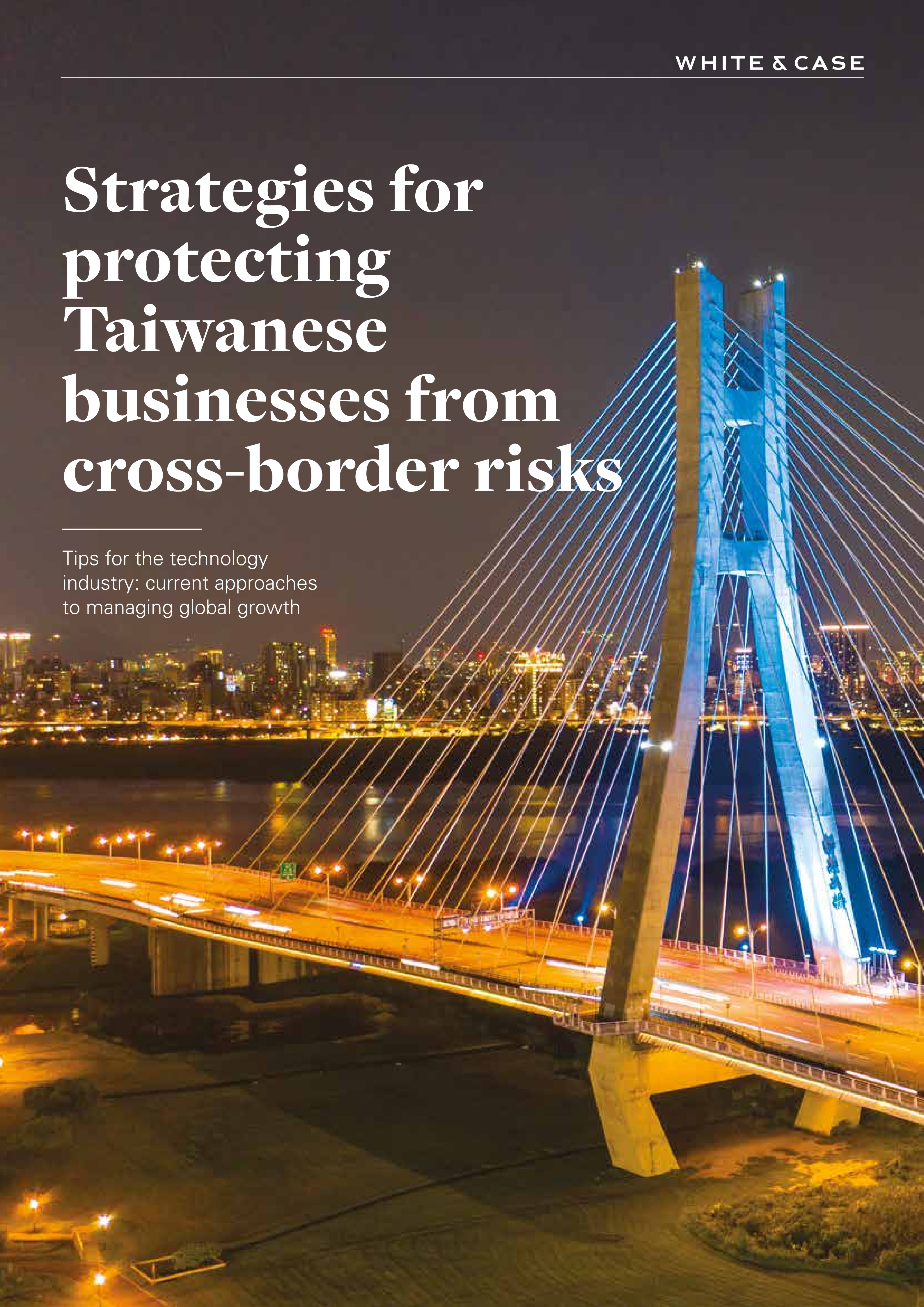
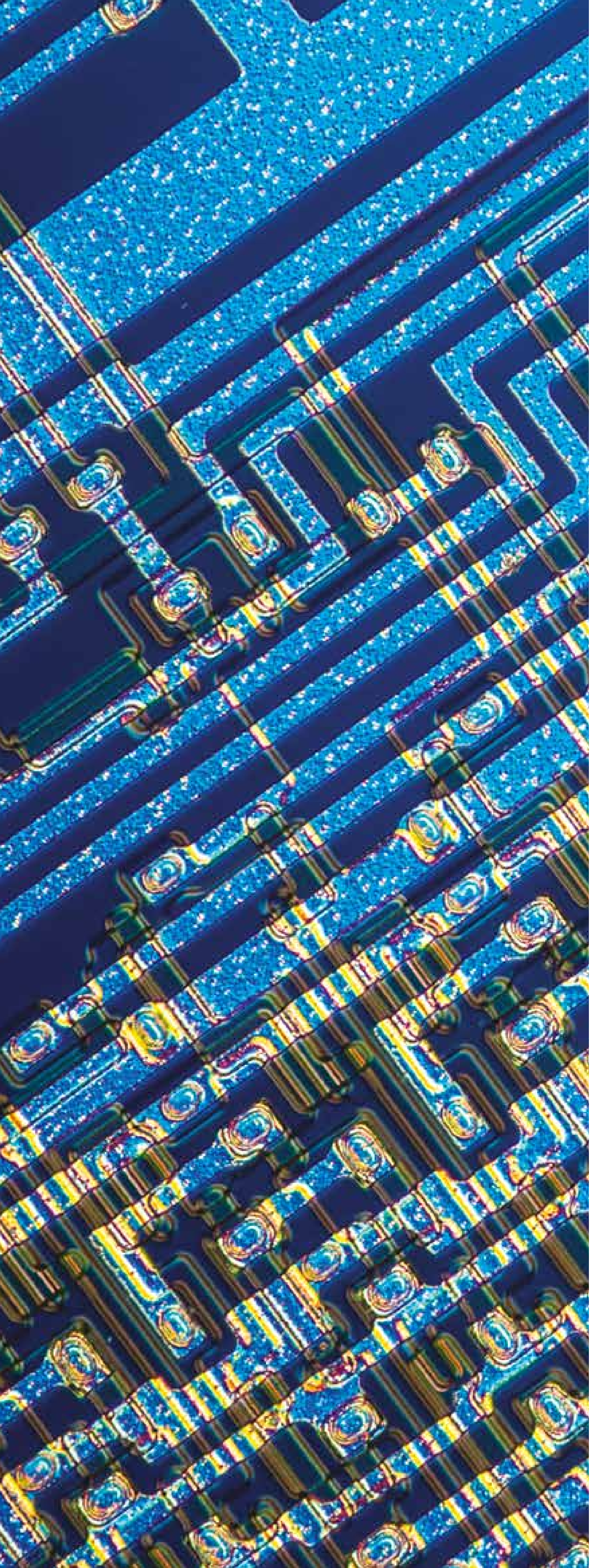
WHITE & CASE

Strategies for protecting Taiwanese businesses from cross-border risks

Tips for the technology industry: current approaches to managing global growth





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Executive summary

Managing efficient global growth requires Taiwanese corporate leaders to make a series of strategic decisions. Understanding key legal developments worldwide can help you plan your company's next steps.

