No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC,

Plaintiff and Appellant,

vs.

AU OPTRONICS CORPORATION et al.,

Defendants and Appellees.

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

APPELLANT'S PETITION FOR REHEARING *EN BANC*

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-8003

Short Caption: Motorola Mobility LLC v. AU Optronics Corporation

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Motorola Mobility LLC

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Crowell & Moring LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Google Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Google Inc.

Attorney's Signature: s/ Thomas Goldstein Date: 4/24/2014

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Attorney's Signature: s/ Eric F. Citron Date: 4/24/2014

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Attorney's Signature: s/ Jerome A. Murphy Date: 4/24/2014

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Attorney's Signature: s/ Matthew J. McBurney Date: 4/24/2014

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Attorney's Printed Name: Janet I. Levine

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Attorney's Signature: s/ Jason C. Murray Date: 4/24/2014

Attorney's Printed Name: Jason C. Murray

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Attorney's Signature: s/ Joshua C. Stokes Date: 4/24/2014

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STATEMENT RESPECTING REHEARING *EN BANC*

Rehearing *en banc* is warranted in this case for two reasons:

(1) The panel decision conflicts with this Court's *en banc* decision in *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012), and the Supreme Court's decision in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

(2) The case presents the following question of exceptional importance: Whether the panel erred in holding that an international cartel is per se immune from Sherman Act liability for harms caused to American companies and consumers whenever the cartel's members deliver price-fixed components to an American company's foreign manufacturing sites.

INTRODUCTION

Without briefing, argument, or the opportunity for the United States to participate, the panel in this case issued perhaps the single most important recent ruling in international cartel enforcement. Its sweeping holding is that, under the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, international cartels are per se immune from U.S. antitrust law to the extent they deliver their price-fixed components to American companies' foreign manufacturing sites. The panel holds that this immunity attaches even if: (1) the cartel's conduct actually raises the price of products imported into the U.S. and sold to American consumers; (2) the American company completely controls the purchasing decisions and suffers the harm inherent in purchasing the price-fixed goods; and (3) the defendants knew and intended that their conduct would cause these harms in the United States. The opinion not only hamstrings the deterrent effect of the Sherman Act and the ability of American companies to seek relief from foreign cartels, but it also radically circumscribes the long-understood criminal enforcement jurisdiction of the Department of Justice—results Congress could not possibly have intended from a statute it adopted to protect American companies, not the foreign competitors who target them.

The panel's decision is not only importantly incorrect, but sows inconsistency in the law. It substantially undercuts *Minn-Chem*, 683 F.3d at 857, an *en banc* decision of this Court whose holding on the very question the panel decided goes unmentioned. It under-rules *Empagran*, 542

U.S. at 165, which reaffirmed that "application of our antitrust laws to foreign anticompetitive conduct is . . . reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." Defendants in this very cartel have already illustrated the sweeping significance of the decision by arguing that it invalidates their criminal convictions for hard-core price fixing. *See United States v. AU Optronics Corp.*, No. 12-10500 (9th Cir. Apr. 2, 2014) (Dkt. No. 79). And the panel's decision passes over other important arguments—adopted by DOJ and other circuits—having denied Motorola the opportunity to brief and argue them.

En banc review is necessary to prevent *Minn-Chem* from being reduced to a curiosity and to restore the proper scope of the U.S. antitrust laws. After review, the Court will conclude that Congress never intended the FTAIA to deprive the U.S. economy of protection against foreign cartels that target American companies and consumers but deliver their products abroad.

BACKGROUND

1. *Statutory and Factual Background*. The FTAIA limits the reach of U.S. antitrust law, for both private plaintiffs and government prosecutions, in a specifically defined subset of cases. It establishes a default rule that certain "conduct" is exempt from U.S. antitrust law if it involves only foreign or export commerce, whereas the antitrust laws continue to apply to anticompetitive conduct "involving . . . import trade or import commerce." (We call this the "import-commerce *exclusion*.") But even for conduct involving wholly foreign commerce, the antitrust laws still apply to foreign "conduct" that "has a direct, substantial, and reasonably foreseeable effect" on either domestic or import commerce when that "effect gives rise to a claim" under the antitrust laws. (We call this the "direct-effects *exception*.")

