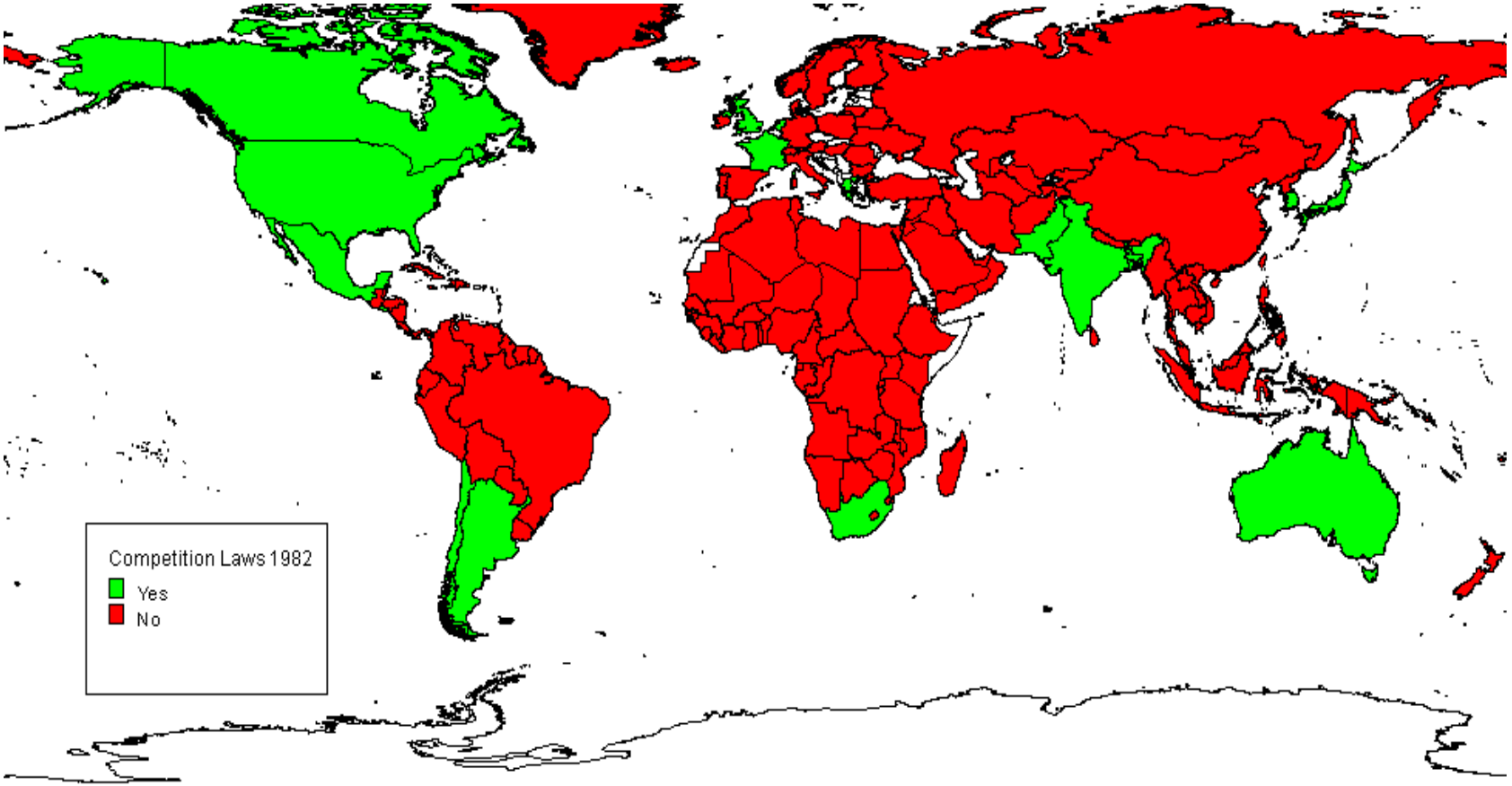
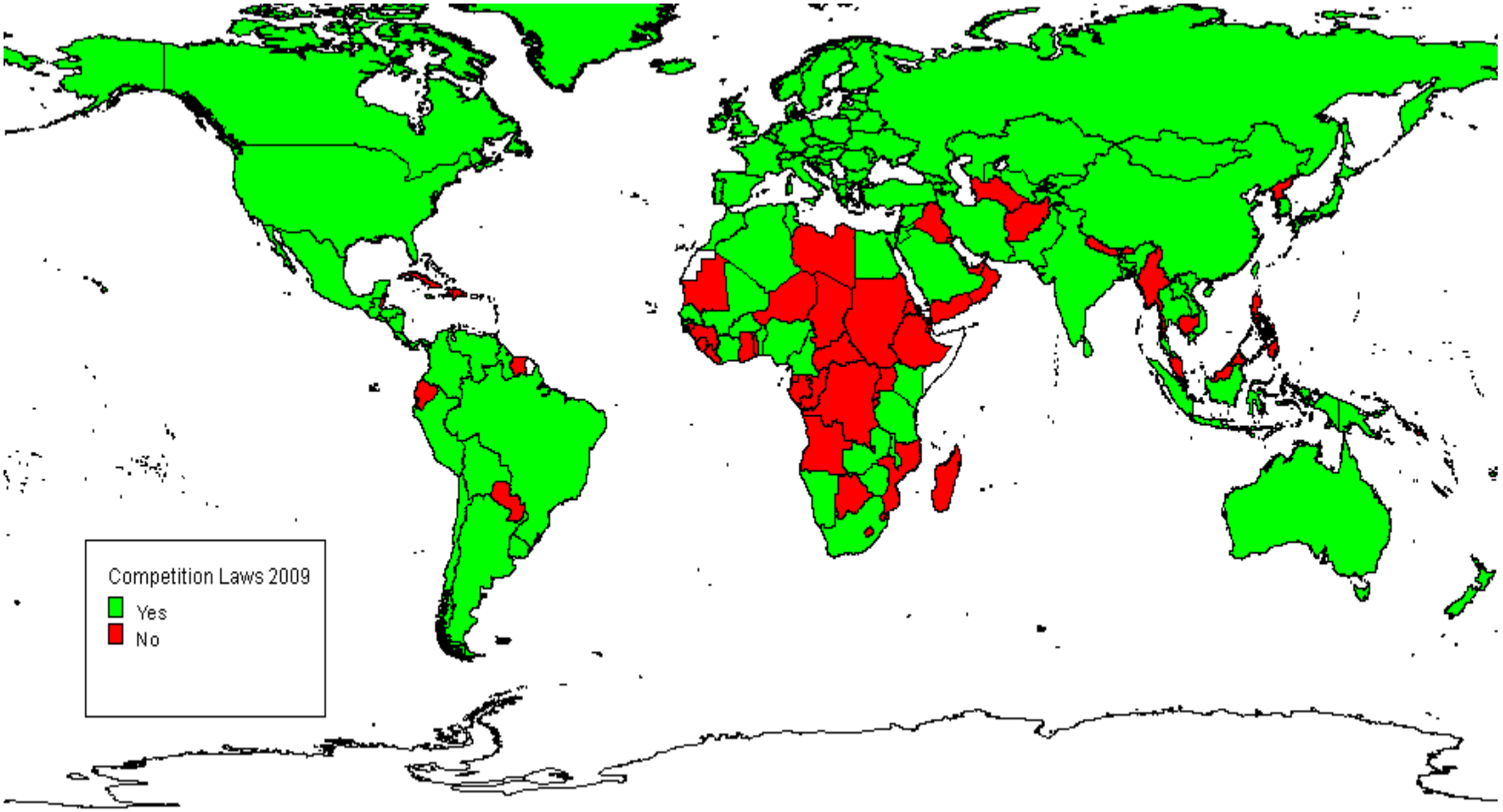
Is it time to improve the Foreign Trade Antitrust Improvement Act?

