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Import Commerce and the Foreign Trade Antitrust Improvements Act

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Abstract: It is clear that the Foreign Trade Antitrust Improvements Act (FTAIA) was not intended to modify the common law effects test as applied to products sold into the United States. Although some courts have mistakenly—or potentially provocatively, one may suspect in Judge Richard Posner's case—applied a heightened standard to foreign conduct involving import commerce, there is nothing in the legislative record that supports this interpretation. By examining Motorola Mobility LLC v. AU Optronics Corp., this Article illustrates once again the ambiguity associated with the interpretation of the "inelegantly phrased" FTAIA.

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I. INTRODUCTION

Judge Posner (once again) created a stir in antitrust circles when he (twice) held in *Motorola Mobility LLC v. AU Optronics Corp*.[1] that U.S. antitrust law did not apply to the anticompetitive conduct of foreign liquid crystal display (LCD) panel manufacturers even though consumers in the United States ultimately purchased the LCD panels. According to Judge Posner, the Foreign Trade Antitrust Improvements Act (FTAIA)[2] protects foreign antitrust violations as long as the sales in the United States are indirect.[3] Although the Seventh Circuit later rescinded Judge Posner's opinion, the case illustrates once again the ambiguity associated with the interpretation of the "inelegantly phrased"[4] FTAIA. Like Judge Posner, many courts assume that the FTAIA applies to import commerce. Instead of applying the common law "effects" test, these courts apply the FTAIA's heightened standard of a "direct, reasonably foreseeable, and substantial effect" to import commerce.[5] This misapplication is problematic because the FTAIA was not intended to restrict or limit the common law effects test as applied to foreign conduct involving import commerce.

Section 1 of the Sherman Act applies to "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[6] Similarly, Section 2 of the Sherman Act applies to monopolization of "any part of the trade or commerce among the several States, or with foreign nations."[7] The pre-FTAIA Sherman Act is silent on its application to conduct occurring outside the United States. Moreover, the pre-FTAIA Sherman Act does not define or distinguish between export commerce, import commerce, and domestic commerce. The prohibitions codified in the statute apply if there is an effect on commerce in the United States or with foreign nations.[8] One

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[1] Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842 (7th Cir. 2014), *amended and superseded,* 775 F.3d 816 (7th Cir. 2015).

[2] The Foreign Trade Antitrust Improvement Act of 1982 (FTAIA), 15 U.S.C. § 6a (2014).

[3] One may speculate as to whether Judge Posner, who undoubtedly recognizes the poor drafting of the FTAIA, was being provocative in order to focus attention once again on the legislation.

[4] United States v. Nippon Paper Indus., 109 F.3d 1, 4 (1st Cir. 1997).

[5] *See, e.g.*, Lotes Co. v. Hon Hai Precision Indus. Co., No. 12 Civ. 7465(SAS), 2013 WL 2099227, at *7–*8 (S.D.N.Y. May 14, 2013).

[6] Sherman Act of 1890, 15 U.S.C. § 1 (2014).

[7] *Id.* § 2.

[8] According to the FTAIA, 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

could even make the argument that the explicit reference to "with foreign nations" expresses a legislative intent to capture export and import commerce.

The lack of a codified jurisdictional limit to the Sherman Act creates the possibility of its application to conduct occurring entirely outside the United States. However, there are two limits to the extraterritorial application of the Sherman Act. First, the public international law principle of territoriality requires the introduction of a limitation on the application of the Sherman Act to conduct that occurred entirely outside the United States.[9] The effects test was introduced to legitimize the application of the Sherman Act extraterritorially by constructively creating a nexus between the foreign conduct and the territory of the United States.[10] According to the effects test, U.S. antitrust law is applicable to conduct occurring outside the United States if the conduct was meant to produce, and did in fact produce, some substantial effect in the United States.[11] This test, which is now arguably the international legal norm,[12] focuses on the effect of the conduct rather than attempting to categorize the related commerce as export or import.

The second limitation on the extraterritorial application of U.S. antitrust law is the FTAIA, which was adopted in 1982 as part of the Export Trading Company Act.[13] The primary goal of the FTAIA was to promote exports from the United States by clarifying that U.S. antitrust laws do not

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commerce in the United States; and (2) such effect gives rise to a claim under the [Sherman Act]." 15 U.S.C. § 6a (2014).

