No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Motorola Mobility LLC,

Plaintiff-Appellant,

vs.

AU Optronics Corporation, et al.,

Defendants-Appellees.

On Appeal from an Order of the
United States District Court for the Northern District of Illinois
Case No. 09-cv-6610
The Honorable Joan B. Gottschall

RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

Motorola seeks to recover overcharges allegedly paid by its foreign subsidiaries for liquid crystal display panels ("LCD" panels) that were made, sold, and delivered in foreign countries and manufactured into cellphones at foreign factories. Under the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), these foreign transactions are beyond the scope of U.S. antitrust law unless (i) the transactions had a "direct" effect on U.S. commerce, and (ii) direct effects on U.S. commerce "give rise to" Motorola's claims. *See* 15 U.S.C. § 6a.

The Panel correctly held that neither of these requirements is satisfied. First, the Panel held that any U.S. effects of the foreign sales were not "direct" because the LCD panels at issue were purchased in foreign countries, used at foreign factories, and transformed into different products before some of them reached the United States. Second, it held that any effects on U.S. commerce were not the effects that "give rise to" Motorola's claims; rather, higher prices allegedly charged in *foreign* commerce give rise to the relevant claims.

Both of these conclusions are well-reasoned and consistent with all other authority construing the FTAIA. They also properly respect the rights of foreign countries to regulate their own economies. Motorola's contrary arguments omit key facts, mischaracterize circuit precedent, and rely on contentions that Motorola expressly waived in the district court. For these reasons, as more fully set forth below, en banc review should be denied.

BACKGROUND

1. <u>The FTAIA</u>. Prior to 1982, the global reach of the Sherman Act was governed by the "effects test" articulated in *United States v. Alcoa*, 148 F.2d 416, 444-45 (2d Cir. 1945). Under that test, U.S. courts applied the Sherman Act to foreign conduct that "was meant to produce and did in fact produce some substantial effect" on U.S. commerce. *Hartford Fire Ins. v. California*, 509 U.S. 764, 795-96 (1993). The effects test, however, "was not warmly received in other

countries, which as of the mid-1940s did not as a rule have antitrust laws and which resented the apparent effort of the United States to act as the world's competition police officer." *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 960-62 (7th Cir. 2003) (en banc) (Wood, J., dissenting), *overruled on other grounds by Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc).

Congress responded by enacting the FTAIA. *See id.* The FTAIA "lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004). It "then brings such conduct back within" the Sherman Act if a two-part "domestic effects" exception is met. *Id.*

To satisfy the exception, a plaintiff first must establish a "direct, substantial, and reasonably foreseeable effect on [U.S.] trade or commerce." 15 U.S.C. § 6a. Second, the plaintiff must establish that this "direct" effect on U.S. commerce "gives rise to a claim under the provisions of [the Sherman Act]." *Id.* Together, these requirements ensure that the United States respects the rights of foreign countries to "regulate [their] own commercial affairs" and "maintain the integrity of [their] own antitrust enforcement system[s]." *Empagran*, 542 U.S. at 156, 168-69.

2. Petitioner's Claims. Petitioner Motorola Mobility LLC ("Motorola") is the U.S. parent company of a group of foreign corporations that manufacture cellphones. Defendants are manufacturers of LCD panels. Motorola alleges that the defendants conspired in violation of the Sherman Act to fix the prices at which they sold LCD panels to Motorola's foreign subsidiaries, principally Motorola (China) Electronics Ltd. ("Motorola China") and Motorola Trading Center Pte. Ltd. ("Motorola Singapore").

Although Motorola implies that its foreign subsidiaries are mere delivery sites for LCD panels purchased by "an American company" (Pet. 1), the undisputed facts are otherwise. The

purchases at issue were initiated when Motorola China and Motorola Singapore issued purchase orders that expressly incorporated Chinese and Singaporean law. *See* Dkt. No. 182, Order of Jan. 23, 2014 ("Order") 17 n.4. After receiving these purchase orders, defendants manufactured LCD panels in Japan, Korea, China, and Taiwan and delivered them to Motorola China and Motorola Singapore at Asian delivery sites. *See* Op. 2. Motorola China, Motorola Singapore, and other foreign subsidiaries then paid for the panels and incorporated them into cellphones at Asian factories. *See id.* The resulting cellphones were sold throughout the world.

