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DETERRING FOREIGN COMPONENT CARTELS IN THE AGE OF GLOBALIZED SUPPLY CHAINS

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I. INTRODUCTION

Suppose an international cartel fixed the price of a product manufactured abroad and imported into the United States. The cartel would be liable under the Sherman Antitrust Act of 1890[1] (the "Sherman Act") for interfering with free competition in the United States and harming the American economy, though the cartel activity occurred outside the United States.[2] Now, suppose that the price-fixed product was a component (e.g., liquid crystal displays ("LCD")[3] or capacitors[4]). These price-fixed components are incorporated into finished products (e.g., phones[5] and televisions[6]), consequently raising the prices of the finished products.[7] When those finished products with the hiked prices are imported into the United States, should the component cartel be similarly liable under the Sherman Act for interfering with free competition and hurting the American economy? Because the adverse economic effect is felt just the same, this Article argues in the affirmative and proposes a new paradigm to treat the importation of finished products incorporating price-fixed components

[1] Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012) ("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, is hereby declared to be illegal."). The Foreign Trade Antitrust Improvements Act (FTAIA) carves out certain non-import trade and commerce exceptions from the Sherman Act's reach. *See* 15 U.S.C. § 6a (2012). Because the hypothetical deals with importation, the FTAIA will not enter the analysis. *See infra* notes 56-58 and accompanying text. In fact, the Department of Justice reportedly considers curbing international cartels a top priority. 2014 FORDHAM COMPETITION LAW INST., ANNUAL PROCEEDINGS OF THE FORDHAM COMPETITION LAW INST.: INT'L ANTITRUST LAW & POLICY 520 (B. Hawk ed. 2015).

[2] *See infra* notes 40-44 and accompanying text.

[3] Both United States v. Hui Hsiung, 778 F.3d 738 (9th Cir. 2015), *cert. denied*, *sub nom.*, Hsiung v. United States, 135 S. Ct. 2837 (2015) and Motorola Mobility LLC v. AU Optronics Corp., 773 F.3d 826 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 2837 (2015) involved an international cartel that fixed the prices of LCD panels.

[4] A consolidated case currently pending in the District Court for the Northern District of California involves an international cartel that fixed the prices of capacitors. *In re* Capacitors Antitrust Litig., No. 3:14-cv-03264 (N.D. Cal. filed July 18, 2014).

[5] *See Motorola,* 775 F.3d at 817 (holding that the international cartel member did not fix the prices of LCD panels that it used in its phones).

[6] *See* Costco Wholesale Corp. v. Au Optronics Corp., 2014 U.S. Dist. LEXIS 133833 (W.D. Wash. Sept. 22, 2014) (discussing the importation of televisions incorporating price-fixed LCD panels).

[7] Panasonic fixed the prices of LCD panels and incorporated those panels into televisions, which were imported into the United States. Although the television price itself was not fixed, Panasonic could have also been liable to Costco if the jury found they conspired with the Defendants. *See id.*

under the "import inclusion"[8] provision of the Foreign Trade Antitrust Improvements Act (the "FTAIA"). This Article further charges Congress to amend and clarify the FTAIA for the first time since the statute's enactment, and to delineate the contours of conduct involving import trade or commerce in the context of the FTAIA. Additionally, this Article argues that the Supreme Court should revisit the indirect purchaser doctrine[9] in *Illinois Brick Co. v. Illinois*[10] that limited the private suit antitrust enforcement mechanism against foreign component cartels in order to update the application of the U.S. antitrust statutes in today's age of globalized supply chains.

The Sherman Act was enacted to promote free competition in the United States by prohibiting conduct that unfairly restrains such competition.[11] When first enacted, the Sherman Act did not distinguish between domestic interstate commerce and foreign commerce.[12] Concerned that the indiscriminate Sherman Act repressed American business activities and caused confusion among courts about the Sherman Act's extraterritorial reach,[13] Congress enacted the FTAIA.[14] However, contrary to its intended purpose of

[8] *See infra* notes 19–25 and accompanying text for a more detailed explanation of this term used throughout this Article. The more popular term used by jurists is "import exception," *e.g.*, Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 471 n.11 (3d Cir. 2011). *But see* Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 854 (7th Cir. 2012) (criticizing "import exception" as an inaccurate description).

[9] *See infra* text accompanying note 180 for an explanation of the indirect purchaser doctrine.

[10] 431 U.S. 720 (1977).

[11] *See* 15 U.S.C. §§ 1–7 (2012); *see also infra* text accompanying notes 41–44.

[12] *See* 15 U.S.C. § 1 (2012).

[13] *See* H. R. Rep. 97-686, at 2 (1982); Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 305 (2007). Before the enactment of the FTAIA, in its first case to determine the extraterritorial reach of the United States' antitrust laws, the Supreme Court ruled that the physical location in which the alleged conduct in violation occurred was determinative. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). Therefore, if anticompetitive conduct had occurred outside the country, the Sherman Act would not apply even if the conduct involved U.S. companies importing goods into the United States. In contrast, if foreign companies were engaged in anticompetitive conduct within the United States to export goods out of the United States, those companies would nevertheless be liable under the Sherman Act. Years after, however, citing a string of lower court cases that found the holding untenable with the economic reality of global interdependence and antitrust law's goal of deterrence, the Court overruled *American Banana*. Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962). This was the type of confusion that Congress sought to clarify in enacting the FTAIA.

[14] 15 U.S.C. § 6a (2012). The FTAIA in relevant part reads as follows:

> [The Sherman Act] shall not apply to conduct involving trade

continued . . .

delineating the types of foreign conduct subject to the Sherman Act[15] and clarifying the Sherman Act's extraterritorial reach, the FTAIA's vague drafting[16] exacerbated the confusion.[17] Specifically, the textual

> 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 Antitrust Act] other than this section.

[15] *See* H. R. Rep. 97-686 (1982), at 2; Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What Is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT'L L.J. 11, 13 (2003). Some commentators, however, interpreted that the FTAIA was designed to limit the Sherman Act's scope instead of simply codifying the inherent limits on the Sherman Act. *E.g.,* Morgan Franz, *The Competing Approaches to the Foreign Trade Antitrust Improvements Act: A Fundamental Disagreement*, 41 PEPP. L. REV. 861, 871 (2013); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797 n.23 (1993) ("Also unclear is whether the [FTAIA] . . . amends existing law or merely codifies it."). Nevertheless, despite the nuanced interpretive differences, the FTAIA, by its textual and structural mandate of "[the Sherman Act] shall not apply," still *modifies* the Sherman Act. *See* 15 U.S.C. § 6a (2012).

[16] *See* FTAIA, *supra* note 14. The FTAIA is not a free-standing statute in that its purpose is to amend the Sherman Act. The text begins by stating the Sherman Act does not apply to conduct involving trade or commerce with foreign nations. However, there is a caveat to this exception, introduced in parentheses: conduct involving import trade or commerce falls under the Sherman Act in the first place, though import trade and commerce, by definition, are trade and commerce with foreign nations. The FTAIA then introduces an exception to the exception—foreign conduct that nevertheless has direct effect on U.S. domestic or import commerce. *See also infra* text accompanying notes 56-62 for a full explanation of the interplay between the statutes. The string of parentheses and double negatives is difficult to follow, ironically causing more confusion about the Sherman Act's extraterritoriality. *See* S. Lynn Diamond, Article, *Empagran, the FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOKLYN J. INT'L L. 805, 819 (2006).

[17] *See, e.g.*, Huffman, *supra* note 13, at 314. *See also* United States v. Hui Hsiung, 778 F.3d 738, 751 (9th Cir. 2015) (calling the FTAIA "a web of words"); Turicentro v. Am. Airlines, 303 F.3d 293, 300 (3d Cir. 2002) (calling the FTAIA's language "convoluted"); Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n, 227 F.3d 62, 69 (3d Cir. 2000) (citing United States v. Nippon Paper Indus. Co., Ltd., 109 F.3d 1, 4 (1st Cir. 1997) to describe the FTAIA as "inelegantly phrased").

source of confusion implicates import commerce because it is unclear what the exact contours of import commerce are.[18] At its fundamental level, the FTAIA carves out foreign conduct exceptions from the Sherman Act's reach.[19] Yet, the FTAIA qualifies that the carved-out foreign conduct is conduct involving "other than import trade or import commerce[.]"[20] In other words, conduct involving import trade or commerce is not the type of foreign conduct that the FTAIA sought to carve out of the Sherman Act and thus is never part of the FTAIA analysis,[21] an interpretation supported by the FTAIA's legislative history.[22]

However, many courts characterize this rule as the "import exception."[23] This view is misleading because it reads as if conduct involving import trade or commerce is an exception to the FTAIA when it in fact never enters the FTAIA analysis.[24] To emphasize that conduct involving import trade or commerce is not an exception to the FTAIA but remains included under the Sherman Act, this Article will employ the term "import inclusion" in lieu of the more popular but misleading term of "import exception." The "import inclusion" term denotes that conduct involving import trade or commerce is always included in and subject to the Sherman Act rather than being an exception to the FTAIA. The only exception to the Sherman Act provided by the FTAIA is the "direct effect" exception.[25]

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[18] *See* Andre Fiebig, *Import Commerce and the Foreign Trade Antitrust Improvements Act*, 35 NW. J. INT'L L. & BUS. AMBASSADOR 1A, 5A–6A (2015).

[19] *See supra* note 14. The FTAIA stipulates that the Sherman Act shall *not* apply to "conduct involving trade or commerce . . . with foreign nations." 15 U.S.C. § 6a (2012).

[20] 15 U.S.C. § 6a (2012).

[21] Beckler & Kirtland, *supra* note 15, at 14; Fiebig, *supra* note 18, at 4A.

[22] *See infra* notes 115–118 and accompanying text.

