Winter 2015

E&I UPDATE

A publication of the Exemptions & Immunities Committee of the Section of Antitrust Law, American Bar Association

IN THIS ISSUE

CONTENTS

MESSAGE FROM THE EDITOR

Welcome to the Winter 2015 edition of *E&I Update*.

In this edition, you will find an excellent article by Ahron Cohen discussing the Ninth Circuit's recent decision in *City of San Jose v. Commissioner of Baseball*, upholding the baseball exemption. You also will find a fascinating discussion of recent federal appellate decisions concerning the Foreign Trade Antitrust Improvements Act ("FTAIA") in *The Circuits Speak: Limiting the Reach of Private Plaintiffs and Preserving Government Cartel Enforcement*, an article by Bob Bloch, Kelly Kramer and Stephen Medlock.

This edition also includes case summaries circulated on our committee's Connect page since the last publication of *E&I Update*. Contributors Carrie Amezcua, Keith Klovers, Stephen Medlock, and T. Brandon Waddell provide summaries of important recent cases in the areas of state action, *Noerr*, and FTAIA.

Please send all submissions for future issues to:

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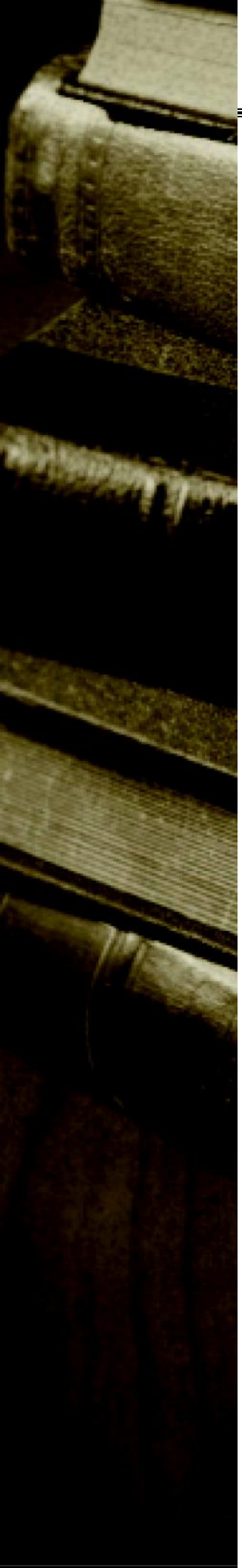


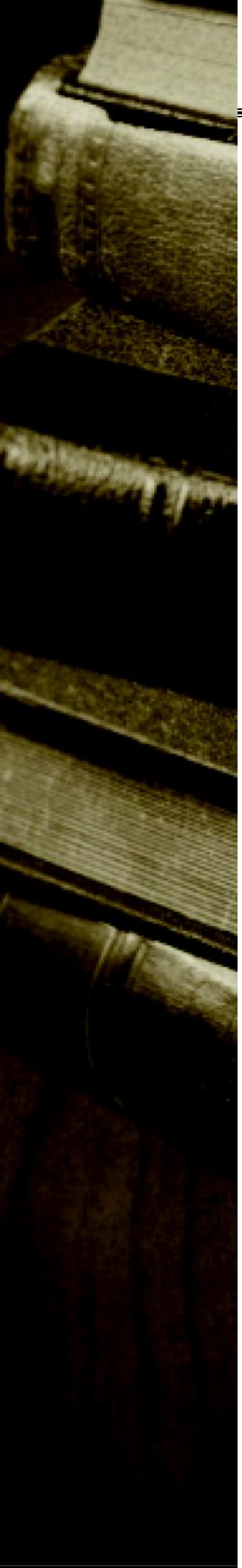
As one of the new Vice Chairs of the E&I Committee, it is my sincere pleasure to help our committee bring you this edition of the *Update.* I hope you enjoy our newsletter, and I look forward to meeting and working with you.

I also would like to highlight a few upcoming programs sponsored by the E&I Committee. We and the Trade, Sports & Professional Associations Committee have been co-sponsoring programming on the *North Carolina State Board of Dental Examiners v. FTC* case recently decided by the Supreme Court. The Court's decision is sure to have important implications for how state regulatory boards are constituted and governed going forward.

Additionally, the 2015 Spring Meeting is almost here! We have an exciting panel that will cover *NC Dental* and its implications, *NC Dental: Does Federalism Trump Competition Policy?*, that will bring our audience a wide range of perspectives, including from government, private counsel and academia. We encourage you to join us on Wednesday, April 15, 2015, for our discussion. Please check the Spring Meeting brochure for our location.

Let me close by reminding our readers that our committee is always interested in new volunteers to summarize important judicial and legislative developments, prepare articles for this newsletter, and assist with Section publications. If you are interested in contributing to the E&I Committee, please contact our chair Gregory Luib, myself or any of the Vice Chairs listed at the end of this newsletter.

