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# A Proposal to the Seventh and Ninth Circuit Split: Expand the Reach of the U.S. Antitrust Laws to Extraterritorial Conduct that Impacts U.S. Commerce

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# A PROPOSAL TO THE SEVENTH AND NINTH CIRCUIT SPLIT: EXPAND THE REACH OF THE U.S. ANTITRUST LAWS TO EXTRATERRITORIAL CONDUCT THAT IMPACTS U.S. COMMERCE

## I. INTRODUCTION

Antitrust laws concern conduct that either occurs in the United States or that is concocted elsewhere, but executed in the United States.<sup>1</sup> For over 100 years, courts have variedly interpreted these antitrust laws by balancing concerns of international comity and deterrence of wrongful conduct.<sup>2</sup> This approach has led to some development of U.S. antitrust case law, but courts have yet to find common ground in determining how to properly apply these laws to conduct that is extraterritorial in its execution, yet still has effects that indirectly harm U.S. commerce.<sup>3</sup> The laws, as interpreted, are still unclear.<sup>4</sup> Some courts prefer to apply a “broad” rule, wherein foreign companies that engage in extraterritorial anticompetitive conduct may be liable under U.S. antitrust laws, so as long as there is a link between the conduct and U.S. commerce;<sup>5</sup> others require a “narrow” rule, wherein the alleged anticompetitive conduct is required to cause stronger and more obvious effects to U.S. commerce.<sup>6</sup> The courts’ difficulty in assessing which rule to apply can be attributed to the vague language of the Sherman Act.<sup>7</sup> The Foreign Trade Antitrust Improvements Act (FTAIA)<sup>8</sup> purportedly clarified that language. Existing case law suggests that not much clarity has evolved out of that at-

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

2. See Jaafar A. Riazi, Note, *Finding Subject Matter Jurisdiction over Antitrust Claims of Extraterritorial Origin: Whether the Seventh Circuit’s Approach Properly Balances Policies of International Comity and Deterrence*, 54 DEPAUL L. REV. 1277, 1277–79 (2005).

3. *Id.* at 1279.

4. See *infra* notes 22–194 and accompanying text.

5. See *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 818 (7th Cir. 2015) (holding that the defendants’ sale of price-fixed LCD panels to foreign purchasers did not give rise to an anti-trust claim under the Sherman Act).

6. See *United States v. Hui Hsiung*, 778 F.3d 738, 751 (9th Cir. 2015) (reiterating the “immediate consequence” test of the Seventh Circuit and narrowly interpreting the FTAIA).

7. Sherman Act, 15 U.S.C. §§ 1–7 (2012).

8. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (2012).

tempt; the courts continue to have diverging interpretations of the statutes.<sup>9</sup>

One example of the diverging interpretations is the circuit split between the Seventh and Ninth Circuit Courts of Appeal, concerning the interpretation of the Sherman Act and the FTAIA in relation to non-import trade.<sup>10</sup> The Seventh Circuit, in *Motorola Mobility LLC v. AU Optronics Corp.*, adopted the “narrow” rule by holding that a foreign company may only be liable under U.S. laws if that company was engaged in transactions that directly affected U.S. commerce.<sup>11</sup> On the contrary, the Ninth Circuit in *United States v. Hui Hsiung* applied the “broad” rule by holding that foreign transactions may be subject to U.S. jurisdiction if the transactions had an effect—even though indirectly—on U.S. commerce.<sup>12</sup> This Comment argues that the other circuits, and eventually, the U.S. Supreme Court, should adopt the Ninth Circuit’s “broad” rule in *Hui Hsiung*, especially in light of the globalized economy and the increasing demand for international business transactions.<sup>13</sup>

Part II provides background information on (a) the Sherman Act,<sup>14</sup> (b) the FTAIA,<sup>15</sup> (c) relevant case law interpreting both the Sherman Act and the FTAIA,<sup>16</sup> and (d) the most recent circuit split between *United States v. Hui Hsiung* and *Motorola Mobility LLC v. AU Optronics Corp.* regarding the reach of the Sherman Act to non-import trade.<sup>17</sup> Part III provides an analysis of (a) the need for an established rule,<sup>18</sup> (b) the differing arguments of the Ninth and Seventh Circuits in the extent of the FTAIA’s reach;<sup>19</sup> and (c) a proposal to adopt the Ninth Circuit ruling as the more appropriate interpretation of the statute, as this interpretation aligns more closely with legislative intent of the FTAIA, supports the proposition that antitrust laws are meant to protect consumers, is more likely to deter perpetrators of antitrust laws, and is more appropriate in today’s global economy.<sup>20</sup> Part IV

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9. See *infra* notes 53–191 and accompanying text.

10. Compare *Motorola*, 775 F.3d at 818–19, with *Hui Hsiung*, 778 F.3d at 746.

11. *Motorola*, 775 F.3d at 819.

12. *Hui Hsiung*, 778 F.3d at 759.

13. This Comment assumes that the questions regarding the FTAIA are not jurisdictional issues, but rather require analysis of the elements of a claim. Therefore, analysis as to whether courts have subject matter jurisdiction over a particular claim will not be discussed.

14. See *infra* notes 29–48 and accompanying text.

15. See *infra* notes 49–83 and accompanying text.

16. See *infra* notes 84–141 and accompanying text.

17. See *infra* notes 142–94 and accompanying text.

18. See *infra* notes 195–237 and accompanying text.

19. See *infra* notes 238–90 and accompanying text.

20. See *infra* notes 291–373 and accompanying text.

demonstrates the impact of the proposed solution on consumers, international business transactions, and the global economy.<sup>21</sup> Finally, Part V concludes that the Ninth Circuit ruling must prevail, and other circuits and the U.S. Supreme Court should adopt the Ninth Circuit's "broad" ruling.

## II. BACKGROUND: DEVELOPMENT OF THE APPLICATION OF U.S. ANTITRUST LAW TO EXTRATERRITORIAL CONDUCT BEFORE AND AFTER THE FTAIA

The Sherman Act was first interpreted to mean that anticompetitive conduct that does not occur in the United States has no place in U.S. jurisdiction.<sup>22</sup> That reasoning was later relaxed, and the courts started interpreting the statute based on the effects of the anticompetitive conduct.<sup>23</sup> Despite this shift, courts struggled with how to correctly interpret the statute, so the FTAIA was enacted to purportedly "clarify" when U.S. antitrust law applies to foreign conduct.<sup>24</sup> The language of the FTAIA is both broad and narrow enough that courts have interpreted its meaning differently. To date, circuit splits regarding how to interpret the requirements that conduct has a (1) "direct, substantial, and reasonably foreseeable effect," which (2) "gives rise to a claim," continue to confuse courts and businesses alike.<sup>25</sup> This Part discusses the development of U.S. antitrust laws;<sup>26</sup> the various interpretations of the Sherman Act and the FTAIA;<sup>27</sup> and the most recent circuit split between the Ninth Circuit's ruling in *United States v. Hui Hsiung* and the Seventh Circuit's ruling in *Motorola Mobility LLC v. AU Optronics Corp.*, which deals with the application of the FTAIA as it applies to non-import trade.<sup>28</sup>

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21. See *infra* notes 374–432 and accompanying text.

22. See, e.g., *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355–56 (1909), *overruled by* *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400 (1990) (holding that the act of state doctrine is not implicated even when international comity, respect for foreign nations, and avoidance of embarrassment to the Executive Branch are at issue).

23. See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (determining that Alcoa was not an illegal monopoly under the Sherman Act), *superseded by statute*, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246, *as recognized in* *United States v. LSL Biotechs.*, 379 F.3d 672 (9th Cir. 2004).

24. Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (codified at 15 U.S.C. § 6a (2012)); Riazi, *supra* note 2, at 1314.

25. 15 U.S.C. § 6a; see *infra* notes 198–237 and accompanying text.

26. See *infra* notes 29–48 and accompanying text.

27. See *infra* notes 49–141 and accompanying text.

28. See *infra* notes 142–47 and accompanying text.

A. *Sherman Act: Foundation of U.S. Antitrust Law*

The United States Constitution empowers Congress “[t]o regulate Commerce with foreign Nations, and among the several States.”<sup>29</sup> Congress enacted the Sherman Act pursuant to that authority.<sup>30</sup> Section 1 of the Sherman Act prohibits “[e]very 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.”<sup>31</sup> Section 2 criminalizes monopolization and any “attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.”<sup>32</sup> The general and vague language of the Sherman Act has led to the courts’ various, and sometimes conflicting, interpretations.

*American Banana Co. v. United Fruit Co.*<sup>33</sup> was the first case considered by the U.S. Supreme Court with regard to the extraterritorial reach of the Sherman Act.<sup>34</sup> American Banana alleged that United Fruit Co. induced the Puerto Rican government to monopolize the tropical fruit market by threatening, invading, and seizing its plantation and railway.<sup>35</sup> In affirming the trial court’s dismissal of the complaint, the U.S. Supreme Court held that the legality (or illegality) of acts must be determined by the law of the country in which the alleged illegal acts were committed.<sup>36</sup> Therefore, the Sherman Act did not apply because the alleged conduct occurred in a foreign country.<sup>37</sup> The Court reasoned that holding otherwise would interfere with another sovereign’s authority and would undermine the soundness of the established comity of nations.<sup>38</sup>

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29. U.S. CONST. art. I, § 8, cl. 3.

30. *Commerce Clause*, CORNELL U. L. SCH., [https://www.law.cornell.edu/wex/commerce\\_clause](https://www.law.cornell.edu/wex/commerce_clause) (last updated June 2016).

31. 15 U.S.C. § 1 (2012). The language of the Sherman Act makes it appear as though every single contract or combination thereof that restrains trade is illegal; however, it has been established that only unreasonable restraints on trade are prohibited. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), *superseded by statute*, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246, *as recognized in* *United States v. LSL Biotech.*, 379 F.3d 672 (9th Cir. 2004).

32. 15 U.S.C. § 2 (2012).

33. 213 U.S. 347 (1909), *overruled by* *W.S. Kirkpatrick & Co. v. Env’t Tectonics Corp., Int’l*, 493 U.S. 400 (1990) (overruling the act of state component).

34. Jeffrey H. Smith, Note, *Call Me Maybe? The Seventh Circuit’s Call in Motorola Mobility*, 90 NOTRE DAME L. REV. 2063, 2065 (2015).

35. *Am. Banana*, 213 U.S. at 354–55.

36. *Id.* at 348, 356.

37. *Id.* at 357.

38. *Id.* at 356.

Thirty years later, Judge Learned Hand, writing for the Second Circuit Court of Appeals, relaxed the strictly territorial rule. In *United States v. Aluminum Co. of America*, Judge Hand applied an “effects test” to determine whether suit can be brought in the United States against a foreign entity.<sup>39</sup> The United States brought suit against the aluminum producer and manufacturer, Alcoa, for participating in a foreign cartel that eliminated all competition by limiting the production and fixing the prices of “virgin” aluminum ingot.<sup>40</sup> The circuit court found that the Sherman Act should be read considering “the limitations customarily observed by nations upon the exercise of their powers.”<sup>41</sup> Therefore, any interpretation of the statute “should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.”<sup>42</sup> After considering the international complications of applying U.S. antitrust laws to foreign companies and the difficulty in forcing courts to apply different canons of interpretation, the majority ultimately held that the statute must only govern agreements that are “intended to affect imports and did affect them.”<sup>43</sup> Applying this standard to the case, Judge Hand found that Alcoa violated section 1 of the Sherman Act.<sup>44</sup>

Other jurisdictions followed suit and developed various formulations of the “effects test” first used in *Alcoa*. Judge Hand did not provide any specificity as to how “some effect” should be interpreted in subsequent cases.<sup>45</sup> In effect, the burden shifted from the plaintiff to the defendant to prove that the alleged conduct did not have any effect in the United States.<sup>46</sup> In practice, more emphasis was placed on a foreign company’s intent to affect the United States, rather than determining how the standard should be used in subsequent deci-

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39. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945), *superseded by statute*, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246, *as recognized in* *United States v. LSL Biotechs.*, 379 F.3d 672 (9th Cir. 2004).

40. *Id.* at 442. Producers in a similar market that cooperate to protect their own interests usually form what is known as a “cartel.” *Cartels*, ECON. ONLINE, [http://www.economicsonline.co.uk/Business\\_economics/Cartels.html](http://www.economicsonline.co.uk/Business_economics/Cartels.html) (last visited Aug. 11, 2016). Usually, the interest revolves around making more money. *Cartel*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/cartel> (last visited Aug. 11, 2016). Cartels can restrict trade transactions by increasing the price of products and reduce production output released to the market. *Cartels*, ECON. ONLINE, *supra*.

41. *Aluminum Co.*, 148 F.2d at 443.

42. *Id.*

43. *Id.* at 444.

44. *Id.* at 427.

45. *Id.* at 444.

