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Foreign Component Cartels and the U.S. Antitrust Laws: A First Principle Approach

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IN THE PAST DECADE, MANY OF THE largest U.S. Department of Justice cartel investigations and follow-on civil lawsuits have targeted foreign suppliers of components that were incorporated by other companies into finished products assembled overseas, which were later imported for sale to U.S. customers. The components include TFT-LCD panels (screens for finished products, such as cell phones, notebook computers, computer displays, and televisions), and, more recently, various parts and assemblies used to make automobiles.

Defendants in such matters collectively have paid billions of dollars in fines and settlements of private damages claims.[1] Cases involving finished products are premised on allegations that U.S. consumers were harmed when effects from cartel behavior in foreign component markets—typically inflated component prices paid in foreign transactions—were passed on to U.S. consumers in the form of higher prices for finished goods, e.g., televisions or automobiles.

Private plaintiffs and government enforcers are engaged in ongoing disputes with defendants about whether claims arising from foreign component cartels may proceed given the Foreign Trade Antitrust Improvements Act (FTAIA), which sets the framework for determining whether U.S. antitrust laws can reach anticompetitive conduct involving foreign commerce. The few court rulings that apply the FTAIA to claims arising from foreign component cartels are mixed, unclear, and do not apply a consistent approach.[2] The dispute has often centered on whether the foreign component cartel had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, one of the two critical questions under the FTAIA. In some recent court decisions, however, we think that inquiry has generated more heat than light.

This article outlines a different approach—that factual analysis in foreign component cartel cases should focus intensively on the other crucial inquiry under the FTAIA, that is, whether the U.S. effect of the foreign cartel conduct "gives rise to" a Sherman Act claim. Courts typically have encountered this requirement as a basic issue of causation: Does this particular plaintiff's claim arise out of effects on U.S. commerce that satisfy the direct, substantial, and reasonably foreseeable requirement?

Here we propose a focus on a critical substantive issue embedded in the "gives rise to" inquiry: Are the effects on U.S. commerce the sort of effects that can support a claim under the U.S. antitrust laws? When the only alleged U.S. effects are higher downstream prices for finished products sold in the United States, we think the answer is clearly no.

This conclusion follows from the first principle that U.S. antitrust laws protect the competitive process in U.S.—not foreign—markets against distortion from anticompetitive conduct. Put differently, U.S. antitrust laws do not apply to all conduct that results in inflated prices in a U.S. market, but rather only to conduct that also distorts competitive interactions in the U.S. market. In cases where a cartel involving foreign sales of components affects a U.S. market only by inflating the prices for finished goods imported to the United States, the effect on U.S. commerce (allegedly higher prices on finished products due to the higher price-fixed cost of components) is not caused by a breakdown of the competitive process in the U.S. market for the finished products and, thus, is not the kind of effect that "gives rise to a claim" under the U.S. antitrust laws.

When the "gives rise to" requirement of the FTAIA is properly applied to cases based on imported finished products, much of the alleged anticompetitive effect caused by cartel conduct in foreign component markets is outside the reach of the U.S. antitrust laws. By contrast, in cases based on price-fixed components that are imported for sale into the United States, the express exception in the FTAIA for import

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trade or commerce assures that U.S. antitrust laws apply, which is entirely consistent with the first principle of protecting against distortion of the competitive process in the U.S. market.

The discussion below proceeds as follows. We first show that U.S. antitrust laws allow claims for injury suffered as a result of conduct that impairs the competitive process in a U.S. market, not conduct that merely leads to inflated prices there—the critical first principle from which our conclusion follows. Next, we explain how the FTAIA is properly applied to cases involving finished products in light of this principle. We then show that important considerations of international comity further support this application of the FTAIA. Next, we demonstrate that state-law indirect purchaser claims are subject to the same limitation. Finally, we explain that correctly applying the FTAIA to foreign component cartels will typically still leave the U.S. government latitude for criminal prosecutions.

First Principle of U.S. Antitrust Law: Protecting the Competitive Process in U.S. Markets

Our analysis begins with the first principle that U.S. antitrust laws safeguard the competitive operation of U.S. markets, not foreign markets, from distortion through anticompetitive conduct.[3] For decades, this rule has coexisted with the express recognition that, in a global economy, the effects of anticompetitive conduct directed at foreign markets can potentially ripple on to inflate prices paid by U.S. consumers.[4] Nearly 70 years ago in *United States v. Aluminum Co. of America* (*Alcoa*), Judge Learned Hand recognized that

> [a]lmost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two of them. Yet when one considers the international complications likely to arise from an effort in this country to treat [foreign] agreements [not directed at imports] as unlawful, it is safe to assume that Congress certainly did not intend the [Sherman] Act to cover them.[5]

The court in *Alcoa*, therefore, concluded that Section 1 of the Sherman Act reached agreements made abroad only "if they were intended to affect imports and did affect them."[6]

The Sherman Act and other U.S. antitrust laws prohibit conduct that unreasonably interferes with the competitive process. Our antitrust laws are based on the premise that protecting the competitive process leads to lower prices, enhanced quality and innovation, and other consumer benefits.[7] But U.S. antitrust laws do not proscribe inflated prices (or other harm to consumers), in and of themselves. For example, Section 1 of the Sherman Act and its state law analogs proscribe agreements that unreasonably restrain trade, but Section 1 does not reach a seller's unilateral decision simply to charge its customers "too much."[8] Nor, as the Supreme Court made clear in *NYNEX Corp. v. Discon Inc.*, does Section 1 reach agreements that effectuate improper conduct and thereby harm competitors or consumers, unless the agreement actually impairs the competitive process.[9]

The law interpreting Section 2 of the Sherman Act is also instructive here. Section 2 proscribes exclusionary conduct that creates or maintains monopoly power. But Section 2 does not prohibit exploiting monopoly power by charging supracompetitive prices.[10] As the D.C. Circuit explained in *Rambus v. FTC*, conduct by an actual or aspirational monopolist may cause higher prices, but unless the conduct "exclude[s] rivals" and thereby "diminishes competition," it is not conduct that the antitrust laws reach.[11]

Given these principles, it follows that the Sherman Act reaches foreign cartel conduct only if that conduct distorts the competitive process in a U.S. market.[12] In *Kruman v. Christie's International PLC*, the court described this requirement with reference to the pre-FTAIA law in the Second Circuit:

> There is a distinction between anticompetitive conduct directed at foreign markets that only affects the competitiveness of foreign markets and anticompetitive conduct directed at foreign markets that directly affects the competitiveness of domestic markets. The antitrust laws apply to the latter sort of conduct and not the former. Our markets benefit when antitrust suits stop or deter any conduct that reduces competition in our markets regardless of where it occurs and whether it is also directed at foreign markets.[13]