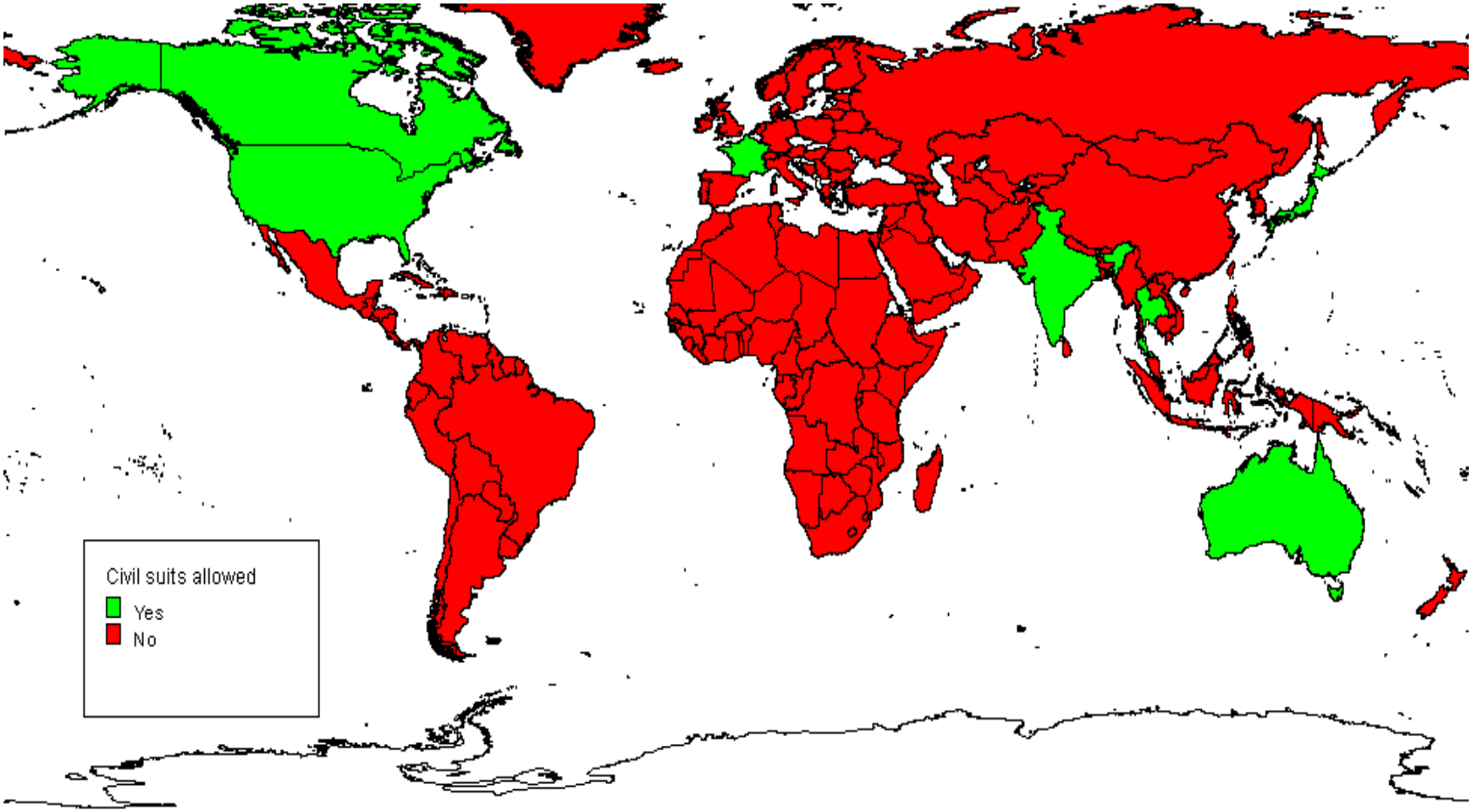
Countries with Competition Laws—1982