Charles C. Moore



The Circuits Speak: Limiting the Reach of Private Plaintiffs, Preserving Government Cartel Enforcement

Bob Bloch, Kelly Kramer and Stephen Medlock, Mayer Brown LLP

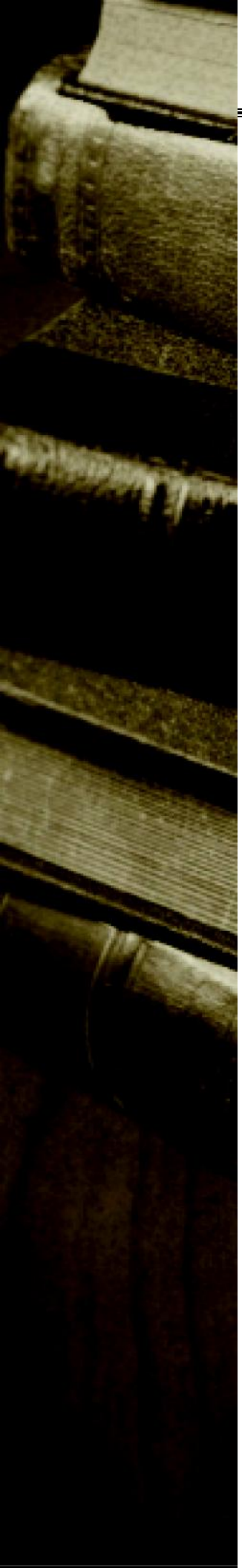
One of the most important topics in cartel enforcement today is the extent to which the U.S. government and civil plaintiffs can reach foreign price-fixing. This question is complicated by the way global commerce takes place. Most multi-national corporations operate through a network of foreign subsidiaries set up to take advantage of favorable foreign laws, lower labor costs, and permissive environmental regulations. Consumer products often consist of dozens, if not hundreds, of components that are manufactured outside the U.S., purchased abroad, integrated into final products, and then exported to the U.S. The application of U.S. antitrust law to component cartels that affect complex, and mostly foreign, supply chains has been uncertain.

In the last year, however, three U.S. Courts of Appeal (the Second, Seventh, and Ninth Circuits) have analyzed the extraterritorial reach of U.S. antitrust law under the Foreign Trade Antitrust Improvements Act ("FTAIA").[1] On November 26, 2014, the Seventh Circuit issued its opinion in the latest of these cases—*Motorola Mobility LLC v. AU Optronics Corporation.*[2] This opinion followed similar closely-watched opinions on the FTAIA from the Second Circuit— *Lotes Co., Ltd. v. Hon Hai Precision Industrial Co.*[3]—and the Ninth Circuit—*United States v. Hui Hsiung*.[4] The Seventh and Ninth Circuits have denied motions for re-hearing *en banc*,[5] and the FTAIA may soon find its way onto the Supreme Court's docket.[6] Before petitions for certiorari are filed, it is useful to analyze what this trilogy of appellate court opinions say (and do not say) about the FTAIA and foreign cartel enforcement efforts.

The FTAIA

The Sherman Act prohibits cartel conduct. The FTAIA "excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury."[7] It does so by "removing … (1) export activities and (2) other commercial activities taking place abroad" from the ambit of the Sherman Act "unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States."[8]

Under the FTAIA, the Sherman Act does not apply to conduct involving foreign trade or commerce (other than import trade or commerce) with foreign nations *unless* the trade or commerce (i) has "a direct, substantial, and reasonably foreseeable effect" on domestic commerce and (ii) the domestic effect "gives rise to a claim" under federal antitrust law.[9] Thus, the FTAIA "initially lays down a general rule placing *all* (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct



both (1) sufficiently affects American commerce, … *and* (2) has an effect of a kind that antitrust law considers harmful[.]"[10]

What the Circuits Are Saying

1. *Motorola Mobility*

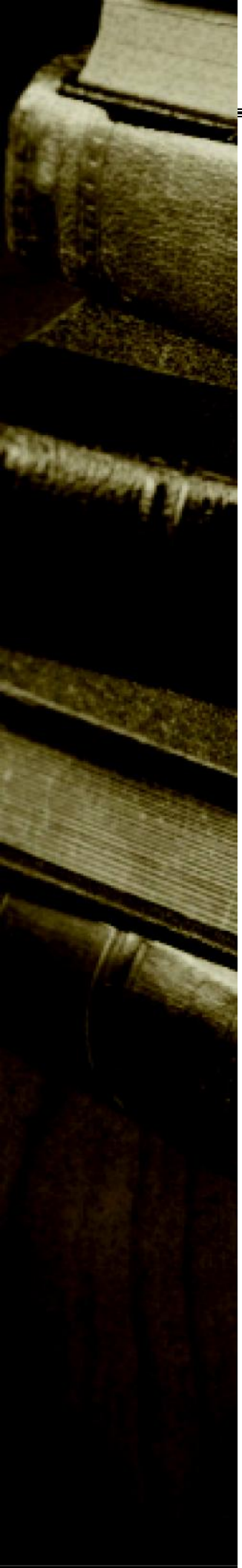
Motorola Mobility provides a paradigmatic example of how some multi-national corporations do business. While Motorola is headquartered in the United States, it has 10 subsidiaries in Europe and Asia. These subsidiaries purchased LCD panels, a component that makes up approximately 10 percent of the cost of a smart-phone, from Asian manufacturers. The prices for these LCD panels were negotiated in the United States, Asia, and Europe. The purchase orders for the LCD panels were governed by foreign law. After purchasing the LCD panels, Motorola's foreign subsidiaries incorporated them into smartphone screens. Finally, the subsidiaries sold the completed smart-phones to other Motorola entities that marketed and sold the smartphones to consumers.