This proposition does not support application of U.S. antitrust law to cartel conduct that affects wholly foreign transactions on the grounds that it leads to a downstream effect on U.S. consumers. In a global economy, anticompetitive conduct directed at transactions anywhere in the world may eventually have some ripple effect on a U.S. market (sometimes trivial and sometimes not). But as Judge Hand recognized long ago, if injuries to U.S. consumers from all such conduct were reachable under the Sherman Act, the implications would be limitless.[14]

For example, consider an agreement among electricity producers in Vietnam to restrict output and thereby increase prices, which then inflates variable manufacturing costs for Vietnamese factories making jeans for U.S. retailers. The factories, in turn, pass on their increased costs to the U.S. retailers, ultimately inflating prices for jeans sold in shopping malls across America. It seems both absurd and contrary to first principles of antitrust law to apply U.S. law to the conspiracy among Vietnamese energy producers. After all, the distortion of competition is in a Vietnamese energy market, and any effects on U.S. consumers are merely derivative of distortions in that foreign market. Such anticompetitive conduct is properly addressed under Vietnamese law and by Vietnamese regulators and courts; U.S. antitrust law has no proper role.

Now assume Asian denim manufacturers agreed to fix prices for the fabric used by Vietnamese factories to make jeans, and U.S. prices for imported jeans are inflated as a result. The economic effect in the U.S. market for jeans is the

same (higher jeans prices), whether the prices are inflated as a result of a conspiracy among suppliers of the denim or electricity used to make the jeans in the Vietnamese factories. Notwithstanding the cases premised on similar facts, we see no justification in law or policy why the Sherman Act should apply to the foreign sales of denim any more than it should apply to the foreign sales of electricity. In either case, U.S. antitrust law has no proper role because the foreign conduct does not interfere with competition in U.S. markets for jeans.

Or, put differently, we see no reason why applying the U.S. antitrust law to the foreign sales of denim would be any less of a misapplication of antitrust first principles (and an example of U.S. overreach) than would doing so with respect to the sale of electricity. In both cases, the transactions targeted by foreign cartel activity were wholly foreign and, in both cases, the process by which suppliers of jeans compete to sell jeans in U.S. markets is not impeded by the foreign conduct.[15] Any effect on the price of jeans in U.S. markets is wholly derivative of lost competition in the foreign input market.

Applying the FTAIA to Foreign Component Sales

The FTAIA is properly read to incorporate the first principle that U.S. antitrust laws reach only foreign conduct that distorts competition in a U.S. market. In 1982, Congress enacted the FTAIA to respond to concerns—especially from U.S. businesses operating in foreign markets—that, post-*Alcoa*, court-made standards for applying the Sherman Act outside of the United States were too vague. The Supreme Court explained the proper operation of the law in its only decision interpreting the FTAIA, *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.* (*Empagran*): First, the FTAIA "lays down a general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach"; and second, the statute "brings such conduct back within the Sherman Act's reach" only if: (1) the relevant restraint has a "direct, substantial, and reasonably foreseeable" anticompetitive effect on U.S. commerce; and (2) that effect on U.S. commerce "give[s] rise to" the plaintiff's Sherman Act claim.[16]

Empagran makes clear that nothing in the FTAIA broadens the range of potentially harmful effects that the Sherman Act reaches.[17] To the contrary, "Congress sought to release domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm."[18] To that end, Congress expressly required plaintiffs challenging anticompetitive conduct involving (non-U.S. import) foreign commerce to show not only that the conduct brought a direct, substantial, and reasonably foreseeable effect on U.S. commerce, but that such effect "gives rise to a claim" under the U.S. antitrust laws.[19] The FTAIA, therefore, removed from the Sherman Act's reach—subject to narrow exceptions—anticompetitive conduct that involves commerce with foreign nations (other than import commerce into the United States).[20]

Accordingly, and applying the first principle discussed above, the FTAIA is properly interpreted to bar Sherman Act claims that seek damages for injuries suffered as a result of foreign component cartels that may cause price effects on finished products that are imported to the United States.

The Import Commerce Exclusion. The Sherman Act applies where foreign cartel conduct directly involves U.S. import commerce, e.g., where foreign cartel participants sell component products into the United States. In such circumstances, the components themselves are imported products and the foreign cartel conduct distorts competition in the U.S. market into which those goods are imported (by artificially restraining competition and raising prices above competitive levels). The FTAIA's domestic effects test does not apply to such sales because the express terms of the statute exclude import trade or commerce from the FTAIA's requirements.[21]

Plaintiffs in component cartel cases have sometimes contended that the import exclusion also applies broadly to price-fixed components sold in foreign transactions that are incorporated overseas into finished products that are later imported by third parties into the United States.[22] To date, one court has agreed with a variant of this argument, holding that if the finished product was sold by a co-conspirator into the United States, then the import exclusion applies.[23] Either way, however, this theory contravenes the courts' traditional construction of the import commerce exclusion to apply only to cartel conduct directed to the import transaction itself (e.g., where cartel members or third parties acting at the direction of cartel members sell the price-fixed product itself into the United States).[24] The import commerce exclusion therefore does not apply where the price-fixed component (e.g., an LCD panel) makes its way into the United States as part of an imported finished product (e.g., a computer display).

For example, in *Kruman*, the Second Circuit found that defendants' conduct—fixing prices for auction services in foreign cities—was not directed to an import market, even though some of the buyers who participated in the foreign auctions were clearly purchasing goods to bring to the United States.[25] The court reasoned that "the object of the conspiracy was the price that the defendants charged for their auction services, not any import market" for the goods purchased in the auction.[26] That logic applies equally where foreign cartel conduct impairs competition in the (foreign) component market but not in an (import) market for finished products. The conduct does not "involve" import commerce, even if the price-fixed inputs are ultimately included in finished goods that are imported into the United States.[27]

Accordingly, the FTAIA's domestic effects test applies to cartel conduct affecting components that wind up in the United States as part of imported finished products. The question, then, is whether the plaintiff can satisfy that test.

