American University Law Review

Volume 68 | Issue 2 Article 5

2018

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Megan L. Masingill
American University Washington College of Law

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EXTRATERRITORIALITY OF ANTITRUST LAW: APPLYING THE SUPREME COURT'S ANALYSIS IN *RJR NABISCO* TO FOREIGN COMPONENT CARTELS

MEGAN L. MASINGILL*

In an increasingly connected global economy, complicated by webs of supply chains and foreign subsidiaries, the impact of foreign conduct will inevitably trickle into countries around the globe, including the United States. Often, such foreign conduct will not abide by the strict laws and regulations enforced by the United States. In the recent cases surrounding foreign price-fixing cartels for liquid-crystal-display panels (LCD) panels, a common component in electronics, the question arose of whether such foreign conduct fell within the scope of U.S. antitrust law under the Sherman Act. If the extraterritorial arm of the law extended to allow foreign plaintiffs to bring a claim in these suits, it would leave the door wide open for the numerous foreign subsidiaries of U.S. parent companies, governed by foreign jurisdictions, to seek redress in the United States.

In 1982, Congress enacted the Foreign Trade Antitrust Improvements Act (FTAIA) seeking to ease concerns surfacing in the business community that the then-current antitrust laws hindered global operations. The purpose of enacting the legislation was to clarify the broad scope of the prominent antitrust law in the United States, the Sherman Act. Unfortunately, the FTAIA was ambiguous and has created even greater confusion among the courts regarding when foreign conduct is to be governed by U.S. antitrust law. The issue has grown particularly

* Senior Staff Member, *American University Law Review*, Volume 68; J.D. Candidate, May 2019, *American University Washington College of Law*; B.A., Spanish Studies and Business Studies, 2016, *Bentley University*. Thank you to the entire *Law Review* staff, and especially to Cecilia Diedrich and Samantha Primeaux, for their diligent review and valuable suggestions in preparing this Comment. I would also like to thank my faculty advisor, Professor Andrew Popper, for his continued guidance and feedback. To my incredible family and friends, I am truly grateful for your constant encouragement and unwavering support.

unclear in cases involving the activities of foreign component cartels where the link between foreign subsidiaries and their U.S. parent companies becomes interrupted by foreign manufacturers and incorporators along the way. As seen in two factually similar cases, the Seventh and Ninth Circuits have provided inconsistent interpretations of the language of the FTAIA, leaving many questions unanswered. Though the Supreme Court denied the opportunity to address the sharp contrast in approaches between the circuits, the Court has not been entirely silent on the reach of the U.S. laws.

In RJR Nabisco v. European Community*, the Court analyzed the extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act (RICO). In its discussion, the Supreme Court analogized to antitrust law and shed light on its view regarding extraterritorial application of U.S. laws. This Comment argues that* RJR Nabisco *is instructive on the extraterritorial scope of the FTAIA as it pertains to foreign component cartel activity. Further, the Seventh Circuit's narrow interpretation of the FTAIA, as seen in* Motorola Mobility v. AU Optronics Corp.*, is most consistent with the Supreme Court's reasoning in* RJR Nabisco *and thus, should provide the standard in future cases. In applying such a standard, clarity, consistency, and predictability for these cases can be achieved, allowing companies to make reasoned decisions about where to do business and avoiding serious judicial capacity and foreign sovereignty concerns.*

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INTRODUCTION

Consider a product owned by ninety-five percent of American adults today: the cellphone.[1] Now consider all the small, technological parts that go into making that cellphone work. In a globalized market, where supply chains grow longer and technology capabilities grow larger, many products, or components of those products, are manufactured around the globe and all come together through layers of distribution to create the final product that ends up in the consumer's hand.[2] As a result, production and sale of many of those components often do not adhere to the strict regulations of the U.S. antitrust laws. Some of those parts may have been subject to a foreign cartel's anticompetitive conduct, such as price-fixed costs. The anticompetitive

1. *Mobile Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/mobile.

2. *See* Robert Connolly, Motorola Mobility *and the FTAIA*, CARTEL CAPERS (Sept. 30, 2014), http://cartelcapers.com/blog/motorola-mobility-ftaia (identifying the concern of the Seventh Circuit with the prevalence of foreign-made components in products sold in the United States); Skye Gould & Antonio Villas-Boas, *Here's Where All the Components of Your iPhone Come from*, BUS. INSIDER (Apr. 12, 2016, 3:54 PM), http://www.businessinsider.com/where-iphone-parts-come-from-2016-4 (defining the most crucial components of the iPhone—LTE modem, storage, camera, display, RAM, A9 processor, rare minerals, chassis, radio frequency transceiver, Wifi module, battery—and how many are manufactured in various places including Japan, China, and Taiwan).

conduct did not occur in the United States, but the cellphone and all its pieces make its way to the consumer here in the United States. Should these foreign actions be subject to U.S. antitrust laws?

This question was scrutinized in cases surrounding the recent conspiracy by foreign manufacturers to price-fix liquid-crystal-display panels (LCDs) incorporated into cell phones, computers, and televisions.[3] Foreign manufacturers sold LCD panels to foreign incorporators of the final products, and those incorporators eventually sold the panels to companies in the United States, including the well-known company, Motorola Mobility.[4] Does U.S. antitrust law allow a domestic company to bring an antitrust claim against a foreign conspirator for foreign anticompetitive conduct that affected a product now being sold in domestic commerce? Such questions regarding the scope of U.S. antitrust law have created considerable confusion among the circuit courts.[5] This uncertainty stems from courts' differing interpretations of the application of the Foreign Trade Antitrust Improvements Act[6] (FTAIA) in the context of foreign component cartel activity.[7] The courts' conclusions have been "mixed, unclear, and do not apply a consistent approach" to factually similar issues.[8]

When the Supreme Court had the opportunity to clear up the ambiguities surrounding the FTAIA, it denied certiorari, surprising the legal community and leaving many questions unanswered.[9] However, in a separate decision, the Supreme Court shed light on its current thinking about the extraterritorial application of federal laws.[10] This Comment argues that the recent decision in *RJR Nabisco, Inc. v. European Community*[11] and the Supreme Court's analysis of the extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act[12] (RICO) are instructive on the extraterritoriality of the FTAIA. Further, this Comment suggests that the Seventh Circuit's interpretation of the FTAIA, as it relates to component cartels, is most

3. *See* Leon Greenfield et al., *Foreign Component Cartels and U.S. Antitrust Laws: A First Principle Approach*, 29 ANTITRUST 18, 18 (2015) (describing other recent component cartel cases that have involved components of automobiles).
4. *Id.* at 21.
5. *See infra* Part II.
6. 15 U.S.C. § 6a (2012).
7. Greenfield et al., *supra* note 3, at 18.
8. *Id.*
9. *See infra* Section III.A.
10. *See infra* notes 135–142 and accompanying text.
11. 136 S. Ct. 2090 (2016) (plurality opinion).
12. 18 U.S.C. §§ 1961–1968 (2012).

consistent with the Court's analysis in *RJR Nabisco*. Though the precedent does not bind antitrust cases, the Court analogizes to antitrust law in its decision, expressing a narrowing trend in the extraterritorial application and general reach of U.S. law.

Part I of this Comment explains the relevant background information, including a brief overview of the development and purpose of antitrust law. Part I continues with a discussion of the history and enactment of the FTAIA in 1982, along with the early jurisprudence that helped shape the law as it currently stands. Finally, Part I outlines the issues component cartels present. Part II follows, providing an overview of the confusions that have emerged among the courts, particularly between the Seventh and Ninth Circuits. Part III describes the recent developments in the law and how the Supreme Court's denial of certiorari in two recent antitrust cases failed to meet the legal community's expectations. Further, Part III highlights the recent case, *RJR Nabisco*, and the Court's analysis of the extraterritorial application of the federal RICO statute. Part IV argues that the Court's decision and analysis in *RJR Nabisco* is instructive on the issue of extraterritoriality of the FTAIA, as it concerns foreign component cartels, by drawing an analogy to RICO and looking to the statutory construction and legislative history of the statute. Part IV then explains why the Seventh Circuit's interpretation is most analogous the Court's reasoning and should provide the standard for future cases of its kind. Part V takes a brief look at policy considerations that arise in the debate of whether U.S. laws should apply extraterritorially. Finally, Part VI considers a simplified scenario presented by a component cartel and provides a roadmap for how a future court should approach the issue in light of the *RJR Nabisco* decision.

I. BACKGROUND

A. Development and Purpose of Antitrust Law

In 1890, Congress enacted the Sherman Act laying the groundwork for antitrust law and what is currently the predominant law protecting against anticompetitive conduct in the United States.[13] The Sherman Act broadly states that its purpose is "to protect trade and commerce

13. Sherman Act, 15 U.S.C. §§ 1–7 (2012); Jeffrey C. Bank & Thua Hong, *The International Comparative Legal Guide to: Competition Litigation 2018: USA*, GLOBAL LEGAL GROUP 273, 273 (10th ed. 2017).

against unlawful restraints and monopolies."[14] The Sherman Act's major focus is competition, as Congress wanted to ensure that unreasonably restrictive conduct would not impede American businesses.[15] Though Congress's motivation was to clear the way for companies, the broad language of the Sherman Act created vast uncertainty among the courts about precisely which activities were included within its scope, particularly concerning foreign activity.[16] The Sherman Act allows for both criminal and civil actions against anticompetitive conduct that affects domestic commerce, such as price-fixing or competition-reducing mergers and monopolization.[17] The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) jointly enforce antitrust law under the Sherman Act, protecting the market and consumers against such restrictive and anticompetitive conduct.[18]

B. Foreign Trade Antitrust Improvements Act

After Congress enacted the Sherman Act, courts consistently held that the foreign activities that arose were within the reach of U.S. antitrust laws, which aggravated foreign nations and raised

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14. H.R. REP. NO. 51-1707, at 1 (1890). *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *Antitrust Guidelines for International Enforcement and Cooperation* 4 (2017) [hereinafter *DOJ & FTC Antitrust Guidelines*] (outlining the antitrust provisions of the Sherman Act); *see also* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (envisioning the Sherman Act as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade").

15. Historically, the Sherman Act was strictly territorial excluding from its reach any conduct that occurred outside U.S. borders. The Supreme Court in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909), *overruled by* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 406–08 (1990), held that conduct occurring in Central America was outside the scope of the Sherman Act. The Second Circuit replaced the territorial approach with the "effects" test in *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 445 (2d Cir. 1945). 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, 12 (2003).

16. The relevant language of the Sherman Act states in part, "[e]very contract . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

17. *See DOJ & FTC Antitrust Guidelines*, *supra* note 14, at 4–5.

18. Beckler & Kirtland, *supra* note 15, at 12. In deciding whether to bring a case, the agencies' primary concern is whether "there is a sufficient connection between the anticompetitive conduct and the United States such that the federal antitrust laws . . . would redress harm or threatened harm to U.S. commerce and consumers." *DOJ & FTC Antitrust Guidelines*, *supra* note 14, at 16.

considerable concerns about the principle of international comity.[19] These concerns pushed Congress to impose limitations on the extraterritorial reach of the Sherman Act.[20] In 1982, Congress enacted the FTAIA, carving out an exception to the Sherman Act by excluding from its reach certain "non-import trade" activity.[21] The general rule reflected in the FTAIA is that the Sherman Act will not govern conduct in foreign trade or commerce, or when the anticompetitive conduct at issue is foreign.[22] The relevant language of the FTAIA states:

> [The Sherman Act] shall not apply to conduct involving trade or commerce . . . with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of [the Sherman Act] other than this section.[23]

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19. *See, e.g.*, David Lord Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. INT'L L. & BUS. 1, 2–4 (1979); James A. Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 NW. J. INT'L L. & BUS. 336, 336 (1980) (highlighting complaints from nations with domestic antitrust laws regarding American competitiveness, following the enactment of the Sherman Act). Hacking discusses a case involving Swiss watchmakers that "provides [a] classic illustration of the foreign policy implications of extraterritorial application of U.S. antitrust laws." Hacking, *supra* note 19, at 3 (citing United States v. Watchmakers of Switz. Info. Ctr., Inc., 25 F.R.D. 197 (S.D.N.Y. 1959)); *see also Alcoa*, 148 F.2d at 443 (taking the view that states have the ability to hold liable any illegal conduct that has consequences within the U.S., regardless of where it occurred or who the actor is); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504, 593–94 (S.D.N.Y. 1951) (extending Sherman Act antitrust application to a British corporation, holding it liable for conspiracy).