46. Gerard F. Bifulco, Comment, *From Sea to Shining Sea: A New Approach to Interpreting the Foreign Trade Antitrust Improvements Act*, 64 EMORY L.J. 869, 879 (2015).

sions.<sup>47</sup> In light of the broad language of the Sherman Act and the various possible interpretations of the “effects test,” courts have applied this “overreaching” rule.<sup>48</sup>

*B. Federal Trade and Antitrust Improvement Act: “Clarification” of the Extraterritorial Application of U.S. Antitrust Laws*

Congress responded to the controversial reach of the Sherman Act by clarifying its extent under the FTAIA’s objective test.<sup>49</sup> The Act states, “Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect [on U.S. commerce]”<sup>50</sup> and “(2) such effect gives rise to a claim under the [Sherman Act].”<sup>51</sup>

The FTAIA, according to the U.S. Supreme Court in *F. Hoffmann-La Roche v. Empagran*,<sup>52</sup> excludes all conduct regarding import trade or commerce with foreign nations from compliance with the Sherman Act, but it brings some conduct back into the Act’s reach, so long as (1) the conduct has a “direct, substantial, and reasonably foreseeable effect” on certain American commerce, and (2) such conduct gives rise to a Sherman Act claim.<sup>53</sup> This “clarification,” however, has caused a variety of legal contentions, as courts interpret the statutory terms “direct,” “substantial,” “reasonably foreseeable,” and “gives rise to a claim” differently.<sup>54</sup>

Courts construe the language of a statute pursuant to the surrounding context and give words their plain and ordinary meaning.<sup>55</sup> When a statute’s meaning is ambiguous from a plain reading of its language, courts look beyond the statutory language and consider the purpose of the law and the legislative history of the statute.<sup>56</sup> Congress intended to “formulate a standard to be applied uniformly throughout the federal judicial system” when it enacted the FTAIA.<sup>57</sup> Specifically, it wanted to “clearly establish when antitrust liability attaches to

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47. *Id.*

48. See Riazi, *supra* note 2, at 1309.

49. Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-920, 96 Stat. 1246 (codified at 15 U.S.C. §6a (2012)).

50. *Id.* § 6a(1).

51. *Id.* § 6a(2).

52. *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

53. *Id.* at 163 (quoting H.R. REP. NO. 97-686, at 9–10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495).

54. See *infra* notes 62–194 and accompanying text.

55. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

56. *Id.* at 341.

57. H.R. REP. NO. 97-686, at 6 (1982).

international business activities.”<sup>58</sup> Relevant themes from the House bill pointed out that Congress clearly intended that (1) transactions between two foreign firms have no place in U.S. jurisdiction, absent a direct, substantial, and reasonably foreseeable effect;<sup>59</sup> (2) foreign purchasers injured by a price-fixing conspiracy that does not have an effect to U.S. commerce do not have recourse in the United States;<sup>60</sup> and (3) the “effect” of the conduct must be the basis of the alleged conduct.<sup>61</sup> Despite these overarching themes, courts remain divided as to how the FTAIA must be interpreted.

When the Ninth Circuit decided *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, it balanced a three-part test to determine whether U.S. antitrust laws can reach an extraterritorial conduct.<sup>62</sup> Timberlane, an American lumber company, and its Honduran partners and businesses, brought suit against Bank of America’s Honduran timber companies for conspiring to drive them out of business.<sup>63</sup> The court explained that some effect on American foreign commerce must have occurred before any application of the FTAIA can be undertaken.<sup>64</sup> Next, the effect must have been “sufficiently large to present a cognizable injury to the plaintiff.”<sup>65</sup> Finally, U.S. interests must have been sufficiently justified to assert extraterritorial authority.<sup>66</sup> The court analyzed the conduct and concluded that the timber companies “intended to, and did, affect the export of lumber from Honduras to the United States,” thereby satisfying the first two parts of the balancing test.<sup>67</sup> The court ultimately held that the district court’s dismissal was inappropriate, even after considering international comity and fairness questions.<sup>68</sup> It reasoned that there was no conflict with the law or policy of the Honduran government, such that the United States would have to intervene.<sup>69</sup>

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58. *Id.* at 7.

59. *Id.* at 8–9.

60. *Id.* at 12.

61. *Id.*

62. 549 F.2d 597, 613 (9th Cir. 1976), *superseded by statute*, FTAIA, 15 U.S.C. §§ 1–7 (2012), *as recognized in* *McClinchy v. Shell Chem. Co.*, 845 F.2d 802, 813 (9th Cir. 1987).

63. *Id.* at 604.

64. *Id.* at 613.

65. *Id.*

66. *Id.*

67. *Id.* at 615.

68. *Timberlane*, 549 F.2d at 615. International comity is a principle of international law that recognizes other countries’ legislative, executive, or judicial acts. *Comity*, DUHAIME’S L. DICTIONARY, <http://www.duhaime.org/LegalDictionary/C/Comity.aspx> (last visited Aug. 11, 2016).

69. *Timberlane*, 549 F.2d at 615.



The Second Circuit, in *National Bank of Canada v. Interbank Card Ass'n*,<sup>70</sup> warned that independent analysis of the first two parts of the balancing test in *Timberlane* may lead to an “assertion of jurisdiction whenever the challenged conduct is shown to have some effect.”<sup>71</sup> National Bank brought suit against Interbank, arguing that Interbank’s stipulation to approve a licensing agreement “only if National Bank disposed of the ‘Visa’ card business” violated the Sherman Act because it limited competition and affected United States commerce.<sup>72</sup> Applying *Timberlane*, the Second Circuit held that the objectionable conduct must “be foreseeable to have any appreciable anticompetitive effect on United States commerce” before the Sherman Act can impose any liability.<sup>73</sup> Consequently, it held that although the profitability of merchants in the market was impacted, the exclusion of National Bank in the Interbank system, as a result of Interbank’s advertent decisions and actions, did not pose a foreseeable threat to United States commerce.<sup>74</sup> The court concluded that National Bank failed to create a relationship between the objected conduct and any anticompetitive consequences to United States commerce.<sup>75</sup>

In *Hartford Fire Insurance v. California*,<sup>76</sup> the U.S. Supreme Court ruled on whether various London-based reinsurance companies conspired to coerce U.S. reinsurers to change certain policy practices that drove costs up, in violation of the Sherman Act.<sup>77</sup> A divided Court overruled the territorial approach of *American Banana Co.* and held that foreign companies may be held liable under U.S. antitrust laws if the conduct “was meant to produce and did in fact produce some substantial effects in the United States.”<sup>78</sup> The Court also held that the Sherman Act applied, and not the FTAIA, because the conduct in question was “import commerce.”<sup>79</sup> Therefore, an analysis under the “direct, substantial, and reasonably foreseeable effect” test did not have to be employed.<sup>80</sup> Justice Scalia, in his dissent, expressed his

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70. *Nat'l Bank of Can. v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981).

71. *Id.* at 8.

72. *Id.*

73. *Id.* at 9.

74. *Id.*

75. *Id.*

76. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

77. *Id.* at 770–71.

78. *Id.* at 795–96.

79. *Id.* at 796 n.23.

80. *Id.*; see also 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, 15 (2003).

concern with the majority's expansive extraterritorial application of the Sherman Act; he believed that the majority's opinion would offend customary international law because it ignored "proscriptive comity."<sup>81</sup> According to him, the majority created a "sharp and unnecessary conflict with the legitimate interests of other countries."<sup>82</sup>

Despite legislators' intent to "clarify" the reach of the Sherman Act through the enactment of the FTAIA, circuit courts still consider both statutes vague.<sup>83</sup> As the next section highlights, this has led to continued substantial disagreements over the statutes' proper interpretations.

### C. Various Interpretations of the FTAIA Continue to Plague the Courts

Earlier case law considered the second part of the FTAIA requirement that ensured that the Sherman Act only applied when the "direct effects" of the alleged conduct "gave rise to a claim." In *Den Norske Stats Oljeselskap v. Heeremac Vof*,<sup>84</sup> a Norwegian oil corporation that exclusively conducted business in the North Sea brought an antitrust claim against a heavy lift barge company that operated in the North Sea, Gulf of Mexico, and the Far East, for conspiring to fix bids and projects.<sup>85</sup> The oil corporation claimed, among other things, that the conspiracy forced it to charge higher prices for the crude oil exported to the United States.<sup>86</sup> The Fifth Circuit, after analyzing the statutory language, legislative history, and the sparse case law, held the second part of "the FTAIA requires more than a 'close relationship' between the domestic injury and the *plaintiff's* claim."<sup>87</sup> Thus, even though the price-fixing and bid rigging satisfied the "direct, substantial, and reasonably foreseeable" requirement because of the inflated prices to U.S. consumers, these inflated prices failed to satisfy the "gives rise" requirement.<sup>88</sup> The higher prices U.S. consumers paid for the defendant's services in the Gulf of Mexico did not give rise to the oil corporation's claim because the plaintiff oil corporation conducted business exclusively in the North Sea.<sup>89</sup> Judge Higginbotham

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81. *Hartford Fire*, 509 U.S. at 817 (Scalia, J., dissenting). Proscriptive comity is the "respect sovereign nations afford each other by limiting the reach of their laws." *Id.*

82. *Id.* at 820.

83. Riazi, *supra* note 2, at 1314–16.

84. *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001).

85. *Id.* at 422.

86. *Id.*

87. *Id.* at 427–29 (emphasis added).

88. *Id.* at 421–22, 425–26.

89. *Id.* at 426–27.

dissented and argued that the majority interpreted the plain statutory language incorrectly when they narrowly construed the requirement that the conduct “gives rise to *the* plaintiff’s claim” instead of “gives rise to *a* claim.”<sup>90</sup> More importantly, he contended that public policy necessitates a broad interpretation of the FTAIA.<sup>91</sup> Doing so would further the purpose of the FTAIA to protect American consumers who may be placed at a disadvantage by potential antitrust violators.<sup>92</sup>

In *Kruman v. Christie’s International PLC*,<sup>93</sup> the Second Circuit reversed the district court’s dismissal of the case and sided with Judge Higginbotham’s dissent in *Den Norske*. The court held that the unambiguous language of the FTAIA did not require that the domestic effect “gives rise to the plaintiff’s claim,” but rather “give rise to a claim.”<sup>94</sup> Defendants Christie’s International PLC, a corporation of the United Kingdom, and Sotheby’s Holdings Inc., a Michigan corporation, are two of the largest auction houses in the world, together controlling ninety-seven percent of the market.<sup>95</sup> Kruman filed suit alleging that both defendants agreed to fix commission rates paid by buyers who purchased and sold goods in auctions outside the United States.<sup>96</sup> The court rejected the defendants’ assertion that a holding against them would open the floodgates of litigation, and it reasoned that policy considerations should not justify a different reading of the statute.<sup>97</sup> It held that the statute is unambiguous in stating what kind of conduct can be brought before U.S. courts.<sup>98</sup> Furthermore, the court rejected the defendants’ contention that because of the globalized economy, any anticompetitive conduct could conceivably impact U.S. commerce.<sup>99</sup> The court held that the FTAIA’s language already provides for a limitation on the reach of U.S. antitrust laws by requiring “direct, substantial, and reasonably foreseeable effect.”<sup>100</sup>

The Seventh Circuit addressed the FTAIA for the first time in *United Phosphorus, Ltd. v. Angus Chemical. Co.*<sup>101</sup> The case involved 2-Amino-1 Butanol (AB), a key ingredient in the production of

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90. *Den Norske*, 241 F.3d at 433 (Higginbotham, J., dissenting) (emphasis added).

91. *Id.* at 434.

92. *Id.*

93. *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384 (2d Cir. 2002).

94. *Id.* at 399.

95. *Id.* at 390.

96. *Id.* at 390–91, 393.

97. *Id.* at 402.

98. *Id.*

99. *Kruman*, 284 F.3d at 402.

100. *Id.*

101. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003) (en banc), *overruled by* *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012).

“Ethambutol,” a primary pharmaceutical used in the treatment of tuberculosis.<sup>102</sup> Plaintiffs were Indian companies that were previous defendants in a prior trade-secret litigation.<sup>103</sup> The plaintiffs alleged that the defendants cost them profits they could have earned had Angus Chemical, a subsidiary of an American company, not used anticompetitive means to impede their plans to sell AB in the United States.<sup>104</sup> The court, just like the earlier courts, analyzed the legislative history to determine how the “direct, substantial, and reasonably foreseeable effect” language of the Act must be interpreted.<sup>105</sup> It also considered policy reasons for exercising the prevailing approach of exercising jurisdiction.<sup>106</sup> Particularly, it emphasized the need to “tread softly” in extending the reach of U.S. antitrust laws, as they could affect the United States’ relationship with other governments.<sup>107</sup> Ultimately, the court held that the miniscule presence of AB in the United States, most of which was not used to make drugs, did not constitute such a “substantial” effect as the statute requires.<sup>108</sup>

One year later, in *United States v. LSL Biotechnologies*,<sup>109</sup> the Ninth Circuit analyzed what the statutory term “direct” means, as used in the first part of the FTAIA test.<sup>110</sup> LSL Biotechnologies, an American corporation that develops and markets seeds, entered into an agreement with Hazera, a foreign company that develops genetically modified tomatoes with a longer shelf-life than regular tomatoes.<sup>111</sup> The United States’ complaint centered on LSL’s breach of a restrictive clause in the agreement, which barred Hazera from entering into other agreements with other American companies after its contract with LSL terminated.<sup>112</sup> The government reasoned that the seventy percent market share the defendants held, and the presence of the restrictive clause, unreasonably restrained competition.<sup>113</sup> As a result, the United States alleged that the clause allowed defendants to artificially raise the price of the tomato seeds and subsequently harmed

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 947–52.

106. *Id.* at 952.

107. *United Phosphorus*, 322 F.3d at 952.

108. *Id.* at 952–53.

109. *United States v. LSL Biotechs.*, 379 F.3d 672 (9th Cir. 2004).

110. *Id.* at 679.

111. *Id.* at 674.

112. *Id.* at 675.

