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I. INTRODUCTION

In the early 1960s, the British philosopher Richard Taylor famously argued that he could use well-accepted principles of logical reasoning to prove the doctrine of fatalism—the idea that mankind lacks free will and life's outcomes are pre-determined. A fatalist, explained Taylor, perceives that a person's actions in the present do not determine outcomes in the future any more than a person's actions in the present determine outcomes in the past. To illustrate, Taylor used the example of a man sitting down to breakfast with his morning newspaper, where conditions are such that if a naval battle occurred yesterday, the newspaper will carry a specific headline today, and if a naval battle did not occur yesterday, the paper will carry a different headline today. Everyone understands that the man does not determine whether the naval battle occurred yesterday by opening his newspaper and *seeing* one headline or the other today. In Taylor's words, "we all are fatalists with respect to the past."[2]

Taylor then asked readers to consider a boat at sea, where conditions are such that if the boat captain gives one order, a naval battle will occur, and if the boat captain gives a different order, a naval battle will not occur. The fatalist, explained Taylor, uses the same logical principles to conclude that what kind of order the boat captain gives depends on *whether a naval battle will take place*; it is not determined by the boat captain.[3] Taylor's essay exasperated some of his fellow philosophers for decades, not because it persuaded them of fatalism's merits, but because they couldn't adequately refute Taylor's logic. Others doubtless rolled their eyes and simply asked, "why should we care?"

Fast forward a half century, and Motorola Mobility is entangled in a messy international antitrust dispute with a global price-fixing cartel that, at first blush, may seem like it has nothing whatever to do with Richard Taylor's logical argument for fatalism. As of this writing, after a grueling and erratic traverse through the federal courts, Motorola's Sherman Act claim against foreign manufacturers of LCD panels used in Motorola smart phones is now on interlocutory appeal in the Seventh Circuit. The parties and amici are arguing primarily about the proper interpretation of statutory language in the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), an act of Congress that delineates the metes and bounds of the Sherman Act's

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[1] Randy M. Stutz is Senior Counsel & Director of Special Projects at the American Antitrust Institute (AAI). *See* http://www.antitrustinstitute.org. The AAI submitted amicus briefs in several of the cases identified in this article, including *Empagran* and *Motorola*. *See* http://www.antitrustinstitute.org/aai_activities/amicus-program. The author wishes to thank Rick Brunell, AAI's General Counsel, who co-authored the AAI brief in *Motorola* with Mr. Stutz, and who contributed original thinking to some of the ideas reflected in this article. The views expressed are the author's alone and do not necessarily reflect the views of AAI.

[2] *See* Richard Taylor, *Fatalism*, 71 PHIL. REV. 1 (1962), *reprinted in* FATE, TIME, AND LANGUAGE 41-51, 45 (Steven M. Cahn & Maureen Eckert eds., 2011).

[3] *See id*. at 46-47.

extraterritorial application. This battle for the meaning of the FTAIA's language raises a philosophical question similar to the one raised by Taylor's argument: Why should we care what sound logic can prove about the direction of causation?

II. BALANCING COMITY PRINCIPLES AGAINST THE GOALS OF THE U.S. ANTITRUST LAWS

The FTAIA prevents Sherman Act suits in U.S. courts where anticompetitive conduct causes foreign injury, excluding conduct involving domestic or import commerce and excepting otherwise foreign conduct that has certain kinds of domestic effects. Ostensibly, the FTAIA was passed to confirm for American exporters and multinationals that the Sherman Act does not prevent them from entering into anticompetitive business arrangements that adversely affect only foreign markets.[4] Although this formulation of the Act's purpose could be mistaken for encouraging American firms to injure foreign economies with impunity, the Supreme Court has made clear that the FTAIA is borne of regard, not disregard, for foreign nations.