20. *See* H.R. REP. NO. 97-686 (1982) [hereinafter *Committee Report*]. *See generally* John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 351 (1983).

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

22. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 158 (2004) (emphasizing the exclusion of activity without a domestic impact).

23. 15 U.S.C. § 6a.

The ambiguity of the FTAIA has resulted in various interpretations and conflict amongst lower courts over its precise meaning.[24] The language of the FTAIA is unclear at best, but ultimately the Sherman Act applies when the alleged anticompetitive conduct falls within certain parameters.[25] As a principal matter, the FTAIA lays out the "import commerce exclusion" that import activity will be governed exclusively by the Sherman Act and the FTAIA will not apply.[26] For example, if a foreign manufacturer conspires and sells a price-fixed product directly to a company in the United States for sale to consumers, the manufacturer directly imported that product into the United States and thus, the FTAIA would not apply.[27]

Once the conduct classifies as non-import—meaning U.S. export or wholly-foreign commerce—the FTAIA applies, and the conduct is only brought back within the scope of the Sherman Act if it satisfies the "effects exception" and that effect "gives rise to a claim."[28] The effects exception provides for Sherman Act coverage if the effect on U.S. domestic commerce is "direct, substantial, and reasonably foreseeable."[29] The effects exception determines whether there is subject matter jurisdiction over the claim, whereas the second requirement determines whether the plaintiff has standing to bring that particular claim.[30] The FTAIA is inapplicable only when the effects exception is met and such domestic effect "gives rise to a claim."[31] A court must find both of these exceptions to the prohibition on extraterritorial application for the non-import conduct to fall back under the governance of the Sherman Act.[32] Precisely what Congress

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24. Lauren Giudice, *What Effects are "Direct" Enough to Satisfy the FTAIA: An Analysis of 2014 FTAIA Decisions*, B.U. INT'L L.J. BLOG (Apr. 29, 2015), https://www.bu.edu/ilj/2015/04/29/what-effects-are-direct-enough-to-satisfy-the-ftaia-an-analysis-of-2014-ftaia-decisions.

25. *See* 15 U.S.C. § 6a (requiring that for conduct to fall back within the Sherman Act's governance it must be import activity that has the requisite effect on U.S. commerce, and such effect must give rise to the plaintiff's claim); Beckler & Kirtland, *supra* note 15, at 14.

26. *DOJ & FTC Antitrust Guidelines*, *supra* note 14, at 19; *see also* 15 U.S.C. § 6a.

27. *DOJ & FTC Antitrust Guidelines*, *supra* note 14, at 19.

28. *Id.* at 21. Europe uses a very similar effects test: the application of antitrust law to conduct that occurs outside of Europe "is justified . . . when that conduct has an 'immediate, substantial, and foreseeable effect' in Europe." Jeffrey S. Jacobovitz, *Foreign Trade Antitrust Improvements Act: When do U.S. Antitrust Laws Apply to Foreign Conduct?*, STRAFFORD CLE WEBINAR 10 (June 22, 2017) (quoting Case T-286/09, Intel Corp. v. Comm'n, ECLI:EU:T:2014:547, ¶¶ 231, 233–36, 243–44 (June 12, 2014)).

29. *DOJ & FTC Antitrust Guidelines*, *supra* note 14, at 21. *See* 15 U.S.C. § 6a.

30. *DOJ & FTC Antitrust Guidelines*, *supra* note 14, at 21. *See* § 6a.

31. *See* § 6a(2); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 173 (2004).

32. *See* § 6a; *DOJ & FTC Antitrust Guidelines*, *supra* note 14, at 21.

meant by the terms "non-import," "direct, substantial, and foreseeable," and "gives rise to" has been contentiously debated.[33]

1. Legislative history of the FTAIA

Legislative history provides some insight into the effect that Congress intended the FTAIA to have, including clarification of the Sherman Act's scope.[34] The committee report for the enactment of the FTAIA outlined two primary purposes for the Act: (1) to promote American exports, and (2) to create one objective test to clear up the confusion.[35] For Congress, the legislation was crucial given the ambiguity that surfaced in trying to define the language of the Sherman Act; thus, Congress's goal was to provide clarification by creating a "precise legal standard" to determine whether certain anticompetitive conduct fell within its reach.[36]

Along with addressing ambiguity, Congress aimed to change a perception. During the period surrounding the enactment of the FTAIA, there was a general sense among American businesses that the antitrust laws, while intended to help, actually hurt their abilities to participate in export markets.[37] Congress wanted to combat this view through the FTAIA's language, making it "explicit [that U.S. antitrust laws] appl[y] only to conduct having a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce or domestic exports."[38] Seeking to ensure businesses would not be excluded from export markets, Congress chose to narrow the application of antitrust law to conduct negatively affecting imports, and excluding export activity.[39]

Further, the discussion preserved in the committee report makes clear that Congress intended to not only clarify when the Sherman Act applied to foreign conduct, but to restrain such application.[40] Unfortunately, the attempt to resolve the ambiguity was unsuccessful

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33. *See infra* Section I.C.3, *infra* Part II.

34. H.R. REP. NO. 97-686, at 2 (1982).

35. *Id.*

36. *Id.* at 5.

37. *See id.* at 2 (acknowledging the first purpose of the legislation to change "the apparent perception among businessmen that American antitrust laws are a barrier to joint export activities that promote efficiencies in the export of American goods and services").

38. *Id.*

39. *Id.*

40. *Id.* at 7–8 (quoting Chairman Rodino's statement that "[t]he specific purpose of the Sherman Act modification is[] to more clearly establish when antitrust liability attaches to international business activities[,] . . . establishing restraints on export trade only violate the Sherman Act if they have a direct and substantial effect").

and led to greater discord among the courts.[41] Foreign activity and the complicated considerations related to such activities continues to create headaches for courts and parties alike. This Comment addresses those considerations and hones in specifically on international component cartels and the typical scenario as presented in price-fixing cases.[42]

C. Early FTAIA Jurisprudence

The FTAIA's enactment created numerous problems, but a handful of cases have made significant developments that have helped to clarify the law. While many other cases have shaped FTAIA law since its inception, this Comment discusses the most impactful cases in detail below.[43]

1. Indirect purchaser doctrine and Illinois Brick

First, an important concept considered in the discussion of the FTAIA is the indirect purchaser doctrine initially raised in *Illinois Brick Co. v. Illinois*[44] in 1977. The plaintiff's claim in this case is still a source of controversy among the circuit courts today.[45] The case involved domestic manufacturers of concrete bricks, which sold the bricks to contractors, and those contractors in turn submitted bids to general

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41. Ellen Meriwether, Motorola Mobility *and the FTAIA: If Not Here, Then Where?*, 29 ANTITRUST 8, 9 (2015) (describing the negative reception to the text of the Act by the Third and Ninth Circuits, calling it "inelegantly phrased" and a "web of words," respectively).

42. *See infra* Part II.

43. *See* Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 398 (2d Cir. 2014) (holding that the requirements of the FTAIA are non-jurisdictional and substantive; therefore, they go to the merits of a claim). The *Lotes* court relied on a bright-line rule that a statute is jurisdictional when the legislature clearly states that it is. *Id.* at 405 (citing Arbaugh v. Y & H Corp., 546 U.S. 500, 504 (2006)).

44. 431 U.S. 720, 764–65 (1977).

45. *See id.* at 726–27 (considering whether the doctrine of an indirect purchaser should apply to the antitrust context at issue and thus be grounds for barring a claim); *see also* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 821 (7th Cir. 2015) (blocking the claim because of "its collision with the indirect-purchaser doctrine" irrespective that some of the increased price was passed on from the direct seller); Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 848 (7th Cir. 2012) (focusing only on direct-purchaser claims because, following *Illinois Brick*, "indirect purchasers are not entitled to sue for damages under the federal antitrust laws"). *But see Lotes*, 753 F.3d at 413 n.7 (acknowledging the doctrine but interpreting the holding in *Illinois Brick* to "in no way impl[y] that anticompetitive injuries cannot be passed through to subsequent purchasers"). *See generally* Matthew Perlman, *States Urge Justices to Flip* Illinois Brick *in* Apple *Case*, LAW360 (Oct. 2, 2018, 7:55 PM), https://www.law360.com/articles/1088314/states-urge-justices-to-flip-illinois-brick-in-apple-case (discussing the thirty-one states that filed amicus briefs urging the Supreme Court to overturn *Illinois Brick*).

contractors, who would ultimately use the bricks on local projects.[46] The general contractors brought an antitrust claim against the manufacturers alleging a conspiracy to fix the price of the bricks, violating the Sherman Act.[47]

At the Supreme Court, the Justices' discussion focused on the indirect purchaser doctrine, which allows only the direct purchaser to bring a suit.[48] The general contractors were indirect purchasers of the bricks because the link between the manufacturers and the general contractors was separated by two levels of distribution.[49] The Court barred the contractors' claim because it was only the direct purchaser who was harmed by the overcharged bricks; the harm could not be passed down the chain of distribution for reasons of duplicative recovery and economic realities.[50] Some courts have discussed applying the doctrine in foreign component cartel cases involving the FTAIA, but the government previously contended that there should be an exception when the FTAIA bars recovery for the first purchaser in the United States.[51] However, the American Bar Association (ABA), in advising on antitrust guidelines, noted that the government-proposed exception contradicts longstanding precedent and tradition.[52] Thus, how the doctrine interacts with component cartel cases remains unsettled.

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46. *Illinois Brick*, 431 U.S. at 726.

47. *Id.* at 726–27.

48. *Id.* at 726.

49. *Id.*

50. *Id.* at 729–32, 743 (considering the economic consequences of allowing offensive, but not defensive, use of the pass-on theory from Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), including the significant risk of duplicative recovery and inconsistent treatment of cases). The Court also looked at the practicality of allowing these claims, recognizing that to trace the cost increase through all levels of distribution would be incredibly complex and expensive because of the time and evidence it would take. *Id.* at 758.

51. *See infra* note 87 and accompanying text. AMERICAN BAR ASS'N, *Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Proposed Update to the U.S. Department of Justice and Federal Trade Commission Antitrust Guidelines for International Enforcement and Cooperation* 8 (2016) [hereinafter *Joint Comments*] (citing Kirsten Limarzi, U.S. DOJ, Antitrust Division, *Comments at the American Antitrust Institute's 10th Annual Private Enforcement Conference* (Nov. 9, 2016)).

52. *Id.*

2. International comity and Hartford Fire

In the Supreme Court case *Hartford Fire Ins. Co. v. California*,[53] Justice Scalia's dissent provides particular insight into extraterritorial analysis.[54] The issue in the case was whether the Sherman Act applied to a conspiracy by London reinsurance companies on the basis that the conspiracy affected the U.S. insurance market.[55] Defendants argued that the "principle of international comity" prevented the Court from exercising jurisdiction because the conduct occurred outside of the United States.[56]

In his dissent, Justice Scalia discussed the extraterritorial application of the Sherman Act, highlighting that when determining if a statute has extraterritorial reach, the Court must look to two canons of statutory construction.[57] The first canon, the "presumption against extraterritoriality," reflects the presumption that legislation is only to apply domestically unless rebutted by a contrary intent.[58] Justice Scalia, however, acknowledged that in some cases, the Sherman Act overcame this presumption and has been applied extraterritorially.[59] In situations where the presumption is overcome, courts must then look to the second canon, that, to the extent possible, congressional actions will not be construed in a way that violates foreign laws.[60] This concept is related to the principle of international comity, a principle historically used to limit the scope of U.S. law.[61] Justice Scalia stated

53. 509 U.S. 764 (1993).

54. *Id.* at 800–20 (Scalia, J., dissenting).

55. *Id.* at 771–74.

56. *Id.* at 770.

57. *Id.* at 814–15 (Scalia, J., dissenting).

58. *Id.* at 814 (citing Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)); *see also* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013) (discussing the presumption against extraterritoriality in enforcing the Alien Tort Statute to avoid "unwarranted judicial interference in the conduct of foreign policy"); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (explaining that Congress must provide a clear indication of extraterritorial application; mere silence on the issue does not give the court authority to presume Congress's intention).

59. *Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting).

60. *Id.* at 814–15. To emphasize this canon, Justice Scalia referred to then-Judge Hand's opinion in *Alcoa*, in which he stated: "we are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers." *Id.* at 816–17 (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2nd Cir. 1945)).

61. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004) (concluding that "principles of prescriptive comity" act as a limit on the reach of U.S. antitrust law); 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1)–(2) (Am. Law Inst. 1987) (limiting unreasonable exercise of jurisdiction when it involves a party or activity that is connected with a foreign State); William S. Dodge,

that it would be inconceivable to apply our laws to the context in *Hartford Fire* and noted that the majority's "breathtakingly broad proposition" would force "the Sherman Act . . . into sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners."[62]

3. The Supreme Court and the "give rise to" requirement

Finally, the most recent FTAIA Supreme Court case, *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*,[63] was an important decision in the development of the FTAIA. The Court granted certiorari over the issue—foreign price-fixing causing domestic and foreign injuries—with the hopes of clearing up the great confusion over the meaning of the § 6a(2) "give[s] rise to" requirement.[64] The context of the case centered around a price-fixing conspiracy for vitamins in which the price of vitamins was allegedly increased globally, including in the United States.[65] In its decision, the Court emphasized the limiting nature of the FTAIA, signaling to U.S. exporters and businesses abroad that the Sherman Act would not prevent businesses from participating in anticompetitive conduct so long as the effect was only felt in the foreign market.[66] The Court also pointed to the committee report for the

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International Comity in American Law, 115 COLUM. L. REV. 2071, 2102–07 (2015) (exploring the use of international comity in domestic law and as a principle of restraint).

62. *Hartford Fire*, 509 U.S. at 820. The Supreme Court recently ruled on a price-fixing case involving Chinese manufacturers of Vitamin C, addressing the deference U.S. courts owe to foreign declarations of their own laws. *See* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018). The Court held, vacating the Second Circuit's ruling, that courts are not bound by the foreign statements, only that "respectful consideration" should be given. *Id.* at 1869–70; *see also* Jones Day, *The Cost of Doing Business: Supreme Court Vacates Chinese Defendants' Antitrust Win*, JD SUPRA (June 27, 2018), https://www.jdsupra.com/legalnews/the-cost-of-doing-business-supreme-89451 (discussing the implications of the holding, that upholding the lower court's decision could have limited the reach of the FTAIA by allowing foreign government statements to outweigh direct, substantial, and reasonably foreseeable impacts). The blog also discussed broader policy implications of the ruling, particularly with foreign countries like Cuba, which may no longer want to do business knowing that "[t]he cost of doing business in the United States may . . . be [a] liability." *Id.*

63. 542 U.S. 155 (2004).

64. *See id.* at 162.

65. *Id.* at 159. Foreign vitamin distributors from Ukraine, Australia, Ecuador, and Panama who purchased price-fixed vitamins tried to get jurisdiction by claiming that the conspiracy raised prices in the United States and in Ecuador. *Id.* at 159–60.

66. *Id.* at 160-61 (discussing how the FTAIA removes conduct from the Sherman's Act's reach unless the criteria are met (citing to H.R. REP. NO. 97-686, 1–3, 9–10 (1982)).

enactment of the FTAIA as being highly persuasive and stated that "[f]or those who find legislative history useful, [it] should end the matter."[67]

The Court held that the phrase "gives rise to" meant gives rise to "the *plaintiff's* claim," and not merely "a" claim, meaning that the domestic effect of the conspiracy must be the cause of the plaintiff's injury.[68] In making this determination, the Court looked at the purpose, language, and history of the FTAIA to hold that where the "adverse foreign effect is independent of any adverse domestic effect," the exception in the FTAIA that the effect must give rise to the claim is not met and therefore the conduct is beyond reach of the Sherman Act.[69] The Court's reasoning was twofold. First, the statutory construction of the principle of international comity requires courts to act cautiously and consider the sovereign interests of foreign nations.[70] Second, "the 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."[71] The "gives rise to" issue was hotly debated and, despite the clarity of this holding, what constitutes the requisite casual connection is still unsettled.[72] However, this decision was one of the most important developments of the FTAIA because it offered insight into the Justices' thoughts regarding the application of U.S. antitrust law, just how far it should reach, and how much conduct the FTAIA excludes.

II. COMPONENT CARTELS: WHAT ARE THEY AND WHAT IS THE CONFUSION?

International cartels occur when a group of manufacturers conspire to fix the price of a product and import that product into the United

67. *Id.* at 163 (adding that legislative history aside, careful consideration of the FTAIA would lead to the same conclusion that when the anticompetitive conduct is foreign, the FTAIA applies).

68. *Id.* at 173–74 (disagreeing with the plaintiff's claim that the domestic effects were "harmful enough to give rise to 'a' claim," and that it does not matter that it "is not their own claim; it is someone else's claim").

69. *Id.* at 164.

70. *Id.* "This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow." *Id.*

71. *Id.* at 169.

72. *See* S. Lynn Diamond, Empagran, *The FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOK. J. INT'L L. 805, 829–30 (2006).

States and around the globe.[73] When a conspirator directly imports the product into the United States, the actors are subject to U.S. antitrust law under the Sherman Act because such conduct is classified as an "import," and thus is removed from the FTAIA's control.[74] Component cartels are similar in that manufacturers conspire to fix the price of a product; however, the product is a component that will go into the manufacture of another final product.[75] The manufacturers sell the component at the illegally fixed price to an incorporator—likely a foreign company or foreign subsidiary of an American company—which then sells the finished product to retailers located, for the purpose of this Comment, in the United States.[76]

The DOJ and FTC Antitrust Guidelines provide an illustrative example of this problem:

> Corporation 1 and Corporation 2 have factories in Country Alpha where they manufacture Component X, a piece of high-tech hardware used in electronic products. Corporation 1 and Corporation 2 agree to raise prices for Component X sold to finished product integrators. These integrators . . . incorporate Component X into finished electronic products sold in the United States.[77]

So why is this confusing for courts? With an international component cartel, the threshold question is whether its activities—and given that its first sale is to a foreign entity—fall within the import requirement, and thus determining whether the conduct is governed

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73. *See* Margaret Levenstein et al., *International Price-Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies* 1, 4 (Nat'l Bureau of Econ. Res., Working Paper No. 9511, 2003) ("Producers form a cartel with the goal of limiting competition. By restricting output and increasing price, ideally to the price a monopolist would set (if the cartel controls the entire market), profits will be jointly maximized.").

74. *See* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 817–18 (7th Cir. 2015) (finding that Motorola had a "solid claim" for the one percent of panels bought and delivered directly to Motorola in the United States); Giudice, *supra* note 24 (providing examples of direct sales that took place in the LCD panel price-fixing cases, such as the direct sale of panels from defendants to the company Dell in the U.S.).

75. "Some of the largest cartel investigations and civil suits have targeted foreign suppliers of components that were incorporated overseas into finished products later sold in the U.S." Jacobovitz, *supra* note 28, at 57.

76. *See* Jae Hyung Ryu, Comment, *Deterring Foreign Component Cartels in the Age of Globalized Supply Chains*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 81, 82 (2016) (describing a situation where price-fixed LCDs were sold to U.S. companies at an increased price, presenting the question of whether the Sherman Act can hold those conspirators of the component cartel liable).

77. *DOJ & FTC Antitrust Guidelines*, *supra* note 14, at 22. Note also that "Illustrative Example C" is discussed separately from the illustrative example on non-component cartel cases, suggesting the situations are to be dealt with differently under antitrust law. *Id.*

by the Sherman Act or the FTAIA.[78] In the case of a domestic plaintiff purchaser, import commerce is evident because the plaintiff purchased the component directly from the cartel.[79] It is increasingly less clear, however, when one or more foreign entities, including U.S. owned foreign subsidiaries, serve as middle men between the cartel and the U.S. entity.[80] Should the foreign entity or the U.S. company on behalf of its foreign subsidiaries be able to recover for an injury—the increased price of the component purchased from the conspirator—suffered outside the United States simply because the products eventually entered the United States? Lower courts have failed to provide a consistent answer to this question.[81]

If the answer is yes and the conduct classifies as import commerce, the FTAIA does not apply; however, if the conduct is not import commerce because the conspirator was not the entity to bring the product into the United States, the FTAIA applies and necessarily begs the question: What qualifies as a "direct, substantial, and reasonably foreseeable" effect?[82] Courts have inconsistently defined what a "direct" effect is, ranging from the narrow definition of "immediate consequence" to the broader "reasonably proximate casual nexus" interpretation.[83]

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78. *See supra* notes 24–29 and accompanying text; *Motorola*, 775 F.3d at 818 (first considering whether the panels were imported to the United States by the defendants).

79. Meriwether, *supra* note 41, at 9.

80. *Id.*

81. *See* Giudice, *supra* note 24 (noting that Congress failed to create a clear rule to analyze foreign anticompetitive conduct, which led to circuit splits).

82. *See* Beckler & Kirtland, *supra* note 15, at 15 (recognizing the difficulty that "[f]or non-import commerce, courts apply the FTAIA's 'direct, substantial, and reasonably foreseeable effect' test," but "determining exactly what constitutes a 'direct, substantial, and reasonably foreseeable effect' has created uncertainty").

83. *See* Giudice, *supra* note 24 (discussing the Second and Seventh Circuits' interpretation of direct to mean a "reasonably proximate causal nexus," and the Ninth Circuit's literal interpretation that "direct" means "immediate consequence"). According to Illustrative Example C of the Antitrust Enforcement Guidelines—in relation to component cartels—"the anticompetitive cartel agreement could cause the price in the world market to stabilize or even rise, which also could indirectly affect U.S. prices[;]" however, this does not necessarily mean that such agreement created "the 'direct, substantial, and reasonably foreseeable effect' necessary to trigger subject matter jurisdiction." *See* Beckler & Kirtland, *supra* note 15, at 16. Beckler and Kirtland provide several examples of conduct that *may* cause such direct effect: customers paying higher prices, "artificial inflation of [the price] of a given product," "artificial limits on the volume of imported products," "an artificial reduction in prices of a given product," and "artificial limits on the volume of products exported from the U.S." *Id.* at 19.

To add to the confusion, scholars and judges have questioned if and how the indirect purchaser doctrine applies to antitrust claims.[84] This question is even more prevalent when a component cartel is involved, because "[n]othing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers."[85] Given this current climate, it is less likely that U.S. entities are purchasing components directly from foreign manufacturers, but rather through a foreign subsidiary. If this is the case, the indirect purchaser doctrine would block the parent company in the United States from being able to bring a claim on behalf of its foreign subsidiary because the two are considered legally independent entities, and thus the U.S. company is an indirect purchaser.[86] Only a handful of cases have even brought up the indirect purchaser doctrine, and the government has proposed an exception.[87] Yet, the extent of the doctrine's applicability, if any, to antitrust cases involving component cartels remains to be determined.[88]

Legislative history provides minimal guidance on these issues, despite the explicit comments on "Imports and Purely Foreign Transactions" and "International Cartels" in the committee report.[89] On international cartels, the committee recognized that because international cartels often cause global shortages and artificial inflation, the conduct would likely have the necessary effect on U.S. commerce, and given this, the committee anticipated the DOJ to

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84. *See* Giudice, *supra* note 24. In discussing the petition for certiorari in the *Motorola* case, Giudice notes that an analysis by the Supreme Court could provide useful guidance on the *Illinois Brick* doctrine and help address the split over the definition of "direct." *Id.*

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

86. *See id.* at 823 (explaining that "[a]lthough Motorola, the 'customer,' owns its foreign subsidiaries—the 'direct purchasers' of the components—[the foreign subsidiaries] are incorporated under and regulated by foreign law").

87. The government in *Motorola* argued that the "doctrine should be construed to permit damages claims by the first purchaser affected in U.S. commerce when the FTAIA bars the direct purchaser's claims." Giudice, *supra* note 24 (citing Brief for the United States and the FTC as Amici Curiae in Support of Neither Party, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Sept. 5, 2014)).

88. The *Motorola* court did not opine on whether there should be an exception as suggested by the government because it "found that Motorola waived the argument that it could recover for overcharges on the finished product based on price-fixing of the component." *Id.* Since the Supreme Court's denial of certiorari on the *Motorola* case, this issue has not been discussed.

89. H.R. REP. NO. 97-686, at 9–10, 13–14 (1982).

continue criminal enforcement against cartel activity.[90] Congress seemed to indicate that in certain circumstances, foreign conduct would have the requisite effect, and therefore, allow the government to pursue criminal charges; however, the report reflects no discussion of when the effect would be sufficient in a private action.[91] Additionally, it is apparent from the report that the committee did not intend for the Sherman Act to reach claims solely because an American actor was involved.[92] This may be an indication of how Congress anticipated the FTAIA to cover indirect purchasers.