[23] *E.g.*, Animal Sci. Prods. v. China Minmetals Corp., 654 F.3d 462, 466 (3d Cir. 2011).

[24] The Sherman Act employs a traditional effects test that examines the party's intent and the effects on the U.S. commerce. *See infra* notes 59–60 and accompanying text. The FTAIA, while stipulating that non-import foreign trade or commerce is beyond the purview of the Sherman Act, provides an exception: any non-import trade or commerce that has a "direct, substantial, and reasonably foreseeable effect" on domestic interstate commerce or U.S. import trade or commerce would be deemed anticompetitive. 15 U.S.C. § 6a (2012). This direct effect exception is a more heightened standard than the traditional effects test because the latter does not require directness or foreseeability. *See infra* notes 73–74 and accompanying text. By inappropriately classifying conduct "involving . . . import trade or import commerce," as an "exception," courts have inappropriately applied the heightened direct effect standard to import conduct. 15 U.S.C. § 6a (2012); *see* Fiebig, *supra* note 18, at 4A.

[25] *See supra* note 14 and accompanying text.

Distinguishing the import inclusion and direct effect exception matters because they employ different legal standards.[26]

On top of this textual mess, courts have encountered hurdles when dealing with international cartels that fix the prices of components, such as capacitors[27] and LCD panels,[28] that are incorporated into smartphones and televisions.[29] Many of these components are manufactured and incorporated into finished products abroad before they are imported into the United States.[30] Though the component cartel's price hike hindered free competition in the United States and hurt American consumers and businesses when the component raised the prices of imported finished products, some courts have ruled that the cartel's conduct was barred by the FTAIA.[31]

This Article argues that the text, context, and the purpose of the U.S. antitrust laws compel that the effects of price-fixed components be treated as the import inclusion and thus analyzed under the Sherman Act, not the FTAIA's direct effect exception.[32] It further charges Congress to amend the FTAIA to specify the contours of the FTAIA's conduct involving import trade or import commerce in the context of imported finished goods incorporating price-fixed components and to clarify the statute's textual command. Part II provides the general history of the Sherman Act and the FTAIA for background information. Part III introduces major case law that illustrates courts' confusion about how to interpret the Sherman Act and the FTAIA. Moreover, this section highlights that confusion about whether imported finished goods incorporating price-fixed components should be subject to the Sherman Act remains unresolved

[26] *See infra* text accompanying notes 73–74.

[27] *See supra* note 4 and accompanying text.

[28] Both *United States v. Hui Hsiung*—a criminal case that implicated the cartel member's officers—and *Motorola Mobility LLC v. AU Optronics Corp.*—a civil case—involved an international cartel of LCD manufacturers. *Hui Hsiung*, 778 F.3d 738, 742 (3d Cir. 2015); *Motorola*, 775 F.3d 816, 817 (7th Cir. 2014).

[29] *See* Information, United States v. NEC Tokin Corp., (No. CR 15-0426) (N.D. Cal., Sept. 2, 2015); Costco Wholesale Corp. v. Au Optronics Corp., 2014 U.S. Dist. LEXIS 133833 (W.D. Wash. Sept. 22, 2014) (litigating about Costco-imported televisions, which incorporated price-fixed LCD panels from Hui Hsiung and Motorola, that were assembled outside the United States).

[30] *See* Brief for the Nat'l Ass'n of Mfrs. as Amicus Curiae in Support of Granting Certiorari, Motorola Mobility LLC v. AU Optronics, 2015 U.S. S. Ct. Briefs LEXIS 1525 (2015) (No. 14-1122), at *6 [hereinafter Mfrs. Amicus Brief]; Brief of Amicus Curiae Economists and Professors in Support of Petitioner, Motorola Mobility LLC v. AU Optronics, 2015 U.S. S. Ct. Briefs LEXIS 1536 (2015) (No. 14-1122), at *8 [hereinafter Economists Amicus Brief].

[31] *E.g.*, *Motorola*, 775 F.3d at 818.

[32] Fiebig, *supra* note 18, at 10A; *Costco Wholesale*, 2014 U.S. Dist. LEXIS 133833, at *9–10.

in current case law and pending cases. Part IV argues that the text, context, and purpose of the U.S. antitrust laws, the Sherman Act, and the FTAIA, command that the imported finished products incorporating price-fixed components are indeed subject to the Sherman Act as conduct involving import trade or commerce under the FTAIA, especially in today's age of globalized supply chains.[33] It further argues that Congress should clean up the FTAIA language and consider combining the statutes to make clear the FTAIA is not a free-standing statute but modifies the Sherman Act. Combining the statutes will elucidate the interaction between the statutes. Moreover, this Article insists that the Supreme Court should revisit the indirect purchaser doctrine in *Illinois Brick*.[34] Part V provides responses to common concerns about U.S. antitrust laws' overreach, such as international comity, endless potential plaintiffs, and the clash with the indirect purchaser doctrine.

II. ANTITRUST, THE SHERMAN ACT, AND THE FTAIA

Antitrust law's primary goal is to promote competition by deterring anticompetitive conduct.[35] This maximizes consumer welfare by promoting efficiency and productivity.[36] At the same time, antitrust law serves as the vehicle for economy policy-making by promoting or discouraging specific economic behavior through criminal and civil enforcement.[37] This implies that the application of the law ideally should reflect the economic reality and will likely embody the prevailing economic doctrine of the time of its enforcement.[38] Perhaps because antitrust law needs to be flexible to

[33] *See supra* note 29 and accompanying text; *see also* DICK K. NANTO, CONG. RESEARCH SERV., R40167, GLOBALIZED SUPPLY CHAINS AND U.S. POLICY (2010), http://www.lb7.uscourts.gov/documents/14-80031.pdf (last visited Jan. 8, 2016) (explaining that in today's globalized economy, much of production is fragmented across borders—globalized supply chains—while the entire process is organized internally within multinational companies).

[34] Ill. Brick Co. v. Illinois, 431 U.S. 720, 747 (1977); *see also infra* note 179 (explaining in more detail the indirect purchaser doctrine).

[35] PHILLIP E. AREEDA & HERBERT HOVENKAMP, I ANTITRUST LAW 4 (4th ed. 2013).

[36] *Id.*

[37] *See id.* at 100.

[38] *Id.* In today's age of globalized supply chains, economic policy decisions grounded in geographic boundaries are no longer sound because economics processes such as manufacturing and assembly span across multiple national borders. Even with the U.S. trade policy, one goal may be to promote overall business efficiency of U.S. companies. However, another arguably equally important policy goal of attracting manufacturing and supply headquarters to the United States and creating jobs may militate against the first goal. In addition, the prevailing economic

continued . . .

reflect the changing economic doctrine of the time, antitrust statutes are written "with a high level of generality."[39]

The Sherman Act, the antitrust statute relevant to international cartels, appears to reflect these aims. In relevant part, the Sherman Act proscribes "every contract . . . or conspiracy [] in restraint of trade or commerce among the several States, or with foreign nations."[40] The Sherman Act sought to achieve the aforementioned antitrust goals.[41] Like many antitrust laws across various jurisdictions, the Sherman Act is written in general terms, perhaps because of the law's need to evolve alongside the economic realities of the time of its application.[42] Its legislative history suggests that the drafters initially sought to curb monopolies through the Sherman Act but reveals no single, discrete economic objective for the statute.[43] Furthermore, the drafters were more interested in deterring rather than compensating victims from anticompetitive conduct.[44]

However, international comity concerns prompted the Supreme Court in *American Banana v. United Fruit Co.*[45] in 1909 to limit the extraterritorial reach of the Sherman Act to the physical location in which the alleged anticompetitive conduct occurred.[46] Therefore, if the alleged conduct occurred entirely outside the United States, the Sherman Act would be considered inapplicable. Nevertheless, this kind of geographic limitation did not hold because foreign economic

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doctrine will necessarily sway based on the political landscape in Congress and the White House. *See* NANTO, *supra* note 33, at 2-3.

It is also important to note that because globalized supply chains span multiple jurisdictions, the effect of anticompetitive conduct in one jurisdiction will affect multiple areas and outside consumers. Perhaps as part of an effort to better rein in the expansiveness of the harmful effects, the international community has seen a convergence of antitrust policies to provide more uniformity and certainty. *See* FORDHAM COMPETITION LAW INST., *supra* note 1, at 373.

[39] AREEDA & HOVENKAMP, *supra* note 35, at 133.

[40] 15 U.S.C. § 1 (2012); *see also* JANICE E. RUBIN, CONG. RESEARCH SERV., 92-367A, EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAWS: SOME HISTORY AND IMPLICATIONS 1 (1992) (describing the Sherman Act as the "primary antitrust statute"). International cartels would fit under this umbrella because cartel members are conspiring to fix prices that restrain foreign trade in pursuit of anticompetitive goals.

[41] *See* AREEDA & HOVENKAMP, *supra* note 35, at 10.

[42] *See id.* at 133.

[43] *Id.* at 42, 62.

[44] *See id.* at 10.

