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Life in the Global Value Lane—The Collision Course with *Empagran* and How to Avert It

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Extraterritoriality and Input Cartels

Life in the Global Value Lane: The Collision Course with *Empagran* and How to Avert It[1]

I. INTRODUCTION

There is a looming danger that judge-made exceptions from U.S. antitrust law for foreign conduct are swallowing the proscriptions of the Sherman Act against modern-style international cartels. The danger has raised its head in the context of input cartels and, in particular, in the case of *Motorola Mobility v. AU Optronics* in the Seventh Circuit[2] and its sister cases in other circuits. The danger stems from a wrong move of the Supreme Court in *Empagran*,[3] which has laid a path that misframes analysis of the Sherman Act's reach.

To explain the point, I revert to pre-*Empagran* analysis of both the *Motorola* facts and the *Empagran* facts. I then show where *Empagran* went wrong and suggest that the Court never would have taken the tack it took if the *Motorola* fact-set had come first. I then suggest how to correct the error.

II. THE FACTS: *MOTOROLA MOBILITY* AND *EMPAGRAN*

Let me first juxtapose the facts of *Empagran* as the Supreme Court assumed them to be, and the facts of *Motorola Mobility*. Allow me license to omit geography in the first instance, and to back into it.

Motorola makes and sells cell phones. It purchases parts and assembles them into cell phones, and it sells the cell phones in the United States and elsewhere. It turns out that the makers of an essential component—liquid crystal display ("LCD") panels—had a price-fixing conspiracy. Can Motorola successfully sue the price-fixers? Of course. This is a quintessential cartel damages case.

A quarter century ago, Motorola would have purchased the inputs from U.S. manufacturers. But times have changed. The world has globalized. U.S. manufactures have declined exponentially as a percentage of GDP. Motorola, like other U.S. businesses, faces intense pressure from global competition. To be, and to remain, competitive, it must scour the world for best execution—which commonly means outsourcing parts and assembly to Asian locations, thus organizing a global value chain, and thus incidentally helping to interconnect the world's economies. In the 21st century, global value chains are a usual way of doing business.

Admitted to the chain, the parts' makers know that they are making the parts for assembly into products that will be shipped to the brand manufacturer; the Motorola parts

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[1] Walter J. Derenberg Professor of Trade Regulation at New York University School of Law.

[2] Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842 (7th Cir. Mar. 27, 2014), rehearing granted, opinion vacated (7th Cir. July 2014).

[3] F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

makers know that they are making parts for the Motorola cell phone. If the parts' makers at the top of the global value chain conspire with their rivals to fix prices, their price-fixing agreement is like a bullet straight through to the phone buyer's purse.[4]

So, in the real *Motorola Mobility* case, the LDC panels were made in Korea, Japan, China, and Taiwan. Despite the clear illegality of the conduct in their country, in the destination country, and in almost every other country of the world, these manufacturers conspired to raise prices. They sold the panels, at prices negotiated by Motorola, to Motorola subsidiaries in China and Singapore. The Motorola subsidiaries shipped 42 percent of the assembled cell phones to Motorola-U.S. for sales in the United States and abroad. They sold 57 percent of the panels directly to buyers abroad. Motorola-U.S. bought 1 percent of the panels directly from the manufacturers (and everyone agrees, as they must, that the Sherman Act applies to the 1 percent). Does Motorola lose 99 percent of its cause of action under the Sherman Act because it buys and assembles parts through its global value chain?

Now we turn to the *Empagran* facts as assumed (it turned out, inaccurately) by the U.S. Supreme Court: There were world conspiracies, largely of European and Asian firms, to fix the price of vitamins. The price-fixing harmed the United States, and caused independent foreign injury. Distributors from Ukraine, Ecuador, Paraguay, and Australia bought price-fixed vitamins in non-US markets. Could these buyers sue the price-fixers under the U.S. Sherman Act? No. Post-*Empagran*, pre-*Empagran*, and pre-FTAIA,[5] their claim had no causal relationship to U.S. commerce. The United States had no interest in protecting these foreign plaintiffs against the foreign defendants (unless it would, altruistically, take the mantle of a world court for antitrust).

