other panels were incorporated into finished products that were sold to foreign subsidiaries of U.S. companies or to other companies who assembled finished products and sold them into the United States.⁶⁷

The Ninth Circuit’s third example for why the “direct” test was satisfied—that outside the United States price-fixed panels were incorporated into finished products that then were sold into the United States—begins to sound like an effect that is not exactly an “immediate consequence” of the defendants’ conduct. By including this third example, the court seems to be suggesting that the “immediate consequence” test is more flexible than some have interpreted it to be, perhaps narrowing the gap between the Ninth Circuit’s “immediate consequence” test and the Seventh Circuit’s “reasonably proximate causal nexus” test.

On March 16, 2015, the defendants in *Hsiung* asked the U.S. Supreme Court to review the Ninth Circuit’s decision with respect to both the “import commerce exclusion” and the “direct effects exception.” In fact, Hsiung and Motorola filed their petitions with the Supreme Court on the same day to make clear the need for the Supreme Court to resolve the inconsistent FTAIA decisions among the appellate courts.

The Effect of the Recent Decisions on the FTAIA

The decisions discussed above have not provided as much clarity regarding the FTAIA as one would have hoped. Indeed, the uncertainty in the law is demonstrated not only by the fact that both the Seventh Circuit (*Motorola Mobility*) and the Ninth Circuit (*Hsiung*) significantly revised their initial decisions, but also by the fact that in both cases, petitions for review have been filed with the Supreme Court. Although the Court may take this opportunity to issue a decision that reshapes the current jurisprudence regarding the FTAIA, four trends can be seen in these recent decisions.

First, the DOJ and private parties continue to aggressively pursue remedies against companies that engage in price fixing. Of course, the simplest way to avoid being trapped in a price-fixing investigation and litigation is not to engage in price fixing in the first place. Under the Sherman Act, the term “price fixing” is used to refer to a broad range of activity, including agreements by competitors to fix prices, to restrict production or output, to limit investments in capacity, to set common terms of sale, and so on. It also includes dividing markets, such as allocating territories, sales channels or customers. And it also includes agreeing with competitors on how much to bid to obtain an opportunity, project, property or other asset. All of these activities are considered *per se* violations of the Sherman Act, are high priorities for the DOJ, and attract the attention of parties who might file a private damages action.

⁶⁶ *Hsiung*, 2015 U.S. App. LEXIS 1590, at *49-*50.

⁶⁷ *Id.* at *49-*52.

Second, the FTAIA does not apply to conduct that is import trade or import commerce. This is a bright-line legal rule that Japanese companies and executives must understand. If a company engages in price fixing and sends products directly into the United States, the FTAIA is highly unlikely to block application of the Sherman Act.

Third, the appellate courts are not consistently applying the “direct effect” requirement for the “domestic effects exception.” In the Ninth Circuit (*Hsiung*), for example, the exception applies (which means the FTAIA is not available to block Sherman Act claims) only if the U.S. effect is an “immediate consequence of the defendant’s . . . activity,” proceeding “without deviation or interruption.” This is a demanding test that is difficult for a plaintiff to meet, in which case the FTAIA will block a Sherman Act claim. However, in the Second and Seventh Circuits, the U.S. effect can be more attenuated for the exception to apply—the defendant’s conduct must have only a “reasonably proximate causal nexus” with an effect on U.S. commerce. This makes it easier for a plaintiff to satisfy the “domestic effects exception” and to proceed with a Sherman Act claim. Note, however, that the Ninth Circuit’s amended decision in *Hsiung* may narrow the difference between the “immediate consequence” test used in the Ninth Circuit and the “reasonably proximate causal nexus” test used in the Second and Seventh Circuits. The different tests used by the appellate courts leave no bright-line rule for Japanese companies other than this: The fewer intermediaries between a company that engages in price fixing and the U.S. purchaser of the price-fixed products, the greater the likelihood that the “domestic effects exception” will be satisfied, in which case the FTAIA would not be available to block Sherman Act claims.

Finally, the “gives rise to a Sherman Act claim” requirement seems to be taking on greater importance in whether the FTAIA applies, and may afford defendants with a strong argument to use the FTAIA as a defense. In *Lotes*, the Second Circuit said the “gives rise to a claim” requirement was not met because Lotes did not suffer injuries in the United States, even though U.S. consumers were harmed. Under this interpretation, Sherman Act claims asserted by non-U.S. companies based on harm to U.S. consumers are not likely to survive an FTAIA attack. In *Motorola*, the Seventh Circuit said the requirement was not met because Motorola’s foreign affiliates, not the U.S. parent, purchased the price-fixed products. This means that Sherman Act claims asserted by a U.S. company based on purchases by its foreign affiliate may be blocked by the FTAIA, depending on the facts and circumstances of the case. Again, the U.S. Supreme Court may take the opportunity to provide more guidance on this issue.