Approximately 57 percent of the panels purchased from defendants were incorporated into cellphones that were sold in foreign countries; those panels never reached the United States at any time. *Id.* A smaller percentage—about 42 percent—eventually reached the United States as part of a completed cellphone. *Id.* The remaining one percent of the panel purchases were shipped directly to the United States, but those purchases are not part of this appeal. *Id.*

Motorola is the named plaintiff with respect to the purchases by its foreign subsidiaries only because the subsidiaries contractually assigned their claims to it. *See* Op. 2; Order 2, 16. Motorola therefore "stands in the shoes" of its foreign subsidiaries for purposes of this Court's analysis. *Coplay Cement Co. v. Willis & Paul Grp.*, 983 F.2d 1435, 1442 (7th Cir. 1993).

3. <u>Proceedings</u>. Defendants first sought summary judgment under the FTAIA when this case was still in San Francisco pursuant to the multi-district litigation ("MDL") process. Although the MDL court denied defendants' motion and returned the case to the district court for further proceedings (Dkt. Nos. 6422, 8173, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-1827 (N.D. Cal) ("MDL Dkt.")), defendants renewed their motion in the district court, and that court granted summary judgment as to the sales to Motorola's foreign subsidiaries (Order 8, 20). The district court then certified its ruling for immediate appeal under 28 U.S.C. § 1292(b).

Upon receiving the parties' section 1292(b) submissions, the Panel concluded that "the petition and the defendants' response, together with the district judge's opinion . . . and the record in the district court, provide an ample basis for deciding the appeal." Op. 1-2. Accordingly, as this Court has done in many other cases,[1] the Panel proceeded to the merits.

The Panel began by rejecting as "frivolous" Motorola's assertion that the Sherman Act applies to the 57 percent of panels that never reached the United States at all, reasoning that these panels "never entered the United States, so never became domestic commerce." Op. 2-3. As to the remaining 42 percent of panels that eventually reached the United States as part of completed cellphones, the Panel affirmed the district court order for two independent reasons.

First, the Panel held that any overcharges on foreign sales to Motorola's foreign subsidiaries did not have a "direct" effect on U.S. commerce, as required by the domestic effects exception. Op. 4-5. Second, the Panel held that although the alleged overcharges on LCD panels "may" have had an indirect effect on U.S. cellphone prices, any effects on *cellphone* prices did not "give rise to" Motorola's claims of overcharges on *LCD panels*. Op. 5-6.

REASONS FOR DENYING THE PETITION

This Court grants en banc review in approximately one out of a thousand cases. *See Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008). As shown below, this is not the one-in-a-thousand case that warrants the extraordinary measure of en banc review.

I. The Panel's "Gives Rise To" Holding Does Not Warrant En Banc Review.

The Panel held that Motorola cannot satisfy the FTAIA's domestic effects exception because effects on *foreign* commerce—not domestic commerce—"give rise to" its antitrust

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[1] Contrary to Motorola's suggestions, defendants have found over a dozen instances in which this Court has resolved an appeal on the basis of the district court record and section 1292(b) papers. *See, e.g.*, *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010); *First Bank v. DJL Props., LLC*, 598 F.3d 915 (7th Cir. 2010); *In re Sprint Nextel Corp.*, 593 F.3d 669 (7th Cir. 2010).

claims. Motorola seeks en banc review of that ruling mainly on the basis of arguments that it waived in the courts below. In the MDL court and the district court, Motorola argued only that higher prices for *LCD panels* give rise to its claims. Here, by contrast, it seeks en banc review on the ground that higher *cellphone* prices supposedly give rise to its claims. Even setting aside Motorola's waivers in the courts below, neither argument justifies en banc review.

