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A Current Look at Foreign Cartels and the United States Foreign Trade Antitrust Improvements Act

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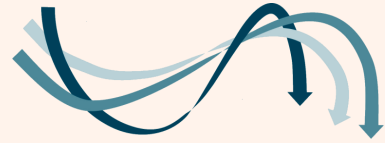
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A CURRENT LOOK AT FOREIGN CARTELS AND THE UNITED STATES FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT



Prof. C. Paul Rogers III#



The United States' Foreign Trade Antitrust Improvement Act (FTAIA), enacted in 1982, is designed to set the framework for determining if and when U.S. antitrust laws have jurisdiction over anticompetitive conduct involving commerce foreign to the United States.¹ While excluding U.S. import commerce from its reach, it seeks to both clarify and limit the extraterritorial application of U.S. antitrust laws, perhaps in partial deference to foreign concerns about the reach of those laws to competitive conduct abroad. It is far, however, from an example of clarity in drafting.² The U.S. Court of Appeals for the Ninth Circuit has described it as a “web of words”³ while the Third Circuit noted that it was “inelegantly phrased.”⁴

The U.S. Supreme Court has considered the applicability of the FTAIA only in its 2004 *F. Hoffman-LaRoche Ltd. v. Empagran S.A.* decision.⁵ The case involved a world-wide vitamin

price fixing scheme which, it was alleged, caused higher vitamin prices in the U.S. as well as other countries such as Ecuador. The Court ruled that U.S. purchasers could bring a Sherman Act claim under the FTAIA but that buyers in other countries could not since their harm was foreign to the United States. In interpreting the statute, the Court held that the act sets forth a general rule placing all non-import activity involving foreign commerce outside of the reach of the Sherman Act. But, the Court noted, the act “brings such conduct back within the Sherman Act’s reach if the restraint at issue has a “direct, substantial, and reasonably foreseeable” anticompetitive impact on U.S. commerce.⁶

Litigation involving the FTAIA has spiked in the last decade or so as the U.S. Department of Justice (DOJ) has increasingly prosecuted foreign-based cartels, spurring many coattail civil lawsuits in addition. In a number of investigations, the DOJ has targeted foreign suppliers of component parts that were incorporated by other companies into finished products assembled overseas but later imported for sale to U.S. customers. Leading examples include TFT-LCD panels for finished products such as televisions,

¹ 15 U.S.C. §6a.

² See e.g. C. Paul Rogers III, *Cross-Border Mergers and Antitrust: Jurisdiction, Enforcement and Cooperation Issues*, in *Cross-Border Mergers and Acquisitions and the Law* (Norbert Horn, ed. 2001), 361, n.10.

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

⁴ *Carpet Group Int’l v. Oriental Rug Importers Ass’n*, 227 F.3d 62, 69 (3d Cir. 2000).

⁵ 542 U.S. 155 (2004).

⁶ *Id.* at 162.

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notebook computers, and cell phones and various parts assemblies used to make automobiles.

Often at issue is whether the foreign component cartel had the required “direct, substantial, and reasonably foreseeable effect” on US commerce.⁷ The DOJ’s position in those cases is typically that U.S. consumers were harmed because inflated cartel prices for the components paid for abroad were incorporated into higher prices for the finished products that were sold in the United States.⁸ It is concerned, however, that interpretations of the FTAIA that preclude the Sherman Act from reaching foreign component part cartels unduly limit its ability to protect U.S. consumers from competitive harm.⁹

Although lower courts have been mindful of the Supreme Court’s admonition that Congress intended that the FTAIA “clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act’s scope as applied to foreign commerce,”¹⁰ they

have applied the statute inconsistently. For example, the Ninth Circuit has held that “direct” under the statute means “as an immediate consequence” with no “intervening developments.”¹¹ In contrast, the Second and Seventh Circuits have rejected the Ninth Circuit’s test, instead defining direct as having a “reasonable proximate cause nexus.”¹²

The nexus test has proven difficult to apply and one group of commentators has argued that in practice it often devolves “into subjective metaphysical analysis.”¹³ But with respect to component part cartels, there is always the argument that effects on U.S. Commerce are not direct where a price fixed component is incorporated overseas into a finished product that is eventually imported into the United States. Thus, under either test, a U.S. plaintiff suing a foreign component part cartel cannot be assured that it can meet FTAIA requirements.