[9] Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010) (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'")); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); *see also* Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298 (4th ed. 1990); Dino Kritsiotis, *Public International Law and Its Territorial Imperative*, 30 MICH. J. INT'L L. 547, 561 (2009); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1 (1964).

[10] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987).

[11] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 853 (7th Cir. 2012); United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945).

[12] Florian Wagner-von Papp, *Competition Law and Extraterritoriality*, *in* RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW 21, 45 (Ariel Ezrachi ed., 2012); INT'L BAR ASSOCIATION (I.B.A.), REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 51 (2009), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=ECF39839-A217-4B3D-8106-DAB716B34F1E ("[t]here is a fair degree of consensus among agencies (and courts) on the application of an 'effects-based' jurisdiction test for cartel and unilateral conduct cases").

[13] Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified in scattered sections of titles 12, 15, and 30 U.S.C.).

apply to purely export conduct.[14] One of the U.S. Congress's concerns that motivated it to adopt the legislation was that judicial opinions applying the effects test were ambiguous on whether the U.S. antitrust laws applied to the export conduct of domestic firms.[15] By clarifying the standard applicable to such export conduct, the legislation sought to address "the complaint voiced by American exporters and potential exporters that their actions are inhibited by uncertainty regarding the scope and effect of our antitrust laws."[16] It was this ambiguity, together with the Congressional desire to promote exports, that led to the introduction and adoption of the FTAIA.[17]

II. IMPORT COMMERCE IS NEVER REMOVED FROM THE REACH OF THE SHERMAN ACT

It is clear that the FTAIA was not intended to modify the common law effects test as applied to products sold into the United States. Although some courts have mistakenly applied a heightened standard to foreign conduct involving import commerce, there is nothing in the legislative record that supports this interpretation. As the Eastern District of New York correctly recognized, "import commerce is never removed from the reach of the Sherman Act."[18] The Northern District of California came to the same conclusion in *Fenerjian v. Nongshim Company, Ltd.*: "Because I find that the conduct invoves import commerce, the FTAIA does not apply and there is no need to address the 'direct, substantial, and reasonably foreseeable effect' exception."[19]

According to the legislative record, some observers raised questions about the status of import transactions under H.R. 2326 and urged the

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[14] Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293, 298–99 (3d Cir. 2002); Lavoho, LLC v. Apple Inc., 2014 WL 6791612 (S.D.N.Y. 2014); 'In' Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 498 (M.D.N.C. 1987); Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102, 1105 (S.D.N.Y. 1984).

[15] H.R. REP. NO. 97-686, at 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2489, *available at* http://www.scefiling.org/filingdocs/252/1375/1656e_Tabx17xxMTSxx1982usccan2487x.pdf.

[16] H.R. REP. NO. 97-686, at 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2492.

[17] F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004); *Hartford Fire*, 509 U.S. at 796 n.23; TI Inv. Servs., LLC v. Microsoft Corp., 23 F. Supp. 3d 451, 469 (D.N.J. 2014).

[18] *In re* Air Cargo Shipping Servs. Antitrust Litig., No. MD 06-1775(JG)(VVP), 2008 WL 5958061, at *12 (E.D.N.Y Sept. 26, 2008); *see also* Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 404 (2d Cir. 2014*)*; Fenerjian v. Nongshim Company, Ltd., 2014 WL 5685562 at *15 (N.D. Cal. Nov. 4, 2014); Costco Wholesale Corp. v. AU Optronics Corp., No. C13-1207RAJ, 2014 WL 4718358, at *2 (W.D. Wash. Sept. 22, 2014); Precision Assoc., Inc. v. Panalpina World Transport, (Holding) Ltd., No. CV-08-42 (JG)(VVP), 2013 WL 6481195, at *25 (E.D.N.Y. Sept. 20, 2013).

[19] Fenerjian v. Nongshim Co., No. 13–cv–04115–WHO, 2014 WL 5685562, at *15 (N.D. Cal. Nov. 4, 2014).

