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I. INTRODUCTION

Over the last decade, the Department of Justice's ("DOJ's") vigorous criminal antitrust enforcement—driven by amnesty for the first self-reporting company—has led numerous companies and executives to plead guilty. Indeed, over the last decade, no corporate defendant (and only a few individuals) has taken the government to trial in an international criminal antitrust cartel case.² Notably, however, one company—AU Optronics, a Taiwanese display maker ("AUO")—and a number of its executives have elected to fight a cartel prosecution.³ *United States v. AU Optronics Corp.*—scheduled to go to trial in the fall of 2011 in federal court in San Francisco—presents a rare opportunity to litigate unresolved issues respecting the antitrust laws' applicability to international cartels in the criminal context.⁴

One set of issues involves the territorial reach of the Sherman Act in a criminal setting—in particular, whether a U.S. court has jurisdiction when the government prosecutes "mixed" conduct (part foreign, part domestic) by companies or individuals. This, in turn, raises questions about what the government may need to charge and prove: What must the government specify in an indictment respecting the impact of conduct on U.S. commerce? Is the Sherman Act's territorial reach "jurisdictional" in the sense that only the judge, and not the jury, must assess whether conduct falls within the statute's scope?⁵ Must the government charge and prove "intent" to affect U.S. commerce when, in a "domestic" cartel case, no such showing is required?

Although the defendants in *United States v. AU Optronics Corp.* raised these (and other) issues in moving to dismiss the government's indictment, the court (to date) has decided only a few. In denying defendants' motions to dismiss, the court held that a fairly attenuated alleged connection

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² See generally Jason Brown, Mark Popofsky, & Anthony Biagioli, *Restraining Liberty Before a Verdict is in Sight*, GLOBAL COMPETITION REV. 36, 36 (May 2011).

³ In *AU Optronics*, the government charged AUO and its executives with participating in a cartel to fix the prices of thin film transistor liquid crystal displays (TFT-LCDs), which are the panels used in various consumer electronic devices. The government claims that the alleged cartel participants met in hotel rooms in Taipei, Taiwan (the so-called "Crystal Meetings") to fix prices and to monitor and enforce the agreement.

⁴ The case is also noteworthy because it reflects the degree to which the government will attempt to restrain the liberty of international cartel defendants prior to trial—even those who voluntarily appear in a U.S. court for arraignment. See generally Brown, Popofsky, & Biagioli, *supra* note 2, at 36.

⁵ As explained below, there is disagreement as to whether "jurisdiction" means "subject matter jurisdiction" (encompassing a court's authority to hear a case) or "prescriptive jurisdiction" (pertaining to the antitrust laws' substantive scope). See generally *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) ("jurisdiction . . . is a word of many, too many, meanings") (internal quotation and citation omitted).

with the United States could establish the Sherman Act's applicability. The court also rejected defendants' arguments that, under *United States v. U.S. Gypsum Co.*,⁶ international antitrust offenses require "intent" to restrain trade that is not required for a domestic offense. Notably, however, the court left unresolved—potentially to be confronted in a later stage of the proceeding—numerous issues, including (i) which jurisdictional test applies; (ii) whether the Sherman Act's territorial reach must be decided by judge (by a preponderance of the evidence) or jury (beyond a reasonable doubt); and (iii) whether and for what purpose must the government prove intent. Accordingly, thus far, *United States v. AU Optronics Corp.* may raise more questions than it answers.

II. WHICH TEST APPLIES FOR DETERMINING THE SHERMAN ACT'S TERRITORIAL REACH?

In any case under the Sherman Act, the Court must determine whether the conduct falls within the statute's "trade or commerce among the several states, or with foreign nations" predicate.⁷ Whether the case is civil or criminal, courts apply one of three sets of tests.

First, under the "interstate commerce" test as described, for example, in *McLain v. Real Estate Board of New Orleans*,⁸ a plaintiff must demonstrate "that the defendants' activity is itself in interstate commerce or . . . that it has an effect on some other appreciable activity demonstrably in interstate commerce."⁹ Although the Antitrust Division has at times failed to satisfy even this low standard,¹⁰ the test is usually easily met.¹¹

Second, under *United States v. Aluminum Co. of America* ("Alcoa"),¹² as reaffirmed in *Hartford Fire Insurance Co. v. California*,¹³ the Sherman Act applies to import commerce if the conduct causes substantial intended effects in the United States.¹⁴ This standard requires proof of two elements—a substantial in-U.S. effect and an intent to cause it—not required under the more easily met interstate commerce test.