The FTAIA’s seemingly intractability is perhaps best illustrated by the recent *Motorola* litigation before the Seventh Circuit. It involved claims based on foreign sales of price-fixed LCD panels incorporated into cellphones that were then imported into the United States. In earlier litigation the DOJ had alleged that the overcharges on

⁷ Other frequently recurring issues arising under the FTAIA include (1) whether, assuming a direct effect on U.S. commerce, that effect “gives rise to” the plaintiff’s Sherman Act claim (*Empagran*, 542 U.S. at 162), and (2) whether the foreign cartel conduct directly involves U.S. import commerce and thus is excluded from the requirements of the statute by its express terms. See *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 855-56 (7th Cir. 2012).

⁸ Leon B. Greenfield, Steven F. Cherry, Perry A. Lange, and Jacquelyn L. Stanley, *Foreign Component Cartels and the U.S. Antitrust Laws: A First Principle Approach*, Antitrust (Spring 2015), 18.

⁹ Brief for the United States and the FTC as Amicus Curiae in Support of Panel Reh’g or Reh’g En Banc at 10, *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. Apr. 24, 2014), 2014 WL 1878995, at *10.83 F.3d 845, 856-57 (7th Cir. 2012).

¹⁰ *Id.* at 169.

¹¹ *Huising*, No 12-10514, slip op. at 40; *United States v. LSL Biotechnologies*, 379 F.3d 672, 680-81 (9th Cir. 2004).

¹² See *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 410 (2d Cir. 2014) and *Minn-Chem*, at 856-57.

¹³ Greenfield, et. al, at 21.

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those panels entering the U.S. exceeded \$500 million.¹⁴

In *Motorola I* the court first held that the targeted conduct did not have a direct effect on U.S. commerce, but subsequently vacated the opinion.¹⁵ Then in *Motorola II* the same panel reversed itself on the direct effect test, holding that if prices of the components were fixed, the effect on U.S. commerce would meet the test for purposes of the FTAIA.¹⁶ But it focused additionally on the second domestic effects question under the statute – whether, assuming a direct effect on U.S. commerce, those effects give rise “to an antitrust cause of action under the Sherman Act.”¹⁷ In doing so, it held that the FTAIA precluded plaintiff’s claims because the domestic effect of a conspiracy to fix component part prices did not “give rise” to a Sherman Act claim. The court reasoned that although the domestic effect of the conspiracy was increased cell phone prices in the U.S., that is not what harmed the plaintiff, which was a wholly owned foreign subsidiary of the American parent company.¹⁸ It had purchased the price fixed compo-

nents directly from the conspirators abroad. According to the court, its harm was suffered abroad when it purchased the price-fixed panels abroad, but that harm was not dependent on the domestic effect of increased cell phone prices.¹⁹

In support of its holding, the *Motorola II* court referenced the Supreme Court’s concern expressed in *Empagran* about the risk of excessive extraterritorial application of U.S. law interfering “with a foreign nation’s ability independently to regulate its own affairs.”²⁰ Of course, that concern for international comity is a prime motivation for the FTAIA itself.²¹ The proof is in the pudding, however. That is, it is the American courts which are left with the task of interpreting and applying an admittedly poorly drafted and confusing statute. As such, it seems that they are the ultimate purveyors of comity.

Part of the judicial function of course is to provide guidance and predictability. But with the circuit split after *Motorola II*, there is currently little of

¹⁴See Brief for the United States at 22, *United States v. AU Optronics Corp.*, No. 12-10492 (9th Cir. Apr. 5, 2013).