For technology companies focused on cross-border growth and expansion, vital issues often include defending business innovations that you invested time and money to develop and avoiding problems with global regulatory authorities.

We have chosen topics for this publication to reflect key changes in multiple jurisdictions that offer new opportunities for Taiwanese businesses, along with updated guidance on how to manage potentially damaging legal issues.

Protecting your innovations has never been more important. Since the US market serves as a vital source of revenue for many Taiwanese businesses, this makes it critical to understand how the patent system is evolving in the United States. "A patent system at an inflection point: Start of a new era at the USPTO" reviews how changing rules may create stronger patent rights in the US and affect patent litigation strategies for Taiwanese companies. "Using US trade secret litigation to protect your business innovations" explains how the 2016 US Defend Trade Secrets Act and trade remedies at the US International Trade Commission can provide powerful remedies to help Taiwanese companies with business in the US protect their proprietary information.

As any company's business grows globally, inevitably the company becomes subject to regulatory oversight and litigation in a variety of countries for anti-corruption, antitrust and many other aspects of its business operations. "How to manage multijurisdictional compliance investigations" shows practical steps that Taiwanese businesses operating in a global context can take to conduct complex compliance investigations in multiple jurisdictions effectively. "Seeking amnesty internationally for cartel allegations" discusses whether, when and how Taiwanese corporations should request leniency from government prosecutors for potential antitrust violations and cartel conduct allegations. "European Commission fines for resale price maintenance in e-commerce" describes the risks for Taiwanese businesses when imposing fixed or minimum resale prices on distributors in Europe. Finally, "Trends in international arbitration for Taiwanese companies" highlights several results from a 2018 White & Case survey for Taiwanese companies interested in international arbitration as a dispute resolution mechanism.

We look forward to discussing these and other issues with you.

Noah A. Brumfield
Taiwan Country Practice Head

A patent system at an inflection point: Start of a new era at the USPTO

Changing rules may start moving the pendulum toward stronger patent rights and affect patent litigation strategies for Taiwanese companies

By Shamita Etienne-Cummings, David Tennant and David Albagli

The US market is a vital source of revenue for many Taiwanese businesses. Protecting your innovations has never been more important, which makes it critical for Taiwanese companies to understand how the patent system is changing in the United States.

In the words of Andrei Iancu, the recently appointed Director of the US Patent and Trademark Office (USPTO), the US patent system is "at an inflection point," and the USPTO "will not continue down the same path"[1]

What path was the US patent system on? Where will the Director lead it from this inflection point? And how will upcoming policy changes affect business strategies for patent prosecution, post-grant challenges and patent litigation?

WHAT SHOULD BE PATENTABLE? THE NEW USPTO DIRECTOR PUSHES TO CLARIFY THE SCOPE OF PATENT-ELIGIBLE SUBJECT MATTER THROUGH ADMINISTRATIVE GUIDANCE AND SUPPORT FOR LEGISLATIVE REFORM

Four independent categories of inventions or discoveries are patent-eligible under US law: "processes;" "machines;" "manufactures;" and "compositions of matter."[2]

While US patent laws historically have been given wide scope to encourage ingenuity,[3] the US Supreme Court has created three categories of discovery that are not patentable: laws of nature; physical phenomena; and abstract ideas—what the Court has termed the "building blocks" of human ingenuity. But in trying to distinguish between claims that are merely "building blocks" of human ingenuity—and thus not patentable—from those that transform building blocks into a patent-eligible invention, recent Supreme Court rulings on the issue are "causing significant confusion," according to USPTO Director Iancu.[4]

In an effort to relieve the uncertainty, in 2018 the USPTO began issuing a series of guidance memoranda to its patent examination corps seeking to clarify the contours of patent-eligible subject matter. For example, in an April 2 memorandum discussing subject-matter eligibility case law developments, the USPTO reiterated that claims reciting certain software-related inventions that improve computer functionality are patent-eligible subject matter. In an April 19 memorandum, the USPTO cautioned patent examiners that just because something is disclosed in one prior art document does not mean that it is a well-understood, routine or conventional activity practiced by those in the field—placing an additional onus on US patent examiners to justify rejections under Section 101 of the US patent code. Finally, in a third memorandum published on June 7, the USPTO reinforced the majority holding from a 2 to 1 decision by the US Court of Appeals for the Federal Circuit, which had found method-of-treatment claims that include a diagnostic assay step to be patent-eligible subject matter under Section 101.

> **"Taiwanese companies can benefit from the renewed focus on patent-eligible subject matter and its impact on patent prosecution and patent litigation strategies.**

The USPTO also has welcomed an opportunity to collaborate with Congress on a legislative fix to subject-matter eligibility. One leading proposal would rewrite Section 101 in a manner that would legislatively overrule the recent Supreme Court holdings to inject certainty in the process by which patents are obtained.

Taiwanese companies can benefit from the renewed focus on patent-eligible subject matter and its impact on patent prosecution and patent litigation strategies. For example, they should preserve all available options through continuation applications, because the scope and interpretation of Section 101 seems likely to be modified.

HOW WILL THE PTAB APPLY THE NARROWER CLAIM CONSTRUCTION STANDARD IN POST-GRANT PROCEEDINGS?

In October of 2018, the USPTO published a final rule changing the standard by which claims of unexpired patents are construed in inter partes review (IPR), post-grant review (PGR) and covered business method (CBM) proceedings at the Patent Trial and Appeal Board (PTAB). The USPTO had proposed the new rule in May of 2018, shortly after the new Director took office.

In these post-grant proceedings, any party may challenge the patentability of claims in an already-issued patent. And if a panel of PTAB judges finds any claim to be unpatentable, then those claims are deemed unpatentable and canceled. Of course, to determine whether a claim is patentable, the first step is to construe the meaning of the claim.

The final rule replaces the broadest reasonable interpretation (BRI) standard with the claim construction standard used by US federal courts and the International Trade Commission (ITC)—the standard applied in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) and its progeny. Under the final rule, the PTAB will take into consideration any prior claim construction determination that has been made in a civil action or a proceeding before the ITC, so long as the prior claim construction is properly entered into the record.