Third, under the Foreign Trade Antitrust Improvements Act ("FTAIA"),¹⁵ the Sherman Act applies to other conduct—for example, non-import commerce involving trade or commerce

⁶ 438 U.S. 422 (1978).

⁷ 15 U.S.C. § 1.

⁸ 444 U.S. 232 (1980).

⁹ *Id.* at 242 (citation omitted).

¹⁰ *See, e.g., United States v. ORS, Inc.*, 997 F.2d 628, 630-32 (9th Cir. 1993) (holding that criminal indictment's "barren" allegations did not meet the interstate commerce test when the indictment discussed wholly intrastate commerce and merely made a bare allegation that activities were within the flow of, and substantially affected, interstate commerce).

¹¹ *See, e.g., Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62, 75 (3d Cir. 2000) (holding that the domestic commerce test applied and that the defendants' alleged anticompetitive activity was "itself in interstate commerce" when the defendant association of rug importers was headquartered in New Jersey and several other activities related to the alleged conspiracy took place in United States), *overruled on other grounds by Animal Sci. Prods., Inc. v. China Minmetals Corp.*, No. 10-2288, Slip. Op. (3d Cir. Aug. 17, 2011) (holding FTAIA non-jurisdictional).

¹² 148 F.2d 416 (2d. Cir. 1945).

¹³ 509 U.S. 764 (1993).

¹⁴ *See id.* at 795-96 (following *Alcoa* and stressing that it is "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"); *Dee-K Enters. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 287 (4th Cir. 2002) (applying *Hartford/Alcoa's* "substantial and intended effects" test because case involved effect of foreign conduct on U.S. import commerce); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (following *Hartford/Alcoa* in criminal context).

¹⁵ 15 U.S.C. § 6a. Congress added the FTAIA to the Sherman Act in 1982 to clarify the Sherman Act's

with foreign nations—if: (1) the conduct has a “direct, substantial, and reasonably foreseeable effect” on U.S. trade or commerce¹⁶; and (2) “such effect gives rise to a claim under the [U.S. antitrust laws].”¹⁷ As relevant here, the FTAIA’s test differs from *Hartford/Alcoa* in two important respects.¹⁸ First, the “intent” element is “objective” (in-U.S. effect must be reasonably foreseeable rather than intended). Second, the in-U.S. effect must be “direct[ly]” caused by the conduct in question.¹⁹

Differences in these three tests can be outcome determinative. For example, when *Hartford/Alcoa* applies, it may be more difficult to demonstrate substantial intended effects on U.S. commerce than the minimal showing required by the interstate commerce test.²⁰ Similarly, the FTAIA’s test—with its additional and largely untested requirement of a “direct” effect—may not be met even when conduct would satisfy *Hartford/Alcoa*.²¹ Importantly, however, as established by the First Circuit in *United States v. Nippon Paper Industries Co.*,²² whether the action is civil or criminal does not affect the analysis.²³

Although the differences in principle between these tests are relatively clear, when each applies is not. In particular, it is unsettled which test applies when the conduct involves “mixed” foreign and domestic elements, as is often true in the case of an international cartel. The cases here are legion and the possible scenarios manifold. For example, some cartel cases may involve very limited foreign elements.²⁴ Yet others may involve worldwide activities where sales

territorial reach. See generally Mark S. Popofsky, *Extraterritoriality in U.S. Jurisprudence*, in 3 ISSUES IN COMPETITION L. & POL’Y 2417 (ABA Section of Antitrust Law 2008).

¹⁶ Or, alternatively, “on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States.” 15 U.S.C. § 6a(1)(A)-(B).

¹⁷ 15 U.S.C. § 6a(2). In addition, when conduct involves export commerce only, the U.S. antitrust laws apply “only for injury to export business in the United States.” *Id.* § 6a.

¹⁸ Subsection (2) of the FTAIA establishes a requirement that in-U.S. effects must cause a particular plaintiff’s injury. See *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 173 (2004). Although this standing-like requirement has given rise to significant litigation in private cases, see, e.g., *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981 (9th Cir. 2008), it arguably is satisfied by proof of the same facts needed to meet subsection (1) in a criminal prosecution by the Department of Justice: in-U.S. anticompetitive effects.

¹⁹ 15 U.S.C. § 6a(1). The third element—substantial effects—carries forward *Hartford/Alcoa*’s requirement.

