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I. INTRODUCTION

In *Motorola Mobility LLC v. AUO Optronics Corp.,* a three-judge appellate panel in the Seventh Circuit issued a series of rulings removing approximately 99 percent of Motorola's claimed purchases from the case.[2] In each ruling, the Court held that those purchases were not subject to U.S. law in light of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"). This article discusses the Court's most recent ruling.

I disagree with the Court's reasoning as well as its ultimate conclusion—both the means and the end are faulty. I believe that the Court's ultimate conclusion is incorrect for the reasons stated in a prior article: As a matter of economic policy, a ruling benefiting defendants and exempting any of Motorola's purchases from U.S. antitrust law before a jury can assess the veracity of Motorola's claims is undesirable because it would increase the incentives that foreign firms have to engage in cartel behavior in global markets. Plus, it would create new incentives to change otherwise efficient supply chain behavior.[3]

In this article, I analyze the Court's reasoning through the lens of economics. I address two questions: First, from the perspective of the economics of cartels, would it matter whether Motorola bought an LCD panel overseas and imported it as part of a finished cell phone, or imported the LCD panel and assembled the cell phone here? Second, should it matter that Motorola used foreign subsidiaries to buy LCD panels, rather than buying them itself?

II. THE COURT'S RULING IGNORES THE FACT THAT THE ECONOMICS OF CARTEL CONDUCT ARE THE SAME WHETHER MOTOROLA IMPORTED LCD PANELS AS PANELS OR IN PHONES

> Thus, Section 6a [i.e., the FTAIA] leaves the Sherman Act applicable to…conduct involving…wholly foreign commerce when that conduct harms U.S. domestic or import commerce (or certain export commerce).[4]

At a high level, the FTAIA excludes wholly foreign commerce from U.S. antitrust law scrutiny, with two notable exceptions. The first exception applies to conduct involving import

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[2] The rulings were issued on March 27, 2014, November 26, 2014, and January 12, 2015. The first ruling was vacated, and further briefing and argument followed. The Court then issued its second ruling. The second ruling was amended and replaced by the third ruling ("Amended Opinion (Jan. 12, 2015)").

[3] David Barth, *Deterrence and Efficiency Considerations Warrant an Expansive Reading of the FTAIA*, 9(1) CPI ANTITRUST CHRON. (Sep. 2014).

[4] Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing *En Banc*, 7 (Apr. 24, 2014).

trade or commerce, so the first issue raised in Motorola's appeal to the Seventh Circuit is whether defendants' conduct involved import trade or commerce.[5] This part of the FTAIA is known as the import-commerce exclusion. If the conduct at issue involves import commerce, then the FTAIA does not apply. That is, the FTAIA does not exclude conduct from the reach of the Sherman Act if the conduct involves import commerce.

The Court's ruling on the import-commerce exclusion is brief. The Court draws a bright-line distinction between LCD panels that entered the United States as component parts and LCD panels that were incorporated into cell phones outside of the United States. The Court's ruling treats the FTAIA as if the import-commerce exclusion covers only imports of the component parts by defendants. Specifically, the Court divides Motorola's purchases into the following three buckets: (1) the 1 percent of LCD panels shipped into the United States as panels; (2) the 42 percent of LCD panels shipped into the United States as component parts contained within assembled cell phones; and (3) the 57 percent of LCD panels that never entered the United States.

According to the Court, purchases in bucket (1) are "subject to the Sherman Act because of the exception in the Foreign Trade Antitrust Improvements Act for importing. That is the 1 percent, which is not involved in the appeal. Regarding the 42 percent, Motorola is wrong to argue that it is import commerce. It was Motorola, rather than the defendants, that imported these panels into the United States, as components of the cellphones that its foreign subsidiaries manufactured abroad and shipped to it."[6]

The Court's ruling fails to discuss the "conduct involving" portion of the statutory language; indeed, in this portion of the ruling, defendants' conduct is not discussed. But the import-commerce exception does not say that the Sherman Act covers imports. It says the Sherman Act applies to conduct involving import commerce.[7]

Moreover, the Court's reasoning implies that because Motorola incorporated most of its LCD panels into cell phones in Asia rather than in the United States, the defendants' conduct toward the LCD panels in those phones necessarily could not and did not involve import commerce that was the subject of defendants' conspiracy.

