Motorola Mobility and the FTAIA: If Not Here, Then Where?

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IN AN AMENDED OPINION ISSUED January 12, 2015, the Seventh Circuit affirmed the grant of summary judgment against plaintiff Motorola Mobility LLC,[1] holding that Sherman Act price-fixing claims arising from its foreign subsidiaries' purchases of liquid crystal display (LCD) panels were barred by the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).[2] The decision, *Motorola Mobility v. AU Optronics* (*Motorola II*), arose from an international conspiracy among Taiwanese and Korean manufacturers of LCD panels used in televisions, computer monitors, and cell phones. Motorola's foreign subsidiaries purchased LCD panels, also known as "flat panels," from the conspirators in Asia, incorporated the panels into cell phones in Asia, and imported the phones into the United States for resale to retailers and consumers.[3]

Writing for the panel, U.S. Circuit Court Judge Richard Posner reasoned that the antitrust claims of Motorola's subsidiaries were barred under the FTAIA because Motorola's injuries occurred wholly in foreign commerce, when its subsidiaries, the direct purchasers from the conspirators, purchased the price-fixed panels abroad.[4] Given that standing for the recovery of treble damages under the Sherman Act is limited to direct purchasers by *Illinois Brick Co. v. Illinois*,[5] the Seventh Circuit's decision has the effect of precluding any recovery by injured purchasers under the Sherman Act for claims arising from the bulk of the purchases from the LCD cartel members, a cartel which (according to the Department of Justice), significantly harmed the U.S. economy.[6]

Motorola II was the second decision issued by the same Seventh Circuit panel on Motorola's appeal of the district court's grant of summary judgment in the defendants' favor.[7] While it may matter little to Motorola, the ruling in *Motorola II* is narrower than the first decision (*Motorola I*), in which the court held that the claims were also precluded by the FTAIA because the "domestic effect" of a conspiracy to fix the price of a "component" part of a consumer product is not sufficiently "direct" to provide a basis for liability under the statute.[8] This ruling could have been read to preclude all Sherman Act claims based on foreign conduct involving a component of finished goods imported into the United States, even criminal claims brought by the federal government.[9]

The panel decision in *Motorola II* announces a broad rule that eliminates private damages remedies under the federal antitrust laws where the first purchase of a price-fixed component occurs overseas—no matter what the effect of the price-fixing conspiracy on U.S. commerce may be. And although foreign purchasers have not found U.S. courts to be friendly to their Sherman Act claims arising from foreign conduct,[10] this particular foreign purchaser happens to be a wholly owned subsidiary of a U.S. company, whose purchase decisions were controlled in the United States, and which was (allegedly) targeted by the conspirators precisely because of its significant business manufacturing and importing cellular telephones into the U.S. consumer market. Given that foreign plaintiffs are not categorically barred by the FTAIA from asserting Sherman Act claims in U.S. courts,[11] the question arising from *Motorola II* may be: if not here, where?

Motorola II narrowly construes both the "import commerce" exclusion and the "gives rise to" requirement of the FTAIA, and in so doing precludes private damages actions for the recovery of overcharges on the bulk of purchases from foreign conspirators. While the significance of the decision to Motorola is obvious, the decision may in fact have wide-ranging negative ramifications on cartel detection and enforcement given the increasing globalization of markets, prevalent use of foreign manufacturing facilities by U.S. companies, and multiple and repeated examples of international cartels.

The discussion below describes the LCD (Flat Panel) antitrust cases, summarizes important decisions under the FTAIA that serve as a backdrop to *Motorola II*, analyzes the reasoning for the ruling in *Motorola II* in the context of these decisions, and provides practical guidance for U.S. purchasers who seek to pursue antitrust damage claims for purchases of foreign-made products that contain price-fixed components.

The Flat Panel Antitrust Cases and the FTAIA

The conspiracy at issue in *Motorola II* spawned well over a dozen private suits that the Judicial Panel on Multidistrict Litigation consolidated and transferred to the Northern District of California for coordinated pretrial proceedings in *In re TFT-LCD (Flat Panel) Antitrust Litigation* (MDL action).[12]

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Judge Susan Illston was assigned to the MDL action and presided over pretrial proceedings for over seven years, issuing numerous rulings on how the FTAIA applies to Sherman Act claims (and claims under various state laws) arising from predominantly foreign conduct, including claims by U.S. direct purchasers,[13] U.S. indirect purchasers,[14] and, importantly, by Motorola.[15] In parallel proceedings, the MDL court also addressed the applicability of the FTAIA to criminal charges brought by the DOJ against defendant AU Optronics and several of its executives.[16] Certain of these FTAIA decisions were reviewed by other courts, both by the Ninth Circuit in the defendants' appeal of their criminal convictions,[17] and by the Northern District of Illinois and the Seventh Circuit in Motorola's private action.[18]

While the conspiracy underlying the decisions in each of these cases is the same, the identity of the plaintiffs, their place in the chain of distribution, and the outcome of FTAIA-based challenges to their claims differ, resting in some instances on varying characterizations of the facts and in others on differing and sometimes conflicting interpretations of the FTAIA.

The principal problem may lie in the statute itself, described by the Ninth Circuit as a "web of words"[19] and by the Third Circuit as "inelegantly phrased."[20] The FTAIA provides in relevant part:

> Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect
>
> (A) on trade or commerce which is not trade or commerce with foreign nations [i.e., domestic trade or commerce] and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title . . . .[21]

In other words, for anticompetitive conduct predicated on foreign activities to be actionable under the Sherman Act, it must either:

(1) involve import trade or import commerce (i.e., the "import trade or commerce exclusion"); *or*

(2) have a direct, substantial and reasonably foreseeable effect on domestic commerce *and* such effect must give rise to a claim under the Sherman Act (the "domestic effects exception").

