No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Motorola Mobility LLC,

Plaintiff-Petitioner,

vs.

AU Optronics Corporation, et al.,

Defendants-Respondents.

On Petition for Interlocutory 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 INTERLOCUTORY APPEAL

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INTRODUCTION

Defendants agree that this appeal presents a controlling question of law, and that an immediate appeal may materially shorten this litigation. In addition, because the two district court judges that considered the controlling legal question reached different conclusions, defendants do not oppose interlocutory review. Motorola's petition, however, misstates the question presented and omits or obscures key facts.

This appeal concerns the claims of foreign companies that are owned by a U.S. parent company, Motorola Mobility LLC ("Motorola"). The foreign companies allegedly overpaid for LCD panels that were manufactured, purchased, and delivered in Asia and used at Asian factories. Although the foreign companies are the companies that ordered, paid for, and used these panels, they assigned their antitrust claims to Motorola, which now seeks to apply U.S. antitrust law to the foreign companies' purchases. Motorola asserts that it played a role in approving the foreign purchases, but it is undisputed that *all* of the claims at issue are based on overseas purchases by foreign companies.

The district court correctly held that the Foreign Trade Antitrust Improvements Act ("FTAIA") bars Motorola's attempt to apply U.S. antitrust law to foreign transactions made by foreign companies. Motorola counters that the purchases fall within the "domestic injury" exception to the FTAIA. The question presented for review, properly framed, is therefore:

> Does the FTAIA's domestic injury exception permit the application of U.S. antitrust law to foreign purchases made by foreign companies where the foreign companies assigned their claims to a U.S. parent company, and the U.S. parent allegedly approved the purchases?

BACKGROUND

Motorola is a technology company that makes and distributes mobile phones. Order 2. During the relevant period, virtually all of the LCD panels used in Motorola-branded phones were purchased overseas by Motorola's foreign subsidiaries, principally Motorola (China) Electronics Ltd. ("Motorola China") and Motorola Trading Center Pte. Ltd. ("Motorola Singapore"). *Id.*[1]

[1] Although Motorola China and Motorola Singapore account for the overwhelming majority of the foreign purchases at issue, a few of these purchases were made by foreign subsidiaries located in Germany, Israel, and other countries. The material facts for these purchases are no different.

Motorola accuses the defendants of fixing the prices at which they sold LCD panels.[2] It further asserts that "Motorola, a U.S. company, . . . purchased over $5 billion worth of LCD panels from cartel members for use in its mobile devices." Pet. 2. This statement mistakenly implies that Motorola's U.S. parent company purchased the panels at issue. In reality, 99 percent of the purchases described in the complaint—and all of the purchases at issue here—were made by Motorola's foreign subsidiaries. Order 7.

The purchases described in the complaint fall into three distinct categories:

- **Category One**, consisting of panels purchased by Motorola in the United States for use in the United States (less than 1 percent of the purchases);
- **Category Two**, consisting of panels that were purchased by Motorola China and Motorola Singapore overseas, incorporated into mobile phones at overseas factories, and eventually shipped to the United States as part of a fully-assembled phone (42 percent of the purchases); and
- **Category Three**, consisting of panels that were purchased by Motorola China and Motorola Singapore overseas, incorporated into mobile phones at overseas factories, and then shipped to final

[2] Motorola's assertion that "[d]efendants in this case admittedly violated U.S. antitrust laws" (Pet. 1) is overstated. A few companies have admitted anticompetitive conduct with respect to Motorola; others deny any liability to Motorola; and still others deny any wrongdoing at all.

> destinations *outside* the United States (57 percent of the purchases). *See* Order 2.[3]

This appeal concerns only Categories Two and Three, both of which consist of "purchases of LCD panels by Motorola's foreign affiliates." Order 2. Because any antitrust claims arising out of these purchases "belong[] to the Motorola foreign affiliates who purchased LCD panels" (*id.*), Motorola China and Motorola Singapore are the true plaintiffs as to these purchases. Motorola Mobility, a U.S. company, serves as the nominal plaintiff on Category Two and Three claims only because "Motorola's foreign affiliates have assigned their claims to [it]." *Id.* The assigned claims remain subject to any defense—including an FTAIA defense—that would have applied if Motorola China and Motorola Singapore had sued in their own names. *See Coplay Cement Co. v. Willis & Paul Grp.*, 983 F.2d 1435, 1442 (7th Cir. 1993) ("The assignee . . . stands in the shoes of the assignor and therefore takes the assignment subject to any defenses against the assignor's . . . claim that arose before the assignment was made").