Moving to this type of standard would align the PTAB's review standard with the standard employed by US federal courts and the ITC.

Taiwanese companies can prepare for this change to the claim construction standard in PTAB proceedings and its impact on patent litigation strategies by keeping in mind that a new standard will affect strategy in any pending or soon-to-be filed challenges.

WHAT DOES THE FUTURE HOLD?

For Taiwanese companies, the implications of these changes to the US patent system are noteworthy.

Any new patent subject-matter eligibility standards that emerge from the USPTO will require careful assessment. Still, the fact that the Director is seeking clarity and predictability may enable Taiwanese businesses engaged in the US market to plan their cross-border business strategies with greater confidence.

Reforms to PTAB procedures, including the new rule for claim interpretation, are an effort to improve the system in view of more than five years of post-grant challenges.

The USPTO's initiatives and rulemaking may soon start moving the pendulum back toward stronger patent rights and affect patent litigation strategy, due diligence investigations, licensing negotiations and portfolio monetization.

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1 Andrei Iancu, Director, United States Patent and Trademark Office, Speech to U.S. Chamber of Commerce (Apr. 11, 2018).

2 35 U.S.C. § 101 (2012).

3 *Diamond v. Chakrabarty*, 447 U.S. 303, 308–309.

4 Oversight of the U.S. Patent and Trademark Office, Hearing Before the S. Comm. on the Judiciary, 115th Cong. (April 18, 2018) (response of Andrei Iancu, Director, United States Patent and Trademark Office, to question of Kamala Harris, United States Senator).

Using US trade secret litigation to protect your business innovations

Powerful US remedies can help protect valuable proprietary information, even if your business is headquartered in Taiwan

By Stefan Mentzer, James Gagen and Jason Xu

Trade secret theft is a critical challenge for technology companies today.

A departing employee might download proprietary company information without permission, taking it to a competitor. A failed joint venture partner might keep sensitive commercial data obtained under a contract. A former consultant might take on a new consulting arrangement with a competitor and share secret information. And outsiders are increasingly breaching companies' IT systems.

Taiwan-headquartered businesses have several methods to protect trade secrets beyond resorting to domestic legal options. If your company's innovations were stolen, you may be able to find powerful remedies under US law—even if your trade secrets were stolen and used outside the United States.

TRADE SECRETS: VITAL AND VULNERABLE

Under US law, trade secrets can generally include any information that is valuable to your business and would be valuable to your competitors. Any non-public information that gives your company a competitive advantage or economic benefit may be a trade secret.

Trade secrets can be the most valuable assets of a technology company. These secrets may include chemical compositions, manufacturing processes and techniques, research methods, equipment designs, product formulas, vendor and supplier details, unique combinations of generally known compounds and customer lists. Protecting this valuable information is often vital to maintain a competitive advantage.

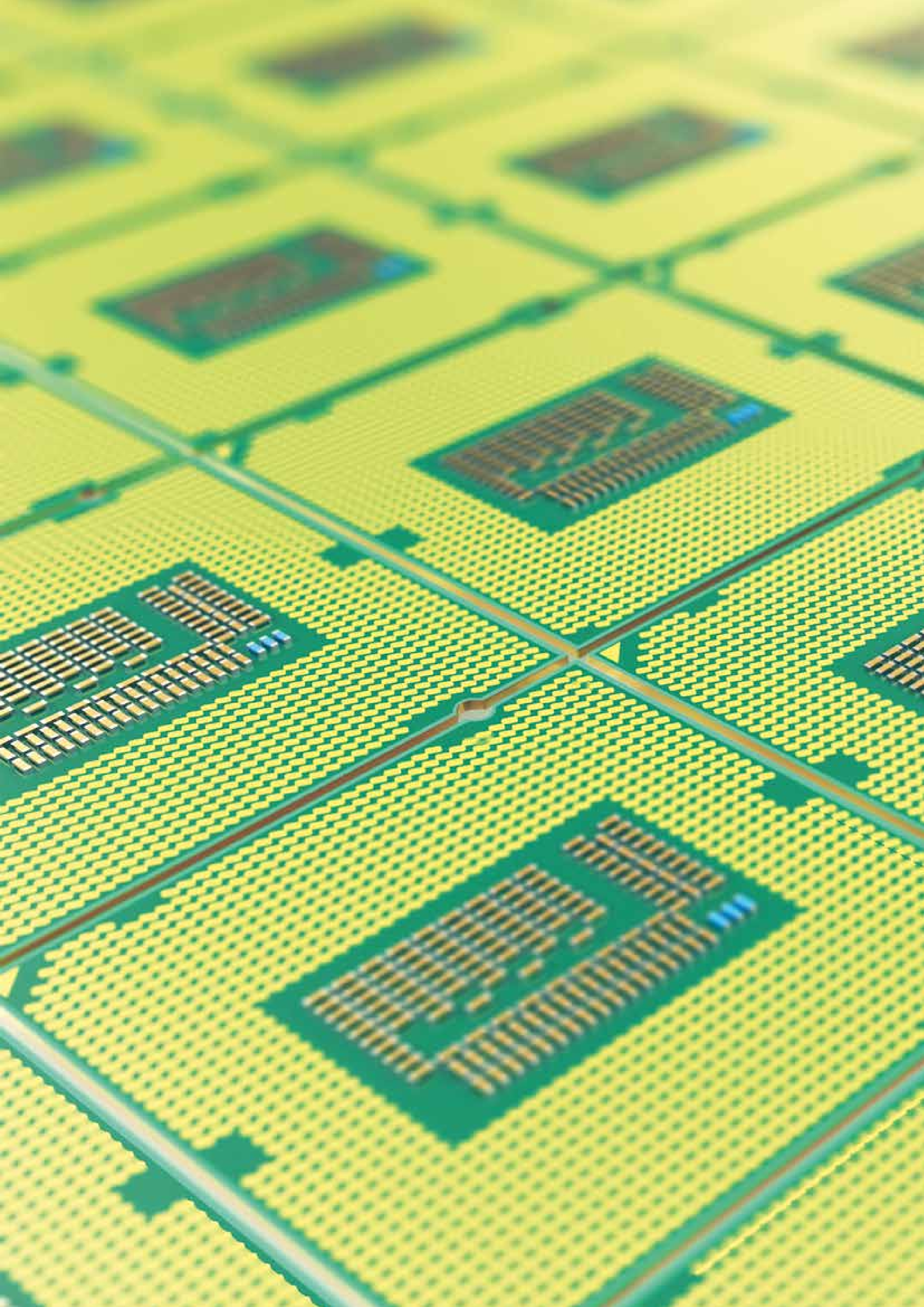
In many countries, including the US, patenting software innovations can be costly and uncertain, given recent court decisions on the standards for patent eligibility. By comparison, protecting your trade secrets requires only that you take reasonable security precautions—which many companies already take—to protect confidential information.