Import Trade or Commerce Exclusion. A threshold question for applicability of the FTAIA is whether the conduct "involves import trade or import commerce."[22] As the Seventh Circuit explained in *Minn-Chem Inc. v. Agrium, Inc.*, import commerce, like domestic commerce, is "excluded at the outset from the coverage of the FTAIA."[23] Consequently, if the challenged conduct involves "import trade or commerce," then "that conduct is subject only to the Sherman Act's general requirements for effects on commerce, not to the special requirements spelled out in the FTAIA."[24] In such cases, the plaintiff must show only that the conduct had "actual and intended effects on U.S. commerce."[25]

The scope of the import trade or commerce exclusion is unsettled. Import commerce is clearly implicated when the plaintiffs are U.S. entities that have purchased directly from members of the cartel.[26] It is on this basis that the MDL court in *In re LCD* rejected multiple challenges to the standing of various plaintiffs under the FTAIA.[27] Import commerce was also found when the conspiracy "targeted the transportation of goods by airfreight, a primary vehicle of modern import commerce"[28] and where "defendants engaged in a course of activity designed to ensure that only U.S. importers and not U.S. retailers could bring oriental rugs manufactured abroad into the stream of American commerce."[29]

In *Turicentro, S.A. v. American Airlines, Inc.*, the Third Circuit held that the import trade or commerce exclusion was inapplicable because the defendants in that case "were not importers, nor engaged in import trade."[30] The Third Circuit later clarified that "[f]unctioning as a physical importer may satisfy the import trade or commerce exclusion but it is not a necessary prerequisite," and the "relevant inquiry is whether the defendants' alleged anticompetitive behavior 'was directed at an import market,'" or, in other words, whether "the defendants' conduct targets import goods or services."[31]

In both the MDL action and before the Seventh Circuit, Motorola argued that its claims fell within the import trade or commerce exclusion from FTAIA coverage because the conspiracy was targeted at Motorola's business of importing cellular phones into the United States. Without analysis, the Seventh Circuit rejected that argument in *Motorola II* on the basis that Motorola, not the defendants, were the importers of the price-fixed goods.[32] This conclusion contradicts the ruling by the Ninth Circuit, which held that the fact that the defendants were not themselves "importers" was immaterial.[33] Those arguments will be assessed below.

Domestic Effects Exception and "Gives Rise To" Requirement. If the import trade or commerce exception to the FTAIA does not apply, then the FTAIA domestic effects exception will allow the Sherman Act claim based on foreign conduct to proceed if two requirements are met: (1) the conduct has a "direct, substantial and reasonably foreseeable effect" on domestic commerce; and (2) that effect gives rise to a claim under the Sherman Act.[34]

The "domestic effects" exception to the FTAIA was discussed in some detail by the Supreme Court in *F. Hoffman-LaRoche v. Empagran* (*Empagran I*),[35] a case involving a worldwide conspiracy affecting the price of vitamins sold both abroad and in the United States. There, the Court considered the applicability of the FTAIA, and particularly the "gives rise to" requirement, to claims based on purchases of vitamins abroad by foreign plaintiffs.

Although the Court found that the international conspiracy had the requisite effects on domestic commerce because it affected the prices at which the vitamins were sold in the United States, it ruled that the foreign plaintiffs' claims did

not arise from those domestic effects but instead arose from wholly separate foreign harm. In other words, although there was a "domestic effect" (the price of vitamins in the U.S. was inflated), and the "domestic effect gave rise to a claim" (the claims of U.S. purchasers), those domestic effects did not "give rise to" the foreign plaintiffs' claims that were at issue in the case.[36] Thus, the Court concluded that the FTAIA barred Sherman Act claims of foreign purchasers for purchases made abroad where the products never entered U.S. commerce.[37]

The Court's holding in *Empagran I* was informed by considerations of international comity, particularly concerning private enforcement of treble damages claims in U.S. courts. The Court noted that application of U.S. antitrust laws to foreign conduct was reasonable and consistent with principles of prescriptive comity only insofar as those laws are applied to redress domestic injury.[38] In limiting the scope of private plaintiff remedies to claims *arising from* domestic harm, the Court sought to strike a balance between the "legitimate sovereign interests of other nations" and the congressional interest in "redress[ing] *domestic* antitrust injury that foreign anticompetitive conduct has caused."[39] These themes resurfaced front and center in *Motorola II*.

The Supreme Court left open the question of what connection was required between the domestic effect and the foreign injury to meet the "gives rise to" requirement. The Court noted several earlier decisions where the "foreign injury was inextricably bound up with domestic restraints of trade" and where the foreign injury was "dependent upon, not independent of, domestic harm,"[40] but remanded the case to the D.C. Circuit to consider the nature of that connection, specifically whether, in the case before it, the "anticompetitive conduct's domestic effects were *linked* to that foreign harm."[41]

On remand, the plaintiffs relied on an "arbitrage" theory to show a causal link between the domestic effects of the conspiracy and the plaintiffs' foreign injury, asserting that "because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury."[42] The D.C. Circuit rejected the arbitrage theory as a basis for the domestic injury exception, holding that such a theory alleges at best a "but-for" relationship, and that "proximate cause" between the domestic effect and foreign injury must be shown for such conduct to fall under the FTAIA exception.[43]

The proximate cause standard announced in *Empagran II* has been followed by other circuits, including the Ninth Circuit in *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*,[44] which presented claims arising from a global price-fixing conspiracy much like those at issue in *Empagran I* and *Minn-Chem, Inc. v. Agrium, Inc.*[45]

By adopting this proximate cause standard in *Empagran II*, the D.C. Circuit implicitly (although not necessarily purposefully) engrafted a requirement that the domestic effect precede in time the foreign harm.[46] This temporal connection is not required by *Empagran I*, as the Court in that case appeared willing to accept other connections between the foreign harm and domestic effect—and in fact remanded for a consideration of whether the "anticompetitive conduct's domestic effects were *linked* to that foreign harm."[47]

The direction of the causation undermined plaintiff's claims in *Lotes Co. v. Hon Hai Precision Industry Co.*[48] There, plaintiff alleged that the defendants, a group of five foreign electronics manufacturers, conspired to leverage their control over key patents in the USB connector market in order to exclude plaintiff and to monopolize the USB market. The plaintiff alleged that the foreign conduct had the effect of driving up the prices of consumer electronics devices incorporating USB connectors in the United States.[49]

The court held that the FTAIA barred the plaintiffs' claim because that domestic effect—higher prices for consumer electronics devices incorporating USB connectors—did not cause the plaintiff's injury of being excluded from the market for USB connectors: Indeed, to the extent there is any causal connection between Lotes's injury and an effect on U.S. commerce, the direction of causation runs the wrong way. Lotes alleged that the defendants' patent hold-up excluded Lotes from the market, which reduced competition and raised prices, which were then passed on to U.S. consumers. Lotes's injury thus *precedes* any domestic effect in the causal chain, and "[a]n effect never precedes its cause."[50]

In short, what has emerged from *Empagran II* is a causation requirement that runs in one direction only. The domestic effect must cause the foreign harm—it is insufficient if the foreign harm causes a domestic effect. Although this result may be invited by the phrase "gives rise to," it does not appear to serve the goal of a statute designed to "reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused."[51] Where the domestic effect depends upon the foreign conduct *and* the foreign harm, it makes little policy sense to preclude Sherman Act claims under the FTAIA.[52] The limitation on the direction of causation under the FTAIA, particularly as it affects claims arising from component price fixing, may well warrant further consideration by the Supreme Court.