From an economic perspective, I disagree. There is no economic basis on which the Court could draw such a strong conclusion at this stage of the litigation. The upstream LCD panel business is allegedly tightly linked with the downstream cell phone business, much as one

[5] The relevant statutory language is, "Sections 1 to 7 of this title [i.e., the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless [certain criteria are satisfied]." 15 U.S.C. § 6a.

[6] Amended Opinion, 5 (Jan. 12, 2015). The Court further states that "[t]he panels—57 percent of the total—that never entered the United States neither affected domestic U.S. commerce nor gave rise to a cause of action under the Sherman Act." *Id*. The Court implicitly reasoned that because the bucket (3) panels were never imported into the United States, they could not satisfy the import-commerce exclusion.

[7] The U.S. government and the FTC agree. "Conduct involving import commerce is excluded from FTAIA's coverage, and the Sherman Act thus applies fully to such conduct. This import-commerce exclusion is not limited to circumstances in which the defendants are importers or specifically 'target' U.S. import commerce. A price-fixing conspiracy can involve import commerce even if the price-fixed product is physically imported by a third party or if the defendants did not focus on U.S. imports." Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party, 5 (Sep. 5, 2014).

would expect the upstream LCD panel business to be tightly linked with the downstream LCD monitor and TV businesses.[8] Hence, regardless of whether a given panel fell into bucket (1), (2), or (3), the LCDs cartel had incentives to care about the pricing of that panel and about the identity of the cartel member realizing the gain from that sale.

From the perspective of the cartel's stability and efficacy, there was no distinction between whether an LCD panel was (a) sent to the United States and then manufactured into a Motorola phone or (b) manufactured into a Motorola phone in Asia and then sent to the United States. Consequently, buckets (1) and (2) suffered interdependent harms and, from the perspective of the cartel incentives, would have been identical.[9]

Consider a cartel's problem in general terms:

> We shall show that collusion normally involves much more than 'the' price….Let us assume that the collusion has been effected, and a price structure agreed upon. It is a well-established proposition that if any member of the agreement can secretly violate it, he will gain larger profits than by conforming to it.[10]

Consequently, a successful cartel will have an agreement encompassing more than prices. The cartel members will also have agreed upon how to allocate the collusive gains and how to enforce the agreement.[11] To allocate the collusive gains, cartel members may agree on market shares, allocate particular customers, or allocate geographies.[12] To enforce the agreement, cartel members may monitor compliance and detect and punish intentional deviations from agreed-upon behavior. For example, cartel members may communicate and report information about their output to one another.[13] A well-known set of pricing, allocation, and enforcement structures is to agree to restrict output and increase price but agree to revert to more competitive behavior—higher output and lower prices—if prices fall below a certain threshold.[14]

It is important to recognize that pricing, allocation, and enforcement structures are interdependent forms of cartel conduct.[15] A cartel that agreed to raise prices but did not agree upon how to divide the gains or how to enforce the agreement would likely succumb to cheating.[16] For example, a cartel that agreed to raise the price charged to a multinational firm, but had no agreement about how the cartel members would divide among themselves the sales to the U.S. parent and to foreign subsidiaries, would likely find any success short-lived.

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[8] According to the U.S. government and the Federal Trade Commission, "whether Motorola can sue the defendants under the Sherman Act" could depend on whether "the upstream panel market is 'inextricably linked and intertwined' with the downstream U.S. cellphone market," as Motorola alleged. Brief, *supra* note 4, 15.

[9] Given the alleged facts in the case, the same appears to be true of purchases in bucket (3), although in principle there could be circumstances in which the harms could be independent. For instance, cell phones used in Asia might be constructed by using types of LCD panels that were never used in U.S. phones.

[10] George Stigler, *A Theory of Oligopoly*, J. POLITICAL ECON. 44-61 (1964) at 44, 46.

[11] Robert Marshall & Leslie Marx, THE ECONOMICS OF COLLUSION: CARTELS AND BIDDING RINGS (2012), 105-109.

[12] Stigler, *supra* note 10, 46-47.

[13] *Id.*, 46.

[14] Edward Green & Robert Porter, *Noncooperative Collusion under Imperfect Price Information*, ECONOMETRICA 87-100 (1984).

[15] Marshall & Marx, *supra* note 11, 108.