113. *Id.* “Market share” is a company’s percentage share of an industry’s or a market’s total sales over a specific time period. *Market Share*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/marketshare.asp> (last visited Aug. 11, 2016). It is calculated by dividing a company’s sales by the industry’s total sales in a given time period. *Id.*

American consumers.<sup>114</sup> Relying on a U.S. Supreme Court case, the Ninth Circuit held that the effects alleged by the government were not “direct,” as they did not follow as an “immediate consequence of the defendant’s activity.”<sup>115</sup> The Ninth Circuit reasoned that an effect could not be “direct” when there are “intervening developments” between the alleged conduct and the effects of that conduct.<sup>116</sup> In particular, the Ninth Circuit held that the government’s assertions that the restrictive clause between LSL Biotechnologies and Hazera will more likely hamper development of high-quality tomatoes and may allow LSL to charge more for their seeds did not rise to the level of “direct” to satisfy the FTAIA.<sup>117</sup>

The most recent U.S. Supreme Court decision regarding the reach of the Sherman Act and the FTAIA was in *F. Hoffman-La Roche v. Empagran*.<sup>118</sup> Five foreign purchasers filed a class action lawsuit against multiple large drug manufacturers and distributors, alleging that the defendants engaged in an over-arching worldwide conspiracy to raise, stabilize, and maintain the prices of vitamins affecting virtually every market where they operated, creating adverse effects in the United States and other nations.<sup>119</sup> Justice Breyer delivered the unanimous opinion of the Court and based the holding on international comity and legislative history considerations.<sup>120</sup> First, the Court held that the ambiguous statute must be interpreted to “avoid unreasonable interference with the sovereign authority of other nations,” and that doing so would harmonize the disfavored extraterritorial application of U.S. antitrust law.<sup>121</sup> It stressed that a worldwide jurisdiction of U.S. antitrust laws would open U.S. courts to plaintiffs who were unhappy with remedies made available by their own legal systems.<sup>122</sup> Second, the Court held that Congress intended to limit the extraterritorial reach of the Sherman Act, shown through its enactment of the FTAIA; the “direct, substantial, and reasonably foreseeable effect” on domestic commerce was Congress’ way of limiting, and not expanding, the scope of the application of the Sherman Act.<sup>123</sup> Therefore, activities that caused solely foreign harm are specifically excluded from the

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114. *LSL Biotechs.*, 379 F.3d at 676.

115. *Id.* at 680 (citing *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)).

116. *LSL Biotechs.*, 379 F.3d at 681.

117. *Id.*

118. 542 U.S. 155 (2004).

119. *Id.* at 159–60.

120. *Id.* at 158, 173.

121. *Id.* at 163–65.

122. *Id.* at 166–67.

123. *Id.* at 156, 159.

scope of U.S. antitrust laws.<sup>124</sup> In effect, even though the FTAIA excludes foreign activities from the Sherman Act, the “direct, substantial, and reasonably foreseeable effect” part of the statute brings those foreign activities back to its reach.<sup>125</sup>

The Third Circuit clarified what the FTAIA exception entails in *Animal Science Products, Inc. v. China Minmetals Corp.* without focusing too much on the policy considerations emphasized in *Empagran*.<sup>126</sup> The plaintiffs were domestic purchasers of magnesite, a chemical used among other things to melt steel, make cement, and clean wastewater.<sup>127</sup> They alleged that Chinese producers and exporters conspired to fix the prices of magnesite exported and sold in the United States, in violation of the Sherman Act.<sup>128</sup> The Third Circuit held that courts should look into whether the alleged conduct was directed at a U.S. import market, regardless of whether goods were imported into the United States, or whether defendants were importers themselves.<sup>129</sup> Moreover, it emphasized that the standard is an objective one; thus, the “requisite ‘direct’ and ‘substantial’ effect must have been ‘foreseeable’ to an objectively reasonable person.”<sup>130</sup> The case was remanded to the lower court, with instructions that the “reasonably foreseeable” standard should be analyzed by determining “whether the alleged domestic effect would have been evident to a reasonable person making practical business judgments.”<sup>131</sup> On remand, the district court dismissed the claim after finding that the complaint did not provide the required specific factual allegations of the connection between the plaintiffs’ purchases and the alleged anticompetitive conduct.<sup>132</sup>

In *Minn-Chem Inc. v. Agrium Inc.*, the Seventh Circuit faced similar questions.<sup>133</sup> Minn-Chem was a U.S. company that purchased potash, a homogenous commodity, from foreign suppliers.<sup>134</sup> Its complaint alleged that the defendants, foreign suppliers and distributors of potash, formed a cartel that reduced supply and increased prices.<sup>135</sup> Those agreed-upon prices eventually became benchmarks for sales to Amer-

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124. *Empagran*, 542 U.S. at 169–70.

125. *Id.*

126. *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011).

127. *Id.* at 464 & n.1.

128. *Id.* at 464.

129. *Id.* at 470.

130. *Id.* at 471.

131. *Id.*

132. *Animal Sci. Prod., Inc. v. China Minmetals Corp.*, 34 F. Supp. 3d 465 (D.N.J. 2014).

133. *Minn-Chem Inc. v. Agrium Inc.*, 683 F.3d 845 (7th Cir. 2012).

134. *Id.* at 848.

135. *Id.* at 848–49.

ican purchasers.<sup>136</sup> The court agreed with the plaintiffs that *United Phosphorus* was “ripe for reconsideration” of the Seventh Circuit’s previous holding that the FTAIA imposed a jurisdictional limit, instead of establishing an element of a Sherman Act claim.<sup>137</sup> After concluding that the language of the statute and procedural implications of the FTAIA outline an element of a claim, the court turned to analyze whether the defendants satisfied the first requirement of the FTAIA.<sup>138</sup> The United States is one of the two largest consumers of potash, and the effects of the supply restriction and the associated price increases of the product satisfied the “direct, substantial, and reasonably foreseeable” requirement of the statute.<sup>139</sup>

Despite the various breakthroughs in interpreting the FTAIA, available case law still has not answered some fundamental questions regarding the reach of the statute. The Ninth and Seventh Circuits attempted to solve the mystery as to when a foreign company’s extra-territorial conduct falls within the purview of U.S. courts.<sup>140</sup> As will be explained in this Comment, despite the similar facts of both cases, a circuit split has emerged yet again.<sup>141</sup>

#### D. *Ninth Circuit and Seventh Circuit Split: Same Conspiracy Product, Different Outcomes*

This Section discusses the Ninth and Seventh Circuit’s inexplicable and directly adverse conflict in *United States v. Hui Hsiung* and *Motorola Mobility LLC v. AU Optronics Corp.*<sup>142</sup> The products discussed in both cases are the same: LCD panels used for the creation of electronics.<sup>143</sup> The conspiracy, likewise, was the same: Taiwanese and Korean electronics manufacturers colluded to set the price of these LCD panels.<sup>144</sup> These LCD panels came under U.S. jurisdiction through finished electronic products.<sup>145</sup> The Ninth Circuit applied the FTAIA broadly and held that the manufacturers were liable because their conduct affected U.S. commerce.<sup>146</sup> On the other hand, the Sev-

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136. *Id.* at 849.

137. *Id.* at 852.

138. *Id.* at 853.

139. *See Minn-Chem*, 683 F.3d at 849–60.

140. *See United States v. Hui Hsiung*, 778 F.3d 738 (9th Cir. 2015); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015).

141. *See infra* notes 142–94 and accompanying text.

142. *Compare Motorola*, 775 F.3d at 816, with *Hui Hsiung*, 778 F.3d at 738.

143. *Compare Motorola*, 775 F.3d at 817, with *Hui Hsiung*, 778 F.3d at 742.

144. *Motorola*, 775 F.3d at 817; *Hui Hsiung*, 778 F.3d at 742–43.

145. *Motorola*, 775 F.3d at 817; *Hui Hsiung*, 778 F.3d at 742–43.

146. *Hui Hsiung*, 778 F.3d at 760.

enth Circuit held that the manufacturers' conduct was too remote to satisfy the narrow interpretation of the FTAIA.<sup>147</sup>

1. *Broad Rule: Ninth Circuit's Ruling in United States v. Hui Hsiung*

*Hui Hsiung*, a criminal antitrust case, involved an international conspiracy between Taiwanese and Korean electronics manufacturers of Liquid Crystal Display (LCDs) panels.<sup>148</sup> The defendants were AU Optronics (AUO), a Taiwanese company, AU Optronics of America (AUOA), AUO's retailer and wholly-owned subsidiary, Hsuan Bin Chen the President of AUO, and Hui Hsiung the Executive Vice President of AUO.<sup>149</sup> For five years, the defendants created and functioned as a cartel by secretly holding meetings called "Crystal Meetings" in Taiwan to "set[ ] the target price" and "stabilize the price" of LCDs.<sup>150</sup> These LCDs were sold to U.S. companies such as Dell, Hewlett Packard (HP), Compaq, Apple, and Motorola.<sup>151</sup> Reports that were produced after the Crystal Meetings were called "Crystal Meeting Reports."<sup>152</sup> These reports provided for pricing targets that were used by retailers as the minimum price of selling panels to wholesale customers, including U.S. companies.<sup>153</sup> The United States made up one-third of the personal computer market; as a result, the defendants made enormous profits.<sup>154</sup> In effect, the U.S. wholesale customers, such as bellwether companies Dell, Compaq, and HP, had no choice but to accept the set prices.<sup>155</sup> Consequently, the increase in price was passed on to smaller consumers who bought electronics such as personal computers and cellphones.<sup>156</sup> The United States Department of Justice (DOJ) initiated proceedings.<sup>157</sup> The conspiracy ended after five years when the FBI raided the offices of AUOA in Houston, Texas.<sup>158</sup>

The reach of the Sherman Act and the FTAIA was a major contention in the Ninth Circuit proceedings.<sup>159</sup> Hui Hsiung contended that

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147. *Motorola*, 775 F.3d at 819.

148. *Hui Hsiung*, 778 F.3d at 742.

149. *Id.*

150. *Id.* at 743 (alteration in original).

151. *Id.*

152. *Id.*

153. *Id.* at 743.

154. *Hui Hsiung*, 778 F.3d at 743.

155. *See id.*

156. *See id.*

157. *Id.* at 741-42.

158. *Id.* 742.

159. *Id.* at 744.



the company was not an importer per se, but rather that a third party (e.g., Motorola) was the one that imported the manufactured cellphones into the country.<sup>160</sup> Therefore, Hui Hsiung argued that the Sherman Act could not be applied.<sup>161</sup> Moreover, because the defendants argued that they should not be subjected to U.S. antitrust laws, the overseas conduct was not sufficient for the “direct” requirement under the FTAIA.<sup>162</sup> On the contrary, the government contended that Hui Hsiung’s intentional and deliberate actions affected U.S. commerce and was sufficient to satisfy the “direct, substantial, and reasonably foreseeable” test of the FTAIA.<sup>163</sup> At trial, voluminous evidence was presented regarding the defendants’ involvement in the Crystal Meetings, their sales of LCDs to customers in the United States, and expert testimony regarding the financial impact of the defendants’ conduct.<sup>164</sup> Ultimately, the jury found the defendants guilty of violating the Sherman Act by conspiring to fix the LCD prices.<sup>165</sup> The indictment alleged that the defendants derived profits of approximately \$500 million from the conspiracy.<sup>166</sup> The defendants moved for an acquittal, contending that the government had failed to prove an exception to FTAIA that the alleged conduct had an “intended and substantial effect on United States commerce.”<sup>167</sup>

The Ninth Circuit analyzed all of the defendants’ challenges.<sup>168</sup> The court, after applying the substantial effects test of *Hartford Fire*, held that discussion and regular communication between the foreign defendants and their U.S. subsidiaries counted as “import commerce,” falling squarely within the Sherman Act; thus, the FTAIA need not be analyzed.<sup>169</sup> It determined that because the defendants targeted the United States and sold millions of the products at a fixed price, the conduct “substantially” affected U.S. commerce.<sup>170</sup> It also found that the circumstances surrounding the conspiracy all pointed to an “immediate consequence” to United States commerce; an increase in price of one component would also increase the price of the final

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160. *Hui Hsiung*, 778 F.3d at 756.

161. *Id.*

162. *Id.* at 758.

163. *Id.* at 756.

164. *Id.* at 744.

165. *Id.* at 745.

166. *Hui Hsiung*, 778 F.3d at 744.

167. *Id.*

168. *Id.* at 750–51.

169. *Id.* at 756.

170. *Id.* at 750–51.

product.<sup>171</sup> Therefore, the conduct was sufficiently within the reach of the Sherman Act.<sup>172</sup>

The United States government argued for the domestic effects theory, which required the court to analyze whether the government pled and proved the requirements of the domestic effects exception of the FTAIA, particularly whether the defendants' conduct had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.<sup>173</sup> Relying on *LSL Biotechnologies*, the defendants argued that because there were intervening steps, such as the development and manufacture of the products prior to the sale into the United States, the effects of the alleged conspiracy to domestic commerce had been "diffuse[d]."<sup>174</sup> The court recognized that "the government's expert created some ambiguity regarding the exact flow of how panels go from the plants of the Crystal Meeting participants into a product."<sup>175</sup> Nevertheless, it used a proximate causation standard, and it found that the LCDs in question were a substantial cost component of the finished products; they made up seventy to eighty percent in monitors and thirty to forty percent in notebook computers.<sup>176</sup> Accordingly, the court found that when the price of these panels went up, it was inevitable that the price of the finished product also went up.<sup>177</sup> In light of the globalized economy, the Ninth Circuit also mentioned that it is "not uncommon that the orders placed with system integrators were based on custom orders from United States customers for direct shipment to that customer."<sup>178</sup> For all these reasons, the court concluded that the "integrated, close, and direct connection between the purchase of the price-fixed panels, the United States as the destination for the products, and the ultimate inflation of prices in finished products imported to the United States" had a "direct, substantial, and reasonably foreseeable" effect on United States commerce.<sup>179</sup> Thus, the defendants were liable, regardless of whether the Ninth Circuit analyzed the case under either the Sherman Act or the FTAIA.<sup>180</sup>

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171. *Id.* at 759.