A. Motorola's claims of higher *panel* prices do not satisfy the "gives rise to" requirement.

The Panel correctly held that effects on U.S. commerce do not "give rise to" Motorola's claims that its foreign subsidiaries were overcharged for LCD panels. All of the panels at issue were made, delivered, and paid for in foreign countries, and all were purchased by foreign companies. *Supra* at 2-3. Motorola's claims thus arise out of increased prices allegedly paid in *foreign* commerce rather than increased prices paid in the United States. Op. 5-6. As this Court now has twice acknowledged, higher prices paid in foreign commerce are not "domestic effects" that give rise to a Sherman Act claim because "'U.S. antitrust laws are not to be used for injury to foreign customers.'" *Id*. (quoting *Minn-Chem*, 683 F.3d at 858).

Any other conclusion would be inconsistent with the Supreme Court's decision in *Empagran*. There, as here, plaintiffs who had purchased price-fixed goods in foreign markets attempted to sue under the Sherman Act, alleging that a worldwide conspiracy involving foreign and domestic misconduct had increased prices both here and abroad. *See* 542 U.S. at 159-60. The conspiracy unquestionably had an "adverse domestic effect." *Id.* at 159. The Supreme Court nonetheless held that effects on U.S. commerce did not "give rise to" the plaintiffs' claims of foreign injury, reasoning that "Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm." 542 U.S. at 166 (emphasis in original). Numerous courts have likewise held that plaintiffs who

make their purchases in foreign markets have no recourse under the Sherman Act.[2]

Motorola nevertheless urges this Court to do what no other court has ever done: apply the domestic effects exception to claims that price-fixed goods were purchased in foreign markets. Its rationale is that the FTAIA does not require a plaintiff to have a "literal Sherman Act claim" as long as it suffered "anticompetitive effects" that eventually rippled into the United States. Pet. 12-13. Contrary to Motorola's assertions, a "literal Sherman Act claim" is *exactly* what the FTAIA requires: it requires an effect on domestic commerce that "gives rise to a claim under the provisions of section 1 to 7 of this title," *i.e.*, a Sherman Act claim. 15 U.S.C. § 6a.

Motorola is simply mistaken in suggesting that *Empagran* and *Minn-Chem* somehow relieved it of the textual requirement that effects on domestic commerce must give rise to its Sherman Act claims. Pet. 12-13. *Empagran* reinforces the statutory text, holding that it is not enough that domestic effects give rise to "a" Sherman Act claim; rather, domestic effects must give rise to "the claim at issue." 542 U.S. at 174-75. Similarly, *Minn-Chem* reaffirmed that "[n]o matter what the quality of the foreign conduct, the statute will not cover it unless the plaintiff manages to state a claim under the Sherman Act." 683 F.3d at 858. All of the plaintiffs in *Minn-Chem* had "literal Sherman Act claims" because all were "U.S. purchasers" who overpaid for the price-fixed product. *Id*. at 854 ("In our case, by contrast, the plaintiffs are all U.S. purchasers, and so the particular problem addressed in *Empagran* does not arise here."). Furthermore, although Motorola asserts that it, too, has a Sherman Act claim with respect to the one percent of panels that were purchased in the United States, the purchases of *those* panels do

[2] *See, e.g.*, *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 989 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535 (8th Cir. 2007); *Empagran S.A. v. F. Hoffmann-La Roche Ltd. ("Empagran II")*, 417 F.3d 1267 (D.C. Cir. 2005); *Turicentro, S.A. v. Am. Airlines*, 303 F.3d 293 (3d Cir. 2002); *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 426 (5th Cir. 2001).

not "give rise to" its claims relating to the 99 percent of panels that its foreign subsidiaries purchased overseas. *See Empagran*, 542 U.S. at 173-75.

Significantly, the government does not disagree with this "gives rise to" analysis. The government's amicus brief acknowledges that the Panel's "gives rise to" holding "does not threaten the government's ability to prevent anticompetitive harm." U.S. Br. 13. The government has also acknowledged that applying U.S. law to foreign injury claims—as Motorola urges here—*would* threaten its ability to prevent anticompetitive harm by "deter[ring] members of international cartels from seeking amnesty from criminal prosecution" and "damag[ing] the cooperative law enforcement relationships that the United States has nurtured with foreign governments." Br. for United States as Amicus Curiae at 5-6, *Empagran*, 542 U.S. 155; *see also id*. at 19. The government nevertheless suggests "further briefing" on the "gives rise to" issue, but it provides no reason to believe that further briefing will lead to a different result.

