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The *Motorola* Decision Overlooks How Cartels and Corporate Families Operate

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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.

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I. INTRODUCTION

I was pleased to have an article I wrote on the FTAIA cited and quoted from in the recent *Motorola Mobility* opinion.[2] I agree with the decision in *Motorola Mobility* and I also believe that the decision was a fair interpretation that reached the optimal outcome for strengthening international cartel enforcement.

The initial Seventh Circuit holding, that the conduct in question did not "have a direct, substantial and reasonably foreseeable effect" on U.S. commerce, could have seriously jeopardized the enforcement efforts of the Department of Justice's Antitrust Division ("Division"). The Court could have reached a decision allowing Motorola Mobility to seek damages in U.S. courts for purchases made overseas by a foreign subsidiary, but that could have created resentment of the United States as the world's only cartel cop that mattered. (*See* Section II, below.) The decision to hold only that Motorola Mobility's claim did not meet the FTAIA's "gives rise to" requirement was a wise compromise from a policy perspective. Here's why I think so.

II. INTERNATIONAL COOPERATION HAS LED TO THE EFFECTIVE PREVENTION, DETECTION, AND PROSECUTION OF CARTELS

While there are a few exceptions,[3] major private civil damage cases in the international cartel arena have generally been brought only after the Division has obtained guilty pleas or convictions. The Division's ability to obtain guilty pleas has been aided greatly by cooperation from foreign governments in global investigations. Numerous foreign governments filed *amicus* briefs in *Motorola Mobility* urging the Court not to reach a decision that would infringe on their sovereignty and undermine their own enforcement of competition laws. For purposes of prosecuting international cartels, as well as for follow-on civil actions, maintaining international cooperation is essential.

Cooperation among antitrust enforcers takes many forms, some public, some not: coordinated dawn raids, assistance in obtaining foreign-located evidence, sharing leads and other non-confidential information, adoption of Mutual Legal Assistance Treaties ("MLATs"), and

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[1] Robert E. Connolly is a partner in the Washington, D.C. office of GeyerGorey, LLP. Mr. Connolly publishes a blog covering cartel issues: http://cartelcapers.

[2] Judge Posner cited and quoted, *Repeal the FTAIA! (Or at Least Consider it Coextensive With Hartford Fire)*, 9(1) CPI ANTITRUST CHRON. (Sept. 2014), *available at* www.competionpolicyinternational.com/repeal-the-ftaia-or-at-least-considerit-as-coextensive-with-hartford-fire/ (Sept. 2014). The Court also cited and quoted a post in my blog, Cartel Capers, *Motorola Mobility and the FTAIA*, (Sept. 30, 2014) *available at* http://cartelcapers.com/bog/motorola-mobility-ftaia.

[3] *See e.g., In re Vitamin C Antitrust Litig.*, 904 F. Supp. 2d 310, 317-18 (E.D.N.Y. 2012).

reducing safe havens from extradition for those who do fix prices.[4] "While challenges remain in the area of international cooperation, cooperation among jurisdictions in anti-cartel enforcement continues to become more robust, sophisticated, and effective."[5]

The Division has observed that, with each passing day, the antitrust community learns of a foreign government that has enacted a new antitrust law, created a new cartel investigative unit, obtained a record antitrust fine, or adopted a new corporate leniency program. This shared commitment to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world, leading to more effective investigation and prosecution of international cartels.[6]

It is probably true that when the Division brought the international lysine price-fixing cartel case against ADM, there was under deterrence of international cartels. ADM was the "supermarket to the world," yet faced penalties in very few jurisdictions. The United States and European Union were the principal enforcers, imposing fines of just slightly more than $200 million cumulatively. While two ADM executives were sent to prison, no foreign executives were. Indeed, at that time, foreign executives had little to fear from cartel participation—extradition, red notices, and potential jail sentences in other jurisdictions were not yet a reality. More recently, by contrast, many foreign executives involved in the LCD cartel received jail terms as a result of Division prosecutions. Many currently believe jail is the greatest deterrent to cartel behavior.

Fines have also increased dramatically in the past decade. In the LCD cartel prosecution, AU Optronics alone was fined $500 million in the United States. LCD cartel enforcement actions have been taken by, among others, the United States, European Union, Canada, Korea, Japan, Brazil, and China, and this is likely not the full list. Global fines for price-fixing reached a record high in 2014 of $5.3 billion, which was a 31 percent increase over 2013's record-breaking total.[7] Fines in Asia were also at a record level of $1.7 billion.[8]

This dramatic expansion of cartel-fighting abilities on a worldwide scale took some time, as did developing a respect for differing views among nations. In the autumn of 1999, the Division hosted the first-ever international meeting of cartel investigators and prosecutors. More than 25 countries sent representatives. An international conference among enforcers has continued, in one form or another, ever since. The International Competition Network ("ICN"),

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[4] *See* Scott D. Hammond, Deputy Assistant Attorney Gen. Antitrust Division, U.S. Dep't of Justice, *An Update on the Antitrust Division's Criminal Enforcement Program* (Nov. 16, 2005), *available at* http://www.justice.gov/atr/public/speeches/213247.htm.

[5] OECD Global Forum on Competition, *Improving International Co-Operation in Cartel Investigations*, (Contribution from the United States (DOJ)), *available at* http://www.justice.gov/atr/public/international/286282.pdf (Jan. 31, 2012).

[6] Scott D. Hammond, Deputy Ass't Att'y Gen, Antitrust Div., U.S. Dep't of Justice, *Recent Developments Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program*, *available at* http://www.justice.gov/atr/public/speeches/232716.htm (Mar. 26, 2008).

[7] *Global Fines for price-fixing hit $5.3 bn record high*, FINANCIAL TIMES (Jan. 6, 2015), *available at* http://www.ft.com/intl/cms/s/0/83c27142-95a8-11e4-b3a6-00144feabdc0.html#axzz3PN4JQQ9a.

[8] DW, *Asia antitrust watchdogs issue record fines*, *available at* http://www.dw.de/asia-antitrust-watchdogs-issue-record-fines/a-18176691 (Jan. 8, 2015).

has developed into a mature international organization with 126 agency members from 111 jurisdictions.[9] And today there are more than 100 competition agencies worldwide with some form of leniency program. Any cartelist facing government action has a long, and continually growing, list of countries where it must "make peace" if it has committed a cartel violation.

These statistics demonstrate that the Division has been spectacularly successful in exporting the view that "cartels are the supreme evil of antitrust." During the time I was with the Chief of the Philadelphia Field Office, we hosted delegations from Korea, Japan, and China, as well as had telephone discussions with many other jurisdictions regarding effective cartel enforcement. Other Division field offices did likewise and, of course, the main stop was always Main Justice in Washington, D.C.

Besides advocating condemnation of cartels, the Division also very effectively advocated for the adoption of leniency programs, which have now been adopted almost universally. Having invited the world to join the effort to prohibit and prosecute cartels, and that invitation having been enthusiastically accepted, it is good manners/policy that the competition regimes set up around the globe—which continue to develop—be given due respect and that the views of our partners be given serious consideration.

III. DAMAGE CLAIMS FOR VICTIMS ARE FOLLOWING A SIMILAR UPWARD TRAJECTORY

There has been something of a time lag in the international community's acceptance of mechanisms by which persons injured by cartels may be compensated for the damages suffered. The landscape, however, is changing rapidly on that front. Today, there is an ever-increasing ability for price-fixing victims to obtain damages. The European Union recently adopted a Directive that "makes it a lot easier for victims of antitrust violation to claim compensation."[10] And, damage actions can already be brought in the Member States.

A few examples of cartel members who have faced damage demands or civil proceedings in various EU Member States are gas-insulated switchgears, vitamins, rubber chemicals, elevators and escalators, cement, hydrogen peroxide, and rail.[11] So far, England, Germany, and the Netherlands have emerged as litigation hotspots. According to one report "Interestingly enough, a vying for the label of the best competition litigation forum for claimants in Europe seems to be evolving."[12]

As new cartel enforcers enter the picture, they are including victim redress as an enforcement goal. In India, for example, damages can be awarded to victims, but the system is completely different than the U.S. class-action system. Victims can make claims to the

[9] *See* Statement by Andreas Mundt, President of the Bundeskartellamt and ICN Chair, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc924.pdf.

[10] Competition Policy Brief, *The Damages Directive*, *available at* http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf (Jan. 2015). Member States must implement the decree by December 27, 2016.

[11] Stefan Rützel, Stephan Wilske, & Alexander Fritzsche, *Collective Redress in Cartel Damages Actions - Recent Developments in Europe*, *available at* http://whoswholegal.com/news/features/article/30916/collective-redress-cartel-damages-actions-recent-developments-europe (Oct. 2013).

[12] *Id.*

Competition Appellate Tribunal after the Competition Commission of India has successfully brought an action.[13] And China took an interesting tack against the LCD cartel members. Besides imposing fines, the six defendants were required to refund the overcharged amount directly to the Chinese TV makers. China also required the defendants to offer extended warranties to consumers of the price-fixed products.[14]

Collective redress or damage actions are proliferating, as cartel enforcement has, around the globe. To be sure, the regimes may be different; the U.S. class action system is not seen as a model to emulate. Some foreign regimes may be better than the U.S. system, some worse, and—in some jurisdictions—damage claims may still not be allowed at all. But as with cartel enforcement, allowing each jurisdiction to create its own system of enforcement in cooperation, not competition, may be the best long-term way to further increase worldwide cartel deterrence.

The *Motorola Mobility* opinion cited the Supreme Court warning that rampart extraterritorial reach of the Sherman Act "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."[15] The Seventh Circuit went on to state, "The position for which Motorola contends would if adopted increase the global reach of the Sherman Act, creating friction with many foreign countries and 'resent[ment at] the apparent effort of the United States to act as the world's competition police officer."[16]

Do I think that had the sovereignty interests of foreign governments (as expressed in their *amicus* briefs) been ignored in *Motorola Mobility,* these and other governments would have stopped cooperating in international cartel investigations? Would we return to the days of "blocking" statutes and "claw back" provisions? Probably not. But cooperation is a matter of degree and requires mutual trust and respect between partners. And it is required in a number of areas. The timing of dawn raids is currently a subject of effective international cooperation. Confidentiality of information is another key area of cooperation that have been essential to the proliferation of leniency programs. Even small areas of increased friction in these or other areas could help kill the golden goose—the governmental enforcement actions that precede civil damage cases. Optimal continued cooperation sometimes means respecting partners' views and processes, even though you're sure you know best.

In short, deterrence against international cartels has increased substantially and will continue to do so as long as enforcement agencies cooperate. The recent cooperation of China with nations coordinating dawn raids in the relatively new international capacitor investigation is a deterrent development probably not yet fully appreciated. And the ability of price-fixing victims to assert damage claims is also on the rise.