²⁰ See, e.g., *United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173, 192 (D. Mass. 1999) (granting Nippon Paper’s renewed motion for acquittal on remand from First Circuit because while conduct at one time had substantial effects on U.S. commerce, those substantial effects did not continue into period encompassed by statute of limitations period).

²¹ See, e.g., *United States v. LSL Biotechs.*, 379 F.3d 672, 680-83 (9th Cir. 2004); see also, e.g., *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236, 244-46 (S.D.N.Y. 2008) (dismissing Sherman Act claim when defendants’ foreign conduct may have been but-for cause of U.S. effects but was not a sufficiently direct cause in light of various other possible intervening factors); *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 562 (D. Del. 2006) (holding connection between foreign conduct and in-U.S. harm was not sufficiently direct). The independent significance of “direct” is largely untested in the case law. See, e.g., Popofsky, *supra* note 15, at 2431-33.

²² 109 F.3d 1 (1st Cir. 1997).

²³ *Id.* at 4.

²⁴ See, e.g., *Am. Copper & Brass, Inc. v. Halcor S.A.*, 494 F. Supp. 2d 873 (W.D. Tenn. 2007). There, plaintiffs alleged that the defendants sold and shipped copper plumbing tubes in the United States and engaged in a conspiracy to fix the prices of those tubes in the United States. Although the plaintiffs also alleged that “the alleged price fixing conspiracy [was] ‘international in nature, scope and effect’ and that the copper tubing market [was] ‘global,’ [the court noted that there was] only a single passing mention of ‘foreign trade’ in the complaint’s allegations.” *Id.* at 876.

agreements reached within the United States played a central role.²⁵ Still others could be characterized as primarily foreign, where conduct in the United States represented “mere drops in [a foreign] sea” of extraterritorial activity.²⁶ As one court summed up: Although “either an entirely foreign or an entirely domestic conspiracy would present a comparatively easy jurisdictional question,” the “mixture of foreign and domestic elements” makes the “analysis challenging.”²⁷

In principle, one could approach how to select among territorial tests in “mixed” cases (at least) two different ways. First, one could ask which element (foreign or domestic) predominates and apply the applicable jurisdictional test. For example, is the case primarily one pertaining to domestic, import, or foreign commerce? Alternatively, one could ask if any of the applicable jurisdictional tests are met. Thus, if the case involves domestic elements where the conduct meets the *McClain* interstate commerce test, one might reason that is sufficient to trigger the Sherman Act’s applicability, and no occasion would arise to assess whether other elements of the single course of conduct sufficed to meet *Alcoa* or the FTAIA.

One set of courts embraces the first approach and inquires where the conduct primarily takes place. For example, in its 2002 decision in *Dee-K Enterprises*,²⁸ the Fourth Circuit confronted how to apply the Sherman Act to an alleged world-wide conspiracy to fix prices of extruded rubber thread. The court held that, when electing between the *McClain* interstate commerce test and the *Hartford/Alcoa* “substantial intended effects” test, “a court should consider whether the participants, acts, targets, and effects involved in an asserted antitrust violation are primarily foreign or primarily domestic.”²⁹ A number of courts have followed *Dee-K* in applying this “primarily foreign or domestic” approach.³⁰

In denying the defendants’ motion to dismiss in *United States v. AU Optronics Corp.*, the district court rejected this approach in favor of treating the “foreign” jurisdictional tests and the interstate commerce tests as alternatives. The court first held the FTAIA inapplicable because the case involved import commerce.³¹ The court then ruled that, because some of the conduct

²⁵ See, e.g., *Motorola v. AU Optronics Corp.*, Nos. M. 07-1827 SI, C 09-5840 SI, 2011 WL 1152477 (N.D. Cal. March 28, 2011). Motorola alleged that defendant suppliers of LCD panels participated in a global price-fixing conspiracy that was partially carried out in the United States. Motorola further alleged that the “[d]efendants and their co-conspirators, using their U.S. affiliates, salespeople, and contacts entered into supply agreements with Motorola in Illinois to sell Motorola LCD Panels at unlawfully inflated prices.” *Id.* at *1. The case is part of the broader *In re TFT-LCD (Flat Panel) Antitrust Litigation*, a civil action arising out of generally the same set of facts as the criminal prosecution against AUO.

²⁶ *Dee-K Enters. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 295 (4th Cir. 2002).

²⁷ *Id.* at 286.

²⁸ *Id.*

²⁹ See *id.* at 294 (emphasis added).