The Panel's "gives rise to" holding enhances rather than harms the government's law enforcement efforts, is fully consistent with all other authority construing the FTAIA, and accords proper respect to foreign sovereigns. En banc review should therefore be denied.

B. Motorola's claims of higher *cellphone* prices do not satisfy the "gives rise to" requirement.

Although Motorola opposed defendants' summary judgment motion solely on the ground that higher *panel* prices give rise to its claims, it now argues that higher *cellphone* prices give rise to its claims because higher panel prices allegedly led to higher cellphone prices, and higher cellphone prices allegedly reduced its U.S. sales of cellphones. Pet. 12. These arguments fail to justify en banc review for several reasons.

First, Motorola waived any argument that its claims arise from higher cellphone prices by failing to raise that argument in response to defendants' summary judgment motion. *See* MDL

Dkt. No. 5745, at 33 (arguing that the "injury" that gave rise to Motorola's claims was "the payment of a single, artificially-inflated price for LCD panels"; no discussion of cellphone sales); Dkt. No. 138, at 14 (same). Motorola also stipulated away any claim for lost profits arising from lost cellphone sales in order to limit the scope of discovery. *See* MDL Dkt. No. 2363, at 5 (opposing discovery motion on the ground that "sales and profits information [are] no longer relevant now that Motorola has dropped its lost profits claims"); MDL Dkt. No. 2342-7 ("Motorola is not pursuing a lost profits damages theory"). Arguments that "were not presented before the district court in opposing [a] summary judgment motion . . . cannot be presented . . . on appeal." *Keene Corp. v. Int'l Fidelity*, 736 F.2d 388, 393 (7th Cir. 1984).

Second, higher U.S. cellphone prices at most would give rise to claims by U.S. cellphone purchasers or the U.S. government—not Motorola. As the Panel explained, Motorola's claims do not arise from the prices it *charged* for completed cellphones; rather, its claims arise from the prices its foreign subsidiaries *paid* for LCD panels. *See* Op. 6. Furthermore, any suggestion that higher cellphone prices give rise to claims of higher panel prices has things backwards. Higher *panel* prices allegedly gave rise to higher *cellphone* prices, not vice versa. *See id*. For precisely this reason, the Department of Justice recently argued in a pending case that downstream effects on U.S. product sales cannot "give rise to" claims that anticompetitive conduct affected upstream sales of components used in the products. *See* Br. for United States as Amicus Curiae at 12-13, *Lotes Co. v. Hon Hai Precision Indus.*, No. 13-2280 (2d Cir. Oct. 10, 2013).

Third, settled law forecloses Motorola from suing on the theory that overcharges paid by its foreign subsidiaries were passed along to Motorola itself in the form of higher prices for cellphones sold internally within the corporate family. Any such claim is barred either by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which bars claims for damages allegedly

passed from direct to indirect purchasers,[3] or by the rule prohibiting claims of derivative injury allegedly passed from a corporation to its owners, *see* Op. 4-5; *Sw. Suburban Bd. of Realtors v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1378 (7th Cir. 1987) ("derivative injuries sustained by . . . stockholders . . . of an injured company do not constitute 'antitrust injury' sufficient to confer antitrust standing"); *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 777 (7th Cir. 1994) ("Shareholders do not have standing to sue for harms to the corporation, or even for the derivative harm to themselves that might arise from [wrongs] to the corporation.").

Fourth, and finally, none of Motorola's arguments based on higher cellphone prices purports to show a conflict between the Panel Opinion and other authority. Accordingly, none provides a basis for en banc review.

C. Ownership of foreign subsidiaries and repatriation of foreign profits do not convert foreign injuries into domestic ones.

Motorola's arguments are not improved by its assertion that the entire Motorola corporate family should be treated as a "common enterprise" for purposes of asserting antitrust claims. Pet. 13. Even if this assertion were correct, it would not change the outcome here because "the focus of [the FTAIA] is on *transactions*, not on the identity or nationality of the parties." IB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272i (3d ed. 2006) (emphasis added).

