*Antitrust*, Vol. 29, No. 1, Fall 2014. 

# Schrödinger's Cat and Extraterritoriality

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SINCE AT LEAST 1945,[1] U.S. FEDERAL courts, encouraged by government enforcement authorities and private litigants, have exercised their extraterritorial power to a greater extent and more visibly than any other country. That however may be changing. Just as Schrödinger's cat was simultaneously both alive and dead,[2] U.S. judicial extraterritorially seems to be at once both expanding and shrinking.

Extraterritoriality concerns frequently arise in antitrust cases, where private parties or the U.S. Department of Justice proceed against defendants based on foreign conduct. The basic legal principle is simple enough, and not by itself controversial: U.S. antitrust law "covers foreign conduct producing a substantial intended effect in United States."[3] Nonetheless, the exercise of such extraterritorial jurisdiction can apparently give offense to foreign governments, as occurred in reaction to the cluster of government and private uranium cartel cases that were litigated in the late 1970s and early 1980s. Close U.S. allies, such as Australia, Canada, France, South Africa, the UK, and others, reacted with hostility by enacting "blocking" and "claw back" legislation. "Blocking" statutes generally made it a crime for companies located within the borders of the country to produce documents in response to subpoenas from U.S. courts. "Claw back" statutes came in many flavors, but were essentially designed to make any damage award unenforceable, and to provide any "home country" defaulting defendant with the right to "claw back" from a plaintiff any treble damage antitrust judgment satisfied outside of the home country.[4] Things quieted down for quite a while, partly because Congress passed legislation that was generally perceived to have the purpose and effect of reining in U.S. federal district courts. We will come to that legislation shortly.

But still, below the surface there has been lurking a notable degree of foreign displeasure with what is still often perceived as the unduly aggressive exercise of extraterritorial authority by U.S. courts, especially in antitrust cases. That displeasure now largely comes from Asia: the People's Republic of China (PRC), Japan, Taiwan and Korea. The PRC displeasure is on display in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*,[5] wherein the defendants—companies chartered by the PRC—were sued by U.S. plaintiffs for engaging in an export price-fixing cartel in the PRC. The PRC has asserted in amicus filings by MOFCOM (a PRC competition enforcement agency) that the PRC directed this conduct so as to ensure compliance with U.S. antidumping laws. The district court rejected MOFCOM's interpretation of Chinese law and held that under Rule 44.1 of the Federal Rules of Civil Procedure, the construction of foreign law was a factual matter for the court and that only "some degree of deference" was owed to the foreign sovereign's statement as to the meaning of its own law.[6] The district court also intimated that MOFCOM's statement regarding the meaning of Chinese law was not just wrong, but intentionally false: "a post-hoc attempt to shield defendants' conduct from antitrust scrutiny."[7]

The case is now on appeal to the Second Circuit, where MOFCOM has filed a strong amicus brief expressing its view that the district court's dismissive attitude towards the foreign sovereign's explanation of its own law was "profoundly disrespectful, and wholly unfounded."[8] MOFCOM further expressed the view that "the district court's approach and result have deeply troubled the Chinese government, which has sent a diplomatic note concerning this case to the U.S. State Department."[9]

The other cases of special note are all recent decisions applying the Foreign Trade Antitrust Improvements Act (FTAIA), which was enacted in 1982 after the uranium cases were concluded, and partially in response to the international protests about these cases. The essence of the FTAIA is that Section 1 of the Sherman Act does not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations,[10] unless the conduct has a *direct*, substantial and reasonably foreseeable *effect* on domestic or import commerce, and that direct, substantial and reasonably foreseeable effect *gives rise to a claim* under Section 1 of the Sherman Act. The key issues raised in four recent or pending cases summarized below, revolve around the highlighted words above.