In *Empagran*, the Court explained that principles of prescriptive comity are fundamental to the FTAIA's partial prohibition on the extraterritorial application of the Sherman Act. As Justice Scalia explained in detail in his *Hartford Fire* dissent, cited approvingly by the majority in *Empagran*, prescriptive comity can be defined as "the respect sovereign nations afford each other by limiting the reach of their laws."[5] Its principal dictate is that courts should construe ambiguous statutes so as not to permit them to interfere with the sovereign authority of foreign nations unreasonably.[6]

At the same time, the *Empagran* Court noted that "our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused."[7] The *Empagran* Court thus neatly framed the fundamental underlying FTAIA policy inquiry as whether extraterritorial application of the Sherman Act would unreasonably "interfere with a foreign nation's ability independently to regulate its own commercial affairs," or if it instead would be consistent with Congress' "legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused."[8]

Empagran involved the "domestic effects" exception of the FTAIA, which permits plaintiffs to sue in U.S. court where conduct causes foreign injury, but the conduct also has a direct, substantial, and reasonably foreseeable domestic effect and that effect "give[s] rise to a [Sherman Act] claim."[9] The plaintiffs were foreign companies that purchased vitamins overseas from the infamous vitamins cartel, which raised vitamin prices worldwide. They had suffered

[4] *See* H.R. Rep. No. 97-686, pp 1-3, 9-10 (1982).

[5] *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

[6] *Id.* at 818-19 (citing Restatement (Third) § 403(1)).

[7] *F. Hoffman-LaRoche Ltd., v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (citing *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-444 (CA2 1945) (L. Hand, J.); P. AREEDA & D. TURNER, ANTITRUST LAW, 236 (1978)) (emphasis in original).

[8] *Id.* at 165.

[9] *Id.* at 161-62.

foreign harm caused by foreign conduct, but they claimed a right to sue in U.S. court under the FTAIA because that conduct also had a harmful domestic effect on U.S. vitamin prices, and that effect gave rise at least to "a" Sherman Act claim. They reasoned that, if nothing else, the domestic effect gave rise to a claim by American purchasers who bought vitamins in the United States. Justice Breyer, writing for the majority, framed the essential question in balancing comity principles and domestic redress goals to determine whether the FTAIA permits suits like this one. He asked:

> Why is it reasonable to apply [the antitrust] laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?[10]

III. THE DIRECTION OF CAUSATION

The majority could find "no good answer to the question,"[11] and it held that the plaintiffs could not demonstrate that a domestic anticompetitive effect gave rise to "a claim" as required by the second prong of the FTAIA's domestic effects exception. The Court reached this outcome by declaring that the second prong of the exception requires that the domestic effect give rise to not just "a" claim, but rather to *the plaintiff's claim at issue*.

The Court did take pains to emphasize, however, that its holding was limited to circumstances where a plaintiff claimed injury arising out of conduct that caused independent foreign harm. It indicated that where "the foreign injury was inextricably bound up" with the domestic effect, or "the domestic harm depended in part upon the foreign injury," the result might be different.[12]

On remand, the D.C. Circuit was left to apply the Court's holding to one of the plaintiffs' surviving arguments, which was that its injury from foreign harm was not in fact "independent" of the domestic effect, because the defendants had to inflate prices in the United States (and globally) to successfully inflate prices in any one jurisdiction. Otherwise, the plaintiffs argued, arbitrage would have successfully defeated the price increase.

In a short opinion, the D.C. Circuit rejected the plaintiffs' argument by putting still another new gloss on the statutory language. Reiterating the comity concerns associated with allowing a foreign plaintiff to recover in U.S. court for foreign harm that was independent of a harmful domestic effect, the court held that the "gives rise to" prong requires a relationship of proximate cause between the domestic effect and the plaintiffs' claimed injury. Although the plaintiffs could establish but-for cause, the court held that they could not establish proximate cause. Importantly, the D.C. Circuit explicitly based its decision to institute a proximate cause standard for the "gives rise to" prong on the same prescriptive comity principles identified by the Supreme Court in *Empagran* and in Justice Scalia's *Hartford Fire* dissent.[13]

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[10] *Id*. at 165.

[11] *Id*.

[12] *Id*. at 171-72 (discussing *Industria Siciliana Asfalit, Biutmi, S.p.A. v. Exxon Research & Engineering Co.*, No. 75 Civ. 5828 CSH, 1977 U.S. Dist. LEXIS 17851 (S.D.N.Y. Jan. 18, 1977) and *Dominicus American Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680 (S.D.N.Y 1979)).