DOJ Case Against AU Optronics

The Flat Panel cases (both criminal and civil) litigated in the MDL court arose from a conspiracy among foreign electronics manufacturers to fix prices and manipulate supply in the market for LCD panels. LCD panels are a "component." They have no utility as stand-alone items but instead are manufactured for use in a variety of consumer products, including computer monitors, televisions, and mobile phones. According to testimony in the MDL action, the cost of an LCD panel can constitute as much as 50 to 80 percent of the price of a computer, 30 to 70 percent of the price of a television, and 10 percent of the price of a cell phone.[53]

Beginning in at least 2001, representatives from the conspiring companies met approximately one time per month and allegedly reached agreements on pricing, limiting production, and manipulating supply. The prices agreed to at these "Crystal Meetings" were then used as the benchmark prices for later negotiations between the conspirators and their customers, both within the United States and abroad.[54]

The conspiracy ceased in 2006 when the U.S. offices of one of the conspirators, AU Optronics (AUO), was raided by the Department of Justice. The investigation and ensuing indictments led to the guilty pleas of seven corporate defendants and a number of individuals, jail time, and record fines. AUO, its American subsidiary, and two of its principals were tried and convicted after an eight-week jury trial. Those convictions were affirmed on appeal, including against challenges regarding the applicability of the FTAIA.[55]

In the Ninth Circuit, defendants argued that the indictment and proof did not satisfy the requirements of the FTAIA because "the bulk of the panels were sold to third parties world-wide rather than for direct import into the United States . . . ."[56] In fact, the evidence was that $23.5 billion in panels were manufactured into consumer goods abroad and then imported into the United States as part of finished products, while a much smaller volume (less than 3 percent of that number), were shipped from the conspiring manufacturers to customers in the United States.[57] The evidence also showed that the conspiring manufacturers negotiated the sale of these panels directly with U.S. companies, establishing wholly owned subsidiaries in close proximity to the major U.S. purchasers.[58]

Based on this evidence, the Ninth Circuit held that the conviction could be sustained under the import trade or commerce exclusion of the FTAIA.[59] Quoting *Minn-Chem*, it wrote that "transactions that are directly between the [U.S.] plaintiff purchasers and the defendant cartel members *are* the import commerce of the United States."[60] It rejected the argument that the import trade or commerce exclusion could not apply because the defendants themselves were not importers: "Importation of this critical component of various electronic devices is surely 'import trade or import commerce.' To suggest, as the defendants do, that AUO was not an 'importer' misses the point. The panels were sold into the United States falling squarely within the scope of the Sherman Act."[61] The court also pointed to the trial testimony establishing that the defendants' "executives and employees negotiated with United States companies in the United States to sell TFT-LCD panels at the prices set at the Crystal Meetings."[62]

Because "at least a portion of the transactions here involve[d] the heartland situation of the direct importation of foreign goods into the United States," the Ninth Circuit declined to further delve into the scope of the import trade exclusion, including whether it applies to conduct "directed at" an import market, as described by the Third Circuit in *Animal Science Products, Inc. v. China Minmetals Corp.*[63]

The Ninth Circuit also found that the evidence supported the verdict under the "domestic effects exception" with respect to "foreign sales of panels that were incorporated into finished consumer products ultimately sold in the United States."[64] Despite some ambiguity as to "the exact flow of how panels go from the plants of Crystal Meeting participants" to the United States, the court nevertheless held that "the impact [of the conspiracy] on the United States market was direct and followed 'as an immediate consequence' of the price fixing."[65] The evidence at trial established a "close and direct connection between the purchase of the price-fixed panels, the United States as the destination for the products, and the ultimate inflation of prices in finished products imported to the United States."[66] Because panel prices directly impacted the prices of the consumer products into which they were incorporated, the court concluded that the government had established that the "defendants' conduct had a direct, substantial and reasonably foreseeable effect on United States commerce."[67]

Motorola Mobility Claims

Proceedings in MDL Action. As the DOJ criminal case was being litigated, civil cases were being litigated in the MDL court, including Motorola's claims based on its foreign subsidiaries' purchases of LCD panels abroad, which were manufactured abroad into cell phones that were shipped to the United States for resale by Motorola.

The MDL court initially dismissed Motorola's complaint for failure to satisfy the "gives rise to" requirement, but allowed the case to proceed based on new allegations and evidence that: (1) Motorola's U.S. parent company was specifically targeted by the conspirators because of its dominant presence in the U.S. mobile phone market; (2) the conspirators negotiated prices in the United States with Motorola's U.S. employees, and the conspirators used those discussions to formulate strategies; and (3) "[t]he foreign affiliates issued purchase orders at the price and quantity determined by Motorola in the United States."[68] The MDL court distinguished *Empagran*, holding that the new allegations specified "a direct causal relationship between the anticompetitive conduct, the domestic negotiations and Motorola's foreign injury":

> Motorola does not rely on an arbitrage theory to establish the domestic injury exception. Motorola instead alleges that an *important domestic effect of the anticompetitive conspiracy was the setting of a global price for all LCD Panel purchases around the world*. As the Court views these new allegations, the SAC alleges that the price and other terms of purchase were negotiated exclusively by Motorola's procurement teams within the United States and applied worldwide, without regard to where the product was ultimately delivered. . . . *These allegations establish a concrete link between defendants' price-setting conduct (the collusion between the defendants to establish an artificially high price for LCD Panels), its domestic effect (the negotiations between Motorola and defendants that resulted in the setting of a global, anticompetitive price for all LCD Panels sold to Motorola) and the foreign injury suffered by Motorola and its affiliates (payment of higher prices abroad)*.[69]

Notably, the MDL court identified the "domestic effect" of the conspiracy as the "*negotiations between Motorola [in the U.S.] and defendants that resulted in the setting of a global, anti-competitive price for all LCD Panels sold to Motorola.*"[70] It was this domestic effect (negotiations at inflated prices set by the conspirators) that gave rise to the foreign injury (purchases at those inflated prices). The MDL court later denied defendants' motion for summary judgment on the same basis.[71]

Later Proceedings in Transferor Forum. Following the conclusion of the pretrial proceedings in the MDL court, the *Motorola* case was remanded for trial to the transferor forum, the U.S. District Court for the Northern District of Illinois. There, defendants renewed their motion for summary judgment and the Illinois district court reversed course, granting summary judgment on the basis that Motorola could not demonstrate that the domestic effect of the defendants' conduct gave rise to the claims of its foreign subsidiaries.[72] The Illinois district court agreed with the MDL court that a "domestic effect" of the conspiracy was the setting of inflated prices in the United States, but disagreed that this domestic effect "gave rise to" Motorola's claim: "For Sherman Act purposes, the injury arose when Motorola's foreign affiliates purchased LCD panels at inflated prices, not when Motorola decided at what price those purchases would be made."[73] Thus, from the Illinois district court's viewpoint, the problem was not wrong-way causation as in *Lotes*—the setting of an inflated price in the United States certainly *preceded* the injury-causing purchases at that inflated price. Instead, the court took an extremely restrictive view of proximate causation (more like direct or immediate cause), by deeming the causal event to be the actual purchases made abroad rather than the pricing decisions made in the United States that controlled those purchases.