House Subcommittee on Monopolies and Commercial Law to make clear that the legislation had no effect on the application of antitrust laws to imports.[20] For example, Mr. James R. Atwood testified during the Subcommittee's hearings that "it is important that there be no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law."[21]

A. The Source of the Confusion

Despite clear legislative intent, courts continue to apply the FTAIA's direct, substantial, and reasonably foreseeable standard to import commerce.[22] The source of the confusion is the ambiguous language of the FTAIA, which contains two references to import commerce. The first reference is part of the general rule clarifying that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations"[23] unless one of the two stated exceptions applies.[24] In other words, the FTAIA only applies to trade or commerce with foreign nations that is not import trade or commerce.[25] One never gets to the application of the FTAIA's direct, substantial, and reasonably foreseeable standard if the conduct involves import commerce. This "involving import trade or import commerce" parenthetical was inserted to clarify that the FTAIA was concerned only with (1) export trade or commerce and (2) purely foreign conduct not involving import trade or commerce. The introduction of the direct, substantial, and reasonably foreseeable standard was clearly intended to benefit export commerce by providing a clearer standard than the traditional effects test, which was thought to be ambiguous when applied to export conduct.[26]

In order to further clarify that the FTAIA could not be used to protect foreign anticompetitive conduct that has a substantial effect in the United States, the drafters of the FTAIA added a second reference to import commerce—this time, in the exceptions. This is where things start to get

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[20] H.R. REP. NO. 97-686, at 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2489.

[21] H.R. REP. NO. 97-686, at 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2492.

[22] *See, e.g.*, *Lotes*, 753 F.3d at 409; Animal Sci. Products, Inc. v. China Minmetals Corp., 34 F. Supp. 465, 485 (D.N.J. 2014).

[23] The Foreign Trade Antitrust Improvement Act of 1982 (FTAIA), 15 U.S.C. § 6a (2014).

[24] Although it is not really an exception but rather a limitation on the scope of the law, we will refer to this as the "involving import commerce exception."

[25] *In re* Foreign Exch. Benchmark Rates Antitrust Litig., Nos. 13 Civ. 7789(LGS), 13 Civ. 7953(LGS), 14 Civ. 1364(LGS), 2015 WL 363894, at *13 (S.D.N.Y. Jan. 28, 2015).

[26] Lavoho, LLC v. Apple Inc., Nos. 14cv1768 (DLC), 14cv2000 (DLC), 2014 WL 6791612 at *2 (S.D.N.Y. Dec. 3, 2014).

confusing. The FTAIA clearly states that the U.S. antitrust laws continue to apply to anticompetitive conduct that "has a direct, substantial, and reasonably foreseeable effect . . . on import trade or import commerce with foreign nations."[27] Instead of reading this additional reference to import commerce as superfluous, some courts have interpreted it to mean that the heightened standard of direct, substantial, and reasonable foreseeability applies to foreign conduct affecting import commerce.[28] The dual reference to import commerce in the FTAIA was a confusing attempt by the legislature to make sure that the FTAIA, which limits the scope of U.S. antitrust laws, should not be applied to conduct involving or affecting import commerce. The test applied to such conduct continues to be whether it was meant to produce and did in fact produce some substantial effect in the United States.[29]

Nonetheless, some courts have failed to recognize that the heightened test codified in the FTAIA does not apply to conduct involving import commerce. These courts tend to subsume—as Judge Posner did in *Motorola Mobility Inc. v. AU Optronics Corp.*—all import trade and commerce under what is widely referred to as the "import commerce exception."[30] Under the undifferentiated and broadly construed import commerce exception to the FTAIA, import commerce is outside the reach of the Sherman Act if it has a direct, substantial, and reasonably foreseeable effect in the United States.[31] However, the application of the import commerce exception, as currently construed by the courts, fails to recognize that import commerce is mentioned twice in the FTAIA. The direct, substantial, and reasonably foreseeable requirement only applies to the affecting import commerce exception. The involving import commerce exception does not require an analysis of the effect of the conduct on import trade or commerce (at least for purposes of the application of the FTAIA).[32]

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[27] FTAIA § 1(A).

[28] *See, e.g.*, *Lotes*, 753 F.3d at 409.

[29] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 855 (7th Cir. 2012).

[30] Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842 (7th. Cir. 2014); *Minn-Chem,* 683 F.3d at 854; Kruman v. Christie's Int'l, PLC, 284 F.3d 384, 397 (2d Cir. 2002); Carpet Group Int'l v. Oriental Rug Imps. Ass'n, Inc., 227 F.3d 62, 71 (3rd Cir. 2000); *In re* Vitamin C Antitrust Litig., 904 F. Supp. 2d 310, 317 (E.D.N.Y. 2012); Fond du Lac Bumper Exch., Inc. v. Jui Li Enter. Co., 795 F. Supp. 2d 847, 850–51 (E.D. Wis. 2011).

[31] *Minn-Chem*, 683 F.3d at 854.