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[13] In India the Competition Appellate Tribunal can "adjudicate on claim for compensation that may arise from the findings of the Competition Commission of India," *see* http://compat.nic.in/Introduction.html.

[14] *See, Chinese Cartel Busters Impose Record Fines on Foreign LCD Makers*, HOGAN LOVELLS (January 2013), *available at* http://www.hoganlovells.com/files/Uploads/Documents/13.01.07_ACER%20newsflash_LCD%20Decision%20.pdf.

[15] F. Hoffman-LaRoche Ltd. v. Empagran, 542 U.S. 155, 165 (2004).

[16] Motorola Mobility, *supra* note 2, at 8.

IV. OTHER POLICY CONCERNS THAT WARRANT RESPECT FOR ENFORCEMENT REGIMES OF OTHER COUNTRIES

A. What's Good for the Goose…

Another concern I have related to the reach of the FTAIA is "what's good for the goose is good for the gander." Many foreign companies do business in the United States, either directly or through subsidiaries. What would the reaction be of a U.S. company, for example, if it was hauled into court in China for sales made in the United States to a Chinese subsidiary because the subsidiary operating in the United States felt the laws (courts) in China would be more favorable? The quote below, while in relation to FCPA enforcement, expresses my concern better than I can:

> It's most certainly not good economics that one court jurisdiction gets to fine companies from all over the world on fairly tenuous grounds. Who would really like it if Russia's legal system extended all the way around the world? Or North Korea's? And I'm pretty sure that the non-reciprocity isn't good public policy either. Eventually it's going to start getting up peoples' noses and they'll be looking for ways to punish American companies in their own jurisdictions under their own laws. And there won't be all that much that the U.S. can honestly do to complain about it, given their previous actions.[17]

B. Cooperation in Areas Beyond Cartels

Continued cooperation among enforcement agencies isn't just important in the areas of cartels, but also in mergers and other competition conduct cases. Thomas O. Barnett, recent head of the Division, stated that global antitrust enforcement could create "burdensome requirements" if "procedures and substantive antitrust analysis diverge across countries, which can lead to inconsistent or even incompatible results."[18] And, in Europe, Joaquín Almunia, the former European Commissioner for Competition, voiced a similar concern, "In this setting, our ability to protect competition on the merits, foster innovation, and keep markets open and fair will depend on how well we manage to establish a common set of principles and goals for our enforcement work."[19]

If the United States is seen as a competition bully, the blowback in other areas besides cartels could be far reaching. Of course, core principles should not be abandoned. So, for example, the United States will likely continue to disagree with partners about the treatment of resale price maintenance. But the ability of a U.S. parent to stand in the shoes of its foreign subsidiary in order to press damages claims in the United States is not a core principle. In that area companies may have to simply "vote with their feet" and not set up foreign subsidiaries. An

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[17] Tim Worstall, *Isn't It Strange That The US Gets to Fine Alstom, A French Company, For Bribery Not In The US?*, FORBES (Dec. 22, 2014) *available at* http://www.forbes.com/sites/timworstall/2014/12/22/isnt-it-strange-that-the-us-gets-to-fine-alstom-a-french-company-for-bribery-not-in-the-us/.

[18] Thomas O. Barnett, Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, *Antitrust Update: Supreme Court Decisions, Global Developments, and Recent Enforcement*, (Feb. 29, 2008) *available at* http://www.justice.gov/atr/public/speeches/230627.htm.

[19] Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, *Competition policy and the global economy* (7 March 2014), *available at* http://europa.eu/rapid/press-release_SPEECH-14-192_en.htm.

even more simple solution, and simple is usually better, would be for the U.S. parent to make purchases if it does not want to have to seek antitrust remedies under the laws of the country in which its subsidiary is are operating.

V. CONCLUSION

The FTAIA is an ambiguous and confusingly written statute. It has proven difficult for courts to apply, and interpretation of the FTAIA seems to turn as much on policy considerations as statutory interpretation. The policy concerns expressed above are not the only policy considerations that are relevant to determining the extraterritorial reach of the Sherman Act. For example, there is legitimate concern that U.S. companies need to have foreign subsidiaries, and they may be subject to collusion without adequate recourse. But, there is an increasing trend towards extending damage remedies. It may be that having companies live with the remedies of the country in which they set up shop and make purchases is the best overall option for continued increased prevention, detection, and prosecution of international cartels.

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Extraterritoriality and Input Cartels:

Life in the Global Value Lane—The Collision Course with *Empagran* and How to Avert It

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Extraterritoriality and Input Cartels
Life in the Global Value Lane: The Collision Course with *Empagran* and How to Avert It[1]

I. INTRODUCTION

There is a looming danger that judge-made exceptions from U.S. antitrust law for foreign conduct are swallowing the proscriptions of the Sherman Act against modern-style international cartels. The danger has raised its head in the context of input cartels and, in particular, in the case of *Motorola Mobility v. AU Optronics* in the Seventh Circuit[2] and its sister cases in other circuits. The danger stems from a wrong move of the Supreme Court in *Empagran*,[3] which has laid a path that misframes analysis of the Sherman Act's reach. The danger is not laid to rest by Judge Posner's revised opinion in *Motorola Mobility*, for Judge Posner repeats the error by finding that the very same conduct that is within the subject matter jurisdiction[4] of U.S. courts when the federal government is the plaintiff may be dismissible as beyond the reach of the Sherman Act when a private party is the plaintiff.

To explain the Supreme Court's error, I revert to pre-*Empagran* analysis of both the *Motorola* facts and the *Empagran* facts. I then show that the governing statute—the FTAIA—was meant to be a subject-matter-jurisdiction statute and one favoring suits by injured Americans, not a standing statute and one cramping the options of American victims of foreign acts. Finally, I highlight the Supreme Court's error and suggest how to correct it short of statutory revision.

II. THE FACTS: *MOTOROLA MOBILITY* AND *EMPAGRAN*

Why is it that the *Empagran* plaintiffs should be out of court on jurisdictional grounds but Motorola should not? I shall first juxtapose the facts of *Empagran* as the Supreme Court assumed them to be, and the facts of *Motorola Mobility*. Allow me license to omit geography in the first instance, and to back into it.

Motorola makes and sells cell phones. It purchases parts and assembles them into cell phones, and it sells the cell phones in the United States and elsewhere. It turns out that the makers of an essential component—liquid crystal display ("LCD") panels—had a price-fixing conspiracy. Can Motorola successfully sue the price-fixers? Of course. This is a quintessential cartel damages case.

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[1] Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. This article is a revision of a previous article, published in September 2013, revised to reflect *Motorola II*. *See* Eleanor Fox, *Extraterritoriality and Input Cartels: Life in the Global Value Lane: The Collision Course with Empagran and How to Avert It,* 9(2) CPI JOURNAL (September, 2014).

[2] Motorola Mobility LLC v. AU Optronics Corp. (*Motorola I*), 746 F.3d 842 (7th Cir. Mar. 27, 2014), opinion vacated (7th Cir. July 2014); *Motorola II* (7th Cir. Nov. 26, 2014, amended Jan. 12, 2015).

[3] F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

[4] This essay uses "jurisdiction" and "subject matter jurisdiction" interchangeably with "reach of the Sherman Act" because that is the usage in the legislative history of the Foreign Trade Antitrust Improvements Act of 1982 ("The FTAIA").

A quarter century ago, Motorola would have purchased the inputs from U.S. manufacturers. But times have changed. The world has globalized. U.S. manufactures have declined exponentially as a percentage of GDP. Motorola, like other U.S. businesses, faces intense pressure from global competition. To be, and to remain, competitive, it must scour the world for best execution—which commonly means outsourcing parts and assembly to Asian locations, thus organizing a global value chain, and thus incidentally helping to interconnect the world's economies. In the 21st century, global value chains are a usual way of doing business.

Admitted to the chain, the parts' makers know that they are making the parts for assembly into products that will be shipped to the brand manufacturer; the Motorola parts makers know that they are making parts for the Motorola cell phone. If the parts' makers at the top of the global value chain conspire with their rivals to fix prices, their price-fixing agreement is like a bullet straight through to the phone buyer's purse.[5]

So, in the real *Motorola Mobility* case, the LDC panels were made in Korea, Japan, China, and Taiwan. Despite the clear illegality of the conduct in their country, in the destination country, and in almost every other country of the world, these manufacturers conspired to raise prices. They sold the panels, at prices negotiated by Motorola, to Motorola subsidiaries in China and Singapore. The Motorola subsidiaries shipped 42 percent of the assembled cell phones to Motorola-U.S. for sales in the United States and abroad. They sold 57 percent of the panels directly to buyers abroad. Motorola-U.S. bought 1 percent of the panels directly from the manufacturers (and everyone agrees, as they must, that the Sherman Act applies to the 1 percent). Does Motorola lose 99 percent of its cause of action under the Sherman Act as a matter of subject matter jurisdiction because it buys and assembles parts through its global value chain?

Now we turn to the *Empagran* facts as assumed (it turned out, inaccurately) by the U.S. Supreme Court: There were world conspiracies, largely of European and Asian firms, to fix the price of vitamins. Price-fixing abroad caused foreign injury abroad. (Implicitly, other vitamin price-fixing conspiracies harmed the U.S. market.) Distributors from Ukraine, Ecuador, Paraguay, and Australia bought price-fixed vitamins in markets abroad. Did the U.S. court have subject matter jurisdiction under the Sherman Act? No; post-*Empagran*, pre-*Empagran*, and pre-FTAIA.[6] The United States had no interest in protecting these foreign plaintiffs against the foreign defendants for a foreign conspiracy (unless the United States would, altruistically, take the mantle of a world court for antitrust, which it never has done).

The Supreme Court gave plaintiffs leave to replead to show that the foreign injury was not independent from U.S. effects of a vitamins conspiracy. Plaintiffs did so replead. But even so,

[5] Compare the famous *Lotus* case, which formed the foundation for acceptance of the effects doctrine under international law: the negligent careening of a Turkish ship into a French ship on the high seas was equivalent to a bullet shot from one national territory into another. S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (Permanent Court of International Justice).

[6] This is the statute that, defendants claim, made a revolutionary cut-back in the reach of the Sherman Act. It is the Foreign Trade Antitrust Improvements Act of 1982, Title IV of The Export Trading Company Act, 15 U.S.C.A. § 6a and § 45(a) (3). Title IV clarified that conduct that harms solely foreign markets is not caught by the Sherman Act or Federal Trade Commission Act. *See* point V *infra*.

the plaintiffs' harm was not proximately related to the U.S. cartel-related harm, and the lower courts dismissed the case on the remand.

