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# Motorola Mobility and the FTAIA

September 30, 2014 by [Robert Connolly](#) — [Leave a Comment](#)

[Competition Policy International \(CPI\)](#) recently published a collection of articles relating to the FTAIA and the *Motorola Mobility* case. I was pretty excited to have an article in the collection that included distinguished authors such as Professor Eleanor Fox. CPI is a subscription-based service, but this is the [blurb introducing the issue](#):

“ In *Motorola Mobility*, the Seventh Circuit is readying to rehear a lawsuit that will (hopefully) clarify the extent of U.S. antitrust law’s reach outside of the United States. The issue concerns the Foreign Trade Antitrust Improvements Act, which was ostensibly passed to clarify the reach and limits of the Sherman Act for U.S. companies doing business abroad. However, given divergent court opinions, matters have become quite messy. This issue will bring you up to date on the history, the issues, and the significant ramifications at stake. As Eleanor Fox writes in her article, this situation raises the possibility that “U.S. law is in danger of creating a void in the reach of U.S. antitrust law to reprehend anticompetitive acts by foreigners abroad destined to raise the price of goods and

services to U.S. consumers.”

## Summary

In my article [\(here\)](#) I make the following points:

- The FTAIA ought to be repealed. The FTAIA was passed in 1982 primarily to provide immunity to U.S. exporters to engage in anticompetitive conduct as long as it was directed at foreign markets. The world has changed since 1982 and such immunity is now obnoxious.
- The comity concerns of foreign nations who have filed amicus briefs arguing that Sherman Act jurisdiction should not extend to overseas sales of components are not frivolous. Many, perhaps most, products purchased by U.S. consumers contain components that were made, purchased and assembled overseas.
- The court should find that the FTAIA requirements of “direct, substantial and reasonably foreseeable effect” on U.S. commerce were met on the facts in *Motorola Mobility*. This would allow the Antitrust Division to prosecute foreign component cartels as it did in the LCD panel matter. The executive branch has a strong incentive to weigh the comity concerns of foreign nations before proceeding. The Antitrust Division has “skin in the game” of fostering international cooperation, and in fact no foreign government has objected to the Division’s criminal prosecution of both foreign companies and foreign executives in the LCD panel investigation.
- The direct purchaser rule of *Illinois Brick* and related cases, however, should apply to civil damage actions brought by U.S. consumers. If a company, or consumer, has elected to make purchases overseas to take advantage of various favorable circumstances and/or laws, it is not unreasonable to require that they pursue damage actions in the jurisdiction where they elected to make the purchase.

## Repeal the FTAIA

The FTAIA makes the Sherman Act inapplicable to conduct involving export or wholly foreign commerce except when that conduct has a “direct, substantial and reasonably foreseeable effect” on U.S. commerce and that effect “gives rise to a claim.” In my article I argued that for starters, the FTAIA ought to be repealed. It was enacted in another era when only the U.S. and Canada had active enforcement against cartels. The Supreme Court explained “[t]he FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint selling arrangements), however anticompetitive, as long as these arrangements adversely

affect only foreign markets.” *F. Hoffmann-LaRoche LTD v. Empagran S.A.* 542 U.S. 155, 161 (2004). Today, the competition landscape is completely different. Thanks to the efforts of the Antitrust Division, cartel enforcement has been one of the most successful exports of the United States. At a time when the U.S. actively seeks to extradite foreign executives to the U.S. for price-fixing and imprison them for up to ten years, it’s a not a good thing to be providing immunity to U.S. executives who ay wish to cartelize foreign markets. It is also an incoherent policy that fosters FCPA prosecution for bribes to foreign officials to obtain contracts, but would bless a conspiracy to rig bids for contracts to foreign consumers. The FTAIA should be repealed and the reach of the Sherman Act judged under the pre-existing case law as set forth in *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993).

### **Deciding *Motorola Mobility***

On to *Motorola Mobility*. In the vacated opinion the court found that the FTAIA requirements of “direct, substantial and reasonably foreseeable effect” on U.S. commerce was not met. “The alleged price fixers are not selling the panels in the United States. They are selling them abroad to foreign companies (the Motorola subsidiaries) that incorporate them into products that are then exported to the United States for resale by the parent. The effect of component price-fixing on the price of the product of which it is a component is indirect...” The ruling in this case drew a bright line in finding that sales made overseas do not satisfy the FTAIA requirements. The decision alarmed the United States and the government has filed several amicus briefs for the rehearing. The United States requested that the panel “hold that a conspiracy to fix the price of a component can directly affect import commerce in finished products incorporating that component and that the conspiracy in this case did directly affect that commerce.” The United States has advocated a “reasonably proximate causal nexus” test. The Second Circuit in *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395 (2d Cir. 2014) recently adopted this test. The Second Circuit rejected the interpretation whereby an effect is “direct” if it follows as an immediate consequence. Instead, the court wrote, “We agree with Lotes and amici [the United States] that this less stringent approach (reasonably proximate causal nexus) approach reflects the better reading of the statute.”