Motorola's purchases of LCD panels fell into three categories:

- Category I: One percent of the panels were purchased in the United States for use in the United States;
- Category II: Forty-two percent of the panels were purchased outside the United States but were incorporated into smartphones that were later sold in the United States; and
- Category III: Fifty-seven percent of LCD panels were purchased overseas by Motorola affiliates and were incorporated into smartphones sold outside the United States.

The defendants sought partial summary judgment, arguing that the category II and III LCD panels sold to Motorola's foreign affiliates were exempt from U.S. antitrust law under the FTAIA.[11] The defendants argued that Motorola could not show that any alleged price fixing of LCD panels purchased outside the U.S. had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.

The district court agreed.[12] It held that "none of the[] facts . . . establish[ed] that a domestic effect gave rise to Motorola's Sherman Act claim."[13] Even though Motorola's U.S.-based executives approved the LCD panel prices paid by the foreign subsidiaries, the district court reasoned that "this domestic approval cannot fairly be said to give rise to Motorola's Sherman Act claim. . . . [T]he injury arose when Motorola's foreign affiliates purchased LCD panels at inflated prices, not when Motorola decided at what price those purchases would be made."[14] In the alternative, the district court observed that even if the defendants' conduct "gave rise to" a Sherman Act claim, it did not have "a 'substantial' effect on domestic or import



commerce. . . . [b]ecause the economic consequences of Motorola's domestic approval of LCD prices were not felt in the U.S. economy."[15]

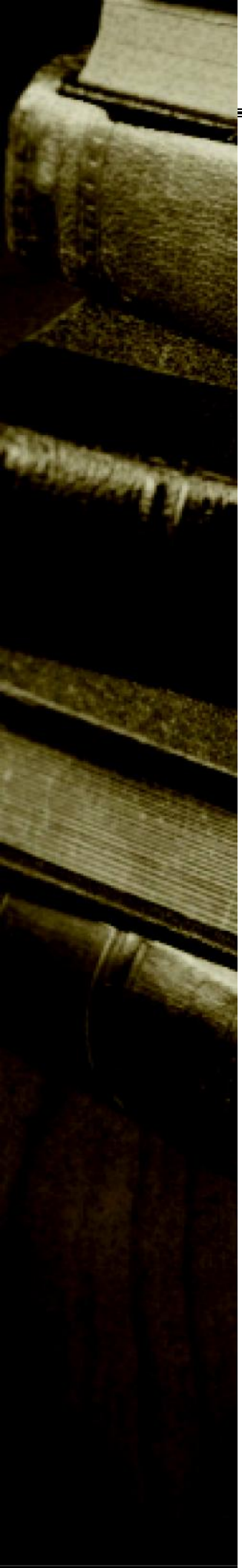
Motorola appealed to the Seventh Circuit. This appeal resulted in two opinions authored by Judge Posner analyzing the FTAIA. In its initial opinion, which has since been vacated, the Seventh Circuit affirmed, holding that category II and category III LCD panels were exempt from U.S. antitrust scrutiny under the FTAIA. The Seventh Circuit held that "[t]here was . . . doubtless *some* effect; and it was foreseen by the defendants if they knew that Motorola's foreign subsidiaries intended to incorporate some of the panels into products that they would sell to Motorola in the United States. . . . But what is missing from Motorola's case is a 'direct' effect."[16] Because the defendants sold their LCD panels abroad to foreign companies that incorporated them into products that were exported to the U.S. for resale, "[t]he effect of component price fixing on the price of the product of which it is a component [was] indirect."[17]

The U.S. government objected to the Seventh Circuit's categorical approach to the first prong of the FTAIA.[18] In an amicus brief, the Federal Trade Commission and U.S. Department of Justice argued that the Seventh Circuit should vacate its decision and rehear the matter.[19] The *amici* argued that "[t]he panel thus limited the application of a federal criminal statute [the Sherman Act] on a basis not found in the decision under review or addressed by the parties in their briefing in this Court or in the court below."[20] On July 1, 2014, the Seventh Circuit vacated its opinion and agreed to rehear the case.[21]

After rehearing, the Seventh Circuit issued a second opinion.[22] Writing for the panel, Judge Posner took a different analytical approach. In this opinion, the Seventh Circuit analyzed the second prong of the FTAIA—whether the domestic effect "gave rise to" a Sherman Act claim—and assumed that the "direct effects" requirement was satisfied.[23] Citing *Illinois Brick Co. v. Illinois*,[24] the Seventh Circuit found that Motorola was only an "indirect purchaser" of LCD panels.[25] Motorola's foreign subsidiaries were the direct purchasers, and because they were formed under foreign law, those subsidiaries had to "seek relief for restraints of trade under the law either of the countries in which they [were] incorporated or do business or the countries in which their victimizers are incorporated or do business."[26] At the same time, the Seventh Circuit was explicit that its opinion had no effect on the Department of Justice's ability to prosecute foreign cartels so long as those cartels have "the requisite statutory effect . . . in the United States," i.e., "that foreign anticompetitive conduct ha[d] a direct, substantial, and reasonably foreseeable effect on domestic U.S. commerce."[27]