[32] As stated above, however, the effect of conduct involving import commerce is relevant under the Hartford Fire test. *Hartford Fire*, 509 U.S. at 764.

B. The Consequences of Misapplication of the FTAIA

This broadly formulated import commerce exception leads to the unintended consequence that, by virtue of the FTAIA, the Sherman Act does not apply to anticompetitive conduct if the effect of such conduct in the United States is substantial but indirect. For example, if you impose a direct requirement on import commerce, a foreign cartel participant might simply sell the price-fixed products to one of its affiliates not involved in the cartel, and the affiliate could then sell the products in the United States.[33] This was clearly not the intent of the FTAIA. The consequence of applying the FTAIA to import commerce is illustrated in *Motorola*[34] where the Seventh Circuit was faced with the issue of whether U.S. antitrust laws applied to the anticompetitive conduct of foreign liquid crystal display (LCD) panel manufacturers. The panels were sold to the foreign subsidiaries of Motorola, assembled into mobile phones, and then imported into the United States. Instead of simply concluding that the anticompetitive conduct involved import commerce, which would have meant that the FTAIA did not apply, the court applied the FTAIA and examined whether the conduct had a direct effect on commerce in the United States. After recognizing that the anticompetitive conduct at issue had some effect on import trade, the court dismissed the relevance of this effect because, in the court's view, it was indirect.[35] The implication is that the FTAIA protects anticompetitive import conduct from the application of U.S. antitrust laws provided that the imports come into the United States indirectly—"If the defendants conspired to sell LCD panels to Motorola in the United States at inflated prices, they would be subject to the Sherman Act because of the foreign trade act's exception for importing."[36] But this interpretation of the FTAIA confuses the domestic effects exception with the reference in the FTAIA that states the FTAIA does not apply to import commerce. According to the Seventh Circuit,

> [s]uppose Motorola had bought the panels from the defendants outright, then resold the panels to its foreign subsidiaries, which used them in manufacturing cellphones that they then exported to the United States. The effect on prices would have been the same as if the foreign subsidiaries had negotiated the price charged by

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[33] The U.S. District Court for the Eastern District of Michigan recognized this possible loophole in *In re Automotive Parts Antitrust Litigation*, and concluded that "the conduct . . . is not the type of conduct Congress sought to exclude from the Sherman Act's reach." No. 12–MD–02311, 2014 WL 4209588, at *7 (E.D. Mich. Aug. 26, 2014).

[34] Motorola Mobility Inc. v. AU Optronics Corp., 746 F.3d 842, 844 (7th Cir. 2014).

[35] *Id.* ("[W]hat is missing from Motorola's case is a "direct" effect.").

[36] *Id.*

> the alleged cartel to Motorola, because the price would be the same—it would be the cartel price.[37]

The Seventh Circuit failed to recognize that if Motorola had purchased the panels from the foreign cartel, the FTAIA would not even apply because the conduct would have involved import commerce. Instead, Judge Posner should have applied the effects test as formulated in *Alcoa* and *Hartford Fire*.[38]

The application of a heightened standard for import commerce creates the possibility that certain conduct, which would otherwise be captured by the U.S. antitrust laws based on the traditional effects test, remains outside the scope of U.S. law. Some courts have correctly recognized the inapplicability of the FTAIA to foreign conduct involving import commerce. In *In re Vitamin C Antitrust Litigation*, for example, U.S. purchasers of foreign-produced vitamins from Chinese sellers alleged that the Chinese sellers violated the Sherman Act by engaging in anticompetitive conduct in China.[39] In concluding that the Sherman Act applied to the Chinese manufacturers, the Eastern District of New York correctly identified the scope of the FTAIA: "The FTAIA makes clear that not only import commerce, but conduct *involving* import commerce, is never removed from the reach of the Sherman Act" (emphasis in original quote).[40] As reflected in the quote below, the court focused on the defendants' knowledge that their products or services would be sold in the United States rather than the directness of the sales into the United States.

> Although defendants sometimes contracted with foreign entities, they knew, by the terms of those very contracts, that the vitamin C was to be delivered directly to the United States . . . . Consequently, the effects of defendants' price-fixing were felt by American consumers, even when the transaction was entered into overseas. Just as in *In re TFT–LCD (Flat Panel) Antitrust Litig.*, the intervening foreign conduct here does not prevent a conclusion that defendants' conduct was directed at the U.S. import market. Thus, the Court finds that the foreign purchaser

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[37] *Id.* at 845.