[45] Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[46] *Id.* at 356. *See also* Franz, *supra* note 15 at 865. Some commentators have noted that this was not really about the extraterritorial reach of the statute but an example of the Sherman Act of State doctrine in which "U.S. courts will not exercise jurisdiction over acts by a foreign sovereign." Huffman, *supra* note 13, at 291.

conduct still exerted influence on the U.S. domestic market. The Second Circuit's decision in *United States v. Aluminum Co. of America* ("*Alcoa*")[47] in 1945 instead imposed an effects test through which the court would proscribe foreign anticompetitive conduct having effects on the U.S. market.[48] The Supreme Court endorsed the *Alcoa* effects test in *Continental Ore Co. v. Union Carbide & Carbon Corp*. in 1962.[49]

Because of these conflicting notions of the Sherman Act's reach and courts' vacillation about the territorial contours of the law's application, Congress enacted the FTAIA[50] in 1982 to clarify the Sherman Act's extraterritorial reach.[51] By passing the FTAIA, Congress first hoped to quell the concerns from American businesses that U.S. antitrust laws were barriers to U.S. export activities.[52]

In addition, the lack of uniformity in determining U.S. antitrust laws' extraterritorial reach—as evidenced by courts formulating their own effects tests[53]—worried Congress that it would cause confusion and uncertainty.[54] Congress thus enacted the FTAIA to clarify the Sherman Act's teeth; the FTAIA was to be read to *modify* the terms of

[47] United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945). For this decision, the Second Circuit was sitting in for the Supreme Court, which lacked the requisite quorum and thus referred the appeal to the Second Circuit.

[48] *Id.* at 444. Judge Hand reasoned that states should be able to "impose liabilities, even upon persons not within its borders that has consequences within its borders which the state reprehends." *Id.* at 443. The Second Circuit's effects test required two elements to find a violation of the Sherman Act: (1) intent to affect U.S. imports and (2) actual effect on U.S. imports. *See id.* at 444. Applying this test, the Second Circuit found an activity that had occurred entirely in Canada violated the Sherman Act. *Id.* at 444–45. The Second Circuit was able to hold as such, seemingly at odds with *American Banana* because the court was hearing the case "in lieu of the Supreme Court and at the Court's behest." *Id.*at 445. The effects test since then has undergone refinement by courts. RUBIN, *supra* note 40, at 6. In addition, though the Second Circuit agreed with the principle of international comity, it found more imperative Congress' ability to deter the adverse effects that foreign conduct may have on U.S. imports. Huffman, *supra* note 13, at 297–98; *see also* Beckler & Kirtland, *supra* note 15, at 13.

[49] *See* Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704–05 (1962) (citing *Alcoa* and other Supreme Court cases to reason that "[a] conspiracy to . . . restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"). *But see* RUBIN, *supra* note 40, at 6 (stating that the Congressional Research Service Report, however, notes that *American Banana* was not explicitly overruled and that its international comity reasoning survives).

[50] 15 U.S.C. § 6a (2012).

[51] AREEDA & HOVENKAMP, *supra* note 35, at 300.

[52] H.R. REP. NO. 97-686, at 2 (1982).

[53] *See* Beckler & Kirtland, *supra* note 15, at 13.

[54] H.R. REP. NO. 97-686, at 5–6 (1982).

the Sherman Act.[55] Therefore, the FTAIA does not impose substantive legal prohibitions as the Sherman Act does, but qualifies the prohibitions imposed by the Sherman Act.[56]

The default rule regulating anticompetitive conduct is the Sherman Act, which covers all anticompetitive domestic interstate and foreign commerce conduct.[57] The FTAIA then carves out from the Sherman Act's reach all foreign conduct involving non-import trade or commerce.[58] Conversely, anticompetitive conduct involving import trade or commerce remains *included* in the Sherman Act.[59] Anticompetitive conduct that remains under the Sherman Act is subject to the traditional effects test under the Sherman Act.[60] The effects test was most recently modified and fleshed out by the Supreme Court in *Hartford Fire Insurance Co. v. California*.[61] Under the *Hartford Fire* effects test, anticompetitive conduct that (1) intended to produce and (2) in fact did produce a substantial effect in the United States is subject to the Sherman Act.[62]

Then, the FTAIA creates an exception to that foreign conduct carve-out: if such foreign conduct not involving import trade or commerce has a "direct, substantial, and reasonably foreseeable effect" on (1) domestic interstate commerce, (2) import commerce, or (3) export commerce of a U.S. company, then that particular foreign conduct, though entirely foreign and non-import, is swept back under the Sherman Act's reach (the "direct effect exception").[63] In sum, the

[55] *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 162 (2004) (showing that the FTAIA's effect is to draw contours of what is subject to the Sherman Act).

[56] *See id.* at 163.

[57] 15 U.S.C. § 1 (2012).

[58] *See* 15 U.S.C. § 6a (2012); *see also* Fiebig, *supra* note 18, at 5A. This carve out would, by definition, encompass exports, answering the concerns raised by American businesses in 1982. *See* H.R. REP. NO. 97-686, at 2 (1982).

[59] *See, e.g.,* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 854 (7th Cir. 2012); *see also* Fiebig, *supra* note 18, at 5A; *supra* note 25 and accompanying text.

[60] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

[61] *Id*.

[62] *Id.* at 795 n.21. The *Hartford Fire* test and Judge Hand's test in *Alcoa* both require anticompetitive intent and an actual effect; but the *Hartford Fire* test requires a *substantial effects* test, the *Alcoa* test did not. Nevertheless, *Hartford Fire*'s effects test still does not demand directness or foreseeability as the FTAIA's direct effect exception does.

[63] *See* 15 U.S.C. § 6a (2012); *see also* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 162 (2004). To be thorough, the "direct effect exception" requires a second prong: that "such effect gives rise to a claim under the provisions of [the Sherman Act]." 15 U.S.C. § 6a (2012). Jurists disagree on the proper role and interpretation of this prong. *Compare Empagran*, 542 U.S. at 162 (interpreting the "give rise to a claim" prong broadly to mean that the direct effect is "a kind that

continued . . .

Sherman Act covers, in approximate parts, the three following broad categories:

> (1) Domestic interstate anticompetitive conduct;
> (2) Anticompetitive conduct involving import trade or commerce; and
> (3) Foreign non-import anticompetitive conduct that has a direct, substantial, and foreseeable effect on the markets for (1), (2), and U.S. exports.[64]

The table below visualizes the interaction of the Sherman Act and the FTAIA.

antitrust law considers harmful") *with* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 819–20 (7th Cir. 2014) (reasoning that Motorola could not raise an antitrust claim because it was Motorola's foreign subsidiary that purchased the price-fixed LCD panels and was injured). Some have suggested that international component cartels should be judged based on this "give rise to" prong. *See* Leon B. Greenfield, et al., *Foreign Component Cartels and the U.S. Antitrust Laws: A First Principle Approach*, 29 ANTITRUST 18, 20 (2015). However, if price-fixed components were deemed part of conduct involving import trade or commerce, the "give rise to" prong would be irrelevant because the FTAIA would not be implicated at all.

[64] *Cf.* Beckler & Kirtland, *supra* note 15, at 14 (discussing the details of the "give rise to" prong).

<table>
<tr><th colspan="3">Type of anticompetitive conduct</th><th>Apply Sherman Act?</th><th>Reason</th></tr>
<tr><td colspan="3">Domestic interstate conduct</td><td rowspan="2">Yes</td><td>15 U.S.C. § 1.</td></tr>
<tr><td rowspan="3">Foreign conduct</td><td colspan="2">....involving import trade or commerce</td><td>Import commerce inclusion</td></tr>
<tr><td rowspan="2">...not involving import trade or commerce</td><td>…that has a direct, substantial foreseeable effect on (1) domestic interstate commerce markets, (2) import trade or commerce markets, or (3) U.S. exports</td><td>Yes[65]</td><td>Direct effect exception</td></tr>
<tr><td>… that does not have a direct, or substantial, foreseeable effects on the markets noted above.</td><td>No</td><td>FTAIA</td></tr>
</table>

III. CONFUSION IN CASE LAW AND ITS IMPLICATIONS

Lack of clarity in the application of the FTAIA has bred, ironically, more uncertainty among courts and hurt businesses because

[65] Though the FTAIA's structure suggests that the direct effect exception is subject to the Sherman Act, in effect, the legal standard is not the *Hartford Fire* test used for the Sherman Act. This is because in order to qualify for the direct effect exception, that conduct needs to have a *direct* effect, a requirement not present in the *Hartford Fire* test. The direct effect exception, in effect, imposes a higher bar than what is required to satisfy the Sherman Act.

of the uncertainty.[66] Some of the confusion arises from different treatment of "conduct involving import trade or commerce."[67]

Because of its less-than-natural drafting, the FTAIA has prompted some courts to view conduct involving import trade or commerce as an exception to the FTAIA though that conduct should not even enter the FTAIA analysis in the first place.[68] By calling the FTAIA's import commerce an "exception," courts have sometimes wrongly used the "direct effect" test instead of the traditional effects test from *Hartford Fire* that is more applicable to conduct involving import

[66] Another significant unresolved disagreement regarding the FTAIA not discussed in this Article is whether the FTAIA serves as a subject-matter jurisdictional limit or a substantive limit on the rights in the Sherman Act. *See, e.g.*, Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 403 (2d Cir. 2014) (reasoning that the FTAIA imposes a substantive limit); Franz, *supra* note 15. The Supreme Court, in a context unrelated to the FTAIA, sought to clarify the difference between the two types of bars by explaining the relevant procedural motions—between Fed. R. Civ. P. R. 12(b)(1) motion based on the lack of the court's subject matter jurisdiction and Fed. R. Civ. P. R. 12(b)(6) motion to dismiss based on the lack of substantive merits. Arbaugh v. Y & H Corp., 546 U.S. 500 (2006). In *Arbaugh*, the Court was asked to decide if the numerosity requirement under Title VII of the Civil Rights Act that subjects employers with fifteen or more employees to liability under the Sherman Act is jurisdictional or substantive in nature. *Id.* at 503. The Supreme Court reversed the District Court's post-judgment dismissal based on the lack of subject-matter jurisdiction, holding that the numerosity requirement was a substantive limit, and thus the motion to dismiss based on Fed. R. Civ. P. R. 12(b)(6) could not have been brought after the judgment was rendered. *Id.* at 504. The Court further instructed that unless Congress specifies the limitation as jurisdictional in nature, courts are to interpret any restrictions as substantive. *See id.* at 516. After *Arbaugh*, multiple circuits overruled their previous holdings that the FTAIA imposed a jurisdictional limit. *See Lotes Co*., 753 F.3d at 406; Minn-Chem, Inc. v. Agrium, Inc. 683 F.3d 845, 852 (7th Cir. 2012); Animal Sci. Prods. v. China Minmetals Corp., 654 F.3d 462, 467–68 (3d Cir. 2011). Because the Supreme Court has not yet resolved the issue in the FTAIA context, the question is not exactly settled, but this particular disagreement is unlikely to arise any time soon. Some commentators suggested an alternative, to view the FTAIA as an issue of standing. *See, e.g.*, Huffman, *supra* note 13. Another potential area of contention involves the second prong of the FTAIA's "direct, substantial and foreseeable effects" exception: "give rises to a claim." *See* Greenfield et al., *supra* note 63, at 18. In *Motorola Mobility LLC v. AU Optronics Corp.*, the Seventh Circuit held that Motorola's claim failed to meet this prong of the FTAIA. 775 F.3d at 819.