A. Circuit Confusions

Despite several developments since the enactment of the FTAIA, the issues regarding its application to foreign component cartels, which limit the extraterritoriality of the Sherman Act, are unresolved.[93] Circuits have approached the problem differently and ruled on various grounds, leading to inconsistent outcomes on what appear to be factually similar cases.[94] One problematic inconsistency arises when a foreign purchaser alleges an international conspiracy to fix the price of components, later to be incorporated into final products and eventually sold in and affecting foreign and domestic markets. This issue arises because either the foreign purchaser, or parent company on its behalf, is harmed by the foreign conduct and is trying to bring a private claim under U.S. antitrust law, or the foreign defendant-

90. *Id.* at 13.

91. *See id.*

92. *Id.* at 9 (explaining legislative intent to exclude transactions between American-owned foreign firms from U.S. antitrust laws).

93. "For the past several years, plaintiffs and defendants in international price-fixing cases have battled over the extraterritorial application of the Sherman Act in light of the Foreign Trade Antitrust Improvements Act of 1982 . . . and the U.S. Supreme Court's seminal decision in *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.*" Robert Reznick, *Antitrust Implications of the U.S. Supreme Court's Decision in* RJR Nabisco v. European Community, ORRICK ANTITRUST WATCH (June 23, 2016), https://blogs.orrick.com/antitrust/2016/06/23/antitrust-implications-of-the-u-s-supreme-courts-decision-in-rjr-nabisco-v-european-community.

94. *See Antitrust Update: Supreme Court Surprises the Antitrust World with Denial of Cert in* Motorola *and* AU Optronics, PATTERSON BELKNAP (June 15, 2015), https://www.pbwt.com/antitrust-update-blog/supreme-court-surprises-antitrust-world-denial-cert-motorola-au-optronics [hereinafter *Antitrust Update*] (discussing the recent Supreme Court denials despite the acute conflict between the circuits' interpretations of objectively similar cases).

conspirator argues against the ability of the U.S. government to pursue a criminal charge against them under U.S. antitrust law.[95]

1. Seventh Circuit and Motorola Mobility v. AU Optronics Corp.

It is an economic reality that more frequently than not, a product being imported into the United States includes components that foreign manufacturers purchased before they were incorporated into final products and resold to retailers.[96] Against this backdrop, more situations like the one in *Motorola Mobility v. AU Optronics Corp.*[97] arise. The case was part of a series of cases alleging that Taiwanese and Korean manufacturers were involved in a large international conspiracy to fix the price of LCD panels in violation of § 1 of the Sherman Act.[98] Motorola, a U.S. company, and ten of its foreign subsidiaries bought LCD panels from the defendant, AU Optronics, to incorporate into cellphones.[99] Not at issue was the one percent of panels the manufacturers sold directly to Motorola in the United States because this portion of panels fell clearly within the classification of "import commerce."[100] Of the other ninety-nine percent of panels AU Optronics produced, only forty-two percent were purchased by Motorola's foreign subsidiaries, incorporated into cellphones, then sold and shipped to Motorola for resale in the United States.[101]

The issues discussed in the case were whether the conduct classified as "import commerce"; whether plaintiffs alleged an antitrust violation under the FTAIA; and whether Motorola, on behalf of its foreign subsidiaries, had antitrust standing to bring the claim.[102] In addition to

95. *See* discussion *infra* Section II.A.1, II.A.2.

96. Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 824 (7th Cir. 2015). *See* Connolly, *supra* note 2 (explaining that it could be near inconceivable to name a product sold in the United States that does not include some component made abroad).

97. *Motorola*, 775 F.3d at 816.

98. *Id.* at 817; Meriwether, *supra* note 41, at 8. LCD panels are an expensive component part incorporated into many modern technologies, such as computers, TVs, and phones, costing up to ten percent of the cost of the final product for a phone, but up to seventy percent for TVs. *Id.* at 10.

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

100. *Id.*

101. *Id.*

102. *Id.* at 818.

opining on these issues, the court also discussed concerns of international comity and made a distinction between criminal and private actions.[103]

Regarding the classification as import commerce, the court held that a defendant must be the importer of the component into the United States.[104] It was Motorola, through its foreign subsidiaries, that imported forty-two percent of the LCD panels that eventually made their way into the United States.[105] Because Motorola, not the defendants, imported the panels, the claim did not fall within the "import exception," and thus the FTAIA applied.[106]

The court did not provide detail as to what is required for conduct to have a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. However, it assumed that the conduct satisfied the requirement because, though probably modest, the effect of the conduct was "clearer" than in *Minn-Chem, Inc. v. Agrium, Inc.*,[107] a case where the effect was satisfied despite having a more tenuous impact.[108] Assuming the direct effect, the court next looked to whether Motorola satisfied the "gives rise to" exception, finding it did not.[109]

From the outset of the opinion, the court referred to Motorola as a "derivative victim" and stated that the foreign subsidiaries were the true victims.[110] The court ran through an analysis of potential harm that Motorola may have felt by the price increase, but said that such harm, if any, was "indirect" and that there was no evidence indicating a loss

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103. *See id.* at 825–26 (making a point during the discussion of international comity that the United States does not police and enforce its laws on the world, and although Motorola may not bring a private suit, the DOJ is up to the task of pursuing criminal charges).

104. *Id.* at 818. *But see* Animal Sci. Prods. v. China MinMetals Corp., 654 F.3d 462, 470 (3d Cir. 2011) (providing the Third Circuit's broad interpretation of import commerce that focuses on whether the defendant's anticompetitive conduct merely targeted the import market).

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

106. *Id.* at 818.

107. 683 F.3d 845 (7th Cir. 2012).

108. *Id.* at 856–57 (holding the potash agreement easily satisfied the substantial effects and foreseeability requirements, while suggesting the direct requirement is not a high bar and therefore is also met); *Motorola*, 775 F.3d at 819; Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 398 (2d Cir. 2014) (interpreting direct to mean a "reasonably proximate causal nexus").

109. *Motorola*, 775 F.3d at 819 (finding that Motorola did not meet the statutory requirement because "the cartel-engendered price increase in the components and in the price of cellphones that incorporated them occurred entirely in foreign commerce").

110. *Id.* at 818 (making an analogy to firms and owners of firms to emphasize that the owner, Motorola, did not have a direct claim against the injuring party because only the subsidiary was a victim of the unlawful acts).

of business or customers as a result of having to raise its prices.[111] Because the purchase of the component as well as the increase to the price of the cellphone occurred entirely in foreign commerce, the conduct harmed Motorola's foreign subsidiaries, and should be governed by the laws under which they incorporated and/or operated.[112] The court held that derivative victims do not have standing to bring a claim, not only because they cannot satisfy the "gives rise to" requirement, but because the "law does not collapse parents and subsidiaries" into a "single integrated" entity.[113] In so holding, the result of the court's interpretation was that foreign subsidiaries of U.S. companies injured by cartels outsides of the United States cannot satisfy the "gives rise to" provision.

The court continued, barring the claim on a separate, yet related ground, that allowing such a claim violated the indirect purchaser doctrine of *Illinois Brick*, and consumers (the indirect purchasers) cannot sue the conspirator even though the seller (the direct purchaser) passed on the increased cost to the consumers.[114] The first sale of the price-fixed component was to the foreign subsidiaries, and there was nothing stopping those subsidiaries from suing the cartel in either their own country or the country of the cartel members.[115] Motorola, on the other hand, was the indirect purchaser, having bought the incorporated product from the foreign subsidiary and thus could not bring suit. The difficulty in estimating the amount of harm to indirect purchasers, confirmed the "wisdom of the indirect purchaser doctrine" because the price Motorola charged its consumers mitigated any initial effect it felt.[116] Motorola made the decision to do business with

111. *Id.* at 819 (commenting that Motorola actually may not have lost customers if competitors also increased their prices, and that Motorola could have even made a profit if it tried to cover the increased costs by charging consumers more).

112. *Id.* at 820 (stating clearly that the subsidiaries should be seeking relief from injury under the appropriate laws, either from which they are governed or for those which govern the conspirators).

113. *Id.* at 820, 823 (emphasizing that even if the conclusion is wrong, and "Motorola is correct that it and its subsidiaries 'are one,' there was no sale by the subsidiaries to Motorola . . . . 'The one' . . . would have been injured abroad when 'it' purchased the price-fixed components").

114. *Id.* at 821 (noting that the plaintiff company and its consumers were merely the indirect purchasers of the price-fixed components).

115. *Id.* at 820.

116. *See id.* at 821–22 (responding to the reality that "[t]his may result in a windfall for the direct purchaser, but preserves the deterrent effect of antitrust damages liability while eliding complex issues of apportionment" present in assessing impacts of price-increase through various levels of distribution).

foreign subsidiaries and could not avoid the legal implications of that structure when it was convenient or in its interests to do so.[117]

After ruling against Motorola and its subsidiaries, the court moved into a discussion of international comity and the need for caution in allowing claims like that of Motorola because doing so would "enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and 'resent[ment at] the apparent effort of the United States to act as the world's competition police officer.'"[118] The court stressed the globalized supply chains and use of foreign subsidiaries in today's economy, and that courts should not extend coverage of U.S. law to include foreign subsidiaries injured abroad by conduct that occurred in foreign commerce.[119]

In response to a government request, the court amended its opinion to ease concern regarding criminal enforcement by providing a distinction between private actions and criminal actions pursued by the DOJ.[120] Though Motorola's claim could not move forward, the court assured that its holding would not prevent the DOJ from seeking criminal charges if the effect of the price-fixing scheme had the required effect on cellphone prices in the United States.[121] The *Motorola* case was based on a private claim, and the court indicated that private claims involving international component cartels create more problems than criminal claims, and should thus be handled differently under antitrust law. The court reasoned that in the context of international component cartels, the U.S. government will weigh considerations of international comity and foreign sovereignty, whereas private plaintiffs will not.[122] District courts within the Sixth

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117. *See id.* at 822 (choosing to do business in such a way does not allow businesses to "pick and choose from the benefits and burdens of United States corporate citizenship").

118. *Id.* at 824 (quoting United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 960–62 (7th Cir. 2004) (en banc)). *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004) (noting that the Supreme Court has warned that rampant extraterritorial application of the U.S. law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs").

119. *Motorola*, 775 F.3d at 824.

120. *Id.* at 825–26. After a decision ruling against Motorola, the DOJ filed an amicus brief requesting that the Seventh Circuit amend the opinion to clearly state that the holding would not impact the government's ability to pursue a criminal case against the foreign conspirators for the impact to the U.S. commerce. *Id.* Among additional language to emphasize its opinion, the Supreme Court clarified that the decision would not prevent the criminal punishment for the harmful price-fixing conduct. Giudice, *supra* note 24.

121. *Motorola*, 775 F.3d at 825–26.

122. *Id.* at 827.

Circuit have followed similar logic in approaching these types of cases, relying on the *Motorola* reasoning in their decisions.[123]

2. Ninth Circuit and United States v. Hui Hsiung

The criminal case against Hui Hsiung and others (including AU Optronics Corp. and AU Optronics Corp. America, Inc.), *United States v. Hsiung*,[124] involved the same conspiracy at issue in *Motorola*.[125] In brief, the Federal Bureau of Investigation found proof of an international conspiracy between Taiwanese and Korean electronics manufacturers to fix the price of LCD panels sold to companies in the United States.[126] The court principally held that the manufacturers' sales made directly to the U.S. retailer constituted import commerce, so the FTAIA did not need to be addressed for those portions of the sales.[127] Looking at several facts, including that the United States held one-third of the global market for personal computers with these LCD panels and that the evidence showed defendants specifically "targeted" U.S. companies, the court held that "import trade" could include defendants whose conduct was "directed" at American imports, thus bringing it back within the scope of the Sherman Act.[128]

At the time of this case, the Ninth Circuit had not yet defined what was included within "import trade"; however, the court looked to the Seventh, Sixth, and Third Circuits for guidance.[129] To hold that conduct "directed" at U.S. imports could classify as "import commerce," the court look at the Seventh and Sixth Circuits' definitions stating that conduct could be an import trade if it pertained

123. *See generally In re* Refrigerant Compressors Antitrust Litig., No. 2:209-md-02042, 2016 WL 6138600, at *1, *4, *9 (E.D. Mich. Oct. 21, 2016) (relying on *Motorola* to hold that the domestic plaintiff was the importer of the component and could not treat its foreign manufacturing subsidiary as "an extension of itself for purposes of satisfying the FTAIA or avoiding the indirect-purchaser-standing rule").

124. 778 F.3d 738 (9th Cir. 2015).

125. *See id.* at 743 (regarding the "Crystal Meetings" and the Taiwanese conspiracy to fix the price of LCD panels eventually sold in the United States to companies, including Motorola).