The Seventh Circuit Decisions

The Seventh Circuit affirmed the district court, twice, but on different grounds. In *Motorola I*, the court held that the requirement of a "direct effect" could not be met because "[t]he effect of component price fixing on the price of the product of which it is a component is indirect."[74] That holding, which could be interpreted to preclude *all* Sherman Act claims (no matter who brings them) based on foreign conduct involving a *component* of foreign-made products that are imported into the United States, caught the attention of the DOJ, which filed amicus briefs asking the court to reverse itself on this point and "hold that the conspiracy to fix the price of LCD panels had a direct, substantial, and reasonably foreseeable effect on the U.S. import and domestic commerce in cell phones incorporating these panels."[75]

In *Motorola II*, the court reversed itself on this "direct effect" point, but affirmed the decision below on other grounds.[76] Specifically, it rejected the argument that the import trade or commerce exclusion applied and concluded that the domestic effect of the conspiracy did not "give rise to" Motorola's claims.

Import Trade or Commerce Exclusion. Motorola's principal argument on appeal was that its claims are covered by the import trade or commerce exclusion from the FTAIA because the defendants "specifically targeted Motorola's business manufacturing cell phones and importing them for sale to U.S. customers"[77]

On this issue Motorola was (somewhat) supported by the DOJ, which wrote that "[t]he LCD price-fixing conspiracy involved import commerce because defendants fixed the price of LCD panels sold for delivery to the United States."[78] But what the DOJ gave with one hand, it took away with the other: "Yet, this does not, by itself, entitle Motorola to recover damages for overcharges on all its panel purchases."[79] The government does not explain this assertion, which is at odds with the text of the FTAIA. If conduct "involves" import trade or commerce, the FTAIA does not apply at all; unlike the domestic effects exception, there is no additional requirement that the effect on domestic commerce give rise to plaintiff's claim.[80]

The Seventh Circuit gave short shrift to Motorola's argument, holding that the import trade or commerce exclusion is inapplicable because Motorola, rather than the defendants, was the actual importer.[81] This reasoning contradicts the conclusion reached by the Ninth Circuit on review of the criminal convictions of these same defendants, where the court held that the fact that the defendants were not importers "misses the point."[82] The Third Circuit has similarly rejected a requirement that the defendant physically import price-fixed products, stating that the question is broader, focused on whether the target of the conduct is an import market.[83] The statute itself is broadly phrased, referring not just to importers but to conduct "involving" import trade or import commerce.

While the Ninth Circuit pointed to several factors supporting its conclusion that the import trade or commerce exclusion applied to the claims (including the fact that the defendants negotiated with U.S. companies, including Motorola), the primary basis for its conclusion appears to be that some of the panels (albeit a small percentage) were directly shipped to U.S. purchasers, a fact not present for Motorola's foreign subsidiaries' claims. The Ninth Circuit declined to probe the extent of the import trade or commerce exclusion, including whether "targeting" an import market would be sufficient.[84] Further analysis of this exclusion is warranted as well, given the size and importance in the global markets of U.S. consumer demand for goods incorporating components.

The "Gives Rise To" Requirement. The Seventh Circuit's principal focus was the "gives rise to" requirement of the FTAIA. Unlike the district court, the Seventh Circuit panel identified the domestic effect as being increased cell phone prices in the United States (not the decision to purchase panels at inflated prices, as identified by both the MDL court and the Illinois district court), but held that that effect did not give rise to Motorola's claims.[85] The court reasoned that Motorola's harm was suffered abroad when it purchased

price-fixed panels; that harm was not dependent on the domestic effect (increased cell phone prices), but rather caused the domestic effect. Although not expressly stated in those terms, the court ruled that the alleged causation ran the wrong way, in that the domestic injury was dependent on the foreign harm, not vice versa.

Key Themes in *Motorola II*

Three interrelated themes reverberate throughout *Motorola II*: (1) Motorola, having chosen to incorporate foreign subsidiaries and manufacture cell phones abroad must abide by that choice and sue for injuries under the laws governing such claims in those foreign jurisdictions; (2) international comity concerns demand that private actions be limited in a way governmental actions are not; and (3) *Illinois Brick* wisely limits Sherman Act damages claims to direct purchasers.

Corporate Structure. On the first theme, Motorola asserted that it "functioned with its subsidiaries as a single enterprise,"[86] controlling all aspects of its mobile phone business: Motorola designed the phones in the United States; selected component parts and manufacturers; engaged potential LCD panel suppliers in pricing negotiations in the United States and determined prices, quantities, and other terms on which the components would be purchased throughout the company; managed the manufacturing and distribution processes; and dictated the terms on which finished products were imported and sold to Motorola's U.S. customers.

The Seventh Circuit rejected these arguments as immaterial:

> Motorola is pretending that its foreign subsidiaries are divisions rather than subsidiaries. But Motorola can't just ignore its corporate structure whenever it's in its interests to do so. Motorola's foreign subsidiaries, the direct purchasers from the makers of the panels, are legally distinct foreign entities and Motorola cannot impute to itself the harm suffered by them.[87]

The court held that "the immediate victims of the price fixing were its foreign subsidiaries and [that the] U.S. antitrust laws are not to be used for injury to foreign customers."[88] In short, a foreign plaintiff is a foreign plaintiff, and it matters little (maybe not at all) how connected that plaintiff is with the United States, or how its business affects domestic commerce.