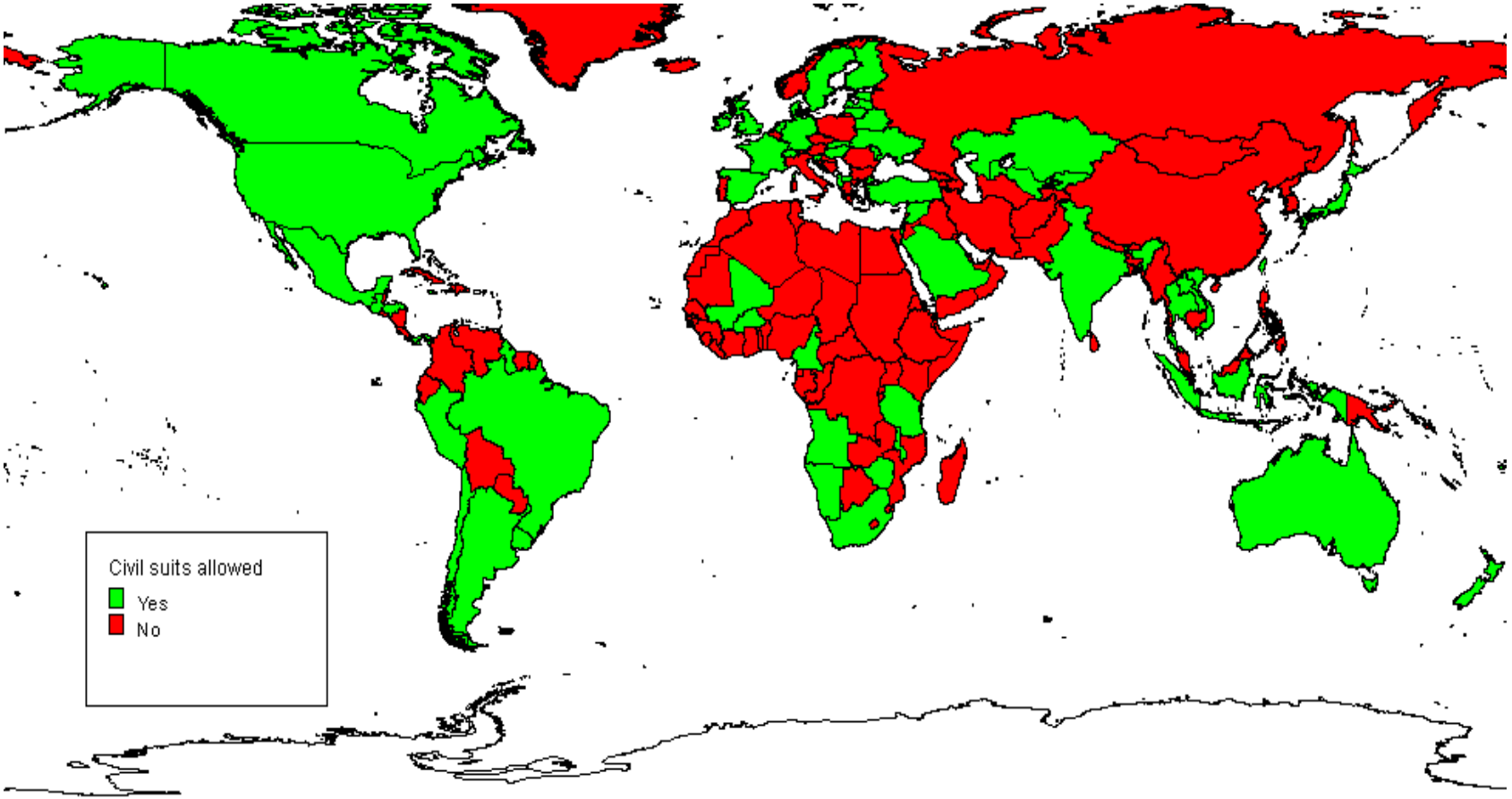
Countries with Competition Laws—2009