³⁰ See, e.g., *Animal Sci. Prods., Inc. v. China Nat’l Metals & Minerals Imp. & Exp. Corp.*, 596 F. Supp. 2d 842, 866 n.19 (D.N.J. 2008) (finding *Dee-K* “insightful and sensitive to the realities of the modern, progressively globalized world trade” and noting that application of Sherman Act where conduct primarily takes place outside of the United States could cause producers-importers to avoid the United States altogether, thus subjecting U.S. consumers to higher prices charged by profiteering middlemen), *vacated and remanded on other grounds*, No. 10-2288, Slip Op. (3d Cir. Aug. 17, 2011); *Am. Copper & Brass*, 494 F. Supp. 2d at 876 (citing *Dee-K* and holding that “[s]ince the violations alleged involve primarily domestic conduct and domestic injury, Plaintiffs’ allegations must be analyzed as direct Sherman Act claims without resort to the qualifying provisions of the FTAIA”); see also *Carpet Group*, 227 F.3d at 75 (refusing to apply *Hartford/Alcoa* when complaint “deal[t] primarily with conduct in the United States.”).

³¹ See Order at 7, *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. April 18, 2011) [hereinafter

alleged occurred in the United States, the interstate commerce test applied.³² The indictment, the court reasoned, met the interstate commerce test because the government charged that AUO regularly instructed employees in its U.S. affiliate to contact other manufacturers to fix prices for U.S. customers.³³

Alternatively, the court held, because the indictment also alleged import commerce, the indictment's allegations sufficed to meet the "substantial intended effects" test even if *Hartford/Alcoa* applied.³⁴ The court found in the indictment averments sufficient to survive a motion to dismiss. Specifically, the indictment charged that the purported conspiracy sought "to fix the prices of TFT-LCDs . . . in the United States and elsewhere" and, therefore, "substantially affected . . . interstate and foreign trade and commerce."³⁵ The court further held that the allegation of a conspiracy to fix prices sufficed to allege an *intended* substantial in-U.S. effect because "intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it."³⁶

The *AU Optronics* court's refusal to follow *Dee-K* is potentially significant. *Dee-K* embraced a "primarily foreign or domestic" approach in recognition of the reality that permitting a drop of U.S. conduct to oust the FTAIA and *Alcoa* would mark a significant end-run around Congress's attempt to limit the Sherman Act's applicability to "conduct involving trade or commerce . . . with foreign nations."³⁷ If other courts follow the contrary approach embraced by *AU Optronics*, that may ease not only the government's ability to establish Sherman Act jurisdiction in criminal cartel cases, but also the ability of litigants to establish the Sherman Act's applicability in civil cases. For the Sherman Act's jurisdictional reach, as *Nippon Paper* held, does not turn on the setting (criminal or civil) in which the statute is enforced.³⁸

III. WHO DECIDES FACTS RELATING TO THE SHERMAN ACT'S TERRITORIAL REACH: JUDGE OR JURY?

The AUO defendants argued that the Sherman Act's applicability comprised an element of the offense charged that, under *Apprendi v. New Jersey*³⁹ and its progeny, must be proved to a

April 2011 Order]. Precisely what comprises either "import commerce" or "conduct involving import commerce" is unsettled. See, e.g., Ian Simmons & Bimal Patel, *One Hundred Years of (Attempted) Solitude: Navigating the Foreign Trade Antitrust Improvements Act*, ANTITRUST 72, 73-74 (Spring 2010).

³² See April 2011 Order, *supra* note 31, at 4-5, 7-8.

³³ See *id.* at 4-5.

³⁴ See *id.* at 5. The court further suggested that *Hartford/Alcoa*, as embraced by *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997), is limited to "wholly foreign conduct." See April 2011 Order, *supra* note 31, at 4-5.

³⁵ April 2011 Order, *supra* note 31, at 5 (internal quotations omitted). The court accordingly appeared to rely on a bare allegation that the defendants fixed prices of goods sold in the United States to find a substantial effect alleged: "the superseding indictment alleges a conspiracy that 'consisted of a continuing agreement, understanding, and concert of action among the defendants and other coconspirators, the substantial terms of which were to agree to fix the prices of TFT-LCDs for use in notebook computers, desktop computer monitors, and televisions in the United States and elsewhere.'" *Id.* (internal citation omitted). For a recent discussion of the "import" commerce test, see *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, No. 10-2288, Slip Op. at 16-17 (3d Cir. Aug. 17, 2011) (opining that the import commerce test is not restricted to importers).

³⁶ See April 2011 Order, *supra* note 31, at 5.

³⁷ 15 U.S.C. § 6a.