[67] Though the FTAIA mentions import trade and import commerce separately, the statute does not define either term, and courts interpreting the statute have often used the terms interchangeably. *See* Costco Wholesale Corp. v. Au Optronics Corp., No. C13-1207RAJ, 2014 U.S. Dist. LEXIS 133833, at *5 (W.D. Wash. Sept. 22, 2014); *see also Empagran*, 542 U.S. at 162 (using the word commerce exclusively and not using the word trade).

[68] *See, e.g.*, Animal Sci. Prods. v. China Minmetals Corp., 654 F.3d 462, 466 (reasoning that the FTAIA creates an "import trade or commerce exception" that restores the authority of the Sherman Act).

trade or commerce.[69] Perhaps reasoning that conduct involving import trade or commerce an exception, some courts have interpreted the conduct's scope restrictively.[70] This narrow reading is inconsistent with congressional intent[71] and today's economic reality.[72]

Determining whether the import inclusion or direct effect exception applies, matters because that determination implicates the applicable legal standard.[73] The traditional Sherman Act test, like in *Hartford Fire*, may require a substantial effect in addition to the defendant's intent to target the U.S. import market, but it does not require additional thresholds like directness or foreseeability.[74] Thus, the direct effect test is a higher standard than the *Hartford Fire* effect test and thus can hamper the efficacy of antitrust enforcement.

A. NEC Tokin: Misapplying Direct Effect Exception

The uncertainty with import inclusion and misapplication of the standards is pronounced in a pending case that involves price-fixed components.[75] In September 2015, NEC Tokin Corporation of Japan was charged with a violation of the Sherman Act for fixing the prices of its capacitors.[76] According to the information submitted to the court by the United States, capacitors constitute "a fundamental component of electrical circuits."[77] Electrolytic capacitors are "ubiquitous," incorporated into many commonly-used electronic devices we all use on a daily basis, including computers and televisions.[78] NEC Tokin allegedly conspired with coconspirators to fix prices for their capacitors that were manufactured outside the United States.[79] The capacitors were incorporated into finished products outside the United States before being imported into the United States.[80] This, the United States claimed, had a "direct, substantial, [and] reasonably foreseeable effect on . . . U.S. import trade or commerce in these electrolytic

[69] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

[70] *See* Carpet Grp. Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 72 (3d Cir. 2000). *But see Minn-Chem, Inc.*, 683 F.3d at 854 ("Congress recognized that there was no need for this self-restraint with respect to imports.").

[71] *See Minn-Chem*, 683 F3d at 854.

[72] *See infra* text accompanying notes 110—118.

[73] *See* Turicentro v. Am. Airlines, 303 F.3d 293, 302—03 (3d Cir. 2002).

[74] *See* Costco Wholesale Corp. v. Au Optronics Corp., 2014 U.S. Dist. LEXIS 133833, at *6 (W.D. Wash. Sept. 22, 2014).

[75] United States v. NEC Tokin Corp., No. CR 15 0426 (N.D. Cal. Sept. 2, 2015).

[76] *Id.*

[77] *Id.* at 2.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 4.

capacitor-containing products,"[81] in violation of the Sherman Act.[82] The Department of Justice was relying on the FTAIA's direct effect exception rather than the import inclusion, setting itself up to prove the more stringent standard under the direct effect exception.

B. Motorola Mobility: Unclear Contours of Conduct Involving Import Trade or Commerce

The second type of confusion involves the exact contours of conduct involving import trade or commerce, especially in today's age of globalized supply chains. In *Motorola Mobility LLC v. AU Optronics Corp.*,[83] AU Optronics, along with other likewise foreign LCD manufacturers, conspired to fix the price of LCD panels.[84] Motorola purchased the price-fixed LCD panels from AU Optronics to incorporate them into their cellphones.[85] Only one percent of Motorola's purchase was directly delivered to the United States; the remaining ninety-nine percent was purchased through its foreign subsidiary outside the United States.[86] Of the ninety-nine percent, forty-two percent was incorporated into Motorola's cellphones outside the United States before being imported into the United States.[87] The rest of the cellphones were shipped to other countries for sale.[88] It was the price-fixed LCD panels incorporated into the forty-two percent that took the center stage in *Motorola Mobility*.[89]

Motorola contended that its importation of the finished products incorporating the price-fixed LCDs should be construed as part of

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[81] *Id.*

[82] *Id.* NEC Tokin signed a plea agreement with the Department of Justice Antitrust Division upon the filing of the information. NEC Tokin Corporation to Plead Guilty and Pay $13.8 Million for Fixing Prices of Electrolytic Capacitors, Press Release, U.S. Department of Justice (2015). A commentator noted that a series of criminal charges against the co-conspirators and related civil charges would likely follow, with one consolidated civil suit already ongoing in the Northern District of California. Robert Connolly, *Current Capacitor Investigation May Be Tip of Large Iceberg*, LAW360, (Oct. 1, 2015); In re Capacitors Antitrust Litig., Docket No. 3:14-cv-03264, (N.D. Cal., July 18, 2014).

[83] Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2014).

[84] *Id.* at 817. To be sure, the Seventh Circuit did not make a finding of the conspiracy, but assumed that the conspiracy occurred, relying on the criminal convictions of AU Optronics' officers in *United States v. Hui Hsiung*. 758 F.3d 1074 (9th Cir. 2014), *amended by* 778 F.3d 738 (9th Cir. 2015).

[85] *Motorola*, 775 F.3d at 817.

[86] *Id.*

[87] *Id.*

[88] *See id.*

[89] *Id.*

conduct involving import trade or commerce.[90] It also argued that even if conduct involving import trade or commerce is interpreted restrictively to apply exclusively to physical importers, Motorola and its foreign subsidiary that purchased the LCDs should be considered a single entity and thus the importer.[91] In rejecting both contentions,[92] the Seventh Circuit did not consider the importation of the finished cellphones with the price-fixed LCDs as part of import trade or commerce.[93] Instead, the court focused on whether the importation would fit under the direct effect exception of the FTAIA.[94] If Motorola satisfied the direct effect exception, its claim, though involving foreign non-import conduct,[95] would have been swept back under the Sherman Act.[96] In making that judgment call, the Seventh Circuit relied on a formalistic view of what constitutes conduct involving import trade or commerce, a view that is inconsistent with today's economic realities in which supply chains are globalized and transcend national boundaries.[97]

Most notably and recently, the Supreme Court decided to forego a golden opportunity to clear confusion surrounding the FTAIA.[98] The

[90] *See id.* at 818–19.

[91] *See id.* at 820.

[92] *Id.* at 818, 820. The Seventh Circuit held that the United States has refused to treat subsidiaries as part of an integrated unit. *Id.* at 820. *But see* AREEDA & HOVENKAMP, *supra* note 35, at 278 ("For the purpose of jurisdiction over foreign corporations, . . . the courts are increasingly ready to regard corporate family as a single entity."). Policy-wise, these multinational corporations are thought to act within an integrated organization rather than separate independent parts, even though different parts of manufacturing processes may take place in multiple countries. *See* NANTO, *supra* note 33, at 1.

[93] *Motorola*, 775 F.3d at 819.

[94] *Id*. at 818.

[95] In the eyes of the Seventh Circuit, this importation of the cellphones with the price-fixed LCDs did not constitute conduct involving import trade or commerce because it was cellphones, not the LCDs that were entering the United States. *Cf. id.* at 817 (reasoning that the LCD panels directly imported into the United States—representing mere one percent of all the LCD panels that Motorola had purchased from AU Optronics—would squarely fall under the Sherman Act per import inclusion).

[96] *See supra* text and table accompanying notes 63–64.

[97] *Compare Motorola*, 775 F.3d at 819 (in which the court relied on the formalistic view in ruling against plaintiffs and finding that the importation of goods was not part of import trade or commerce), *with* Minn-Chem Inc. v. Agrium, Inc., 683 F.3d 845, 854 (7th Cir. 2012) (where the court took the modern approach in holding that import trade or commerce is equivalent to domestic interstate commerce).

[98] *See* United States v. Hui Hsiung, 778 F.3d 738 (9th Cir. 2015), *cert. denied sub nom,* Hsiung v. United States, 135 S. Ct. 2837 (2015); *see also* Motorola Mobility LLC v. AU Optronics, 773 F.3d 826 (7th Cir. 2014), *cert. denied*, 135 S.

continued . . .

Court was asked to resolve differing court decisions that examined an identical set of facts involving an international cartel that fixed the prices of LCD panels used in electronics, such as phones and televisions.[99] Many groups implored the Court to use this opportunity to elucidate the U.S. antitrust laws' extraterritorial reach.[100] In denying certiorari, the Court has prolonged the same confusion and uncertainty surrounding the application of the FTAIA[101] and the Sherman Act.[102]

Ct. 2837 (2015).