The Supreme Court gave plaintiffs leave to replead, to show that the foreign injury was not independent of the U.S. effects. Plaintiffs did so replead. But even so, the plaintiffs' harm was not proximately related to the U.S. cartel-related harm, and the lower courts dismissed the case on the remand—as they should have done and courts probably would have done pre-*Empagran* and pre-FTAIA (although not for lack of subject matter jurisdiction over the price-fixing).

III. BACK TO BASICS

Why is it that the *Empagran* plaintiffs should be out of court and Motorola (especially for the 42 percent) should not be? Here, I want to present the framework for analysis pre-*Empagran*, even including post-FTAIA, regarding the reach of the Sherman Act (which until recently was called subject matter jurisdiction). The framework is based on the following goal regarding foreign-related offenses: We want to protect our citizens/residents/businesses from antitrust violations, from wherever launched, without interfering unreasonably with choices our trading partners make to regulate their own economies.

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[4] Compare the famous *Lotus* case, which formed the foundation for acceptance of the effects doctrine under international law: the negligent careening of a Turkish ship into a French ship on the high seas was equivalent to a bullet shot from one national territory into another. S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (Permanent Court of International Justice).

[5] This is the statute that, defendants claim, made a revolutionary cut-back in the reach of the Sherman Act. It is the Foreign Trade Antitrust Improvements Act of 1982, Title IV of The Export Trading Company Act, 15 U.S.C.A. § 6a and § 45(a) (3). Title IV clarified that conduct that harms solely foreign markets is not caught by the Sherman Act or Federal Trade Commission Act. *See* text following n. 16 *infra*.

Why do we (Americans) want to avoid unreasonable interference with foreign sovereign choices? Both as part of a reciprocal compact—to protect our sovereignty when the tables are turned;—and to avoid action that will interfere with our foreign relations.

The framework is composed of two sets of questions:

1. Does the United States have a stake in reaching the impugned conduct?[6] (often stated in terms of effects on U.S. commerce). It clearly does if the conduct is price-fixing into the U.S. market. It clearly does not if the conduct is price-fixing abroad by foreigners who hurt foreigners and foreign market competition (the *Empagran* facts as presumed by the Supreme Court).

   The early cases after enactment of the FTAIA drove home the point—which was the reason for the legislation—that the Sherman Act does not follow American firms into foreign markets. The United States has no business regulating American business in foreign markets whose conduct does not impact U.S. markets. Such regulation is a handicap on U.S. firms and on U.S. competitiveness (the main point of the FTAIA). Thus, Pfizer's distribution system in Europe for the European market was not proscribed by the Sherman Act even if it would have been illegal if adopted in the United States.[7] The FTAIA overturned the handful of cases that violated this principle.[8]

2. If the United States has a legitimate stake in enforcement, we reach the comity questions: Are the links with, and interests of, involved foreign nations stronger than the links with and interests of the United States? If so, the Sherman Act does not reach the conduct.[9] The answer is virtually always no if the United States has a significant stake and thus an antitrust interest to exonerate.[10]

Even if the United States has a legitimate stake in regulating the conduct, and even if there is no foreign sovereign claim of such weight that it would trump the Sherman Act, various defenses would be available. Thus, in *Empagran*, if the case was not dismissed under question 1 for lack of jurisdiction over the subject matter of the claim, the case would probably be dismissed because plaintiffs' injury was not proximately caused by conduct related to the U.S. cause of action.[11] The foreign plaintiffs would have had no standing to sue the foreign defendants under the Sherman Act.[12]

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[6] *See* Eleanor Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is Reasonableness the Answer?*, 19 NYU J. INT'L L. & POLITICS 565 (1987).

[7] Eurim-Pharm GmbH v. Pfizer, Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984).

[8] *See* John F. Bruce & John C. Peirce, *Understanding the Export Trading Company Act and Using (Or Avoiding) Its Antitrust Exemptions*, 38 BUS. LAWYER 975, 987 (ABA May 1983).

[9] *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976), applying a test that was in part jurisdictional and in part speaking to the discretion of the court.

[10] Fox, *supra* note 6 at 576-77.