### *Minn-Chem*

The 2012 en banc decision of the Seventh Circuit in *Minn-Chem, Inc. v. Agrium Inc.*,[11] addressed the meaning of the word "direct" in the FTAIA. The Supreme Court had earlier held in construing the Foreign Sovereign Immunities Act that an effect is "direct" if it "follows as an immediate consequence of the defendant's . . . activity,"[12] and a divided panel of the Ninth Circuit had embraced this definition as applying to the FTAIA.[13]

The Seventh Circuit disagreed and adopted the interpretation urged by the DOJ in an amicus brief, holding that the term "direct" in the FTAIA means only a "reasonably prox-

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imate" causal nexus.[14] But, in language foreshadowing its later decision in *Motorola Mobility*[15] discussed below, the court also stated:

> The word "direct" addresses the classic concern about remoteness—a concern, incidently, that has been at the forefront of international antitrust law at least since Judge Hand wrote in *Alcoa* that "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." Just as tort law cuts off recovery for those whose injuries are too remote from the cause of an injury, so does the FTAIA exclude from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce.[16]

### *LCD* and the *AU Optronics* Criminal Case

The DOJ has pursued criminal enforcement actions against Korean and Taiwanese producers of thin-film transistor, liquid crystal display panels (LCDs). The fines imposed, based in part on indirect sales into the United States, have been enormous.[17] In due course, the DOJ went to trial against AU Optronics (AUO), the one LCD corporate defendant that chose not to settle and pay a criminal fine. The record in the case is huge, but two points are noteworthy here.

First, in late 2010, the district court requested that the DOJ provide a written statement of its views on the applicability of the FTAIA. The Government's response asserted that three categories of commerce comprised the harm to U.S. consumers caused by the LCD cartel, namely:

(1) LCD panels directly imported into the United States;
(2) LCD panel sales billed or invoiced to purchasers located in the United States; and
(3) LCD panels purchased by foreign affiliates of U.S. companies that were integrated into final products imported to the United States.[18]

Second, the record shows that LCD panels are a significant cost component in finished products, perhaps comprising thirty to forty percent of the cost of a notebook computer and seventy to eighty percent of the cost of desktop monitors.[19] Oddly, given the potential importance of this issue as discussed below, the record does not make clear what percentage of the cost of a telephone handset is accounted for by LCD panels.

AUO went to trial before a San Francisco jury and was found guilty of price fixing. The court imposed a fine of $500 million.[20] AUO appealed to the Ninth Circuit on a number of grounds, including the FTAIA and other aspects of the case implicating judicial extraterritoriality. The very first sentence of appellant's brief asserted that "[t]his appeal raises issues of law that profoundly affect economic and political relations between the United States and other nations."[21] At bottom, AUO argued that alleging or proving that a defendant has placed goods into the worldwide stream of commerce, with some of those goods eventually reaching the United States, is insufficient to meet the requirements of the FTAIA.[22]

The Ninth Circuit upheld the jury verdict,[23] holding that AUO's conduct "involved" import trade or import commerce and hence did not implicate the two FTAIA exceptions quoted above at all, even though the LCD panels were manufactured into finished consumer goods abroad before coming into the United States. AUO has filed spirited petitions for rehearing and rehearing en banc. The essence of AUO's argument is that the only evidence that the conduct involved import trade or commerce was that the AUO defendants sold LCD components overseas and the components "made their way" into the United States.[24]

The Ninth Circuit decision appears to give an expansive reading to the phrase "import trade or commerce." The words "import commerce" appear twice in the statute and must be read harmoniously. As the Third Circuit stated in *Carpet Group International v. Oriental Rug Importers Association*,[25] "The FTAIA differentiates between conduct that 'involves' [import] commerce, and conduct that 'directly, substantially, and foreseeably' affects such commerce. To give the latter provision meaning, the former must be given a relatively strict construction."[26] Corning, Inc., a multinational supplier to AUO, pointed this out in its brief amicus curiae in support of AUO's petitions.[27] Corning emphasized that anything less than a strict construction of the introductory clause would enable a greater range of conduct to avoid the effects test, thereby vastly increasing the scope of foreign conduct subject to the Sherman Act, and hence undermining the purpose of the FTAIA. Corning pointed out that the Ninth Circuit panel interpreted "import commerce" as conduct involving direct sales by foreign defendant producers of LCDs to purchasers located in the United States, notwithstanding that the jury instruction asked only whether members of the conspiracy engaged in fixing LCD panel prices targeted "for delivery" to the United States. Thus, the jury could have found a violation on evidence not establishing "import commerce" or "direct" sales as the Court used those terms.[28]

Interestingly, Corning's principal argument focused on the failure of the panel carefully to weigh considerations of comity, perhaps as a way to point out to the Ninth Circuit that the Republic of China, South Korea and Japan had all filed amicus briefs in the separate but related case in the Seventh Circuit also involving AUO (discussed below). The Republic of China (Taiwan) also filed an *amicus* letter brief that raised comity considerations in support of AUO's petitions in the Ninth Circuit case.