[99] *Motorola* was a civil action that followed the criminal convictions of the responsible companies' executive officers in *Hui Hsiung*. Though the Seventh Circuit found that their individual conduct violated the Sherman Act, the Ninth Circuit determined that Motorola was not to be compensated. Some commentators have viewed that this amounted to a circuit split. Deirdre A. McEvoy & Kathrina Szymborski, *March Madness for Foreign Companies: Supreme Court Asked to Resolve Circuit Split on Reach of FTAIA*, Antitrust Update (Mar. 20, 2015), http://www.antitrustupdateblog.com/blog/march-madness-foreign-companies-supreme-court-asked-resolve-circuit-split-reach-ftaia/. *But see* Robert Connolly, *Why the Supreme Court Refused to Hear the FTAIA Appeals*, LAW360 (June 16, 2015), http://www.law360.com/articles/668031/why-the-supreme-court-refused-to-hear-the-ftaia-appeals (reasoning that *Hui Hsiung* and *Motorola* did not amount to a circuit split because the *Motorola* court ruled on other grounds).

To be sure, the *Motorola* court had assumed that the cartel's price-fixing had a direct, substantial, and foreseeable effect on U.S. commerce. However, it still found that Motorola's claim must fail on the second prong of the FTAIA's direct effect exception—that the effects of the anticompetitive conduct complained of must "give rise to a claim" under the Sherman Act. 15 U.S.C. § 6a (2012); *see generally supra* note 64. The court found that because it was Motorola's foreign subsidiary that bought most of the price-fixed LCD panels, Motorola, as a "derivative victim[,]" could not bring the claim. *Motorola*, 775 F.3d at 818. Because Motorola imported the *finished products* into the United States using the price-fixed LCD that its *foreign subsidiary* bought, it could not argue that the defendant's conduct was import commerce. *Id. But see* F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 173–74 (2004) (reasoning that the "give rise to a claim" prong functions only to clarify that the effects mentioned in the FTAIA are *adverse* effects and not to limit the private damages claim to cases in which the *plaintiff* felt the effects). To that end, the court rejected the contention that Motorola and its subsidiary function "as a single enterprise." *Id.*; AREEDA & HOVENKAMP, *supra* note 35, at 278 ("courts are increasingly ready to regard corporate family as a single entity, without unduly fastidious regard for separate legal personalities").

[100] *See* Mfrs. Amicus Brief, *supra* note 30, at *2–3 (arguing that the uncertainty among courts' decision on the extraterritorial reach can cause significant detriment to the U.S. economy); Economists Amicus Brief, *supra* note 30, at *8–9 (same); Brief for the Am. Antitrust Inst. as Amicus Curiae in Support of Petitioner, Motorola Mobility LLC v. AU Optronics Corp., 2015 U.S. S. Ct. Briefs LEXIS 1533, at *6–7 (2015) (No. 14-1122) (urging the Supreme Court to grant certiorari to better deter anticompetitive conduct in the United States and to resolve conflicting decisions among circuits) [hereinafter Institute Amicus Brief].

[101] 15 U.S.C. § 6a (2012).

[102] 15 U.S.C. § 1 (2012).

IV. ANALYZING THE IMPORTATION OF FINISHED PRODUCTS INCORPORATING PRICE-FIXED COMPONENTS UNDER IMPORT INCLUSION BETTER ADHERES TO THE TEXT, CONTEXT, AND PURPOSE OF THE ANTITRUST STATUTES.

A. The Text

First, the text of the FTAIA leads to the conclusion that the importation of finished products incorporating price-fixed components should be treated as part of import inclusion because it involves import trade or commerce.[103] By dictionary definition, foreign cartels selling price-fixed components constitutes conduct "involving import trade or commerce," as that phrase is used in the FTAIA.[104]

Merriam-Webster defines "involve" as "to have within or as part of itself" or "to produce a material influence upon or alteration in" (as synonymous with the word "affect").[105] A cartel member's manufacture and subsequent sale of price-fixed components, to be incorporated into finished products that will be imported into the United States, is certainly *part* of "import trade or commerce"; but for the manufacture and sale, the finished products in question could not have been imported.[106] The cartel member fixing prices surely produces a material influence upon import commerce because the component price partly determines the price of the resulting finished products.[107] The FTAIA uses an expansive expression of "involving,"[108] instead of limiting its scope to direct importers or importation.[109] As a result, some courts have broadly construed the

[103] *See supra* note 14 (stating that the FTAIA provides that the Sherman Act "does not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations . . . ." In other words, the Sherman Act shall apply to conduct involving import trade or import commerce with foreign nations. Thus, the narrower issue becomes whether the importation of finished products incorporating price-fixed components involves import trade or import commerce).

[104] *See infra* text accompanying notes 106–07.

[105] "Involve." Merriam-Webster Online Dictionary. 2016. http://www.merriam-webster.com (Jan. 11, 2016).

[106] *See* 15 U.S.C. § 6a (2012).

[107] *Id.*

[108] *Id.* (using parentheses to denote that import trade or commerce is not affected by the FTAIA. Because the parenthetical comes after the expression "conduct involving trade or commerce," the natural reading of the parenthetical—"other than import trade or import commerce"—modifies "trade or commerce." Therefore, conduct involving import trade or commerce would remain included under the Sherman Act); *see also* Turicentro v. Am. Airlines, 303 F.3d 293, 302 (3d Cir. 2002).

[109] *See* Animal Sci. Prods. v. China Minmentals Corp., 654 F.3d 462, 466–70

continued . . .

contours of conduct involving trade import or commerce and held that the plaintiff need not be the physical importer to qualify under conduct involving import trade or commerce.[110]

Moreover, the structure of the FTAIA evinces that import trade or commerce is equivalent to domestic interstate commerce and thus requires more aggressive protection.[111] The FTAIA's direct effect exception provides that non-import foreign anticompetitive conduct may still be subject to the Sherman Act if it has a direct, substantial, and foreseeable effect on U.S. domestic commerce or on import trade or commerce.[112] This construction appears to equate domestic interstate commerce and import commerce to the extent of the afforded level of importance and protection. Inferring from this structure, courts have deduced that they need not exercise restraint when import trade or commerce was implicated and that the Sherman Act may be extended liberally.[113] Just as the Sherman Act proscribes a wide set of anticompetitive conduct in the domestic interstate market, a similarly wide net of protection should be afforded to import trade or commerce.

B. The Context

The context of the antitrust statutes requires that the importation of finished products incorporating price-fixed components be treated as part of the import inclusion.[114] The FTAIA's legislative history suggests that the drafters assumed that import commerce had a direct and substantial effect on U.S. commerce—the very kind of effect that the antitrust statutes were designed to regulate and deter.[115] One of the drafters sought to ensure that anticompetitive conduct in import commerce would remain subject to the Sherman Act because its effect would invariably reach American consumers.[116] Hence, the FTAIA came with a caveat that the statute would affect non-import foreign

(3d Cir. 2011).

[110] *See Turicentro*, 303 F.3d at 300–04 (emphasizing that the analysis of conduct involving import trade or commerce is not about the plaintiff's conduct but whether the defendant's allegedly anticompetitive conduct involved import trade or commerce).

[111] Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 854 (7th Cir. 2012).

[112] 15 U.S.C. § 6a(1)(A).

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

[114] *See* H.R. Rep. 97-686, at 11–12 (1982); *see also Minn-Chem,* 683 F.3d at 854.

[115] *See* H.R. Rep. 97-686, at 11–12 (1982); *see also Minn-Chem*, 683 F.3d at 854.

[116] *See* H.R. Rep. 97-686, at 9 (1982).

conduct.[117] Furthermore, the drafters wanted to impress upon the public that foreign non-import conduct may be subject to the Sherman Act only if it had a direct, substantial, and foreseeable effect on U.S. commerce.[118] By equating import commerce with non-import conduct that has a direct, substantial, and foreseeable effect on U.S. commerce, the drafters evinced an understanding that import commerce already had that similar requisite direct effect to be subject to the Sherman Act.[119] Even under the paradigm in 1982 when the FTAIA was drafted, import trade or commerce was presumed to have a direct effect on U.S. commerce and thus be deserving of broad protection.[120]

Yet, that was under the traditional paradigm, which neatly divided economies by national boundaries, and manufacturing processes were more or less confined within the national boundaries.[121] However, today's economic reality is different.[122] The FTAIA serves to delineate the contours of the Sherman Act's extraterritorial reach.[123] Production chains have become global and largely foreign—component manufacturing and assembly into finished products all occur outside the United States.[124] Few of these of components are actually imported into the United States directly.[125] Nevertheless, because globalized supply chains are so prevalent in today's world economy that the U.S. economy will inevitably be affected if foreign cartels price fix components; it would subsequently raise the prices of affected finished products as well.[126] This kind of internationally interdependent economy of today's scale was not envisioned when the FTAIA was drafted; therefore, the application of the statute should be updated to better reflect today's context in which globalized supply

[117] *See id.* at 9–10 (noting that the FTAIA's earlier draft affirmatively carved out "export" rather than the negative expression of "other than import." However, the drafters then wanted to ensure that some purely foreign transactions that are neither import nor export be carved out as well).

[118] *Id.* at 9.

[119] *See id.*

[120] *See id.*

[121] *See* NANTO, *supra* note 33, at 4.

[122] Antitrust laws, while drafted with a high level of generality, reflect the prevailing economic doctrine and reality of the time. *See supra* note 42 and accompanying text; *see also* FORDHAM COMPETITION LAW INST., *supra* note 1, at 517.

[123] *See* H.R. Rep. No. 97-686, at 2 (1982).