[11] Compare Empagran S.A. v. F. Hoffmann-LaRoche Ltd., 417 F.3d 1267 (D.C. Cir. 2005), cert. denied, 546 U.S. 1092 (2006), asking whether the effect of the vitamin cartel in the United States proximately caused the foreign plaintiffs' injuries.

[12] This result was clarified by the FTAIA. See Bruce & Peirce, *supra* note 8 at 983 et seq.

Let us return to the first part of question 2. Was there a legitimate, weighty foreign sovereign counterweight in *Empagran*? First, there was nothing to countervail; the United States had no interest in hosting these suits by foreigners against foreigners for a foreign conspiracy that hurt foreign markets wholly independent from U.S. effects, so it would take nothing on the scale to require dismissal and next to nothing to tilt towards a pro-foreign balance of interests. But tellingly, in *Empagran*, none of the involved foreign sovereigns—Ukraine, Ecuador, Australia, and Panama—even came forward to express their views of interference or otherwise. Ecuador, which then had no antitrust law, would surely have been delighted for their nationals to have a vehicle to recover their losses. The nations on whose behalf amicus briefs were filed—including the United Kingdom, Germany, and Japan—expressed the concern that a U.S. enforcer-for-the-world would undermine establishment of their own private enforcement systems, and would also undermine their leniency programs by deterring whistleblowers, who would be immediately confronted with the damages they caused and for which they would all the more certainly have to pay—creating great liability for their firms, making them non-competitive.

Since the United States had no stake in exercising jurisdiction, it was an easy shot for the Supreme Court to nod to foreign concerns and disavow U.S. ambition to become antitrust enforcer for the world.

IV. WHOSE EXTRATERRITORIALITY IS IT?

But where the United States *has* a significant stake in protecting its firms from price-fixing on inputs destined for the U.S. market, would these (somewhat orchestrated) foreign sovereign arguments amount to anything more than—We live in an increasingly interdependent world and enforcement by one nation has ripples across the seas? In cases of real U.S. stakes, as in *Motorola*, the claim of "extraterritoriality" has lost its ring. Whose extraterritoriality is it? That of the United States, which seeks to protect its citizens/residents from the culprits, wherever they might be? Or that of the culprits' home nation, which, by insulating its firms if it can from the consequences of their out-bound-directed conduct (which is illegal at home and abroad),[13] puts costs on the harmed nation, its businesses, and in consequence the citizens of the world? The insight of the Coase theorem is relevant: cause is reciprocal.[14] Does U.S. law cause AU Optronics and Taiwan harm, or does AU Optronics and Taiwan cause the United States (and the world) harm?

The fact is, not only would enforcement of the Sherman Act against input cartels in global chains intuitively not interfere with U.S. foreign relations, but the United States has filed an amicus brief in *Motorola* to say so[15] and to sound the alarm that the cut-back urged by defendants and endorsed by the district court and the first (now vacated) opinion of the Court of

[13] There is no claim that the United States, by applying its anticartel law, interferes with Taiwan's prerogative to regulate its own economy. This is a far cry from the days of *Alcoa* when trading partners could claim that the United States was an outlier in prohibiting cartels and they had made a different regulatory choice. It bears noting that even where cartelists' home nations make a different regulatory choice, the offending firms are not automatically excused for their outbound cartel that violates the law of the importing country. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

[14] *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

[15] *See* Supplemental Brief for the United States as Amicus Curiae, Motorola Mobility LLC v. AU Optronics Corp., Court of Appeals for the Seventh Circuit, June 27, 2014.

Appeals for the Seventh Circuit threatens to deeply undermine the U.S. federal imperative to reach offshore cartels that hurt the United States.[16]

V. THE FTAIA AND WHAT IT MEANT TO DO

The FTAIA was not a foreign cartelists' benefit act. In fact, it was meant to help American business. As Chairman Peter Rodino, co-sponsor of the legislation, said as he opened hearings before the House of Representatives Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary on March 26, 1981:

> H.R. 2326 [the FTAIA] would amend the Sherman Act and the Clayton Act to remove . . . any unnecessary barriers to export trading by U.S. firms. At the same time, it would continue to provide antitrust protection for American consumers and competitors.[17]

Shortly after the legislation's passage, an American Bar Association journal published a thorough analysis of the legislation, its history, and intended effects. The article echoes Chairman Rodino's statement:

> The main purpose of the title IV amendments [i.e., the FTAIA] is to codify the jurisdictional reach of the Sherman and FTC Acts. As the House Judiciary Committee put it, the objective of the amendments is "freeing American-owned firms that operate entirely abroad or in United States export trade from the possibility of dual and conflicting antitrust regulation." Where conduct by foreigners in foreign countries is concerned, these amendments may clarify the law, but do not appreciably change it.[18]

The main advocates for the legislation were small and middle-sized exporters and their champion, U.S. Secretary of Commerce Malcolm Baldrige, who was the first witness at the hearings and who was concerned about loss of competitiveness of American business. The exporters feared application of the Sherman Act to their export associations. They worried that U.S. law would follow them in foreign commerce, and they wanted clarity that it would not. Two bills were introduced into Congress; one in the House of Representative and one in the Senate, and there ensued a sort of race.

The Senate bill got there first. This bill was regulatory. It provided for a process for a certificate of review for exporters who filed with the Commerce Department and the FTC and whose proposed conduct or association was not anticompetitive or unfair as to the United States.

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[16] The fears of the U.S. Solicitor General have been confirmed. AU Optronics and two of its executives have filed petitions with a view towards setting aside their criminal convictions for price fixing the LCD panels. They seek a rehearing before the full Court of Appeals for the Ninth Circuit, questioning among other things the applicability of the Sherman Act to their (foreign) conduct in view of the FTAIA.

[17] Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary House of Representatives, 97th Cong. 1st Session on H.R. 2326, Foreign Trade Antitrust Improvements Act, p. 1. (March 26, 1981). The bill was also meant to clarify the law by making clear that the Sherman Act does not reach harm that infects solely foreign markets. As I testified at the opening hearing on the Rodino bill:

> The bill, as I understand it, is intended to make two things clear: First, that the U.S. antitrust laws do not protect foreign consumers against breakdown of competitive conditions in foreign countries; and, two, the U.S. antitrust laws do not protect foreign producers against loss of competitive opportunities in foreign countries. *Id.*, p. 27.

[18] Bruce & Peirce, *supra* note 8 at 980.

By rights, this legislation should have replaced the Webb Pomerene Act, which gives exporters who file with the FTC immunity from U.S. antitrust for harms abroad, but the existing Webb Pomerene associations objected to a sunset because they drew comfort from the strong Webb-Pomerene name.

The other bill became what we now know as the FTAIA. It was designed to clarify the reach and limits of the Sherman Act, particularly to remove the chill on U.S. exporters, but without new bureaucracy. It made clear that the Sherman Act does not cover export associations and other restraints as long as they harm only foreign markets. It was intended to protect the interests of Americans; clearly not to make them impotent to defend their interests when exploited by foreign cartels.

After the export-certificating bill was passed, there was a question whether the House Bill was any longer necessary; but its sponsor, Peter Rodino, was committed to the non-regulatory solution and ushered his bill through the House.[19] Both bills passed the Congress, and both are titles in the Export Trading Company Act of 1982. The certificating bill is Title III. The non-regulatory solution (the FTAIA) is Title IV.

VI. WHERE *EMPAGRAN* WENT WRONG (ALTHOUGH IT WAS HARMLESS ERROR IN *EMPAGRAN*)

The Supreme Court disposed of the *Empagran* case by an interpretation of paragraph (2) of the FTAIA. Paragraph (2) must be read in the context of both paragraphs (1) and (2). The statute provides that, for commerce other than import commerce, (1) the Sherman Act shall not apply to conduct involving commerce with foreign nations unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on import trade or commerce or the export trade of a person engaged in such trade in the United States, and "(2) such effect gives rise to a claim under the provisions of [the Sherman Act or FTC Act §5 (a)], other than this section."[20]

The Supreme Court in *Empagran* viewed the FTAIA as sweeping all conduct involving foreign commerce (other than imports) out of the reach of the Sherman Act, and then drawing back only the confined class that fits within paragraphs (1) and (2). Thus, Sherman Act coverage of conduct involving foreign commerce would be an exception to the rule. Second, the Court focused on paragraph (2).