¹⁵*Motorola Mobility LLC v. AU Optronics Corp. (Motorola I)*, 746 F.3d 842, 844-45 (7th Cir. Mar. 27, 2014) (Posner, J.), vacated and rehearing granted, 2014 U.S. App. LEXIS 120704 (7th Cir. July 1, 2014).

¹⁶*Motorola Mobility LLC v. AU Optronics Corp. (Motorola II)*, 775 F.3d 816, 819 (7th Cir. 2015).

¹⁷*Id.* at 820.

¹⁸Motorola argued that it functioned with its subsidiaries as a single enterprise, but the court ruled them legally distinct and that it could not pretend that its foreign subsidiaries were divisions rather than subsidiaries. *Id.* at 822.

¹⁹*Id.* at 820. The court also held that Motorola’s claims did not fall within the import trade exception to the FTAIA, since Motorola, not the defendants, were the importers of the price-fixed goods. *Id.* at 818. This holding conflicts with the Ninth Circuit, which held that the fact that the defendants were not themselves “importers” was immaterial. *Huising*, 2015 WL 400550, at *14.

²⁰*Motorola II*, 775 F.3d at 824 (quoting *Empagran*, 542 U.S. at 165).

²¹Ellen Meriwether, *Motorola Mobility and the FTAIA: If Not Here, Then Where?*, Antitrust, Spring 2015, 13. ²¹Further, *Motorola IP*’s restriction of the reach of the FTAIA’s import exception adds another potential layer of defense for foreign cartels. See note 19, *supra*, and *Motorola II*, 775 F.3d at 818.

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either for cases involving component part price-fixing abroad. *Motorola II* certainly restricts the reach of U.S. antitrust laws to those conspiracies and adds additional hurdles for the DOJ and private plaintiffs seeking relief for domestic harms. In addition to the direct and substantial effects requirement, plaintiffs must be prepared to meet a narrow, restrictive “domestic effects” test to satisfy the FTAIA.²²

But before one asserts that *Motorola II* has effectively swept away all U.S. antitrust claims against foreign component part price-fixers, it is important to remember the Supreme Court’s admonition in *Empagran* that it matters who the plaintiff is.²³ For example, if *Motorola* had made its purchase decisions and executed purchase orders in the U.S. rather than abroad through a foreign subsidiary, the result might have been different.²⁴ Further, the DOJ, while is concerned about the effect of cases like *Motorola II* on its ability to criminally prosecute foreign based component part cartels, has typically asserted jurisdiction through the FTAIA’s import commerce exception.²⁵

Nonetheless *Motorola II* has limited the reach of Sherman Act claims to foreign component part cartels. But that case may have created a circuit split and it is far from clear how other circuits might handle the same type of claim. On June 15, 2015, the Supreme Court denied certiorari in both *Motorola II* and the Ninth Circuit’s *Hsiung* case, so we are not going to get a definitive answer anytime soon.

Motorola II may have shifted the focus to the domestic effects analysis and away from the direct effects requirement, which could perhaps soften the supposed circuit spit since the FTAIA requires both. As a result, it may be that in declining to hear the case, the Supreme Court did not see a circuit split.²⁶

In any event, judicial application of the FTAIA seems to have produced more questions than answers. While ideally the law should create certainty, the combination of an unartfully drafted statute, differing judicial interpretations of that statute, and the somewhat amorphous concept of comity all combine to produce a great deal of uncertainty about the application of the FTAIA to foreign component part cartels.

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²² 542 U.S. at 170-71.

²³ In that instance, the goods would have been import commerce and thus presumably within the FTAIA’s import exception but whether the “gives rise to” domestic effect standard under *Motorola II* would be satisfied is still questionable.

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²⁵ *Hsiung*, No. 12-10514, slip op. 35-36.

²⁶ The U.S. Supreme Court does not give its reasons for denying a petition for certiorari.