Motorola also submitted evidence that the conspirators consciously targeted Motorola in the United States because of their desire to access that large source of LCD demand.[89] It asserted that the conspiracy's effect on Motorola and the U.S. domestic cell phone market was not happenstance: "[D]efendant's price-fixing did not just forseeably affect the U.S. market for Motorola's LCD-containing *products*; rather, that was a carefully calculated and fully intended result."[90]

The court rejected these "targeting" arguments as irrelevant to the analysis. In the court's words, they are nothing more than "inflated rhetoric used to describe, what is obvious, that firms engaged in the price-fixing of a component are critically interested in the market demand for the finished product."[91] Having chosen to incorporate distinct legal entities organized under foreign law and to receive the benefits of those (presumably) more favorable laws, Motorola should be left to pursue its antitrust remedies under those laws as well. The court made this statement even while recognizing that "foreign antitrust laws rarely authorize private damages actions."[92]

International Comity. The Seventh Circuit justified its reasoning by referring to the concerns addressed in *Empagran I*—that "rampant extraterritorial application of U.S. law 'creates a serious risk of interference with a foreign nation's ability independently to regulate its own affairs.'"[93] Yet the language of the FTAIA is itself meant to address these concerns, by balancing the "legitimate sovereign interests of other nations" and the congressional interest in "redress[ing] *domestic* antitrust injury that foreign anticompetitive conduct has caused.[94] Thus, conduct "involving" an import market (as Motorola urged was at issue here), is exempt from the reach of the FTAIA at the outset. Moreover, the conduct at issue had almost wholly domestic effects, as it appears that all or almost all of the inflated prices paid by the foreign purchasers on U.S.-bound panels were passed on and ultimately paid in the U.S. by consumers.[95]

Even if these comity concerns may arise in some instances, the Flat Panel cases do not appear to have raised serious concerns of excessive or unwarranted antitrust enforcement. The DOJ indicted foreign companies and their principals, and obtained guilty pleas, verdicts, and record fines in U.S. courts based on the domestic effect of the conspiracy (inflated prices on consumer products). No foreign government submitted briefs or arguments asserting that the conduct at issue in the criminal prosecutions and private civil claims was lawful under the foreign country's domestic law or that the private parties acted pursuant to compulsion by the foreign governments.[96]

In any event, with regard to the Flat Panel conspiracy, how concerned should U.S. courts be about the sensibilities of foreign governments when their nationals engage in hardcore cartel conduct directed at a huge U.S. consumer market that caused substantial effects within that market? As Motorola put it, with the United States already acting "as a literal competition police officer—throwing foreign nationals in U.S. prisons for targeting Motorola"—barring private suits to redress those injuries on comity grounds seems anomalous.[97]

Illinois Brick. The court also rejected "Motorola's 'target' theory of antitrust liability" because it would "nullify the doctrine of *Illinois Brick*."[98] The panel reasoned:

> [A] cartel would always want to estimate the price at which the direct purchaser would resell in order to capture some or all of the resale profits. . . . Motorola ignores the fact that a cartel almost always *knowingly* causes injury to indirect purchasers, yet those purchasers are barred from suit by *Illinois Brick* and the doctrine of antitrust standing that the rule of that case instantiates.[99]

Although the court's observations about the knowledge and intentions of a cartel are interesting, they describe business conduct that is a far cry from Motorola's allegations and evidence at summary judgment (and what the government proved in the related criminal case). Motorola did not allege (or show) that the defendants simply "estimated" the price at which the direct purchaser would resell to its indirect purchaser customers; rather, Motorola alleged (and showed) that the defendants negotiated prices directly with the indirect purchaser (a U.S. company) using benchmark pricing established by the cartel.[100] Evidence that the defendants knowingly targeted and adversely affected the market for cell phones that Motorola imported for sale to U.S. consumers is qualitatively different from a general supposition that conspirators must be aware that their conduct affects prices in downstream markets.

Moreover, while the Seventh Circuit extols the "wisdom" of the direct purchaser standing doctrine of *Illinois Brick* because it "preserves the deterrent effect of antitrust damages liability,"[101] the decision has the effect of precluding any damages recovery by injured purchasers under the Sherman Act for claims arising from the bulk of the purchases from the LCD cartel members, a cartel which (according to the DOJ) has significantly harmed the U.S. economy.[102] Under *Motorola II*, direct purchasers are barred by the FTAIA, and indirect purchasers (including U.S. consumers who suffered injury in the United States arising from purchases of goods at prices inflated by the conspiracy) are barred by *Illinois Brick*.

In briefing before the Seventh Circuit, the DOJ and Motorola proposed that this problem could be resolved by construing *Illinois Brick* to allow suits by the first purchaser in affected U.S. commerce when the direct purchaser's claims were barred by the FTAIA.[103] The Seventh Circuit rejected this invitation, noting a lack of evidence that Motorola, the first purchaser in U.S. domestic commerce, was actually injured.[104]

Elimination of Private Enforcement Under Federal Law

The Seventh Circuit repeatedly stated that Motorola must seek its remedies abroad, under the laws of the country in which its subsidiaries are incorporated.[105] Yet only a few Asian countries even allow for recovery of private antitrust damages, and these countries generally disallow class actions and require plaintiffs to pay all court costs.[106] Moreover, in Motorola's case, the evidence suggests that none of the injury arising from panels shipped into the United States was suffered overseas; rather, the inflated prices paid by the purchasers abroad were passed through to the United States and ultimately paid by U.S. consumers.[107] It is not likely that foreign purchasers, even if they have private rights of action in their home countries, can recover without proving actual damages.[108]

The ease with which the Seventh Circuit dismisses concerns about the elimination of private enforcement may suggest an underlying assumption that criminal prosecution and fines here and abroad are sufficient to deter global cartel conduct. Yet successfully conducted global cartels have been highly profitable,[109] and criminal fines, when issued at all, are small in comparison to profits earned by members of global cartels.[110] The Sherman Act attempts to address this issue by imposing treble damages on violators, but in most other countries private actions lack this deterrent force.[111] Thus, the consequence of the panel decision is to remove any deterrent effect of private actions from the cost-benefit calculus of cartel members.

Given the dearth of effective private damages remedies in many foreign jurisdictions and the inability of government enforcement to adequately deter global cartel activity, private plaintiffs may be expected to argue (1) that the application of the FTAIA in *Motorola II* should not be accepted by other courts outside the Seventh Circuit, and (2) that the bar to indirect purchaser claims under federal antitrust law should be changed (presumably by the Supreme Court) to allow indirect purchasers to assert damages claims as the DOJ proposed.

Indirect Purchaser Claims Under State Law

Although it may appear anomalous, the reasoning of the Seventh Circuit in *Motorola II* does not apply to indirect purchaser consumer claims. Even if Motorola's antitrust claim does not "arise from" the identified domestic harm (i.e., inflated prices for cell phones), the claims of Motorola's customers surely do—there is no wrong-way causation problem with such claims. And as the Supreme Court indicated in *Empagran I*, under the FTAIA, it matters who the plaintiff is.[112] Thus, a consistent application of the language of the FTAIA should allow damages claims by indirect purchasers (whether consumers or business customers) because their claims and injuries arise from domestic harm.

