IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MOTOROLA, INC. Plaintiff, v. AU OPTRONICS CORPORATION, *et al.*, Defendants.	)	CASE NO. 09-cv-6610 Judge Joan B. Gottschall Magistrate Judge Sidney I. Schenkier

AMICUS CURIAE BRIEF OF TWELVE LAW PROFESSORS
IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION

Amici Curiae Twelve Law Professors (who are separately listed below and are collectively referred to as "*Amici*"), by and through undersigned counsel, respectfully submit this Brief in Support of Defendant's Motion for Reconsideration of the MDL Court's August 9, 2012 Denial of Defendants' Joint Motion for Summary Judgment on Motorola's Foreign Injury Claims.

LIST OF *AMICI*

- Anu Bradford, Professor of Law, Columbia Law School
- Darren Bush, Professor of Law and Law Foundation Professor, University of Houston Law Center
- David J. Gerber, Distinguished Professor of Law and Co-Director of the Program in International and Comparative Law, IIT Chicago-Kent College of Law
- Jeffrey L. Harrison, Stephen C. O'Connell Chair and Professor of Law, University of Florida Levin College of Law
- Herbert Hovenkamp, Ben and Dorothy Willie Professor of Law, University of Iowa College of Law
- Max Huffman, Associate Professor of Law and Dean's Fellow, Indiana University Robert H. McKinney School of Law
- Thomas Lambert, Wall Chair in Corporate Law and Governance, University of Missouri School of Law

- Geoffrey A. Manne, Lecturer in Law, Lewis & Clark Law School and Executive Director, International Center for Law & Economics
- Barak Y. Orbach, Professor of Law, University of Arizona James E. Rogers College of Law
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- D. Daniel Sokol, Associate Professor of Law, University of Florida Levin College of Law
- Christopher Jon Sprigman, Professor of Law, New York University School of Law

INTEREST OF *AMICI*

Amici are law professor at U.S. law schools who teach and research in the fields of antitrust and/or international law. They share a common interest in encouraging vigorous and effective antitrust enforcement consistent with recognized principles of domestic and international law and an equitable and rational sharing of enforcement authority among different jurisdictions around the world. *Amici* are concerned that the Court's August 9, 2012 Order Denying Defendants' Joint Motion for Summary Judgment on Motorola's Foreign Injury Claims ("Order") could be interpreted as re-establishing a territorial sovereignty view of antitrust jurisdiction, which has been rejected in the United States for the better part of seventy years and would seriously impede effective antitrust enforcement and the development of shared international enforcement. *Amici* believe that established principles of antitrust law and the Foreign Trade Antitrust Improvement Act ("FTAIA"), 15 U.S.C. § 6a, require adherence to the principle that the situs of the direct effects of an anticompetitive agreement, not the situs of the making or approval of the agreement, determine which nation's antitrust laws apply.[1]

[1] The views expressed in this brief are those of *Amici*. None of *Amici* were compensated by, or are affiliated with, any party to this case. This brief was primarily written by Professor Daniel Crane of the

STATEMENT OF FACTS

Amici offer the following brief statement of facts to explain their understanding of the jurisdictional record in this case. *Amici* base their recitation of facts solely on assertions of facts in briefs and orders in the public record of this case. They express no opinion on the actual facts of this case or of whether there are genuine issues of material fact precluding or requiring the granting of summary judgment. *Amici's* analysis of the appropriate application of extraterritoriality principles is based on this statement of facts.

This case arises from an alleged price-fixing conspiracy between a number of manufacturers of liquid crystal display ("LCD") panels, including LG Display, Sharp Corporation, Chunghwa Picture Tubes, Chi Mei Optoelectronics, and HannStar Display. Each of the alleged co-conspirators is a Japanese, South Korean, or Taiwanese company manufacturing its LCD panels in Asia.

The issue in dispute on Defendants' Motion for Summary Judgment involves sales made from Defendants to foreign subsidiaries of Motorola.[2] Defendants manufactured the LCD panels abroad. Motorola's foreign subsidiaries issued purchase orders which provided for foreign payment and foreign delivery and defendants shipped goods to Motorola's foreign subsidiaries. The foreign subsidiaries paid defendants for the goods supplied. Those subsidiaries then incorporated the LCD panels into mobile phones manufactured in the foreign markets. Some of

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University of Michigan, who is affiliated with Paul, Weiss, Rifkind, Wharton & Garrison LLP, which represents defendant Sharp in this matter.

[2] Motorola also seeks damages for sales of LCD screens made directly into the United States. Those sales are not at issue on Defendants' summary judgment motion, and *Amici* offer no opinions on the Sherman Act's coverage of such claims.

those mobile phones were imported into the U.S. and eventually sold to U.S. consumers. Some of these phones were sold to customers outside the United States. Motorola seeks to recover treble damages under the Sherman Act for these sales made outside the United States to a foreign country for use in manufacturing other products in a foreign country.