TRADE SECRETS WERE STOLEN: WHAT NOW?

Despite all the security measures your company may have in place, trade secrets often remain vulnerable. If your confidential information is stolen, you will need to move quickly. The first steps should include preserving all relevant information, enlisting assistance from law enforcement authorities, where applicable, and analyzing your options for preliminary legal relief while you work on a long-term solution.

Identifying and preserving relevant data sources are crucial. First, determine exactly what information may have been taken, and then identify and preserve relevant sources for future use, particularly if US litigation is a possibility. This may include copies of employee hard drives, emails, server locations and external storage devices, such as USB drives. Your company already may have HR policies regarding the computers or mobile devices of departing employees for a certain period after each employee's departure. If any issues are raised

> **A successful strategy to remedy trade secret misappropriation should consider all available remedies, including your cross-border legal options.**



about the actions of a departing employee within that period, make sure to preserve relevant employee computers, phones and other electronic devices as well as any server locations where the employee may have stored documents.

Consider contacting national or local law enforcement authorities with the information you collect during an investigation, since trade secret misappropriation may constitute a crime. For example, the 2013 amendments to Taiwan's Trade Secrets Act strengthened enforceability and introduced criminal punishments and fines. In the US, trade secret theft may violate the Economic Espionage Act and the Computer Fraud and Abuse Act.

In addition, in certain circumstances, evidence collected by law enforcement—or even law enforcement's actual findings—may be admissible in civil trials and can further support a separate civil lawsuit.

Next, examine your legal options to quickly stop or prevent any additional harm to your company.

In US courts, at the start of a case, parties to a lawsuit can seek a preliminary injunction or temporary restraining order to prevent a range of conduct, as long as they can satisfy the court that they are likely to succeed on the merits of their case. Injunctions are key in trade secrets cases, since they may prevent a former employee from sharing confidential information with others, stop the destruction of computers or other sources, or even prevent the marketing of a competitive product.

THE US DTSA: A NEW LEGAL OPTION FOR TECHNOLOGY COMPANIES

Companies with business in the US are increasingly using a 2016 US law, the Defend Trade Secrets Act (DTSA), for relief from trade secret theft. For example, when a US-headquartered semiconductor company recently alleged that its former employees passed trade secrets to a Chinese company through a Taiwanese business partner, even though Taiwanese prosecutors criminally indicted the employees and civil cases were brought in Taiwan and China, the company also filed a complaint under the DTSA in California.

In 2017, companies filed more than 1,100 complaints in US federal courts under the DTSA. While the number of US patent infringement cases has declined over the last few years, the number of US court cases that include a DTSA claim have increased every quarter since the law was enacted. Statistics indicate a high initial success rate for DTSA claims.

In addition to preliminary injunctions or temporary restraining orders, the DTSA lets companies seek "ex parte" seizure orders—a one-sided (unopposed) court order that directs law enforcement officers to seize property, like computers and electronic data sources. This extraordinarily powerful legal remedy can quickly prevent the further dissemination of a trade secret in situations where a preliminary injunction would not suffice. For example, if your company's investigation reveals that a former employee unlawfully possesses trade secrets in the US and is preparing to leave the country with them, an ex parte order may allow you to seize the former employee's laptops or other electronic devices.

BLOCK INFRINGING PRODUCTS FROM ENTRY INTO US MARKETS

Your company can take advantage of another strong remedy for trade secret theft under US law.

Section 337 of the US Tariff Act of 1930, as enforced by the US International Trade Commission (ITC), allows companies with industries in the US to block imports from competitors who misappropriated trade secrets. The ITC has the authority to issue orders that completely exclude unfairly traded products from entering into or being sold within the US.

Companies with investments, expenditures or licensing programs in the US may be able to initiate investigations in the ITC to remedy misappropriation (among other unfair acts, including patent infringement)—no matter where the trade secrets were developed, misappropriated, or used—so long as there is an imported product providing the ITC with jurisdiction.

And a victory in the ITC can deliver a powerful blow to a competitor who stole your trade secrets: an exclusion order enforced by US Customs that bans the importation of your competitor's unfairly imported product into the US for a period equal to the time that your company spent developing your misappropriated trade secret. If your company spent ten years developing a manufacturing technique, and you can convince the ITC that a competitor misappropriated that technique, you could potentially block your competitor from importing its similar product into the US for the next ten years—even if your business is headquartered in Taiwan and your competitor is also based in Asia.

KNOW YOUR CROSS-BORDER OPTIONS

Trade secret misappropriation often crosses borders, inflicting damage that spans multiple countries.

A successful strategy to remedy misappropriation should consider all available remedies. These might include a combination of US trade actions, US federal or state court actions, and civil and criminal proceedings in your home country, EU member states or other jurisdictions, where appropriate. Knowing your cross-border legal options will be the best chance to protect your innovations.

How to manage multijurisdictional compliance investigations

Taiwanese businesses operating in a global context need strong mechanisms to investigate and manage potential cross-border misconduct

By Bingna Guo

As a company's business grows globally, inevitably the company will become subject to regulators in different countries for anti-corruption, antitrust and many other aspects of its business.

This makes it vital for multinational companies operating in a global context to have a mechanism in place to investigate suspected cross-border misconduct. A credible internal investigation mechanism is not only an expectation from regulators and law enforcement agencies, but also recognized as a matter of good corporate governance. However, conducting complex compliance investigations in multiple jurisdictions can be challenging and difficult.

To manage multijurisdictional compliance investigations efficiently and effectively, here are a few practical steps that Taiwanese companies can take.

ESTABLISH STANDARD INVESTIGATIVE PROCEDURES

It is important for Taiwanese companies to establish a protocol for the conduct of any investigation and to ensure coordination among all parties involved.

Having standard procedures at the outset of any investigation will help. At a minimum, these investigation procedures should provide guidance on:

- How to set up an investigation team for different types of investigations. This includes determining when external advisors—such as outside legal counsel, forensic technology vendors and forensic accounting experts—should be engaged
- Which internal functions need to be aligned. Usually, internal functions that need to align include audit, finance, human resources, IT, media/PR and occasionally the relevant business teams
- How to determine the level of authority to which the investigation team should report. Usually, investigation teams should provide their reports to the company's general counsel or chief compliance officer, who, in turn, may report on the investigation to other senior executives. However, if an investigation involves senior executives, the investigation team should report to the board of directors of a company or a special committee established by the board
- How to delineate workstreams. Standard procedures should explain how to define workstreams by jurisdiction, regulator or issue—as appropriate—and make sure that each workstream feeds into the main investigation

MANAGE COMPETING DEMANDS FROM DIFFERENT REGULATORS AND LAW ENFORCEMENT AGENCIES

If a multijurisdictional investigation is in response to requests from regulators and law enforcement agencies, it is important to understand and manage the expectations and competing demands from different authorities.