[16] *Id.*

A cartel that agreed to raise the prices charged on all sales—those in domestic U.S. commerce, those in import U.S. commerce, and those outside of those channels—would need to monitor compliance across all channels, as the cartel's success would depend on adherence to the agreement in all channels. Indeed, if firms are rivals in distinct markets, economic theory shows that multimarket contact can enhance firms' ability to effectively collude in those markets.[17] In short, because cartel members care about the overall results from their conspiracy, conduct needs to be assessed broadly, not narrowly.

In this case, even an excessively narrow assessment of the alleged collusive conduct—one limited solely to conduct toward Motorola—indicates that the conduct included pricing and enforcement structures involving U.S. import (and domestic) commerce, and involved both LCD panels and cell phones.

In terms of pricing structures, Motorola alleged that it and its foreign subsidiaries always paid the same price (at a given point in time), a single price negotiated by Motorola.[18] As one defendant employee put it, "there was one global price…wherever Motorola would purchase LCD [panels]—in different facilities Motorola would purchase the product, they would all purchase at the, quote-unquote, Motorola price."[19] So LCD panels in buckets (1), (2), and (3) allegedly shared a common price.

In terms of enforcement structures, the U.S. government charged several defendants with exchanging information with co-conspirators "for the purpose of monitoring and enforcing adherence to the agreed-upon prices" with respect to Motorola.[20] Motorola alleged that defendants "monitored the 'street prices' of U.S. LCD products and used those prices 'as a benchmark for establishing, organizing, and tracking their price-fixing of LCD Panels.'"[21]

Assuming that the allegations are correct, defendants' price-fixing of, and other conduct toward, LCD panel sales in bucket (2) were part and parcel of the same conduct toward the LCD panel import commerce in bucket (1).[22] This is true due to the structure of pricing, which included the setting of common LCD panel prices across the buckets, and of enforcement, which included the exchange of information to monitor and to enforce adherence to the agreement by the use of the street prices of cell phones as a benchmark for the common price-fixing of LCD panels in buckets (1) and (2).

Consequently, given the economics of cartels as well as the specific facts alleged in this matter, the Court's approach to the import-commerce exclusion is unsatisfactory. By dividing

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[17] B. Douglas Bernheim & Michael Whinston, *Multimarket Contact and Collusive Behavior,* RAND J. ECON. 1-26 (1990).

[18] Appellant's Opening Brief, 8-9 (Aug. 29, 2014).

[19] *Id*.

[20] Information, *United States v. Sharp Corp.*, No. 08-802 (N.D. Cal. Dec. 8, 2008) at 5, and Information, *United States v. Epson Imaging Devices Corp.*, No. 09-854 (N.D. Cal. Aug. 25, 2009) at 3.

[21] Appellant's Opening Brief, 6 (Aug. 29, 2014).

[22] In *Empagran*, the Supreme Court noted that the Sherman Act "can apply and not apply to the same conduct, depending on other circumstances," including "the nature of the lawsuit (or of the underlying related harm)." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 174. However, *Empagran* was a case in which the foreign harms were assumed to be independent of the domestic harms. *Id.*, 159-160. Also, no purchases in *Empagran* correspond to the bucket (2) category in this case. *Id.*

purchases into distinct buckets based on each LCD panel's initial and ultimate destinations, but doing no further analysis, the Court failed to examine the relevant incentives and alleged behaviors of the cartel that both underlie the cartel's sale of price-fixed LCD panels and involve U.S. import commerce.

III. THE COURT'S CONSIDERATION OF THE LEGAL STATUS OF MOTOROLA'S SUBSIDIARIES IGNORES EFFICIENCY CONSIDERATIONS

> To answer a question about antitrust as about any other field of law it is always helpful and often essential to consider what the purpose of the law is. The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency.[23]

The Court's ruling shields defendants from Motorola's claims by stating, "Motorola wants us to treat it and all its foreign subsidiaries as a single integrated enterprise, as if its subsidiaries were divisions rather than foreign corporations. But American law does not collapse parents and subsidiaries (or sister corporations) in that way."[24] The Court's logic is that "'a corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties.'"[25] No recognized justification for "deeming a parent and subsidiary one…is present in this case."[26]

Yet efficiency considerations would appear to be a clear, sensible possibility.[27] Efficiency considerations were central to the Supreme Court's *Copperweld* decision, which justified treating a parent and its wholly owned subsidiary as a single unit for the purpose of defending a Section 1 claim. The Supreme Court held:

> [T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.[28]

The Supreme Court noted that if antitrust liability depended on whether firms used incorporated subsidiaries or unincorporated divisions, "parent corporations would be encouraged to convert subsidiaries into unincorporated divisions.…Such an incentive serves no valid antitrust goals, but merely deprives consumers and producers of the benefits that the subsidiary form may yield."[29]

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[23] *Morrison v. Murray Biscuit Co.,* 797 F.2d 1430, 1437 (7th Cir. 1986).