The Ninth Circuit has, by degrees, expanded what qualifies as "conduct involving . . . import commerce," and AUO is likely to seek review by the Supreme Court absent relief through its pending petitions in the Ninth Circuit.

### *Motorola Mobility*

While the AUO criminal case was awaiting decision in the Ninth Circuit, the Seventh Circuit issued a ruling on FTAIA issues in a related private action also involving AUO.[29] Motorola sued AUO in Illinois for cartelizing the prices of

Map Graphic: Mike Agliolo / Purestock

LCDs that Motorola subsidiaries outside the United States purchased from AUO for use in Motorola telephone handsets. The case was combined with many other cases against AUO and others relating to LCDs in an MDL proceeding in San Francisco. The district court in that case (the same judge who presided over the criminal case) rejected multiple efforts by AUO to dispose of the case on motions to dismiss or for summary judgment, including AUO's motion for summary judgment on Motorola's foreign injury claims.[30]

In due course, Motorola's case was transferred back to Illinois for trial, where AUO sought reconsideration of the FTAIA issues. The Illinois court (Gotschall, J.), declined to follow the rulings on these issues by the California court and dismissed Motorola's claims based on overseas purchases of LCD panels by its foreign affiliates, which generated the overwhelming percentage of Motorola's claimed damages.[31]

Motorola filed a petition with the Seventh Circuit seeking interlocutory review; expedited briefing was ordered, and on March 27, 2014, Judge Richard Posner, writing for the Seventh Circuit's motions panel, granted the petition and also issued a merits decision affirming the district court's order dismissing Motorola's claims.[32]

Whereas in *Minn-Chem* the Seventh Circuit (en banc) had expanded the meaning of the word "direct" as used in the FTAIA (thus expanding the extraterritorial reach of Section 1 claims), the panel in *Motorola* expanded the meaning of the non-statutory words "indirect" and "remote," while also breathing life into the FTAIA language requiring that the domestic effects of the foreign conduct must "give rise to" the plaintiffs claim (thus limiting the extraterritorial reach of Section 1 claims).

An understanding of the underlying commerce is important. LCDs typically fall into three main categories (and these categories have analogs in numerous other industries and markets):

(1) Products directly purchased by and delivered to Motorola in the United States (direct commerce);
(2) Products purchased by Motorola's foreign subsidiaries and incorporated into products that were sold abroad (purely foreign commerce); and
(3) Products purchased by Motorola's foreign subsidiaries and incorporated by those subsidiaries into products that were shipped to Motorola in the United States for resale by Motorola (indirect commerce).

Direct commerce presented no issue as it was not involved. Purely foreign commerce presented no issue either, as it involved products that never entered the United States, and thus could not support Motorola's Sherman Act claim notwithstanding the nationality of Motorola or its involvement in the prices paid by its subsidiaries. As to indirect commerce, Judge Posner provided no detailed facts, but simply wrote as follows:

> The effect of component pricefixing on the price of the product of which it is a component is indirect, compared to the situation in *Minn-Chem*, where "foreign sellers allegedly created a cartel, took steps outside United States to drive the price up of a product that is wanted in United States, and then . . . *sold that product to U.S. Customers*. It is closer to the situation in which we said the foreign trade act would block liability under the Sherman Act: the "situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States."[33]

Judge Posner did not stop with finding this indirect commerce too remote. He wrote that the effect of the alleged price fixing on such commerce in this case was mediated by Motorola's decision on what prices to charge U.S. consumers for cellphones manufactured overseas with (alleged) price-fixed components. He thus concluded that "the effect in the United States of the price fixing could not give rise to an antitrust claim."[34]

Turning then to comity principles, Judge Posner noted that:

> The Supreme Court has warned that rampant extraterritorial application of U.S. law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. [155,] 165 (2004). The [FTAIA] was intended to prevent such "unreasonable interference with the sovereign authority of other

> nations." *Id.* at 164. The position for which Motorola contends would if adopted enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and "resent[ment at] the apparent effort of the United States to act as the world's competition police officer," a primary concern motivating the foreign trade act.[35]

The Seventh Circuit panel later vacated its opinion and granted Motorola's petition for rehearing, but the panel's reasoning raises important issues about how the FTAIA (and Section 1 of the Sherman Act) may apply to indirect commerce as described above. For example, the first block quote above does not address whether U.S. effects may be sufficiently direct where a high percentage of the finished product price is accounted for by the cost of (alleged) price-fixed components. The vacated panel opinion also did not distinguish among foreign sales, manufacturing, and distribution systems with just one or two, rather than many, layers. The DOJ has collected millions of dollars in fines from Japanese auto parts producers that pleaded guilty to price fixing where a non-trivial amount of indirect commerce was at issue,[36] and the dynamics of plea negotiations show that the DOJ takes indirect commerce into account in calculating fines under the U.S. Sentencing Guidelines. At the behest of the DOJ and its economist, the district court in the AUO criminal case took indirect commerce into account in determining the fine level imposed on AUO.[37]

The court filings and procedural maneuvers surrounding the Seventh Circuit's now-vacated panel decision in *Motorola*, in particular by the DOJ, offer critical insights into the importance of these issues for government and private antitrust enforcement.

In May 2014, the panel provoked an unusual filing by the Solicitor General (SG) (who does not normally become involved in circuit court cases), when the it invited the U.S. Departments of State and Commerce to file their own briefs as amici curiae. The SG filed a rather testy letter with the panel stating that he had authorized the filing on behalf of the United States after appropriate consultation with interested components of the U.S. government.[38] The SG went on to assure the panel that the United States had criminally prosecuted several foreign defendants for fixing the price of LCD panels manufactured abroad, and stated that "[w]e are not aware of any instance in which a foreign government has expressed disapproval *of those prosecutions* to any official of the United States . . . . Motorola alleges substantially the same unlawful conduct as gave rise to those prosecutions."[39]

A week later, the Korea Fair Trade Commission (KFTC) filed an amicus brief in support of AUO's opposition to the petition for rehearing en banc, broadly asserting that the position urged by Motorola "would . . . enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and 'resent[ment at] the apparent effort of the United States to act as the world's competition police officer . . . .'"[40] The Republic of China (Taiwan) (Ministry of Economic Affairs) filed its own similar letter a short time later, asserting that "unduly extensive extraterritorial application of US law would undermine principles of international comity," and that the law "was applied correctly by Circuit Judge Posner."[41]

The panel issued a further order in the nature of a note to the SG that pointedly referred to a variety of briefs filed in other cases by the governments of Japan, the United Kingdom, Germany, Switzerland, and the Netherlands criticizing "overly aggressive extraterritorial enforcement of American antitrust law."[42] The panel also mentioned the recent filings by Taiwan and Korea and invited, but did not order, a filing by the United States setting out "your thoughts on the concerns expressed by the foreign governments."[43]

The United States did file such a supplemental amicus brief following these proceedings that was expressly "authorized by the Solicitor General" and signed by the DOJ, the Departments of State and Commerce, and the Federal Trade Commission.[44] The brief was the first of two substantive pleadings that the United States has filed in the case as of this writing. The government broadly criticized the Asian amici filings for failing to

> explain[] how application of U.S. antitrust law to a conspiracy to fix prices for LCD panels, which "doubtless" had an effect on the price of panel-incorporating cellphones sold in the United States . . . is unreasonably expansive. And none explains why allowing Motorola to recover damages for overcharges it paid on panels incorporated into such cellphones could not reasonably redress that domestic injury.[45]

The government also discussed at length the "direct effect" and "gives rise to" requirements of the FTAIA. As to the "direct effect" requirement, the government explained that the requirement "helps ensure that the Sherman Act is not used to police anticompetitive conduct whose impact, as a practical matter, is limited to foreign markets."[46] This is a potentially provocative formulation, as it invites the court to find a direct effect whenever the effect is not strictly "limited to foreign markets." The government juxtaposes this proposition with a quote from Learned Hand in the *Alcoa* case that "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has *no consequences* within the United States."[47] The government seems thus to be arguing, again, that direct effects can be found whenever there is *any* consequence within the United States.