> “Engage with regulators at an early stage to manage their expectations and coordinate your approach to requests from authorities in different jurisdictions.

For example, in a US-style internal investigation, a US regulator would expect a company to have undertaken document preservation measures and to have interviewed relevant employees.

However, if the misconduct is in mainland China and under Chinese authorities' investigation, the authorities might consider these types of measures as possible obstruction of justice and interfering with mainland Chinese authorities' investigation. The UK Serious Fraud Office (SFO), for example, has been vocal in criticizing companies for "churning" the crime scene by interviewing key witnesses and disturbing documents before the SFO has become involved. The SFO has also criticized companies for continuing with their own internal investigations once an SFO investigation has commenced.

Therefore, it is important to have a plan to engage with regulators

at an early stage to manage their expectations and have a coordinated approach to requests from authorities in different jurisdictions.

PRESERVE DATA AND ENSURE COMPLIANCE WITH DATA PRIVACY LAWS

At the outset of an investigation, a company should take immediate action to preserve all relevant data. This may include imaging electronic data, issuing document preservation notices and ceasing automatic deletion policies.

An investigation team should always be aware that data may need to be collected, processed and presented in different ways for different regulators.

In addition, the increasing stringent requirements of data privacy laws globally make it vital for companies to have defined a data protection strategy for navigating different jurisdictions' data protection laws. This may include securing consents in advance in employees' employment contracts and putting in place appropriate data-sharing agreements among subsidiaries.

CONSIDER THE VARIATION OF LEGAL PRIVILEGE IN DIFFERENT JURISDICTIONS

At the outset of any investigation, a company should check the legal position on privilege in relevant jurisdictions to protect legal advice and relevant investigation materials from disclosure to regulators and third parties. The operation of privilege can differ significantly from jurisdiction to jurisdiction.

PLAN FOR REMEDIATION AND ASSESS REPORTING OBLIGATIONS

Throughout the process of an investigation, it is crucial to consider potential remediation plans.

In some cases, a company must be able to show regulatory authorities that it has taken tangible steps in response to the findings of an investigation. If an internal investigation is not initiated by government authorities, it is important for a company to assess whether any self-reporting obligations will be triggered once a preliminary investigation has been completed.

Finally, in a multijurisdictional context, a company must consider all jurisdictions where it may have reporting obligations. This will not necessarily be limited to jurisdictions in which the relevant conduct took place. For example, a company should review and comply with all obligations to regulators in its home jurisdiction as well as any jurisdictions where the relevant conduct may have impacted its business.

Seeking amnesty internationally for cartel allegations

Whether, when and how Taiwanese corporations should request regulatory leniency for potential antitrust violations

By Noah Brumfield and Jonathan Klaren

The Taiwan Fair Trade Commission (TFTC)'s recent investigation into possible toilet paper price-fixing and recent global fines and litigation arising from alleged antitrust violations are reminders that company growth and success also bring potential legal pitfalls. Allegations of cartel conduct in particular can pose significant problems for international corporations.

Taiwanese companies face potential scrutiny not only domestically, but also globally. In 2016 – 2017, competition authorities globally collected fines totaling more than US$12 billion for cartel violations. Each year, we see new record fines. Thus far in 2018, Singapore, Australia and Egypt have issued their largest fines ever against companies alleged to have participated in a variety of industry cartels.

For in-house and outside counsel, uncovering and responding to alleged cartel violations is a complex task. Where matters entail an allegation of price-fixing and other "hard-core" antitrust conduct, the risks increase exponentially, but also invite the possibility of leniency from government prosecutors.

THE LENIENCY OPTION

Leniency (sometimes called amnesty) programs have become global mainstays in antitrust enforcement regimes. These programs allow corporations with knowledge of criminal cartel activity to apply and cooperate with regulators in exchange for a complete exemption, or sometimes reduced exposure, from administrative fines or criminal penalties.

Historically, Taiwanese companies have been the targets of leniency programs, rather than their beneficiaries. However, understanding both how and when to seek out global leniency programs offered by competition authorities is vital to any effective mitigation of antitrust risks and antitrust compliance.

Deciding whether your company should pursue leniency involves analyzing the potential risks and benefits related to specific, individualized considerations about the company, its industry and the facts at issue. An effective strategy should consider multiple jurisdictions worldwide, with the expectation, for example, that the TFTC will itself coordinate with foreign enforcement agencies.

WHEN TO REQUEST LENIENCY

Whether a regulator will grant leniency often depends on a variety of factors, including the applicant's timing relative to other alleged cartel members, the nature of the conduct, role of the applicant in the conduct, the nature and materiality of information the applicant possesses about the conduct of other cartel members, and other considerations.

Assessing these and other issues is critical to deciding whether to address the issues internally or proceed with an amnesty application.

In-house counsel are the first line of defense to uncovering cartel activity. Obtaining information as quickly and efficiently as possible allows you to work with the necessary parties to analyze the issues and potential exposure and to consider any leniency options.

Your company's timing is crucial. In jurisdictions like the United States, amnesty is only available to the first-in-time applicant. In other jurisdictions, such as Taiwan and throughout Asia and Europe, regulators will reduce fines and mitigate criminal penalties for second, third and sometimes even fourth applicants.