The issue that seemed to concern Judge Posner in the original Seventh Circuit opinion, now vacated, was the idea that virtually every product sold in the United States has some foreign-made component. Allowing component based private damage actions might make the U.S. the world’s policeman. Judge Posner wrote: “The position for which Motorola contends would if adopted enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and ‘resent[ment at] the apparent effort of the United States to act as the world’s competition police officer,’ a primary concern motivating

the foreign trades act.”

Numerous countries have filed amicus briefs urging the court upon rehearing to again find that Motorola Mobility did not satisfy the FTAIA requirements because the purchases were made overseas. Korea, for example, contends that applying the Sherman Act here would extend its application “to any intermediary product produced or purchased outside the United States, so long as it is eventually incorporated into an end product sold in the United States.” The DOJ replied: “But there is no reason to believe that would be the consequence of finding a direct effect on U.S. commerce in the particular circumstances here or in many other cases.” Of course, the uncertainty of this case-by-case analysis may be the very concern of the foreign countries that filed amicus briefs. It is fairly certain that private plaintiffs would find the FTAIA requirements met in a much broader set of circumstances than the DOJ.

The solution I proposed was to hold that the price-fixing at issue in *Motorola Mobility* did have a “direct, substantial and reasonably foreseeable effect” of U.S. commerce. The U.S. therefore should not be barred from bringing criminal enforcement actions involving component price-fixing. As the U.S. noted in its amicus filings, no foreign government objected to the U.S. prosecutions, not only of foreign companies but also of foreign executives, for price-fixing in the LCD panel matter. The Antitrust Division works closely with foreign enforcement agencies on international cartel matters and seriously considers comity issues before bring such cases. Without foreign cooperation in matters such as coordinating dawn raids, MLAT’s, extradition and many other areas, the U.S. ability to prosecute foreign cartels would suffer. The Antitrust Division has “skin in the game” in the need for foreign cooperation in these prosecutions. Courts normally defer to the executive brick on when issues of comity with foreign governments are raised and should do so in *Motorola Mobility*.

The comity concerns of foreign government are much different with respect to private civil damage actions. Private plaintiffs simply don’t have to weigh the impact on long-term enforcement. Their obligation is to vigorously press the damage claims arising in their case. The U.S. government has reason to weigh comity and sovereignty concerns when bringing international component cartel case. Private plaintiffs do not.

A compromise decision in *Motorola Mobility* would be to find the requirements of the FTAIA met, thus preserving the DOJ’s ability to bring appropriate component price-fixing cases, while applying the principles of *Illinois Brick* to dismiss the plaintiff’s suit. The purchases that are at issue are purchases made overseas by Motorola’s foreign subsidiaries. These price-fixed panels were then assembled into a finished product and imported for sale into the

U.S. Under *Illinois Brick*, therefore, the plaintiff in *Motorola Mobility* was not a direct purchaser and does not have standing to bring the suit. There is some equity in this position. Motorola Mobility chose to set up and purchase the LCD panels through foreign subsidiaries to take advantage of tax, labor and other laws it must have considered favorable in doing business in those countries. It is not unreasonable to find that “You take the good with the bad” and any damage actions should be brought in the country where the businesses were set up. U.S consumers, by contrast, have little to no choice but to buy products that have some foreign-made components in them.

The concern that foreign companies would be exposed to litigation in the United States based on component price-fixing is heightened by the fact that the circuits are now unanimous that meeting the FTAIA requirements is a substantive element of the offense, not a jurisdictional requirement. The Second Circuit in *Lotes* stated: “We hold that, under the principles articulated in a line of recent Supreme Court decisions ... the requirements of the FTAIA are substantive and nonjurisdictional in nature.” Other circuits agree. As a practical matter this means that the FTAIA issues generally cannot be decided on a motion to dismiss. Instead, discovery will take place before the issue can be raised on a summary judgment motion. This can result in very protracted litigation. Judge Posner observed that the *Motorola Mobility* civil litigation was in its fifth year. The case of *Animal Science Products v. China Minmetals Corp.* (Sherman Act damages case against Chinese magnesite companies) involves FTAIA issues. The case was filed in 2005 and the plaintiffs were just recently granted leave to amend their complaint.

It would be a loss to cartel deterrence if the plaintiff in *Motorola Mobility* was found not to have standing to bring suit. But, it is a reasonable compromise to address the concerns of foreign governments by applying *Illinois Brick*, while at the same time allowing enforcement actions by the Antitrust Division to go forward by finding the FTAIA requirements met. If the Seventh Circuit, and ultimately the Supreme Court, finds that component price-fixing as a matter of law does not have a “direct, substantial and reasonably foreseeable effect” on U.S commerce, global cartel enforcement would suffer a huge blow.

Thanks for reading.

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