As to the "gives rise to" requirement, the government emphasized that the Supreme Court in *Empagran* had directed lower courts to distinguish claims arising from an independent foreign injury (which are barred by the FTAIA), from claims sufficiently linked to the anticompetitive conduct's effects on U.S. commerce.[48] The government criticized the panel for never addressing whether Motorola's injuries were sufficiently intertwined with the effect on U.S. commerce to satisfy the "gives rise to" requirement.[49]

The second government pleading of interest is the "Brief for the United States and the Federal Trade Commission as

Amici Curiae in Support of Neither Party."[50] The brief makes arguments that differ in subtle ways from those in prior government filings in the case, including some that appear to be new.

In addressing a defendant's "involvement" with import commerce, the basic propositions advanced are as follows:

(1) "A price-fixing conspiracy can involve import commerce even if the price-fixed product is physically imported by a third party or if the defendants did not focus on U.S. imports."
(2) "The LCD price-fixing conspiracy involved import commerce because defendants fixed the price of LCD panels sold for [inclusion in a finished product made overseas, but intended for ultimate] delivery to the United States."
(3) These circumstances do not necessarily "entitle Motorola to recover damages for overcharges on all its panel purchases. But [they do] allow the government to bring criminal and civil enforcement actions." This is because, "[u]nlike civil damage claims, in which courts should differentiate among claims based on the underlying transactions, government enforcement actions seek to prosecute or enjoin violations of law, not to obtain damages compensating for particular injuries."[51]

Perhaps for the first time in this brief, the government is separating itself from private plaintiffs and claiming meaningfully greater rights under the FTAIA. This may be one consequence of treating the FTAIA as defining the substantive standard for claims under the Sherman Act, rather than establishing a standard that limits the jurisdiction of federal courts.[52]

In addressing the FTAIA requirement on the effect of price fixing on import and domestic commerce, the government argues that for purposes of *government* enforcement, raising the price of cellphones is an effect that is not only substantial and reasonably foreseeable, but also direct. This is a very broad proposition without any inherent limiting principle. In effect, the government is asserting that it has superior rights to private plaintiffs, arguing that while the government may prosecute conduct that has such an effect under Section 6a(1) of the FTAIA, for private plaintiffs Section 6a(2) requires that the effect "give rise to [plaintiff's] claim," which limits the scope of injuries redressable by private damage claims. In effect, the government is asserting that the injury to Motorola's foreign affiliates is not caused by the inflated prices of cellphones sold in import or domestic commerce, and therefore the affiliates' claims do not arise from the requisite effect on U.S. commerce under the FTAIA.[53]

The government further argues that the first purchasers of cellphones in affected U.S. commerce *did* suffer an injury arising out of U.S. effects of foreign price fixing. While *Illinois Brick* would ordinarily bar these purchasers from recovering damages under federal law (because they did not purchase directly from the conspirators), the government advances the new and untested proposition that *Illinois Brick* "should be construed to permit damage claims by the first purchaser in affected U.S. commerce when Section 6a(2) bars the direct purchasers' claims."[54] Such a construction, the government argues, would permit vigorous private enforcement without implicating concerns about multiple recovery and apportionment, and without such a construction, it is possible that no private plaintiff could recover damages under federal antitrust laws.[55]

### *Lotes*

The Second Circuit has also issued a recent ruling on FTAIA issues in *Lotes Co. v. Hon Hai Precision Industry Co.*[56] Lotes (the plaintiff) is a Taiwanese electronics manufacturing company with facilities in China. It claimed that a group of five competing electronics firms attempted to leverage their ownership of key patents to gain control of a new technology standard for USB connectors and, by extension, to gain monopoly power over the entire USB connector industry.