2. *Hui Hsiung*

United States v. Hui Hsiung is a criminal cartel enforcement action involving the same set of facts.[28] In this prosecution, the United States alleged that AU Optronics and seven executives of AU Optronics conspired with its competitors in Asia to fix the



price of LCD panels.[29] According to the Government's indictment, from October 2001 to January 2006, representatives from six Asian LCD manufacturers met in Taiwan to set the target price for LCD panels sold in the United States to Dell, Hewlett Packard, Compaq, Apple, and Motorola for use in consumer electronics.[30] In addition, employees at AU Optronics' U.S. subsidiary regularly traveled to the U.S. offices of Dell, Apple, and HP to discuss pricing for LCD panels.[31]

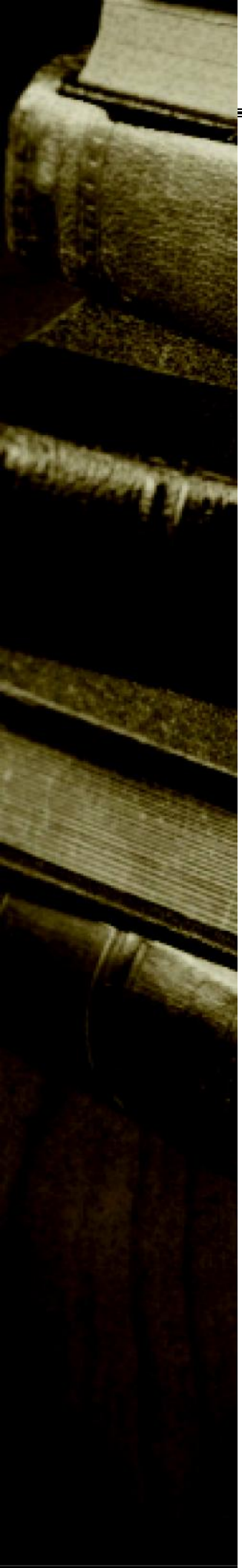
After an eight week trial, a jury found AU Optronics and two executives guilty of fixing prices in violation of Section 1 of the Sherman Act.[32] These defendants appealed claiming that, among other things, the Government failed to prove that AU Optronics' actions had a direct, substantial, and reasonably foreseeable effect on U.S. commerce.[33]

The Ninth Circuit rejected this argument for two reasons. First, it found that AU Optronics and its executives engaged in import commerce and "[u]nder its plain terms, the FTAIA does not affect import trade."[34] The Ninth Circuit defined "import trade" as "transactions that are directly between the [U.S.] plaintiff purchasers and the defendant cartel members."[35] Under this definition, AU Optronics was an importer—"[t]rial testimony established that AU [Optronics] imported over one million price-fixed panels per month into the United States."[36] Thus, "[t]o suggest . . . that AU [Optronics] was not an 'importer' misses the point. The panels were sold into the United States, falling squarely within the scope of the Sherman Act."[37]

Distinguishing *Motorola Mobility*, the Ninth Circuit found that "[t]he 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."[38] At trial, one witness explained that the LCD panel price "will directly impact" the price of consumer electronics sold in the U.S.[39] In addition, some LCD panels were directly imported to the United States.[40] Moreover, "[i]t 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."[41]

3. *Lotes*

Lotes involved a different set of facts. Lotes is a Taiwanese company that manufactures universal serial bus (USB) connectors in China.[42] Lotes then sells the USB connectors to other Chinese companies known as Original Design Manufacturers ("ODMs").[43] The ODMs assemble computer products, such as smart phones, laptops, and other electronic devices, incorporating USB connectors.[44] Then these electronic devices are shipped around the world, including to the United States, and sold under brand names such as Acer, Dell, HP, and Apple.[45] The defendants—Hon Hai and Foxconn—also manufacture USB connectors in China.[46]



Lotes and the defendants are members of a trade group that created a new technical standard for USB connectors, known as USB 3.0.[47] All of the parties agreed, as a condition of their membership in this standard-setting organization, to make available to all other members royalty-free, reasonable and non-discriminatory ("RAND-Zero") license terms for any patents that were required to practice the USB 3.0 standard.[48]

Lotes alleged that Hon Hai and Foxconn breached this RAND-Zero provision.[49] According to Lotes, Hon Hai and Foxconn took steps to exclude Lotes as a potential competitor and to secure a dominant position that would result in higher prices for USB connectors worldwide—including patent lawsuits filed in China and marketplace communications claiming ownership over USB 3.0 patents.[50]

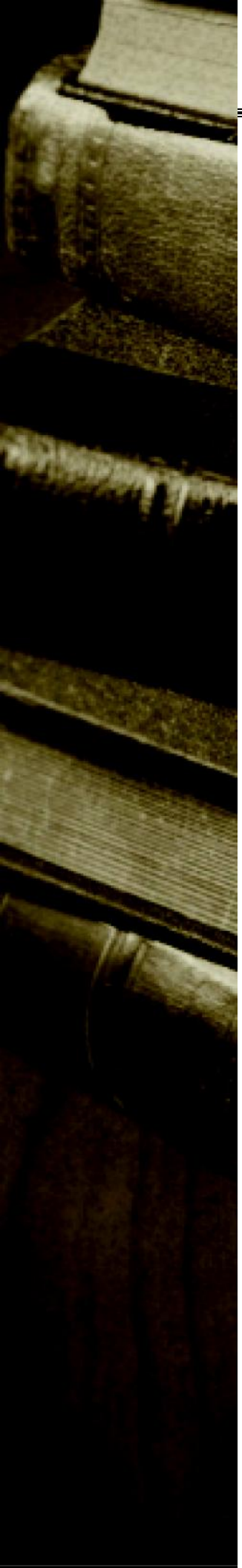
Lotes filed suit asserting claims for violations of Sections 1 and 2 of the Sherman Act, as well as violations of state law.[51] The district court dismissed Lotes' complaint with prejudice finding that the FTAIA was a jurisdictional statute and that the defendants' actions "ha[d] neither a direct, substantial nor reasonably foreseeable effect on domestic commerce."[52]