126. *Id.* The manufacturers sold to companies including Dell, Hewlett Packard, Compaq, Apple, and Motorola. *Id.* at 743.

127. *Id.*

128. *See id.* at 755, 755 n.8 (holding that the conduct was classified as "import trade" and as such not governed by the FTAIA, but stating in a footnote that the Third Circuit allows jurisdiction over activities "directed at a U.S. import market" to satisfy the exception under the FTAIA).

129. *Id.* at 754–55, 755 n.8.

to a "direct" transaction between a U.S. purchaser and the cartel.[130] Despite determining that the case fell within "import commerce" and therefore, that the FTAIA would not apply, the government proceeded with a domestic effects theory.[131] The court held that the FTAIA would not block the government from seeking a claim against foreign conspirators in this context.[132] Speaking to the domestic effects theory, the court held that the conduct met the requirements because it had a "direct, substantial and reasonably foreseeable effect" on U.S. commerce.[133] Other courts dealing with similar issues have followed the reasoning that the *Hsiung* court set forth.[134]

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130. *Id.* at 755 (emphasis added); *see also* Animal Sci. Prods. Inc. v. China Minmetals Corp., 654 F.3d 462, 470–71 (3d Cir. 2011) (holding that the import trade exclusion includes both actual importers as well as those who, while not having imported the product themselves, participated in anticompetitive conduct directed at the United States). *But see* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 818 (7th Cir. 2015) (citing Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 853–54 (7th Cir. 2012) (holding the import commerce is limited in scope to situations where the defendant physically imports the price-fixed goods to the United States); Lotes Co. v. Han Hai Precision Indus. Co., 753 F.3d 395, 398 (2d Cir. 2014) (requiring only a "reasonably proximate causal nexus").

131. *Hsiung*, 778 F.3d at 756. The court decision rested on the "import commerce" exception and did not discuss whether the provision "can independently support a criminal prosecution." *See* Ian Simmons et al., *Where to Draw the Line: Should the FTAIA's Domestic Effects Test Apply in Criminal Prosecutions?*, 29 ANTITRUST 42, 43–46 (2015) (criticizing the Court's decision in *Hsiung* and arguing that the FTAIA's "domestic effects" exception should not be applicable in criminal prosecutions).

132. *Hsiung*, 778 F.3d at 756.

133. *Id.* at 758.

134. *See In re* Cathode Ray Tube (CRT) Antitrust Litig., 738 F. Supp. 2d 1011, 1022–23 (N.D. Cal. 2010) (holding that whether the defendant was the importer was less important than whether the price-fixed components (CRTs) were sold in the United States). The court cited to cases where downstream, indirect plaintiff purchasers had standing to bring a claim against the manufacturer. *See id.* at 1023 (citing *In re* Linerboard Antitrust Litig., 305 F.3d 145, 159–60 (3d Cir. 2002) (finding that plaintiffs who purchased linerboard from defendants had standing in alleged conspiracy to fix prices of linerboard)). Another court to follow suit after *Hsiung* was *Costco Wholesale Corp. v. AU Optronics Corp*, No. C13-1207RAJ, 2016 WL 4017462, at *1 (W.D. Wash. Mar. 3, 2016), which alleged the same price-fixing conduct found in *Motorola* and *Hsiung*. *See id.* at *2–*3. Despite its similarities to *Motorola*, the court took a totality of the circumstances approach to allow the plaintiff's claim and classified the conduct as import commerce simply because the price-fixed panels "were sold in a transaction between a member of the conspiracy and a customer in the United States." *Id.* at *4. The court stated that even if the conduct was not import commerce, the effect was "direct" because it had "an immediate impact on later sales." *Id.* at *5. Finally, the *Costco* court distinguished the facts from *Motorola* regarding the "give rise to" requirement, because the plaintiff did not make its purchase through foreign

III. RECENT LEGAL DEVELOPMENTS

A. Certiorari Denials

Recently, the Supreme Court denied certiorari on two cases, which had it granted, could have resolved the circuit confusion and cleared up the ambiguities surrounding the extraterritoriality of the FTAIA. The Court denied certiorari to both *Motorola Mobility LLC v. AU Optronics Corp.* and *United States v. Hsiung*.[135] The denial shocked many in the antitrust community because "the conflict between the circuit courts' interpretations of the FTAIA 'could not be sharper' [given that] [t]he two cases dealt with the same products, the same conspiracy, and the same FTAIA provisions—and yet the circuit courts arrived at diametrically opposite conclusions."[136] In *Motorola*, the Seventh Circuit did not classify the conduct as "import commerce" because the product was imported through foreign subsidiaries.[137] Further, the court held that the injury did not arise from the effect on domestic commerce, failing to satisfy the requirements of the FTAIA necessary to bring the conduct back under the control of the Sherman Act.[138] Conversely, in *Hsiung*, the Ninth Circuit held that the same conduct classified as "import commerce" because the components were eventually sold, through final products, to U.S. customers and thus the FTAIA did not prevent the DOJ from pursuing a criminal case.[139]

The issues surrounding these cases were ripe for review and, had the Supreme Court granted certiorari, it likely would have analyzed the issues together, addressing the questions asked by the parties in both cases.[140] In its petition, Motorola asked: "Is a cartel's delivery of price-

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subsidiaries, but from U.S. vendors who originally purchased the components from the conspirators. *Id.* at *5–*6. The court did not discuss the question of whether this decision violated *Illinois Brick* and the indirect purchaser doctrine. *See id.* (failing to discuss the applicability of the indirect purchaser doctrine).

135. *Antitrust Update*, *supra* note 94. The Supreme Court denied certiorari to both cases in 2015. *See* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015) *cert. denied*, 135 S. Ct. 2837 (2015) (Mem.); United States v. Hsiung, 778 F.3d 738 (9th Cir. 2015), *cert. denied*, 135 S. Ct. 2837 (2015) (Mem.).

136. *Antitrust Update*, *supra* note 94.

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

138. *Id.* at 820–21.

139. *Hsiung*, 778 F.3d 742 at 755–56.

140. Clarification of these issues is crucial because it would "allow individuals and businesses (and their legal counsel) to anticipate correctly the legal consequences of their marketplace conduct, thereby enhancing compliance and conserving agency (and judicial) resources devoted to enforcement." *Joint Comments*, *supra* note 51, at 3.

fixed goods overseas for incorporation into finished products imported directly to the United States immune from private suit under U.S. antitrust law?"[141] The petition from *Hsiung* asked related questions: (1) "Whether a foreign seller's conduct can 'involv[e] . . . import trade or import commerce' even when the seller himself does not import any goods into the United States;" and (2) "Whether a foreign price-fixing agreement can have an effect on U.S. commerce that is 'direct' and 'gives rise to' a Sherman Act claim even when the agreement fixes prices only in foreign sales."[142] The denials of certiorari have left these and many other questions unanswered; however, a recent Supreme Court decision may provide insight into the approach the Justices might have taken.

B. RJR Nabisco, Inc. v. European Community

Confusion among the courts persists after these denials, and although the Supreme Court has not handed down a decision directly interpreting the FTAIA, it recently decided *RJR Nabisco*, which concerned the extraterritoriality of RICO.[143] In 2000, the European Community, on behalf of itself and twenty-six-member states, filed suit in the Eastern District of New York alleging a global money-laundering scheme between traffickers to sell drugs throughout Europe, resulting in competitive harm to the respondents.[144] RJR Nabisco, a company

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141. Petition for Writ of Certiorari, *Motorola*, No. 14-1122, *cert. denied*; *see* Giudice, *supra* note 24.

142. Petition for Writ of Certiorari, *Hsiung*, No. 14-1121, *cert. denied*; *see* Giudice, *supra* note 24. The Supreme Court could have addressed other issues as evidenced by the several requests made for clarification by the ABA regarding the guidelines. *See generally*, *Joint Comments*, *supra* note 51, at 1–2, 4, 14.

143. *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016) (plurality opinion).

144. 136 S. Ct. at 2098. *See generally*, John Bellinger, III, et al., RJR Nabisco, Inc. v. The European Community*: Supreme Court Limits RICO's Extraterritorial Reach*, ARNOLD & PORTER ADVISORY (June 22, 2016), https://www.arnoldporter.com/en/perspectives/publications/2016/06/rjr-nabisco-inc-v-the-european-community (providing further background and details on the facts of the case). The original case, brought in the Eastern District of New York, provides the extensive list of Member States represented by the European Community: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovenia, Spain, and Sweden. European Cmty. v. RJR Nabisco, Inc., No. 02-CV-5771, 2011 WL 843957, at *1 (E.D.N.Y. Mar. 8, 2011). *See generally*, Matthew J. Gabel, *European Community*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/European-Community-European-economic-association (last updated Sept. 28, 2018) (providing historical background on the European Community as a "principal component" of the European Union).

alleged to have "engaged in a pattern of racketeering," including conspiracy, money laundering, and supporting foreign terrorism, moved to dismiss the claim arguing that RICO did not apply to activity occurring outside of U.S. borders nor did it apply to a foreign enterprise.[145]

1. The Racketeer Influenced and Corrupt Organizations Act

Section 1962 of the RICO statute provides in relevant part:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.[146]

Section 1964 of the RICO statute also adds that:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit . . . .[147]

The RICO statute created criminal offenses for activities of organized criminal groups in relation to enterprise.[148] RICO also set out a civil cause of action for violations of an act that injures any person's business or property.[149]

2. Procedural history

The district court dismissed the case, agreeing that the claim was "impermissibly extraterritorial," but on appeal the Second Circuit reinstated the claim on the grounds that Congress intended the statute to apply extraterritorially to certain conduct provided that the violations serve as the basis for the liability under RICO.[150]

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145. *RJR Nabisco*, 136 S. Ct. at 2098–99.

146. 18 U.S.C. § 1962(a) (2012).

147. *Id.* § 1964(c).

148. *Id.* §§ 1961–1968. *See* U.S. DEP'T OF JUST., *Criminal Rico: 18 U.S.C. §§ 1961–1968 a Manual for Federal Prosecutors* 1–2 (6th ed. 2016) [hereinafter *Criminal RICO Manual*] (providing examples of racketeering offenses under the RICO statute including "extortion, interstate theft, narcotics violations, mail fraud, securities fraud, [and] currency reporting violations").

149. § 1964(c); *RJR Nabisco*, 136 S. Ct. at 2096.

150. *Id.* at 2099 (citing European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 137 (2d Cir. 2014)).

Additionally, the Second Circuit held on a rehearing that a RICO claim did not require domestic injury.[151] Seeing the importance of the issue, the Supreme Court granted certiorari to resolve the conflict.[152] In its review, the Court addressed two questions: (1) whether the substantive provisions of § 1962 applied to conduct which occurred in foreign countries, and (2) whether the § 1964(c) private right of action applied to injuries suffered in foreign countries.[153]

3. Analytical framework

Based on recent precedent, the Supreme Court followed a two-step framework for analyzing extraterritoriality issues generally: (1) the presumption against extraterritoriality; and (2) the statute's "focus."[154] The first step requires analysis of the presumption against extraterritoriality, a canon of statutory construction.[155] Absent a clear congressional intent to the contrary, the presumption against extraterritoriality stands and the law applies domestically.[156] If the court finds that the statute has extraterritorial effect, thus overcoming the presumption, it will have no need to consider the "focus" and the analysis ends.[157] However, if the presumption is not overcome, a court

151. *Id.* (citing European Cmty. v. RJR Nabisco, Inc., 764 F.3d 149, 150 (2d Cir. 2014) (per curium)).

152. *Id.* at 2096.

153. *Id.* at 2096–97; *see* 18 U.S.C. §§ 1962, 1964(c).

154. *See RJR Nabisco*, 136 S. Ct. at 2100–01 (noting that step one grew out of a basic premise that "United States law governs domestically, but does not rule the world" (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 111–13 (2013) (reviewing the extraterritoriality of the Alien Tort Statute); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255–56 (2010), *superseded by statute*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864–65 (2010), (reviewing the extraterritoriality of the Securities Exchange Act of 1934).

155. *RJR Nabisco*, 136 S. Ct. at 2100; *see also Kiobel*, 569 U.S. at 117, 122–24 (recognizing that the presumption limits courts' ability to exercise jurisdiction because the presumption against extraterritoriality "guards against our courts triggering such serious foreign policy consequences"); *Morrison*, 561 U.S. at 255 (explaining that the principle of the presumption against extraterritoriality "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters," and courts must assess whether it is overcome in any context regardless of a conflict of laws).