³⁸ See *supra* note 23 and accompanying text.

³⁹ 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

jury beyond a reasonable doubt, and not merely found by a judge by a preponderance of the evidence.⁴⁰ Therefore, AUO argued, because the indictment failed to allege facts sufficient to trigger the Sherman Act's applicability, the indictment must be dismissed.

AUO's contention raises—indeed may turn on—whether the different Sherman Act territoriality tests described above implicate subject matter jurisdiction or instead implicate prescriptive jurisdiction (that is, comprise an element of the offense).⁴¹ Many civil antitrust cartel cases have confronted this question in the context of deciding whether a motion to dismiss for failure to meet the FTAIA should be brought under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction—with the possibility of first taking jurisdictional discovery—or under Rule 12(b)(6) for failure to state a claim, where the motion must take the complaint's allegations as given.⁴² Because relatively few criminal antitrust cases are contested, however, AUO's motion presented the issue in a novel—and potentially very high stakes—setting. If the Sherman Act's territorial scope must be found by a jury beyond a reasonable doubt and not the court by a preponderance of evidence, that could create significantly greater risk to the government in cartel prosecutions.

In contesting AUO's position, DOJ implicitly conceded that the *McClain* interstate commerce test implicated an element of a Sherman Act Section 1 offense and, therefore, must be alleged in the indictment and proved to a jury beyond a reasonable doubt.⁴³ DOJ, however, sought to draw a distinction between the interstate commerce element—which appears in the text of Sherman Act Section 1⁴⁴—and the FTAIA, which DOJ characterized as merely regulating subject matter jurisdiction. Based on this distinction, the government argued that whether the charged conduct fell within the court's subject matter jurisdiction need not be decided by a jury.⁴⁵ Recognizing the novelty of the issue, DOJ noted that it had “found no authority (nor do Defendants cite to any) requiring that the government plead FTAIA exceptions

⁴⁰ See Notice of Motion and Motion of Defendants AU Optronics Corporation and AU Optronics Corporation America to Dismiss Indictment (Fed. R. Crim. Proc. 12(b)(3)(B)) at 5-17, *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. Feb. 23, 2011) [hereinafter Second Motion to Dismiss].

⁴¹ The Supreme Court debated this question without resolving it in *Hartford*. Compare *Hartford*, 509 U.S. at 796 n.22 (noting that “[t]he parties do not question prescriptive jurisdiction . . . and for good reason: it is well established that Congress has exercised such jurisdiction under the Sherman Act,” and citing treatise stating that the “Sherman Act is a prime example[e] of the simultaneous exercise of prescriptive jurisdiction and grant of subject matter jurisdiction”) (internal quotations omitted) *with id.* at 817 (Scalia, J., dissenting) (contending that the Sherman Act's applicability to foreign conduct raised only an issue of prescriptive jurisdiction). See generally Popofsky, *supra* note 15, at 2428 n.91.

⁴² Compare *United Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946-52 (7th Cir. 2003) (extensively discussing debate in *Hartford* over subject matter jurisdiction as well as analogous authority from other cases) *with Animal Sci. Prods., Inc. v. China Minmetals Corp.*, No. 10-2288, Slip Op. at 12-15 (3d Cir. Aug. 17, 2011) (expressly disagreeing with *United Phosphorous* and relying on *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), to hold that because the FTAIA is silent regarding the jurisdiction of the federal courts the FTAIA imposes only a substantive limitation on the Sherman Act).

⁴³ See United States' Opposition to Defendant AU Optronics Corporation and AU Optronics Corporation America's Motion to Dismiss the Superseding Indictment at 3, *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. Mar. 25, 2011) [hereinafter U.S. Opposition] (“The Indictment in this case adequately alleges *both* the flow and effects theories, and it alleges them with the required nexus between the conduct and interstate commerce.”).

⁴⁴ 15 U.S.C. § 1 (declaring illegal those “contract[s], combination[s] . . . or conspirac[ies]” which are “in restraint of trade or commerce **among the several States, or with foreign nations**” (emphasis added)).