The Second Circuit embraced the more expansive interpretation of "direct" than the Seventh Circuit adopted in *Minn-Chem*, but still affirmed dismissal of the antitrust claims. The court determined that it need not decide whether the plaintiff had plausibly alleged the requisite direct effect, because whatever effect the defendant's conduct had on U.S. domestic or import commerce did not "give rise to" the plaintiff's claim.[57] Notably, the "gives rise to" argument was not raised by defendants in the Second Circuit, or ruled upon by the district court. Rather, it was a disposition urged upon the court by amici as an alternative holding.[58]

In *Lotes*, the plaintiff alleged that the defendant's foreign conduct had the effect of driving up U.S. prices for consumer electronics devices incorporating USB 3.0 connectors. Those higher prices, however, did not cause the plaintiff's injury of being excluded from the market for USB 3.0 connectors; that injury flowed directly from the defendant's exclusionary foreign conduct, not the domestic effect of that conduct.

The decision in *Lotes* demonstrates with some simplicity how this near-relative of "antitrust injury" has found its way to an important place in dealing with extraterritoriality, and serves as a further brake on the reflexive exercise of extraterritorial jurisdiction, albeit without explicitly invoking the comity concerns expressed by Judge Posner.

## Conclusion

*Minn-Chem* and *Lotes* are over, but *Motorola*, *AUO*, and *Animal Science Products* are very much alive in the Seventh, Ninth, and Second Circuits, respectively.[59] The issues presented by these cases are far-reaching, ranging from comity and extraterritoriality writ large to statutory interpretation of key terms in the FTAIA, i.e., the meaning of direct, the meaning of indirect and remote, and the circumstances under which a domestic effect gives rise to a claim. Judge Posner's largely *ex cathedra* statement in the now vacated *Motorola* decision that Motorola's position "would if adopted enor-

mously increase the global reach of the Sherman act, creating friction with many foreign countries and 'resent[ment at] the apparent effort of the United States to act as the world's competition police officer,'" invites further judicial examination (and has caused many Asian governments to lodge their agreement with it). In any event, the subtle but significant conflicts between and among the Second, Seventh, and Ninth Circuits, along with the foreign backlash against judicial extraterritoriality that has arisen from some of these decisions, may portend well for Supreme Court review.

Beyond these large issues are the only slightly smaller issues of whether government enforcement has a broader reach than enforcement by private plaintiffs, whether an exception to *Illinois Brick* should be recognized for the first U.S. indirect purchaser where the direct purchaser is denied a cause of action under Section 6a(2) of the FTAIA, and perhaps even whether the Supreme Court's holding in *Arbaugh* is properly applied to make the FTAIA requirements non-jurisdictional (thereby preventing foreign sovereigns, as a practical matter, from being heard at the outset of a case).

Each of these issues is substantial. Supreme Court review would be welcome on any one of them to establish uniform and coherent national standards for government and private antitrust enforcement involving foreign conduct. ■

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[1] United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945). (The case was certified by the Supreme Court to the Second Circuit for want of a quorum.)

[2] "Schrödinger's cat is a thought experiment, sometimes described as a paradox, devised by Austrian physicist Erwin Schrödinger in 1935. It illustrates what he saw as the problem of the Copenhagen interpretation of quantum mechanics applied to everyday objects. The scenario presents a cat that may be both alive and dead, this state being tied to an earlier random event." *Schrödinger's Cat*, Wikipedia, http://en.wikipedia.org/wiki/Schr%C3%B6dinger's_cat.

[3] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797 n.24 (1993).

[4] *See generally* Bob Smith, *Uranium Antitrust Litigation, Articlesbase* (Oct. 25, 2008), http://www.articlesbase.com/extreme-sports-articles/uranium-antitrust-litigation-616356.html; *see also* Abbott B. Lipsky, Jr. & Kory Wilmot, *The Foreign Trade Antitrust Improvements Act: Did Arbaugh Erase Decades of Consensus Building?*, ANTITRUST SOURCE, Aug. 2013, http://www.americanbar.org/content/dam/aba/ publishing/antitrust_source/aug13_lipsky_7_30f.authcheckdam.pdf.

[5] Brief for Amicus Curiae Ministry of Commerce of the People's Republic of China in Support of Defendants-Appellants, *In re* Vitamin C Antitrust Litig., No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105.