The FTAIA's Domestic Effects Test. The first part of the FTAIA domestic effects test asks whether the conduct has a

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"direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Most of the controversy regarding this element has concerned what types of effects are sufficiently direct, and the courts of appeals are split on what "direct" means under the FTAIA. The Ninth Circuit has held that direct means "as an immediate consequence" with no "intervening developments."[28] The Seventh and Second Circuits have rejected the Ninth Circuit's test, and instead define direct as having a "reasonably proximate causal nexus."[29]

Even where the wording of the test is settled, however, the case law addressing whether a particular effect is "direct" has too often devolved into subjective, metaphysical analysis.[30] Cases involving foreign component cartels that are alleged to have inflated prices for finished goods imported into the United States are no exception. For example, the Seventh Circuit in *Minn-Chem v. Agrium Inc.* said conduct that "filters through many layers [before it] finally causes a few ripples in the United States" does not meet the "reasonably proximate causal nexus test."[31] Although this is evocative language, it is not a practical standard for addressing specific factual scenarios or assisting courts or companies in understanding the reach of U.S. antitrust law. Indeed, a panel of the same court abstained from definitively applying the standard in the subsequent *Motorola* case involving claims based on foreign sales of price-fixed LCD panels incorporated into cellphones that were imported into the United States.[32] Instead, Judge Posner, writing for the panel, focused on the second domestic effects question—whether the U.S. effects gave rise "to an antitrust cause of action."[33]

There are strong arguments that any effects on U.S. commerce that result when a price-fixed component is incorporated overseas into a finished good that is eventually imported into the United States are not direct, even assuming they were in a particular case found to be substantial and reasonably foreseeable. But directness is not the focus of this article. Instead we contend that the "gives rise to" element of the domestic effects test will often be the most straightforward for determining whether the FTAIA will permit an antitrust claim predicated on pass-on effects from distortion of a foreign component market.[34] Because such downstream effects do not distort the competitive process in a U.S. market, but result only in inflated prices there, such claims do not arise from the sort of effects on a U.S. market that are actionable under the U.S. antitrust laws.[35] Put differently, the only effects of the sort that the U.S. antitrust laws prohibit, i.e., impairment of the competitive process, occurred in a foreign market for components, so any resulting effects in a U.S. market (inflated prices for finished products) cannot give rise to a cognizable antitrust claim.[36] As Judge Posner wrote: "Motorola itself, along with U.S. purchasers of cellphones incorporating those panels, were at most derivative victims" of the harm to the foreign LCD panel market.[37]

It is instructive to contrast the foreign component cartel cases with claims against members of the alleged potash cartel that the en banc Seventh Circuit addressed in *Minn-Chem*.[38] There, the court determined that a global supply restriction on potash, combined with the fixing of foreign benchmark prices that were applied to purchases in the United States, actually distorted the competitive operation of U.S. potash import markets, and that potash purchasers in the United States therefore had plausible Sherman Act claims.[39] Unlike the foreign component cartels, the alleged distortion of competition was not restricted to a foreign market, and the effects on the U.S. market were not limited to the pass-on of foreign overcharges through imported products incorporating potash.

The district court in the TFT-LCD Panel MDL cases reached a conclusion at odds with the first principle approach described here, holding that the FTAIA does not bar antitrust claims for downstream price effects on finished products that incorporate TFT-LCD panels. The court focused on alleged harm to U.S. consumers who purchased finished products and the perceived need for a remedy, reasoning that, by barring the "indirect" claims before it under the FTAIA, the court would prohibit claims by purchasers of the actual price-fixed product whenever the "first sale of a price-fixed product" occurred outside the United States.[40] But, in doing so, the court failed to appreciate that the plaintiffs had not actually purchased LCD panels—the object of the conspiracy—but rather different products sold in entirely different U.S. markets, not the foreign components market in which the defendants participated and fixed prices. Their "indirect" claims were not based on distortion of the competitive process in U.S. markets for TFT-LCD panels (or finished products), but rather on alleged indirect follow-on effects (i.e., pass-on of some portion of alleged overcharges on price-fixed components) resulting from distortion of foreign component markets.[41]

Comity Considerations

There are also strong policy reasons to read the FTAIA to bar claims based on a downstream effect from the U.S. sale of a finished product that includes a component purchased in an allegedly cartelized foreign component market.[42] Inserting U.S. antitrust law into input sales in foreign markets may interfere with foreign enforcement efforts in those markets and may jeopardize international cooperation in U.S. cartel enforcement. Regulating such transactions because they may harm U.S. consumers through derivative, pass-on effects is precisely the sort of interference with other nations' econ-

omies and competition enforcement efforts that the United States has long recognized to be counterproductive to U.S. interests.[43]

As the Supreme Court stated in *Empagran*, "America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs."[44] Although there has been a trend in recent years towards greater convergence of national antitrust laws, especially as to prosecution of hardcore cartels, there remain significant differences between the antitrust laws of different nations—both in terms of scope and character of these laws and available remedies.[45] If, for instance, a U.S. court were to award a claimant treble damages under the Sherman Act for price fixing that distorted a Brazilian market, U.S. antitrust law would be determining how the Brazilian market should be ordered.[46]

The TFT-LCD and various auto parts cases have involved to a significant extent non-U.S. suppliers that allegedly fixed prices paid by non-U.S. customers in wholly foreign markets. Many of the transactions at issue in these component cases occurred in the domestic commerce of Japan, Taiwan, or Korea, or between these and other Asian countries. These countries have an obvious interest in regulating such conduct because it affects the competitive process within their own countries and domestic economies. By contrast, the interest of the United States in this conduct does not derive from protecting the competitive process in U.S. markets but rather is entirely derivative of the harm to foreign component markets in Asia. The competitive process for sales of components in Japan, Taiwan, or Korea to customers in those countries may have been distorted but not the competitive process for U.S. sales of mobile phones or automobiles.[47]

Extending U.S. antitrust enforcement to overseas sales of components could create substantial problems for enforcement efforts by foreign antitrust agencies. The effectiveness of those efforts, and particularly foreign governments' leniency programs (which are an important element of efforts to detect cartels), may be diminished if potential amnesty applicants in foreign jurisdictions must weigh the advantages of amnesty in the country in which they did business against the potentially far-reaching criminal or civil exposure in the United States, even if they never or only rarely sold components into the United States.[48] This is particularly true because of the availability of private treble damages remedies in the United States, a feature that is not common in other jurisdictions.[49]

Most U.S. cartel enforcement actions in the last two decades have involved some element of international coordination among enforcement agencies.[50] Overreaching by the United States could easily threaten foreign political support for cooperation with U.S. antitrust authorities—or for robust antitrust enforcement of any sort—if foreign countries come to believe the United States will intrude on their authority to sanction anticompetitive conduct affecting the operation of their own markets and affecting U.S. markets only indirectly and derivatively.[51] Concern about perceived overreaching by U.S. courts and antitrust agencies has provoked strong protests and opposition from foreign nations, resulting in measures such as blocking statutes, anti-suit injunctions, and other retaliatory conduct.[52] The last two decades have brought about a more cooperative approach by both the United States and its major trading partners abroad, and it would be counterproductive to allow overreach of U.S. antitrust laws in component cartel cases to jeopardize this cooperation. A rational and harmonious system of global competition enforcement should leave each nation the exclusive authority to use competition law to safeguard the process of competition in its own markets, not in the markets of other nations.