III. BACK TO BASICS

I present the framework for analysis pre-*Empagran*, even including post-FTAIA, regarding the reach of the Sherman Act. The framework is based on the following goal regarding foreign-related offenses: We want to protect our citizens/residents/businesses from antitrust violations, from wherever launched, without interfering unreasonably with choices our trading partners make to regulate their own economies.

We (Americans) want to avoid unreasonable interference with foreign sovereign choices. Why? Both as part of a reciprocal compact—to protect our sovereignty when the tables are turned;—and to avoid action that will interfere with our foreign relations.

The framework is composed of two sets of questions:

1. Does the United States have a stake in reaching the impugned conduct?[7] (often stated in terms of effects on U.S. commerce). It clearly does if the conduct is price-fixing into the U.S. market. It clearly does not if the conduct is price-fixing abroad by foreigners who hurt foreigners and only foreign market competition (the *Empagran* facts as presumed by the Supreme Court).

   The early cases after enactment of the FTAIA drove home the point that the Sherman Act does not follow American firms into foreign markets. The United States has no business regulating American business in foreign markets whose conduct does not impact U.S. markets. Such regulation is a handicap on U.S. firms and on U.S. competitiveness (the main point of the FTAIA). Thus, Pfizer's distribution system in Europe for the European market was not proscribed by the Sherman Act even if it would have been illegal if adopted in the United States.[8] The FTAIA overturned the handful of cases that violated this principle.[9]

2. If the United States has a legitimate stake in enforcement, we reach the comity questions: Are the links with, and interests of, involved foreign nations stronger than the links with and interests of the United States? If so, the Sherman Act does not reach the conduct.[10] The answer is virtually always no if the United States has a significant stake and thus an antitrust interest to exonerate.[11]

Even if the United States has a legitimate stake in regulating the conduct, and even if there is no foreign sovereign claim of such weight that it would trump the Sherman Act, various

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[7] *See* Eleanor Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is Reasonableness the Answer?*, 19 NYU J. INT'L L. & POLITICS 565 (1987).

[8] Eurim-Pharm GmbH v. Pfizer, Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984).

[9] *See* John F. Bruce & John C. Peirce, *Understanding the Export Trading Company Act and Using (Or Avoiding) Its Antitrust Exemptions*, 38 BUS. LAWYER 975, 987 (ABA May 1983).

[10] *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976), applying a test that was in part jurisdictional and in part speaking to the discretion of the court.

[11] Fox, *supra* note 7 at 576-77.

defenses would be available. Thus, on the *Empagran* facts, if the case were not dismissed for lack of jurisdiction over the subject matter of the claim, the case would probably have been dismissed because plaintiffs' injury was not proximately caused by conduct related to the U.S. cause of action.[12] The foreign plaintiffs would have had no standing to sue the foreign defendants under the Sherman Act.[13]

If there were a U.S. interest, would there have been a legitimate, weighty foreign sovereign counterweight in *Empagran*? First, there was nothing to countervail; the United States had no interest in hosting these suits by foreigners against foreigners for a foreign conspiracy that hurt foreign markets wholly independent from U.S. effects. It would take next to nothing on the foreign side of the scale to tilt the scale towards a pro-foreign balance of interests. But tellingly, in *Empagran*, none of the involved foreign sovereigns—Ukraine, Ecuador, Australia, and Panama—even came forward to declaim interference. Ecuador, which then had no antitrust law, would surely have been delighted for their nationals to have a vehicle to recover their losses. The nations on whose behalf amicus briefs were filed—including the United Kingdom, Germany, and Japan—expressed the concern that a U.S. enforcer-for-the-world would undermine establishment of their own private enforcement systems, and would also undermine their leniency programs by deterring whistleblowers, who would be immediately called to account for the damages they caused and for which they would all the more certainly have to pay—creating great liability for their firms.

Since the United States had no stake in exercising jurisdiction, it was an easy shot for the Supreme Court to nod to foreign concerns and disavow U.S. ambition to become antitrust enforcer for the world.

IV. WHOSE EXTRATERRITORIALITY IS IT?

But where the United States *has* a significant stake in protecting its firms from price-fixing on inputs destined for the U.S. market, why wouldn't these foreign sovereign arguments amount to no more than: We live in an increasingly interdependent world and enforcement by one nation causes ripples across the seas? In cases of real U.S. stakes, as in *Motorola*, the claim of "extraterritoriality" has a hollow ring. Whose extraterritoriality is it? That of the United States, which seeks to protect its citizens/residents from the culprits, wherever they might be? Or that of the culprits' home nation, which, by insulating its firms if it can from the consequences of their out-bound-directed conduct (which is illegal at home and abroad),[14] puts costs on the harmed nation, its businesses, and in consequence the citizens of the world? The insight of the Coase

[12] Compare Empagran S.A. v. F. Hoffmann-LaRoche Ltd., 417 F.3d 1267 (D.C. Cir. 2005), cert. denied, 546 U.S. 1092 (2006), asking whether the effect of the vitamin cartel in the United States proximately caused the foreign plaintiffs' injuries.

[13] The FTAIA meant to clarify this result. See Bruce & Peirce, *supra* note 9 at 983 et seq.

[14] There is no claim that the United States, by applying its anticartel law, interferes with Taiwan's prerogative to regulate its own economy. This is a far cry from the days of *Alcoa* when trading partners could claim that the United States was an outlier in prohibiting cartels and they had made a different regulatory choice. It bears noting that even where cartelists' home nations make a different regulatory choice, the offending firms are not automatically excused for their outbound cartel that violates the law of the importing country. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

theorem is relevant: cause is reciprocal.[15] Does U.S. law cause AU Optronics and Taiwan harm, or does AU Optronics and Taiwan cause the United States (and the world) harm?

Not only would enforcement of the Sherman Act against input cartels in global chains intuitively not interfere with U.S. foreign relations, but the United States filed an amicus brief in *Motorola* to say so[16] and to sound the alarm that the cut-back urged by defendants and endorsed by the district court and the first (vacated) opinion of the Court of Appeals for the Seventh Circuit threaten to deeply undermine the U.S. imperative to reach offshore cartels that hurt the United States.[17] *Motorola II*, granting a reprieve for federal government plaintiffs on the basis of a convoluted construction of the FTAIA, merely silences the federal government by satisfying it; the new opinion does not cure the error.

V. THE FTAIA AND WHAT IT MEANT TO DO

The FTAIA was not a foreign cartelists' benefit act. In fact, it was meant to help American business. As Chairman Peter Rodino, co-sponsor of the legislation, said as he opened hearings before the House of Representatives Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary on March 26, 1981:

> H.R. 2326 [the FTAIA] would amend the Sherman Act and the Clayton Act to remove . . . any unnecessary barriers to export trading by U.S. firms. At the same time, it would continue to provide antitrust protection for American consumers and competitors.[18]

Shortly after the legislation's passage, an American Bar Association journal published a thorough analysis of the legislation, its history, and intended effects. The article echoes Chairman Rodino's statement:

> The main purpose of the title IV amendments [namely, the FTAIA] is to codify the jurisdictional reach of the Sherman and FTC Acts. As the House Judiciary Committee put it, the objective of the amendments is "freeing American-owned firms that operate entirely abroad or in United States export trade from the possibility of dual and conflicting antitrust regulation." Where conduct by foreigners in foreign countries is concerned, these amendments may clarify the law, but do not appreciably change it.[19]

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[15] *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

[16] *See* Supplemental Brief for the United States as Amicus Curiae, Motorola Mobility LLC v. AU Optronics Corp., Court of Appeals for the Seventh Circuit, June 27, 2014.

[17] The fears of the U.S. Solicitor General were confirmed. AU Optronics and two of its executives filed petitions with a view towards setting aside their criminal convictions for price fixing the LCD panels. They sought a rehearing before the full Court of Appeals for the Ninth Circuit, questioning among other things the applicability of the Sherman Act to their (foreign) conduct in view of the FTAIA.

[18] Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary House of Representatives, 97th Cong. 1st Session on H.R. 2326, Foreign Trade Antitrust Improvements Act, p. 1. (March 26, 1981). The bill was also meant to clarify the law by making clear that the Sherman Act does not reach harm that infects solely foreign markets. As I testified at the opening hearing on the Rodino bill:

> The bill, as I understand it, is intended to make two things clear: First, that the U.S. antitrust laws do not protect foreign consumers against breakdown of competitive conditions in foreign countries; and, two, the U.S. antitrust laws do not protect foreign producers against loss of competitive opportunities in foreign countries. *Id.*, p. 27.

[19] Bruce & Peirce, *supra* note 9 at 980.

The main advocates for the legislation were small- and middle-sized exporters and their champion, U.S. Secretary of Commerce Malcolm Baldrige, who was the first witness at the hearings and who was concerned about loss of competitiveness of American business. The U.S. exporters feared application of the Sherman Act to their export associations. They worried that U.S. law would follow them in foreign commerce, and they wanted clarity that it would not. Two bills were introduced into Congress; one in the House of Representative and one in the Senate, and there ensued a sort of race.

The Senate bill got there first. This bill was regulatory. It provided for a process for a certificate of review for exporters who filed with the Commerce Department and the U.S. Federal Trade Commission ("FTC') and whose proposed conduct or association was not anticompetitive or unfair as to the United States. By rights, this legislation should have replaced the Webb-Pomerene Act, which gives exporters who file with the FTC immunity from U.S. antitrust for harms abroad, but the existing Webb-Pomerene associations objected to a sunset because they drew comfort from the strong Webb-Pomerene name.

The other bill became what we now know as the FTAIA. It was designed to clarify the reach and limits of the Sherman Act, particularly to remove the chill on U.S. exporters, but without creating the new bureaucracy involved in filing for a certificate. It made clear that the Sherman Act does not cover export associations and other restraints as long as they harm only foreign markets. The bill was intended to protect the interests of Americans; clearly not to make them impotent to defend their interests when exploited by foreign cartels.

After the export-certificating bill was passed, there was a question whether the House Bill was any longer necessary; but its sponsor, Peter Rodino, was committed to the non-regulatory solution and ushered his bill through the House.[20] Both bills passed the Congress, and both are titles in the Export Trading Company Act of 1982. The certificating bill is Title III. The non-regulatory solution (the FTAIA) is Title IV.

VI. WHERE *EMPAGRAN* WENT WRONG (ALTHOUGH IT WAS A HARMLESS ERROR IN *EMPAGRAN*)

The Supreme Court disposed of the *Empagran* case by an interpretation of paragraph (2) of the FTAIA. Paragraph (2) must be read in the context of both paragraphs (1) and (2). The statute provides that, for commerce other than import commerce, (1) the Sherman Act shall not apply to conduct involving commerce with foreign nations unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on import trade or commerce or the export trade of a person engaged in such trade in the United States, and "(2) such effect gives rise to a claim under the provisions of [the Sherman Act or FTC Act §5 (a)], other than this section."[21]

The Supreme Court in *Empagran* viewed the FTAIA as sweeping all conduct involving foreign commerce (other than imports) out of the reach of the Sherman Act, and then drawing back only the confined class that fits within paragraphs (1) and (2). Thus, Sherman Act coverage

[20] *See* Bruce & Peirce, supra note 9 at 977-78; Fox, *supra* note 7 at 577-79.