[6] *In re* Vitamin C Antitrust Litig., 810 F. Supp. 2d 522, 541 (E.D.N.Y. 2011).

[7] *Id.* at 552.

[8] Brief for Amicus Curiae, *supra* note 5, at 2. For discussion of the case and various implications, see Michael N. Sohn & Jesse Solomon, *Lingering Questions on Foreign Sovereignty and Separation of Powers After the* Vitamin C *Price-Fixing Verdict*, ANTITRUST, Fall 2013, at 78.

[9] Brief for Amicus Curiae, *supra* note 5, at 13.

[10] This used to be referred to as "jurisdiction" until the Supreme Court decided *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), which announced a new standard requiring that statutes not clearly designated as jurisdictional should not be treated as such. This is an important distinction warranting Supreme Court review in the FTAIA context. *See* Abbott B. Lipsky, Jr. & Kory Wilmot, *The Foreign Trade Antitrust Improvements Act: Did* Arbaugh *Erase Decades of Consensus Building?*, ANTITRUST SOURCE, Aug. 2013, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug13_full_source.authcheckdam.pdf.

[11] Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845 (7th Cir. 2012).

[12] *Id.* at 856.

[13] United States v. LSL Biotechs., 379 F.3d 672 (9th Cir. 2004).

[14] Brief for the United States and the Fed. Trade Comm'n as Amici Curiae in Support of Neither Party on Rehearing *En Banc* at 8, *Minn-Chem, Inc.*, 683 F.3d 845 (No. 10-1712), 2012 WL 6641190.

[15] Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842 (7th Cir. 2014).

[16] *Minn-Chem*, 683 F.3d at 857 (citation omitted).

[17] With respect to LCDs, eight companies have pleaded guilty or been convicted of price fixing and have been sentenced to pay criminal fines totaling more than $1.39 billion. Twenty-two executives have been charged, 13 have pleaded guilty or been convicted, and 7 remain fugitives. The executives who have been sentenced have been ordered to serve a combined total of 4,871 jail days. These are mostly citizens of Taiwan and Korea. *See* Press Release, U.S. Dep't of Justice, AU Optronics Corporation Executive Convicted for Role in LCD Price-Fixing Conspiracy (Dec. 18, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/290399.htm.

[18] Letter from Antitrust Div. of the U.S. Dep't of Justice to Hon. Susan Illston, *In re* TFT-LCD Flat Panel Antitrust Litig., No. 3:07-md-01827 (N.D. Cal. Nov. 15, 2010), ECF No. 2146.

[19] Brief for United States at 23, United States v. AU Optronics Corp., No. 12-10500 (9th Cir. Apr. 5, 2013), ECF No. 36-1.

[20] Press Release, U.S. Dep't of Justice, Taiwan-Based AU Optronics Corporation Sentenced to Pay $500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy (Sept. 20, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/287189.htm.

[21] Opening Brief for Defendants-Appellants AU Optronics Corp. and AU Optronics Corp. Am. at 1, United States v. AU Optonics Corp., No. 12-10500 (9th Cir. Feb. 4, 2013), ECF No. 19-1.

[22] *Id.* at 56.

[23] United States v. Hui Hsiung, 758 F.3d 1074 (9th Cir. 2014).

[24] Defendants-Appellants' AU Optronics Corp. and AU Corp. Am. Petition for Panel Rehearing at 1, United States v. AU Optronics Corp., No. 12-10500 (9th Cir. Aug. 25, 2014), ECF No. 92-1.

[25] 227 F.3d 62 (3d Cir. 2000).

[26] *Id.* at 72.

[27] Brief of Corning Inc. et al. as Amici Curiae in Support of Defendants-Appellants' Petitions for Rehearing *En Banc*, United States v. AU Optronics Corp., No. 12-10500 (9th Cir. Sept. 4, 2014), ECF No. 103.

[28] *Id.* at 8–10.

[29] Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842 (7th Cir. 2014) (vacated July 1, 2014).

[30] Order Denying Defendants' Joint Motion for Summary Judgment on Motorola's Foreign Injury Claims, *In re* TFT-LCD Flat-Panel Antitrust Litig., No. 3:07-md-01827, 2012 WL 3276932 (N.D. Cal. Aug. 9, 2012).

