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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

III. SETTING UP THE COMITY-DETERRENCE TRADE-OFF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. WHAT ABOUT FINAL U.S. CONSUMERS?

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

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

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

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

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