Applying U.S. antitrust laws to wholly foreign sales in the component cases could also undermine the United States' own interests in another way. If U.S. antitrust agencies seek criminal fines or courts award civil damages based on transactions in foreign markets that only derivatively affect U.S. consumers, what is to stop other countries' enforcers from seeking their own (redundant) penalties based on wholly U.S. transactions that cause only indirect, pass-on effects to their consumers? For example, in 2011, U.S. manufacturers exported over $4 billion in civilian aircraft and related parts to Japan. Under the approach taken in the component cases, the Japan Fair Trade Commission would be justified in imposing fines—and injured private parties would be justified in bringing civil actions—against a conspiring American avionics manufacturer that imposes an overcharge when it sells auto pilot devices in the United States to U.S. aircraft companies, simply because aircraft containing the auto pilot devices are later exported to Japan. Such actions would be a sharp departure from international competition enforcement norms and would interfere with U.S. antitrust enforcement in U.S. markets, but that is precisely what the component cases invite.[53]

State Indirect Purchaser Claims

Given that the *Illinois Brick* doctrine bars most indirect purchaser claims under federal antitrust laws, the question of whether U.S. antitrust laws should apply to component sales in wholly foreign markets will often arise in the context of indirect purchaser suits under state antitrust laws that recognize such claims. For instance, as described above, in the TFT-LCD Panel MDL, a class of self-styled indirect purchasers of TFT-LCD panels brought claims based on their purchases of finished products containing price-fixed panels. These private actions were brought under various state antitrust laws. Although the FTAIA is a creature of federal, not state law, we believe that its underlying principles dictate that cartel conduct in foreign component markets is not actionable under state antitrust law either.

When the court in the TFT-LCD Panel MDL addressed the indirect purchaser claims before it (discussed above), it held that the claims met the FTAIA's domestic effects test.[54] It, therefore, did not reach the question of whether these state

law claims could reach foreign conduct that the Sherman Act could not.[55] In our view, the fundamental analysis does not change regardless of whether component indirect purchaser actions are brought under state law, including *Illinois Brick* repealer statutes.

First, on their own terms, state antitrust laws—similar to federal antitrust statutes—regulate conduct that distorts the competitive process in markets that are within the state's regulatory reach, not price levels within its borders standing alone.[56] That being so, *Illinois Brick* repealer laws cannot properly be read to authorize suits by state residents claiming pass-on injuries derived from distortion of foreign markets that the state's antitrust laws do not reach.[57] Repealer statutes merely allow indirect purchasers to recover if they can prove that—as a result of pass-on—they were actual economic victims of conduct *that violates the state's antitrust laws*.[58] They do not make wholly foreign conduct a violation of state law or provide redress for purely downstream effects, in and of themselves.[59]

Moreover, the principle that U.S. antitrust laws regulate only U.S. markets should apply even more strongly to state antitrust laws because the states do not have any role in regulating commerce involving foreign nations, much less the wholly foreign commerce involved in many component cartels.[60] If state antitrust laws were permitted to reach into foreign markets when federal laws do not, that would circumvent national policy regarding the appropriate bounds of U.S. antitrust laws established by Congress and the President, which have exclusive authority over foreign commerce and U.S. foreign policy.[61] Allowing the antitrust laws of the 50 states, the District of Columbia, and U.S. territories to regulate purely domestic conduct within other countries' economies would result in a cacophony of uncertainty to the application of U.S. antitrust laws overseas, precisely the problem that Congress enacted the FTAIA to address.[62]

It is beyond the scope of this article to discuss the constitutional issues that could arise if state antitrust laws were construed to extend to foreign commerce that Congress has declared beyond the reach of federal antitrust law. But there are, at the least, very serious questions about whether constitutional provisions fundamental to our system of federalism—such as the Supremacy Clause, the Dormant Foreign Commerce Clause, and the "one voice" doctrine—would bar state law from interfering with Congress's decision to limit the extraterritorial reach of U.S. laws through the FTAIA.[63]

DOJ Enforcement Efforts Against Component Cartels

The DOJ has expressed concern that interpreting the FTAIA to preclude the Sherman Act from reaching cartel conduct in foreign component markets may unduly limit its ability to effectively prosecute foreign cartels that harm U.S. consumers.[64] A full discussion of issues specific to the DOJ's authority to prosecute component cartels and the remedies that it can obtain in such prosecutions is beyond the scope of this article, but the interpretation and application of the FTAIA's "gives rise to" element, described above, should not overly restrict the DOJ's ability to prosecute foreign component cartels in most cases.[65]

All of the component cartels prosecuted by the DOJ to date have involved at least some component sales into or within the United States. The DOJ appears to rely on such U.S. (import or domestic) sales as the basis for its jurisdiction in such cases. As discussed above, cartel conduct directed at U.S. import commerce (and domestic commerce) is expressly excepted from the limitations of the FTAIA. Thus, the existence of some affected import sales of components into U.S. markets will provide a basis in most cases for the DOJ to investigate and prosecute foreign cartel conduct in component markets.

The Ninth Circuit recently considered this issue in connection with an appeal by defendants who were convicted of violating Section 1 of the Sherman Act for participating in the TFT-LCD Panel cartel. The defendants claimed that the FTAIA barred the prosecution. The court upheld the conviction because at least some U.S. import sales were affected by the cartel, notwithstanding that many of the affected sales were in wholly foreign commerce.[66] In its amended opinion, the Ninth Circuit added that, in the alternative, the domestic effects test was also satisfied because it found that the effects were direct, substantial, and reasonably foreseeable. The court did not, however, consider the issue we address here—whether those effects were the type of effects that could give rise to a claim under the antitrust laws.[67]

The DOJ, on occasion, has sought to include foreign component sales as a basis for seeking an increased criminal fine and has expressed concern that the FTAIA not be interpreted in a way that impairs its ability to obtain criminal sanctions sufficiently severe to deter cartels that harm U.S. consumers. Sentencing courts have flexibility to determine the appropriate sentence for antitrust offenders, taking into account the severity of the offense, specific and general deterrence, as well as other punishment objectives. When negotiating recent plea agreements, the DOJ has taken the position that, in exercising this discretion, courts can, for example, consider a defendant's conduct outside the reach of the U.S. antitrust laws—e.g., sales of price-fixed components in foreign commerce—in imposing a sentence.[68] Based on this reasoning, the DOJ has occasionally sought fines that, although within a Sentencing Guidelines range calculated based on U.S. sales, were at a higher point within that range to account for foreign component sales that made their way into the United States in the form of finished products.[69] Courts have yet to consider what impact, if any, the FTAIA might have on such sentencing issues, but even were the FTAIA found to impose limitations, such rulings would only affect the amount of fines the DOJ could obtain, not prohibit prosecution entirely. The underlying conduct and foreign sales at issue also would remain subject to penalties in the foreign jurisdiction.