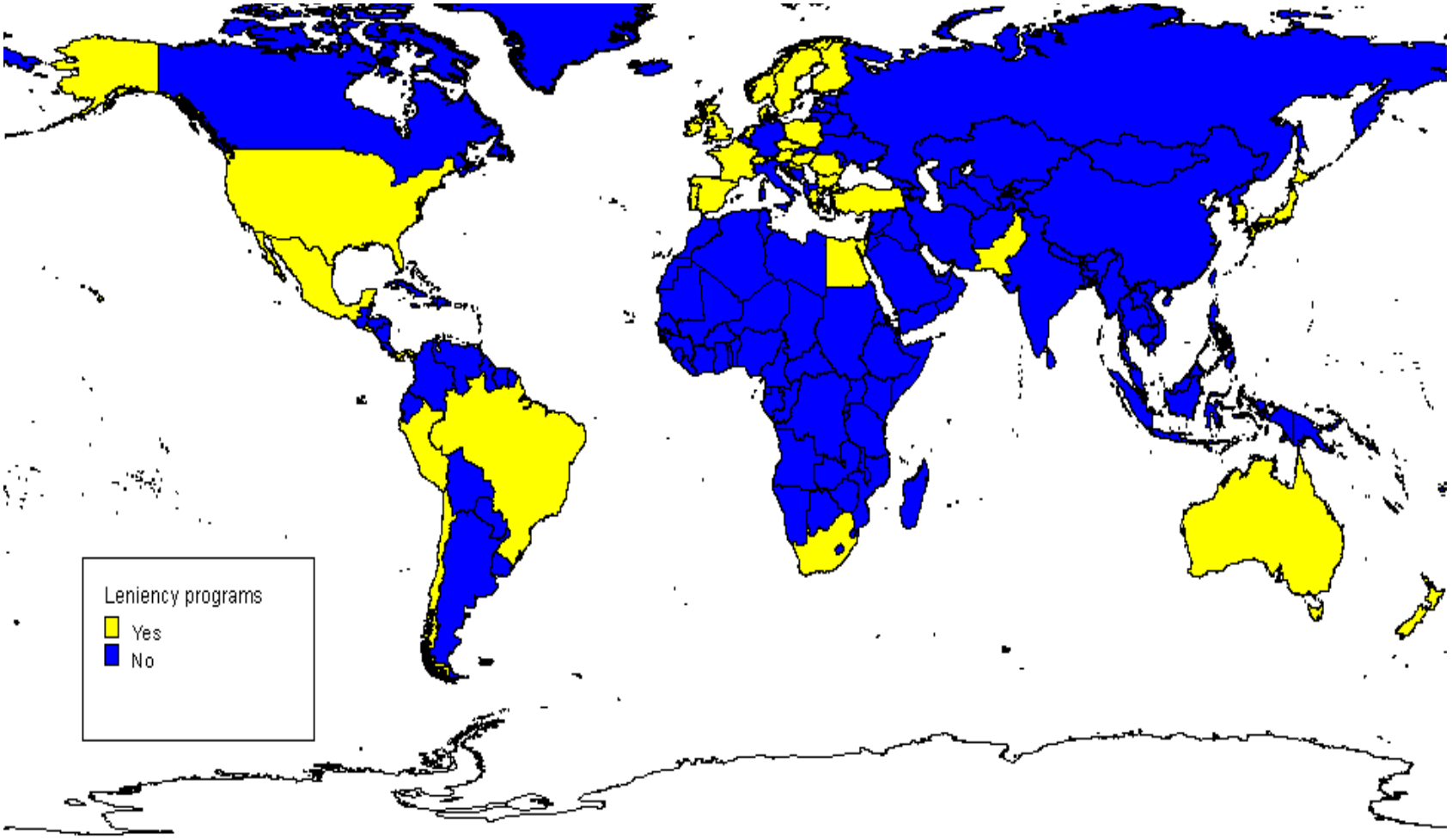
Countries allowing private antitrust actions—1982