The MDL court in *In re LCD* addressed the applicability of the FTAIA to the claims of indirect purchasers, where the direct purchase was made abroad (and therefore barred by the FTAIA).[113] There, the defendants moved for summary judgment, asserting that the claims of indirect purchasers of foreign panel products (consumer products manufactured abroad with the price-fixed panels before importation) were barred by the FTAIA from recovery under state law.[114] The defendants argued that the claims of foreign panel purchasers were too attenuated from the ultimate sale in the United States to have a direct, substantial, and reasonably foreseeable effect on American commerce.[115] The plaintiffs countered that because the inflated prices of LCD panels were passed through to U.S. consumers regardless of how the LCD panels made their way into the United States, the pass-through constitutes a direct effect under the FTAIA.[116]

The MDL court agreed:

> Plaintiffs argue that defendants colluded to increase the price of LCD panels, a major component in electronic products that are imported into the United States. The increased price of the components caused the prices of the finished products

> in the United States to increase. If this effect is not direct, it is difficult to imagine what would be.[117]

This conclusion, finding a direct effect on U.S. domestic commerce from price fixing on component parts shipped into the United States as part of a finished product, is consistent with the result in the DOJ criminal case against AUO and the position ultimately accepted by the Seventh Circuit in *Motorola II*.[118]

Despite the fact that the language of the FTAIA would appear to permit indirect purchaser claims, would these claims nevertheless be preempted in situations, such as *Motorola II*, where the direct purchaser's claim is barred? Preemption arises if there is a conflict between state and federal law.[119] Ultimately, the court found that Motorola's claims arose abroad, where its subsidiaries made their purchases, and did not arise from any domestic effect of the conspiracy.

As discussed above, however, the reasoning underlying the *Motorola II* decision—that is, that the effects on U.S. commerce do not give rise to the plaintiff's claim—would not apply where a domestic purchaser is harmed by the direct, substantial, and reasonably foreseeable effect on domestic commerce. Because indirect purchaser standing requires that the sale and purchase take place on American soil (in fact within the plaintiff's home state), *Motorola II* will likely have no preemptive effect on those claims.

Implications and Conclusions from *Motorola II*

It remains to be seen whether the reasoning in *Motorola II* will be accepted by other circuits or reviewed by the Supreme Court, but some observations are warranted now about the practical impact of the panel decision.

First, despite the court's dicta otherwise,[120] direct purchasers of price-fixed components in the United States should not face FTAIA issues, regardless of whether their purchases were in the first instance delivered abroad or to the United States. Such transactions "*are* the import commerce of the United States."[121] Consequently, had Motorola not only made its purchase decisions in the United States but also executed the purchase orders here, the result might have been different. Second, private litigants should focus on arguments that characterize the conduct as directed to or targeted at an import market. While Motorola was unsuccessful in making these arguments, they may well obtain traction in other circuits, such as the Third Circuit.

Third, wrong-way causation may continue to create a problem in component parts price-fixing cases where the inflated price of a component part purchased abroad gives rise to the domestic injury rather than vice versa. An attempt should be made to identify a domestic injury and to trace the claim as arising from that domestic injury. For example, if Motorola had shown harm to its domestic cellular business on account of its subsidiaries' foreign purchases, the Seventh Circuit may have been more receptive to its claims.

Finally, in light of the fact that *Motorola II* effectively precludes all private enforcement of claims for injuries arising from component parts purchased abroad, plaintiffs should continue to urge, as the government did in *Motorola II*, that an exception to *Illinois Brick* should be established for the first purchaser in affected U.S. commerce. Plaintiffs should argue that cartel detection and enforcement requires the deterrent effect of both governmental and private actions. In any event, indirect purchasers should continue to be able to assert claims under state law in those states that allow for indirect purchaser standing. ■

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1 Motorola Mobility LLC v. AU Optronics Corp. (*Motorola II*), 775 F.3d 816 (7th Cir. 2015).

2 15 U.S.C. § 6a.

3 *Motorola II*, 775 F.3d at 817.

4 *Id.* at 820.

5 431 U.S. 720 (1977).

6 See Brief for the United States at 22, United States v. AU Optronics Corp., No. 12-10492 (9th Cir. Apr. 5, 2013) [hereinafter Brief for the United States] (referring to the government's expert analysis that overcharges on panels entering the United States were in excess of $500 million).

7 The panel issued an earlier decision prior to merits briefing that it later withdrew. Motorola Mobility, LLC v. AU Optronics Corp. (*Motorola I*), 746 F.3d 842 (7th Cir. 2014), *vacated and reh'g granted*, 2014 U.S. App. LEXIS 12704 (7th Cir. July 1, 2014).

8 *Motorola I*, 746 F.3d at 844.

9 See Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party at 22–23, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Sept. 5, 2014) [hereinafter DOJ Amicus Brief].

10 See F. Hoffman-LaRoche Ltd. v. Empagran S.A. 542 U.S. 155, 172–73 (2004) (*Empagran I*) (reasoning that claims of foreign plaintiffs arising from independent foreign harm are barred under the FTAIA).

11 Empagran S.A. v. Hoffman-LaRoche, Ltd., 417 F.3d 1267, 1269 (D.C. Cir. 2005) (*Empagran II*) ("[T]he legislative history makes clear that the FTAIA's 'domestic effects' requirement 'does not exclude all persons injured abroad from recovering under the antitrust laws of the United States.'" (citation omitted)).

12 *In re* TFT-LCD (Flat Panel) Antitrust Litig. (*In re LCD*), No. 3: 07-md-1827 (N.D. Cal.).

13 See, *e.g.*, *In re LCD*, 781 F. Supp. 2d 955, 964 (N.D. Cal. 2011).

14 *In re LCD*, 822 F. Supp. 2d 953, 966 (N.D. Cal. 2011).

15 *In re LCD*, 785 F. Supp. 2d 835, 842–43 (N.D. Cal. 2011).

16 See, *e.g.*, *In re LCD*, No. M 07-1827, 2011 WL 1464858 (N.D. Cal. Apr. 18, 2011).

17 United States v. Hui Hsiung, No. 12-10492, 2015 WL 400550 (9th Cir. Jan. 30, 2015), *amending* 758 F.3d 1074 (9th Cir. 2014).

18 See *supra* notes 1 and 7.

19 *Hui Hsiung*, 2015 WL 400550, at *9.

20 Turicentro S.A. v. Am. Airlines Inc., 303 F.3d 293, 300 (3d Cir. 2002) (quoting Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 69 (3d Cir. 2000).

21 15 U.S.C. § 6a.

22 Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 855 (7th Cir. 2012) (en banc) (quoting 15 U.S.C. § 6a).