Here, the transactions at issue were foreign: LCD panels were manufactured, delivered, and paid for in Asia for use at Asian factories. *Supra* at 2-3. The Panel therefore correctly held that, even if Motorola itself had engaged in the foreign commerce that its foreign subsidiaries

[3] Motorola and its amici suggest that this Court could create an exception to *Illinois Brick* where a direct purchaser of price-fixed goods makes its purchases in foreign countries, but that argument (i) was waived in the district court, (ii) would offend foreign sovereignty by applying the Sherman Act more aggressively to purchases made in foreign countries than to purchases made domestically, and (iii) ignores Supreme Court precedent holding that it would be "an unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick*. *See Kansas v. Utilicorp*, 497 U.S. 199, 216 (1990). Motorola has alleged and proven no *Illinois Brick* exception and thus has waived any such argument.

engaged in—*i.e.*, if it had ordered, paid for, and taken delivery of panels in foreign countries and used those panels at foreign factories—the FTAIA would bar its claims. *See* Op. 5-7; *see also Turicentro*, 303 F.3d at 301 n.5 ("Whether plaintiffs are United States citizens is irrelevant"); H.R. Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494 ("A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws.").

Furthermore, even if the identity of the purchaser made any difference under the FTAIA, the fact would remain that the purchasers here were foreign. Motorola's foreign subsidiaries are distinct legal entities that were created to take advantage of foreign law and foreign labor markets. *See* Dkt. No. 116-1, at 20. Having created these foreign subsidiaries and having benefitted from their foreign incorporation, Motorola cannot selectively ignore their separate existence merely because it prefers U.S. antitrust remedies to foreign remedies. *See* Op. 6; *J.F. McKinney & Assocs. v. Gen. Elec. Inv. Corp.*, 183 F.3d 619, 621 (7th Cir. 1999) ("Corporations can't disregard their separate existence whenever that is convenient, while insisting that the forms be observed when that will shield their investors."); 18 Am. Jur. 2d Corporations § 49 ("the corporate veil is never pierced for the benefit of the corporation or its stockholders").

Motorola cites a single Sixth Circuit decision, *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981), in support of its contrary argument, but it fails to acknowledge that the Sixth Circuit repudiated *Chrysler* over thirty years ago. *See Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 293 (6th Cir. 1983) ("*Chrysler Corp.* is no longer controlling precedent for determining the proper party to bring an antitrust action."). Motorola also fails to disclose that *this* Court has always rejected the former *Chrysler* rule allowing derivative injury claims in antitrust cases. *See Sw. Suburban*, 830 F.2d at 1378.

Motorola's argument that its foreign subsidiaries repatriated their profits to the United States is equally unavailing. This argument is simply a different version of the type of derivative injury claim that this Court has long rejected. *See id.*; *see also In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 560 (D. Del. 2006) ("courts have recognized that reduced income flowing from a foreign subsidiary to a domestic parent is not a direct domestic effect or injury" under the FTAIA). Moreover, if repatriation of profits to the United States were enough to invoke U.S. antitrust law, there would be no limits whatsoever on extraterritorial application of U.S. law to foreign transactions by U.S. companies—or even their foreign subsidiaries.

II. The Panel's "Directness" Holding Does Not Warrant En Banc Review.

The Panel also held that Motorola failed to show the necessary "direct" effect on U.S. commerce. Op. 4. This holding does not warrant en banc review because the Panel properly applied the term "direct" to the facts of this case, because Motorola waived its contrary argument in the courts below, and because the Panel Opinion does not conflict with any other authority. Furthermore, en banc review of the "directness" issue would not change the result here: the Panel's alternative "gives rise to" holding is plainly correct and provides an independent basis for affirming the district court. The Petition should be denied for this reason as well. *See United States v. Burdeau*, 180 F.3d 1091, 1092 (9th Cir. 1999) (en banc review is reserved for "decid[ing] cases, not [] edit[ing] statements in opinions") (Tashima, J., concurring).