Motorola makes mobile phones. One key component is an LCD screen. The defendants, who make those screens, formed a quintessential, hard-core cartel that conspired in secret to raise

their price. At Motorola's precise direction, Motorola's foreign subsidiaries issued purchase orders and were invoiced for about $5 billion in defendants' price-fixed goods. As the panel acknowledged, Motorola's U.S. parent controlled all the price and quantity decisions, even though most screens were delivered abroad. App. 5. For that reason, much of the relevant conduct in this case actually occurred in the United States; some defendants even set up Chicago offices to better target Motorola. And in any event, because the policy was for these subsidiaries to repatriate their profits, Motorola U.S. ultimately suffered the harm from the higher prices paid.

The cartel's conduct with respect to Motorola involved U.S. import commerce. All agree that the defendants shipped 1% of Motorola's purchases directly to the United States. The other 99% were delivered to Motorola's foreign subsidiaries. But even for those deliveries, defendants knew that a very large portion of the screens they delivered (about 42%) would be imported for sale to U.S. consumers as components in finished phones. App. 2, 4.

Indeed, although the panel (and the courts below) considered the FTAIA question differently based on where the screens ended up, it is important to note that, from the statute's vantage on defendants' "conduct," there was no difference. Wherever the screens were delivered or ultimately headed in finished phones, Motorola and its foreign subsidiaries always paid a single price negotiated in the U.S. by Motorola. And defendants' "conduct" included delivering LCDs at that fixed price knowing that a substantial proportion were headed for the United States.

Most cartel members have admitted their misconduct or been convicted in criminal cases that are subject to the FTAIA; at least a dozen executives have gone to prison; and these companies have paid the government billions in criminal Sherman Act fines. Several of these pleas were predicated on an admission of having targeted Motorola in particular—*i.e.*, the conduct underlying this suit. *See, e.g.*, Plea Agreement at 3, *United States v. Sharp Corp.*,

No. 08-802 (N.D. Cal. Dec. 8, 2008) (Dkt. No. 9-1); Plea Agreement at 3, *United States v. Epson Imaging Devices Corp.*, No. 09-854 (N.D. Cal. Oct. 9, 2009) (Dkt. No. 7-1).

2. *Procedural Background*. Motorola's suit started in Chicago but was consolidated with suits by other victims in a California MDL. After Motorola amended its complaint, the MDL court ultimately rejected the defendants' motions for dismissal and summary judgment under the FTAIA. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, 2012 WL 3276932, at *2 (N.D. Cal. Aug. 9, 2012); 785 F. Supp. 2d 835, 842-43 (N.D. Cal. 2011); No. 09-5840, 2010 WL 2610641 (N.D. Cal. June 28, 2010). In so holding, the MDL judge heavily emphasized the defendants' anticompetitive conduct in the United States, rather than the fact that defendants' conduct was directed at U.S. imports and directly affected U.S. commerce. The MDL court then remanded the case to the Northern District of Illinois for trial.

Defendants asked the Illinois trial judge to reconsider the MDL court's summary judgment ruling. Motorola opposed, largely arguing that there were neither new facts nor new law that would make it appropriate to second-guess the MDL court. On January 23, 2014, without argument on the merits, the district court granted reconsideration and held that the FTAIA immunized the defendants from antitrust liability except for LCD screens they delivered to this country. Because that decision removed 99% of the purchases from the case, the parties and district court agreed that the issue was appropriate for interlocutory appeal.

Motorola thus sought an interlocutory appeal from this court, again focusing its briefing on the § 1292(b) standard rather than the merits. Defendants' "opposition" agreed that interlocutory appeal was appropriate. On March 27, 2014, a panel granted the § 1292(b) application, but also unexpectedly issued a published opinion summarily affirming the dismissal of Motorola's claims on three important grounds. *See* App. 1.

First, it summarily dismissed as "frivolous" any assertion that, because the defendants' "conduct" was the delivery of LCD screens—many of which they knew would be imported into the United States and some of which they imported themselves—all those price-fixed deliveries fell outside the FTAIA. To that end, the panel did not even consider the import-commerce exclusion, or ask—as does the Third Circuit—whether defendants' deliveries "targeted" import commerce. *See Animal Sci. Prods. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011).

The panel then turned to whether defendants were immune from liability for components delivered abroad for incorporation into phones to be sold in the U.S. It held as a matter of law that component price fixing can *never* satisfy the FTAIA's direct-effects exception because "the effect of component price fixing on the price of the product of which it is a component is indirect." App. 4-5. That holding relied on no case-specific factors; it will apply in every future case even if (as here) there was "doubtless *some* effect; and it was foreseen by the defendants." App. 4. And while *Minn-Chem*'s specific holding was to define "direct" to mean "reasonably proximate" and not "immediate," 683 F.3d at 857, the panel did not mention that standard once.