As with corporate defendants, so long as the individual participated in cartel behavior that affected some sales in U.S. import or domestic commerce, the FTAIA should be no impediment to prosecution . . .

The DOJ regularly seeks substantial prison sentences for individuals convicted of participating in component cartels.[70] Indeed, the DOJ consistently points to prison sentences as the prosecution tool with the most potent deterrent effect.[71] As with corporate defendants, so long as the individual participated in cartel behavior that affected some sales in U.S. import or domestic commerce, the FTAIA should be no impediment to prosecution (or prison time for the culpable individuals).[72]

Finally, as foreign enforcement efforts continue to grow more robust, there should be less concern that U.S. enforcement efforts based only on sales into or in the United States will underdeter foreign cartel conduct. By ensuring that U.S. antitrust laws do not interfere with enforcement efforts of foreign competition authorities in their own domestic markets, application of the FTAIA's "give rise to" requirement, in the manner described above, will promote more effective enforcement of non-U.S. antitrust laws. Indeed, one would expect that the competitive process itself should lead foreign competition enforcement agencies to enforce competition laws more aggressively in their own markets, as a way to encourage non-domestic companies to do business there.

Conclusion

Interpreting the FTAIA to preclude U.S. purchasers of finished products from asserting claims based on pass-on effects from cartel conduct in foreign component markets accords due respect for the principle that U.S. antitrust laws regulate the competitive conditions of U.S. markets and that other nations' laws regulate the competitive conditions of their markets. This approach will better promote foreign governments' enforcement of antitrust laws in their own domestic economies, including against international cartels, which will ultimately provide greater protection to U.S. consumers and businesses than were the United States to act as the world's enforcer of antitrust norms. ■

1 *See* U.S. Dep't of Justice, Antitrust Div., *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More*, (Dec. 16, 2014), *available at* http://www.justice.gov/atr/public/criminal/sherman10.html (identifying corporate fines over $10 million by company name, market or product at issue, fine amount, geographic scope (domestic or international), and country of company; identifying 105 of the 121 companies on list as non-U.S. companies).

2 *See, e.g.*, United States v. Hsiung, No. 12-10514, slip op. at 40–43, 41 n.9 (9th Cir. Jan. 30, 2015); Costco Wholesale Corp. v. AU Optronics Corp., No. C13-1207RAJ, 2014 U.S. Dist. LEXIS 133833, at *15–24 (W.D. Wash. Sept. 22, 2014); *In re* TFT-LCD Flat Panel Antitrust Litig., 822 F. Supp. 2d 953, 963–64 (N.D. Cal. 2011); *In re* TFT-LCD (Flat Panel) Antitrust Litig., MDL. No. 1827, 2010 U.S. Dist. LEXIS 65037, at *5–6 (N.D. Cal. June 28, 2010); *see also In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07-MD-01819CW, 2010 U.S. Dist. LEXIS 141968, at *47–48 (N.D. Cal. Dec. 31, 2010) (SRAM) (holding that FTAIA might not bar indirect purchaser plaintiffs' claims where "[p]laintiffs ha[d] proffered some evidence from which it could be inferred that Defendants produced certain types of SRAM products specifically designed to be sold to a particular manufacturer, to be incorporated into a product in turn specifically designed for the United States market, and actually sold in the United States. Supra-competitive pricing of that SRAM could have had a domestic effect in the United States which could have given rise to antitrust injury."); *cf.* Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003, 2014 U.S. App. LEXIS 22408, at *12–14 (7th Cir. Nov. 26, 2014) (holding that FTAIA barred claim based on alleged harm suffered from effects on foreign market); Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 413–16 (2d Cir. 2014) (same).

3 *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies"). *See also* Turicentro, S.A. v. Am. Airlines Inc., 303 F.3d 293, 307 (3d Cir. 2002), *overruled on other grounds by* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011) ("Plaintiffs' injuries occurred exclusively in foreign markets. They are not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act.").

4 *See generally* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 393 (2d Cir. 2002) (recognizing that anticompetitive conduct in foreign markets can result in increased prices in domestic markets), *abrogated on other grounds by* F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

5 148 F.2d 416, 443 (2d Cir. 1945).

6 *Id.* at 444.

7 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 895 (2007) ("Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct. . . . [T]he antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result.").

8 *See* NYNEX Corp. v. Discon, 525 U.S. 128, 135–36 (1998) (finding that injury to consumers in the form of increased rates did not give rise to a per se Sherman Act § 1 claim because it "naturally flowed not so much from a less competitive market for [the relevant] services, as from the [lawful] exercise of market power"); *cf.* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) ("The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal, and . . . the circumstances under which he will refuse to sell.").

9 525 U.S. at 135–36 (holding that plaintiff in Sherman Act Section 1 action "must allege and prove harm, not just to a single competitor, but to the competitive process" and finding that "consumer injury [from increased telephone rates] naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power that is *lawfully* in the hands of a monopolist, namely, New York Telephone, combined with a deception worked upon the regulatory agency that prevented the agency from controlling New York Telephone's exercise of its monopoly power"); *see also* Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990) (rec-

ognizing purpose of U.S. antitrust laws is "the protection of *competition*, not *competitors*" (internal quotation marks omitted)).

[10] Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

[11] 522 F. 3d 456, 464 (DC Cir. 2008); *see also* Forsyth v. Humana Inc., 114 F.3d 1467, 1477–78 (9th Cir. 1997) (quoting Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989) (an allegation of payment of higher rates because of a kickback scheme did not alone support claim of an antitrust injury because plaintiffs did "not explain how the scheme reduced competition in the relevant market.")).

[12] *See Kruman*, 284 F.3d at 393–95 (observing that House Judiciary Committee expressly referenced Second Circuit law in describing what constitutes sufficient domestic effects under FTAIA.); *see also* H.R. REP. NO. 97-686, at 11, *reprinted in* 1982 U.S.C.A.N.N. 2487, 2496 ("[T]he domestic 'effect' that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit" (citing Nat'l Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6, 8 (2d Cir. 1981))).

[13] *Kruman*, 284 F.3d at 393.