[13] *Empagran S.A. v. F. Hoffmann-Laroche*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) (citing *Hartford Fire*, 509 U.S. at 817; *Empagran*, 124 S. Ct. at 2366).

The D.C. Circuit's use of a proximate cause standard took for granted the direction of causation in *Empagran*. Implicitly, the proximate cause inquiry into the relationship between the domestic effect and the plaintiff's claimed injury in *Empagran* presupposed a specific temporal relationship between the domestic effect and the claimed injury. Namely, the domestic effect had to precede the claimed injury in time. Logically, a claimed injury can never precede a domestic effect if the effect is to have proximately caused the claimed injury, because an effect never precedes its cause.

IV. SHOULD THE DIRECTION OF CAUSATION FORECLOSE SHERMAN ACT CLAIMS?

The D.C. Circuit's holding on remand in *Empagran* filled a gap that the Supreme Court had left open where foreign plaintiffs might seek to recover in U.S. court for foreign harm that is independent of domestic harm. However, the court did not disturb the Supreme Court's holding with respect to domestic harm that is *dependent* on foreign harm. The Supreme Court unmistakably confirmed that this kind of foreign harm can satisfy the "gives rise to" prong of the domestic effects exception, notwithstanding that the temporal relationship between claimed injury and domestic effect is reversed. First, the Court had allowed that the prong could be satisfied where the "foreign injury was inextricably bound up" with the domestic effect. This statement is at most agnostic about the temporal relationship between domestic effect and claimed injury.

More importantly, however, the Court had allowed that the prong could be satisfied where "the domestic harm *depended* in part upon the foreign injury."[14] Logically, a claimed injury must *precede* a domestic effect if the domestic effect is to *depend* on the claimed injury, because, with all due respect to fatalists, an effect cannot depend on something that has not yet occurred.

Recently, the D.C Circuit's holding on remand in *Empagran* seemed to confuse the Second Circuit in *Lotes v. Hon-Hai Precision Industry Co.*,[15] and that confusion could play an important role in the *Motorola* case. Both *Lotes* and *Motorola* involve instances in which anticompetitive conduct targets foreign component goods that are inserted overseas into end-products bound for the United States. The conduct in both cases is part of a proliferating international trend—of proliferating concern to the DOJ's Antitrust Division—involving international cartels targeting the so-called "component-goods" sector.

Component-goods manufacturers make products that serve as component parts of other goods. They are a staple of the modern global supply chain, particularly for complex electronics products. Companies often will independently source components of complex products globally, and then assemble the finished end-product overseas before importing it into the United States. When foreign component-goods manufacturers artificially inflate the price of component goods in these circumstances, whether by price-fixing or otherwise, U.S. consumers inevitably are injured, often severely, with harm frequently in the billions of dollars.[16] Importantly for purposes

[14] *Empagran*, 542 U.S. at 72 (emphasis added).

[15] 753 F.3d 395 (2d Cir. 2014).

[16] *See* Brief of the American Antitrust Institute in Support of Appellant at 2-5, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003, Doc. __ (7th Cir. Apr. 24, 2014) (discussing inadequate deterrence of intermediate

of interpreting the FTAIA in these circumstances, a victim's claimed injury in the price of the component good will inevitably precede the domestic effect caused by the inflated price of the end-product.

In *Lotes*, the Second Circuit adopted the D.C. Circuit's proximate cause standard for the second prong of the domestic effects exception, but without realizing that it has no meaningful application in the component-goods context, where domestic harm is *dependent* on foreign harm. The plaintiff in *Lotes* was a manufacturer of computer components called USB 3.0 connectors. The plaintiff alleged that a rival component manufacturer's foreign anticompetitive conduct (in China) raised the price of the components, which had the domestic effect of raising the price of the end-product computers for U.S. consumers.