[21] Section 5 (a) (1) of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce . . . ." The FTAIA adds subsection 3 to Section 5 (a) of the FTC Act. Subsection (3) (B) requires: "such effect gives rise to a claim under the provisions of this subsection, other than this paragraph."

of conduct involving foreign commerce would be an exception to the rule. Second, the Court focused on paragraph (2).

Under paragraph (2), the "direct, substantial and reasonably foreseeable effect" of the conduct on U.S. domestic or export commerce must "give[ ] rise to a claim" under Section 1 or 2 of the Sherman Act or Section 5 (a) (1) of the Federal Trade Commission Act. For a cartel having the effect of raising prices in the United States, the effect must (and would) give rise to a violation of Section 1 of the Sherman Act. But suppose an export joint venture of small firms excludes another firm, and the jilted firm cries "boycott!" Or suppose an export joint venture creates efficiencies and destroys an inefficient competitor.[22] Is there "an effect" on U.S. commerce? Yes; but not an anticompetitive effect. As explained by Bruce & Peirce:

> The effect conferring jurisdiction . . . must "giv[e] rise to a claim" under the provisions of the Sherman or FTC Acts. The House Judiciary Committee was most concerned that *beneficial* effects on U.S. interstate commerce—for example, an increase in profitability or employment—should not create antitrust jurisdiction.[23]

In *Empagran*, the Supreme Court misconstrued the plain meaning of paragraph (2). It changed the word "a" claim to "the" claim; that is "the [plaintiff's] claim." It then said that the off-shore cartel's U.S. effect (price rise of vitamins in the United States) did not give rise to the Ecuadorians' and Ukrainians' having to pay an overcharge on the vitamins they bought abroad, and therefore their case failed to meet the requirements of paragraph (2) and was not covered by the Sherman Act.

This was a big error of construction. The *effect* of a violation in the United States never gives rise to a reasonably proximate antitrust injury to a foreigner. If, for example, the Wildenstein Art Gallery, as a result of the Christie-Sotheby trans-Atlantic price-fix, paid an overcharge on a Rembrandt that it bought at Sotheby's in London, it was injured by the conspiracy, not by the overcharge of paintings in New York.[24]

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[22] Since the FTAIA retained subject matter jurisdiction in the case of harm to the export business of an exporter from the United States, it was especially important to clarify that the FTAIA itself did not create a cause of action; the exporter—and any other Sherman Act plaintiff—must be able to state a cause of action based on Sherman Act §§ 1 or 2, and the FTC must be able to make out a cause of action under Subsection 5 (a) (1) of the FTC Act.

[23] *Id*. at 986 (footnotes omitted). *See* also Brief of Amici Curiae Legal Scholars (Professors Harry First & Eleanor Fox) in Support of Respondents, F. Hoffmann-LaRoche Ltd. v. Empagran, S.A., No. 03-724, pp. 5-10.

[24] I have mentioned in the text only two of the seven interpretative reasons or factors (even apart from the major policy objectives of deterrence and compensation) that demonstrate the Court's error in reading "a claim" as "the plaintiff's claim." The seven are:

1. The language of the statute is clear in the relevant respect.
2. The Court's construction creates a null category.
3. The statute clearly concerns jurisdiction over the subject matter of the action; it does not relate to who sues to challenge the conduct. The words "subject matter jurisdiction" are repeated throughout the legislative history.
4. The title (FTAIA) is a title of the Export Trading Company Act. The statute is about export trading and competitiveness.
5. Congress understood that the FTAIA of 1982 did nothing to help foreign firms escape from Sherman Act liability if their conduct had a significant effect on U.S. commerce. Three years later, Senator Dennis DeConcini introduced the Foreign Trade Antitrust Improvements Act of 1985—a bill that never passed.

The FTAIA was clearly meant to be jurisdictional; the legislative history continually says so. It was meant to identify what conduct, although foreign, was within the reach of the Sherman Act. The FTAIA did not define the substance of a violation. Much less did the FTAIA involve itself with rules of standing or whether an indirect purchaser could sue. Under the FTAIA, the Sherman Act reaches the cartel in Taiwan of inputs designed for the U.S. market. Still, it is possible that Motorola might not have been injured or might have been barred by *Illinois Brick*. These are issues for another day.

The construction was harmless error on the *Empagran* facts because the plight of the Ecuadorians and Ukrainians had no reasonable connection with the U.S. violation. But it was a bomb waiting to explode in a case such as Motorola's.[25]

VII. HOW TO CORRECT THE ERROR

There were two errors of the Court in *Empagran*; one general and one specific. The first was identifying a foundational perspective of inhospitality, by reason of the FTAIA, to the Sherman Act's reach of foreign-related conduct. The second is the re-writing of paragraph (2) to replace "a claim" with "the claim"—i.e., the plaintiff's claim.

I shall first say a word about the specific error: the wrong construction of "gives rise to a claim." How can the harm be ameliorated? Courts should limit the *Empagran* interpretation of paragraph (2) to facts such as in *Empagran* where on the face of the matter the connection with U.S. commerce is attenuated. In all other cases, courts should recognize that the *Empagran* construction nullifies the foreign commerce reach of the Sherman Act except in the diminishing

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This bill was designed to respond to complaints of foreign firms about private actions against them. It would have facilitated early dismissal of such private actions on grounds of lack of subject matter jurisdiction. *See* Hearings Before the Committee on the Judiciary United States Senate, 99th Cong. 1st Session on S. 397, to Amend the Sherman Act and the Clayton Act to Modify the Application of Such Acts to International Commerce (June 21 and October 15, 1985).

6. To the best of my knowledge, all of the interpretations following adoption of the FTAIA, and for two decades thereafter until *Empagran,* gave the language its plain meaning. The consensus understanding immediately after a law is passed would seem to be more credible than a (revolutionary) construction 20 years later.
7. The Court's construction, by focusing on the particular private plaintiffs' Sherman Act claims, ignores the parallel language amending the FTC Act. There is no private right of action under the FTC Act. Therefore the same words in the parallel FTC amendment would do no work.

[25] Judge Posner compounds the error of construction in *Motorola II*. Declaring Motorola's case dismissible under the FTAIA but government enforcement actions "safe," he, incredibly, interprets paragraph (2) as follows:

> It is essential to understand that these are two requirements. There must be a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce – the domestic American economy, in other words – *and* the effect must give rise to a federal antitrust claim. The first requirement, if proved, establishes that there is an antitrust violation; the second determines who may bring a suit based on it.

Quite to the contrary, the first requirement, "effect," means only that there must be a sufficient effect *on commerce*. The language does not require an anticompetitive effect, much less an "antitrust violation." The second requirement – the effect on U.S. commerce must give rise to a claim under a section of the Sherman Act other than the FTAIA (which is Section 7 of the Sherman Act) simply means that the FTAIA does not create any new substantive claims; the plaintiff must state a claim under Section 1 or 2 of the Sherman Act, such as price-fixing. *See* text at n. 23. Since the conduct was price-fixing, the second requirement was clearly met. Price-fixing states a claim under Section 1. The only contendable jurisdictional issue was the directness of the effect on U.S. commerce.

set of cases of direct imports of price-fixed goods[26]—the category expressly outside of the operation of the FTAIA.

Had the *Motorola* facts come to the Supreme Court before the *Empagran* facts, the Court may well have avoided its erroneous construction of paragraph (2) because it would then have been forced to confront the consequences of the construction as applied to a legitimate Sherman Act case by an American firm targeted by an off-shore cartel. Courts can satisfy the spirit of the Supreme Court's construction of paragraph (2) by requiring that the plaintiff's cause of action be proximately related to the effect of the impugned conduct on U.S. commerce.

The general error is the Supreme Court's perspective on the FTAIA. The Court wrongly detected, or more accurately injected, a Congressional stance of hostility to Sherman Act coverage of foreign acts. There clearly was none, especially when it comes to exposing U.S. firms to antitrust harms. The general stance of hostility threatens to skew the interpretation of the requirement of "direct, substantial, and reasonably foreseeable effects" on U.S. commerce.

I propose that courts should not extend the stance of inhospitality to claims by Americans injured by acts destined to affect the U.S. marketplace. "Direct, substantial and reasonably foreseeable" merits a flexible interpretation sympathetic to the protections of antitrust. It is properly treated, as it was before *Empagran*, as an iterative phrase.[27] The more foreseeable is a harm, the less direct must be the line between cause and effect, as in the application of proximate cause in torts.[28] Thus, the contextual interpretation of "direct" in the Seventh Circuit's decision *Minn-Chem*[29] and the Second Circuit's decision in *Lotes*[30]is much more faithful to the law than is the de-contextualized interpretation of "direct" in the district court and vacated court of appeals decisions in *Motorola*.[31]

VIII. CONCLUSION

U.S. law is in danger of creating a void in the reach of U.S. antitrust law to reprehend anticompetitive acts by foreigners abroad destined to raise the price of goods and services to U.S. consumers. *Motorola*, the input-cartel global-value-chain case is a test case. It is no wonder that, in its first and now vacated decision, the panel was misled by the *Empagran* Court's failure to appreciate the pedigree of the FTAIA. After *Motorola II*, it still remains to be seen if a future

[26] Diminishing because of the growth of global value chains and because price-fixers are generally too smart to sell their rogue goods directly into the United States. *See* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845 (7th Cir. 2012).

[27] *See* Mannington Mills, *supra* note 10; Timberlane, *supra* note 10; U.S. Department of Justice and FTC Antitrust Enforcement Guidelines for International Operations (April 1995) at 3.121.

[28] *See*, e.g., Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955).

[29] *Supra* note 27.

[30] Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395 (2d Cir. 2014).

[31] The opinion of the Seventh Circuit in *Motorola II* steps back from its earlier decontextualized interpretation and says, "We'll *assume* that the requirement of a direct, substantial and reasonably foreseeable effect on domestic commerce has been satisfied …." (Emphasis added.) Can we infer that the "assumption" is a reluctant concession triggered not by an epiphany on the meaning of "direct" but by a strategy to satisfy the federal government's concern that, under a narrow construction of "direct," it too would be barred from a critical mass of international enforcement?

court realizes the opportunity to move the law in a direction that carries out the Congressional mandate and meets the needs and economic circumstances of the 21st century.