[3] Motorola did not assert claims based on importation of *phones* into the United States; rather, its claims relate to overseas purchases of *panels*.

Category Two and Three purchases were initiated when Motorola China or Motorola Singapore issued purchase orders in Asia that provided for foreign payment and delivery and that explicitly referenced foreign law. Order 17 n.4. After receiving the purchase orders, defendants manufactured LCD panels in Japan, Korea, and Taiwan and delivered them to Motorola China and Motorola Singapore at overseas locations. Motorola China and Motorola Singapore paid for the panels abroad and incorporated them into mobile phones at foreign factories.

Category Two panels eventually reached the United States as components of fully-assembled phones. Category Three panels were incorporated into phones that were distributed and sold abroad, and never reached the United States at any time.

Although the MDL court allowed Motorola to proceed with U.S. antitrust claims based on Category Two and Three purchases, the district court reconsidered and granted summary judgment for defendants, finding that the Category Two and Three claims "do not arise from any domestic effect" on U.S. commerce. Order 20.

ARGUMENT

Interlocutory appeal under section 1292(b) is appropriate when "(1) the appeal presents a question of law; (2) it is controlling; (3) it is contestable; [and] (4) its resolution will expedite the resolution of the litigation." *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1007 (7th Cir. 2002). Here, defendants agree that the first, second, and fourth criteria are satisfied; the only question that requires discussion is whether the district court's decision is "contestable."

Motorola asserts that the FTAIA issues are contestable because "the district court and the MDL court came to contrary conclusions when applying the FTAIA to the same issues." Pet. 8. As to Motorola's "domestic injury" argument, Motorola is correct that the district court and the MDL court reached different conclusions, and in that sense, the issue is contestable. As to Motorola's separate "import commerce" argument, however, the district court and the MDL court both agreed that the argument has no merit. Order 19-20. Accordingly, the district

court's domestic injury ruling, but not its import commerce ruling, provides a basis for interlocutory review.[4]

A. Although The "Domestic Injury" Question Is Contestable, The District Court Resolved That Question Correctly.

Motorola argues that the district court was "clearly wrong" in concluding that the injuries sustained by Motorola China and Motorola Singapore fall outside the FTAIA's domestic injury exception. Pet. 8. Although defendants agree that the domestic injury issue is contestable in the sense that two different judges reached different conclusions on that question, the district court's ruling is clearly correct.[5]

The FTAIA was enacted because extraterritorial application of U.S. antitrust law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."

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[4] Motorola suggests that the district court should not have reconsidered the MDL court's FTAIA ruling under a "clear error" standard. Pet. 5 & n.1. Motorola waived this argument by conceding below that clear error was the correct standard. Opp. to Mot. for Recons. at 12 (Dkt. No. 138, Oct. 23, 2013). Additionally, resolving this standard-of-review question would not advance the termination of this litigation. Rather, it would delay ultimate resolution of the substantive legal issue: whether the district court correctly applied the domestic injury exception to the FTAIA. Unless the Court can review that question under a de novo standard, there is no reason to grant interlocutory review.

[5] Defendants here briefly respond to Motorola's assertion that the district court was "clearly wrong," but request the opportunity to submit a complete merits brief should interlocutory appeal be granted.

