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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.