Defendants moved for summary judgment, contending that, under the FTAIA, the Sherman Act does not apply to these sales to foreign subsidiaries since the alleged direct effect of the anticompetitive agreements was increased prices charged to foreign companies for goods delivered into foreign markets. Motorola responded that since many of the contracts at issue were negotiated in the United States, the United States was the situs of the anticompetitive conduct and the Sherman Act does apply. Thus, Motorola pointed out that the defendants met with Motorola in the United States to negotiate the prices to be paid by Motorola's foreign subsidiaries and used U.S.-based employees to further the conspiracy, such as by gathering competitive information. Although Defendants contended that many of the negotiations for the prices paid by the foreign subsidiaries took place outside the United States, the Court found that Motorola had created a genuine issue of material fact on whether the final pricing decisions were made in the United States.

Based on this record, the Court denied Defendant's motion for summary judgment. It found it dispositive that "decisions regarding the pricing of LCD panels took place in the United States," Order at 5, and that the United States was the "locale of the transactions at issue." Order at 2.

ARGUMENT

I. EXTRATERRITORIAL APPLICATION OF THE SHERMAN ACT IS BASED ON THE SITUS OF THE CONDUCT'S DIRECT EFFECTS, NOT THE TERRITORY IN WHICH THE CONDUCT OCCURRED

Whether the Sherman Act applies to anticompetitive foreign conduct is governed by the FTAIA, which makes the Sherman Act applicable only when the effects of anticompetitive foreign conduct are directly felt in the United States. This was not always the case. In the early years of the Sherman Act, jurisdiction[3] was predicated on a territorial sovereignty view in which only the country where the anticompetitive conduct occurred could assert jurisdiction. In order to understand the contemporary effects-based approach, it may be helpful to contrast it with this earlier territorial sovereignty approach that prevailed until the mid-twentieth century.

The older territorial view of jurisdiction is embodied in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), a Supreme Court decision written by Justice Oliver Wendell Holmes. The plaintiff and defendant were both American corporations that owned banana plantations in Central America. The plaintiff was trying to build a new plantation in the newly formed Republic of Panama and a railway to transport the bananas out, principally for importation into the United States. The defendant allegedly used corrupt means to induce the Costa Rican army to seize the plaintiff's plantation and railway, which permitted the plaintiff to monopolize the flow of bananas into the United States. *Id.* at 355. The plaintiff then brought suit under the Sherman Act in the United States, claiming that the defendant had restrained trade and monopolized the sale of bananas into the United States.

[3] Under the law prevailing in this Circuit, the FTAIA is considered a substantive rather than jurisdictional statute. *See Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845 (7th Cir. 2012). When *Amici* refer to jurisdictional issues, they do so in light of the assumptions made in pre-FTAIA cases. Whether the FTAIA is jurisdictional or substantive has no bearing on the views presented by *Amici*.

The Court held that U.S. jurisdiction over the claims was lacking since the anticompetitive behavior took place in a foreign country. As Justice Holmes observed, "the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other states." *Id.* at 355. The Sherman Act should be "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." *Id.* at 357. Since the challenged acts were done in Costa Rica and Panama, those sovereign nations would have to determine whether the acts were lawful or unlawful according to their own domestic laws.

This territorial approach to jurisdiction enunciated in *American Banana* prevailed until the middle of the twentieth century, when it came under challenge in Judge Learned Hand's seminal decision in *U.S. v. Aluminum Co. of America* ("Alcoa"), 148 F.2d 416 (2nd Cir. 1945). One of the issues in *Alcoa* was whether the Sherman Act applied to an agreement between French, German, Swiss, British, and Canadian corporations to fix production quotas for aluminum ingot. *Id.* at 442. The agreements were executed outside the United States between foreign corporations but involved restrictions on sales of aluminum in the United States. *Id.* Defendants argued that the Sherman Act did not cover those agreements since they were physically made outside the United States.

Judge Hand began with a creative re-imagination of *American Banana*, interpreting it to mean that "[w]e 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." *Id.* at 443. This was not actually what *American Banana* had held, since there obviously were consequences in the U.S. market for the monopolization in Central America of banana plantations that primarily served the American market. Nonetheless, Judge Hand went on: "On the other hand, it is settled law . . .

that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *Id.* Judge Hand thus effectively repudiated *American Banana* and transformed the jurisdictional focus from the territory where an agreement was made to the place where the consequences or effects of the agreement arose.