F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 161, 164-65 (2004). The FTAIA therefore "lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach." *Id.* at 162. The statute "then brings such conduct back within the Sherman Act's reach" if a two-part domestic injury test is met. *Id.*

To satisfy the two-part test, 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 the effect on U.S. commerce "gives rise to" its antitrust claim. *Id.* Together, these requirements confirm that "the U.S. antitrust laws are not to be used for injury to foreign customers," while also maintaining "the well-established principle that the U.S. antitrust laws reach foreign conduct that harms U.S. commerce." *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 858, 859 (7th Cir. 2012) (en banc). The FTAIA thus clarifies that U.S. law does not apply to anticompetitive arrangements "as long as those arrangements adversely affect only foreign markets." *Empagran*, 542 U.S. at 161.

The district court correctly concluded that the alleged injuries to Motorola China and Motorola Singapore do not satisfy the domestic injury exception. For claims based on Category Three panels—panels that never entered the United States at any point in the distribution chain—Motorola fails to satisfy even the first part of the two-part test. These panels had no "direct, substantial, and reasonably foreseeable effect" on U.S. commerce because they never *entered* U.S. commerce. Motorola thus conceded in the MDL court (before later changing its mind) "that it could not assert any claims based on the sale of LCD panels to Motorola subsidiaries abroad if the panels never entered the United States (Category III sales)." Order 3.

As for Category Two panels—panels that ultimately reached the United States as components of fully-assembled mobile phones—Motorola argues that the eventual entry of the mobile phones into the United States satisfies the requirement of a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. Assuming *arguendo* that this is correct, Motorola still fails the second part of the two-part test, because the downstream entry of mobile phones into the United States is not what "gives rise to" the alleged upstream injuries

to Motorola China and Motorola Singapore. Motorola China and Motorola Singapore allegedly were injured when they overpaid for LCD panels in China and Singapore, not when fully-assembled phones were later shipped to the United States. The district court therefore correctly concluded that effects on U.S. commerce were not the "proximate cause" that gave rise to the Category Two and Three claims. *See* Order 14-19; *accord In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 988 (9th Cir. 2008) (claim barred where plaintiff "has not shown that the higher U.S. prices proximately caused its foreign injury of having to pay higher prices abroad").

The U.S. antitrust enforcement agencies recently explained in a similar case why downstream U.S. sales of fully-assembled goods do not "give rise to" upstream claims based on earlier sales of components used in the goods:

> [A]ssuming defendants' conduct had a direct, substantial, and reasonably foreseeable effect on U.S. import commerce in [a downstream product market], that effect would not be the cause of [the plaintiff's] injuries—lost sales in wholly foreign commerce and the potential closure of its foreign factories. *In the causal chain, [plaintiff's] injuries precede, indeed contribute to, the effect on U.S. import commerce. Thus, that effect does not give rise to [plaintiff's] Sherman Act claims as the FTAIA's effects exception requires.*

Brief for the United States & Fed. Trade Comm'n as Amici Curiae at 12-13, *Lotes Co. v. Hon Hai Precision Indus.*, No. 13-2280 (2d Cir. Oct. 10, 2013) (emphasis added). Likewise here, the alleged injuries to Motorola China and Motorola Singapore "precede, indeed contribute to" the alleged effect on U.S. commerce, and the alleged effect on U.S. commerce is not what gives rise to the asserted antitrust claims.

This Court's decision in *Minn-Chem* reinforces this conclusion. *Minn-Chem* held that U.S. purchasers of potash were entitled to sue the members of a global potash cartel under the domestic injury exception. *See* 683 F.3d at 848. The Court made clear, however, that the result would be different for plaintiffs who made their purchases in foreign markets, observing that under *Empagran*, "the U.S. antitrust laws are not to be used for injury to foreign customers." *Id.* at 858. Rather, for "purchasers of allegedly price-fixed products that were sold in foreign markets," the FTAIA recognizes that "the foreign country whose consumers are hurt would [be] the better enforcer." *Id.* at 854, 860.

Motorola nevertheless suggests that as long as defendants' conduct injured *someone* in the U.S. economy—even if not Motorola China or Motorola Singapore—those companies may assert their antitrust claims

under U.S. law. Pet. 10. This theory was litigated and lost in *Empagran*. There, the Supreme Court rejected the argument that a plaintiff may invoke the domestic injury exception merely because "[t]he alleged conduct here did have domestic effects, and those effects were harmful enough to give rise to 'a' claim." 542 U.S. at 173. Instead, the Court required that each plaintiff show how "the plaintiff 's claim" or "the claim at issue" resulted from a domestic injury. *Id.* at 174. Motorola must therefore show that an adverse effect on U.S. commerce gave rise to the alleged injuries *to Motorola China and Motorola Singapore*, a showing it failed to make.