[38] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); United States v. Aluminum Co. of America, 148 F.2d 416 (1945). The inapplicability of the FTAIA does not necessarily mean that the Sherman Act applies and the floodgates to the U.S. courts are burst open. In such cases, the traditional effects test continues to apply and would provide a jurisdictional hurdle for foreign plaintiffs. Costco Wholesale Corp. v. AU Optronics Corp., No. C13–1207RAJ, 2014 WL 4718358, at *2 n.2 (W.D. Wash. Sept. 22, 2014).

[39] *In re* Vitamin C Antitrust Litig., 904 F. Supp. 2d 310, 317 (E.D.N.Y. 2012).

[40] *Id.* at 317 (quoting *In re* Air Cargo Shipping Servs. Antitrust Litig., No. MD 06-1775(JG)(VVP), 2008 U.S. Dist. LEXIS 107882, at *12 (E.D.N.Y. Sept. 26, 2008)).

> claims fall within the import trade or commerce exception and that the FTAIA is inapplicable.[41]

The Seventh Circuit made the same distinction—this time, by Judge Sykes—in *Minn-Chem*.[42] In that case, U.S. purchasers of potash from foreign producers in Canada, Russia, and Belarus brought antitrust claims in the United States based on violations of the Sherman Act. In his opinion for the court, Judge Sykes noted, "The FTAIA differentiates between conduct that 'involves' . . . [import] commerce, and conduct that 'directly, substantially, and foreseeably' affects such commerce."[43]

In *Fond du Lac Bumper Exch., Inc. v. Jui Li Enterprise Co., Ltd*, Taiwanese auto parts manufacturers met to fix the prices of automobile parts.[44] The defendants argued that import commerce into the United States was not involved because the parts were sold to buyers in Taiwan before they were imported into the United States. The court, however, applied the import commerce exception, focusing on the manufacturers' knowledge that the products were destined for the United States.[45]

III. WHAT CONSTITUTES IMPORT COMMERCE?

The issue then becomes largely definitional: what constitutes "import commerce"? To be sure, the legislative record does not distinguish between cartelized products indirectly or directly sold to a customer in the United States.[46] Nor does the legislative record distinguish between cartelized products sold to a customer in the United States by a cartel member and products sold to a customer in the United States containing cartelized parts. This was essentially the issue before the court in *Costco Wholesale*[47] where Costco purchased televisions from a foreign supplier that contained cartelized panels. The prices of the televisions were not fixed, but the prices of the panels were allegedly fixed in violation of the Sherman Act. In concluding that these purchases of downstream products constituted import commerce, the court held that "provided the price-fixed product

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[41] *Id.* at 318.

[42] Minn-Chem, Inc. v. Agrium Inc., 657 F.3d 650, 660–62 (7th Cir. 2011).

[43] *Id.* at 660 (citing Carpet Group Int'l v. Oriental Rug Imps. Ass'n, 227 F.3d 62, 72 (3d Cir. 2000)).

[44] Fond du Lac Bumper Exch., Inc., 795 F. Supp. 2d 847, 852 (E.D. Wis. 2011).

[45] Courts frequently refer to the defendants' knowledge that the goods, which were the object of the anticompetitive conduct, were to be imported into the United States. *See, e.g.*, Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. N.Y. 2002); *In re* Vitamin C Antitrust Litig., 904 F. Supp. 2d 310 (E.D.N.Y. 2012).

[46] H.R. Rep. No. 97-686 at 12 (1982), reprinted in 1982 U.S.C.C.A.N. 2487.

[47] Costco Wholesale Corp. v. AU Optronics Corp., No. C13–1207RAJ, 2014 WL 4718358, at *1 (W.D. Wash. Sept. 22, 2014).

ultimately moved from a member of the conspiracy to a United States customer, the conspirators have engaged in import trade regardless of prior movement of the price-fixed product in foreign commerce among the conspirators."[48]

The application of the FTAIA's heightened scrutiny test to all import commerce allows foreign conduct having a substantial and reasonably foreseeable effect in the United States to escape the scrutiny of the U.S. antitrust laws—a result clearly not envisaged by the drafters of the FTAIA.[49] Moreover, as foreign countries do not have any interest in sanctioning such conduct,[50] similar to the lack of U.S. interest in prosecuting export cartels from the United States,[51] such foreign conduct will remain unsanctioned. The application of the FTAIA to import conduct would mean, for example, that all foreign cartelized component parts could escape the application of U.S. antitrust laws as long as they were sold and assembled outside the United States, even if the customer was in the United States.