The Second Circuit affirmed the decision on different grounds.[53] Relying on *Arbaugh v. Y & H Corp.*,[54] the Second Circuit clarified that the FTAIA is a substantive element of a Sherman Act claim, not a jurisdictional requirement.[55] The Second Circuit's decision was based on the second prong of the FTAIA—the "gives rise to a claim" test.[56] The Second Circuit held that this test is only satisfied when the defendants' foreign conduct causes a domestic effect that is the proximate cause of the plaintiff's injury.[57] Lotes could not pass this test. The higher prices for USB connectors did not cause Lotes' injury—Lotes' injury preceded the increased U.S. prices.[58]

In dicta, the Second Circuit adopted a more flexible approach to the "direct, substantial, and reasonably foreseeable effect" test. The Second Circuit found that the word "direct" means only "'a reasonably proximate causal nexus.'"[59] The Second Circuit observed that "[t]here is nothing inherent in the nature of outsourcing or international supply chains that necessarily prevents the transmission of anticompetitive harms or renders any and all domestic effects impermissibly remote and indirect."[60] The Court suggested that it would apply a multi-factor analysis to determine whether this foreign anticompetitive conduct is sufficiently "direct."[61] These factors include "the structure of the market and the nature of the commercial relationships at each link in the causal chain."[62]

Implications

When analyzed together *Lotes*, *Hui Hsiung*, and *Motorola Mobility* suggest that: (i) the FTAIA is substantive, not jurisdictional; (ii) there is no U.S. antitrust remedy when a foreign company, including a foreign subsidiary of a U.S. corporation, purchases price-fixed products abroad; (iii) what constitutes a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce is still an open question; and (iv) no



Court of Appeals has squarely addressed the application of *Morrison v. National Australia Bank*[63] to prosecutions of foreign cartels.

1. The FTAIA is Substantive, Not Jurisdictional

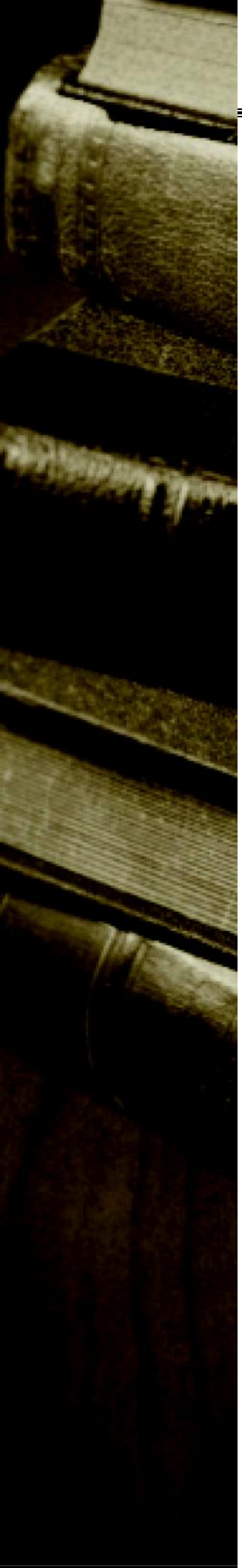
After *Lotes*, *Hui Hsiung*, and *Motorola Mobility*, there can be little doubt: the FTAIA is a substantive element of an antitrust claim, not a jurisdictional prerequisite. As the Second Circuit noted in *Lotes*, "we have little difficulty concluding that the requirements of the FTAIA go to the merits of an antitrust claim rather than to subject matter jurisdiction. Nothing in the statute 'speak[s] in jurisdictional terms or refer[s] in any way to the jurisdiction of the district courts.'"[64] Instead, the FTAIA refers to conduct to which the Sherman Act applies.[65] For this reason, every Court of Appeals that has analyzed the FTAIA after *Arbaugh* has concluded that the FTAIA is substantive, not jurisdictional.[66]

2. Foreign Conduct That Affects Purely Foreign Commerce is Outside of the Scope of the FTAIA

Taken together, *Lotes*, *Hui Hsiung*, and *Motorola Mobility* hold that foreign conduct that gives rise to a purely foreign injury is not actionable under the Sherman Act. However, these opinions scrupulously protect the Department of Justice's ability to prosecute foreign cartelists that directly injure domestic purchasers.