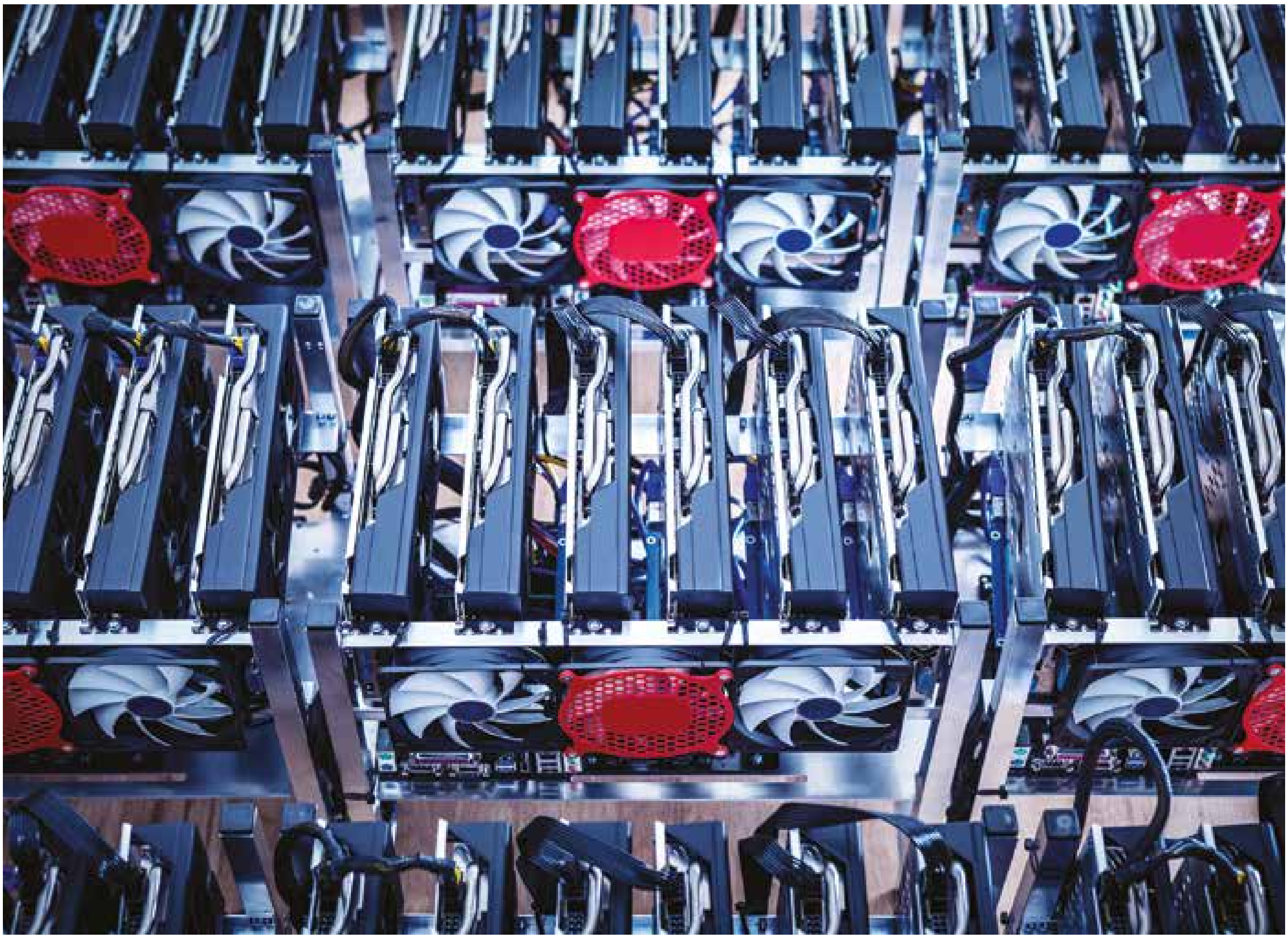
However, amnesty is not for every company or every potential violation.

IS LENIENCY THE BEST OPTION?

Almost inevitably, one government agency's investigation will give rise to other jurisdictions investigating—and potentially to civil litigation. These are important considerations in any decision about whether your company should seek amnesty. The nuances and distinctions among different jurisdictions' substantive law and procedural rules will affect your company's opportunities to defend itself against alleged violations.

So, you should carefully coordinate any amnesty effort across all relevant jurisdictions to maximize the benefits and limit potential penalties for your corporation.

Taiwan is not party to the Hague Evidence Convention, adding a further consideration when assessing leniency. Jurisdictional limits on discovery affect how foreign enforcers and civil plaintiffs obtain discovery from Taiwan companies. Thus, evidence held by Taiwanese entities may more



complicated to obtain, but is by no means out of reach from international regulators.

Another essential concern with any amnesty application is whether regulators may uncover multiple conspiracies within your industry. From freight and airline fees to auto parts and technology, regulators have been relentless in leveraging pleas from purported cartel members to launch new investigations and root out perceived anti-competitive conduct.

The US, for example, achieved so much success utilizing cartel members' information to investigate other corporate wrongdoing that it launched an Amnesty Plus program. This program allows cartel members during plea negotiations to offer information on a separate conspiracy, obtain amnesty from participation in that conspiracy and reduce their fines in the current investigation. While this can create perverse incentives to mischaracterize facts and suggest a second conspiracy where there is none or only weak evidence of one, it also illustrates why a thorough internal investigation can pay dividends when pursuing an amnesty application.

As with all antitrust issues, the best means of limiting your exposure and positioning your company to take advantage of global amnesty programs is to develop a robust and effective internal compliance program that will both limit the likelihood of cartel liability and catch potential cartel violations quickly.

In today's enforcement landscape, managing information flow and encouraging internal reporting allows in-house counsel to identify potential exposure to cartel activity early, respond strategically and effectively, and limit a company's ultimate liability.

“The best means of limiting your antitrust exposure is to develop a robust, effective internal compliance program.

European Commission fines for resale price maintenance in e-commerce

The risks for Taiwanese businesses when imposing fixed or minimum resale prices on distributors

By James Killick

The European Commission (the Commission) recently imposed steep fines on four consumer electronics companies—including Taiwanese electronics company Asus—for imposing fixed or minimum resale prices on their distributors.

This was the first time in 15 years that the Commission imposed penalties for resale price maintenance in vertical agreements.

RESALE PRICE MAINTENANCE UNDER EU COMPETITION LAW

European Union (EU) competition law prohibits resale price maintenance (RPM), which it defines as "agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or price level."

EU competition law prohibits both direct and indirect forms of RPM, which are considered hardcore restraints on competition. Examples of indirect forms of RPM include: fixing margins; making the grant of rebates or reimbursement of promotional costs subject to the observance of a given price level; intimidation; warnings; and similar practices.

By contrast, the EU allows maximum resale prices, since they act as a ceiling for prices, thereby benefiting consumers. The EU also allows recommended resale prices, provided that they do not result in a de facto fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

PENALTIES IMPOSED ON E-COMMERCE COMPANIES

In February of 2017, the Commission initiated competition proceedings against four companies—Asus, Denon & Marantz, Philips and Pioneer—following information obtained during an e-commerce sector inquiry. The Commission's sector inquiry report had identified RPM as an area of competitive concern. In particular, it highlighted these companies' increased use of automated software for monitoring and setting resale prices.

In July of 2018, the Commission imposed a total of €111 million in fines[1] on the four consumer electronics corporate groups for restricting online retailers' ability to set their own retail prices for widely used electronics products (including notebook computers and headphones).