The FTAIA and State Antitrust Laws

That leaves a final issue that Japanese companies should be aware of: Although the FTAIA can be used in some circumstances to block price-fixing claims brought under the federal Sherman Act, it is possible that it cannot be used to block claims brought under the antitrust laws of individual states. This is important because about one-half of the 50 states have passed antitrust laws that allow so-called “indirect purchaser” antitrust claims that are not allowed under the Sherman Act. Under the Sherman Act, only the first (or direct) purchaser of a price-fixed product can sue for damages.⁶⁸ All of the subsequent, downstream (or indirect) purchasers cannot bring a Sherman Act claim.⁶⁹ This, in part, explains why the “direct effect” and “gives rise to a claim” requirements are so critical in the analysis of whether the FTAIA applies: If the U.S. purchaser is not the first purchaser of the price-fixed product, it is very difficult to maintain a Sherman Act claim.⁷⁰

⁶⁸ *Illinois Brick co. v. Illinois*, 431 U.S. 720 (1977).

⁶⁹ *Id.* at 729.

⁷⁰ There are exceptions if the first purchaser is owned or controlled by the company that engaged in price-fixing, a cost-plus contract is involved, or the purchase was made from a co-conspirator. See *Illinois Brick*, 431 U.S. at 736 n.16; see also *Jewish Hosp. Ass’n v. Stewart Mech. Enters.*, 628 F.2d 971, 975 (6th Cir. 1980); *In re Brand*

This is not true in the many states that have passed statutes that allow indirect purchasers to bring the same antitrust claims that the Sherman Act does not permit. There is no clear answer yet as to whether the FTAIA blocks claims under state antitrust laws in the same way that it blocks Sherman Act claims. Some courts have found that congressional intent in passing the FTAIA would be impermissibly frustrated if state antitrust laws were permitted to regulate foreign commerce more extensively than the Sherman Act; other courts, however, have hesitated to conclude this.⁷¹ Although few courts are likely to find that the FTAIA is ineffective to block claims brought under state antitrust laws, this remains an open issue. Accordingly, every Japanese company should be aware that even though the FTAIA may block Sherman Act claims based on conduct in Japan, the FTAIA might not block state antitrust claims based on the same exact conduct.

CONCLUSION

The United States has a long history and tradition of enforcing the Sherman Act against foreign companies and individuals who engage in anticompetitive conduct that has effects in the United States. For more than 100 years, the courts have tried to strike a balance between protecting the interests of the United States while trying not to infringe on the sovereignty of other nations. The FTAIA is a well-intentioned statute that tries to strike this balance, but it has proven to be difficult to apply with consistency in real world situations. As demonstrated above, there is a lack of consensus among the appellate courts, and all concerned would benefit if the Supreme Court takes the opportunity presented by the *Hsiung* and *Motorola* cases to provide some guidance.

That said, some bright-line rules remain clear. The DOJ aggressively prosecutes price-fixing conduct against both U.S. and non-U.S. companies and individuals, and the penalties can be severe. Moreover, despite international comity concerns, courts across the spectrum are trying not to interfere with the DOJ's efforts to enforce the Sherman Act, as they did in *Hsiung* and *Motorola*. The possibility of criminal prosecution should be enough to discourage Japanese companies and executives from engaging in price fixing for products that will be exported either directly or indirectly to the United States. If the possibility of criminal prosecution is not enough of an incentive, there is also the possibility of private damages actions where the company may be fully liable for three times the harm caused to downstream purchasers of the price-fixed products. Finally, although the FTAIA may provide some room for companies and individuals to avoid some private damages suits under the Sherman Act, it is unclear whether the FTAIA will provide protection from private damages suits under individual state antitrust laws.

All this points to a straightforward conclusion and bit of advice: In our global economy, where products are routinely shipped around the world including to the United States, the best way to avoid U.S. antitrust liability is not to engage in conduct that violates the Sherman Act.

David M. Goldstein is a San Francisco partner in Orrick, Herrington & Sutcliffe's Antitrust and Competition group. Robert Reznick is a Washington, D.C. partner in the firm's Intellectual Property group and is co-chair of the firm's Life Sciences practice. Shannon Leong is a San Francisco managing associate in Orrick's Litigation group. The

Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 606 (7th Cir. 1997); *Arizona v. Shamrock Foods, Co.*, 729 F.2d 1208, 1211 (9th Cir. 1984).

⁷¹ Compare *In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452, 457-58 (D. Del. 2007) with *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-md-2143, 2011 WL 3894376, at *12 (N.D. Cal. Aug. 3, 2011), and *Proview Technology Inc. v. AU Optronics Corp.*, 2014 U.S. Dist. LEXIS 57828, at *56-*57 (N.D. Cal. Apr. 18, 2014) (requesting briefs, which are available at ECF Nos. 69, 70).

views expressed in this article are those of the authors and do not necessarily represent the views of Orrick or its clients.

To receive Orrick's bi-monthly [Antitrust and Competition Newsletter](#), including updates on important issues in antitrust and competition law, and/or Orrick's quarterly publication, [The World in US Courts](#), summarizing FTAIA related matters as well as the extraterritorial application of other significant U.S. statutes, please subscribe [here](#).

These publications are designed to provide Orrick clients and contacts with information they can use to more effectively manage their businesses and access Orrick's resources. The contents of these publications are for informational purposes only. Neither these publications nor the lawyers who authored them are rendering legal or other professional advice or opinions on specific facts or matters. Orrick assumes no liability in connection with the use of these publications.