Repeal the FTAIA! (Or At Least Consider It as Coextensive with Hartford Fire)

Robert Connolly, Sep 17, 2014

The goal of this article is to advance two propositions: 1) that the Foreign Trade Improvements Act ("FTAIA") should be repealed; and 2) that Motorola Mobility can be decided through the principles set forth in Hartford Fire and Illinois Brick.

The FTAIA was passed in 1982. A primary motivation behind the FTAIA was to give immunity to American exporters to engage in anticompetitive conduct—as long as it negatively affected only foreign consumers. With a purpose like that, what could go wrong? The FTAIA did not establish the extraterritorial reach of the Sherman Act and its repeal would not remove it.

Deciding Motorola Mobility through the application of Hartford Fire and Illinois Brick would preserve the ability of the U.S. Department of Justice’s Antitrust Division to prosecute international cartels that harm American consumers but, at the same time, give weight to foreign governments that seek to limit the reach of antitrust treble damage actions for sales made abroad.

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