⁴⁵ See U.S. Opposition, *supra* note 43, at 6.

and prove them to a jury beyond a reasonable doubt.”⁴⁶ The AUO defendants responded that the label applied to the “jurisdictional” test was irrelevant: *Apprendi* requires that “the jury find the existence of ‘any particular fact’ [for example, the facts establishing jurisdiction] that the law makes essential to his punishment.”⁴⁷

Which side has the better of the arguments is yet to be definitely settled. The Third and Seventh Circuits, for example, have reached opposite conclusions on whether the Sherman Act’s territorial scope (as modified by the FTAIA) involves a question of subject matter or prescriptive jurisdiction.⁴⁸ As this circuit split suggests, the Supreme Court has not yet ruled on the issue. As a textual matter, DOJ’s position sits uncomfortably with the fact that the FTAIA carves out from the Sherman Act cases that involve “trade or commerce . . . with foreign nations”—that is, the FTAIA limits the very clause in Section 1 (i) from which the interstate commerce test springs and (ii) that, the government concedes, establishes an element of a Sherman Act offense.⁴⁹ Numerous other courts have addressed in other contexts whether apparently jurisdictional language comprises an element of an offense (which the jury must find beyond a reasonable doubt) or merely implicates subject matter jurisdiction (which the court can find established by a mere preponderance of the evidence).⁵⁰ And the Third Circuit recently reasoned that the Supreme Court’s decision in *Arbaugh v. Y&H Corporation*⁵¹ compels the conclusion that the FTAIA is not “jurisdictional.”⁵²

The *AU Optronics* court ultimately punted on the issue. Because, as explained, the court held the indictment sufficed to meet both *McClain* and *Hartford/Alcoa*, the court did not need to decide—and did not decide—whether the issue was for judge or jury. Nevertheless, the court subsequently signaled receptivity to *Apprendi*-based arguments. The government later moved to separate the guilt and penalty phases of the trial on the ground that, in the penalty phase, the judge should determine the offense’s gain or the victim’s loss by a preponderance of the evidence for sentencing under the Alternative Fines Act.⁵³ The defendants argued that *Apprendi* required a

⁴⁶ See *id.* at 7.

⁴⁷ See Reply Memorandum of Defendants AU Optronics Corporation and AU Optronics Corporation America in Support of Motion to Dismiss Indictment (Fed. R. Crim. Proc. 12(b)(3)(B)) at 7-8, *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. April 1, 2011) (quoting *United States v. Booker*, 543 U.S. 220, 232 (2005)).

⁴⁸ See *supra* note 42.

⁴⁹ See also *United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173 (D. Mass. 1999) (granting Rule 29 Motion for Judgment of Acquittal under *Hartford/Alcoa* because government could not meet “substantial effects” prong of *Hartford/Alcoa* test, and thus implying that the jurisdictional question implicates an element of a Sherman Act offense).

⁵⁰ Compare, e.g., *Stuber v. Hill*, 170 F. Supp. 2d 1146, 153-54 (D. Kan. 2001) (holding that subject matter jurisdiction need not be proven to a jury beyond a reasonable doubt when the facts required to demonstrate jurisdiction are not “fact[s] necessary to constitute the crime” itself) with *United States v. Tinoco*, 304 F.3d 1088, 1104-08 (11th Cir. 2002) (stating that where subject matter jurisdiction is “inextricably interwoven with the substantive elements of a criminal offense, the issue of jurisdiction may be one for the jury to decide”).

⁵¹ 546 U.S. 500 (2006).

⁵² See *supra* note 42 (discussing *Animal Science*).

⁵³ See United States’ Notice of Motion and Motion for Order Regarding Fact Finding for Sentencing Under 18 U.S.C. § 3571(d), *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. June 24, 2011). While the Sherman Act provides for fines up to \$100 million for corporate defendants, see 15 U.S.C. § 1, the alternative fine statute permits fines above that limit. See 18 U.S.C. § 3571(d) (“If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.”).

jury to find the facts necessary to impose an alternative fine in excess of the statutory maximum beyond a reasonable doubt.⁵⁴ The court held that *Apprendi* indeed required a jury to find such facts and, therefore, refused to bifurcate the trial.⁵⁵ Notably, the court declined to find a contrary ruling compelled by either a recent Supreme Court case suggesting that the facts underlying at least some criminal fines may not need to be found by juries⁵⁶ or a First Circuit decision holding that criminal fines were exempt from *Apprendi*.⁵⁷

It is accordingly likely that the AUO defendants will renew their *Apprendi* argument with respect to the Sherman Act's reach.⁵⁸ For example, the AUO defendants might argue that, if the jury fails to find in-U.S. conduct in furtherance of the conspiracy, the jury must find substantial intended in-U.S. anticompetitive effects beyond a reasonable doubt. Were the court to accept this argument, it would mark a significant development that could complicate the government's efforts to secure convictions in international cartel cases. That, in turn, may make firms "on the fence" as to whether to seek leniency from the Antitrust Division less likely to plead guilty. In other words, the stakes in how the *AU Optronics* court ultimately rules on this issue are potentially quite high.