A. Defendants' foreign sales of LCD panels did not have a "direct" effect on U.S. cellphone commerce.

The Panel correctly held that defendants' conduct had its "direct" effects in Asia, not the United States. As noted above, the LCD panels at issue were made, sold, and delivered in Asia and used at Asian factories. *Supra* at 2-3. Although higher prices charged for the panels "may" have led to higher U.S. cellphone prices, Op. 6, any such effects were "mediated" by Motorola's

decisions about what to charge for its cellphones, *id.*, and by the fact that LCD panels represent only ten percent of the component costs of a cellphone, *see* Dkt. No. 159-3, at 29. Accordingly, to the extent that higher panel prices in Asia had a downstream impact on U.S. cellphone prices, these effects were "indirect" and do not satisfy the domestic effects exception. Op. 4-5.

This reading of "direct" comports with *Empagran*'s instruction that the FTAIA should be construed to avoid "unreasonable interference with the sovereign authority of other nations." 542 U.S. at 164. Defendants' conduct had a far greater impact in the *foreign* countries in which panels were purchased, delivered, and manufactured into cellphones than in the country in which there "may" have been a downstream effect on cellphone sales. The Panel's reading of "direct" properly respects the right of these foreign nations, as the nations directly impacted by the transactions at issue, to apply their laws to those transactions. *See* Op. 8. Put differently, U.S. antitrust law gives way to the law of foreign nations where, as here, foreign nations are "the better enforcers" of antitrust prohibitions. *See Minn-Chem*, 683 F.3d at 860. Abundant authority construing the antitrust laws in other contexts reinforces this reading of "direct." *See, e.g.*, *Assoc. Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 541 (1983) (barring antitrust claims based on the "indirect result of whatever harm may have been suffered by" more immediate victims); *Loeb Indus. v. Sumitomo Corp.*, 306 F.3d 469, 494 (7th Cir. 2002) (antitrust injury "would be indirect" for downstream purchaser when direct purchaser "would serve as a more immediate victim"); *see also Lexmark Int'l v. Static Control Components*, 134 S. Ct. 1377, 1390 (2014) (harm is "too remote" and proximate cause does not exist where "harm is purely derivative of misfortunes visited upon a third person by the defendant's acts" (citation and internal quotation marks omitted)).

Motorola's contrary reading of "direct" would thwart the purposes of the FTAIA by

extending U.S. antitrust law into the furthest reaches of the global economy. For example, under Motorola's reading of the term "direct," U.S. law would apply to an Egyptian cotton farmer's sales of cotton to an Egyptian cotton merchant if the merchant paid an anticompetitive price that eventually filtered into the price of clothing sold at a U.S. retail outlet. *Cf.* U.S. Br. 9 (asserting that U.S. law applies to foreign transactions unless U.S. effects are "'so attenuated that the consequence is more aptly described as a mere fortuity.'"). The United States would thus become the "world's competition police officer," the very result the FTAIA was intended to prevent. *United Phosphorus*, 322 F.3d at 960.

Motorola's assertions notwithstanding, *Minn-Chem* does not require these troubling results or conflict with the Panel Opinion. The plaintiffs in *Minn-Chem* were "U.S. purchasers" of a "homogeneous commodity." *See* 683 F.3d at 848, 854, 856. Although certain defendants did not sell the commodity at issue in the United States, even these defendants participated in fixing "benchmark prices" that "direct[ly]" and "almost immediately" increased U.S. commodity prices paid by the plaintiffs. *Id*. at 859. Furthermore, the off-shore defendants were liable only for their co-conspirators' sales to "U.S. customers." *See id*. at 859, 860-61. Here, by contrast, LCD panels were sold to foreign purchasers in foreign markets and incorporated into cellphones at foreign factories. The Panel expressly relied on these distinctions in the course of carefully aligning its holding with *Minn-Chem*, observing that the U.S. effects of defendants' conduct were "remote" and "indirect, compared to the situation in *Minn-Chem*." Op. 4-5.