[24] Amended Opinion, 8 (Jan. 12, 2015).

[25] Amended Opinion, 7 (Jan. 12, 2015) (quoting *Disenos Artisticos E Industriales, S.A. v. Costco Wholesale Corp.*, 97 F.3d 377, 380 (9th Cir. 1996)).

[26] Amended Opinion, 9 (Jan. 12, 2015).

[27] My prior article described two efficiency considerations for allowing Motorola's claims to proceed to trial: A rule adverse to firms in Motorola's circumstances would increase the incentives that foreign firms have to engage in cartel behavior in global markets. Also, it would create new incentives to change otherwise efficient supply chain behavior. Either outcome would reduce economic efficiency. Barth, *supra* note 3.

[28] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

[29] *Id.* at 773-774.

As the Court's ruling neither cites nor addresses *Copperweld*, it is not clear what the Court would say to distinguish this case from *Copperweld*. One possible distinction is that *Copperweld* addresses the situation in which a parent and its wholly owned subsidiary are accused of a Section 1 violation, while the present case involves a parent and its wholly owned subsidiaries accusing others of a Section 1 violation.[30] But I am not aware of any economic justification for treating a family of corporate buyers (typically, plaintiffs in a Section 1 case) differently than a family of corporate sellers (typically, defendants).[31] If corporate buyers lose access to U.S. courts by incorporating foreign subsidiaries, then parent corporations would be encouraged to avoid the otherwise efficient use of subsidiaries, just as *Copperweld* contemplated.

While I consider this result a disadvantage to the Court's ruling, others approvingly describe this outcome. Text of Robert Connolly's September 2014 *CPI Antitrust Chronicle* article was cited in the Court's decision as follows:

> Domestic corporate purchasers are not without remedy when buying component parts from foreign vendors. First, the U.S. parent could buy directly from the foreign vendor and preserve the right to sue as a direct purchaser (while trading off [i.e., losing] the benefits the company gained from operating through a foreign subsidiary). Or, if a U.S. parent doesn't think that antitrust laws are sufficiently, or fairly, enforced in a given country, they certainly don't have to set up a subsidiary there.[32]

Connolly concludes, "You take the good with the bad."[33] But these alleged remedies throw the baby out with the bathwater. The Court and Connolly view antitrust as simply another type of law to apply locally—such as contract, labor, and tort law—even though competition and supply chains are often, and increasingly, international in nature.[34]

IV. CONCLUSION

"The FTAIA is designed to prevent…absurd results."[35]

The enforcers of U.S. antitrust law should care about cartel conduct that manifests itself in harm to domestic and import commerce. When cartel conduct harms commerce in components ultimately bought in end products by U.S. consumers, that cartel conduct should be

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[30] I assume that Motorola wholly owns its foreign subsidiaries, as was the case in *Copperweld*. Even if that is untrue, the Court's logic should still follow the guidance of *American Needle*: "the inquiry is one of competitive reality," which eschews "formalistic distinctions in favor of a functional consideration of how the parties involved…actually operate." *American Needle Inc. v. Nat'l Football League,* 130 S.Ct. 2201, 2209, 2212 (2010).

[31] The "fact that every transaction involves two parties is something that economists do not easily forget." Stigler, *supra* note 10, 44.

[32] Robert Connolly, *Repeal the FTAIA! (Or at Least Consider It as Coextensive with Hartford Fire),* CPI ANTITRUST CHRON., 7 (Sep. 2014 (1)), cited in Amended Opinion, 22 (Jan. 12, 2015).

[33] *Id*.

[34] Defendants' own *amici* describe a situation where jurisdiction over the same conduct should depend on the type of law in question: Suppose a U.S. company murders the executives of its domestic rival at a corporate retreat in Mexico to force its rival to go out of business. The *amici* say Mexican courts would have jurisdiction over the criminal murders, while U.S. courts would have jurisdiction over the associated antitrust claims, because in the hypothetical, "the anticompetitive consequences had nothing to do with the Mexican market." Amicus Curiae Brief of Twelve Law Professors in Support of Defendants' Motion for Reconsideration, 9, n. 4 (Oct. 3, 2013).