172. *Hui Hsiung*, 778 F.3d at 754.

173. *Id.* at 756.

174. *Id.* at 758 (citing *United States v. LSL Biotechs.*, 379 F.3d 672, 680–81 (9th Cir. 2004)).

175. *Id.*

176. *Id.* at 759.

177. *Id.*

178. *Hui Hsiung*, 778 F.3d at 759.

179. *Id.* at 759–60.

180. *Id.* at 743.

2. *Narrow Rule: Seventh Circuit's Motorola Mobility LLC v. AU Optronics Corp.*

The Seventh Circuit ruled differently in a factually similar case. In *Motorola Mobility LLC v. AU Optronics Corp.*, Motorola accused AU Optronics, a defendant in *Hui Hsiung*, of price-fixing when it sold LCD panels to Motorola, its foreign subsidiaries, and other U.S.-based companies.<sup>181</sup> Forty-two percent of these LCDs were purchased by foreign companies and passed through an “extended, multi-step foreign supply chain that ended with their incorporation into cellphones at foreign factories.”<sup>182</sup> These cellphones were eventually shipped to Motorola for sale; only one percent of the panels were directly purchased by Motorola’s foreign subsidiaries.<sup>183</sup> The other fifty-seven percent, on the other hand, did not enter domestic commerce; they were incorporated into products that were sold abroad.<sup>184</sup> The Seventh Circuit first found that the transactions of the defendants did not rise to the level of “import commerce” to be analyzed under the Sherman Act.<sup>185</sup> It then found that even though the conspiracy had *some* effect within the United States, it was too indirect or remote to satisfy the “direct effects” test of the FTAIA.<sup>186</sup> It reasoned that the price-fixing did not have any effect on prices in the United States because the cartel price would have been what Motorola charged, regardless of whether the alleged conspiracy were true.<sup>187</sup> Furthermore, the effect of the alleged price fixing was mediated because Motorola ultimately decided the retail price of the cellphone.<sup>188</sup> Consequently, the “effects” of defendant’s practice did not give rise to an antitrust claim, having failed to pass the second exemption of the statute.<sup>189</sup>

The Seventh Circuit also considered the remedies Motorola’s foreign subsidiaries had in countries where they were incorporated, the prevalence of importing products into the United States containing components that producers had bought from foreign manufacturers, and the “serious risk of interfer[ing]” with a foreign nation independently regulating its own commercial affairs.<sup>190</sup> Ultimately, the court

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181. *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 817 (7th Cir. 2015).

182. Brief for Respondents in Opposition at 6, *Motorola Mobility LLC v. AU Optronics Corp.*, 135 S. Ct. 2837 (2015) (mem.) (No. 14-1122), 2015 WL 2375815, at \*6.

183. *Motorola*, 775 F.3d at 817.

184. *Id.*

185. *Id.* at 818–19.

186. *Id.* at 819.

187. *Id.*

188. *Id.*

189. *Motorola*, 775 F.3d at 820–21.

190. *Id.* at 824 (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004)).

concluded that due to all of these considerations, Motorola did not succeed in its allegations. The Seventh Circuit's opinion is irreconcilable with the Ninth Circuit's ruling.<sup>191</sup>

The conflict between these two circuit courts "could not be sharper."<sup>192</sup> "The two cases dealt with the same products, same conspiracy, and the same FTAIA provisions"; and yet, the Ninth and Seventh Circuits arrived at opposite conclusions.<sup>193</sup> The Ninth Circuit held that a foreign company's anticompetitive conduct that affects the prices of goods sold in the United States is sufficient for a U.S. antitrust claim, while the Seventh Circuit ruled narrowly by requiring a tighter nexus between the alleged conduct of a foreign company with its effect on the United States.<sup>194</sup> These differing conclusions pose a threat to the stability of U.S. antitrust laws and must immediately be resolved, either through the other circuit courts' adoption of one rule or the Supreme Court's intervention.

### III. ANALYSIS

This Part discusses the differences between the reasoning of the Seventh and Ninth Circuits by considering their application of existing case law and analyzing their relevant arguments. First, this Part lays out why an established rule is necessary in light of today's global economy.<sup>195</sup> Second, this Part discusses the differing arguments of both the Seventh and Ninth Circuits and the merits of their arguments.<sup>196</sup> Third, this Part proposes which of the two opinions advances a stronger and more apt interpretation of the FTAIA in today's global economy, and finally it argues why U.S. courts, including the U.S. Supreme Court, should apply the Ninth Circuit's "broad" interpretation in subsequent cases.<sup>197</sup>

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191. *Id.* at 825.

192. Petition for Writ of Certiorari at 3, *Hui Hsiung v. United States*, 135 S. Ct. 2837 (2015) (mem.) (No. 14-1121), 2015 WL 1201366, at \*3.

193. J. Taylor Kirklin & Deirdre A. McEvoy, *Supreme Court Surprises the Antitrust World with Denial of Cert in Motorola and AU Optronics*, PATTERSON BELKNAP WEBB & TYLER LLP: ANTITRUST UPDATE (June 15, 2015), <http://www.antitrustupdateblog.com/blog/supreme-court-surprises-antitrust-world-denial-cert-motorola-au-optronics/>.

194. *Compare* *United States v. Hui Hsiung*, 778 F.3d 738, 756 (9th Cir. 2015), *with* *Motorola*, 775 F.3d at 821.

195. *See infra* notes 198–237 and accompanying text.

196. *See infra* notes 238–90 and accompanying text.

197. *See infra* notes 291–373 and accompanying text.

A. *The Need for an Established Rule*

The FTAIA was enacted to “clarify” the Sherman Act’s application to transactions that affect U.S. commerce, yet the circuit courts have not come to a consensus as to how it must be consistently interpreted.<sup>198</sup> Similarly, despite the circuit splits that have overwhelmed the judicial system, the U.S. Supreme Court has only interpreted the FTAIA once, in *Empagran*.<sup>199</sup> The Court at that time, however, did not answer the critical question embodied in *Hui Hsiung* and *Motorola*: whether the FTAIA applies to transactions made outside of the United States but eventually have an impact upon U.S. competition, commerce, and consumers.<sup>200</sup>

The indistinguishable facts of *Hui Hsiung* and *Motorola* and the irreconcilable rulings call for a consistent rule across the circuit courts and intervention by the U.S. Supreme Court.<sup>201</sup> Both cases involved the price-fixing of LCD panels by foreign entities, whose manufactured products eventually reached the United States.<sup>202</sup> Yet, the Seventh and Ninth Circuits disagreed on what constitutes “import trade” or “import commerce.”<sup>203</sup> The Seventh Circuit held that in order to be liable, a defendant must be engaged as an importer, who directly sells goods into the United States.<sup>204</sup> Accordingly, it ruled that the one percent of LCDs sold directly to Motorola were too attenuated to become “import trade” under the Sherman Act;<sup>205</sup> the remaining forty-two percent of LCDs, which Motorola’s foreign subsidiaries bought from the defendants, were too “remote” under FTAIA.<sup>206</sup> In complete contrast, the Ninth Circuit held that any conduct consummated within an import market qualifies as either “import trade” or “import commerce.”<sup>207</sup> This meant that the defendants did not have to import any goods themselves, but only needed to have engaged in conduct within the import business to satisfy both the Sherman Act and the FTAIA.<sup>208</sup> Accordingly, the Ninth Circuit held that the defendants, although not the per se importers of the LCD panels, were

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198. Reply Brief for the Petitioner at 6, *Motorola Mobility LLC v. AU Optronics Corp.*, 135 S. Ct. 2837 (2015) (mem.) (No. 14-1122), 2015 WL 33979577, at \*6.

199. *Id.*; see also *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

200. Reply Brief for Petitioner, *supra* note 198, at 3.

201. *Id.*

202. Compare *United States v. Hui Hsiung*, 778 F.3d 738, 742 (9th Cir. 2015), with *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 821 (7th Cir. 2015).

203. Compare *Hui Hsiung*, 778 F.3d at 756, with *Motorola*, 775 F.3d at 821.

204. *Motorola*, 775 F.3d at 818–19.

205. *Id.*

206. *Id.*

207. *Hui Hsiung*, 778 F.3d at 756.

208. *Id.*

liable under either the Sherman Act or the FTAIA for engaging in business that affected the finished products that were sold into the United States.<sup>209</sup>

These two contrasting rulings have placed not only the defendants—but also other foreign companies doing business with the United States—in a precarious position.<sup>210</sup> These two cases represent the frequently recurring question of how to interpret the FTAIA.<sup>211</sup> Foreign companies that do business, directly or indirectly, want clear guidance on how their business practices could be subjected to U.S. antitrust laws.<sup>212</sup> No company will want to risk breaking the law in one jurisdiction, yet be absolved in the other.<sup>213</sup> A clear ruling across all federal courts will be beneficial to international antitrust enforcement and the domestic economy, especially with the continuous expansion of global supply chains.<sup>214</sup>

A “supply chain” is defined as “a network between a company and its suppliers to produce and distribute a specific product, and the supply chain represents the steps it takes to get the product or service to the customer.”<sup>215</sup> It essentially “encompasses each step from the supplier to the final consumer.”<sup>216</sup> Establishing global supply chains across the world has become a strategy of companies in today’s globalized economy.<sup>217</sup> Global supply chains have played an important role in the end-to-end production of goods sought by consumers across the world.<sup>218</sup> In today’s globalized economy, companies use this practice to source, manufacture, transport, and distribute products internationally.<sup>219</sup> For example, televisions are manufactured in China using displays from Taiwan and Korea.<sup>220</sup> These televisions eventually find

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209. *Id.*

210. Brief of the Nat’l Ass’n of Mfrs. as Amici Curiae in Support of Granting Certiorari at 1, *Motorola Mobility LLC v. AU Optronics Corp.*, 135 S. Ct. 2837 (2015) (mem.) (No. 14-1122), 2015 WL 1798939, at \*1.

211. *Id.*

212. James J. O’Connell, *Antitrust and the Limits of Globalization*, ANTITRUST, Spring 2015, at 4, 6.

213. *Id.* at 6.

214. Brief of the Nat’l Ass’n of Mfrs., *supra* note 210, at 2.

215. *Supply Chain*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/marketshare.asp> (last visited Aug. 11, 2016).

216. Smith, *supra* note 34, at 2063.

217. *Id.*

218. *Id.*

219. *Id.*

220. See Julie Hopkins, *Why Americans Don’t Make Televisions Anymore*, DETROIT NEWS (Oct. 22, 2014, 12:06 AM), <http://www.detroitnews.com/story/opinion/2014/10/22/americans-make-tvs/17680951/>.

their way into various countries, including the United States.<sup>221</sup> Due to this multi-step process, many businesses that utilize global supply chains become victims of anticompetitive activity by foreign cartels.<sup>222</sup> In fact, price-fixing conspiracies have cost consumers more than \$1 trillion over the last twenty-five years.<sup>223</sup> Needless to say, the United States, holding a huge market share of these products, should protect these supply chains to some degree through the enactment and execution of an understandable U.S. antitrust law.<sup>224</sup>

The manufacturing industry, in particular, contributes more than \$1.8 trillion annually to the U.S. economy and “employs nearly twelve million men and women.”<sup>225</sup> The goods sold by foreign intermediaries eventually find their way into the United States, some of which may be used to further domestic manufacturing.<sup>226</sup> For example, in 2014, approximately \$2.8 trillion of goods were imported into the United States.<sup>227</sup> This amount has more than doubled in the last fifteen years.<sup>228</sup> Most of these imports act as intermediate inputs on productivity used for other businesses in the United States.<sup>229</sup> For example, in 2006, over ten percent of intermediate inputs accounted for imported intermediaries used by private industries.<sup>230</sup> Without a doubt, the question presented in these two cases is of tremendous economic significance to U.S. manufacturers and the United States as a whole. The harm of the price-fixing conspiracy from these two cases alone has affected well over \$23.5 billion in sales of LCD panels imported into the United States, either as raw materials or as components of finished products.<sup>231</sup> Manufacturers have had to absorb the artificially high costs of the LCD panels as they incorporate the component LCD panels into finished products, and they ultimately pass those arti-

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221. *Id.*

222. Smith, *supra* note 34, at 2063.

223. John M. Connor, The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-2013, at 23 (Aug. 9, 2014) (unpublished manuscript), <http://ssrn.com/abstract=2478271>.

224. *Id.* at 24.

225. Brief of the Nat'l Ass'n of Mfrs., *supra* note 210, at 1.

226. *Id.* at 1-2.

227. *Annual Trade Highlights*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/statistics/highlights/annual.html> (last visited Aug. 11, 2016).

228. *U.S. Trade in Goods and Services - Balance of Payments (BOP) Basis*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/statistics/historical/gands.pdf> (last visited Aug. 11, 2016).

229. Brief of the Nat'l Ass'n of Mfrs., *supra* note 210, at 6.

230. Lucy P. Eldridge & Michael J. Harper, *Effects of Imported Immediate Inputs on Productivity*, MONTHLY LAB. REV., June 2010, at 3, 5.

231. *United States v. Hui Hsiung*, 778 F.3d 738, 759 (9th Cir. 2015).

cially inflated costs on to U.S. consumers.<sup>232</sup> Price-sensitive consumers, in return, may have refused to purchase these more expensive products, altering the demand-supply market and impacting the companies' bottom lines.