Countries allowing private antitrust actions—2009



Countries with leniency programs—2010



U.S. antitrust litigation—then and now

1982

- 1,100 private actions per year
- Mostly monopolization cases

2010

- 600–800 private actions per year
- Largely multi-party MDL litigation
- Often global in scope

1982

Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §6a

Sections 1 to 7 of [the Sherman Act] shall not apply to [defendants'] conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –

(1) such conduct has a direct, substantial, and reasonably foreseeable ***effect*** –

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce ...Or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; ***and***

(2) ***such effect gives rise to a claim*** under the provisions of sections 1 to 7 of this title, other than this section.

Sherman Act does not apply to conduct involving foreign commerce

- Two exceptions
  - (1) Import trade or commerce
  - (2) Conduct that (i) has direct, substantial, and reasonably foreseeable effect on U.S. commerce and (ii) this domestic effect gives rise to a Sherman Act claim
- Most cases arise under the second exception

Legislative intent of FTAIA

- To free American exporters to compete in foreign markets where collusion was permitted, so long as their conduct did not affect the U.S. market. (H.R. Rep. No. 97-686 (1982), reprinted in 1982 U.S.C.C.A.N. 2487.)
- Congress expected that the FTAIA would preserve Sherman Act claims for victims of international cartels, including purchasers that take title abroad or suffer economic injury abroad, if the conduct substantially affected U.S. commerce. (*Id.)*

Empagran I—Supreme Court

- International cartel to fix the price of animal feed vitamins
- Foreign plaintiffs seeking recoveries from a global price-fixing cartel for purchases delivered abroad
- Court held that FTAIA's domestic effects exception did not apply to plaintiffs' Sherman Act claims
- Court held foreign harm did not arise out of domestic effect of the conspiracy
  - Court assumed foreign injury "independent" of domestic effect
  - Did not foreclose cases where harm linked
  - Endorsed *Industria Siciliana* where foreign injury was "*inextricably bound up with . . . domestic restraints of trade*" and foreign injury was "dependent upon, *not independent of*, domestic harm." (emphasis in original)

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

Empagran II—D.C. Circuit Court of Appeals

- E*mpagran S.A. v. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005)
- Arbitrage theory is not sufficient
- U.S. effect must proximately cause victim's injury

Post-*Empagran* Cases

- Virtually all federal courts have adopted *Empagran II* standard adopted by D.C. Circuit
- Proximate cause standard leads to uncertainty
  - It is something more than "but for" cause
- Courts have embarked upon a case-by-case analysis, with particular focus on:
  - Plaintiffs' and defendants' global corporate structures
  - Contracting and procurement systems
  - Whether purchases are "domestic" or "foreign"
- Import commerce: focus is on defendant's conduct

Arbitrage theory rejected by courts

- Theory that in a global market, a cartel cannot raise prices outside the U.S. without also raising them in the U.S.
- Courts have rejected this theory
  - *In Re Rubber Chemicals Antitrust Litigation*, 504 F. Supp.2d 777 (N.D. Calif. 2007)
  - *Emerson Electric Co. v. Le Carbone Lorraine*, 500 F.Supp.2d 437 (D.N.J. 2007)

Conflicts in cases are irreconcilable

- Court apply the import commerce exception in conflicting ways
  - *Transpacific* (May 2011) held transport of passengers is not import commerce.
  - *Air Cargo* (Sept 2008) held transport of goods is import commerce.
- Courts disagree on whether a global conspiracy involving one global price negotiated in the United States is sufficient
  - *DRAM* (Mar 2009) held is it insufficient.
  - *LCDs* (Mar 2011) held it is sufficient.
- Courts disagree on whether intent to affect the U.S. market is significant
  - SRAM (Dec 2010) ruled that intent to affect the U.S. market is significant.
  - LCD (June 2010) ruled that intent to affect the U.S. market is not a workable standard