23 *Id.* at 854.

24 *Id.*

25 *Id.* at 855 (citing United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945) (*Alcoa*)).

26 *Id.* ("Those transactions that are directly between plaintiff [U.S.] purchasers

and defendant cartel members *are* the import commerce of the United States . . . .").

[27] *See, e.g.*, *In re LCD*, M 07-1827, 2012 WL 3763616, at *2–3 (N.D. Cal. Aug. 29, 2012).

[28] *In re* Air Cargo Shipping Servs. Antitrust Litig., No. MD 06-1775, 2008 WL 5958061, at *14 (E.D.N.Y. Sept. 26, 2008) ("It follows that conduct directed at fixing the cost of airfreight necessarily affects the commerce in the goods transported by airfreight."), *adopted by* 2009 WL 3443405 (E.D. N.Y. Aug. 21, 2009).

[29] Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62 (3d Cir. 2000), *overruled on other grounds*, Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011).

[30] 303 F.3d 293, 303 (3d Cir. 2002), *overruled on other grounds*, *Animal Science Products*, 654 F.3d 462.

[31] *Animal Science Products*, 654 F.3d at 470 (quoting *Turicentro*, 303 F.3d at 303).

[32] *Motorola II*, 775 F.3d at 818.

[33] *Hui Hsiung*, 2015 WL 400550, at *14.

[34] *Motorola II*, 775 F.3d at 818.

[35] *Empagran I*, 542 U.S. at 162.

[36] *Id.* at 174.

[37] *Id.*

[38] *Id.* at 165 (citing *Alcoa*, 148 F.2d at 443–44).

[39] *Id.* at 164–65; *see also* Kelly L. Tucker, *In the Wake of* Empagran*—Lights Out on Foreign Activity Falling Under Sherman Act Jurisdiction? Courts Carve Out a Prevailing Standard*, 15 FORDHAM J. CORP. & FIN. L. 807, 823–25 (2010).

[40] *Empagran I*, 542 U.S. at 171–72 (quoting Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co., No. 75 Civ-5828-CFH, 1977 WL 1353, at *11 (S.D.N.Y. Jan. 18, 1977)).

[41] *Id.* at 175 (emphasis added).

[42] *Empagran II*, 417 F.3d at 1269.

[43] *Id.* at 1207–71.

[44] 546 F.3d 981, 987 (9th Cir. 2008).

[45] 683 F.3d 845, 859 (7th Cir. 2012) ("It is no stretch to say that the foreign supply restrictions, and the concomitant price increases forced upon the Chinese purchasers, were a direct—that is, proximate—cause of the subsequent price increases in the United States.").

[46] Lotes Co. v. Hon Hai Indus. Co., 753 F.3d 395, 414 (2d Cir. 2014).

[47] *Empagran I*, 542 U.S. at 175 (emphasis added).

[48] *Lotes Co.*, 753 F.3d at 414.

[49] *Id.*

[50] *Id.* (quoting Am. Home Prods. Corp. v. Liberty Mut. Ins. Co., 748 F.2d 760, 765 (2d Cir. 1984).

[51] *Empagran I*, 542 U.S. at 156.

[52] *See* Randy M. Stutz, *Comity, Domestic Injury, and the Metaphysics of the FTAIA*, CPI ANTITRUST CHRON., Sept. 2014 (1), at 7.

[53] Brief for the United States, *supra* note 6, at 23; Brief of Defendants-Appellees at 12, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Oct. 3, 2014).

[54] *Hui Hsiung*, 2015 WL 400550, at *2.

[55] *Id.* at *1.

[56] *Id.*

[57] Brief for the United States, *supra* note 6, at 7–8.

[58] *Id.* at 17.

[59] *Hui Hsiung*, 2015 WL 400550, at *14.

[60] *Id.* at *13 (quoting *Minn-Chem*, 683 F.3d at 855).

[61] *Id.* at *14.

[62] *Id.*

[63] *Id.* at 13 n.7 (citing *Animal Science Products*, 654 F.3d at 470).

[64] *Hui Hsiung*, 2015 WL 400550, at *16.

[65] *Id.* at *16–17 (quoting United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004)).

[66] *Id.* at *17.

[67] *Id.* at *14. The amended decision in *United States v. Hui Hsiung* was issued shortly after the Seventh Circuit amended its decision in *Motorola II*. The Ninth Circuit noted its agreement with *Motorola II*'s conclusion that the effect of the conspiracy was "direct," and explained the difference in outcomes as a consequence of the indirect purchaser doctrine of *Illinois Brick*. *Id.* at *18 (citing Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977)). *See infra* text at notes 76 & 98.

[68] *In re LCD*, 785 F. Supp. 2d 835, 838–39 (N.D. Cal. 2011).

[69] *Id.* at 842–43 (citing *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 987 (9th Cir. 2008) (emphasis added)).

[70] *Id.* (emphasis added).

[71] *In re LCD*, 2012 WL 3276932, at * 4 (N.D. Cal. Aug. 9, 2012) ("[A] reasonable jury could find a 'concrete link between defendants' price-setting conduct [,] its domestic effect, and the foreign injury suffered by Motorola and its affiliates.'").

[72] Motorola Mobility, Inc. v. AU Optronics Corp., No. 09 C 6610, 2014 WL 258154, at *8 (N.D. Ill. Jan. 23, 2014).

[73] *Id.* at *9.

[74] *Motorola I*, 746 F.3d at 844. The court also rejected Motorola's argument that the import trade or commerce exclusion applied. *Id.* at 844–45.

[75] *See* DOJ Amicus Brief, *supra* note 9, at 24.

[76] *Motorola II*, 775 F.3d at 819 (stating that if prices of the components were fixed, the effect on U.S. commerce would be sufficiently direct for purposes of the FTAIA).

[77] Appellant's Opening Brief at 17, Motorola Mobility, LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Aug. 29, 2014) [hereinafter Appellant's Opening Brief].

[78] DOJ Amicus Brief, *supra* note 9, at 5.

[79] *Id.*

[80] *See Minn-Chem*, 683 F.3d at 855.

[81] *Motorola II*, 775 F.3d at 818 ("It was Motorola, rather than the defendants, that imported these products into the United States.").

[82] *Hui Hsuing*, 2015 WL 400550, at *14.

[83] *Animal Science Products*, 654 F.3d at 470.

[84] *Hui Hsuing*, 2015 WL 400550, at *14.

[85] *Motorola II*, 775 F.3d at 819.

[86] Appellant's Opening Brief, *supra* note 77, at 9, Motorola Mobility, LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Aug. 29, 2014).

[87] *Motorola II*, 775 F.3d at 822.