The lack of an established rule—highlighted by the circuit split in interpreting the FTAIA—has effectively made it burdensome for companies to develop transactions for goods intended for eventual import into the United States. This issue does not apply only to the manufacturing industry.<sup>233</sup> Companies engaging in transactions with the United States, whether directly or indirectly, need to know the possible effects of their decisions.<sup>234</sup> Given that corporations engage in multitudinous transactions, it is highly important and necessary for companies to know precisely how these transactions could create financial and legal risks/consequences.<sup>235</sup> The costs associated with the uncertainty create a burden to producers, causing them to increase product prices to offset the risks.<sup>236</sup> These higher prices could then be passed on to U.S. consumers, which would negatively impact the U.S. economy.<sup>237</sup>

Having highlighted the importance of an established rule, certiorari to the U.S. Supreme Court and a consistent ruling across the courts are warranted. Providing clarity on how to interpret FTAIA would (1) resolve the conflict between the circuits regarding the scope of the “import commerce” clause of the Sherman Act; (2) clarify how “direct, substantial, and reasonably foreseeable effects” of the FTAIA must be interpreted; (3) recognize and fix the ubiquitous nature of component price fixing abroad; (4) deter the formation of more cartels adversely impacting the United States; and (5) keep up with the growing demands of the international business community.

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232. *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 821–22 (7th Cir. 2014).

233. Ryan A. Haas, Comment, *Act Locally, Apply Globally: Protecting Consumers from International Cartels by Applying Domestic Antitrust Law Globally*, 15 *LOY. CONSUMER L. REV.* 99, 119 (2003).

234. Brief of the Nat'l Ass'n of Mfrs., *supra* note 210, at 2.

235. *Id.* As presented by the petitioners, four scenarios could arise with the lack of an established rule:

- (a) the transshipment of price-fixed goods via an overseas destination to the United States; (b) the direct importation of price-fixed goods into the United States; (c) the shipment of price-fixed goods to an overseas affiliate of the domestic purchaser for incorporation into finished products delivered to the United States; and (d) the shipment of price-fixed goods to an overseas affiliate of the domestic purchaser for incorporation into finished products delivered abroad.

*Id.* at 4.

236. *Id.* at 8.

237. *Id.*



## B. *Overarching Themes of the Sherman Act and FTAIA*

The Seventh and Ninth Circuits' rulings revolved around similar overarching themes that the other U.S. courts have attempted to resolve through the years. First, this Section discusses both the Circuit Courts' interpretations of "import commerce," particularly those of the Seventh and Ninth Circuits, as to when the Sherman Act can be applied to foreign companies' transactions made outside of the United States.<sup>238</sup> Second, this Section analyzes what kinds of conduct could successfully subject foreign companies under the FTAIA.<sup>239</sup> Third, this Section explores the Seventh Circuit's analysis of its ruling under international comity and deterrence considerations.<sup>240</sup>

### 1. *Import Commerce Under the Sherman Act*

The Seventh Circuit defined "import trade" or "import commerce"—two phrases to describe the same concept—as "trade involving only foreign sellers and domestic buyers."<sup>241</sup> Manufacturers that directly sell goods into the United States are the only entities potentially liable under the Sherman Act.<sup>242</sup> Motorola bought only one percent of the LCD panels that were sold by the defendants.<sup>243</sup> This one percent of purchased panels were shipped to the United States and used to manufacture cellphones.<sup>244</sup> Only those panels incorporated into the cellphones sold in the United States are subject to the Sherman Act.<sup>245</sup> The one percent, according to the Seventh Circuit, was too "remote" to give rise to a Sherman Act claim.<sup>246</sup> The court refused to include the other ninety-nine percent because these were panels that were bought by Motorola's foreign subsidiaries. Where the phones were ultimately sold, in the United States or in a foreign country, did not matter.<sup>247</sup> It was Motorola's foreign subsidiaries that purchased the artificially high price of the panels.<sup>248</sup> Therefore, the Seventh Circuit held that Motorola and its customers were just the

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238. *See infra* notes 241–61 and accompanying text.

239. *See infra* notes 262–83 and accompanying text.

240. *See infra* notes 284–90 and accompanying text.

241. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 855 (7th Cir. 2012).

242. *Motorola*, 775 F.3d at 817–18.

243. *Id.* at 817.

244. *Id.*

245. *Id.*

246. *Id.* at 819.

247. *Id.* at 817–18.

248. *Motorola*, 775 F.3d at 817–18.

“indirect purchasers”; they are not within the purview of the Sherman Act.<sup>249</sup>

Motorola argued that the forty-two percent of panels that eventually reached U.S. commerce should be treated similarly as that of the one percent that did, even though Motorola’s foreign subsidiaries technically purchased the LCD panels from the defendants.<sup>250</sup> Motorola contended that it, together with its foreign subsidiaries, acted and functioned as a “single enterprise” by managing the operations of the whole company from pricing negotiations, purchasing components, manufacturing and distribution processes, and determining which finished products were imported and sold in the United States.<sup>251</sup> The Seventh Circuit rejected these arguments and held that Motorola must not ignore its deliberate decision to structure the company the way it did only because it will be beneficial to the company in this limited instance.<sup>252</sup> It reasoned that Motorola and its foreign subsidiaries are legally separate entities; thus, only the foreign subsidiaries that directly bought from these foreign defendants would be able to sue in a court that has jurisdiction over the companies.<sup>253</sup> It concluded that the relationship between a foreign plaintiff and the United States generated a minimal effect on domestic commerce, if at all.<sup>254</sup>

Relying on the Seventh and Sixth Circuits’ definitions of “import commerce,” the Ninth Circuit, to the contrary, determined that the allegations against the defendants were sufficient to establish their actions as “import commerce” falling squarely within the Sherman Act.<sup>255</sup> The defendants reached pricing agreements to import panels into the United States after conspiring through one-on-one meetings and phone calls with employees of the defendants and other LCD manufacturers.<sup>256</sup> These agreements affected over one million price-fixed panels per month, and collectively, they generated \$600 million in revenue for the defendants.<sup>257</sup> The court rejected the contention that the defendants should not be held liable because they were not importers per se.<sup>258</sup> It was undisputed that the defendants did not

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249. *Id.* at 819.

250. *Id.* at 818.

251. *Id.*

252. *Id.* at 820.

253. *Id.*

254. *Motorola*, 775 F.3d at 820.

255. *United States v. Hui Hsiung*, 778 F.3d 738, 754–56 (9th Cir. 2014) (citing *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 855 (7th Cir. 2012)); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 n.3, 440 (6th Cir. 2012).

256. Petition for Writ of Certiorari, *Hui Hsiung*, *supra* note 192, at 6.

257. *Id.* at 19.

258. *Id.* at 22.

manufacture most of the consumer products imported into the United States. Nevertheless, the Ninth Circuit concluded that the negotiations between the executives of the defendants and U.S. companies regarding the sale of panels at prices set at the Crystal Meetings were enough to classify the conduct as “import commerce.”<sup>259</sup>

Both Circuit Courts also analyzed the defendants’ conduct under the FTAIA.<sup>260</sup> Under the FTAIA, the appropriate standard is whether the anticompetitive conduct had a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce (also known as the “domestic effects” test), and whether the alleged conduct “gave rise to a [Sherman Act] claim.”<sup>261</sup>

## 2. *Domestic Effects and Gives Rise to a Claim Requirements of the FTAIA*

For the forty-two percent of LCD panels that were purchased by the foreign subsidiaries, incorporated into cellphones, and subsequently sold to the United States, Motorola had to prove that defendants’ price-fixing had a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce; next, it had to show that the alleged anticompetitive conduct gave rise to a Sherman Act claim.<sup>262</sup>

The Seventh Circuit distinguished the facts of *Motorola* from those of *Minn-Chem*.<sup>263</sup> According to Judge Posner, the effect of price-fixing in *Motorola* was less direct than the effects of the conduct in *Minn-Chem*, because “many layers” of the supply chain insulated the adverse effects, and consequently it only caused a “few ripples” in the United States.<sup>264</sup> In *Minn-Chem*, foreign cartels colluded to drive up the price of potash, knowing that the product was in high demand in the United States. The cartels subsequently *sold the product* to U.S. customers.<sup>265</sup> Unlike that case, the LCD panels bought by Motorola’s foreign subsidiaries were incorporated into finished products before they were sold to U.S. commerce.<sup>266</sup> Despite this distinction, the Seventh Circuit still assumed that the first requirement of the FTAIA was

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259. *Id.* at 10; see *Hui Hsiung*, 778 F.3d at 756.

260. Compare *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 827 (7th Cir. 2015), with *Hui Hsiung*, 778 F.3d at 749.

261. 15 U.S.C. §§ 1–7 (2012).

262. *Motorola*, 775 F.3d at 818.

263. *Id.* at 819 (citing *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 860 (7th Cir. 2012)).

264. *Id.* at 819 (quoting *Minn-Chem*, 683 F.3d at 860).

265. *Minn-Chem*, 683 F.3d at 860.

266. *Motorola*, 775 F.3d at 819.

satisfied, and the court proceeded with the analysis of the second requirement.<sup>267</sup>

It is true that the cost of cellphones sold into the United States increased as a result of the price-fixing conduct; however, the Seventh Circuit noted that the price increase caused by the cartel occurred entirely in foreign commerce.<sup>268</sup> The foreign subsidiaries bought the LCD panels from the defendants at the inflated price.<sup>269</sup> The subsidiaries subsequently increased the price of the cellphones that were sold to Motorola to compensate for this increase.<sup>270</sup> On top of that, Motorola further increased the price by “*more* than the increased price charged to it by its foreign subsidiaries.”<sup>271</sup> As a result of this set up, according to the Seventh Circuit, Motorola may even have profited from the price-fixing of the LCD panels.<sup>272</sup> Consequently, the Seventh Circuit held that any injury alleged by Motorola and its customers was only “derivative,” as their positions in the global supply chain were already at a “subsequent level” of distribution.<sup>273</sup> The court concluded that the immediate victims of the defendants are Motorola’s foreign subsidiaries, not Motorola itself.<sup>274</sup> The price-fixing could then not have given rise to Motorola’s claim, and therefore the FTAIA did not apply.<sup>275</sup>

In analyzing the domestic effect theory on the defendants’ conduct, the Ninth Circuit instead focused its attention on the meaning of “direct.”<sup>276</sup> Its prior ruling in *LSL Biotechnologies* gave light to this definition; an effect is “direct” if “it follow[s] ‘as an immediate consequence’ of the defendant’s activity.”<sup>277</sup> The court held that applying this rule, together with the undisputed facts and events surrounding the conspiracy, led to the conclusion that the United States was affected by the “immediate consequence of the price-fixing.”<sup>278</sup> The LCDs were “a substantial cost component of the finished product.”<sup>279</sup> According to the Court, “[I]f the panel price goes up, then it

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267. *Id.*

268. *Id.* at 820.

269. *Id.* at 817.

270. *Id.* at 819.

271. *Id.*

272. *Motorola*, 775 F.3d at 819.

273. *Id.* at 820–21.

274. *Id.* at 818.

275. *Id.*

276. *United States v. Hui Hsiung*, 778 F.3d 738, 758 (9th Cir. 2015).

277. *Id.* at 759 (quoting *United States v. LSL Biotechs.*, 379 F.3d 672, 680 (9th Cir. 2004)).

278. *Id.* (quoting *LSL Biotechs.*, 379 F.3d at 680).

279. *Id.*

will directly impact the monitor set price.”<sup>280</sup> Despite expert testimony that described the ambiguous flow of how panels go from plants into a product, the court depended on the “integrated, close and direct connection between the purchase of the price-fixed panels, the United States as the destination for the products, and the ultimate inflation of prices in finished products imported to the United States” in making its decision.<sup>281</sup> Ultimately, the Ninth Circuit held that the evidence presented was sufficient to satisfy the “direct” effects test of the FTAIA, making the defendants liable.<sup>282</sup> The Ninth Circuit did not discuss at length the second requirement of the FTAIA.<sup>283</sup>

### 3. *International Comity and Deterrence*

Like the U.S. Supreme Court in *Empagran*, the Seventh Circuit considered international comity concerns in extending the reach of the FTAIA.<sup>284</sup> In *Empagran*, the U.S. Supreme Court held that rampant extraterritorial “application of [U.S.] laws creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.”<sup>285</sup> Applying this theory to *Motorola*, the Seventh Circuit stated that allowing companies like Motorola to win would allow companies to forum shop and to neglect international comity principles established by precedent.<sup>286</sup> The court held that companies could find redress in foreign jurisdictions for component price-fixing.<sup>287</sup> The companies just need to find the appropriate jurisdiction in which to seek remedies; that jurisdiction is abroad, under the laws of the country where they were incorporated.<sup>288</sup> By extending the reach of the FTAIA to non-import trade, the Seventh Circuit hinted that this would presume the inadequacy of antitrust laws of foreign countries; a presumption that would hamper the efforts other countries, including the United States, in developing and implementing adequate antitrust laws globally.<sup>289</sup>

The Ninth Circuit did not specifically discuss international comity nor deterrence in its ruling. Extending the reach of the FTAIA was

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280. *Id.* (alteration in original).

281. *Id.*

282. *Hui Hsiung*, 778 F.3d at 756.

283. *Id.* at 751.

284. *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 818 (7th Cir. 2015).

285. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004).

286. *Motorola*, 775 F.3d at 821.

287. *Id.* at 827.