Air passenger cases

- Plaintiff buys ticket in U.S. for travel between Europe and Asia – Court holds not import commerce; no direct, substantial effect on domestic commerce (McLafferty, E.D. Pa., 2009)
- "(S)ignificant differences between cargo and (most) people." (In Re Transpacific Passenger Air Transport Lit., N.D. Cal., 2011). Passengers are not imports or products like oriental rugs; effects too indirect (rejects pocket money argument but accepts higher prices paid for tickets).
- Redress for foreign injury requires proximate cause to domestic effect, not just same overall conspiracy. (*Id.)*

Air cargo cases

- Relevant conduct is global conspiracy to fix prices for transporting cargo from abroad into the U.S. (In re Air Cargo Shipping Services, E.D.N.Y., 2008), not the foreign transactions themselves
- Cargo is import commerce, includes instrumentalities of trade like airfreight
- Defendants' conduct targeted directly at a channel of import trade

LCDs

- *In re TFT-LCD (Flat Panel) Antitrust Litigation* (N.D. Calif. 2011) (Dell) and *In Re: TFT-LCD (Flat Panel) Antitrust Litigation* (N.D. 2011) (Motorola)
- U.S. company enters global procurement contract, including pricing, negotiated in the United States with foreign defendant
- U.S. company's foreign affiliates implement the global purchase plan by placing the orders and invoicing the sales
- Foreign defendants ship the product to the U.S. company's overseas affiliate, which purchases and pays for the flat panels and then incorporates the flat panels into the final products
- Final products are shipped to and sold in the United States, and throughout the world
- Foreign defendants pled guilty to Sherman Act violations in the United States
  - Guilty pleas establish that U.S. companies were targeted
- Ruling: Claims sustained under the FTAIA

DRAM

- *Sun Microsystems Inc. v. Hynix Semiconductor Inc. (DRAM)*, 608 F.Supp.2d 1166(N.D. Calif. 2009)
- U.S. company enters global procurement contract, including pricing, negotiated in the United States with foreign defendant
- U.S. company's foreign affiliates implement the global purchase plan by placing the orders and invoicing the sales
- Foreign defendant ships the product to the U.S. company's overseas affiliate, which purchases and pays for the computer chips and then incorporates the chips into the final products
- Final products are sold overseas
- Ruling: Claims precluded by the FTAIA

SRAM: Impact of payment terms and direction of products to the U.S.

- *In Re: Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313 (N.D. Calif. Dec. 31, 2010)
- Transactions where SRAM was billed to U.S., but shipped to foreign country sustained under FTAIA
- Regarding transactions based on indirect purchases in the U.S. of SRAM or finished products containing SRAM where Defendants originally sold the SRAM to a customer in a foreign country and then third parties imported the products containing Defendants' SRAM into the U.S., the court ruled:
  - If Plaintiffs could demonstrate that certain types of SRAM products were specifically designed to be sold to a particular manufacturer, to be incorporated into a product in turn specifically designed for the United States market, and those products actually were sold in the United States, then "[supracompetitive pricing of SRAM could have had a domestic effect in the US which could have given rise to antitrust injury."

Reform proposals

- Antitrust Modernization Commission: As a general principle, bar claims for purchases made outside of the U.S. from a seller outside of the U.S.
- Jim Martin: Abandon two-part domestic effects/cause of foreign injury test. Allow claims where conduct caused a "direct, substantial and reasonably foreseeable effect" on domestic commerce.
- Allow claims where there is (1) an intent to affect the U.S. market and (2) a substantial impact.
- LCDs Guilty Plea Standard: Allow claims for sales by a defendant that are (1) *directly shipped to* the U.S., (2) *directly billed to* a customer in the U.S., or (3) sold to foreign subsidiaries of U.S. companies for use in products *ultimately shipped to* the U.S.
- Allow only U.S. citizens, U.S. residents and U.S. companies (or US subsidiaries of foreign companies) to use the Sherman Act.
- AMC Commissioners Carleton and Garza: Increase the damages multiplier if the FTAIA bars foreign claims