It makes no difference that Motorola China and Motorola Singapore are owned by a U.S. company. "[T]he focus of [the domestic injury exception] is on transactions, not on the identity or nationality of the parties." IB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272i (3d ed. 2006). Thus, 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." H.R. Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494.

Similarly, it would make no difference if Motorola were correct that U.S.-based procurement executives approved the price and quantity of the foreign purchases made by Motorola China and Motorola Singapore. The domestic injury exception requires an adverse effect on U.S. "trade or commerce." 15 U.S.C. § 6a. Decisions of U.S. executives regarding prices to be paid or quantities to be purchased in *foreign* commerce are not themselves an effect on U.S. "trade or commerce" because they have no effect on the U.S. economy. *See Turicentro, S.A. v. Am. Airlines*, 303 F.3d 293, 305 (3d Cir. 2002) ("That certain activities might have taken place in the United States is irrelevant if the economic consequences are not felt in the United States economy."); *Dedication & Everlasting Love to Animals v. Humane Soc'y*, 50 F.3d 710, 712 (9th Cir. 1995) ("Interpreting the Sherman Act, the Supreme Court has spoken of 'commerce' in terms of 'the purchase, sale, and exchange of commodities'").

A contrary approach that applies the antitrust law of the country in which transactions are "approved" would be untenable. First, it would undermine the FTAIA's statutory purpose of exempting U.S. *exporters* from U.S. antitrust law when they meet in the United States to

discuss—and approve—anticompetitive arrangements that "adversely affect only foreign markets." *Empagran*, 542 U.S. at 161; H.R. Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487-88, 2493-95. Second, it would allow companies to manipulate the antitrust laws by strategically placing procurement executives responsible for "approving" particular transactions at locations far removed from the actual transaction sites.

The district court therefore correctly held that allegations that U.S. executives approved the foreign purchases made by Motorola China and Motorola Singapore fail to establish the requisite effect on U.S. commerce. *See* Order 18; *accord Sun Microsystems, Inc. v. Hynix Semiconductor, Inc.*, 608 F. Supp. 2d 1166 (N.D. Cal. 2009) (allegations that foreign purchases were controlled by U.S. procurement executives held insufficient to invoke domestic injury exception); *In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777 (N.D. Cal. 2007) (same); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F. Supp. 2d 437 (D.N.J. 2007) (same); H.R. Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490 ("it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies").

B. The District Court's Order Vindicates The Statutory Purpose Of The FTAIA.

Applying U.S. antitrust law to the foreign purchases of Motorola China and Motorola Singapore would violate the comity principles that underlie the FTAIA. Congress enacted the FTAIA in order to reduce conflict with foreign governments, 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), *overruled on other grounds by Minn-Chem*, 683 F.3d 845; *Empagran*, 542 U.S. at 161, 164-65.

The FTAIA codifies the principle that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). Here, applying U.S. law to foreign transactions in panels that were manufactured, delivered, and sold abroad for use at foreign factories would create precisely the kind of "unreasonable interference with the sovereign authority of other nations" that the FTAIA seeks to prevent. *Empagran*, 542 U.S. at 161, 164-65. Accordingly, when Motorola elected to locate its factories overseas and to make its Category Two and Three purchases in foreign commerce, it subjected

those purchases to foreign law. By contrast, U.S. consumers and other plaintiffs who purchased LCD panels in the United States have received billions in compensation from the defendants.

Motorola argues that there will be "a severe negative impact on the antitrust enforcement agencies' ability to pursue international cartels" unless U.S. antitrust law extends to foreign purchases like those of Motorola China and Motorola Singapore. Pet. 13. Not so. To the extent that foreign conduct has a direct, substantial, and reasonably foreseeable effect on U.S. commerce, the Department of Justice may enforce the antitrust laws. Indeed, as Motorola points out, it has done so in this very case. Pet. 2. It is only Motorola China and Motorola Singapore that cannot sue here because *their* claims do not arise from an effect on U.S. commerce.