288. *Id.*

289. *Id.* at 821.

not a concern of the court's because it held that both the Sherman Act and the FTAIA applied as a result of the defendants' conduct.<sup>290</sup>

*C. The Ninth Circuit Must Prevail: Apply the Broad Rule*

International supply chains have benefits in today's modern world. Raw materials, parts, and labor costs are generally cheaper in Asia.<sup>291</sup> Companies have more flexibility to look for other companies to transact with, given the advancement in technology and the volatility of the marketplace.<sup>292</sup> Efficiency and effectiveness increase over time as these companies collaborate and integrate their efforts to achieve optimal returns.<sup>293</sup> Customers, generally, want cheap but quality-made products.<sup>294</sup> When companies meet these demands, customers are more likely to buy the products, and as a result, other companies enter the market with the intention of delivering the same goods at a lower price.<sup>295</sup> Companies, then, both cooperate and compete against each other, finding ways to come up with final products that are more efficient, eventually leading to market growth.<sup>296</sup> However, despite these described benefits, price-fixing cartels still find a way to impose higher costs of products to consumers.<sup>297</sup>

A price-fixing cartel considers the product flow among regions in order to establish the price it will charge for a particular product.<sup>298</sup> The conspiracy, generally, will not work if the price of the product is only increased in one region because market forces will essentially re-allocate the sales to other regions that sell the product at lower prices.<sup>299</sup> For example, if the LCD conspirators focused their price increase on regions outside of the United States, U.S. companies would have a strong inclination towards limiting their purchases to

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290. *United States v. Hui Hsiung*, 778 F.3d 738, 749, 760 (9th Cir. 2015).

291. Brief of Amicus Curiae Economists and Professors in Support of Petitioner at 24, *Motorola Mobility LLC v. AU Optronics Corp.*, 135 S. Ct. 2837 (2015) (mem.) (No. 14-1122), 2015 WL 1777073, at \*24.

292. Noah F. Gans, *Issues and Benefits of Global Supply Chain Management*, BLOGSPOT: MY REVS. & EXPERIENCES (Apr. 24, 2011, 4:49 AM), <http://noahgans.blogspot.com/2011/04/global-supply-chain-management.html>.

293. Matthew B. Myers, *The Many Benefits of Supply Chain Collaboration*, SUPPLY CHAIN MGMT. REV. (Nov. 12, 2010), [http://www.scmr.com/article/the\\_many\\_benefits\\_of\\_supply\\_chain\\_collaboration](http://www.scmr.com/article/the_many_benefits_of_supply_chain_collaboration).

294. *See id.*

295. *Id.*

296. *Id.*

297. *See* John M. Connor, *Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels* 7 (Purdue Univ. Dep't of Agric. Econs. Working Paper No. 04-08, 2004), <http://ageconsearch.umn.edu/bitstream/28686/1/sp04-09.pdf>.

298. *Id.*

299. Brief of Economists and Professors, *supra* note 291, at 6.

LCD panels sold in the United States at lower prices and then exporting these panels to foreign subsidiaries themselves, thus effectively avoiding the cartel's products.<sup>300</sup> However, conspirators are savvy enough to avoid being cut out of certain markets, particularly as the United States is one of the largest consumer markets in the world.<sup>301</sup>

To avoid this problem, the LCD conspirators (or any international cartel) have an incentive to raise the prices of the products in all regions that have multinational operations, including the United States.<sup>302</sup> This action will disrupt the efficient and organized processes that help lower production costs, primarily because the United States has higher than usual labor costs compared to other countries.<sup>303</sup> With insufficient rules curtailing price-fixing cartels, U.S. companies could limit the use of international supply chains.<sup>304</sup> Moreover, they will be discouraged from conducting business or moving some businesses offshore where it will be more beneficial.<sup>305</sup> As a result, the total price of U.S. consumer goods will be higher than it would have been had they been created in countries that have lower production and labor costs.<sup>306</sup> This kind of uncertainty makes it difficult for both producers and consumers to manage the volatility of the market.

In light of the increasing demand for international business transactions, it is more important than ever that U.S. consumers are continuously protected from companies' wrongful conduct, whether or not these companies engage in these transactions while outside of the United States' jurisdiction.<sup>307</sup> The Seventh Circuit's ruling undermines this protection. It focused its analysis on technicalities of the statute, and it placed more weight on international comity concerns than on the protection of U.S. consumers, whom the legislators intended to protect when it enacted the statute.<sup>308</sup> On the contrary, the Ninth Circuit's interpretation of the FTAIA is aligned more closely with the canons of statutory interpretation.

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300. *Id.* at 7.

301. The United States makes up twenty-nine percent of the world market. *The 25 Largest Consumer's Markets . . . And the Outlook for 2015*, INT'L BUS. DEGREE GUIDE, <http://www.internationalbusinessguide.org/25-largest-consumers-markets-outlook-2015/> (last visited Aug. 10, 2016); see also Brief of Economists and Professors, *supra* note 291, at 7.

302. Brief of Economists and Professors, *supra* note 291, at 12–13.

303. *Id.* at 27.

304. *Id.* at 9.

305. *Id.* at 25.

306. *Id.* at 27.

307. See Smith, *supra* note 34, at 2083.

308. See *supra* notes 181–94 and accompanying text.

The Seventh Circuit's holding that "it was Motorola, rather than the defendants, that imported these panels into the United States"<sup>309</sup> is inconsistent with the legislative intent of the FTAIA.<sup>310</sup> Congress plainly intended to read the import-commerce exclusion broadly when it enacted the FTAIA.<sup>311</sup> In *Hartford Fire*, the U.S. Supreme Court recognized that the "FTAIA was intended to exempt from the Sherman Act [1] export transactions that [2] did not injure the United States economy."<sup>312</sup> The court reiterated this in *Empagran* when it held that the "FTAIA seeks to make clear to American exporters . . . that the Sherman Act does not prevent them from entering into business arrangements . . . , however anticompetitive, as long as those arrangements adversely affect only foreign markets."<sup>313</sup> The language of the Sherman Act neither implies nor explicitly states that it should only be applied when commercial transactions occurred in the United States, and not abroad.<sup>314</sup> This is a strained interpretation of the Act given that Congress could have explicitly stated such a rule.<sup>315</sup> The Ninth Circuit, therefore, correctly dismissed the defendants' suggestion that because they were not the importers, they should not be held liable.<sup>316</sup>

Other Federal Circuit Courts of Appeal have held in accordance with the Ninth Circuit, suggesting that some federal courts are in agreement with this reading of the FTAIA's legislative intent. In *Animal Science*, the Third Circuit held that in order to find liability, the anticompetitive behavior of the defendant must have been "directed at an import market."<sup>317</sup> Thus, in holding this, the defendants needed only to "function as the physical importers of goods."<sup>318</sup> This meant that there was not a "necessary prerequisite" that the defendants are the importers per se before antitrust laws could apply;<sup>319</sup>

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309. *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 818 (7th Cir. 2015).

310. Smith, *supra* note 34, at 2093–95.

311. *The FTAIA in State Court: A Defense Perspective*, LAW360 (Feb. 24, 2010, 4:45 PM), <https://www.law360.com/articles/149024/the-ftaia-in-state-court-a-defense-perspective>.

312. Reply Brief for Appellant-Petitioner, *supra* note 198, at 6 (alteration in original) (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 n.23 (1993)).

313. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004).

314. Smith, *supra* note 34, at 2085.

315. Reply Brief for Appellant-Petitioner, *supra* note 198, at 13.

316. Petition for a Writ of Certiorari at 14–17, *Motorola Mobility LLC v. AU Optronics Corp.*, 135 S. Ct. 2837 (2015) (mem.) (No. 14-1122), 2015 WL 1223711, at \*14–17.

317. *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011) (quoting *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 303 (3d Cir. 2002), *overruled by Animal Sci.*, 654 F.3d at 462)).

318. *Id.*

319. *Id.*



“[f]unctioning as a physical importer” will be sufficient.<sup>320</sup> Here, even though the defendants did not import the LCD panels into the United States per se, the panels’ incorporation into the electronics that were subsequently imported into the United States was sufficient to pass the test.<sup>321</sup> The defendants knew that these panels could not stand alone, but rather must be combined with other parts to manufacture a final product.<sup>322</sup> That knowledge, the foreseeability of the effect to the United States, and the intentional inflation of the price to an artificially high level meant that the defendants “functioned as a physical importer,” falling squarely under the Sherman Act.<sup>323</sup>

With regard to the first requirement of the FTAIA, Judge Posner for the Seventh Circuit, wrote that the domestic effect was too “remote” to satisfy the “direct effects” test because the conduct occurred abroad and then passed through a multi-step process before causing “a few ripples in the United States.”<sup>324</sup> However, this reasoning assumes the presence of a complicated process to import the LCDs when, in fact, there was none.<sup>325</sup> The LCDs were purchased at a high price, incorporated into electronics, and almost instantly shipped to the United States.<sup>326</sup> The process was limited to purchasing, manufacturing, and distribution,<sup>327</sup> and the LCD panels have no utility without being incorporated in various consumer products, such as mobile phones.<sup>328</sup> The artificially high price of the panels was the exclusive factor that adversely impacted U.S. commerce.<sup>329</sup> Assuming relatively flat labor costs, the price of the final product would not have increased had it not been for the defendants’ anticompetitive conspiracy to increase the panels’ price. The Ninth Circuit’s interpretation of “direct effects” is therefore proper. The United States market was directly

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320. *Id.*

321. *United States v. Hui Hsiung*, 778 F.3d 738, 756 (9th Cir. 2015).

322. Smith, *supra* note 34, at 2093.

323. Michael Sennett et al., *Antitrust Alert: Recent U.S. Cases May Allow New Antitrust Challenges to Foreign Conduct*, JONES DAY ANTITRUST ALERT (Oct. 2011), <http://www.jonesday.com/antitrust-alert—recent-us-cases-may-allow-new-antitrust-challenges-to-foreign-conduct-10-13-2011/>.

324. *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 819 (7th Cir. 2015) (quoting *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 860 (7th Cir. 2012)); *see also* Smith, *supra* note 34, at 2092.

325. Smith, *supra* note 34, at 2093.

326. *Id.*

327. *Id.*

328. Ellen Meriwether, *Motorola Mobility and the FTAIA: If Not Here, Then Where?* Antitrust, Spring 2015, at 8, 10.

329. Smith, *supra* note 34, at 2093.

impacted as a result of the “immediate consequence” of the defendants’ price-fixing conspiracy.<sup>330</sup>

With regard to the “gives rise to” requirement of the FTAIA, the Seventh Circuit’s opinion was sparse, despite consensus among the other circuits.<sup>331</sup> The Seventh Circuit relied on the argument that Motorola could not recover because the injury “occurred entirely in foreign commerce.”<sup>332</sup> By concluding that the defendants’ conduct did not give rise to Motorola’s claim, the court misread the holding in *Empagran*,<sup>333</sup> in which the U.S. Supreme Court highlighted the importance of our nation’s “ability . . . to regulate its own commercial affairs.”<sup>334</sup> However, it also held that antitrust laws may be applied to foreign anticompetitive conduct so long as it is “reasonable” and it reflects “legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.”<sup>335</sup> That is exactly the issue in *Motorola*. The Seventh Circuit held that Motorola’s overcharge claims as a result of defendants’ inflated price did not give rise to those claims.<sup>336</sup> It reasoned that the harm happened abroad when Motorola purchased the price-fixed panels, independent of the increased cell phone prices.<sup>337</sup> But as stated above, the artificially high price of the LCD panels was the reason Motorola was seeking a remedy.<sup>338</sup> Had the defendants not conspired to fix the price of these components, the final product price of the mobile phones would not have increased; Motorola would not have been forced to pass on the artificial price increase to U.S. consumers.<sup>339</sup> Instead of focusing on the linguistics the U.S. Supreme Court employed in *Empagran*, the Seventh Circuit should have applied a “more natural” reading by fo-

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330. *United States v. Hui Hsiung*, 778 F.3d 738, 758 (9th Cir. 2015).

331. Smith, *supra* note 34, at 2073, 2076; see *Hui Hsiung*, 778 F.3d at 758; *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 414 (2d Cir. 2014) (holding that the statutory language “gives rise to” indicates a direct, causal, or proximate relationship); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 988 (9th Cir. 2008) (holding that the “gives rise to” language of the domestic injury exception requires a direct or proximate causal relationship); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007) (holding that the statutory “gives rise to language” requires a direct or proximate causal relationship and that this standard is in accordance with the principles of prescriptive comity). These courts utilized the “proximate causation” standard.

332. *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 819 (7th Cir. 2015).

333. Brief for the Am. Antitrust Inst. as Amicus Curiae Supporting Petitioner at 4, 18, *Motorola Mobility LLC v. AU Optronics Corp.*, 135 S. Ct. 2837 (2015) (mem.) (No. 14-1122), 2015 WL 1798940, at \*4, \*18.

334. *F. Hoffman-La Roche v. Empagran*, 542 U.S. 155, 165 (2004).

335. *Id.*

336. *Motorola*, 775 F.3d at 818–19.