Under paragraph (2), the "direct, substantial and reasonably foreseeable effect" of the conduct on U.S. domestic or export commerce must "give[ ] rise to a claim" under Section 1 or 2 of the Sherman Act or Section 5 (a) (1) of the Federal Trade Commission Act. For a cartel having the effect of raising prices in the United States, the effect must (and would) give rise to a violation of Section 1 of the Sherman Act. But suppose an export joint venture of small firms excludes another firm, and the jilted firm cries "boycott!" Or suppose an export joint venture creates

[19] *See* Bruce & Peirce, supra note 8 at 977-78; Fox, *supra* note 6 at 577-79.

[20] Section 5 (a) (1) of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce . . . ." The FTAIA adds subsection 3 to Section 5 (a) of the FTC Act. Subsection (3) (B) requires: "such effect gives rise to a claim under the provisions of this subsection, other than this paragraph."

efficiencies and destroys an inefficient competitor.[21] Is there "an effect" on U.S. commerce? Yes; but not an anticompetitive effect. As explained by Bruce and Peirce:

> The effect conferring jurisdiction . . . must "giv[e] rise to a claim" under the provisions of the Sherman or FTC Acts. The House Judiciary Committee was most concerned that *beneficial* effects on U.S. interstate commerce—for example, an increase in profitability or employment—should not create antitrust jurisdiction.[22]

In *Empagran*, the Supreme Court misconstrued the plain meaning of paragraph (2). It changed the word "a" claim to "the" claim; that is "the [plaintiff's] claim." It then said that the off-shore cartel's U.S. effect (price rise of vitamins in the United States) did not give rise to the Ecuadorians' and Ukrainians' having to pay an overcharge on the vitamins they bought abroad, and therefore their case failed to meet the requirements of paragraph (2) and was not covered by the Sherman Act.

This was a big error of construction. The *effect* of a violation in the United States never gives rise to a reasonably proximate antitrust injury to a foreigner. When, for example, the Wildenstein Art Gallery, as a result of the Christie-Sotheby trans-Atlantic price fix, paid an overcharge on a Rembrandt that it bought at Sotheby's in London, it was injured by the conspiracy, not by the overcharge of paintings in New York.[23]

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[21] Since the FTAIA retained subject matter jurisdiction in the case of harm to the export business of an exporter from the United States, it was especially important to clarify that the FTAIA itself did not create a cause of action; the exporter—and any other Sherman Act plaintiff—must be able to state a cause of action based on Sherman Act, §§ 1 or 2, and the FTC must be able to make out a cause of action under Subsection 5 (a) (1) of the FTC Act.

[22] *Id*. at 986 (footnotes omitted). *See* also Brief of Amici Curiae Legal Scholars (Professors Harry First & Eleanor Fox) in Support of Respondents, F. Hoffmann-LaRoche Ltd. v. Empagran, S.A., No. 03-724, pp. 5-10.

[23] These are only two of the seven interpretative reasons or factors that demonstrate the Court's error in reading "a claim" as "the plaintiffs' claim." The seven are:

1. The language of the statute is clear in the relevant respect.
2. The Court's construction creates a null category.
3. The statute clearly concerns jurisdiction over the subject matter of the action; it does not relate to who sues to challenge the conduct. The words "subject matter jurisdiction" are repeated throughout the legislative history.
4. The title (FTAIA) is a title of the Export Trading Company Act. The statute is about export trading and competitiveness.
5. Congress understood that the FTAIA of 1982 did nothing to help foreign firms escape from Sherman Act liability if their conduct had a significant effect on U.S. commerce. Three years later, Senator Dennis DeConcini introduced the Foreign Trade Antitrust Improvements Act of 1985—a bill that never passed. *This* bill was designed to respond to complaints of foreign firms about private actions against them. It would have facilitated early dismissal of such private actions on grounds of lack of subject matter jurisdiction. *See* Hearings Before the Committee on the Judiciary United States Senate, 99th Cong. 1st Session on S. 397, to Amend the Sherman Act and the Clayton Act to Modify the Application of Such Acts to International Commerce (June 21 and October 15, 1985).
6. To the best of my knowledge, all of the interpretations following adoption of the FTAIA, and for two decades thereafter until *Empagran,* gave the language its plain meaning. The consensus understanding immediately after a law is passed would seem to be more credible than a (revolutionary) construction 20 years later.