In *Lotes*, the Second Circuit explained that when a foreign company is harmed by foreign conduct, it "precedes any domestic effect in the causal chain," and cannot give rise to a U.S. antitrust claim.[67] Expanding on this analysis, Judge Posner held in *Motorola Mobility* that foreign subsidiaries that are the victim of a foreign cartel "must seek relief for restraints of trade under the law either of the countries in which they are incorporated and do business or the counties in which their victimizers are incorporated or do business. The [U.S.] parent has no right to seek relief on their behalf in the United States."[68] The derivative injury alleged by a multi-national parent company, like Motorola, "rarely gives rise to a claim under [U.S.] antitrust law."[69]

While the Seventh Circuit held that FTAIA limits the ability of foreign plaintiffs to seek damages for foreign cartel conduct, it also explained that its holding would not interfere with government cartel enforcement efforts. Indeed, the Seventh Circuit held that "[i]f price fixing by the component manufacturers had the requisite statutory effect on cellphone prices in the United States, the [FTAIA] would not block the Department of Justice from seeking criminal or injunctive remedies."[70] The Seventh Circuit also explained that it "ha[d] no reason to doubt" that "the Justice Department has worked out a modus vivendi with foreign countries regarding the Department's antitrust proceedings against foreign companies."[71] Ultimately, the Seventh Circuit observed that the FTAIA and international comity concerns are not a significant hurdle to criminal antitrust prosecutions because "the U.S. government has reason to



weigh comity and sovereignty concerns when bringing international component cartel case[s]," while "private plaintiffs do not."[72]

3. Disagreements Persists Regarding the "Direct, Substantial, and Reasonably Foreseeable" Test

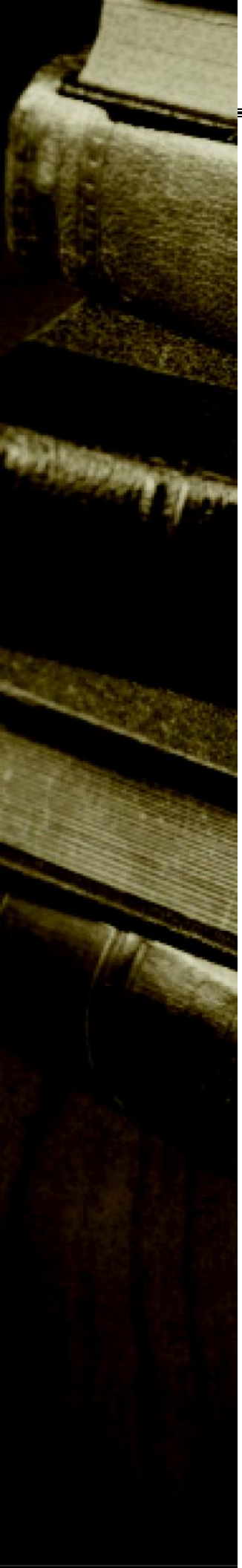
The Second, Seventh, and Ninth Circuits did not squarely address the question of what constitutes "direct, substantial, and reasonably foreseeable" effect on U.S. commerce. In dicta, the Seventh Circuit stated that "[i]f the prices of the components were indeed fixed, there would be an effect on domestic U.S. commerce . . . [a]nd that effect would be foreseeable."[73] However, the Court did not determine whether that effect was substantial and direct—stating only that it "could be substantial, and might well be direct."[74] The Seventh Circuit's equivocation on this point is significant. In a prior, now vacated opinion, the same panel held that Motorola Mobility's claims were not sufficiently "direct," and therefore exempt from antitrust scrutiny under the FTAIA.[75] By vacating its prior opinion and dismissing Motorola's claims on the alternate ground that they did not give rise to a claim under U.S. law, the Seventh Circuit avoided a result that could have significantly impaired government prosecutions of foreign component cartels.

In dicta, the Second Circuit suggested a more flexible approach to the "direct, substantial, and reasonably foreseeable" inquiry.[76] The *Lotes* Court found "nothing inherent in the nature of outsourcing or international supply chains that necessarily prevents the transmission of anticompetitive harms or renders any and all domestic effects impermissibly remote and indirect."[77] The Second Circuit indicated that it would analyze "many factors" to determine whether "a domestic effect is sufficiently 'direct' under the FTAIA"—including "each link in the causal chain."[78]

The Ninth Circuit's analysis of the "direct, substantial, and reasonably foreseeable" test in *Hui Hsiung* was highly fact-dependent.[79] The Court concluded that this test was satisfied by a "constellation of events," including testimony that if LCD panel prices increased "then it will directly impact" the price of consumer electronics sold in the United States.[80] In addition, the record in *Hui Hsiung* included pricing negotiations in the United States and imports of LCD panels from Taiwan to the United States.[81] While the Ninth Circuit concluded that "this record" supported "the conviction on the domestic effects prong," it did not articulate a more general test for determining when the "direct, substantial, and reasonably foreseeable" test is met.[82] As a result, *Lotes*, *Hui Hsiung*, and *Motorola Mobility* do not create a test for determining when conduct is "direct, substantial, and reasonably foreseeable."