Alcoa marked a significant transformation in the analysis of the Sherman Act's coverage to foreign commerce. *See* IB PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 272c at 278-79 (2006) ("Areeda") (explaining importance of *Alcoa* in shifting jurisdictional inquiry); Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 Hous. L. Rev. 285 (2007) (discussing pre-*Alcoa* test, *Alcoa* and subsequent judicial developments, and passage of FTAIA). In subsequent decisions, the Supreme Court cited *Alcoa's* effects test with approval and *American Banana's* territorial test with disapproval. *See Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 705 (1962). The effects test better reflected the legitimate enforcement interests of different jurisdictions, whereas the territory in which anticompetitive conduct physically took place might bear no relationship to the injuries caused by the conduct.

When Congress passed the FTAIA in 1982, it adopted the *Alcoa* effects test, although with some important caveats. *See generally* Areeda & Hovenkamp at ¶ 272i (discussing legislative history of FTAIA and its role in codifying the *Alcoa* test, with some refinements). Under the statute, conduct involving trade or commerce with foreign nations is covered by the Sherman Act only if that conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce and the effect gives rise to a claim under the U.S. antitrust laws. 15 U.S.C. § 6a; *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004) (examining text of

FTAIA). Significantly, the FTAIA limits the effects-based test proposed in *Alcoa* to those effects that are closely related to U.S. interests, *i.e.* based on their direct, substantial, and foreseeable relationship to U.S. commerce. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 679 (9th Cir. 2004) (explaining the independent significance of the "direct, substantial, and reasonably foreseeable" prongs of the FTAIA's effects test).

The shift from a territorial based approach to an effects-based approach is not merely an expansion of the Sherman Act's coverage allowing the antitrust laws to be enforced more broadly. The effects based approach, with its FTAIA qualifications, is also a *limitation* on the Sherman Act's extraterritorial coverage. *See* Empagran, 542 U.S. at 169 ("[T]he FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce"). The effects-based approach does not just add to the territorial-based approach; it supplants it altogether and expresses a completely different set of evaluative criteria.

Today, the effects test has been adopted not only in the United States, but also by our most significant trading partners. *See* ELEANOR FOX & DANIEL CRANE, GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW: CASES AND MATERIALS 456-460 (2010) (discussing adoption of effects test in European Union); Mark Williams, *Foreign Investment in China: Will the Anti-Monopoly Law be a Barrier or Facilitator?*, 45 Tex. Int'l L. J. 127, 135 (2009) (discussing effects based approach to jurisdiction in China's 2007 anti-monopoly law); BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL 7-33 (2002) (observing that jurisdictions such as United Kingdom, Canada, Japan, and France have adopted effects approach to jurisdiction). A sovereign state may have jurisdiction over anticompetitive behavior even though all of the relevant agreements and other behavior occurred

completely outside its borders. Conversely, the fact that an anticompetitive act may have been committed in the territory of a particular sovereign state does not give that state jurisdiction over the conduct unless the anticompetitive consequences of that conduct—higher prices to consumers—are directly felt in that state.[4]

II. PREDICATING SHERMAN ACT COVERAGE ON THE TERRITORY IN WHICH AN AGREEMENT TOOK PLACE WOULD LEAD TO PERVERSE RESULTS

The Court's summary judgment ruling appears to predicate Sherman Act coverage on two different types of conduct that took place within the physical territory of the United States. First, employees of defendants supposedly took actions, such as collecting competitive intelligence, in the United States that furthered the conspiracy. Second, the negotiations (and approval of those negotiations by Motorola) for the sale of goods from Asian manufacturing sites to Motorola's foreign subsidiaries took place in the United States, primarily at Motorola's headquarters in Schaumburg, Illinois. Notably absent from the Court's opinion is any discussion of facts tending to show an effect that is cognizable under the FTAIA—harms suffered by U.S. consumers resulting directly from the challenged conduct.

Amici respectfully submit that this sort of analysis reflects the now-supplanted territorial approach where the situs of the challenged conduct, rather than the situs of its direct effects, governs Sherman Act coverage. It would mean that the Sherman Act would apply to anticompetitive acts whenever those acts occurred physically in the United States, even if those

[4] A state may have jurisdiction *other than antitrust jurisdiction* over conduct that occurs within its borders and produces anticompetitive effects solely in other jurisdictions. For example, suppose that an American company wishes to damage another American competitor by disabling the rival's entire executive team. While the victim firm's executives are at a company retreat in Mexico, the malfeasant firm arranges to have them all poisoned. The victim firm has to shut its doors, giving the malfeasant firm a monopoly position in the U.S. market. Clearly, Mexico has the right to punish the crime in Mexico under its own criminal laws. However, Mexico would not bring an *antitrust* claim, since the anticompetitive consequences had nothing to do with the Mexican market. The antitrust claim would belong in the United States.

acts did not distort competition in U.S. markets, give rise to higher prices for U.S. consumers, or otherwise directly affect the U.S. market. Such an approach would not only violate the FTAIA and settled legal norms, but would also lead to absurd results, misallocation of judicial and enforcement resources, and a distortion in the allocation of antitrust enforcement between different jurisdictions around the world.