IV. MUST "INTENT" TO CAUSE ADVERSE IN-U.S. EFFECTS BE SHOWN?

AU Optronics raises another long unresolved question: What intent to affect U.S. Commerce must the government prove? The AUO defendants made two distinct intent-related arguments: First, that when an international conspiracy is involved, intent to affect U.S. commerce adversely is required as a substantive *mens rea* element.⁵⁹ Second, that when the *Hartford/Alcoa* "substantial intended effects" jurisdictional test applies, that test requires "intent" to affect U.S. commerce.⁶⁰ The court rejected the first and ducked the second.

As to the substantive *mens rea* argument, it is settled that a criminal Sherman Act offense requires some level of intent.⁶¹ However, courts have held that, at least in the case of price-fixing

⁵⁴ See Opposition of Defendants AU Optronics Corporation and AU Optronics Corporation America to Government's Motion for Bifurcation and Order Regarding Fact Finding for Sentencing at 9-15, *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. July 6, 2011) [hereinafter Opposition to Bifurcation Motion]. The defendants also argued that the court should not bifurcate the trial because of the likelihood that each phase would require duplicative evidence. *Id.* at 1-8.

⁵⁵ See Order Denying United States' Motion for Order Regarding Fact Finding for Sentencing Under 18 U.S.C. § 3571(d), *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. July 18, 2011) [hereinafter Bifurcation Order].

⁵⁶ See *id.* at 3-6. In *Oregon v. Ice*, 555 U.S. 160 (2009), the Court held that a court could sentence a defendant to consecutive, not concurrent, prison terms without having a jury find the facts that made consecutive sentences appropriate. See *id.* at 168-69.

⁵⁷ See *United States v. S. Union Co.*, 630 F.3d 17 (1st Cir. 2010) (upholding \$18 million fine when statute permitted a fine of \$50,000 for each day of violation, even though jury made no finding regarding the number of days the violation continued).

⁵⁸ The AUO defendants, for example, could move for judgment of acquittal at the close of evidence, as did the defendants on remand in *Nippon Paper*. See, e.g., *United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173 (D. Mass. 1999) (granting motion for judgment of acquittal).

⁵⁹ See Defendant Hsuan Bin Chen's Notice of Motion and Motion to Dismiss Superseding Indictment, *United States v. Hsuan Bin Chen*, No. 3:09-cr-00110-SI (N.D. Cal. Nov. 12, 2010) [hereinafter Motion to Dismiss].

⁶⁰ See Second Motion to Dismiss, *supra* note 40, at 11.

⁶¹ See, e.g., *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 (1978) ("[I]ntent is a necessary element of a criminal antitrust violation . . ."). *Gypsum* held, in a rule of reason case, that "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding

and other *per se* Sherman Act offenses, the *mens rea* required to prove a criminal antitrust offense can be inferred from the conduct itself.⁶² The AUO defendants nonetheless argued that, in an international criminal antitrust case based entirely on foreign conduct, this rule did not apply and an actual intent to cause in-U.S. anticompetitive effects must be shown. In support, the AUO defendants cited *Metro Industries Inc. v. Sammi Corp.*⁶³ In *Metro*, a plaintiff importer alleged that a Korean design registration system offering Korean producers a three-year exclusive right to export a registered product constituted market division that was a *per se* violation of the Sherman Act. Yet the Ninth Circuit held that the Rule of Reason, and not the *per se* rule, governed the legality of this arrangement, stating that, “[e]ven if Metro could prove that the registration system constituted a ‘market division’ that would require application of the *per se* rule if the division occurred in a domestic context, application of the *per se* rule is not appropriate where the conduct in question occurred in another country.”⁶⁴ The AUO defendants relied on this statement to contend that all Sherman Act “cases based on foreign conduct are rule of reason cases.”⁶⁵

The *AU Optronics* court disagreed and held that *Metro* did not require a showing of intent to cause in-U.S. anticompetitive effects in a criminal cartel case. The court reasoned that *Metro* “arose in a very different context,” involved “a ‘previously unexamined business practice,’” and “did not address the question presented here, namely the *mens rea* standard in a criminal antitrust price fixing prosecution involving foreign conduct.”⁶⁶ The *AU Optronics* court further noted that, in *Metro*, “there was no evidence in the record, which included a bench trial, that the registration system had the purpose or effect of restraining trade, which also militated against extension of the *per se* rule.”⁶⁷ Instead, the court found controlling *Nippon Paper*, which it cited for the proposition that “defendants can be convicted of participation in price-fixing conspiracies without any demonstration of a specific criminal intent to violate the antitrust laws.”⁶⁸ In other words, the *AU Optronics* court reasoned that price-fixing is still price-fixing. Even if the conduct occurs in part abroad, the principle that intent can be inferred from conduct still governs.