4. No Circuit Court Has Addressed the Application of *Morrison* to Foreign Cartel Enforcement Actions

None of these opinions addresses the application of *Morrison v. National Australia Bank Ltd.*[83] to foreign cartel prosecutions. In *Morrison*, the Supreme Court concluded that if



"a statute gives no clear indication of an extraterritorial application, it has none."[84] Rather than attempting to "divin[e] what Congress would have wanted if it had thought of the situation," the Court adopted a strong "presumption against extraterritoriality."[85] Although *Morrison* analyzed the Securities and Exchange Act, Circuit Courts have held that *Morrison* limits the extraterritorial application of other statutes, such as RICO.[86] Indeed, at least one district court has found that *Morrison* prohibits the extraterritorial application of the Robinson-Patman Act.[87]

In *Hui Hsiung*, the AU Optronics executives argued that *Morrison* applied to the Sherman Act as well—"[b]ecause the Sherman Act contains no clear statement of extraterritorial effect, it doesn't have any."[88] The Ninth Circuit did not reach the question.[89] Instead, it ruled that the defendants waived their *Morrison* defense by failing to raise it below.[90] Consequently, no Court of Appeals has addressed the application of *Morrison* to federal antitrust law.

Conclusion

In 2014, the Second, Seventh, and Ninth Circuits had an opportunity to put to rest several important questions regarding the FTAIA. In the end, only some of these questions were answered. Collectively, these cases establish that the FTAIA is a substantive element of an antitrust claim. U.S. criminal enforcement actions against cartels that fix the prices of components abroad are still alive and well. However, civil antitrust plaintiffs may have considerable difficulty showing that foreign component price-fixing gives rise to a claim under U.S. antitrust law. Ultimately, while these cases clarify a great deal about the FTAIA, much has been left undecided. Future international component cartel action will grapple with what constitutes a "direct, substantial, and foreseeable" on U.S. commerce and the application of *Morrison* to federal antitrust law.

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[1] 15 U.S.C. § 6a.

[2] 773 F.3d 826 (7th Cir. 2014), *amended and superseded by Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015).

[3] 753 F.3d 395 (2d Cir. 2014).

[4] *United States v. Hui Hsiung*, 758 F.3d 1074 (9th Cir. 2014), *amended and superseded by* --- F.3d ---, 2015 WL 400550 (9th Cir. Jan. 30, 2015).

[5] *See United States v. Hui Hsiung*, --- F.3d ---, 2015 WL 400550, at *1 (9th Cir. 2015); Order, *Motorola Mobility LLC v. AU Optronics*, No. 14-8003 (7th Cir. Jan. 12, 2015) (ECF No. 147). The appellant in *Lotes* did not seek *en banc* rehearing or file a petition for writ of certiorari with the Supreme Court of the United States.

[6] *See, e.g.*, Jeffrey Jacobovitz & David Hobson, *Recent FTAIA Cases Leave Important Questions Unanswered*, LAW 360, at 5 (Aug. 22, 2014) ("If these, and other pressing questions concerning the applicability of the FTAIA, cannot be resolved by the circuits themselves, they would likely have to be resolved by the U.S. Supreme Court.").

[7] *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158 (2004).

[8] *Id.* at 161.

[9] 15 U.S.C. § 6a.

[10] *Empagran S.A.*, 542 U.S. at 162.

[11] *See* Memorandum of Law in Support of Motion for Reconsideration, *Motorola Mobility, Inc. v. AU Optronics Corp.*, No. 1:09-cv-06610, 2013 WL 7175374 (N.D. Ill. Sept. 20, 2013) (ECF No. 116-1) (arguing that "[n]o other court has ever applied U.S. antitrust law to foreign claims where an injury occurs first in foreign commerce and is not caused by a direct, substantial, and reasonably foreseeable effect on U.S. commerce.").

[12] *See Motorola Mobility, Inc. v. AU Optronics Corp.*, No. 09 C 66410, 2014 WL 258154, at *9 (N.D. Ill. Jan. 23, 2014).

[13] *Id.* at *8.

[14] *Id.* at *9.

[15] *Id.*

[16] *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842, 844 (7th Cir. 2014), *superseded by Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015).

[17] *Id.*

[18] *See* Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing En Banc, *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003, 2014 WL 1878995 (7th Cir. Apr. 24, 2014) (ECF No. 23-2).

[19] *Id.* at 6-7.

[20] *Id.* at 6.

[21] *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. July 1, 2014) (ECF No. 58).

[22] *Motorola Mobility LLC v. AU Optronics Corp.*, 773 F.3d 826 (7th Cir. 2014), *amended and superseded by* 775 F.3d 816 (7th Cir. 2015).

[23] *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 819 (7th Cir. 2015) ("What trips up Motorola's suit is the statutory requirement that the effect of anticompetitive conduct on domestic U.S. commerce give rise to an antitrust cause of action.").

[24] 431 U.S. 720 (1977).

[25] *Motorola*, 775 F.3d at 819.

[26] *Id.* at 820.

[27] *Id.* at 825.

[28] --- F.3d ---, 2015 WL 400550 (9th Cir. Jan. 30, 2015).

[29] *Id.* at *1.

[30] *Id.* at *2.

[31] *Id.*

[32] *Id.* at *1.

[33] *Id.* at *11.

[34] *Id.* at *13.

[35] *Id.* (quoting *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 855 (7th Cir. 2012), citing *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 n.3, 440 (6th Cir. 2012)).

[36] *Id.* at *14.

[37] *Id.*

[38] *Id.* at *17.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Lotes*, 753 F.3d at 399.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 399-400.