[14] *Alcoa*, 148 F.2d at 443 (recognizing "international complications" likely to result from effort to extend Sherman Act to all foreign anticompetitive agreements that "may have repercussions "in United States," finding it "safe to assume that Congress certainly did not intend the Act to cover [all such agreements]").

[15] This follows as an economic matter also. Even in industries where an input market is a monopoly or near monopoly, there will often be robust competition for the finished product. For example, Microsoft's near monopoly on personal computer operating systems in the 1990s did not preclude robust competition for PCs themselves.

[16] *See Empagran*, 542 U.S. at 162 (quoting 15 U.S.C. § 6a(2)) ("such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section"); *see also id.* (effect on U.S. commerce must be "of a kind that antitrust considers harmful" to give rise to a claim).

[17] *See id.* at 169 ("[T]he FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce.").

[18] *Empagran*, 542 U.S. 161, 165–66 ("The 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 . . . however anticompetitive, as long as those arrangements adversely affect only foreign markets.").

[19] *See id.* at 162 (quoting 15 U.S.C. § 6a(2)).

[20] The statute says: "[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—(1) such conduct has a direct, substantial, and reasonably foreseeable effect—(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and (2) such effect gives rise to a claim under the provisions of [the Sherman Act] other than this section. If [the Sherman Act] appl[ies] to such conduct only because of the operation of paragraph (1)(B), then [the Sherman Act] shall apply to such conduct only for injury to export business in the United States." 15 U.S.C. § 6a. The FTAIA also limits application of the FTC Act to unfair methods of competition that have the requisite domestic effects on U.S. markets. 15 U.S.C. § 45(a)(3). It does not limit the FTC's consumer protection authority, however.

[21] *See Hsiung*, No. 12-10514, slip op. at 33 ("Although our circuit has not defined 'import trade' for purposes of the FTAIA, not much imagination is required to say that this phrase means precisely what it says . . . transactions that are directly between the [U.S.] plaintiff purchasers and the defendant cartel members are the import commerce of the United States" (internal citations omitted)); Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 855–56 (7th Cir. 2012) (direct sales of products by defendant into U.S. are "pure import commerce" to which import exclusion applies).

[22] Appellant's Reply Brief at 5–10, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Oct. 12, 2014), 2014 WL 5510635.

[23] In *Costco Wholesale Corp v. AU Optronics Corp.*, the court held that if the finished product was sold by a co-conspirator into the United States, then the import exclusion applies. 2014 U.S. Dist. LEXIS 133833 at *8–10. This distinction does not matter in our view. Whether or not the finished product was imported by a member of the conspiracy, the conspiracy did not fix prices of the finished products, and, therefore, the defendants' alleged conduct did not involve import commerce.

[24] *See, e.g.*, Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 470 (3d Cir. 2011) ("[T]he relevant inquiry is whether the defendants' alleged anticompetitive behavior was 'directed at an import market'") (quoting *Turicentro*, 303 F.3d at 303); *see also Minn-Chem*, 683 F.3d at 853–54 ("[T]he import trade or commerce exception requires that the defendants' [foreign anticompetitive] conduct target [U.S.] import goods or services.").

[25] *Kruman*, 284 F.3d at 395–96. *See also In re* Foreign Exch. Benchmark Rates Antitrust Litig., No. 1:13-cv-07789-LGS, slip op. at 28 (S.D.N.Y. Jan. 28, 2015) ("Because Defendants' conduct was directed at manipulating prices charged for extraterritorial FX transactions, FTAIA's 'import commerce' exception does not apply.").

[26] *Id.* Similarly, in *Turicentro*, the Third Circuit explained that, because plaintiffs could not "demonstrate that defendants' conduct reduced imports of goods or services into the United States . . . defendants were not involved in 'import trade or import commerce,' but rather were engaged in 'conduct involving trade or commerce (other than import trade or import commerce) with foreign nations.'" 303 F.3d at 304 (citing 15 U.S.C. § 6a).

[27] *See Turicentro*, 303 F.3d at 304; *Kruman*, 284 F. 3d at 395–96.

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

[29] *Minn-Chem*, 683 F.3d at 856–57; *Lotes*, 753 F.3d at 410.

[30] *See, e.g.*, *Hsiung*, No. 12-10514, slip op. at 40–43 (recognizing "ambiguity regarding . . . how the price-fixed panels wound up in finished consumer goods sold in the [US]" and "question regarding whether . . . effects were sufficiently direct," but concluding based on "constellation of events that surrounded the conspiracy" that directness requirement was satisfied).

[31] *Minn-Chem*, 683 F.3d at 856–57, 860.

[32] *Motorola*, 2014 U.S. App. LEXIS 22408, at *7–11. Judge Posner, after observing that the U.S. effects of fixing prices of foreign LCD panels incorporated into U.S. bound cell phones was "less direct than the conduct in *Minn-Chem* . . . [b]ut . . . not equivalent to what we said in *Minn-Chem* would definitely block liability," essentially punted on determining whether the effect was in the end actually direct or indirect. *Id.* at *9–10.

[33] *Id.* at *7–11. In a prior, vacated, opinion the panel held that the effects were not direct under the *Minn-Chem* standard. Motorola Mobility Corp. v. AU Optronics Corp., 746 F.3d 842, 844–45 (7th Cir. Mar. 27, 2014) (Posner, J.), *vacated*, 2014 U.S. App. LEXIS 22408 (7th Cir. Nov. 26, 2014).

[34] There may be situations in which the second element will be difficult to apply because the location of the distorted market is ambiguous—for example, price fixing in markets for transportation services between the United States and other countries. *See, e.g.*, *In re* Transpacific Passenger Air Transp. Antitrust Litig., No. 07-CV-05634, 2011 U.S. Dist. LEXIS 49853, at *26–34 (N.D. Cal. May 9, 2011); *In re* Korean Air Lines Co. Antitrust Litig., No. 07-MD-1891, 2008 U.S. Dist. LEXIS 111722, at *13 n.10 (C.D. Cal. June 25, 2008); *In re* Air Cargo Shipping Servs. Antitrust Litig., 2008 U.S. Dist. LEXIS 107882, at *99–106 (E.D.N.Y. Sept. 26, 2008). However, these concepts should be relatively straightforward for price fixing involving physical goods. *See, e.g.*, *Turicentro*, 303 F.3d at 303 (an import "generally denotes a product . . . [that] has been brought into the United States from abroad").