337. Meriwether, *supra* note 328, at 8.

338. Smith, *supra* note 34, at 2093.

339. *Id.*

cusing on the basic purpose of the FTAIA and the Sherman Act—protection of U.S. consumers.<sup>340</sup> After all, it has been widely recognized that, in a global economy, anticompetitive conduct can negatively impact domestic markets by inflating prices paid by U.S. commerce.<sup>341</sup> This is an outcome that U.S. antitrust laws were created to combat.<sup>342</sup>

The Seventh Circuit ruling also addressed policy arguments that are pertinent in today's global economy. It held that foreign subsidiaries could bring suit to seek remedies under the laws of the country where they operated, and in light of this, the United States must not overextend its reach. Rather, it should allow foreign countries to govern conduct that occurs exclusively within their borders.<sup>343</sup> However, the court failed to consider that allowing a private company to pursue claims under U.S. antitrust law would detect and deter the formation of cartels.<sup>344</sup> Treble damages are available under U.S. antitrust law.<sup>345</sup> The adversaries of this proposition argue that this would presume the inadequacy of the antitrust laws of foreign countries.<sup>346</sup> They argue that foreign countries, with the help of the United States, set up their own antitrust laws and continue to improve these laws throughout the years; thus, these foreign laws must prevail in dealing with foreign anticompetitive conduct.<sup>347</sup> While it is true that the United States has taken on a role to help foreign countries develop their own antitrust laws, the Seventh Circuit's ruling presumes that fines and criminal prosecutions, both here and abroad, are sufficient to deter global cartels.<sup>348</sup>

The truth is, collective laws across the nations are still inadequate to protect U.S. companies and consumers, primarily because many nations still do not have laws against international price-fixing cartels.<sup>349</sup> In fact, only a limited number of countries allow private companies to

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340. Brief for the Am. Antitrust Inst., *supra* note 333, at 17.

341. Leon B. Greenfield et al., *Foreign Component Cartels and the U.S. Antitrust Laws: A First Principle Approach*, ANTITRUST, Spring 2015, at 18, 19.

342. *Id.*

343. *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 821 (7th Cir. 2015).

344. Brief of Amicus Curiae Economists and Professors, *supra* note 291, at 3.

345. *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Jan. 19, 2017).

346. *Id.* at 4.

347. *See Motorola*, 775 F.3d at 824.

348. Meriwether, *supra* note 328, at 8.

349. Brief of Amicus Curiae Economists and Professors, *supra* note 291, at 4–5.

bring private antitrust claims for damages.<sup>350</sup> On the other hand, existing antitrust laws in many other countries are insufficient because the penalties are significantly lower than those in the United States; therefore, this discrepancy fails to deter foreign companies from forming international price-fixing cartels.<sup>351</sup> The financial gains from a conspiracy far outweigh the maximum criminal and civil fines imposed by other countries' antitrust laws.<sup>352</sup>

The presence of price-fixing conspiracies for products such as LCDs, automotive parts, vitamins, and DRAM illustrate these ineffective antitrust laws.<sup>353</sup> Companies engaged in these conspiracies know how the system works and will repeatedly participate in cartels without more rigid rules in place, such as that of the Ninth Circuit's.<sup>354</sup> The Seventh Circuit's logic seems misplaced when focused on the availability (or the lack thereof) of the laws in foreign countries where the conduct occurred. The antitrust laws of the United States have nothing to do with the adequacy or inadequacy of other countries' antitrust laws. Rather, they have everything to do with the fact that U.S. consumers were injured.

In *Empagran*, the U.S. Supreme Court held that extraterritorial application of U.S. antitrust law should be limited to balance the "legitimate sovereign interests of other nations."<sup>355</sup> One of the fears is that foreign plaintiffs with no relation to domestic commerce would flock to the United States to recover damages, which would be too costly given the already scarce judicial resources.<sup>356</sup> The Seventh Circuit emphasized the principle of international comity and brought up the same concern in its *Motorola* opinion.<sup>357</sup> However, the enactment of the FTAIA, particularly the "gives rise to" requirement, already accounts for this concern.<sup>358</sup> This second requirement of the FTAIA ensures that all causes of action that have domestic effects to the United

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350. Meriwether, *supra* note 328, at 13. Even though these countries allow recovery for antitrust violations, private companies are still unlikely to succeed because of stringent requirements of proving actual damages and requiring plaintiffs to pay all court costs. *Id.* at 14.

351. Brief of Amicus Curiae Economists and Professors, *supra* note 291, at 8.

352. *Id.*

353. *Id.*

354. *Id.* at 9.

355. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164–65 (2004).

356. *But see* Siddharth Fernandes, Note, *F. Hoffmann-Laroche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: Where Comity and Deterrence Collide*, 20 CONN. J. INT'L L. 267, 304 (2005) (discussing how courts can use the *forum non conveniens* doctrine to "filter out foreign plaintiffs who have no relation to domestic commerce").

357. *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 824–25 (7th Cir. 2015).

358. Smith, *supra* note 34, at 2092.

States are the proximate causes to those effects.<sup>359</sup> Congress, therefore, made sure that unnecessary suits are not filed in U.S. jurisdictions, while not overstepping into another country's interests.<sup>360</sup> In *Motorola*, it is undisputed that the defendants' conduct had domestic effects, as the inflated prices paid by the foreign purchases were ultimately passed on to U.S. consumers.<sup>361</sup> Motorola purchased over \$5 billion worth of panels, over fifty percent of which eventually entered U.S. commerce.<sup>362</sup> What seems to be a small increase in the price of the panels nonetheless would have a substantial effect on the market.<sup>363</sup> Furthermore, the defendants were business executives engaged in global supply chains.<sup>364</sup> If they did not already, they should have known that the artificially inflated price of these LCD panels targeted to reach the United States (as alleged by Motorola) would have an impact on the U.S. market.<sup>365</sup>

Moreover, it does not appear that these cases have raised serious comity concerns; despite the DOJ's prosecution of the foreign companies and their employees, no foreign government has stepped forward expressing deep concerns about the overreaching enforcement of antitrust law.<sup>366</sup> This is not to say that courts must forget about the importance of international comity when analyzing antitrust cases. International comity ensures that the United States does not overstep into foreign countries' authority when extending the reach of U.S. antitrust laws.<sup>367</sup> In fact, the United States has proactively assisted foreign countries in their efforts to capture more anticompetitive conduct.<sup>368</sup> However, despite the need to "tread softly" in this arena, the United States must put down its foot and continue to litigate claims of anticompetitive conduct by foreign companies, so long as the foreign anticompetitive conduct satisfies the requirements of the FTAIA.<sup>369</sup>

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359. *Id.*

360. *Id.*

361. Meriwether, *supra* note 328, at 8.

362. *Motorola*, 775 F.3d at 817–18.

363. Smith, *supra* note 34, at 2093.

364. *Id.*

365. *See id.*

366. Meriwether, *supra* note 328, at 13.

367. *See Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 549 F.2d 597, 615 (9th Cir. 1976), *superseded by statute*, FTAIA, 15 U.S.C. § 6a (2012), *as recognized in McGlinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988) (reasoning that Congress enacted section 6a to provide for one application of the Sherman Act).

368. *See Fernandes*, *supra* note 356, at 268–69.

369. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 952 (7th Cir. 2003) (en banc), *overruled by Minn-Chem Inc. v. Agrium Inc.*, 683 F.3d 845 (7th Cir. 2015) (holding that

Limiting the extent of the FTAIA, as the defendants contended and the Seventh Circuit ruled, would significantly destabilize the enforcement of antitrust law—“a central safeguard for the Nation’s free market structures,” which “is ‘as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.’”<sup>370</sup> The Seventh Circuit, in ruling that a “component” is not “direct” enough to provide sufficient basis for liability under the statute, precluded any claim that involved components of finished goods imported into the United States from being brought under the Sherman Act.<sup>371</sup> In effect, the court has made a *per se* rule that claims based on foreign conduct regarding a component of finished goods that eventually reach the United States have no place in the United States’ jurisdiction.<sup>372</sup> This sweeping decision has negative ramifications in the detection of cartels, the protection of U.S. consumers, and the development of the international business community.<sup>373</sup>

The Ninth Circuit’s logic and reasoning should prevail in subsequent cases. It allows for a more rigid, yet necessary, rule in the rapid growth of the economy. By the Ninth Circuit’s logic, foreign cartels that harm U.S. commerce will be reached by U.S. antitrust laws. Treble damages will disincentivize these foreign companies from pursuing anticompetitive conduct; products will not be overpriced as a result of cartels’ price-fixing; transactions among domestic and/or foreign producers will be much smoother because both parties are at ease. U.S. Supreme Court involvement, interpreting how the FTAIA applies to non-import trade, would provide answers to questions that federal courts have been struggling to answer for many years, and it would reverberate the United States’ firm position against conspiracies that adversely impact U.S. consumers and the U.S. economy.

#### IV. IMPACT: THE FTAIA’S EXPANDED REACH MORE EFFECTIVELY DETERS ANTICOMPETITIVE CONDUCT AND PROTECTS CONSUMERS

Anticompetitive activity of cartels and the globalization of commerce have exponentially accelerated the gap between buyers and

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the “FTAIA’s criteria relate to the merits of a claim, and not the subject-matter jurisdiction of the court”).

370. *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1109 (2015) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

371. Meriwether, *supra* note 328, at 8.

372. *Id.*

373. *Id.*

sellers.<sup>374</sup> Collectively, increasing poverty, the decline in median income, and the collusion of companies to sell products at a certain price put buyers at the mercy of these cartels.<sup>375</sup> Sometimes, because the products are inelastic, consumers have no choice but to accept the inflated purchase price.<sup>376</sup> As global supply chains continue to expand, business transactions become a source of potential victims by perpetrators of consumer fraud.<sup>377</sup> This raises the need for stricter rules to protect the consumers who are more likely in a worse financial position than that of companies taking advantage of these consumers. Expanding the reach of the FTAIA to include transactions made outside of the United States but nonetheless have an impact to U.S. commerce, as held by the Ninth Circuit, will reduce this prevalent issue.<sup>378</sup> This Part discusses the effects of this proposal to the protection of U.S. consumers and the international business community.

In today's global economy, it is difficult to distinguish and separate foreign from domestic effects.<sup>379</sup> Global supply chains have made it easier for products to move rapidly and with ease. The United States, holding twenty-one percent of the worldwide Gross Domestic Product (GDP), is most susceptible to cartel targeting.<sup>380</sup> With twenty-nine percent market share, it is the largest consumer in the world.<sup>381</sup> Any impact of collusion in the international market is intertwined with a harm to customers in the United States.<sup>382</sup> Measures must be taken to ensure that markets remain open and competitive; no company should be able to dominate and restrict the supply of products sold. With a rigid rule in place, formation of domestic and international cartels would decline, further strengthening competition.<sup>383</sup> After all, the protection

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374. Haas, *supra* note 233, at 99–100.

375. Riazi, *supra* note 2, at 1322.

376. “Inelastic” products are those whose demand remains relatively stable despite the change in price. See Michelle Dwyer, *What Is the Difference Between Price Elasticity and Inelasticity?*, CHRON, <http://smallbusiness.chron.com/difference-between-price-elasticity-inelasticity-74240.html> (last visited Aug. 11, 2016). Conversely, “elastic” products are those that have bigger dependence on the change in price; a change in price causes a bigger change in demand. *Id.* Examples include gasoline, cigarettes, and Apple products. See Tejvan Pettinger, *Examples of Elasticity*, ECON. HELP (May 4, 2014), <http://www.economicshelp.org/blog/7019/economics/examples-of-elasticity/>.

377. See Smith, *supra* note 34, at 2087.

378. See Haas, *supra* note 233, at 104.

379. Fernandes, *supra* note 356, at 316.

380. *Id.*

381. *The 25 Largest Consumer's Markets*, *supra* note 301.

382. Fernandes, *supra* note 356, at 316.

383. See *id.* at 302–04.

of consumers through the preservation of deterrence is one of the main focuses of antitrust laws.<sup>384</sup>

Courts, as well as scholars, have commented that cartel deterrence should be the primary concern over international comity issues in analyzing the FTAIA.<sup>385</sup> In *United States v. Nippon Paper Indus. Co.*,<sup>386</sup> the First Circuit concluded that principles of comity should not “shield” a defendant from any intentional wrongdoings, especially if a substantial effect occurred in U.S. markets.<sup>387</sup> Otherwise, because cartel members are more likely to engage in anticompetitive conduct, a decision that is based more heavily on the international comity principle would make company transactions, domestic and abroad, confusing and ultimately increase the burden on consumers.<sup>388</sup>

Cartels, more often than not, operate in secrecy. Members can coordinate and collude to fix prices outside of U.S. jurisdiction, making it much more difficult for the U.S. government to detect and prosecute them.<sup>389</sup> To achieve deterrence, a rule that will dissuade companies from engaging in anticompetitive conduct from the very beginning will allow antitrust enforcement to be more manageable.<sup>390</sup> A cartel will most likely weigh the potential damages engaging in anticompetitive activities with the potential benefits of those anticompetitive activities.<sup>391</sup> A study conducted in the United Kingdom showed that labor productivity declined when industries are characterized by collusion or when competition is low.<sup>392</sup> The study showed, however, that once a strict antitrust law was enforced, the gap declined, if not disappeared.<sup>393</sup>

The presence of competition drives productivity by incentivizing companies to be more efficient.<sup>394</sup> Studies have revealed that competition boosts product innovation and creativity, all while firms strive to reduce their costs, by encouraging them to produce higher-quality and

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384. *Id.* at 295.

385. *Id.* at 268.

386. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997).

387. *Id.* at 8; see Fernandes, *supra* note 356, at 285.

388. See Fernandes, *supra* note 356, at 272.

389. *Id.* at 311.

390. See *Pfizer Inc. v. Gov't of India*, 434 U.S. 308, 315 (1978) (“If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries,” it is likely that companies would “enter into anticompetitive conspiracies affecting American consumers.”).

391. Fernandes, *supra* note 356, at 313.

392. Markus Kitzmuller & Martha Martinez Licetti, *Competition Policy: Encouraging Thriving Markets for Development*, VIEWPOINT, Sept. 2012, at 6, <http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/VP331-Competition-Policy.pdf>.

393. *Id.* at 3–45.