Although Motorola warns that foreign cartels may stop their sales at U.S. borders in order to "immunize" their conduct from U.S. prosecution (Pet. 7), these fears are overblown. It is the rare cartel that does not sell at least some of its output in the United States, and nothing in the Panel Opinion alters the government's ability to prosecute a cartel for such sales. *Cf. Minn-*

Chem, 683 F.3d at 860-61 (entire cartel is liable to U.S. purchasers). The LCD defendants, for example, sold LCD panels here and were prosecuted on that basis.[4] The government thus has dismissed out of hand any suggestion that the Panel Opinion affects its pending LCD prosecution. *See* Dkt. No. 88, *United States v. AU Optronics Co*., No. 12-10492 (9th Cir.).

There will, of course, be *some* foreign conduct that cannot be prosecuted consistent with the requirement of a "direct" effect on U.S. commerce, but that is precisely what Congress intended. The FTAIA was enacted to create "a single, objective test" and a "clear benchmark" that would allow our trading partners to predict in advance whether U.S. antitrust law will be applied to particular transactions. H.R. Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487-88, 2491. Motorola's malleable reading of "direct" would frustrate these goals by aggressively applying U.S. law to foreign transactions based only on indirect ripple effects in the United States. The Korean antitrust regulator and the Japanese government are so concerned about these prospects that the former filed an amicus brief opposing the Petition, *see* KFTC Mot. 1-2, and the latter expressed its concerns in an amicus brief in the district court, *see* Dkt. No. 152, and reiterated those concerns to the U.S. Commerce and State Departments just last week.

Motorola's arguments also mistakenly assume that only the U.S. government can be trusted to prosecute foreign cartels. Contrary to Motorola's assertions, where, as here, foreign companies that purchased in foreign markets are the direct victims of anticompetitive conduct, "the foreign country whose consumers are [directly] hurt would [be] the better enforcer." *Minn-Chem*, 683 F.3d at 860. Furthermore, to the extent that foreign countries have not adopted the same set of remedies that U.S. antitrust law provides, "Congress, we must assume, would not

[4] Although the sales to Motorola's foreign subsidiaries took place outside the United States, that is only because *they* elected to make their purchases where Motorola built its foreign factories, not because *defendants* were attempting to manipulate U.S. antitrust laws.

have tried to impose them, in an act of legal imperialism." *Empagran*, 542 U.S. at 169.

Motorola is equally mistaken in suggesting that the Panel's reading of "direct" renders the domestic effects exception redundant with the FTAIA's import commerce exclusion (an exclusion that plainly does not apply here[5]). The domestic effects exception reaches a variety of circumstances that the import commerce exclusion does not, such as (i) fixing prices of foreign goods or commodities in a manner that directly affects U.S. prices for the same goods or commodities (*e.g.*, *Minn-Chem*, 683 F.3d at 859), (ii) foreign buyers' cartels that lower U.S. export prices, (iii) anticompetitive tying of foreign and domestic products (*see Empagran II*, 417 F.3d at 1270), or (iv) monopolization of foreign markets that harms domestic commerce (*see id.*).

B. Motorola made no factual record of "direct" effects on U.S. commerce.

Even if there may be cases in which anticompetitive conduct affecting foreign sales of components has a "direct" effect on U.S. sales of products containing those components, Motorola made no factual record that this is such a case. In responding to defendants' summary judgment motion, Motorola focused only on arguments about LCD panels; it waived any argument that foreign panel prices had a "direct" effect on U.S. cellphone sales or prices. *Supra* at 7-8. Motorola fails to provide a *single* citation to the record containing any such evidence or argument.[6] Motorola's total failure to create a factual record of "direct" effects on U.S. commerce makes this case an extraordinarily poor vehicle for en banc review.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

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[5] Every court to consider the question has rejected Motorola's suggestion that a *plaintiff's* importation of price-fixed products is sufficient to trigger the import commerce exclusion. *See* Order 19-20.

[6] The government cites only to the record in *other* cases; it cites (i) an expert report from a different MDL case and (ii) an MDL court opinion in a separate case that did not even involve cellphone panels. *See* U.S. Br. 10 (citing MDL Dkt. No. 7843-4 and *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953 (N.D. Cal. 2011)).

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CERTIFICATE OF SERVICE

I, Robert D. Wick, an attorney, do hereby certify that I caused a copy of the foregoing response to be electronically filed with the Court and served on all parties on May 23, 2014 using the Court's electronic case filing system.

By: /s/ *Robert D. Wick*

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