The Second Circuit found the requisite direct, substantial, and reasonably foreseeable domestic effect, and it read the statutory language "gives to a claim" to mean "gives rise to the plaintiff's claim at issue." However, unlike the D.C. Circuit on remand in *Empagran*, which, along with the Eighth[17] and Ninth[18] Circuits, had used a proximate cause standard to determine whether the plaintiff's claim arose from independent foreign harm, the *Lotes* court determined that the plaintiff's claim arose from independent foreign harm *because* it used a proximate cause standard.

Lotes was not like *Empagran*, where the domestic effect and the claimed foreign injury had an insufficient causal nexus, which led the Supreme Court to characterize the plaintiffs' claim for *succeeding*, rather than *preceding*, foreign harm as a claim for "independent foreign harm." In *Lotes*, the domestic effect (inflated computer prices) was *dependent* on the claimed foreign injury (inflated USB 3.0 connector prices). Because the *Lotes* court applied a proximate cause standard where the domestic injury was *dependent* on the claimed foreign harm, it very easily concluded that the plaintiff's claim could not go forward. The court's conclusion, however, was a tautology. If the "test" is whether foreign harm that *precedes* a domestic effect proximately causes that effect, there can only be one answer. An effect never precedes its cause. In reality, the *Lotes* court did not base its decision on anything having to do with proximity; it based its decision on the direction of causation between the domestic effect and the foreign injury.

In *Motorola*, the plaintiff is not a rival manufacturer, as in *Lotes*, but rather a purchaser. The defendants are members of a global cartel that manufactures LCD panels that are used in Motorola's smart phones. Motorola alleges that the cartel's price-fixing raised the price of LCD panels, which had the domestic effect of raising the price of smart phones for U.S. consumers. The defendants in *Motorol*a make the same argument made in *Lotes*, using the same reasoning. In briefs filed during earlier proceedings, the defendants cite to *Lotes* and argue that "any suggestion that higher cellphone prices give rise to claims of higher panel prices has things backwards. Higher panel prices allegedly gave rise to higher cellphone prices, not vice versa."[19]

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goods cartels), *available at* http://www.antitrustinstitute.org/content/aai-asks-seventh-circuit-reject-immunity-international-cartels-harm-us-victims-motorola-v-au.

[17] *See In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007).

[18] *See In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981 (9th Cir. 2008).

[19] *See* Resp. to Pet'n for Rehearing at 5-7, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003, Doc. 37 (7th Cir. 2014).

Although the defendants have not (yet) expressly asked the court to follow *Lotes* in applying a proximate cause standard where the domestic injury was *dependent* on the claimed foreign harm, they essentially argue that the claimed foreign injury should be disqualified because it precedes the domestic effect temporally.

Considering what is at stake in the component-goods sector, where global cartels seem to be growing in tandem alongside global supply chains for U.S. bound end-products, causing tremendous harm to U.S. consumers, there is no discernible policy justification or sensible reason to eliminate Sherman Act claims based on the direction of causation.[20]

The D.C. Circuit emphasized that it relied entirely on comity considerations in reading the second prong of the exception to incorporate a proximate cause test on the *Empagran* facts. It noted that a more flexible standard might "interfer[e] with other nations' prerogative to safeguard their own citizens from anti-competitive activity within their own borders."[21] Eliminating Sherman Act claims arguably makes some sense where conduct causes independent foreign harm, and that harm alone gives rise to the plaintiff's claim. In that circumstance, comparatively little is lost with regard to domestic redress goals. But to apply a proximate cause "test" where the domestic effect is *dependent* on claimed foreign harm makes no sense, unless *every* sensible balancing of comity principles and domestic redress goals would to suggest that Sherman Act claims should *never* be permitted, no matter how severe the domestic injury.