[124] *See supra* note 30 and accompanying text; *see also* NANTO, *supra* note 33, at 4.

[125] *See* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 818 (7th Cir. 2014) (explaining that only one percent of the price-fixed LCDs were imported into the United States directly by Motorola).

[126] *Id.* at 822.

chains reigns.[127]

Moreover, trade has become a much more important component of the U.S. economy. Since 1982, merchandise trade's portion in the United States' gross domestic product ("GDP") has increased by more than fifty percent to reach nearly a quarter of the GDP.[128] Therefore, undue influence on U.S. imports will have a much more significant impact on the U.S. economy than it could have had when the FTAIA was enacted.[129] The health of the U.S. economy depends more on trade than before, and when components are manufactured and incorporated into finished products largely outside the United States, foreign cartel activities over component prices will have a significant amount of sway on the U.S. economy. This, in turn, provides grounds for the United States to be more vigilant and aggressively enforce the U.S. antitrust laws against foreign component cartel activities.[130]

C. The Purpose

The purpose of the antitrust statutes is better served if the importation of finished products incorporating price-fixed components is treated as part of the import inclusion.[131] At the outset and in the abstract, if the goal is to deter anticompetitive conduct because it leads

[127] *Id.* at 826 (arriving at the opposite conclusion based on the ubiquity of components manufactured abroad and warning of the potential for opening up floodgates for private damages suits because of the prevalence of foreign-manufactured components. The Seventh Circuit also noted that the United States' increased cooperation with the European Union and Canada warranted less extraterritorial application of the U.S. antitrust laws. However, this overlooks the full extent of detrimental effects that foreign component cartels could have on the U.S. economy absent enforcement from the United States. When it comes to protecting its own economy, there is little reason to argue that the U.S. laws should stay on the sidelines. Moreover, the increased international cooperation in competition goes hand in hand with the trend of expanding extraterritoriality of other countries' antitrust laws.).

[128] *See Merchandise Trade (% of GDP),* THE WORLD BANK, http://data.worldbank.org/indicator/TG.VAL.TOTL.GD.ZS (last visited Nov. 14, 2015) (explaining that the United States data show that in 1982, trade accounted for about 14% of the GDP. In 2014, the ratio grew to 23%.).

[129] Moreover, considering that one of the primary purposes of the FTAIA was to quell concerns raised by exporting businesses, it is even more crucial now to read the FTAIA properly. Because the trade data, which include exports, show that trade takes up a bigger slice of the pie that is the U.S. economy, there is more reason to read the FTAIA faithfully to its context. *See infra* text accompanying note 184.

[130] In fact, today's globalized economy has prompted numerous countries to expand the extraterritorial application of their antitrust laws. FORDHAM COMPETITION LAW INST., *supra* note 1, at 514.

[131] The primary purpose of the antitrust statutes is to deter anticompetitive conduct. *See supra* text accompanying notes 35–37.

to unfairness and inefficiency, who brings the suit hardly matters as long as the defendant in violation of the law must pay for the transgression—the plaintiff is merely the vehicle to mete out the punishment.[132] Courts have approved this notion, emphasizing that antitrust suits are about the defendant's conduct, not the plaintiff's.[133]

This is especially true in today's internationally interconnected economy and globalized supply chains.[134] Private suits constitute a significant part of the antitrust deterrence mechanism.[135] In fact, scholars have noted that government enforcement alone fails to provide adequate deterrence against antitrust violations.[136] When it comes to international cartels, the current deterrence mechanism—government enforcement *combined with* private suits—is largely ineffective in meeting the deterrence goal.[137] In order to restore a meaningful level of deterrence, private suits need to be available even more widely, not barred or limited.[138] However, if courts were to limit private suits only to direct purchaser plaintiffs (actual component importers),[139] the Sherman Act would be without teeth.[140] As Justice Brennan wrote in his dissent in *Illinois Brick*, "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation."[141] If the direct purchaser fails to bring a suit for whatever reason—attorney's fees, power imbalance against the cartel that retains absolute control over the purchaser's

[132] *See* Pfizer, Inc. v. Gov't of India, 98 S. Ct. 584, 588–89 (1978).

[133] *See id.*

[134] *See* THE BROOKINGS INST., ANTITRUST GOES GLOBAL 1, 7 (Simon J. Evenett et al. eds., 2000); AREEDA & HOVENKAMP, *supra* note 35, at 268 ("The first key issue arises from the fact that in an interdependent world economy everything affects everything else"); *see also* Economists Amicus Brief, *supra* note 30 and accompanying text.

[135] Ill. Brick Co. v. Illinois, 431 U.S. 720, 749 (1977) (Brennan, J., dissenting).

[136] *See, e.g.*, United States v. Hui Hsiung, 778 F.3d 738 (9th Cir. 2015), *cert. denied sub nom.*, Hsiung v. United States, 135 S. Ct. 2837 (2015); Motorola Mobility LLC v. AU Optronics Corp., 773 F.3d 816 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 2837 (2015); some commentators noted that the denial would limit the availability of private damages action, even barring some U.S. companies injured by component cartels. Lawrence Kill & Carrie Maylor DiCanio, *FTAIA May Bar US Cos. from Relief under US Antitrust Laws*, LAW360 (Dec. 21, 2015) (remarking that after the Supreme Court denied certiorari in *Hsuing* and *Motorola Mobility*, the availability of private damages actions will be limited, even barring recovery for some U.S. companies injured by component cartels); *see also* Institute Amicus Brief, *supra* note 100, at 6–7.

[137] Institute Amicus Brief, *supra* note 100, at *3–4.

[138] *See id.* at *8.

[139] *See Motorola Mobility*, 775 F.3d at 821.

[140] *Ill. Brick Co.*, 431 U.S. at 749 (Brennan, J., dissenting).

[141] *Id.* at 760.

supply of the necessary component, to name a few—then there is effectively little deterrence against the cartel because "ultimate consumer individuals often suffer only minor damages and therefore have little incentive to bring suit."[142]

This deterrence gap is even more pronounced when one considers that a large portion of finished products are assembled outside the United States.[143] When finished products incorporate the price-fixed components, the increased price will be passed on to the finished products and affect the economy.[144] The restrictive reading of what constitutes conduct involving import trade or commerce in the context of price-fixed components would render the Sherman Act powerless to defend the U.S. economy against an influx of price-fixed components.[145] The Seventh Circuit in *Motorola* justified barring private damages for price-fixed components and distinguished its seeming conflict with *Hui Hsiung* by reasoning that *Hui Hsiung*'s prosecutorial context minimized the international comity concerns because the government presumably takes them into account.[146]

Yet, the European counterpart is already expansively employing its antitrust laws in the context of import commerce. In 2010, the European Commission, facing the same cartel faced by the *Motorola* court, fined the LCD manufacturer cartel for fixing prices.[147] These panels were manufactured and incorporated into televisions, computer monitors, and notebooks in Asia.[148]

The finished products were then imported into the European Economic Area ("EEA").[149] The European Commission found significant that the cartel was "aware" of its violation and that it

[142] *Id.* at 752. Moreover, some courts have reasoned that the defendants need not be the *physical* importer to be liable under the Sherman Act, but rather that their anticompetitive behavior was *directed* at the U.S. import market. *See, e.g.,* Animal Sci. Prods. v. China Minmetals Corp., 654 F.3d 462, 470 (3d Cir. 2011); Kruman v. Christie's Int'l PLC, 284 F.3d 384, 395 (2d Cir. 2002).

[143] Randy M. Stutz, *The FTAIA in Flux: Foreign Component-Goods Cases Have Tripped, But Have They Fallen?*, 2 CPI ANTITRUST CHRONICLE, 1, 5 (Jan. 2015); *see supra* note 30 and accompanying text.

[144] *See, e.g.*, NANTO, *supra* note 33, at 1.

[145] *See In re* TFT-LCD Antitrust Litig., 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011); Institute Amicus Brief, *supra* note 100, at *4 (arguing that there was no reason to limit the applicability of the antitrust statutes when price-fixed components do have direct and substantial effects on the U.S. economy).

[146] Motorola Mobility LLC v. AU Optronics Corp., 773 F.3d 816, 826 (7th Cir. 2014).

[147] Press Release, Eur. Comm'n, Antitrust: Commission Fines Six LCD Panel Producers €648 Million for Price Fixing Cartel (Dec. 8, 2010).

[148] *Id.*

[149] *Id.*

harmed European buyers of finished products that use the LCDs.[150] Innolux, one of the fined defendants, appealed to the European Union's Court of Justice ("Court of Justice") and challenged the European Commission's jurisdiction over their conduct.[151] The Court of Justice, noting that the issue did not involve the actual cartelized components but rather finished products incorporating the components, nevertheless held the cartel's activities were subject to the European Union's competition laws.[152] The court reasoned that failing to punish the cartel would overlook the adverse economic effects in the EEA.[153] The Court of Justice identified two potential advantages a cartel that price-fixed components would have over competitors.[154] The first advantage is passing the increased price to finished products and consumers, who take the brunt of increased prices.[155] Second is the cartel member achieving a relative cost advantage against its competitors when the component purchaser does

[150] *Id.* This reasoning very much mirrors the effects test used in *Hartford Fire Ins. Co. v. California*, which examines whether the harmful effect of the defendant's anticompetitive conduct was foreseeable and substantial. 509 U.S. 764 (1993). *See supra* text accompanying note 63; *see also supra* note 49 and accompanying text.

[151] Case C-231/14, InnoLux Corp. v. Comm'n, http://curia.europa.eu (July 9, 2015). InnoLux had first brought the case to the General Court, which reduced the fine but upheld the commission's finding. Press Release, Ct. of J. of the Eur. Union, *The Court Confirms the €288 Million Fine Imposed on InnoLux for Its Participation in the Cartel on the Market for LCD Panels* (July 9, 2015).