[48] *Id.* at 400.

[49] *Id.* at 401 ("The crux of Lotes's complaint is its claim that the defendants have brazenly flouted their obligations under the Contributors Agreement to provide RAND-Zero licenses to adopters of the USB 3.0 standard.")

[50] *Id.* at 401-02.

[51] *See* First Amended Complaint at ¶¶ 75-119, *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., Ltd.*, No. 1:12-cv-07465-SAS (S.D.N.Y. Dec. 21, 2012) (ECF No. 23).

[52] *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., Ltd.*, 2013 WL 2099227, at *7 (S.D.N.Y. May 14, 2013).

[53] *See Lotes*, 753 F.3d at 415-16.

[54] 546 U.S. 500, 503 (2006).

[55] *Lotes*, 753 F.3d at 404-08.

[56] *Id.* at 413-15.

[57] *Id.* at 414.

[58] *Id.* ("Indeed, to the extent there is any causal connection between Lotes's injury and an effect on U.S. commerce, the direction of causation runs the wrong way. . . . Lotes's injury thus *precedes* any domestic effect in the causal chain.").

[59] *Id.* at 410 (quoting *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 857 (7th Cir. 2012)).

[60] *Id.* at 413 ("Indeed, given the important role that American firms and consumers play in the global economy, we expect that some perpetrators will design foreign anticompetitive schemes for the very purpose of causing harmful downstream effects in the United States.").

[61] *Id.*

[62] *Id.*

[63] 561 U.S. 247 (2010).

[64] *Lotes*, 753 F.3d at 405 (quoting *Arbaugh*, 546 U.S. at 515).

[65] *See, e.g.*, *Minn-Chem*, 683 F.3d at 852 ("This is the language of elements, not jurisdiction.").

[66] *See Minn-Chem*, 683 F.3d at 851-52; *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467-68 (3d Cir. 2011); *Lotes*, 753 F.3d at 405-06; *Hui Hsiung*, 2015 WL 400550, at *10-11.

[67] *Lotes*, 753 F.3d at 414.

[68] *Motorola Mobility LLC*, 773 F.3d at 820.

[69] *Id.* (analogizing case to indirect purchaser doctrine of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)).

[70] *Id.* at 825.

[71] *Id.* at 825-26.

[72] *Id.* at 826.

[73] *Id.* at 819.

[74] *Id.*

[75] *See Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842, 844 (7th Cir. 2014), *vacated by Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. July 1, 2014) (ECF No. 58).

[76] *See Lotes*, 753 F.3d at 413.

[77] *Id.* at 413.

[78] *Id.*

[79] *Hui Hsiung*, 2015 WL 400550, at *17-18.

[80] *Id.* at *17.

[81] *Id.*

[82] *Id.* at *17-18. The Ninth Circuit did note its prior determination that "[c]onduct has a 'direct' effect for purposes of the domestic effects exception to the FTAIA 'if it follows as an immediate consequence of the defendant[s'] activity." *Id.* at *17 (citing *United States v. LSL Biotechnologies*, 379 F.3d 672, 680-81 (9th Cir. 2004)); *see also Hui Hsiung*, 2015 WL 400550, at *17 n.9 (noting that other Circuits have criticized *LSL Biotechnologies*).

[83] 561 U.S. 247 (2010).

[84] *Id.* at 255.

[85] *Id.* at 261.

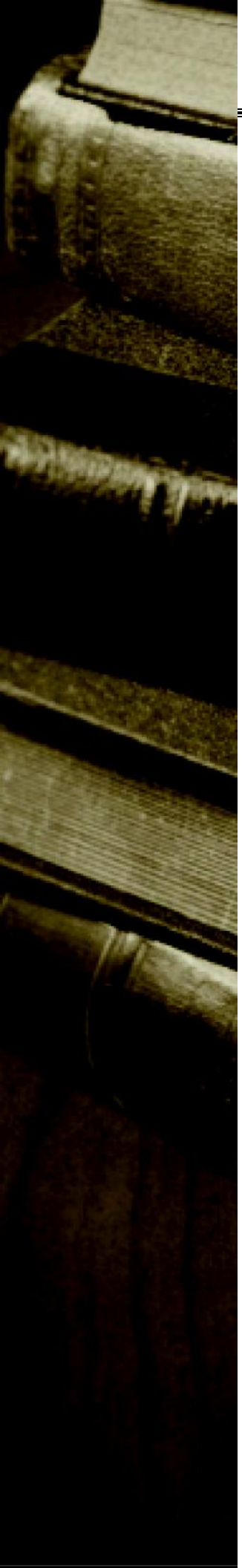
[86] *See, e.g.*, *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010).

[87] *NewMarket Corp. v. Innospec, Inc.*, 2011 WL 1988073, at *4 (E.D. Va. May 20, 2011) ("In accordance with the holding of *Morrison*, the Court finds that § 2(c) of the Robinson-Patman Act does not apply extraterritorially.").

[88] Brief for Defendants-Appellants Hui Hsiung and Hsuan Bin Chen at 19, *United States v. Hui Hsuing*, No. 12-10492, 2013 WL 526193 (9th Cir. Feb. 4, 2013) (ECF No. 24-1).

[89] *Hui Hsiung*, 2015 WL 400550, at *5-6.

[90] *Id.*



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