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The Comity-Deterrence Trade-off and the FTAIA: *Motorola Mobility* Revisited

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The Comity-Deterrence Trade-off and the FTAIA: *Motorola Mobility* Revisited

Joseph E. Harrington, Jr.[1]

I. INTRODUCTION

The Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. §6a states that the Sherman Act "shall not apply to conduct involving trade or commerce … with foreign nations." but provides some exceptions to that rule. The exception of relevance in *Motorola Mobility*[2] is that foreign companies are liable under the Sherman Act when their conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce and "such effect gives rise to a claim under [the Sherman Act]."

The case at hand involves a cartel of foreign manufacturers of liquid crystal display ("LCD") panels used in mobile phones. In the initial decision written by Judge Richard Posner,[3] the LCD manufacturers were found not liable partly because their conduct did not have a "direct" effect and thus did not fall into the above-stated exception to the FTAIA. After vacating the decision and retrying the case, the Seventh Court expanded their view of what it means for an effect to be "direct," concluded the effect was probably direct, but again ruled against Motorola on the grounds that they lacked antitrust standing.[4] Thus, the Court's decision supports the government's prosecution—as its legitimacy only requires the presence of a "direct, substantial, and reasonably foreseeable effect"—but not Motorola's litigation, which also requires that it be entitled to relief.

In my earlier paper,[5] the focus was on providing criteria with which to judge whether conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and left untouched the issue of standing. I turn to that issue here.

II. THE SEVENTH CIRCUIT'S RE-EXAMINATION OF "DIRECT" EFFECT

However, prior to doing so, let me comment on the change in the Seventh Circuit's assessment of whether the LCD cartel had a "direct" effect. From its original decision:[6] "The effect of component price fixing on the price of the product of which it is a component is

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[2] *Motorola Mobility*[2] *LLC v. AU Optronics*, No. 14-8003, (7th Cir.; Mar. 27, 2014 - decision vacated; Nov. 26, 2014)

[3] *Motorola Mobility LLC v. AU Optronics*, No. 14-8003, (7th Cir.; Mar. 27, 2014)

[4] *Motorola Mobility LLC v. AU Optronics*, No. 14-8003, (7th Cir. Nov. 26, 2014)

[5] Joseph E. Harrington, *Motorola Mobility and the FTAIA: A Deterrence-Based Definition of 'Direct' Effect*, 9(1) CPI ANTITRUST CHRON., (September, 2014); hereafter referred to as "Harrington (2014)."

[6] *Motorola Mobility (*Mar. 27, 2014), *supra* note 3.

indirect." The view in the more recent decision is:[7] "If the prices of the components were indeed fixed, there would be an effect on domestic U.S. commerce. And that effect … might well be direct rather than 'remote'."

Though I support this more expansive view of "direct" effect, the Court continues to take an *ad hoc* approach to the matter, rather than adopting a framework within which to judge whether or not an effect is direct. As I previously argued,[8] focusing on what it means to be "remote"[9] or of "immediate consequence"[10] or "reasonably proximate"[11] does not bring us any closer to a useful definition in that each term is as ill-defined as the preceding one. What is lacking is a guiding principle for determining whether an effect is "direct."

The approach I proposed is grounded in the perspective that the FTAIA is trying to balance respect for a country's sovereignty with the protection of U.S. commerce which, in the current context, requires the deterrence of anticompetitive conduct. The key implication of that approach can be most concisely stated as follows: If, by making unlawful the causal mechanism by which foreign firms' conduct resulted in harm to U.S. commerce, those foreign firms might have been deterred from that conduct then that conduct should be considered to have had a "direct, substantial, and reasonably foreseeable effect."[12]

III. SETTING UP THE COMITY-DETERRENCE TRADE-OFF

Turning to the issue of antitrust standing in the more recent decision, the most striking absence in the Seventh Circuit's analysis is the lack of adequate consideration of how it would impact the disabling and deterring of collusion; the focus is almost entirely on comity. Using a superficial but not irrelevant metric, the Court mentioned "comity" six times in its decision, while only once did they use a word with the root "deter" (and it was not used in arguing the Court's conclusions). The problem with this decision is less that Motorola does not have standing and more that an evaluation of who should have standing is divorced from the issue of harm.

That the disabling and deterring of cartels should be balanced against comity is clear from the FTAIA. They could have left import commerce as the lone exception, but they did not. They created an exception whereby a U.S. entity is unlawfully harmed even though it did not directly purchase from a foreign cartelist (for if it was a direct purchaser then it falls under the import commerce exception). Such an interference in comity can only be rationalized from the perspective of preventing harm to U.S. commerce.

More specific to the issue of standing, the prohibition on indirect-purchaser suits in *Illinois Brick*[13] is predicated on serving the goal of deterrence. In considering the relevance of that decision to *Motorola Mobility*, one should not focus on indirect purchasers lacking antitrust standing under *Illinois Brick*—which might suggest that Motorola should not be entitled to

[7] *Motorola Mobility* (Nov. 26, 2014), *supra* note 4.
[8] Harrington (2014), *supra* note 5.
[9] *Minn-Chem, Inc. v. Agrium, Inc.,*" 683 F.3d 845 (7th Cir. June 27, 2012)
[10] *United States v. LSL Biotechs*., 379 F.3d 672, 680 (9th Cir. 2004)
[11] *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, No. 13-2280 (2nd Cir., June 4, 2014)
[12] For details, *see* Harrington (2014).
[13] *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977).

relief—but rather on the *rationale* for indirect purchasers not having standing. It is not that direct purchasers are more entitled to compensation than indirect purchasers—indeed, in many cases with a high cost pass-through rate, indirect-purchaser harm greatly exceeds that of direct purchasers—but rather that deterrence is better served. The Seventh Circuit notes that "[t]his may result in a windfall for the direct purchaser, but preserves the deterrent effect of antitrust damages liability while eliding complex issues of apportionment."[14] Though recognizing the objective of deterrence in the U.S. Supreme Court's determination of who should have standing, the Seventh Circuit failed to draw on that same objective in its determination of who should have standing under the FTAIA.

The implication of this omission is that the Seventh Circuit is short-circuiting the ability of U.S. purchasers harmed by foreign cartels to bring suit, which runs contrary to the long-recognized role of private litigation:[15]

> Congress enacted the treble-damages remedy of [Clayton Act] § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources to the Department of Justice for enforcing the antitrust laws and deterring violations.

However, just because it is more difficult to bring private suits, it does not follow that antitrust enforcement is significantly hampered, especially given that the government has many instruments to enforce Section 1 of the Sherman Act. To be clear, this is exactly the type of analysis that needs to be conducted. The FTAIA does not say "comity above all else" but rather has implicit in it a trade-off between the sovereignty of foreign nations and the right of U.S. consumers not to be harmed through anticompetitive conduct. So, how critical are private suits to this cause?

IV. THE POTENTIAL HARM CREATED BY THE SEVENTH CIRCUIT'S DECISION

Public and private antitrust enforcement can shut down existing cartels and deter future cartels from forming by influencing both the likelihood that a cartel is discovered and convicted and the extent of penalties brought to bear on convicted cartels. The higher is that likelihood, the more likely is the spigot of harm to be shut off. The higher is that likelihood and the more severe are the penalties, the more likely that firms will be deterred from ever turning the spigot on. If we take private damages out of the equation, how much is the disabling and deterring of cartels impacted?

In addressing that question, let us first consider the scenario in which, if there is a cartel, the government were to prosecute it. Presuming that they obtain a conviction, the cartel will be shut down and thus serve the objective of *disabling* cartels. However, the lack of private suits weakens the objective of *deterring* cartels as penalties are limited to jail time and government fines and lack potentially sizable private damages. It is well-recognized that current penalties—even with private damages—are very likely to be insufficient to deter. As this point is well-argued

[14] *Motorola Mobility* (Nov. 26, 2014), *supra* note 4.

[15] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (emphasis in original)

in a recent *Amicus Curiae* Brief[16] and the point is not new, I will not dwell on it. Suffice it to say that the Court's decision to prohibit companies like Motorola to sue will undoubtedly reduce the penalties levied on cartels and, because the full array of penalties are currently inadequate to deter many cartels, will contribute to antitrust enforcement further falling short of what is require to achieve the goal of deterrence.

The preceding analysis was predicated on the critical assumption that the government prosecutes the cartel, but this may not occur for two reasons. First, the government may be unaware of the cartel's existence. Lacking the right to bring a private case, cartels are less likely to be discovered because those harmed have weaker incentives to monitor for collusion. Nevertheless, they still do have some incentive to monitor and report a suspected cartel to the government in order to disrupt the harm that is being inflicted upon them. It is then unclear whether the loss of antitrust standing will substantively weaken the incentive to monitor to the point that it warrants interfering with comity.

Of greater relevance is the second reason for the lack of public enforcement, which is that the government suspects unlawful collusion but *chooses* not to litigate. The Antitrust Division of the U.S. Department of Justice ("DOJ") has limited resources, which means all possible cases cannot be pursued. Furthermore, the presence of a resource constraint impacts the type of cases that are pursued. These days, the DOJ's caseload is heavily oriented to cases involving the leniency program but not all forms of collusion lend themselves to a firm receiving amnesty. A member of a hard-core cartel engaged in a *per se* offense can expect to receive leniency if it is the first to come forward but there are many cases of collusion that do not involve behavior that is *per se* unlawful. Given the lower threshold for a conviction in a civil case, private litigation has been, and will continue to be, essential in prosecuting these less flagrant, but no less harmful, forms of collusion.

While it is difficult to document case selection by the DOJ, there is certainly evidence consistent with it being a substantive factor. In noting that the DOJ obtained convictions in 92 percent of 699 cases filed over 1992 to 2008, Professors Robert Lande and Joshua Davis comment:[17]

> The DOJ appears much more willing to tolerate a false negative (a failure to prosecute a violation of the antitrust laws) than a false positive (litigating a case when in fact there was no violation). In other words, it appears the DOJ chooses not to pursue litigation in many meritorious cases, perhaps at least in part because it lacks the necessary resources. This may well create a need for private litigation as a complement to government enforcement of the antitrust laws.

In their analysis of 60 recent large private antitrust suits, Professors Lande and Davis documented that 40 percent of them were initiated by the plaintiffs (that is, they did not follow a government case).[18] By way of example, the current prosecution of the vitamin C cartel, which is

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[16] "*Amicus Curiae* Brief of Economists and Professors in Support of Appellant's Petition for Rehearing *En Banc*," (*Motorola Mobility LLC v. AU Optronics*, No. 14-8003), December 17, 2014

[17] Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, BRIGHAM YOUNG UNIV. L. REV., 315-390 at 336 (2011).