156. *RJR Nabisco*, 136 S. Ct. at 2100–01 (clarifying that for any statute, courts must discern whether the presumption has been overcome based on a clear limitation placed on its extraterritorial application by Congress).

157. *Id.* at 2100–01 (distinguishing from *Morrison* and *Kiobel*, two cases where the presumption was not rebutted, and the court looked at the "focus").

must move on to the second step and determine whether the case involves a domestic application of the statute by finding its "focus."[158]

4. Holdings

On the first issue, the Supreme Court held that the RICO statute clearly applied to some foreign conduct—thus rebutting the presumption—because Congress made specific reference to instances involving a domestic defendant and offenses taking place outside of the United States.[159] In agreement with the Second Circuit, the Court held that the inclusion of these instances provided an implicit indication that the law of § 1962 was to apply extraterritorially.[160] However, the Court clarified that although a domestic enterprise is not required, not "every foreign enterprise will qualify . . . [and RICO] requires proof . . . [that the enterprise is] 'engaged in, or the activities of which affect, interstate or foreign commerce.'"[161]

On the second issue of whether the private right of action under RICO is available to plaintiffs with foreign injuries, the Court held that the plaintiff did not successfully overcome the presumption against extraterritoriality.[162] The Court stressed that the presumption applied separately to both provisions of RICO, and in application to § 1964 it was not overcome because providing such private civil remedy "create[d] a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct."[163] The Court continued to explain its reasoning through an analogy to antitrust law.[164] Several respondents in the current case had also advised the Court in *Empagran* of the ramifications to their own antitrust schemes if U.S. remedies were applied to their citizens.[165] For this reason, a private right of action under RICO requires

158. *Id.* at 2101.

159. *Id.* at 2101–02. Though not expressly stated, Congress's definition of "racketeering activity" included violations of other statutes that *do* explicitly state extraterritorial application. *Id.*

160. *Id.* at 2102.

161. *Id.* at 2105 (citing 18 U.S.C. § 1962(a)-(c) (2012)).

162. *Id.* at 2106 ("Irrespective of any extraterritorial application of § 1962, we conclude that § 1964(c) does not overcome the presumption against extraterritoriality.").

163. *Id.*

164. *Id.* at 2106–07.

165. *Id.*; *see supra* Section I.C.3 (discussing *Empagran*). Foreign antitrust laws were created in consideration of their own domestic needs and priorities. To simply allow for a U.S. remedy would be to allow foreign citizens to ignore the concerns behind their policy choices. *See RJR Nabisco*, 136 S. Ct. at 2106–07.

"[s]omething more" beyond a finding that the substantive provision reaches foreign conduct, and in this context "it [was] absent."[166]

Therefore, in holding that the presumption stands, the Court established a requirement for a private RICO plaintiff to prove a "*domestic* injury."[167] The Court found support for this decision in the language of the statute: "'[A]ny person injured' . . . by a violation."[168] Though the word "any" typically indicates broad inclusively, the Court said the word on its own cannot overcome the presumption.[169]

Finally, the Court expressly disagreed with respondent's and Justice Ginsberg's argument that the private right of action was modeled after the Clayton Act, and therefore, should allow for plaintiffs to sue for foreign injury.[170] While the Clayton Act often guided interpretations of § 1964(c), the Court was convinced that current doctrine and recent congressional actions advised against doing so here.[171] Further, the Court dismissed earlier concerns that not applying U.S. antitrust law to foreign defendants would defeat its purpose because to use this concern as a justification would be to "divin[e] what Congress would have wanted" and such judicial approach should not be followed.[172] The Court's "reluctance" not to read § 1964(c) as broadly as the Clayton Act has been read previously is "[u]nderscor[ed] . . . [in] Congress's more recent decision to define precisely the antitrust laws' extraterritorial effect," excluding "conduct that 'causes only foreign injury.'"[173] Further, the Court states that the enactment of the FTAIA

166. *Id.* at 2108.

167. *Id.* at 2106.

168. *Id.* at 2108 (quoting 18 U.S.C. § 1964(c))

169. *Id.*

170. *Id.* at 2109 (noting that section 4 of Clayton Act served as a model during the creation of the private right of action under RICO). *See* 15 U.S.C. § 15(a) (2012) (stating in relevant part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the Unites States . . . and shall recover three-fold the damages by him sustained"). *See generally The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Dec. 3, 2018). The Clayton Act was enacted in 1914, amending the Sherman Act explicitly by prohibiting additional conduct and allowing private parties to recover triple damages for harm from antitrust violations. *Id.*

171. *RJR Nabisco*, 136 S. Ct. at 2110.

172. *Id.* (quoting Pfizer Inc. v. Gov't of India, 434 U.S. 308, 414 (1978)).

173. *Id.* at 2110–11 (quoting F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 158 (2004) (describing the FTAIA and that application of U.S. law will differ based on which type of actor is bringing the claim)).

"counsel[ed] against importing into RICO those Clayton Act principles that are at odds with . . . current extraterritoriality doctrine."[174]

IV. ANALYSIS

The *RJR Nabisco* decision is analogous to, and instructive on, the analysis of extraterritoriality of U.S. antitrust law relating to the FTAIA. The Seventh Circuit's interpretation of the scope of the FTAIA, as it relates to component cartels, is in line with this recent Supreme Court decision. Though non-binding, the Court's interpretation of the federal RICO statute provides insight into the proper way to interpret the FTAIA.[175]

A. Analogizing RICO and the FTAIA

Drawing the analogy between RICO and the FTAIA is possible because the Supreme Court does so itself in *RJR Nabisco* by relying on antitrust law and previous decisions it has made regarding the extraterritorial reach of federal statutes.[176] The Court saw a similarity between the two issues—racketeering and antitrust law—in the *RJR Nabisco* case and relied on antitrust law and its precedent to determine the extraterritoriality of another federal statute (RICO).[177] Though the Court declined to apply the broad application found in the Clayton Act regarding a private right of action, it did so to balance against strong concerns of "international friction" and to rule in accordance with more recent congressional decisions to "reign in" the reach of such laws.[178] By not prescribing the scope of the Clayton Act, the Court acknowledged that the purpose of enacting laws like the FTAIA was to narrow the scope of U.S. antitrust law, and that to allow a foreign plaintiff's recovery would go against current extraterritoriality jurisprudence.[179] Accordingly, the Court found that the enactment of

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174. *Id.*

175. Reznick, *supra* note 93; Jacobovitz, *supra* note 28, at 9 (predicting that "the Supreme Court's decision in *RJR Nabisco v. European Community* . . . which addressed the extraterritorial application of the federal RICO statute—cited to, and may ultimately help shape, the FTAIA").

176. *See supra* notes 162–166 and accompanying text.

177. *See RJR Nabisco*, 136 S. Ct. at 2106–07.

178. *Id.* at 2109–10. *See* Reznick, *supra* note 93 ("While an extraterritoriality rule arising out of the construction of a purpose-made federal statute (the FTAIA) may seem less amenable to change than one simply construing a private right of action, this Court seems determined to reign in federal jurisdiction involving expensive litigation.").

179. *See RJR Nabisco*, 136 S. Ct. at 2110 (suggesting that prior antitrust jurisprudence and the current Supreme Court view may not be in accordance).

the FTAIA, while not independently limiting on RICO, nonetheless discouraged using Sherman Act principles to discern the scope of RICO.[180] The Court's holding to deny a private action for foreign injury from racketeering activity in *RJR Nabisco* reflects this analysis.[181]

Additionally, the similarities between RICO and the Sherman Act, to which the FTAIA limits, are apparent—both are federal statutes aimed at counteracting corrupt activity at home and abroad having significant impacts on the commerce of the United States. Further, the relevant discussion surrounding both these statutes centers around the extraterritoriality of a federal U.S. law regarding corrupt practices, whether it be racketeering or price-fixing.[182] It is true that the two statutes pertain to separate issues—the RICO statute deals with racketeering activity and the FTAIA with antitrust violations.[183] Reducing the laws to their differences, however, is an oversimplified comparison. When reviewing the extraterritoriality of U.S. law, the analysis is the same in every situation, requiring the court to run through the same two-steps outlined in *RJR Nabisco*.[184] Further, in both statutes, the conduct at issue is not the focus of that analysis, but rather the impact of the conduct—the effect on U.S. commerce.[185] In fact, the laws do prohibit overlapping conduct, such as conspiracy, and both require a substantive showing that the conduct at issue had a requisite effect on domestic commerce.[186]

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180. *Id.* at 2110–11.

181. *See id.* at 2110.

182. *See* 18 U.S.C. § 1962 (2012) (outlining four criminal actions of organized crime and use of income from such crime by "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce"); Sherman Act, 15 U.S.C. § 1 (2012) (making it illegal to restrain "trade or commerce among the several States, or with foreign nations" which includes conspiracy).

183. *See Criminal RICO Manual*, *supra* note 148, at 1–5; *DOJ & FTC Antitrust Guidelines*, *supra* note 14, at 1–5 (describing prohibited conduct under the Sherman Act including price fixing, customer allocation, bid rigging, cartel activities, competition-reducing mergers, and monopolization).

184. *See supra* notes 154–158 and accompanying text.

185. *See* 18 U.S.C. § 1962(a) (removing from reach "activities of which affect, interstate or foreign commerce"); FTAIA, 15 U.S.C. § 6a(1)(A) (excluding "conduct involving trade or commerce . . . with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect . . . on trade or commerce").

186. *See* 18 U.S.C. § 1962(a) ("It shall be unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . to use or invest . . . in . . . activities of which affect, interstate or foreign commerce."); 15 U.S.C. § 6a(1) ("[S]uch conduct has a direct, substantial, and reasonably foreseeable effect . . . on commerce . . . in the United States.").

Further, for a private plaintiff to bring a claim under either law, the plaintiff must make a showing of "domestic injury" because neither law intends to give relief for all foreign injuries occurring outside the United States.[187] Lastly, both statutes allow for criminal and private causes of action.[188]

B. Incorporating RJR Nabisco

1. Statutory construction

In many of its decisions, the Court highlighted the importance of congressional intent and use of the statutory canons of construction when analyzing the presumption against extraterritoriality.[189] The Court in *RJR Nabisco* discussed the presumption of all statutes against extraterritoriality, unless there is congressional indication otherwise; therefore, the presumption would apply to an analysis of the extraterritoriality of the FTAIA.[190] Further, the presumption applies to each part of a statute.[191] Just as the Court separately analyzed the presumption against the two provisions of the RICO statute in *RJR Nabisco*, courts must look at each requirement of the FTAIA to determine whether the presumption has been overcome.[192]

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187. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106 (2016) (plurality opinion). *See* 15 U.S.C. § 6a(2) (providing that the effect must "give[] rise" to the plaintiff's claim).

188. *See* Clayton Act, 15 U.S.C. § 15(a) (2012); RICO, 18 U.S.C. § 1964(c) (2012).

189. *See RJR Nabisco*, 136 S. Ct. at 2100 (applying the presumption against extraterritoriality to the federal RICO statute and discussing the reasoning for the presumption); Kiobel v. Royal Dutch Petroleum Co., 596 U.S. 108, 115 (2013) (applying the presumption against extraterritoriality to an issue of extraterritorial application of the Alien Tort Statute and finding nothing to rebut the presumption); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010), *superseded by statute*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376 (2010), (explaining its decision to apply the presumption in every case, the Court noted that the disregard of the presumption in the past has led to unpredictability); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991), *superseded by statute*, Civil Rights Act of 1991, § 109(a), 105 Stat. 1077, (discussing the "longstanding principle of American law" that an act of Congress was intended to apply domestically, unless there is evidence of a contrary intent).

190. *See RJR Nabisco*, 136 S. Ct. at 2100 (implementing "the presumption across the board, regardless of whether there is a risk of conflict between the American statute and a foreign law" (internal quotes omitted)).

191. *Id.* at 2106. Even though the substantive provision of RICO overcame the presumption, the Court emphasized that the presumption must apply independently to each cause of action. *Id.*

192. *See supra* notes 159–173 and accompanying text.