Where an anticompetitive agreement is formed or where the negotiations about the terms of an anticompetitive contract take place often has nothing to do with where the anticompetitive effects of the agreements are realized. Imagine, for example, that two German automobile executives happen to be vacationing in Jamaica and coincidentally meet in a bar. Over drinks, they seize the opportunity to fix the price of cars to be sold in the United States. Before the evening's end, they have worked out the entirety of the price-fixing scheme. Under a territorial view, the laws of Jamaica would govern the cartel agreement since that was where the agreement was made—indeed, the place that all of the anticompetitive conduct took place. But, for the reasons expressed in *Alcoa*, that result would be absurd. Jamaica would have no interest at all in the conspiracy. That the relevant conduct occurred in Jamaica was mere happenstance. Conversely, the United States would have a strong interest in the cartel agreement, since it pertained to the U.S. market and the U.S. market would be the situs of the agreement's direct effects. Under the effects test, American law, not Jamaican law, would apply.

This approach would also apply to a contract negotiated and signed in one country but concerning sales of goods into another. For example, many commercial contracts involving sales of goods around the world are negotiated in Hong Kong, a major business and financial center. Suppose that executives of a Malaysian seller and German buyer met in Hong Kong to negotiate a contract for delivery of goods to Germany. If the Malaysian seller happened to be

part of a price-fixing conspiracy, Hong Kong's laws would apply to the cartel—and Hong Kong does not presently have an antitrust law.[5] Obviously, it is Germany—the place where the anticompetitive effects would be immediately felt—and not Hong Kong that would have an interest in an antitrust case. Yet a territorial based approach would make the laws of Hong Kong rather than Germany applicable.

Indeed, a territorial based approach would have even more perverse effects than those hypothesized in the previous hypotheticals concerning coincidental meetings. The territorial approach would incentivize executives keen on fixing prices to travel to jurisdictions without antitrust laws or weak antitrust enforcement to consummate anticompetitive agreements. Thus, for example, under a territorial approach executives wanting to fix prices for the U.S. market could meet in Hong Kong and therefore obtain effective immunity for their conspiracy. Or members of the cartel could ask that any negotiations over contracts or prices take place in Hong Kong, knowing that this would immunize their behavior from antitrust scrutiny. Executives involved in cartels might decide to meet with each other and their customers in locales with no antitrust laws, weak antitrust enforcement, or low levels of sanctions (such as no criminal enforcement and moderate fines) in order to minimize antitrust risks. This, in turn would weaken and jeopardize antitrust enforcement against global cartels.

The FTAIA is designed to prevent these sorts of absurd results by making clear that the laws of the place where the direct effects of anticompetitive conduct appear, not the laws of the territory in which the conduct took place, should apply. That meetings may have taken place in

[5] Hong Kong's Legislative Council has adopted a limited antitrust law, but it may be years before it is implemented.

the United States or employees gathered competitive information in the United States are simply irrelevant to effects-based analysis.[6]

The reintroduction of a territorial sovereignty based approach would be seriously damaging to the global antitrust system. It would encourage countries with no legitimate interests in anticompetitive schemes to assert jurisdiction based on the happenstance of physical presence, either to block antitrust enforcement altogether or to promote parochial industrial policies. It would deprive countries with legitimate enforcement interests from vindicating the interests of their consumers. Perhaps worst of all, it would invite members of a cartel to engage in territorial gamesmanship, planning meetings and other activities in geographic locations that would minimize their antitrust exposure. The effects-based approach is designed to prevent these kinds of arbitrary and pernicious results.

CONCLUSION

Amici respectfully request that this Court reconsider the Court's August 9, 2012 Order and determine the Sherman Act's coverage under an effects-based approach.

[6] In this regard, it may be helpful to underline the fundamental distinction between personal jurisdiction—where such minimum contacts with the forum jurisdiction are important—from the FTAIA's framework for determining the coverage of domestic antitrust law, where the relevant question is not how connected to the forum jurisdiction the defendant was but where the effects of the defendant's conduct were directly felt.

Dated: September 20, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Max A. Stein, an attorney, certify that on October 3, 2013, 2013, I electronically filed the foregoing **Brief of Twelve Law Professors in Support of Defendants' Motion for Reconsideration**, using the ECF system which will send notification of that filing to counsel of record in this matter.

/s/Max A. Stein