As for what met the *Hartford/Alcoa* “intent” requirement, the court ducked the issue by holding the indictment sufficient to meet even AUO’s articulation of the test.⁶⁹ Notably, the court

of criminal liability under the antitrust laws.” *Id.* at 444.

⁶² See, e.g., *United States v. Giordano*, 261 F.3d 1134, 1143 (11th Cir. 2001) (“Gypsum [a rule of reason case] did not change *Socony-Vacuum’s* rule that price fixing is *per se* illegal”); see also *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991) (noting that at least six other circuits agree that “*Gypsum* does not require proof of a defendant’s intent to produce anticompetitive effects where the defendant is charged with a *per se* violation of the Sherman Act. . . . Where *per se* conduct is found, a finding of intent to conspire to commit the offense is sufficient”).

⁶³ 82 F.3d 839 (9th Cir. 1996).

⁶⁴ *Id.* at 844-45.

⁶⁵ Motion to Dismiss, *supra* note 59, at 4-5.

⁶⁶ Order Denying Defendants’ Motions to Dismiss the Indictment and for a Bill of Particulars at 5, *United States v. Hsuan Bin Chen*, No. 3:09-cr-00110-SI (N.D. Cal. Jan. 28, 2011).

⁶⁷ *Id.* at 4.

⁶⁸ *Id.* at 6 (citing *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 6-7 (1st Cir. 1997). See also *Nippon Paper*, 109 F.3d at 7 (citing *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991)).

⁶⁹ The court similarly avoided deciding the issue in the course of denying the government’s motion to bifurcate the trial into guilt and penalty phases. In arguing against bifurcation, the AUO defendants listed “[evidence] as to whether or not the defendants’ alleged conduct had an ‘intended and *substantial* effect in the United States’” as one of many pieces of evidence that would be admissible in both the trial’s guilt and penalty phases. See *Opposition to Bifurcation Motion*, *supra* note 54, at 6. The defendants and the government subsequently debated whether or not

found “intent” to affect U.S. commerce averred based on allegations that, as explained, were arguably conclusory.⁷⁰ It will be seen whether other courts follow the *AU Optronics* court’s lead in finding intent to affect U.S. commerce sufficiently alleged based on such seemingly thin allegations. Moreover, as explained, the AUO Defendants may still persuade the court to require the jury to find *Hartford/Alcoa* satisfied beyond a reasonable doubt. Thus, even if the court correctly upheld the indictment, it is unclear whether a jury charged with finding a substantial intended in-U.S. effect beyond a reasonable doubt would hold these facts—even if proven—sufficient to convict.

V. STAY TUNED

As demonstrated, for the first time since *Nippon Paper* in the mid-1990s, *United States v. AU Optronics Corp.* marks an occasion for courts to grapple with unresolved issues concerning the Sherman Act’s territorial reach in a criminal setting. Although the *AU Optronics* court thus far has taken the “easy way out”—sustaining the indictment under both *McClain* and *Hartford/Alcoa*—the final chapters are yet to be written. At a minimum, the unresolved issues the litigation has surfaced respecting the Sherman Act’s extraterritoriality—which test applies?; is the test’s applicability for judge or jury?; must the government prove intent under certain tests?—demonstrate that international cartel defendants that elect not to plead guilty may, depending on the facts, have additional weapons with which to contest a Sherman Act prosecution. This, in turn, may affect a potential amnesty applicant’s decision whether to plead guilty or, as the AUO Defendants have, take the government to trial.

the judge definitively ruled that the “substantial and intended effects” test was inapplicable, or instead left the question open. Compare *United States’ Reply in Support of Motion for Order Regarding Fact Finding for Sentencing under 18 U.S.C. § 3571(d) at 2-4, United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. July 11, 2011) with *Motion for Leave to File Surreply and Proposed Surreply of Defendants AU Optronics Corporation and AU Optronics Corporation America to Government’s Motion for Bifurcation and Order Regarding Fact Finding for Sentencing at 2-3, United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. July 13, 2011). The court remained silent on the point.

⁷⁰ See *supra* notes 35 and 36 and accompanying text.