[31] Motorola Mobility, Inc. v. AU Optronics Corp., No. 1:09-cv-06610, 2014 WL 258154 (N.D. Ill. Jan. 23, 2014).

[32] Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842, 843 (7th Cir. 2014).

[33] *Id.* at 844 (citations omitted).

[34] *Id.* at 845.

[35] *Id.* at 846.

[36] *See., e.g.*, Press Release, U.S. Dep't of Justice, Toyoda Gosei Co. Ltd. Agrees to Plead Guilty for Fixing Prices and Rigging Bids on Automobile Parts Installed in U.S. Cars (Sept. 29, 2014) (announcing a $26 million criminal fine imposed based on Toyoda Gosei's participation in a conspiracy "to fix the prices of automotive airbags and steering wheels sold to Toyota and Fuji

Heavy Industries Ltd. and certain of its subsidiaries, affiliates and suppliers, and certain of their subsidiaries, affiliates and suppliers (collectively Subaru), in the United States *and elsewhere*." (Emphasis added.) This is typical of the language found in DOJ press releases dealing with Japanese auto parts companies.), *available at* http://www.justice.gov/atr/public/press_releases/2014/308912.htm.

[37] *See, e.g.*, United States v. Hui Hsiung, 758 F.3rd 1074, 1078 (9th Cir. 2014) (The defendants urge that "because the bulk of the panels were sold to third parties worldwide rather than for direct import into the United States, the nexus to United States commerce was insufficient [under the FTAIA]".). In addition, the jury instruction at issue in AUO allowed a guilty verdict if the jury found that the defendant was party to agreements fixing the price of LCD panels "targeted by the participants to be sold in United States or for delivery to the United States." *Id.* at 1088.

[38] Letter from Solicitor Gen. to Clerk of Court, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. May 19, 2014), ECF No. 34.

[39] *Id.* (emphasis added). The panel was displeased with the SG's response and issued an order directing the SG to identify by name the officials with whom the SG had consulted. But the order was withdrawn the next day.

[40] Brief of the Korea Fair Trade Comm'n as Amicus Curiae in Support of Appellees' Opposition to Rehearing *En Banc* at 2, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003, 2014 WL 2583475 (7th Cir. May 27, 2014), ECF No. 42 (citing slip. op. at 8–9).

[41] Letter from Amicus Curiae Ministry of Econ. Affairs, Republic of China, Taiwan to Express Its Views Regarding Application of the Foreign Trade Antitrust Act at 1, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. May 29, 2014), ECF No. 47.

[42] Petition for Leave to Take an Interlocutory Appeal from the United States District Court for the Northern District of Illinois, Eastern Division at 2, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. June 2, 2014), ECF No. 50.

[43] *Id.*

[44] Supplemental Brief for the United States as Amicus Curiae at 1, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. June 27, 2014), ECF No. 57.

[45] *Id.* at 3.

[46] *Id.*

[47] *Id.* (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945)) (emphasis added).

[48] *Id.* at 15 (citing F. Hoffmann-La Roche Ltd. v. Empagran S.A. (*Empagran*), 542 U.S. 155, 175 (2004)).

[49] *Id.* Other procedural maneuvers occurred as well, resulting in denial of a petition for rehearing en banc, and a new briefing and oral argument schedule by the panel, with the government granted leave to present ten minutes of oral argument.

[50] Brief for the United States and the Federal Trade Comm'n as Amici Curiae in Support of Neither Party, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Sept. 5, 2014), ECF No. 92.

[51] *Id.* at 5.

[52] This seems to put the DOJ at odds with Motorola as Motorola argues that the FTAIA does not distinguish between government enforcement rights and the enforcement rights of private parties. Appellant's Opening Brief, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Aug. 29, 2014), ECF No. 86.

[53] Brief for the United States, *supra* note 50, at 6.

[54] *Id.*

[55] *Id.*

[56] Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395 (2d Cir. 2014).

[57] *Id.* at 413.

[58] *Id.*

[59] The Second Circuit also has yet to hear oral argument in *Animal Science Products*, discussed *supra* in text accompanying note 5, in which the PRC through MOFCOM has sought permission to present oral argument.