[18] Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, GEORGIA L. REV., 1-81 at 48 (2013).

composed of Chinese manufacturers, has been exclusively conducted by customers (who have antitrust standing under the FTAIA exception of "import commerce"). After eight years of private litigation, the government has yet to bring a case. In early 2013, the U.S. District Court for the Eastern District of New York found the defendants guilty and assessed damages of $54 million, which were then trebled to $162 million. As reported in *The New York Times*:[19]

> James T. Southwick, a lawyer at Susman Godfrey who represented the plaintiffs in the case, said he hoped the judgment would encourage the Justice Department to investigate Chinese cartels "and begin treating Chinese cartels the same as they treat cartels from the rest of the world."

That a cartel may be prosecuted by customers but not the government has occurred and will continue to occur.

Once private litigation is eliminated as an option, a most troubling scenario may then arise: Suspected collusion continues without interruption because the government chooses not to bring a case and, by virtue of the Seventh Circuit's decision, U.S. consumers are prohibited from bringing a case. The Seventh Circuit seems to have missed this possibility and instead focused on the contrary concern that giving Motorola standing would cause a flood of cases:[20]

> The mind boggles at the thought of the number of antitrust suits that major American corporations could file against the multitudinous suppliers of their prolific foreign subsidiaries if Motorola had its way.

This prognostication misses the mark in two ways. First, there will be a mind-boggling number of antitrust suits only if there is a mind-boggling number of cartels, in which case it is quite appropriate that our minds are boggled with litigation. Of course, plaintiffs can pursue suits lacking merit but that would not seem to be a serious concern in a post-*Twombly* world where the hurdle is high to plead a case. Second, as I have sought to argue, there is a very real concern of too few cases which not only means that cartels are less deterred but also that uncovered cartels are allowed to continue unabashed.

V. WHAT ABOUT FINAL U.S. CONSUMERS?

Just as striking as the absence of the comity-deterrence trade-off in the Seventh Circuit's analysis is any mention of final U.S. consumers. The Court speaks to Motorola's options of buying directly from foreign manufacturers (rather than through subsidiaries) or from U.S. input suppliers (if they exist) but what are the options of final consumers of cellphones? Suppose Motorola decides that, even when forced to pay collusive prices, it is better to maintain its current supply chain. Further suppose there is a high rate of cost pass-through from LCD panels to the retail price of cellphones. If the U.S. government had not brought a case (which, as argued above, is a possibility in some cases), and Motorola is prohibited from suing, then collusion persists and with it the harm to final consumers.

The scenario present in *Motorola Mobility*—a foreign cartel impacts U.S. commerce by raising the price of an input that finds itself in a product sold to U.S. consumers—is an

[19] David Barboza, *U.S. Court Fines Chinese Vitamin C Makers*, N.Y. TIMES (March 15, 2013).
[20] *Motorola Mobility* (Nov. 26, 2014), *supra* note 4.

ubiquitous one. On the centennial of the Clayton Act, the Seventh Circuit's decision is calling for a return to the pre-Clayton Act world in which the only avenue for prosecution and punishment resides in the U.S. government. While the U.S. government is certainly supplied with many more instruments in 2014 than in 1914—harsher corporate fines, longer prison sentences, the leniency program—all that is for naught if the U.S. government chooses not to prosecute. A potential safe haven has been created for some foreign cartels.

In conclusion, when it comes to interpreting the FTAIA, courts should recognize that the FTAIA established a trade-off to be considered between respecting the sovereignty of foreign nations to deal with domestic cartels as they deem fit and the right of U.S. consumers not to be harmed by cartels. The requirement that the conduct of a foreign cartel has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce sets the bar that must be met to justify interfering with comity for the reason of preventing harm to U.S. commerce. Once that effect is established (that is, the bar for intervention is met), it has been argued here that it is necessary that antitrust standing be given to *some* class of U.S. consumers in order for private enforcement to assist in making reasonably sure that this harm is discontinued and future harm is deterred.

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Judge Posner Speaks on the FTAIA:
Rejects Fermat's Principle of Least Time

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Judge Posner Speaks on the FTAIA: Rejects Fermat's Principle of Least Time

James R. Martin[1]

A few months ago, I argued that the law should employ Pierre de Fermat's "principle of least time" when applying the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") to private antitrust actions brought in the U.S. courts.[2] Fermat's principle states that a ray of light will choose a path between two points that can be traversed in the least time. The purpose of the analogy was to show that the path of least resistance to determine which victims can seek treble damages was to use long-established principles of standing rather than a twisted application of the FTAIA.

Perhaps the reference was too arcane, as one of the most recent FTAIA decisions, *Motorola Mobility LLC v. AU Optronics Corp.*, cited at length a well-written article by another practitioner titled *Repeal the FTAIA!*[3] (a sentiment with which I could not agree more) that argued the same legal principles. Perhaps a more apt analogy is this: Using the FTAIA to determine which private plaintiffs can seek treble damages for hard-core violations is like trying to pound a nail with a wrench. Sometimes it can be done, sloppily, but there are more effective tools readily available to make sure the job is done right.

In *Motorola*, Judge Posner and the Seventh Circuit perpetuated the mistaken use of the FTAIA as a tool of standing analysis. The facts in *Motorola* are straightforward. A cartel of foreign suppliers agreed to, and did, increase the prices of liquid crystal display ("LCD") panels sold in a global marketplace. LCD panels are used for, among other things, screens in cellphones.

Motorola is a U.S. company that negotiated (from its U.S. offices) a single worldwide price for LCD panels purchased by its subsidiaries around the world. Motorola's subsidiaries, most of which are located in Asia and therefore nearer to the LCD panel production facilities, issued the purchase orders and took delivery of the panels outside the United States at the negotiated prices, took delivery outside the United States, and incorporated those panels into cellphones outside the United States. The affiliates then "sold" the cellphones to their parent company in the United States at internally set transfer prices that reflected the artificially high LCD panel prices. Motorola then sold the cellphones to consumers in the United States, again at prices that reflected the effects of the conspiracy.

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[2] James Martin, *Fermat's Principle and the FTAIA: What Courts Can Learn From Optics,)*, 9(1) CPI ANTITRUST CHRON. (September 2014).

[3] Robert Connolly, *Repeal the FTAIA! (Or At Least Consider It as Coextensive with Hartford Fire)*, 9(1) CPI ANTITRUST CHRON. (September 2014).

There is no question that the conduct—the price agreement among horizontal competitors—was unlawful under the laws of the United States as well as virtually every other country that has an antitrust regime, including the countries in which Motorola's subsidiaries acquired the LCD panels. The Seventh Circuit agreed that the cartel exerted a direct, substantial, and reasonably foreseeable effect on U.S. commerce. But then the Seventh Circuit made the same mistake so many courts before it have made; it viewed the FTAIA as a tool to determine "who may bring a suit based on" the Sherman Act violation.[4]

The Seventh Circuit found that the FTAIA's import commerce exception would allow Motorola to pursue treble damages "had the defendants conspired to sell LCD panels to Motorola in the U.S. at inflated prices."[5] Apparently, that meant Defendants had to ship the LCD panels directly to the United States because the Seventh Circuit ruled that Motorola could not claim any damages if the LCD panels were delivered to foreign affiliates located near the production site for assembly into cellphones before those cellphones were transferred to Motorola in the United States for sale here.

The Seventh Circuit accepted as true an economist's finding that (1) the cartel inflated the price that Motorola paid (via its subsidiaries) to the cartelists, (2) the cartel inflated the price that Motorola in the United States paid for LCD panels as a component of the cellphones that they received from their affiliates at transfer prices, and (3) U.S. consumers paid higher prices for cellphones as a result of the conspiracy.[6]

If one understands that Congress created a private right of action for victims of antitrust violations to seek treble damages as a way to deter cartel formation, then one would expect that **someone** should be permitted to seek damages for this conduct. As the Supreme Court wrote in *Pfizer,*[7] treble damage remedies serve to deter violators, deprive them of the fruits of their illegality, and compensate victims of antitrust violations for their injuries. Denying a plaintiff injured by an antitrust violation the right to sue would defeat those purposes and permit price fixers to escape full liability for their illegal actions.[8]

Not so in the Seventh Circuit, where the Court decided Motorola must deal with the consequences of its decision to use a global supply chain rather than some less efficient method of production and delivery. If the countries in which Motorola took delivery of the LCD panels did not have adequate antitrust laws, "these are consequences that Motorola committed to accept by deciding to create subsidiaries that would be governed by the laws of those countries."[9] The Seventh Circuit treated the antitrust laws as a business tort rather than a statute grounded in public policy.

The Court then applied the *Illinois Brick* indirect purchaser rule to prevent anyone other than the first purchaser—Motorola's foreign subsidiary—from seeking treble damages. Explaining the purpose of the *Illinois Brick* rule, the Supreme Court wrote "it may result in a

[4] *Motorola Mobility LLC v. AU Optronics Corp.*, -- F.3d. --, 3015 WL 137907 at *2 (7th Cir., Jan. 12, 2015).
[5] *Id * 3.*
[6] *Id * 3.*
[7] *Pfizer, Inc.*[7] *v. Government of India*, 434 U.S. 308, 314-15 (1978).
[8] *Id* 314-15.
[9] *Motorola * 4.*

windfall for the direct purchaser, but preserves the deterrent effect of antitrust damages liability while eliding complex issues of apportionment."[10] The Court never addressed the perverse consequence of blending the FTAIA's supposed rule against foreign recovery with the *Illinois Brick* rule to deprive **anyone** of a remedy. How could that possibly preserve the deterrent effect of treble damages?

It does not. The wrench cannot pound this nail.

Consider, alternatively, how the case might be analyzed if the Seventh Circuit applied the U.S. Supreme Court's decision in *Associated General Contractors* ("AGC")[11] —the leading case on antitrust standing[12] to the facts. AGC identifies a set of factors to consider in deciding which victims of antitrust violations should be allowed to seek "the Clayton Act's rich bounty of treble damages."[13] These factors include: (1) the causal connection between the violation and the plaintiff's injury, (2) the type of harm the plaintiff suffered, (3) the directness of the plaintiff's injury, (4) whether more direct victims existed, and (5) whether the claim could create problems identifying and apportioning damages.[14] Courts may also consider notions of comity to limit interference with the laws of other countries.[15]

Note that these factors do not ask **whether** someone should be able to seek damages for a Sherman Act violation. They ask instead **which victim** is the most appropriate plaintiff. Applying these factors, one could forcefully argue that Motorola's subsidiaries should be granted standing as direct purchasers and victims of conduct that unquestionably exerted a direct, substantial, and foreseeable effect on U.S. commerce and which are the most direct victims. Alternatively, even if the foreign subsidiaries could somehow be precluded from seeking damages, the parent company would be next in line, and the next best plaintiff.