[88] *Id.* at 820.

[89] Appellant's Opening Brief, *supra* note 77, at 5.

[90] *Id.* at 6.

[91] *Motorola II*, 775 F.3d at 822.

[92] *Id.* at 826. Moreover, in dicta, the panel suggests that even if Motorola had functioned through divisions rather than subsidiaries, it would not have mattered: "But supposing this is wrong and Motorola is correct that it and its subsidiaries 'are one.' *'The one' (Motorola and its foreign subsidiaries conceived of as a single entity) would have been injured abroad when 'it' purchased the price-fixed components." Id.* at 823 (emphasis added.) If the court is asserting that a purchase by a U.S. company directly from a conspirator would also be barred by the FTAIA, that assertion is inconsistent with *Minn-Chem*'s statement that "transactions that are directly between the plaintiff [U.S.] purchasers and the defendant cartel members *are* the import commerce of the United States . . . ." *Minn-Chem*, 683 F.3d at 855. This statement is also inconsistent with the language later quoted by the court with apparent approval that a domestic purchaser can preserve its right to sue as a direct purchaser in U.S. courts if the parent company makes the actual purchase or the U.S. parent declined to set up foreign subsidiaries. *Motorola II*, 775 F.3d at 165 (quoting Robert Connolly, *Repeal the FTAIA! (Or at Least Consider It as Coextensive with* Hartford Fire*)*, CPI ANTITRUST CHRON. (Sept. 2014)).

[93] *Motorola II*, 775 F.3d at 824 (quoting *Empagran I*, 542 U.S. at 165).

[94] *See Empagran I*, 542 U.S. at 164–65; Tucker, *supra* note 39, at 823–25.

[95] *See Motorola II*, 775 F.3d at 822; *see also In re* TFT-LCD Flat Panel Litig., 267 F.R.D. 583, 601–02 (N.D. Cal. 2010) (discussing expert pass-through analysis in indirect purchaser class certification decision).

[96] *Cf.* Brief for Amicus Curiae Ministry of Commerce of the People's Republic of China in Support of Defendants-Appellants at 2, *In re* Vitamin C Antitrust Litig., No. 13-4791 (2d Cir. Apr. 14, 2014) (contending in amicus filings that the "defendants' coordinated conduct with respect to vitamin C exports was compelled by Chinese law, and as such was completely immune from U.S. antitrust liability.").

[97] Appellant's Petition for Rehearing *En Banc* at 15, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Dec. 18, 2014).

[98] *Motorola II*, 775 F.3d at 822.

[99] *Id.* at 822–23.

[100] Appellant's Opening Brief, *supra* note 77, at 6–9.

[101] *Motorola II*, 775 F.3d at 821.

[102] Brief for the United States, *supra* note 6, at 22–23.

[103] DOJ Amicus Brief, *supra* note 9, at 22–23; *Motorola II*, 775 F.3d at 822–23.

[104] *Motorola II*, 775 F.3d at 821 ("[T]here is a remarkable dearth of evidence from which to infer actual harm to Motorola.").

[105] *Id.* at 820.

[106] International Handbook on Private Enforcement of Competition Law 23 (Albert A. Foer & Jonathan W. Cuneo eds., 2010) (noting that limited discovery procedures also pose a challenge to private antitrust actions) [hereinafter International Handbook].

[107] DOJ Amicus Brief, *supra* note 9, at 12 ("Motorola passed through any overcharges to its customers more than dollar-for-dollar.").

[108] *See, e.g.*, Brief of the American Antitrust Institute as Amicus Curiae in Support of Appellant's Petition for Rehearing En Banc at 10, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Dec. 17, 2014) (noting that most foreign jurisdictions allow a pass-on defense).

[109] *See, e.g.*, Amicus Curiae Brief of Economists and Professors in Support of Appellant's Petition for Rehearing En Banc at 7, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Dec. 17, 2014) [hereinafter Economists' Amicus Brief] (noting that cartels are often profitable, even after all penalties are assessed).

[110] Chinese regulators issued their first-ever fine in connection with cartel activity to players in the Flat Panel cartel—only $56 million compared with the $1.4 billion in fines handed down by U.S. regulators and the $890 million handed down by EU regulators. On the other hand, in the period from 1990 through 2007, global cartel private recovery in the United States accounted for four times the amount of governmental fines, while, for the world as a whole, private recovery only accounted for 16% of total damages. International Handbook, *supra* note 106, at 22. *See also* Economists' Amicus Brief, *supra* note 109, at 7 (noting that the median European Commission fine equaled only 31.7% of overcharges and the median DOJ fine typically equaled only 43.8% of overcharge in the United States alone).

[111] For example, on November 26, 2014, the European Parliament signed into law a measure that requires all member nations to allow private enforcement of the competition laws within two years of its passage. Council Directive 2014/104, 2014 O.J. (L 349) 12 (EC). This measure only provides for recovery of actual damages, which serves some deterrent effect, but coupled with "loser pays," no contingency agreements, and lack of a class action mechanism, there is not a lot of incentive for private actors to bring suit. *See* International Handbook, *supra* note 106, at 23.

[112] *Empagran I*, 542 U.S. at 170–71 (noting the FTAIA's bar applies differently to different plaintiffs' claims).

[113] *In re LCD*, 822 F. Supp. 2d at 956–57.

[114] *Id.* at 954–56. The indirect purchasers asserted only injunctive claims under federal law and asserted damages claims under laws of 23 states that allow indirect purchaser damages claims. *In re LCD*, 267 F.R.D. 583, 590 (N.D. Cal. 2010).

[115] *In re LCD*, 822 F. Supp. 2d at 962. Ironically, if defendants' arguments had been accepted, indirect purchasers from direct purchasers whose claims were not barred by the FTAIA would have retained those claims—causing the possibility of double recovery—while indirect purchasers from suppliers with no federal claims would have had no claim, meaning there would be no recovery at all for those purchasers.

[116] *Id.* at 963.

[117] *Id.* at 966.

[118] *Motorola II*, 775 F.3d at 819.

[119] *In re* Potash Antitrust Litig., 667 F. Supp. 2d 907, 927 (N.D. Ill. 2009) (noting that preemption issues in the FTAIA context could arise where "state antitrust laws reached foreign commercial activity that federal laws did not"), *vacated on other grounds*, Minn-Chem, Inc. v. Agrium Inc., 657 F.3d 650 (7th Cir. 2011).

[120] *See supra* note 92 and accompanying text.

[121] *See Minn-Chem*, 683 F.3d at 855 ("Those transactions that are directly between the plaintiff [U.S.] purchasers and the defendant cartel members *are* the import commerce of the United States.").