By far, the steepest fine was the €63.5 million penalty imposed on Asus.[2]

The Commission found that Asus had monitored retailers' resale prices for certain computer hardware and electronics products. Specifically, Asus had intervened with retailers in two EU Member States (Germany and France) that were selling their products below Asus's recommended resale prices, and had asked them to increase their prices. The Commission concluded that this practice had had the effect of limiting effective price competition, thus leading to higher prices for consumers.

This is the first Commission decision that has considered the use of pricing algorithms.

> "
> **A recent decision signals a focus on increased enforcement in the European Union, with serious consequences for the companies involved.**

The Commission specifically pointed to the fact that the companies had used sophisticated algorithms to monitor the prices set by distributors, thereby allowing them to intervene quickly when there were price decreases. The Commission noted that in today's online world, "Many, including the biggest online retailers, use pricing algorithms which automatically adapt retail prices to those of competitors. In this way, the pricing restrictions imposed on low-price online retailers typically had a broader impact on overall online prices."

Until this decision, the Commission had not adopted a decision condemning a company for RPM since 2003.[3]

So, this decision signals a focus on increased enforcement against vertical arrangements in the EU. It also serves as a reminder that a general sector inquiry by the Commission can lead to the opening of individual cases—with serious consequences for the companies involved.

Finally, this decision underlines how important it is that companies carefully review their contractual provisions and their operational practices, when it comes to "recommended" prices, to ensure that they are not running any risk of competition law scrutiny in the EU. Companies also should examine how they use algorithms or other automated software of varying degrees of complexity when setting prices, since using these tools may prompt increased examination by competition authorities.[4]

1 The companies obtained significant fine reductions in exchange for their cooperation ranging from 40% (for Asus, Denon & Marantz and Philips) to 50% (for Pioneer).

2 A summary of the Asus decision is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0921(01)&from=EN

3 Yamaha was fined €2.56 million for fixing the minimum retail price of musical instruments for distributors who engaged in parallel imports (Commission Decision of 16 July 2003 in COMP/37.975 – Po/Yamaha).

4 See, for example, the UK competition authority decision that found an illegal agreement between two online poster sellers not to undercut each other, relying on automated repricing software and specific pricing algorithms, which they configured to automatically enforce the agreement (CMA decision, Case 50223, 12 August 2016, Online sales of posters and frames).

Trends in international arbitration for Taiwanese companies

Highlights from White & Case's recent survey results

By Melody Chan

This year, White & Case partnered with the School of International Arbitration at Queen Mary University of London to conduct a survey of participants in the field of international arbitration, including private practitioners, full-time arbitrators, in-house counsel, experts and other stakeholders.

These survey results hold intriguing findings for Taiwanese companies interested in international arbitration as a dispute resolution mechanism.

A CLEAR PREFERENCE FOR ARBITRATION

The vast majority (97 percent) of the survey respondents stated that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48 percent) or in conjunction with alternative dispute resolution (ADR) (49 percent).

Arbitration is a go-to resolution mechanism for many Taiwanese cross-border business disputes.

However, our survey found that many companies worldwide are increasingly resorting to various forms of ADR in the hope of finding even swifter and more cost efficient resolutions to disputes before conducting arbitration.

Globally, corporations—through their in-house counsel—displayed a strong preference for international arbitration (either as a stand-alone method or in conjunction with ADR) over litigation for several reasons. Our survey respondents perceived the enforceability of awards as arbitration's most valuable characteristic, followed by arbitration's utility in avoiding specific legal systems/national courts, flexibility and the ability of parties to select their own arbitrators. They viewed arbitration's costs and lack of effective sanctions as its worst features.

PREFERRED ARBITRATION SEATS AND INSTITUTIONS

Survey respondents globally stated that their five most preferred seats of arbitration are London (64 percent), Paris (53 percent), Singapore (39 percent), Hong Kong (28 percent) and Geneva (26 percent). This gives Taiwanese companies two highly respected arbitration seats nearby in the Asia-Pacific region.

These preferences were primarily determined by each location's general reputation and recognition, followed by users' perceptions of the neutrality and impartiality of their legal systems and their track records in enforcing agreements to arbitrate and arbitral awards.

The five most preferred arbitral institutions were the International Chamber of Commerce (77 percent), the London Court of International Arbitration (51 percent), the Singapore International Arbitration Centre (36 percent), the Hong Kong International Arbitration Centre (27 percent) and the Arbitration Institute of the Stockholm Chamber of Commerce (16 percent). Again, Asia-Pacific arbitral institutions performed well among global perceptions.