The construction was harmless error on the *Empagran* facts because the plight of the Ecuadorians and Ukrainians had no reasonable connection with the U.S. violation. But it was a bomb waiting to explode in a case such as Motorola's.

VII. HOW TO CORRECT THE ERROR

There were two errors of the Court in *Empagran*; one general and one specific. The first was identifying a foundational perspective of inhospitality, by reason of the FTAIA, to the Sherman Act's reach of foreign-related conduct. The second is the re-writing of paragraph (2) to replace "a claim" with "the claim"—i.e., the plaintiff's claim.

I shall first say a word about the specific error: the wrong construction of "gives rise to a claim." How can the harm be ameliorated? Courts should limit the *Empagran* interpretation of paragraph (2) to facts such as in *Empagran* where on the face of the matter the connection with U.S. commerce is attenuated. In all other cases, courts should recognize that the *Empagran* construction nullifies the foreign commerce reach of the Sherman Act except in the diminishing set of cases of direct imports of price-fixed goods[24]—the category expressly outside of the operation of the FTAIA.

Had the *Motorola* facts come to the Supreme Court before the *Empagran* facts, the Court may well have avoided its erroneous construction of paragraph (2) because it would then have been forced to confront the consequences of the construction as applied to a legitimate Sherman Act case by an American firm designedly harmed by an off-shore cartel. Courts can satisfy the spirit of the Supreme Court's construction of paragraph (2) by requiring that the plaintiff's cause of action be proximately related to the effect of the impugned conduct on U.S. commerce.

The general error is the Supreme Court's perspective on the FTAIA. The Court wrongly detected, or more accurately injected, a Congressional stance of hostility to Sherman Act coverage of foreign acts. There clearly was none, especially when it comes to exposing U.S. firms to antitrust harms. The general stance of hostility threatens to skew the interpretation of the requirement of "direct, substantial, and reasonably foreseeable effects" on U.S. commerce.

I propose that courts should not extend the stance of inhospitality to claims by Americans injured by acts destined to affect the U.S. marketplace. "Direct, substantial and reasonably foreseeable" merits a flexible interpretation sympathetic to the protections of antitrust. It is properly treated, as it was before *Empagran*, as an iterative phrase.[25] The more foreseeable is a harm, the less direct must be the line between cause and effect, as in the application of proximate cause in torts.[26] Thus, the contextual interpretation of "direct" in the Seventh Circuit's decision

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7. The Court's construction, by focusing on the particular private plaintiffs' Sherman Act claims, ignores the parallel language amending the FTC Act. There is no private right of action under the FTC Act. Therefore the same words in the parallel FTC amendment would do no work.

[24] Diminishing because of the growth of global value chains and because price-fixers are generally too smart to sell their rogue goods directly into the United States. *See* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845 (7th Cir. 2012).

[25] *See* Mannington Mills, *supra* note 9; Timberlane, *supra* note 9; U.S. Department of Justice and FTC Antitrust Enforcement Guidelines for International Operations (April 1995) at 3.121.

[26] *See*, e.g., Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955).

Minn-Chem[27] and the Second Circuit's decision in *Lotes*[28]is much more faithful to the law than is the de-contextualized interpretation of "direct" in the district court and vacated court of appeals decisions in *Motorola*.

VIII. CONCLUSION

U.S. law is in danger of creating a void in the reach of U.S. antitrust law to reprehend anticompetitive acts by foreigners abroad destined to raise the price of goods and services to U.S. consumers. *Motorola*, the input-cartel global-value-chain case, which will be reheard by the panel of the Court of Appeals for the Seventh Circuit to which it was originally assigned, is a test case. It is no wonder that, in its first and now vacated decision, the panel was misled by the *Empagran* Court's failure to appreciate the pedigree of the FTAIA. The Seventh Circuit court now has the opportunity to move the law in a direction that carries out the Congressional mandate and meets the needs and economic circumstances of the 21st century.

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[27] *Supra* note 24.

[28] Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395 (2d Cir. 2014).