Similar to *RJR Nabisco*, the substantive provisions of the FTAIA overcome the presumption.[193] Separating the two provisions, § 6a(1) provides the substantive law of the FTAIA, determining whether the conduct at issue falls within the Sherman Act's reach by having a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.[194] The FTAIA and Sherman Act would likely be a similarly "rare statute," like RICO, because neither expressly states extraterritoriality, but context clearly provides for it.[195] Congress enacted the FTAIA to specifically address when the Sherman Act should apply extraterritorially, indicating that, provided the criteria have been met, there are circumstances where the law brings foreign conduct within reach.[196]

Also consistent with the reasoning of *RJR Nabisco*, the FTAIA can be read to have a separate private right of action because § 6a(1) describes what claims plaintiffs can bring, whereas § 6a(2) describes which plaintiffs can bring those claims.[197] By looking at criminal and private civil claims differently under the FTAIA, a division taken by the *RJR Nabisco* Court in the analysis of RICO, one would find that § 6a(2) is applicable to private claims.[198] In the criminal context, when the government brings an action for an antitrust violation, it does so "on behalf of the United States" seeking to stop conduct that had "a direct, substantial, and reasonably foreseeable effect on U.S. commerce," thus giving rise to the government's claim.[199] When the government brings

193. *See supra* notes 159–161 and accompanying text.

194. *Compare* FTAIA, 15 U.S.C. § 6a(1) (2012), *with* RICO, 18 U.S.C. § 1962 (2012) (prohibiting patterns of activities "of which affect interstate or foreign commerce").

195. *See RJR Nabisco*, 136 S. Ct. at 2103–04 (stating that, though rare, it is clear and easy to see why Congress would not limit application of the statute to domestic enterprises); H.R. REP. NO. 97-686, at 10 (1982) (qualifying the explanation of the requisite domestic effect by stating that the Act "does not exclude all persons injured abroad from recovering under the antitrust laws of the United States").

196. *See* 15 U.S.C. § 6a (excluding foreign conduct, but subjecting foreign conduct to U.S. law provided the "conduct has a direct, substantial, and reasonably foreseeable effect" and "such effect gives rise to a claim," thus anticipating situations where foreign conduct is within the scope of antitrust law); H.R. REP. NO. 97-686, at 9–10 (clarifying that U.S. courts should not exercise jurisdiction over foreign transactions absent "a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor").

197. *See* 15 U.S.C. § 6a(2) (requiring that the necessary effect of § 6a(1) "give[] rise to a claim"). As stated in *RJR Nabisco*, this provision has been interpreted to mean giving rise to the "particular" plaintiff's claim. *See supra* note 68 and accompanying text.

198. 15 U.S.C. § 6a(2).

199. *See DOJ & FTC Antitrust Guidelines*, *supra* note 14, at 26; Jacobovitz, *supra* note 28.

a claim and the conduct satisfies the substantive requirements, that effect will conceivably always satisfy § 6a(2); and thus, the section would only bar private actions that do not arise from a domestic injury.[200] Provided this, as in *RJR Nabisco*, foreign plaintiffs claiming foreign injury could not rebut the presumption because such claims create the same international friction.[201] As the *RJR Nabisco* court discussed, providing private remedies for foreign anticompetitive conduct to foreign plaintiffs creates a greater problem of international friction than it does when criminally prosecuting that foreign conduct because it allows foreign citizens to bypass the potentially less generous antitrust laws of their own nations.[202] If the plaintiff cannot prove a domestic injury in addition to the requisite effect on domestic commerce, the court cannot entertain the private claim.[203] Further, the Sherman Act defines a "claimant" as "a person . . . that has brought . . . a civil action alleging a violation of section 1 or 3 of the Sherman Act."[204] The term "a person" is comparable to the term "any person" as used in RICO, and similar to the reasoning in *RJR Nabisco*, the use of the term "a person," while ordinarily broad in scope, does not overcome the presumption against extraterritoriality.[205]

2. Legislative history

Absent a statute's express showing of intent, legislative history can be instructive to find the purpose and intent behind its enactment.[206] The legislative history for the FTAIA illustrates its intended extraterritorial applicability and supports a position consistent with the

200. *See* H.R. REP. NO. 97-686, at 13 (weighing concerns that international cartel activity would increase due to the legislation, Congress reassured that such activities and their impact would likely trigger jurisdiction under which the government could still enforce the antitrust laws).

201. *See supra* notes 162–163 and accompanying text.

202. *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106–07 (2016) (plurality opinion) (acknowledging the competing interests of other nations; nations that had raised concerns in other contexts such as antitrust).

203. *See supra* notes 30–31 and accompanying text.

204. Sherman Act, 15 U.S.C. § 1(4) (2012).

205. *See RJR Nabisco*, 136 S. Ct. at 2108.

206. *See* Julia Taylor, *Legislative History Research: A Guide to Resources for Congressional Staff* 1 CONG. RES. SERV. (2013) (providing an overview of legislative history as a research tool for interpreting statutes because it provides "background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates").

reasoning in *RJR Nabisco*.[207] The Court in *RJR Nabisco* relied on recent congressional actions, reflecting the modern extraterritorial doctrine (referencing the enactment of the FTAIA), to narrow the extraterritorial scope of a private claim under RICO.[208] In doing so, the Court nods to Congress's intention behind the enactment, supporting a narrower reading of antitrust laws.

The application of the rationale from the *RJR Nabisco* decision is consistent with the legislative intent behind the enactment of the FTAIA. The purpose of the FTAIA was to clarify and potentially limit the reach of the Sherman Act.[209] As reflected in the committee report, Congress did not intend to broaden the scope of U.S. antitrust law for cases of foreign injury to foreign plaintiffs caused by foreign conduct.[210]

In enacting the FTAIA, Congress sought to ease the concerns of U.S. exporters about liability under the Sherman Act for participating in a foreign market where anticompetitive conduct may be necessary to succeed.[211] Congress wanted to encourage U.S. exporters by addressing concerns from the business community that establishment of antitrust law would bar joint export activities.[212] Bearing this purpose in mind, "to protect *American exporters*, it does not make sense to protect *foreign plaintiffs* injured by effects felt abroad, and not by effect to the U.S. market."[213] This sentiment is consistent with the Supreme Court's emphasis on the principle that U.S. federal law is not meant to govern the world and will not intend to bring foreign plaintiffs' injuries within the reach of its jurisdiction.[214] Put another

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207. *See* H.R. REP. NO. 97-686, at 7 (1982) (amending the current antitrust laws at the time to offer clarification when international anticompetitive conduct is to be governed by such laws).

208. The Committee Report reflects a narrowing of applicability, a trend supported by the Court in *RJR Nabisco*. *See RJR Nabisco*, 136 S. Ct. at 2110–11 (declining to apply the broader application principles of the Clayton Act because recent congressional acts, including the enactment of the FTAIA, have altered the current extraterritoriality doctrine); H.R. REP. NO. 97-686, at 10, 13 (restricting extraterritorial application in those contexts where the conduct does not have the requisite effects).

209. *See* 15 U.S.C. § 6a; *supra* Section I.B.1.

210. H.R. REP. NO. 97-686, at 9 ("A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come with the reach of our antitrust laws.").

211. Beckler & Kirtland, *supra* note 15, at 22.

212. H.R. REP. NO. 97-686, at 2–3, 9–10.

213. Beckler & Kirtland, *supra* note 15, at 22.

214. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004) (questioning why application of American law to conduct that causes foreign harm is

way, foreign plaintiffs cannot merely "piggy-back" off of a U.S. entity to seek recovery under U.S. law.[215]

C. Seventh Circuit and Motorola

In addition to being able to draw a comparison between the statutes, the Seventh Circuit's interpretation of the FTAIA is most analogous to the interpretation of the RICO statute in this recent Supreme Court decision. Further, the Court's distinction between the substantive law and private right of action leads to the conclusion that the Seventh Circuit is more in line with the reasoning and current thinking of the Court and its precedent regarding extraterritoriality of federal statutes.

Concerns of international comity and friction aligned with those the Court expressed in *RJR Nabisco*. The Seventh Circuit in *Motorola* correctly stated that the purpose behind the FTAIA, in consideration of international comity, was to limit the scope of U.S. antitrust law.[216] The potential for international friction weighed heavily on both the Seventh Circuit and the Supreme Court, which received several amicus briefs from foreign countries expressing their concern about the implications of applying U.S. law would have on their own antitrust policies.[217] Further marking the importance of this consideration, both courts quoted *Empagran*, supporting the view that allowing foreign entities to benefit from U.S. antitrust law would "be an unjustified interference" with foreign nations and likely cause "resentment at the apparent effort of the United States to act as the world's competition police officer."[218]

Just as the *RJR Nabisco* Court analyzed the statute as two separate requirements—looking at its substantive provision apart from the provision allowing for a right of action—the Seventh Circuit in *Motorola*

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better than allowing the foreign nation to decide how to best protect its customers, concluding that "the justification . . . seems insubstantial").

215. Beckler & Kirtland, *supra* note 15, at 23.

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

217. *Id.* at 817; RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106–07 (2016) (plurality opinion).

218. *Motorola*, 775 F.3d at 824. The court in *Motorola* makes a point to quote *Empagran* in asking the question: "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?" *Id.* at 825 (quoting *Empagran*, 542 U.S. at 165). *See RJR Nabisco*, 136 S. Ct. at 2106–07 (raising the same international concerns about giving recovery to foreign injuries as expressed in *Empagran*).

noted the essentiality of looking at the two requirements separately, providing that one establishes the existence of a claim, and the other establishes whether the plaintiff has standing to bring that claim.[219] Assessing the first requirement, the holding in *Motorola*, that there could be such an effect for foreign conduct, is consistent with the holding in *RJR Nabisco*, that the substantive provision overcame the presumption and therefore, some conduct, though foreign, will be within scope of U.S. federal law in certain circumstances.[220]

In assessing the second requirement of the FTAIA, the Seventh Circuit in *Motorola* determined that the foreign subsidiaries of Motorola could not, through Motorola, seek damages under the Sherman Act.[221] Just as the Supreme Court held in *RJR Nabisco*, the presumption against extraterritoriality was not overcome regarding the provision of *who* can bring a claim, and required a foreign plaintiff show domestic injury.[222] The *Motorola* court similarly did not find domestic injury for a foreign plaintiff who was injured by foreign conduct occurring abroad.[223]

Lastly, the *Motorola* decision—holding that the foreign plaintiff did not have a private right of action—did not hinder the DOJ in criminally pursuing illegal activity directly affecting commerce of the United States.[224] This holding reflects the understanding that there is a critical distinction between private actions and those brought by the DOJ.[225] Such a concept is consistent with the Supreme Court's clear distinction between the application of substantive law and existence of a private right of action under RICO, and courts should treat them differently in determining the extraterritoriality of the law.[226] To

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219. *Motorola*, 775 F.3d at 818; *see RJR Nabisco*, 136 S. Ct. at 2106, 2108.

220. *See RJR Nabisco*, 136 S. Ct. at 2101; *Motorola*, 775 F.3d at 819.

221. *See Motorola*, 775 F.3d at 824–25.

222. *See RJR Nabisco*, 136 S. Ct. at 2105 (finding that although "RICO imposes no domestic enterprise requirement [presumption rebutted as to *which* claims], this does not mean that every foreign enterprise will qualify"); *Motorola*, 775 F.3d at 818 (looking at the requirements separately, distinguishing the analysis for what violations can be brought and secondly, who can claim them).

223. *See Motorola*, 775 F.3d at 827.

224. *Id.*

225. *Id.* The court notes that China, Japan, Korea, and Taiwan all raised serious concerns about the "expansive application" of the U.S. antitrust laws; however, "[n]o nation . . . objected to the DOJ's successful prosecution of foreign companies and even citizens," only highlighting that "the comity considerations with private plaintiffs are quite different." *Id.*

226. *See RJR Nabisco*, 136 S. Ct. at 2106.

underscore this distinction, the Seventh Circuit made clear that to deny the private claim would not inhibit the DOJ's ability to seek a criminal claim, provided the impact to cellphone prices in the Unites States met the statutory requirements.[227] This holding not only aligns with Supreme Court precedent, but did not directly conflict with outcome in *Hsiung*, in which the Ninth Circuit allowed the DOJ to bring the cause of action.[228]

V. POLICY

In *RJR Nabisco*, the Supreme Court applied its reasoning in *Empagran*, which declined to extend the extraterritorial application of antitrust law in certain cases, to analyze the extraterritorial application of the federal RICO statute.[229] Citing *Empagran*, the Court highlighted that the application of U.S. private damages to foreign conduct sparked controversy with foreign nations which said the application allows its citizens to bypass the foreign nations' laws.[230] The Court wrote in its opinion that "[a]llowing recovery for foreign injuries in a civil RICO action, including treble damages, presents the same danger of international friction."[231] Ignoring the analogy to antitrust law would be ignoring the clearly expressed concern about infringing on a foreign nation's ability to enforce its own antitrust scheme. In an amicus brief, France expressed concern that extraterritorial application of U.S. antitrust law would "upset that delicate balance and offend the sovereign interests of foreign nations."[232] Many other nations shared this concern, and the Supreme Court made clear that it should be a major consideration and antitrust precedent in its discussion of this issue agrees.[233]

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227. *Motorola*, 775 F.3d at 827.