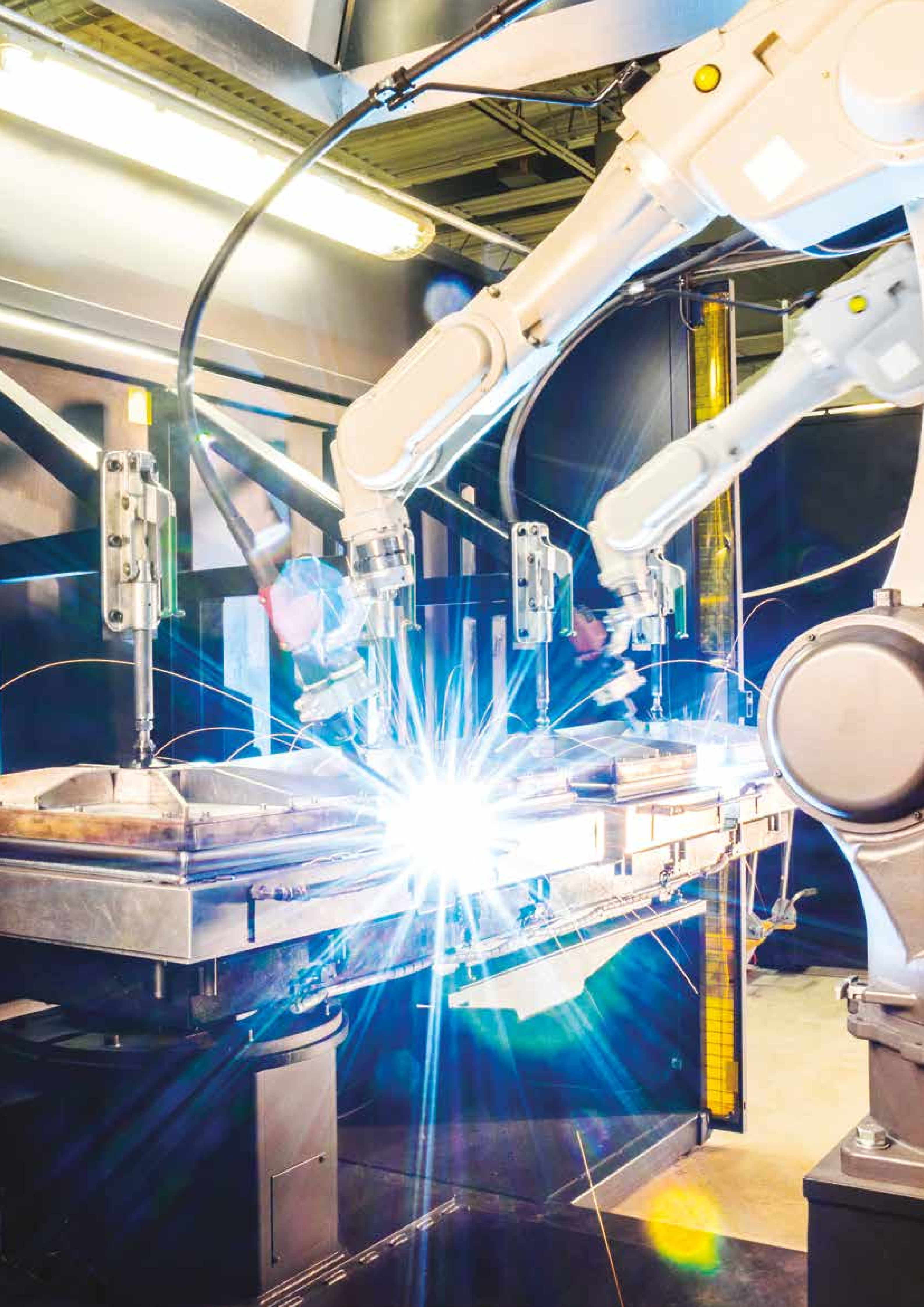
THE PERCEIVED FUTURE OF INTERNATIONAL ARBITRATION

International arbitration generally has not been supported to the same degree in all industries and sectors.

Generally, survey respondents said they believe the use of international arbitration will likely increase in several key industries, including energy (85 percent) construction/infrastructure (82 percent), technology (81 percent) and banking and finance (56 percent).

For example, respondents expect the technology sector would become more inclined to arbitrate disputes if more industry and sector-specific arbitral rules are introduced to reflect the specificities of disputes in this sector (such as enhanced rules regarding confidentiality of proceedings and proprietary information).

A significant number of respondents believe that arbitral proceedings could become more efficient through an increased use of technology. A large majority believe that videoconferencing (89 percent), cloud-based storage (91 percent) and hearing room technologies (98 percent) are tools that arbitration users should use more often. 66 percent of respondents suggested an increased use of virtual hearing rooms, and 78 percent indicated that artificial intelligence is a form of technology worth using more often in arbitration. These trends reflect the fact that respondents expect that technology can streamline the arbitration process and save significant costs by conducting hearings and meetings via videoconferencing and similar tools that do not require parties to be physically present.



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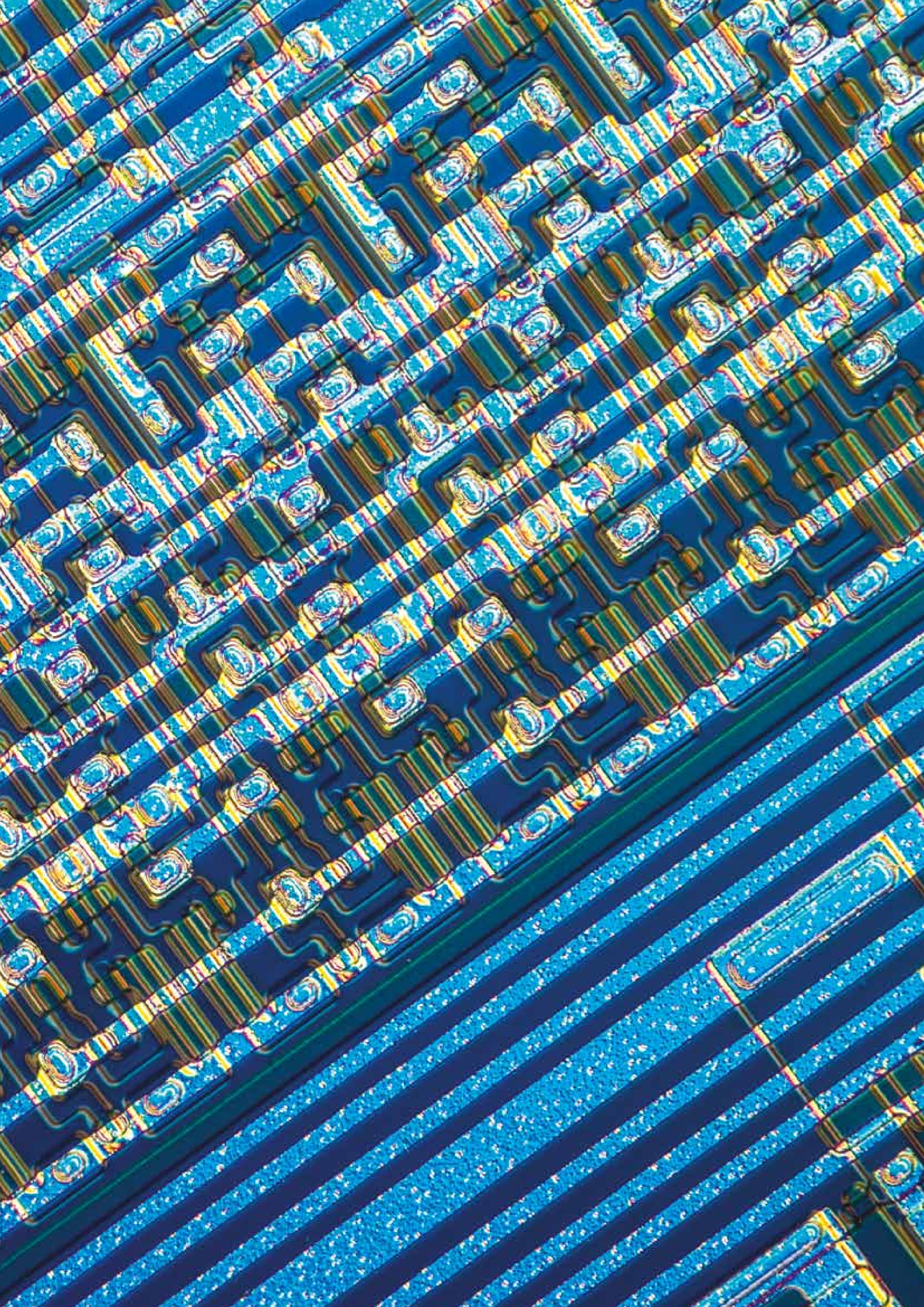

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