[35] *Id*. at 11.

punishable by both public and private enforcers under U.S. antitrust law. Specifically, whenever substantial effects of anticompetitive conduct in component products are felt in the United States, private parties affected by that conduct should be able to bring suit in U.S. courts and potentially recover damages.

Similarly, U.S. antitrust law should not create artificial reasons for companies to change organizational forms and supply chains. Courts should focus on functional economic considerations (e.g., how supply chains operate, and how conduct impacts U.S. domestic and import commerce), not on formalistic distinctions (e.g., how a component is imported, the identity of the importer, or buyers' corporate structures). These should be effects-based inquiries, not legal ones.

These conclusions are consistent with the effects-based approach embodied in the statutory language of the FTAIA. Twelve professors of law filed an *amicus* brief on behalf of defendants in this case advocating an effects-based approach.[36] According to the professors, under "the FTAIA's framework for determining the coverage of domestic antitrust law…the relevant question is…where the effects of the defendant's conduct were directly felt."[37] The professors argued, "The FTAIA is designed to prevent…absurd results by making clear that the laws of the place where the direct effects of anticompetitive conduct appear…should apply."[38] Of course, economics teaches that direct effects of conduct may be felt in multiple locations, and therefore multiple locations may have a valid legal interest.[39]

The professors go on to warn that determining jurisdiction based on the location of conduct rather than effects:

> would be seriously damaging to the global antitrust system. It would encourage countries with no legitimate interests in anticompetitive schemes to assert jurisdiction based on the happenstance of physical presence, either to block antitrust enforcement altogether or to promote parochial industrial policies.…The effects-based approach is designed to prevent these kinds of arbitrary and pernicious results.[40]

Even under an effects-based approach, courts should seek to avoid pernicious results that will decrease economic efficiency. To that end, I wish that the Court here had focused on the

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[36] The professors are Anu Bradford, Darren Bush, David Gerber, Jeffrey Harrison, Herbert Hovenkamp, Max Huffman, Thomas Lambert, Geoffrey Manne, Barak Orbach, William Page, D. Daniel Sokol, & Christopher Sprigman.

[37] Brief, *supra* note 35, 12, n. 6.

[38] *Id*. at 11.

[39] Joseph Harrington proposed the following definition of direct: "[A]n effect is 'direct' if it can be determined that the observed harm was caused by the actions of the company. That is, there is a clear path from conduct to harm…." Joseph E. Harrington, Jr., *Motorola Mobility and the FTAIA: A Deterrence-Based Definition of "Direct" Effect*, 9(1) CPI ANTITRUST CHRON., 4 (Sep. 2014).

[40] Brief, *supra* note 35, 12. Of course, countries could also invoke effects-based jurisdiction to block antitrust enforcement by others and to promote industrial policies within their own borders. For instance, one might wonder whether Japan and Korea pursue, prosecute, and punish anticompetitive conduct by keiretsus and chaebols harming wholly foreign-owned subsidiaries operating within their borders as aggressively as other cases of anticompetitive conduct within their jurisdictions.

functional economic consideration of how the cartel and Motorola operated, not on formalistic distinctions.[41]

[41] As an example of a focus on a formalistic distinction, consider the ruling's treatment of Motorola and its foreign subsidiaries. Pages 7-10 discuss how Motorola must be considered distinct from its foreign subsidiaries under U.S. law. Pages 7 and 10-14 discuss how Motorola's claims must fail under the *Illinois Brick* doctrine because Motorola is distinct from its foreign subsidiaries under U.S. law and hence an indirect purchaser. But on page 15, in response to Motorola's argument for an exception to the *Illinois Brick* doctrine, the ruling emphasizes Motorola's control over its foreign subsidiaries. "[I]t would be odd to think that Motorola could obtain antitrust damages on the basis of its own pricing decisions." (Of course, Motorola's allegations already address what its claimed overcharges are, assuming an *Illinois Brick* exception: The sum of its subsidiaries' overcharges.) The need for the ruling to emphasize the distinctness of Motorola and its foreign subsidiaries in much of the discussion, yet to rely upon the interrelationship in another, highlights the wisdom underlying *Copperweld* and *American Needle*: In antitrust cases, courts should focus on how interrelated companies operate, not on how they are legally structured.