Contributing to the confusion over the application of the FTAIA to import commerce is the infusion of the logic behind the "indirect purchaser" rule.[52] The basic reasoning behind the indirect purchaser rule is that an indirect purchaser of a cartelized product does not suffer antitrust injury because the direct purchaser absorbed the injury. Applying this reasoning to the FTAIA, U.S. courts assume that indirect sales of a cartelized foreign product do not give rise to an antitrust injury in the United States.[53] However, the purpose of the FTAIA was to clarify the application of the antitrust laws to export conduct and their extraterritorial application. There is no indication in the FTAIA that the legislature intended to codify the application of the indirect purchaser rule to import commerce.[54] Moreover, such an extension would not make sense because the indirect purchaser rule has certain limitations that are not codified in the

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[48] *Id*. at *4.

[49] H.R. REP. No. 97-686, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498.

[50] James Atwood, *Conflicts of Jurisdiction in the Antitrust Field: The Example of Export Cartels*, 50 L. & CONTEMP. PROBS. 153, 162–63 (1987).

[51] Spencer Weber Waller, *The Ambivalence of United States Antitrust Policy Towards Single-Country Export Cartels*, 10 NW. J. INT'L L. & BUS. 98 (1989).

[52] Victor P. Goldberg, *The* Empagran *Exception: Between* Illinois Brick *and a Hard Place*, 2009 COLUM. BUS. L. REV. 785, 794–800 (2009).

[53] Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842, 844–45 (7th Cir. 2014).

[54] H.R. REP. No. 97-686, at 10 ("The substantive antitrust issues on the merits of the plaintiffs' claim would remain unchanged. For example, the mere fact that an exporter may be adversely affected in a financial sense by the activities of another would not necessarily mean that he has sustained an injury for which he may recover under Section 4 of the Clayton Act. See, e.g., Illinois Brick Co. v. State of Illinois, 431 U.S. 720 (1977); Brunswick Corp. V. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977).").

FTAIA. For example, the indirect purchaser rule does not apply if the customer was part of the conspiracy.[55] If the FTAIA were interpreted as taking indirect imports out of the scope of the Sherman Act, then transactions not falling under the indirect purchaser rule and giving rise to an injury in the United States would be protected by the FTAIA. Similarly, if the foreign manufacturer sold the cartelized products to a foreign distributor on the basis of a cost-plus contract and the distributor then sold the products to a U.S. customer, the indirect purchaser rule might not protect the foreign manufacturer, but the application of the FTAIA would if the court adopted the heightened requirement of the FTAIA.

The failure to recognize that the FTAIA does not apply to conduct involving import commerce, regardless of whether that conduct has a direct effect in the United States, creates the potential that anticompetitive conduct with an indirect effect in the United States escapes the scrutiny of U.S. antitrust laws. The courts have not overlooked this potential result. Rather than applying the traditional effects test to such indirect import commerce, however, these courts have continued to apply the domestic effects test as codified in the FTAIA but with a broader understanding of the direct requirement.[56]

The more appropriate result would be to not apply the FTAIA standard to import commerce at all. As the court correctly held in *Fenerjian v. Nongshim Co. Ltd.*,[57] once the court concludes that the commerce at issue involved import commerce, "the FTAIA does not apply and there is no need to address the 'direct, substantial, and reasonably foreseeable effect' exception."[58]

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[55] Ariz. v. Shamrock Foods Co., 729 F.2d 1208, 1211 (9th Cir. 1984); Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478, 481 (7th Cir. 1980); Wallach v. Eaton Corp., 814 F. Supp. 2d 428, 437–38 (D. Del. 2011); *In re* Mid-Atlantic Toyota Antitrust Litig., 516 F. Supp. 1287, 1292 (D. Md. 1981).

[56] *See* Lotes Co. v. Hon Hai Precision Industry Co., No. 12 Civ. 7465, 2013 U.S. Dist. LEXIS 69407, at *1–*4 (S.D.N.Y. May 14, 2013); *In re* TFT-LCD (Flat Panel) Antitrust Litig., 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011).

[57] *See, e.g.*, Fenerjian v. Nongshim Co. Ltd., 13-CV-04115-WHO, 2014 WL 5685562, at *1 (N.D. Cal. Nov. 4, 2014).

[58] *Id*. at *27.