As the Department of Justice explained in a similar case, the FTAIA's bar against foreign injury claims like those of Motorola China and Motorola Singapore poses no barrier to the government's authority to prosecute the very same conduct under U.S. antitrust law:

> While the Sherman Act does not apply to [the claims of a plaintiff injured in foreign commerce], the statute could apply to that same conduct if another plaintiff made a claim arising out of effects on

> U.S. commerce. . . . [T]he government would have ample authority to bring an action to enforce the Sherman Act.

Brief for the United States & Fed. Trade Comm'n as Amici Curiae at 21, *Lotes Co. v. Hon Hai Precision Indus.*, No. 13-2280 (2d Cir. Oct. 10, 2013). Indeed, the Department has recognized that it is *Motorola's* reading of the FTAIA that poses the greatest threat to its enforcement activities: applying U.S. antitrust law to foreign injuries would "deter[] members of international cartels from seeking amnesty from criminal prosecution by the United States Government" and "damag[e] the cooperative law enforcement relationships that the United States has nurtured with foreign governments." Brief for the United States as Amicus Curiae at 5-6, *Empagran*, 542 U.S. 155 (2004) (No. 03-724).

C. Motorola's "Import Commerce" Argument Does Not Present A Contestable Issue.

Under the FTAIA's "import commerce exclusion," the FTAIA does not apply, and the Sherman Act therefore *does* apply, to conduct involving "import commerce." 15 U.S.C. § 6a. Motorola argues that its claims fall within this exclusion because, after Motorola China and Motorola Singapore purchased LCD panels in foreign commerce and incorporated

those panels into phones at foreign factories, 42 percent of the resulting phones were shipped to the United States. Pet. 9, 10.

Both the district court and the MDL court correctly rejected this argument. As this Court made clear in *Minn-Chem*, the import commerce exclusion applies to "transactions in which a good or service is being sent directly into the United States, with no intermediate stops." 683 F.3d at 854. Here, there were "intermediate stops" before the panels reached the United States: the panels were sold to foreign purchasers, delivered to foreign factories, and transformed from stand-alone panels into fully-assembled phones before the resulting phones were imported into the United States "by Motorola's affiliates, as opposed to Defendants." Order 19. Courts are unanimous that this type of downstream importation of goods by a plaintiff or its affiliates does not satisfy the import commerce exclusion. *See id.* 19-20; *Turicentro*, 303 F.3d at 303 (3d Cir. 2002) (the re-sale of goods initially sold by defendants in foreign commerce is "immaterial to determining if defendants were involved in import trade or import commerce"); *Kruman v. Christie's Int'l*, 284 F.3d 384, 395 (2d Cir. 2002) ("The

relevant inquiry is whether the conduct of the defendants—not the plaintiffs—involves import trade or commerce").

Motorola argues that under *Animal Science*, the import commerce exclusion applies whenever "the defendants' conduct target[ed] import goods or services." Pet. 9 (quoting *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011)). There, however, the defendant magnesite producers allegedly conspired "to fix the price of magnesite that is exported to *and sold in the United States*." 654 F.3d at 464 (emphasis added). In discussing *foreign* purchases like the ones at issue here, *Animal Science* explicitly rejected Motorola's theory that "subsequent 'importing' . . . into the United States [that] occurred as a result of the plaintiffs' own activities" can transform foreign commerce into import commerce. *Id.* at 470.

Because the district court, the MDL court, and all other courts to consider the question agree that the import commerce exclusion does not extend to the type of commerce at issue here, the import commerce question presented in the petition is not "contestable" and does not support interlocutory review.

CONCLUSION

Defendants do not oppose interlocutory review under section 1292(b). On the merits, however, the district court decision should be affirmed.

March 10, 2014

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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 March 10, 2014 using the Court's electronic case filing system.

By: /s/ *Robert D. Wick*
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