[35] Both *Motorola* and *Lotes* resolved the "gives rise to" question against the plaintiff because the plaintiff alleged it had suffered harm in a foreign market—in essence the same issue presented in *Empagran*. *Motorola*, 2014 U.S. App. LEXIS 22408, at *10–11; *Lotes*, 753 F.3d at 413–15. The scenarios we discuss here are different: the plaintiffs claim to have suffered harm in the United States, and the analysis turns on whether the effects that gave rise to those alleged injuries are the type of effects that can sup-

port a claim under U.S. antitrust law. In the initial, now vacated panel opinion in *Motorola*, Judge Posner appeared to recognize a point similar to the argument we make here. *See Motorola*, 746 F.3d at 845 ("No one supposes that Motorola could be sued by its U.S. customers for an antitrust offense merely because the prices it charges for devices that include such components may be higher than they would be were it not for the price fixing . . . . So the effect in the United States of the price fixing could not give rise to an antitrust claim."), *vacated*, 2014 U.S. App. LEXIS 22408 (7th Cir. Nov. 26, 2014).

[36] *Matsushita*, 475 U.S. at 582.

[37] *Motorola*, 2014 U.S. App. LEXIS 22408, at *6; *see also id.* at *20 ("[T]he [FTAIA] requires that the effect of an anticompetitive practice on domestic U.S. commerce must, to be subject to the Sherman Act, give rise to an antitrust cause of action.").

[38] 683 F. 3d 845 (7th Cir. 2012).

[39] *Id.* at 859–60.

[40] *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d at 963–64.

[41] The court may have been correct to reject a bright-line rule barring all claims where there was an intermediary between a foreign seller of a price-fixed product and a U.S. buyer of that product. *Id.* If all production for a particular product is controlled by an international cartel for purposes of increasing prices worldwide, it is reasonably likely that the cartel's global restrictions on price and output will impair the operation of the U.S. domestic resale market for that product. *See generally*, Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629 (7th Cir. 2002). This is similar to the example in the House Judiciary report of the U.S. export cartel that creates a worldwide shortage for a good, raising U.S. prices. H.R. REP. NO. 924, 97th Cong., 2d Sess. (1982) (conference report).

[42] *See generally* Veda v. Cords Corp., 476 F.3d 887, 901 (Fed. Cir. 2007) (statutes should be construed to minimize comity concerns).

[43] *See, e.g.*, Brief of United States as Amicus Curiae Supporting Petitioners at 21–22, F. Hoffman-La Roche Ltd v. Empagran, S.A., 03-724, 542 U.S. 155, 161 (2004) [hereinafter United States *Empagran* Brief] (arguing that subjecting wholly foreign conduct to U.S. antitrust laws in cases where the plaintiff is suing for injuries to foreign markets can threaten U.S. economic relations with important trading partners).

[44] *Empagran*, 542 U.S. at 165.

[45] *See id.* at 167–68 (discussing potential conflicts with foreign nations due to differences between U.S. and foreign antitrust laws). For example, some countries, including the United States, have made hardcore antitrust violations a criminal offense. In contrast, in many other important U.S. trading partners, such as the European Union, antitrust violations are considered administrative offenses that merely involve monetary sanctions, and may not involve any sanctions on individuals at all. Most foreign antitrust regimes do not provide for the treble damages that are available to successful plaintiffs under the Sherman Act. *See* Amicus Curiae Brief of the Ministry of Economy, Trade and Industry of Japan in Support of Appellees at 5, Motorola v. AU Optronics, 14-8003, 2014 U.S. App. LEXIS 22408 (7th Cir. Nov. 26, 2014) [hereinafter Amicus Curiae Brief of the Ministry of Economy, Trade and Industry of Japan] ("The Japanese law and the laws of many (if not all) countries other than the US do not provide for treble damage awards in antitrust claims."); Brief of the Belgian Competition Authority as Amicus Curiae in Support of Appellees' Position Seeking Affirmation of the District Court's Order at 6, Motorola v. AU Optronics, 14-8003, 2014 U.S. App. LEXIS 22408 (7th Cir. Nov. 26, 2014) [hereinafter Brief of the Belgian Competition Authority as Amicus Curiae] (recognizing "territorial differences in the application of appropriate remedies, particularly the unique aspect of private treble-damages remedies under U.S. law, which neither Belgium nor the EU has adopted").

[46] *See Motorola*, 2014 U.S. App. LEXIS 22408 at *12–15; *see also Empagran*, 542 U.S. at 165 (expressing skepticism that "American law [should] 'supplant'" that of foreign governments in cases where claims arise from harm to foreign markets).

[47] *Motorola*, 2014 U.S. App. LEXIS 22408, at *22–23 ("Nothing is more common nowadays than for products imported into the United States to include components that the producers bought from foreign manufacturers . . . . As a result, the prices of many products exported to the United States doubtless are elevated to some extent by price fixing or other anticompetitive acts that would be forbidden by the Sherman Act if committed in the United States . . . [but] the defendants did not sell in the United States and, if they were overcharging, they were overcharging other foreign manufacturers . . . . The position for which Motorola contends would if adopted enormously increase the global reach of the Sherman Act").

[48] *See* Amicus Curiae Brief of the Ministry of Economy, Trade and Industry of Japan, *supra* note 45, at 9 ("[T]he leniency program is a strong source of information for investigation and legal enforcement measures in bid-rigging cases and price cartel cases, and proper functioning of the leniency program is essential in the enforcement of the Antimonopoly Act. Applying U.S. antitrust law to Japanese companies operating outside the United States would create significant disincentives in the use of the leniency program under the Antimonopoly Act and thereby seriously hamper the effectiveness of this enforcement tool."). Brief of the Belgian Competition Authority as Amicus Curiae, *supra* note 45, at 2 ("The proper functioning of a leniency policy requires that the foreign firms seeking leniency can make an adequate assessment of the potential consequences of alleged infringements, which requires in turn that they may rely on principles of causality and jurisdiction developed in the spirit of comity. If seeking leniency and acknowledging infringement were to expose the foreign firm to the consequence of civil suits in the U.S. courts, such infringers would have little incentive to enter into amnesty programs").

[49] Amicus Curiae Brief of the Ministry of Economy, Trade and Industry of Japan, *supra* note 45, at 5. Foreign governments arguing that the FTAIA bars private civil claims based on category ii transactions in *Motorola* have distinguished such claims from U.S. criminal actions, noting that "private US attorneys . . . do not bear responsibility in international diplomacy and cooperation, [and thus their] right to interfere with Japanese governmental regulation of the Japanese market is troublesome" in a way or to a degree that the U.S. government's right to prosecute is not. *Id.* at 6.

[50] *See, e.g.*, Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Justice, International Cooperation: Preparing for the Future, Remarks as Prepared for the Fourth Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 21, 2010), *available at* http://www.justice.gov/atr/public/speeches/262606.htm.