The U.S. Department of Justice ("DOJ") argued some variation of this analysis in its *amicus* briefs. Although the DOJ unfortunately took the position that the FTAIA should be used to cut off private remedies for plaintiffs located outside the United States,[16] it nevertheless argued that Courts should create an exception to *Illinois Brick* so that U.S. consumers could bring claims.[17]

Thus, the Seventh Circuit failed to add any clarity to a confused and muddled area of the law. One can only hope that the U.S. Supreme Court agrees to grant *certiorari* so that it can revisit and repair the damage done by *Empagran* and the subsequent series of cases that put the FTAIA wrench closer at hand than the hammer of standing.

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[10] *Id* * *5.*

[11] *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983)

[12] *Id. at* 14.

[13] *In re LIBOR-Based Financial Instruments Antitrust Litig.*, 935 F.Supp.2d 666, 686 (S.D.N.Y. 2013).

[14] *Associated General Contractors* at 536-45.

[15] H.R. Rep. No. 97-686, at 13 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2498 (citing *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 612-13 (9th Cir. 1976).

[16] Brief for the United States and the Federal Trade Commission as *Amici Curiaie* in Support of Neither Party (Sep. 5, 2014), *available at* http://www.justice.gov/atr/cases/f308400/308451.pdf.

[17] *Id. at 20-21.*

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The FTAIA in Flux: Foreign Component-Goods Cases Have Tripped, But Have They Fallen?

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I. INTRODUCTION

The epic saga of the Great Motorola Case of 2014 continues. In the latest chapter, a Seventh Circuit panel has issued its third and final opinion explaining why Motorola must lose. The case sets the stage for an evolving conversation about how antitrust law can meet the challenges of globalized supply chains in light of a thorny statute called the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA").

Motorola v. AU Optronics Corp. involves a claim for price-fixing against an international component-goods cartel. Component-goods are goods created to serve as component parts of other, finished products. A prime example is the LCD panels at issue in this case, which are manufactured to serve as the touch-screen component of Motorola smartphones. In the modern era, the various components for a single, finished product—particularly a complex electronic product with many different parts—can be manufactured in a multitude of different countries. Manufacturers of the finished product will source the components globally, and often they will then assemble the finished end-product overseas before importing it into the United States. When foreign component-goods manufacturers artificially inflate the price of component goods in these circumstances, including by fixing their prices, U.S. consumers invariably are injured, often severely, with harm frequently in the billions of dollars.[2] Importantly for purposes of interpreting the FTAIA in these circumstances, economic injury will inevitably occur first overseas before then making its way to the United States.

In *Motorola*, economic injury first occurred in several foreign countries when ten of Motorola's wholly owned foreign subsidiaries paid inflated prices for the cartelized panels. The injury then migrated to the United States when smartphones containing the cartelized panels were sold by Motorola to U.S. consumers at higher prices. The Seventh Circuit held that Motorola is prohibited from recovering in U.S. court under the FTAIA, raising the question of whether *anyone* can recover under U.S. antitrust laws when price-fixed components are first sold abroad before they are imported into the United States as part of a finished product.

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[1] Randy Stutz is Associate General Counsel of the American Antitrust Institute ("AAI"). *See* http://www.antitrustinstitute.org. The AAI submitted amicus briefs in several of the cases identified in this article, including *Empagran* and *Motorola*. *See See* http://www.antitrustinstitute.org/aai_activities/amicus-program. The author wishes to thank Rick Brunell, AAI's General Counsel, who co-authored the AAI's briefs in *Motorola* with Mr. Stutz, and who contributed original thinking to some of the ideas reflected in this article. The views expressed are the author's alone and do not necessarily reflect the views of AAI.

[2] *See* Br. of the Am. Antitrust Inst. in Support of Appellant's Pet'n for Rehearing En Banc at 9-13, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003, Doc. __ (7th Cir. Dec. 17, 2014) (discussing inadequate deterrence of component-goods cartels), *available at* http://antitrustinstitute.org/sites/default/files/AAI%20Amicus%20Brief%20Final%20-%20As%20Filed.pdf.

II. WHITHER THE IMPORT COMMERCE EXCLUSION?

The most immediate question for the three-judge panel was whether Motorola's claim is excluded from the scope of the FTAIA, and necessarily within the reach of the Sherman Act, because it involves import commerce. The FTAIA provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations."[3] In other words, the Sherman Act *does* apply to conduct "involving import trade or import commerce."

The panel held that LCD screens purchased abroad by Motorola's foreign subsidiaries and incorporated into smartphones imported into the United States did not involve import commerce because "[i]t was Motorola, rather than the defendants, that imported these [LCD screens] into the United States."[4] In dismissing the import commerce exclusion out of hand, without citation or analysis, the panel may have buried what could be the lead statement at the Supreme Court if Motorola seeks certiorari.

The panel's holding creates a clear circuit split with the Third Circuit in *Animal Science*, which squarely rejected any requirement under the import commerce exclusion that the "defendants function as physical importers of goods."[5] Instead, *Animal Science* directs courts to assess whether the alleged conduct is "directed at a U.S. import and not solely whether the defendants physically imported goods into the United States."[6] When price fixers overseas expect and intend their price-fixed products to be imported into the United States, logic and a plain reading of the statute suggest that that their conduct *involves* import trade or commerce.

III. WHAT WE DO AND DON'T KNOW WHEN CLAIMS "TRIP," DOCTRINES "COLLIDE," AND RELATIONSHIPS "COLLAPSE"

If the import commerce exclusion does not apply, the FTAIA provides that foreign commerce is beyond the scope of the Sherman Act, unless it satisfies a two-prong test known as the "domestic effects exception." The first prong of the test requires that the anticompetitive conduct has a direct, substantial, and reasonably foreseeable domestic effect in the United States, and the second prong requires that the effect must give rise to a cognizable claim under the Sherman, Clayton, or FTC Acts (hereinafter the "gives-rise-to prong"). If both prongs are met, the domestic effects exception applies, and a plaintiff may recover for conduct involving foreign commerce even without satisfying the import commerce exclusion.

Although the panel unequivocally held that the defendant's conduct did not involve import commerce, it is unclear what ultimately led the panel to finally dismiss Motorola's case under the domestic effects exception. The panel's opinion was issued, withdrawn, re-issued, and then revised.[7] Its several iterations are sparse with citable legal propositions. It suggests,

[3] 15 U.S.C. § 6a.

[4] *Motorola*, *supra* note 3 at *8.

[5] *Animal Science Products, Inc. v. China Minmetals Corp*., 654 F. 3d 462, 470 (3d Cir. 2011).

[6] *Id.* at 471.

[7] The panel originally held that Motorola could not satisfy the first prong of the domestic effects exception because the domestic effect caused by the defendant's conduct was insufficiently "direct." It subsequently vacated that opinion and reversed itself as to the first prong.

alternately, that Motorola's claim may fail because Motorola cannot satisfy the gives-rise-to prong, because Motorola cannot satisfy *Illinois Brick*, or because Motorola cannot satisfy choice-of-law rules. However, the panel never explicitly connects any of these rationales to its conclusion that Motorola failed to assert an antitrust cause of action.

The panel frequently resorts to metaphors that seem to stop short of grounding its holding in any particular rationale. It first observes that Motorola's claim "trips" on the gives-rise-to prong, leaving open the question of whether this is merely where it stumbles or fully where it "falls." Later, the panel observes that, because Motorola is an indirect purchaser, its claim is in "collision" with *Illinois Brick*, leaving the aftermath of the collision—and its meaning—to the reader's imagination. Finally, the panel observes that American law does not "collapse" parents and subsidiaries for choice-of-law purposes, begging the question whether the panel thinks this is what the effects test does.[8]

To the extent the panel does try to explain, non-metaphorically, why Motorola's suit is doomed, it vacillates. At one point the panel observes that "the cartel-engendered price increase in the components and in the price of cellphones that incorporated them occurred entirely in foreign commerce," which would implicate the gives-rise-to rationale. At another point the panel observes that this is a case of derivative injury, and there is nothing to suggest that the indirect purchaser rule does not apply to the FTAIA, which would suggest an *Illinois Brick* rationale. At still another point, the panel observes that foreign-injured corporations ordinarily must sue in the country in which they are incorporated or operate, or the country where they took delivery of the cartelized goods, and none of the recognized justifications for piercing the corporate veil are present in this case—which would suggest a choice-of-law rationale.[9] None of the panel's observations are controversial, but it is not immediately evident why any of them should upend Motorola's claim.

If the panel couldn't or wouldn't say exactly how it reached its outcome, it left no doubt as to the outcome itself. Readers at least come away knowing that the panel's view of the gives-rise-to prong is restrictive enough to exclude Motorola's claim from the domestic effects exception, and that the panel recognizes no exception to *Illinois Brick* for the first injured victim in domestic commerce. Given what we know about the panel's view of the import commerce exclusion, we also know the panel would, if presented the opportunity, bar all companies situated like the Motorola parent company, the combined Motorola parent and subsidiaries (considered as a single entity), and the Motorola subsidiaries (standing alone) from bringing a claim to recover any of the hundreds of millions of dollars in cartel overcharges on price-fixed components sold into the United States.

IV. THE EFFECTS TEST

Because of the panel's ambiguous reasoning, an important question left open is whether future courts will construe the panel's choice-of-law analysis to be part of its holding. If claims by foreign component-goods purchasers based on a U.S. domestic effect are barred in U.S. court whenever the purchaser is domiciled or takes delivery of the cartelized goods overseas, then the

[8] *See Motorola*, *supra* note 3 at *11-12, *15.

[9] *See id*. at *11-12, *14-16.

panel will have effectively announced a new, parallel choice-of-law rule governing FTAIA cases, which diverges from the effects test. The effects test, which has historically governed extraterritorial subject matter jurisdiction in antitrust cases, substitutes the formalisms that govern traditional choice-of-law rules, like the locus of the victim or the locus of the conduct, for an inquiry into whether the conduct has sufficiently significant economic consequences in the United States. Foreign harm in component-goods cases, notwithstanding that the immediate victim and conduct may be located abroad, often does.

Such a reading would deal a severe blow to the deterrence goals of the U.S. antitrust laws because it would categorically eliminate claims by all direct purchasers in addition to indirect purchasers in component-goods cases. In component-goods cases, the price-fixed component will first be assembled into an end-product overseas before being sold into the United States, which means the injury claimed, which stems from the over-priced component, necessarily will be felt first by foreign direct purchasers and second (or third or fourth) by domestic indirect purchasers. Under this reading, all direct purchasers are categorically barred from suing in U.S. courts under the panel's choice-of-law rules, and all indirect purchasers are categorically barred under *Illinois Brick*, even where foreign conduct causes a severe U.S. domestic effect and a mild foreign effect. Unless the Supreme Court intercedes to nullify the panel's opinion, future defendants will likely argue that this is precisely what the panel intended.