[152] *InnoLu*x, p. 52, 61.

[153] *Id.* p. 62. The court approved the distinction that the European Commission and the General Court made between vertically-integrated undertakings (including through its foreign subsidiaries and affiliates) that both manufactured the components and assembled them into finished products from undertakings that only manufactured the components but did not do the incorporation themselves. *Id.* p. 64. In effect, if incorporation was done by companies other than the cartel manufacturers, these sales were not included for the purpose of determining fines. *See* Matteo F. Bay, et al., *EU InnoLux Ruling Affirms Potential for Higher Cartel Fines*, LAW360 (July 23, 2015, 10:41 AM), http://www.law360.com/articles/680699/eu-innolux-ruling-affirms-potential-for-higher-cartel-fines.

Costco v. Au Optronics involved a similar factual situation. Costco had purchased televisions from Panasonic, one of the LCD price-fixing cartel members. Panasonic, upon manufacturing the LCD panels, sold them in foreign locations for incorporation into televisions. Ninety percent of them were sold to Panasonic in foreign locations and the rest were sold to Daewoo. Of the ninety percent sold to Panasonic, less than ten percent was sold U.S. Panasonic. Though this fact situation included a case of vertical integration (or intracompany sales), namely within Panasonic, the court did not distinguish the ten percent sold to non-party Daewoo separately. Costco Wholesale Corp. v. Au Optronics Corp., No. C13–1207RAJ, 2014 U.S. Dist. LEXIS 133833, at *3–4 (W.D. Wash. Sept. 22, 2014).

[154] Ct. of Just. of the Eur. Union Press Release, *supra* note 151.

[155] *See id.*

not raise the price and forego partial revenue.[156] Either way, unless punished, the cartel would get away with the price-fix despite the adverse effects on domestic commerce. This case serves as further evidence that achieving the anticompetitive statutes' purpose requires extending their reach to the importation of finished products incorporating price-fixed components.[157]

The current pending case[158] and related guilty plea,[159] involving an international cartel that price-fixed capacitors, provides a good case study of the potential economic ramifications of not enforcing the Sherman Act against the importation of finished products incorporating price-fixed components. Capacitors form an integral component in most electronic devices.[160] A number of capacitors are manufactured and incorporated into electronic devices outside the United States before the finished products are sold in or delivered throughout the United States.[161] When capacitors' prices—while individually cheap, "typically under a penny,"[162]—are artificially fixed higher by a cartel of global manufacturers, the increase will invariably raise the finished products' prices.[163] When the finished products incorporating the price-fixed capacitors are imported into the United States, they are involved in import commerce. To resolve the uncertainty and better deter international cartel activities adversely affecting U.S. commerce, the importation of finished products incorporating price-fixed components should be treated as part of the import inclusion. If the direct effect test is applied, it may result in the

[156] *See id.*

[157] *See* FORDHAM COMPETITION LAW INST., *supra* note 1, at 519 (analyzing that globalization has pushed a number of jurisdictions to adopt a more expansive reading of their antitrust laws).

[158] In re Capacitors Antitrust Litig., 106 F. Supp. 3d 1051 (N.D. Cal. 2015). As expected, a good portion of this consolidated case will involve the question about the applicability of the FTAIA. *Id.* The court has since deferred ruling on this issue, reasoning that the disposition will depend on the specific facts of the case. In re Capacitors Antitrust Litig., No. 14-cv-03264-JD, 2016 U.S. Dist. LEXIS 136224 (N.D. Cal. Sept. 30, 2016), at *36-38.

[159] Press Release, U.S. Dep't. of Justice, *supra* note 82.

[160] *See* Connolly, *supra* note 82.

[161] *See supra* text accompanying note 1.

[162] *See* Connolly, *supra* note 82 (noting that because capacitors' individual prices are so low, even a minute price increase in its nominal value will amount to a high proportional price increase. For example, suppose a capacitor is normally one cent. If the cartel increases the price by one cent to two cents, the cartel member would double its earnings. Furthermore, because they are presumably purchased in bulks, a small nominal increase will add up to much higher prices for electronic device manufacturers that *need* to buy these capacitors).

[163] *See id.*

same decision as *Motorola*.[164] The failure to deter international cartels and protect the U.S. economy from the cartel's harmful effects is universally felt because capacitors are ubiquitous.[165]

Resolving these conflicting ideas will be a difficult task because import commerce encompasses a complex web of transactions and implicates multiple aspects of economic policy-making.[166] Therefore, Congress, which has not made major amendments to the Sherman Act or the FTAIA since their enactments,[167] should clarify the statutes' scopes. As the above mentioned trade data suggest, the world economy is much more interconnected, and other countries have already begun to flex their antitrust muscles outside their borders in the context of price-fixed components.[168] Moreover, because many corporations are multinational and thus subject to the corresponding jurisdictions' competitions laws, competition laws are starting to converge, mostly to resemble those of the United States.[169] Congress, through its committees, research commissions, and hearings that will elicit expert testimonies, is in the best position to examine in detail which form of antitrust law would best serve the needs of American consumers and businesses.

In doing so, Congress should consider combining the Sherman Act and the FTAIA to clarify the interaction between the two statutes.[170] Because the FTAIA modifies the Sherman Act, instead of having a distinct section, the FTAIA's language can simply be added to the

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[164] *Compare In re* Capacitors Antitrust Litig., 154 F. Supp. 3d. 918, 928 (N.D. Cal. 2015) (receiving price-fixed goods purchased outside the United States did not satisfy the Article III injury-in-fact requirement under the antitrust or consumer protection state laws), *with* United States v. Hui Hsiung, 778 F.3d 738, 742–44 (9th Cir. 2015) (finding that, in this criminal case, the price-fixed products were sold in large part in the United States, as did part of the conspiracy to carry out the price-fixing agreement), *and* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 821–25 (7th Cir. 2014) (finding that the manufacturer of the finished products incorporating the price-fixed LCDs could not bring a Sherman Act claim for injury to its foreign subsidiaries because the LCD panel cartel members had sold the price-fixed panels outside the United States,).

[165] *See* Information, *supra* note 82.

[166] *See generally* NANTO, *supra* note 33, at 1 (explaining that in today's age of globalized supply chains, changes in trade policy will affect not only foreign companies but also multinational U.S. companies).

[167] *See* 15 U.S.C. §§ 1–7 (2012).

[168] *See* FORDHAM COMPETITION LAW INST., *supra* note 1, at 373.

[169] *See id.* The United States' competition laws are stronger than most other countries' and thus tend to attract foreign litigants. *See* Diamond, *supra* note 16, at 805.

[170] *See* Mfrs. Amicus Brief, *supra* note 30, at 2 (asking the Supreme Court to "resolve [] uncertainty . . . on the applicability of U.S. antitrust laws to foreign transactions involving goods intended for eventual import into the United States.").

Sherman Act to make the Sherman Act more self-contained and easily understandable.[171] In revising the statutes, Congress should define the contours of import commerce to provide courts with clearer guidance. Furthermore, considering that one of the major concerns involving a broad reading of the FTAIA is international comity,[172] it is more appropriate for Congress to consider complex foreign relation concerns than for the judiciary. Congress could update U.S. antitrust law in the face of increasing cross-border antitrust collaborations and other countries' practices of expanding extraterritorial applications of antitrust law.[173]

In addition, the Supreme Court may have the chance to determine how to treat the importation of finished products incorporating price-fixed components within the current Sherman Act and FTAIA framework before Congress revises the statutes.[174] In denying certiorari to *Hui Hsiung* and *Motorola*,[175] the Court stepped aside for the time being, but commentators predict that the lingering uncertainty surrounding the applicability of U.S. antitrust laws will hamper American business activities.[176] Before Congress deliberates and drafts clearer antitrust statutes, the Court should not shy away from the opportunity to determine the proper bounds of conduct involving import trade or commerce under the FTAIA—this chance just may present itself before the Court if the current capacitor cartel case[177] travels through the Ninth Circuit. Until it decides to take on the

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[171] A suggested revision of the FTAIA reads as follows:

> Plaintiffs (may) have a claim in foreign commerce under the Sherman Act if:
>
> 1. the conduct in question has a direct, substantial, and reasonably foreseeable effect
>   a. on a domestic commerce or on import commerce; or
>   b. on American export commerce; and
> 2. such effect gives rise to a claim under the Sherman Act.

Diamond, *supra* note 16, at 819 n.107 (citation omitted). Though this version revises only the FTAIA and leaves the Sherman Act as is, the proposal serves as evidence that Congress should revise the antitrust statutes.

[172] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004), *see generally* discussion *infra* Part V regarding international comity.

[173] *See generally* FORDHAM COMPETITION LAW INST., *supra* note 1, at 514.

[174] Kill & DiCanio, *supra* note 136.

[175] United States v. Hui Hsiung, 778 F.3d 738 (9th Cir. 2015), *cert. denied sub nom.,* Hsiung v. United States, 135 S. Ct. 2837 (2015); Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015), *cert. denied*, 135 S. Ct. 2837 (2015).

[176] *E.g.,* Mfrs. Amicus Brief., *supra* note 30, at 3.

[177] *In re* Capacitors Antitrust Litig. 106 F.Supp.3d 1051 (N.D. Cal. 2015).

mantle, the Court can expect a continued call for review and clarification by the same groups that clamored for certiorari in *Hui Hsiung* and *Motorola*.