[51] *Cf.* H.R. REP. NO. 97-686, at 14, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2499 ("[T]he clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets").

[52] *See* Eleanor M. Fox, *Modernization of Effects Jurisdiction: From Hands-Off to Hands-Linked*, 42 NYU J. INT'L POL. 159, 160–62 (2013).

[53] *Cf.* Brief of the United States *Empagran*, *supra* note 43, at 21–22 (arguing that extraterritorial application of U.S. antitrust laws to conduct that has "no meaningful connection" to the United States invites "counter-reactions" from foreign countries).

[54] *In re TFT-LCD Antitrust Litigation*, 822 F. Supp. 2d at 954–55.

[55] *Id.* at 967–68.

[56] *See, e.g.*, Cal. Bus. & Prof. Code § 16720; N.Y. Gen. Bus. Law § 340.

[57] Similarly, we believe the United States' related argument, that "first purchasers" of finished products in the United States ought to be able to recover damages under federal law—*Illinois Brick* notwithstanding—misses the critical point. Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party at 23–24, Motorola v. AU Optronics, 14-8003, 2014 U.S. App. LEXIS 22408 (7th Cir. Nov. 26, 2014). Whether the claimant is the first purchaser, or the tenth purchaser of the finished good, its claim arises from a distortion of competition in the foreign component market, and, therefore, does not arise from actionable effects on a U.S. market.

[58] For example, California's Cartwright Act simply allows injured indirect purchasers, like direct purchasers, to bring claims for "anything forbidden or

declared unlawful" by the Cartwright Act. Cal. Bus. & Prof. Code §§ 16750(a) (providing indirect purchaser standing), 16720 (prohibiting agreements that restrain competition). *See also* Me. Rev. Stat. Ann. Tit. 10, § 1104 (2009) (providing indirect purchaser standing), tit. 10, §§ 1101–1102 (prohibiting contracts in restraint of trade and conspiracies to monopolize); N.Y. Gen. Bus. Law §§ 340(1) and (6).

[59] For example, an indirect purchaser plaintiff, injured by downstream effects on a finished product market and suing under an *Illinois Brick* repealer, must still show antitrust injury even though the legislature has conferred general standing on indirect purchasers to sue for antitrust violations. *E.g.*, *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 516 F. Supp. 2d 1072, 1087–88 (N.D. Cal. 2007) (although indirect purchaser status is sufficient for general standing under California law, California's *Illinois Brick* repealer does not confer antitrust standing).

[60] *See* United States v. Pink, 315 U.S. 203, 233 (1942).

[61] *See* U.S. Const. Art. I, § 8, Cl. 3 (reserving to Congress the power "to regulate Commerce with foreign Nations"); The Federalist No. 42 (Madison) (stating that Foreign Commerce Clause reflects judgment that "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations").

[62] Several courts have held that state antitrust laws cannot reach foreign conduct that is not reachable under the Sherman Act. *See, e.g.*, *In re* Potash Antitrust Litig., 667 F. Supp. 2d 907, 927 (N.D. Ill. 2009) ("Defendants are correct in noting that there could potentially be conflict with certain constitutional provisions if state antitrust laws reached foreign commercial activity that federal laws did not."); *see, e.g.*, *In re* Intel Corp. Microprocessor Antitrust Litig., 476 F. Supp. 2d 452, 457–58 (D. Del. 2007) ("Congress has spoken under the FTAIA with the 'direct, substantial and reasonably foreseeable effects' test, and the Court is persuaded that Congress's intent would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not."); The 'In' Porters v. Hanes Printables, Inc., 663 F. Supp. 494, 502 n.8 (M.D.N.C. 1987) (noting "the anamoly [sic] that would be created if [North Carolina's Unfair Trade Practices Act] were construed to have a greater extraterritorial reach than the Sherman Act"); *SRAM*, 2010 U.S. Dist. LEXIS 141968, at *39–40.

[63] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000) ("[F]rustrating federal statutory objectives" in foreign arena violates Supremacy Clause.); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979) ([N]ation must "speak with one voice" in regulating foreign commerce.); *SRAM*, 2010 U.S. Dist. LEXIS 141968, at *39–40.

[64] 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 ("[T]he panel's narrow view of the statutory term 'direct' is likely to constrain the government's ability to effectively prosecute cartels that substantially and intentionally harm U.S. commerce and consumers, as well as prevent those injured in the United States from redressing that harm."). In the TFT-LCD Panel MDL, the DOJ contended that the FTAIA did not apply at all to criminal prosecutions. Letter from U.S. Dep't of Justice, *In re* TFT-LCD Flat Panel Antitrust Litig., 822 F. Supp. 2d 953 (N.D. Cal. Nov. 15, 2010).

[65] Although Judge Posner's *Motorola* opinion includes extensive discussion about the government's ability to prosecute the foreign conduct, we do not read the opinion to reach specific conclusions about how the "gives rise to" element relates to those efforts, other than to observe that the DOJ did successfully prosecute the conduct at issue in *Motorola*. *Motorola*, 2014 U.S. App. LEXIS 22408, at *25–27.

[66] *Hsiung*, No. 12-10514, slip op. at 35–36.

[67] *Id.* at 38–44.

[68] *See, e.g.*, Plea Agreement ¶ 8(c), United States v. British Airways PLC, No. 07-183, (D.D.C. Aug. 23, 2007), *available at* http://www.justice.gov/atr/cases/f225500/225523.htm ("[T]he United States asserts that a Guidelines fine calculation that fails to account for cargo shipments into the United States affected by the charged cargo conspiracy would understate the seriousness of, and the harm caused to U.S. victims by, the offenses and would not provide just punishment.").

[69] Melissa Lipman, *DOJ Might Target More Remote Foreign Cartels, Official Says*, Law360 (Jan. 29, 2015) (quoting statements made by Deputy Assistant Attorney General Brent Snyder at the New York State Bar Association Antitrust Law Section's annual meeting).

[70] U.S. Dep't of Justice Antitrust Div., *Antitrust Division 2014 Criminal Enforcement Update* (Dec. 17, 2014), http://www.justice.gov/atr/public/division-update/2014/criminal-program.html.

[71] Thomas O. Barnett, Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, United States Senate, Concerning Oversight of U.S. Dep't of Justice Antitrust Div. (Mar. 7, 2007), *available at* http://www.usdoj.gov/atr/public/testimony/221777.pdf.

[72] *See Hsiung*, No. 12-10514, slip op. at 44 ("The evidence offered in support of the import trade theory alone was sufficient to convict the defendants of price-fixing in violation of the Sherman Act.").