In reality, foreclosing Sherman Act recoveries under the domestic effects exception whenever a foreign injury precedes the domestic effect can lead to perverse results, particularly in the component-goods context. Consider, for example, that in the United States, *Illinois Brick* prevents indirect purchasers from recovering damages. Yet many foreign jurisdictions, while moving slowly toward permitting private remedies for antitrust violations, do not have *Illinois Brick's* corollary, *Hanover Shoe,* which prevents defendants from asserting "pass on" as a defense.[22]

Consequently, in the component-goods context, *Illinois Brick* prevents an injured U.S. purchaser from recovering for the inflated price of the end-product because the U.S. victim is an indirect purchaser of the component good. And yet a foreign direct purchaser of the component good, if it passed on the overcharge to U.S. consumers, would have no claim abroad because the defendant would have a pass-on defense. Perversely, then, in those jurisdictions, the more that foreign harm is absorbed by American indirect purchasers through pass-on, the less foreign cartelists will be deterred and punished by the Sherman Act, and the less victims will be compensated. And if the full 100 percent of the overcharge is passed on to American indirect purchasers, there would be no deterrence, punishment, or compensation from private

[20] One might argue that the statutory language "gives rise to" requires that causation run in a single direction from domestic effect to injury, but a domestic effect caused by a proceeding injury can "give rise to" a claim in the sense that the preceding injury *creates* the necessary domestic effect. Moreover, the Supreme Court has already re-interpreted the statutory language to change the meaning of "a claim" in order to successfully balance comity and domestic redress goals. It would be anomalous not to do the same here if it were necessary to achieve the same balance.

[21] *Empagran*, 417 F.3d, at 1271.

[22] *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

enforcement whatsoever, whether at home or abroad.[23] At the same time, because only Americans would be injured after 100 percent pass on, and no citizens of the foreign jurisdiction would be injured, no principle of prescriptive comity would be served either.

The Justice Department in its most recent *Motorola* filing has suggested that the causal direction does matter, as it had urged in *Lotes*, but that an exception to *Illinois Brick* should be considered for U.S. indirect purchasers when the direct purchaser abroad cannot satisfy the second prong of the FTAIA.[24] Assuming the Seventh Circuit buys such an exception, this solution is less than ideal from a deterrence point of view unless indirect purchasers are allowed to recover the entire amount of the overcharge, as the AAI pointed out in its brief.[25]

V. WHAT WILL FATE DECIDE?

In *Motorola*, the Seventh Circuit will have to decide for itself whether the temporal relationship between injury and domestic effect, and the direction of the causal chain, have any real usefulness in answering the fundamental *Empagran* question of whether extraterritorial application of the Sherman Act would unreasonably "interfere with a foreign nation's ability independently to regulate its own commercial affairs," or if it, instead, would be consistent with Congress' "legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused."

One might respond by asking the same question deservedly put to Richard Taylor: Why should we care what sound logic can prove about the direction of causation? If the *Motorola* case makes it all the way to the Supreme Court, perhaps Justice Breyer will now ask:

> Why is it *unreasonable* to apply [the antitrust] laws to foreign conduct insofar as that conduct causes domestic harm that is *dependent* on the foreign harm that gives rise to the plaintiff's claim?

Where, as in *Motorola*, a U.S. victim wishes to sue in a U.S. court for injuries caused by foreign harm that preceded an otherwise qualifying domestic effect, the Court may have no good answer to the question.

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[23] Of course, deterrence from public enforcement would remain. However, current levels of combined deterrence from both public and private enforcement are already woefully inadequate, to the point that on average it is currently net profitable for international cartels to target Americans even if they are caught. *See* Brief of the American Antitrust Institute, *supra* note 16, at 2-5. Eliminating private enforcement would create a huge incentive for foreign cartels to further injure U.S. consumers by drastically increasing the profitability and reducing the risk of doing so.

[24] Brief for the United States and Federal Trade Commission in Support of Neither Party at 6, 20-24, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003, Doc. __ (7th Cir. Sept. 5, 2014), *available at* http://www.justice.gov/ atr/cases/f308400/308451.pdf.

[25] *See* Brief of the American Antitrust Institute in Support of Appellant at 3 n.2 , Motorola Mobility LLC v. AU Optronics Corp. (Sept. 5, 2014), *available at* http://www.antitrustinstitute.org/sites/default/files/ Motorola%20-%20As%20filed%20AAI%20Merits%20brief.pdf. The Seventh Circuit, without explanation, denied the AAI's unopposed motion to file this amicus brief, as well as an amicus brief submitted by several prominent economists. Both groups were permitted to submit briefs earlier in the proceedings. *See supra* note 16.