Moreover, the Supreme Court's action is necessary due to a potential conflict with the indirect purchaser doctrine outlined in *Illinois Brick*.[178] The indirect purchaser doctrine stipulates that only the "overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the [injured] party" in the antitrust context.[179] Part V will explain that the concerns posed by the indirect purchaser doctrine should not bar the antitrust laws from being applied to the importation of finished products incorporating price-fixed components.[180] Nevertheless, because the indirect purchaser doctrine remains the law, the Supreme Court should reexamine the validity of the doctrine in the context of today's age of globalized supply chains.[181] Moreover, as a commentator warned, the blanket application of the indirect purchaser doctrine will render the Sherman Act powerless to achieve the deterrence goal.[182] It is notable that the *Illinois Brick* Court created a caveat in its indirect purchaser doctrine holding, leaving room for abandoning or modifying the doctrine if the "effectiveness of the antitrust treble-damages action would be substantially reduced by" the doctrine.[183] The prevalence of globalized supply chains and amounting voices arguing that U.S.

[178] Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977). In fact, the Seventh Circuit relied in part on the indirect purchaser doctrine to rule that Motorola could not recover against the defendant cartel member that fixed the LCD panels' prices. The court, treating Motorola and its foreign subsidiary as separate entities, reasoned that because the foreign subsidiary purchased the LCD panels, Motorola was an indirect purchaser. Thus, the court held that Motorola was prohibited from recovering from the cartel member defendant. *Motorola*, 775 F.3d at 821.

[179] *Ill. Brick*, 431 U.S. at 729.

[180] *See infra* text accompanying notes 179–82.

[181] Because the indirect purchaser doctrine was imposed by the Supreme Court, only the Court (or Congress) can modify or overrule the indirect purchaser doctrine. More than half of the states have enacted statutes to override the limits imposed by the indirect purchaser doctrine so that they can control the effects that anticompetitive conduct will have on their respective states. Jennifer Fischell, *Standing in the Way of the FTAIA: Exceptional Applications of* Illinois Brick, 114 MICH. L. REV. 309, 312 n.18 (2015) (citation omitted). The spread of these laws overturning the doctrine suggests that the doctrine excessively interferes with effective antitrust enforcement. These laws were not preempted by *Illinois Brick*. California v. ARC Am. Corp., 490 U.S. 93, 101 (1989).

[182] *See* Stutz, *supra* note 143, at 5 (arguing that the direct purchaser abroad would be barred by the FTAIA and the indirect purchaser would be barred by the indirect purchaser doctrine, and warning that this result would "deal a severe blow to the deterrence goals of the U.S. antitrust laws").

[183] *Ill. Brick*, 431 U.S. at 729.

antitrust laws would be powerless to mitigate anticompetitive harms outside its borders should supply sufficient grounds for the Supreme Court to revisit *Illinois Brick* and examine if that caveat rings truer today.

V. COMMON CONCERNS ARE MITIGATED

Common concerns, such as international comity, the indirect purchaser doctrine, endless plaintiffs, and over-deterrence, do not sufficiently justify not analyzing the importation of finished products incorporating price-fixed components under import inclusion. First, international comity concerns are minimal because the international norm is expanding extraterritoriality, other countries having already taken an expansive approach based on anticompetitive conduct's effects on its domestic market. For one, imports necessarily affect the U.S. economy—an area that the United States is more than justified to protect. As analyzed above, the FTAIA's drafters assumed that import commerce by definition would influence the U.S. domestic commerce.[184] Anticompetitive conduct, even if it happens outsides the United States, would necessarily affect domestic commerce because its influx would affect all other parts of the market.

Empagran, the last Supreme Court case that squarely considered the issue of the extraterritorial reach of U.S. antitrust laws, based its holding primarily on the concerns of international comity.[185] Yet, international comity is not unilateral because the doctrine is based on mutuality between the United States and other countries; it is based on the silent agreement between sovereign nations not to interfere with each other's sovereign authority.[186] When other countries are more willing to punish foreign component cartels when finished products incorporating price-fixed components are imported,[187] there is little reason why the United States should sit on the sidelines and not protect the interests of its consumers and businesses. Moreover, the trend of the convergence of international regulations[188] suggests that the United States would be more than justified in following the European Union's steps in expanding the extraterritorial reach of U.S. antitrust laws.

The European Commission's decision to fine companies for

[184] *See supra* text accompanying notes 117–18.

[185] *See* F-Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004).

[186] *Id.*

[187] The European Union courts' decisions are a prime example of this trend. *See supra* notes 153-157 and accompanying text.

[188] *See* FORDHAM COMPETITION LAW INST., *supra* note 1, at 514.

importing finished products manufactured outside the EEA[189] and the Court of Justice upholding the expansive enforcement power[190] support that a similarly expansive reading of the FTAIA would not invoke international comity concerns. International comity is predicated on not infringing the sovereign regulatory and enforcement powers of other countries.[191] However, when other countries are similarly expansively regulating conduct outside its borders on the basis of *effects* felt within its borders, there is hardly any infringement on their sovereign authority to do the same.[192] In fact, this convergence of perspectives on the proper scope of the competitions laws focusing on the actual effects of allegedly anticompetitive conduct comports with the globalization of the world economy in which many corporations act across the borders and jurisdictions.[193]

Second, the indirect purchaser doctrine has little sway because this Article's construct proposes to analyze the importation of finished products incorporating price-fixed components as conduct involving import trade or commerce—a discrete transaction—rather than treating it as a step in the larger manufacturing process. The indirect purchaser doctrine was largely borne out of the Supreme Court's concern that allowing indirect purchasers to recover treble damages based on a pass-on theory[194] would cause multiple liabilities for defendants[195] and run into difficulty measuring exact remedies.[196] However, when the importation of finished products incorporating price-fixed components is analyzed as import commerce, reasoning is different because the argument does not rely on any pass-on theories. The defendant is liable (whether the suit involved is criminal or civil) not because the harm was passed on to the plaintiff but because the defendant's anticompetitive conduct targeted and harmed U.S. import commerce.[197] The defendant would be liable—tested under the

[189] *See* Press Release, European Comm'n, *supra* note 147.

[190] *See* Press Release, Ct. of J. of the Eur. Union, *supra* note 151.

[191] *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004).

[192] Some courts have even gone on to say that because imports necessarily affect the domestic commerce, there should be little restraint when it comes to regulating and proscribing anticompetitive conduct involving import commerce. Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 854 (7th Cir. 2012).

[193] *See also supra* text accompanying notes 118, 120.

[194] Under the pass-on theory, the indirect purchaser plaintiff argued that it bore the harmful effects of the defendant's price-fixing because the plaintiff had to buy from the direct purchaser at an accordingly increased price. Ill. Brick Co. v. Illinois, 431 U.S. 720, 727–28 (1977).

[195] *Id.* at 730. *See infra* text accompanying notes 198–201 (explaining other reasons why multiple liability concerns are mitigated).

[196] *Ill. Brick*, 431 U.S. at 741–42.

[197] If the involved suit is civil, the plaintiff, as the *importer* of the finished

continued . . .

Hartford Fire test[198]—for the portion that was imported into the United States—directly or in the form of finished products incorporating price-fixed components.

Third, the concern about endless plaintiffs and over-deterrence is minimized because import commerce happens only once—when finished products cross the borderline into the United States. The potential plaintiff is limited to those that actually imported the finished products incorporating price-fixed components.[199] Furthermore, that plaintiff's claim would not encompass all of the defendant's manufacturing conduct, but only the portion that was imported into the United States as part of the import of the matching finished products. Moreover, the concern has little weight because who receives the compensation is largely irrelevant when the antitrust statutes' primary purpose is deterrence rather than compensation.[200] In fact, Supreme Court justices and commentators view private treble damage claims primarily a Sherman Act enforcement vehicle rather than a compensatory mechanism.[201] Granted, the prospect of endless plaintiffs is not a matter that should be lightly tossed aside. However, the question is one of balancing. On one side the balance is the possibility of over-deterrence stemming from endless overzealous private plaintiffs, and the other side is the current state of ineffectual antitrust law. Considering the antitrust statutes were designed to reach broadly and to deter anticompetitive conduct, restoring the deterrent effects of the antitrust statutes is more faithful to the purpose of the statutes and thus far outweighs the concerns of over-deterrence.

VI. CONCLUSION

An update is long overdue in the realm of U.S. antitrust laws to face novel challenges in the form of the importation of finished products incorporating price-fixed components in today's globally interconnected economy. In the hope of better attaining the primary goal of deterring anticompetitive conduct and mitigating its harmful

products, would bring the suit. Importantly, this formulation is more consistent with U.S. antitrust laws' deterrence goals.

[198] Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); *see also supra* text accompanying note 61.

[199] *See supra* text accompanying notes 135–143.

[200] *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting); *see also supra* notes 35–44 and accompanying text.

[201] *See Ill. Brick*, 431 U.S. at 749 (Brennan, J., dissenting) (arguing that the majority's decision to apply the indirect purchaser doctrine to limit the scope of private treble damages claim under the Clayton Act cripples the deterrence effect stemming from the threat of private actions. 15 U.S.C. §§ 12–27 (2012)).

effects, this Article proposed a solution within the current regime: analyze the importation of finished products incorporating price-fixed components under conduct involving import trade or commerce under the FTAIA. However, because the FTAIA's wording and its proper application have caused confusion among courts, and because the specific contours of import trade or commerce remain unclear, this Article's substantive legal solution can only be temporary. Therefore, Congress should take the initiative to revisit U.S. antitrust laws and provide clearer guidance on the laws' extraterritorial reach.

Many electronics and products that American consumers and business use and rely on today consist of various critical components that are manufactured and incorporated into finished products all outside the United States. Foreign cartels that supply these components can hike up the prices to the detriment of American consumers and businesses, knowing that U.S. courts still employ antiquated antitrust case law and doctrines. Considering that international cartel is the Department of Justice's primary concern at this time, the problem stemming from the outdated legal regime is all the more severe, the need for a review imperative.