394. See *id.* at 3.



more diverse goods and services at more competitive prices.<sup>395</sup> Consumers will gain more access to markets they had not previously been exposed to as a result of commercial competition.<sup>396</sup>

Cartels limit the presence of competition in the economy.<sup>397</sup> Once producers work together to protect their own interests, to the detriment of consumers, competition is eliminated.<sup>398</sup> Cartel members either agree on a fixed price at which to sell certain products or restrict the quantity of output of the product released into the market.<sup>399</sup> By deliberately restricting the output released into the market, without a natural shift in the consumers' demand, the supply decreases, thereby increasing the price of the product.<sup>400</sup> When most of the producers in an industry are part of a cartel, consumers will have no means to find a substitute, and they will have no choice but to accept the inflated price.<sup>401</sup> For example, when AU Optronics and other defendants colluded to artificially set the price of the LCD panels, Motorola and other plaintiffs had no choice but to subsequently increase the price of their own products that used these LCD panels.<sup>402</sup> Without the cartel-priced LCD panels, Motorola's foreign subsidiaries would have been able to buy them at the market price and charge U.S. consumers less than they ultimately did.<sup>403</sup>

Extending the reach of the FTAIA to foreign conduct with an impact on U.S. commerce makes economic sense.<sup>404</sup> Judge Higginbotham's dissent in *Den Norske* was correct: Emphasizing the role of deterrence protects market efficiency.<sup>405</sup> He argued that a broad interpretation of the FTAIA would aid the DOJ's efforts in curtailing international cartels.<sup>406</sup> A cartel's overall profitability is favorably impacted by anticompetitive conduct, and this may lead cartel members to either further restrict the output or increase the price of the product.<sup>407</sup> A decrease in competition could potentially move market

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395. *Id.* at 1.

396. *Id.*

397. *Cartels*, ECON. ONLINE, *supra* note 40.

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 819 (7th Cir. 2015).

403. *Id.*

404. *See* O'Connell, *supra* note 212, at 5.

405. Riazi, *supra* note 2, at 1317 (citing *Den Norske Stats Oljeseelskap As v. HeereMac Vof*, 241 F.3d 420, 431 (5th Cir. 2001) (Higginbotham, J., dissenting)).

406. *Den Norske*, 241 F.3d at 434.

407. *Id.*; *Cartels*, ECON. ONLINE, *supra* note 40.

share away from these efficient producers.<sup>408</sup> Thus, a consistent application of the Ninth Circuit ruling across all U.S. jurisdictions will limit both this unacceptable behavior and the foreign companies' incentive to form cartels. Foreign companies will be deterred from price-fixing knowing that they could be liable for anticompetitive conspiracies, even for transactions that occurred outside of the United States.<sup>409</sup> Studies have already shown that antitrust enforcement increases productivity growth.<sup>410</sup> In fact, a study has concluded that the price of products tends to drop approximately twenty to forty percent after cartels are broken up.<sup>411</sup> The price-fixing issue is not only prevalent in the manufacturing industry, but also in the industries at issue in *Hui Hsiung* and *Motorola*.<sup>412</sup> Studies show that increased competition also benefits the agricultural, telecommunications, transport, and professional services industries.<sup>413</sup> Moreover, even though competition usually starts at a domestic level, a ruling against cartel formation will positively affect the competitiveness of the domestic products as they compete in the international community.<sup>414</sup> Companies typically acquire their production inputs from local markets and industries.<sup>415</sup> If these industries lack competition, product prices in these markets may not be priced competitively, which affects the finished products' competitiveness with foreign rivals.<sup>416</sup>

A U.S. Supreme Court ruling in favor of the Seventh Circuit will also prevent companies from potentially leaving the United States to avoid compliance with antitrust laws.<sup>417</sup> Domestic companies with foreign subsidiaries that seek to increase their market share by colluding to fix the prices of products will be deterred from engaging in illegal conduct, but they will also be incentivized to keep their businesses in the country.<sup>418</sup> Mere knowledge that companies can be liable in the United States for engaging in illegal, extraterritorial conduct that indirectly affects U.S. consumers could in itself discourage the companies from pursuing such conduct.<sup>419</sup> Likewise, without the benefit of being

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408. *Id.*

409. Haas, *supra* note 233, at 119.

410. *Kitzmuller & Licetti*, *supra* note 392, at 1–5.

411. *See id.* at 2.

412. *United States v. Hui Hsiung*, 778 F.3d 738, 742 (9th Cir. 2015); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 817 (7th Cir. 2015).

413. *Kitzmuller & Licetti*, *supra* note 392, at 2–4.

414. *Id.* at 1–2.

415. *Id.* at 3.

416. *Id.* at 1–2.

417. Brief of Amicus Curiae Economists and Professors, *supra* note 291, at 25.

418. *Id.*

419. *Id.* at 4–5.

exculpated from any extraterritorial conduct, companies will rather stay in the United States than incur expensive costs of moving overseas. This is a win-win situation; prices of products remain controlled by the natural forces of supply and demand, and small and local companies are able to compete with the bigger and international companies. On the contrary, a ruling that limits the extraterritorial reach of the FTAIA to non-import commerce, similar to what the Seventh Circuit held, will encourage companies to move their operations overseas and strategically only deal with the United States in instances they are certain will not subject them to either the Sherman Act or FTAIA.<sup>420</sup>

Arguably, ruling in favor of the Ninth Circuit could hurt companies that trade with the United States indirectly. These companies have legitimate reasons for incorporating as “foreign subsidiaries,” and subjecting them to U.S. jurisdiction would in effect deplete some of these purposes.<sup>421</sup> Although domestic legal remedies are available in some foreign countries, as mentioned above, they are unlikely to deter price-fixing by international cartels.<sup>422</sup>

Moreover, having a more consistent approach in cases like this will strengthen and harmonize the partnership across nations. Needless to say, the cooperation between these countries can play a significant role in attaining this objective. Bilateral agreements between the countries have proven that, though challenging, implementing this stricter rule is not impossible.<sup>423</sup> International trade rules, such as the General Agreement on Tariffs and Trade (GATT), World Trade Organization (WTO), Organization for Economic Cooperation and Development (OECD), and agreements between countries, imply the general acceptance of this proposal.<sup>424</sup> The rapid growth in globalization has forced governments to institute and enforce policies that both protect domestic products from multinational firms and encourage the domestic firms to compete internationally, in furtherance of international trade.<sup>425</sup>

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420. *Id.* at 12.

421. Foreign subsidiaries are usually created to take advantage of tax reductions and more cost-effective means of production and manufacturing, limit a parent company’s potential losses of the subsidiaries, diversify a parent company’s product line, maintain the identity of the parent company distinct as those of the subsidiaries, acquire easier access to local knowledge and more advanced skills in the country of the subsidiaries. *The Pros and Cons of Setting Up a Foreign Subsidiary*, SHIELD GEO GLOB. EMP’T SOLS., <http://shieldgeo.com/the-pros-and-cons-of-setting-up-a-foreign-subsi-dary-2/> (last visited Aug. 11, 2016); *see also Subsidiary*, BUS. LAW. (Mar. 31, 2012), <http://www.businesslawyers-online.com/blog/subsidiary>.

422. *See supra* notes 328–33 and accompanying text.

423. *See Haas, supra* note 233, at 120.

424. *Id.* at 120–22.

425. *Id.* at 121.

One of the partnerships the European Union (EU) and the U.S. governments are currently working on is called the Transatlantic Trade and Investment Partnership (T-TIP).<sup>426</sup> Its aim is to further develop the strong relationship nations have and leverage that relationship to boost economic growth and international competitiveness.<sup>427</sup> The agreement purports to provide greater transparency around trade and investment regulation while ensuring the quality of the products.<sup>428</sup> As part of the agreement, the governments seek to eliminate all tariffs, other duties, and charges on trade in various products between the United States and the European Union.<sup>429</sup>

The proponents of T-TIP point out that the elimination of tariffs and quotas will, among other things, entail lower costs of import to each of the regions, put products from one area “on equal footing” with the products from another, create more jobs, lower the unemployment rate, increase competitiveness, and improve the overall growth of members of the agreement.<sup>430</sup> Although the agreement seems ambitious at this time, it intends to link two of the world’s larg-

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426. Leala Padmanabhan, *TTIP: The EU-US Trade Deal Explained*, BBC NEWS (Dec. 18, 2004), <http://www.bbc.com/news/uk-politics-30493297>. With President Trump’s withdrawal from the controversial Trans-Pacific Partnership (TPP) days after his inauguration and his protectionist policies, the T-TIP is likely to be “in the freezer at least for a while.” Donna Rachel Edmunds, *TTIP: ‘Dead and Buried’ as Trump Moves Toward Bi-Lateral Trade*, BREITBART (Jan. 24, 2017), <http://www.breitbart.com/london/2017/01/24/ttip-dead-buried-trump-moves-toward-bi-lateral-trade/>.

427. *Id.*

428. Andrew Walker, *TTIP: Why the EU-US Trade Deal Matters*, BBC NEWS (May 13, 2015), <http://www.bbc.com/news/uk-politics-30493297>.

429. *Id.* The United States’ reciprocal access to the EU market will allow for the integration of high quality “made-in-USA” products into the EU supply chains and, eventually, to European customers. See *Transatlantic Trade and Investment Partnership (T-TIP)*, U.S. TRADE REP., <https://ustr.gov/ttip> (last visited Aug. 29, 2016). Moreover, non-tariff barriers and regulatory issues that reduce opportunities to compete against domestic products will be eliminated. See Walker, *supra* note 428. For example, when importing products, firms no longer have to go through expensive and repetitive tests to satisfy differing requirements of the United States and EU. *Id.* The T-TIP aims to come up with “common standards” to reduce the costs of these redundant tests. *Id.*

430. *Id.*; see *What Is TTIP?*, WAR ON WANT, <http://waronwant.org/what-ttip> (last visited Aug. 13, 2016); *What You Need to Know About TTIP*, EURO. AM. CHAM. OF COMM., <http://www.eaccny.com/international-business-resources/what-you-need-to-know-about-ttip/>. For example, U.S. farmers will no longer have to pay over seven percent in duties when shipping to Europe, compared to EU competitors that pay no duties on their shipments. Sean Ellis, *U.S.-EU Trade Agreement Could Benefit Agriculture*, CAPITAL PRESS (Oct. 29, 2014, 10:12 AM), [http://www.capitalpress.com/Nation\\_World/Nation/20141029/us-eu-trade-agreement-could-benefit-](http://www.capitalpress.com/Nation_World/Nation/20141029/us-eu-trade-agreement-could-benefit-). As a result, prices of products will decrease; customers get incentives to purchase more; businesses will have to create more jobs to keep up with the demand; and more companies will export to the EU, possibly impacting the country’s trade balance. See *What You Need To Know About TTIP*, *supra*.

est economies to generate a third of the world's GDP.<sup>431</sup> Critics argue, however, that the deregulation of several national laws—possibly resulting in lower consumer standards, as well as compromised laws covering intellectual property, food safety, privacy and data collection, and democratic legitimacy—are all steps in the wrong direction.<sup>432</sup>

Having an established rule that foreign companies' non-import trade conduct can be subjected to U.S. antitrust laws, as long as the conduct had an "immediate consequence" on U.S. commerce, could mitigate the risks associated with the opening of U.S. and EU markets. Foreign companies that will be encouraged to invest in the United States as a result of T-TIP will have an understanding of the laws and the possible repercussions of any business transaction in which they take part. These companies do not need to determine if and how any of their strategic decisions can be subjected to either the Seventh or Ninth Circuit rulings before securing deals or signing agreements. The certainty will provide companies with notice and understanding of how the law affects their decisions, thereby making their investments less risky. In return, investments could become safer, eventually having a favorable impact on the continued development of the world economy.

## V. CONCLUSION

International commerce has expanded over time. Accordingly, the U.S. courts' interpretation of antitrust laws must keep up with this rapid growth. It is time to apply a consistent rule that will solve the convoluted body of law and conflicting application of that body of law by the courts. U.S. courts must be able to reach foreign companies' extraterritorial conduct that have wrongfully affected the U.S. economy. Though international comity may have been a concern in years past, deterrence should bear a greater weight in determining whether a foreign company is subject to the United States' jurisdiction. After all, antitrust laws are geared towards protecting consumers. Ex-

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431. *What You Need To Know About TTIP*, *supra* note 430.

432. Padmanabhan, *supra* note 426. For example, the EU has stricter food regulations compared to the US. Opening the market to cheaper products from the United States might sacrifice those high standards. *Id.* The need for integration, harmonization, and mutual recognition of laws will force the nations to give up part of the democracy it was used to when both were independently legislating and executing own laws. *See id.* It is also feared that the Agreement could bring back the Anti-Counterfeiting Trade Agreement—an agreement that was largely criticized by the EU. *Id.* Jobs—though the other party believes will be created—could actually lead to unemployment as jobs switch to the US where labor standards and trade union rights are lower. *Id.* The idea of Investor-State Dispute Settlements is what scares the critics most. *Id.* In effect, this could mean that corporations can dictate policies that would benefit them, but adversely impact the consumers. *Id.*

panding the reach of the FTAIA to include transactions that occurred outside of the United States, but still have direct and significant effects in the United States, will allow for a more rigid yet necessary rule in the age of increasing international commerce. Consistency across all federal courts will provide foreign companies greater transparency with regard to the laws that govern both their import and non-import trade transactions; formation of cartels will be minimized; price-fixing of products will be easily detected and stopped; innovation and creativity will be encouraged; competition will increase; and prices of goods will likely decrease. Consequently, the United States and the global economy will be favorably impacted.

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