228. *See* United States v. Hsiung, 778 F.3d 738, 756 (9th Cir. 2015) (allowing the government's claim against Hsiung to pursue Sherman Act charges); Reznick, *supra* note 93 (highlighting that the separate analysis of the two issues "is consistent with *Hsiung*" in the Ninth Circuit).

229. *RJR Nabisco*, 136 S. Ct. at 2106–07.

230. *Id.* at 2107.

231. *Id.*

232. Brief for Republic of France as *Amicus Curiae* in Support of Respondents at 25–26, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191).

233. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269–70 (2010), *superseded by statute*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864–65 (2010), (referencing briefs submitted by Australia, the United Kingdom, and France); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 167–68 (2004) (referencing briefs submitted by Germany, Canada, and Japan).

Some commentators argue that the United States needs to bring within the reach of its law anything that affects the United States, and that broadening the scope of laws such as RICO and the FTAIA is necessary because of globalization and complicated chains of production.[234] However, that very argument can be turned on its head. The more complicated and more connected the world becomes, the more inevitable it is that nearly all foreign conduct or every foreign component will make its way to or its impacts will trickle into the United States, and the United States cannot police the world.[235] Not having the U.S. antitrust laws available to them is a risk companies take by doing business in or with companies located in countries where the laws are more forgiving.[236]

Because "virtually every product sold in the United States has some foreign-made component," and because so many U.S. companies take advantage of the use of global supply chains and foreign subsidiaries, it is inevitable that companies will do business where anticompetitive conduct is not enforced to the same extent as in the United States.[237] In turn, it would be ignorant not to recognize that anticompetitive conduct, such as price fixing, touches many products that make their way into the United States. However, the foreign subsidiary is the only entity overcharged, who passes the cost along to the U.S. purchaser, who passes it along to their customers, and customers cannot bring such a suit.[238] If courts allowed a U.S. purchaser, such as Motorola, to bring suit, it would open the gates to floods of private litigation on behalf of all foreign subsidiaries.[239] The "enormous potential for suits

234. *See* Ryu, *supra* note 76, at 87 (arguing that the Sherman Act should apply to price-fixing component cartels "especially in today's age of globalized supply chains").

235. *See Empagran*, 542 U.S. at 165.

236. Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 827 (7th Cir. 2015).

237. *Id.* at 826; *see also* Gregory Tassey, *Competing in Advanced Manufacturing: The Need for Improved Growth Models and Policies*, 28 J. ECON. PERSPECTIVES 27, 31–35 (2014) (analyzing how the rise in Asian countries' abilities to manufacture products through increased expertise and lower costs have taken over previously American manufacturers, changing the supply chain); Dick K. Nanto, *Globalized Supply Chains and U.S. Policy* CONG. RES. SERV. (2010) (discussing the difficulty for U.S. policy makers "[i]n the globalized world of business, [where] production is becoming fragmented into discrete activities and can be spread geographically within and across national borders while remaining integrated organizationally within a multinational company or network of companies").

238. *See Motorola*, 775 F.3d at 821.

239. *See id.* at 826 (emphasizing that the Motorola case only involved ten foreign subsidiaries; however, "[t]he mind boggles at the thought of the number of antitrust suits that major American corporations could file against the multitudinous suppliers

of this character," underscores the need to treat criminal and private claims differently.[240] In determining whether to pursue a claim, "the U.S. Government has reason to weigh comity and sovereignty concerns . . . but private plaintiffs do not."[241]

Additionally, the position that foreign subsidiaries should not be able to "piggy-back" off of their U.S. parent company to seek damages because it does not satisfy the "gives rise to" exception of the FTAIA is supported in case law and in the American Law Reports.[242] The American Law Report asserts that despite attaching itself to a domestic entity, a foreign entity's injury remains just that: foreign.[243]

Further, while the Supreme Court in *RJR Nabisco* did not answer specific questions—such as how to define "direct," what classifies as an import, or whether the indirect purchaser doctrine applies—the inclination to read statutes narrowly regarding extraterritoriality, as evidenced in the decision as well as the guidelines from the ABA, encourage definitions that limit foreign injuries to enter U.S. courts. For example, the ABA, in a request for clarification regarding the Proposed Update of the Antitrust Guidelines published by the DOJ, suggested that the proposed update "implies that cases involving component price-fixing do not necessarily involve 'import commerce.'"[244] In its request, the ABA urged the DOJ to make this statement explicitly and to openly adopt the *Motorola* decision on the issue of "import commerce" for component price-fixing, but it did not.[245]

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of their prolific foreign subsidiaries if Motorola had its way"). The court noted other companies and the number of subsidiaries to illustrate: General Motors had twenty-six subsidiaries, Walmart had twenty-seven, and Exxon had 122. *Id.*

240. *Id.*

241. *Id.* (quoting Connolly, *supra* note 2). Some believe that the Seventh Circuit's decision in *Motorola* "suggest[s] an underlying assumption that criminal prosecution and fines here and abroad are sufficient to deter global cartel conduct," but others resist the idea that the DOJ can successfully do so given that "global cartels have been highly profitable, and criminal fines, when issued at all, are small in comparison to profits earned by members of global cartels." Meriwether, *supra* note 41, at 14. The DOJ, however, "seems confident that effective governmental remedies remain [and] the Department was successful in its criminal prosecution against AU Optronics." *Motorola*, 775 F.3d at 826.

242. Beckler & Kirtland, *supra* note 15, at 23; *see* 15 U.S.C. § 6a(2) (2012).

243. Richard J. Link, Annotation, *Construction and Application of Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C.A. § 6a*, 1 A.L.R. Fed. 2d 483 (Supp. 2018) (citing Animal Sci. Prods., Inc. v. China MinMetals Corp., 34 F. Supp. 3d 465 (D.N.J. 2014).

244. *Joint Comments*, *supra* note 51, at 10.

245. *Id.*

Lastly, the Supreme Court's emphasis on limiting the scope of U.S. law supports the application of the indirect purchaser doctrine to American antitrust law, and the ABA agrees. Acknowledging that the DOJ has pushed for an exception to the doctrine, the ABA states that an exception to the doctrine would go against "long-standing" precedent and the principle of international comity; thus, there should not be an exception for businesses that make the choice to do business abroad.[246]

VI. FUTURE OF ANTITRUST CLAIMS UNDER THE FTAIA

Taking the decision in *RJR Nabisco* as instructive on the extraterritoriality of antitrust claims under the Sherman Act and FTAIA, courts can bring FTAIA claims in-line with each other to create greater uniformity. No recent antitrust cases have cited to the *RJR Nabisco* decision; however, consideration of the typical scenario similar to those in *Motorola* and *Hsiung* can be used to illustrate how the issue should be analyzed consistent with current Supreme Court precedent and the extraterritoriality doctrine.

Take the following scenario: Companies A, B, and C conspire to fix the price of component X. Company B sells component X to Company D, a foreign subsidiary of Company E, which produces the final product incorporating component X. Company D then sells the final product to Company E. Company E is a U.S. retailer that receives the final product and sells it to consumers. The question is whether Company D can bring a claim on its own behalf and/or through Company E claiming conspiracy on behalf of its foreign subsidiary, Company D.

Following the reasoning of *RJR Nabisco* and consistent with *Motorola*, the court should acknowledge and analyze the substantive and private claims separately to decide whether there is a claim in the first place, and then, whether Company D—or Company D on behalf of Company E—can bring the claim. The specific facts of the case would determine whether there is a substantive claim based on a "direct, substantial, and reasonably foreseeable effect" on domestic commerce.[247] Secondly, if Company E is trying to bring the claim for itself based on the downstream increase in the price paid for the final product, application of the indirect purchaser doctrine would bar the claim. Because Company E purchased the final product with the incorporated component from Company D, who bought it from

246. *Id.* at 8.
247. 15 U.S.C. § 45(a)(3)(A) (2012).

conspirators (Companies A, B, and C), Company E is the indirect purchaser of a component that went through at least two layers of the supply chain. Lastly, if Company E is bringing the claim on behalf of Company D, its foreign subsidiary, the FTAIA would bar the claim because it does not fall within the "gives rise to" exception.[248] U.S. law separates the entities into two distinct legal entities, and therefore, Company E cannot bring a claim for the injury Company D suffered in foreign commerce. Company D was harmed by the increase in price for component X prior to Company E selling the final product in the United States, so such effect on the U.S. domestic commerce does not "give rise to" Company D's claim; Company D will have to seek redress in the country where it is incorporated.[249]

As the *Motorola* court noted, while there may be no right to a private claim, the DOJ would not be precluded from bringing a claim against Companies A, B, and C for direct, substantial, and reasonably foreseeable effects on the domestic commerce of the United States. If the DOJ could make such showing, it could hold the conspirators criminally liable as it did successfully in *Hsiung*.

CONCLUSION

Current law cautions against the extraterritorial application of federal statutes as reflected in the recent Supreme Court decision, *RJR Nabisco*, which is instructive on the extraterritoriality and scope of other federal laws, including U.S. antitrust laws. To bring jurisprudence in-line with this reasoning, courts should look to the decision in *Motorola* when deciding whether the arm of antitrust law extends to reach certain foreign injuries from component cartel price-fixing schemes.

In making the analogy to antitrust law, the Court stressed that the analysis of extraterritoriality applies to all federal statutes and therefore, determining the scope of one law (RICO) will be relevant to the scope of another (FTAIA). Courts must look to the same two-step analysis outlined in *RJR Nabisco*, to determine the statute's reach when the claim is a private right of action by a foreign plaintiff for recovery from foreign injury. To do otherwise would be against current extraterritoriality doctrine, which advises the "reigning in" of foreign application of U.S. laws out of a concern for international comity.[250]

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248. *Id.* § 6a(2).
249. *Id.*
250. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 166–67 (2004).

Not only is the analogy relevant, but making such comparison is consistent with statutory construction and legislative history. The presumption against extraterritoriality is a principle that applies to all federal statutes and must be applied to each separate provision of a statute, both the substantive provisions and right of action provisions. Determining whether the presumption is rebutted first establishes whether an action exists, and second whether or not the specific plaintiff has standing to bring that action. Further, the legislative history behind the enactment of the FTAIA is consistent with the narrowing trend the Court expressed in *RJR Nabisco* and incorporating that rationale would uphold Congress's intention to clarify, and likely limit, the scope of the Sherman Act given the concerns raised about its reach.

Looking to recent jurisprudence, the Seventh Circuit's interpretations in *Motorola* are most in accord with the reasoning of the Supreme Court, and courts should use it as a guide in future antitrust cases involving foreign component cartels. The Seventh Circuit reflects the same limiting mindset due to concerns of international friction as expressed by the Court. The Seventh Circuit in *Motorola* also began to discuss the separation of the substantive provision from the right of action provision in the FTAIA in relation to rebutting the presumption against extraterritoriality. The presumption is likely rebutted on the substantive provision if the effect meets the "direct, substantial, and reasonably foreseeable"[251] requirement; however, the absent a domestic injury, the effect will not give rise to the plaintiff's claim, barring recovery. As the court points out, the DOJ may still hold foreign conspirators accountable because a criminal claim by the government will meet the "gives rise to" requirement[252] claiming injury to the United States and its commerce.

Lastly, policy considerations support the narrow scope of U.S. antitrust laws as suggested by the Supreme Court and the Seventh Circuit. Foreign nations have raised valuable concerns that allowing foreign plaintiffs to recover under U.S. law allows them to bypass the laws of the country under which they are incorporated. For those who feel a globalized society calls for the extension of such reach, it is important to bear in mind that the United States cannot and should not police the world. It is simply the price of doing business: if a company choses to conduct its business in foreign countries or with foreign enterprises, it must seek redress under such laws. To allow

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251. 15 U.S.C. § 45(a)(3)(A).
252. *Id.* § 6a(2).

claims like Motorola's would open the floodgates to domestic companies bringing private claims on behalf of the thousands of foreign subsidiaries owned by U.S. companies.

While many issues are left to be resolved, using the *RJR Nabisco* decision and its general limiting nature as instructive, courts can provide be more uniform rulings on the applicability of the FTAIA and antitrust laws to foreign component cartel cases in the future—an issue of high importance and one courts are sure to continue to see in the current, globalized economy.