V. ANTITRUST INJURY AND ANTITRUST STANDING

Another important open question is how the lower federal courts currently define the gives-rise-to prong. According to the Supreme Court, the gives-rise-to prong is supposed to be primarily concerned with the doctrine of antitrust injury, which creates an inquiry into the *type of harm* that an antitrust plaintiff may claim. However, the panel apparently did not decide the gives-rise-to prong based on the type of harm Motorola claimed.

In *Empagran*, the Court explained that the gives-rise-to prong of the domestic effects exception ordinarily is supposed to do no more than incorporate an antitrust injury inquiry into the FTAIA. Specifically, the Court said the prong exists to ensure that the domestic effect in question is "of a kind that the antitrust laws consider harmful."[10] Under traditional antitrust injury principles, this means showing that the injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[11] In other words, a plaintiff must show the injury sustained is attributable to an anticompetitive aspect, rather than a pro-competitive aspect, of the defendant's behavior.[12]

In the course of resolving *Empagran*, however, the Court put a gloss on the gives-rise-to prong for a certain class of plaintiffs who have suffered what the Court characterized as "independent foreign harm." The Court explained that independent foreign harm is foreign harm caused by a foreign anticompetitive effect that is independent of any domestic anticompetitive effect. The Court's gloss, which was rooted in comity concerns embodied in the international abstention doctrine, expanded the gives-rise-to prong to require not just antitrust

[10] *F. Hoffman-LaRoche Ltd., v. Empagran S.A.*, 542 U.S. 155, 162 (2004).
[11] *Brunswick Corp. v. Pueblo Bowl-0-Mat, Inc.*, 429 U.S. 477, 489 (1977).
[12] *Id.* at 489-90.

injury, but also antitrust standing, where plaintiffs claim independent foreign harm (hereinafter "*Empagran*-plaintiffs").[13]

The Court found that, where *Empagran*-plaintiffs are concerned, it makes sense to read the FTAIA as if it required not just that a domestic effect give rise to "a claim" for antitrust injury, which is the minimal showing the statute's literal language requires, but that a domestic effect give rise to the plaintiff's *own* claim *at issue*. In other words, in addition to antitrust injury, the plaintiff must have antitrust standing to assert, and must in fact assert, the antitrust injury it proffers as having arisen from a domestic effect. Antitrust standing, which is distinct from Article III standing, raises the question of "whether the plaintiff is a proper party to bring a private antitrust action" by examining whether a claimed injury "'falls squarely within the area of congressional concern'" that informed the passage of the antitrust laws.[14] Injuries outside this area of congressional concern are said to lack antitrust standing and are barred accordingly.

The *Empagran* Court determined that plaintiffs who suffer independent foreign harm are not within the area Congress was concerned about in passing the Sherman Act. The Court reached this conclusion after balancing the domestic deterrence goals of the antitrust laws with principles of prescriptive comity. The Court had previously determined that "Congress' foremost concern in passing the antitrust laws was the protection of Americans."[15] It reasoned that, if it were to allow *Empagran*-plaintiffs to sue, there would be minimal deterrence gains in the United States, because Americans obviously aren't the victims of independent foreign harm. At the same time, there would be substantial interference with foreign antitrust regimes, which have every incentive to police harms to their own citizens under their own laws.[16] For these reasons, the Solicitor General had urged the Court to reject plaintiffs' claims on either FTAIA or antitrust standing grounds.[17]

However, in cases where the foreign harm is *not* independent of the domestic effect, but rather *causes* the domestic effect, the balance of domestic deterrence goals and international comity concerns comes out quite differently. There is every reason to allow plaintiffs to recover for foreign harm that *causes* domestic antitrust injury, because there will be substantial deterrence gains in the United States, where the ultimate (and likely primary) victims are located. At the same time, there will be minimal interference with foreign antitrust regimes, which have no incentive to police harms that are passed from their own citizens onto the United States, as the effects test implicitly recognizes. Indeed, in the absence of an exception to the *Illinois Brick*

[13] *Empagran*, *supra* note 13 at 158, 165.

[14] *Associated General Contractors v. Carpenters*, 459 U.S. 519, 538 (1983) (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 484 (1982)). Both antitrust injury and the indirect-purchaser rule, as well as other factors, are sometimes viewed as subsidiary inquiries that come under the umbrella of antitrust standing insofar as they limit who is entitled to sue. *See id.* When this article refers to antitrust standing, it refers to the general inquiry into whether a person is injured by reason of a violation of the antitrust laws within the meaning of Section 4 of the Clayton Act, and not to any of these subsidiary inquiries individually.

[15] *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978); *see Empagran*, *supra* note 13 at 165.

[16] *Empagran*, *supra* note 13 at 158, 165.

[17] *See e.g.* Br. for the United States as Amicus Curiae Supporting Pet'rs at 25-30, F. Hoffman-LaRoche v. Empagran, 542 U.S. 155 (2004).

rule, such plaintiffs may be the only ones who could sue in U.S. court to address such domestic injury.

VI. DID THE MOTOROLA PANEL IMPOSE THE *EMPAGRAN* ANTITRUST STANDING INQUIRY ONTO A NON-*EMPAGRAN* PLAINTIFF?

The panel went to great lengths to emphasize that, in fairness and as a matter of corporate law, the Motorola parent company should be considered an indirect purchaser. Notwithstanding *Copperweld*, the panel was extremely concerned that the parent was improperly seeking to disavow parent and subsidiary relationships for antitrust purposes, but preserve those relationships when it suits Motorola, such as for tax purposes. The panel repeatedly said that the parent has no right to seek relief for derivative injury of this sort.[18]

However, the panel also hinted, again without expressly stating, that Motorola might not have been able to satisfy the gives-rise-to prong even if it had been a direct purchaser. The panel considered a hypothetical in which it assumed that Motorola and its subsidiaries were one single entity. It observed that the hypothetical entity's first injury in domestic commerce would have occurred *after* the foreign injury from the price-fixed components was sustained.[19] With respect to lost profits in the U.S. smartphone market, which the hypothetical single entity may have suffered domestically as a result of the inflated cost of the component, the panel noted that the single entity chose not to pursue this claim, even affirmatively stating in response to a request for admission that "Motorola is not basing its claims" on the purchase of finished smartphones.[20]

The panel's reasoning is curious, however. The fact that the first injury occurred in foreign commerce tends to show that the domestic effect could not have given rise to Motorola's "own" claim, because Motorola's own claim for foreign harm preceded the domestic effect, and effects can't logically precede their own causes. Likewise, the fact that Motorola did not assert a claim for lost profits owing to higher component costs tends to show that U.S. smartphone prices did not give rise to Motorola's own claim *at issue*, because Motorola's claim at issue was for overcharges. However, the fact that a domestic effect did not give rise to Motorola's *own* claim or the claim *at issue* should not have prevented Motorola from asserting that a domestic effect gave rise to "a claim." Any cognizable antitrust injury arising from a domestic effect should have been sufficient to satisfy the gives-rise-to prong, because Motorola is not an *Empagran*-plaintiff. It did not claim independent foreign harm, but rather foreign harm that *proximately caused* a U.S. domestic effect.

Perhaps the panel raised the single-entity hypothetical to signal that it would have extended the *Empagran* gloss to non-*Empagran*-plaintiffs if it had been given the chance. If so, the panel's rationale seems dubious. It acknowledged that "[n]othing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers," and that as a result of weak foreign antitrust enforcement, "the prices of many products exported to the United States doubtless are elevated to some extent

[18] *Motorola*, *supra* note 3 at *11-14.
[19] *Id*. at 12-13.
[20] *Id*. at 24.

by price fixing or other anticompetitive acts."[21] Yet the panel would deny all recovery to both direct and indirect purchasers, apparently because it believes that harm to American consumers from price fixing in global supply chains is so common that allowing relief would result in an explosion of litigation against international cartels, creating friction with many foreign countries.

The panel has it exactly backwards. Protecting American consumers from harm caused by international cartels is a core purpose of both the Sherman Act and the FTAIA. The more widely American consumers are at risk from international cartels, the *greater* is the need for private attorneys general to enforce the law. Meanwhile, when American consumers are directly, substantially, and foreseeably harmed by foreign conduct, and the remedy redresses that harm, there is no comity concern.

The panel also selectively quoted *Minn-Chem* for the proposition that "U.S. antitrust laws are not to be used for injury to foreign customers." However, what *Minn-Chem* actually said was:

> While [*Empagran*] holds that the U.S. antitrust laws are not to be used for injury to foreign customers, it goes on to reaffirm the well-established principle that the U.S. antitrust laws reach foreign conduct that harms U.S. commerce:
>
> "[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused."[22]

Nothing in *Minn-Chem* or *Empagran* suggests the U.S. antitrust laws are not to be used for harm to foreign direct purchasers that causes injury to *U.S. customers*, consistent with the effects test. *Empagran* involved plaintiffs whose harm had nothing to do with U.S. customers.

This portion of the opinion could well be academic to the extent the panel found that the Motorola parent and subsidiaries were "distinct in uno, distinct in omnimus." If the panel considers the parent and subsidiaries distinct in every respect, there should be no doubt that the single-entity hypothetical remains just that—a hypothetical. That would mean it is at least an open question as to whether a single-entity plaintiff claiming foreign harm that causes a domestic effect can satisfy the gives-rise-to prong, whether by asserting that a domestic effect gives rise to *a* claim rather than its *own* claim, or by asserting that a domestic effect gives rise to its own claim for lost profits rather than its own claim *at issue* for cartel overcharges.

VII. CONCLUSION

Perhaps the worst trait of the Seventh Circuit's *Motorola* opinion (or best, depending on one's point of view), is that it does not explain how it reached its outcome, making it difficult to discern how another court would rule on slightly different facts. Looking ahead, the next interesting case may involve a claim in which a foreign division, rather than a foreign subsidiary, purchases component goods overseas for assembly and shipment to the U.S. parent, where the parent and division are "one" and the parent is thus a direct purchaser. Or perhaps a parent will bring a claim for lost profits in the sale of the U.S. end-product rather than overcharges on the

[21] *Motorola*, *supra* note 3 at *24-25.

[22] *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 858 (7th Cir. 2012) (quoting *Empagran*, *supra* note 3 at 165).

purchase of the component. Or, perhaps a third-party intermediary that assembles component goods into end-products overseas for shipment into the United States will take delivery of cartelized components goods, and the intermediary, rather than the importing parent, will be the lone plaintiff in U.S. court.

Still another possibility is that the Supreme Court could take up this case, or another in the near future, and moot these issues by declaring that these kinds of component-goods cases "involve import commerce." Alternatively, the Court might definitively decide whether to extend the *Empagran* gloss beyond *Empagran*-plaintiffs. If essential electronics products grow increasingly expensive because foreign cartels are exacting supracompetitive profits through component-goods price fixing to which they are unaccountable for damages in the United States, American consumers may begin watching these developments as closely as American lawyers.