The panel then further held that the direct-effects exception cannot be satisfied in any event, even if there were a profound effect on the U.S. economy from defendants' price fixing, because no one in the United States has a Sherman Act claim. App. 5-7. Relying on an eighteen-year-old, out-of-circuit, copyright case, it reasoned that any Sherman Act claim could only ever belong to Motorola's foreign subsidiaries, apparently as a matter of the federal common law of corporate organizations. *See* App. 6 (quoting *Disenos Artisticos E Industriales, S.A. v. Costco Wholesale Corp.*, 97 F.3d 377, 380 (9th Cir. 1996) ("*Costco*")). Thus, even if the defendants targeted a U.S. plaintiff—here, Motorola—and that U.S. plaintiff bears the harmful, anticompetitive effects of defendants' conduct, and even if U.S. consumers are seriously injured

as a result, U.S. antitrust law never applies.[1]

REASONS FOR GRANTING REHEARING *EN BANC*

I. The Panel's Decision Critically Misconstrues The Purpose And Effect Of The FTAIA

This panel became the first ever to hold that neither American plaintiffs nor American prosecutors can protect the U.S. economy from international cartels that fix component part prices before delivering those parts to the foreign manufacturing sites of American companies. This is a foundational decision—perhaps the most important ever under the FTAIA—from a court the Nation looks to on questions of international antitrust enforcement. Having taken the less consequential *Minn-Chem* case for *en banc* review, this Court should not allow it to be eclipsed by an un-briefed decision that will rapidly become the lodestar opinion on the FTAIA.

The panel acknowledged that this question is of great and growing importance because U.S. manufacturers increasingly build products abroad and rely on foreign component makers. App. 7-8. Indeed, the panel even acknowledged that "[a]s a result, the prices of many products exported to the United States are elevated to some extent by price fixing or other anticompetitive acts that would be forbidden by the Sherman Act if committed in the United States." *Id.* 8. But having expressly said that this issue concerns anticompetitive practices that harm Americans at home, the panel still invalidated a consistent interpretation of the FTAIA under which the Justice Department has punished and deterred the harmful behavior, and American companies have sought recompense. *See, e.g.*, Verdict Form, *United States v. AU Optronics*, No. 09-110 (N.D.

[1] The panel concluded by calling Motorola "oblivious" to the consequences of its position, App. 9, an *ad hominem* that might have been fairer had Motorola been allowed a merits brief in this Court. It is understandable that Motorola did not brief such matters in its § 1292(b) petition; we have found no case ever—even on the most frivolous issue—in which a federal court of appeals has denied an appellant an opening brief before finally dismissing its claims on the merits. *Cf. Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535 (7th Cir. 2012) (only case ever finally deciding the merits in same posture; appellant prevailed). We leave to the court whether this practice is consistent with due process, the understood value of the adversary system, the unequivocal rule that oral argument may be denied only after the parties have submitted "the briefs," Fed. R. App. P. 34(a), and the right of the United States to participate as *amicus* in any case, *id.* 29(a).

Cal. Mar. 13, 2012) (Dkt No. 851); Nylen, *U.S. Impact of Overseas Price-Fixing Frequent Consideration in DOJ Cartel Fines, Says Official*, mLex, (Feb. 21, 2014) (quoting Deputy AAG Snyder) (U.S law applies where components are "sold to wholly owned subsidiaries . . . and . . . incorporated into finished products that US OEMs purchased and then sold to US consumers").

This fundamental error will critically undermine the deterrence of foreign cartels and the economic standing of American companies. Several cartels already uncovered by the Justice Department and several more that may already exist will claim immunity under the umbrella this panel has built—as these defendants already are. Defense firms are already reporting this decision as one that could "change the landscape for international antitrust enforcement," and "become a go-to precedent for defending foreign business and their executives" in "enforcement actions against international cartels." Bourelly & Mink, *7th Circ. Ruling May Restrict Int'l Cartel Enforcement* (Apr. 15, 2014), *available at* http://www.law360.com/articles/528248. As noted, the defendants have invoked the ruling in their Ninth Circuit criminal appeals arising from this cartel. The volume of affected commerce in this case alone is $5 billion in LCDs; the billions in fines that DOJ has secured from this cartel, and others, reflect its position that such commerce counts because of its domestic effects. Freed from all liability by this opinion, foreign companies will conclude that building a criminal cartel that targets American companies and consumers through foreign subsidiaries is an irresistibly good idea. Cartel members may even (as here) compete with U.S. manufacturers in the market for the assembled good, and use their criminal behavior to advance their position. Nothing, however, could be further from Congress's intent in passing the FTAIA than depriving Americans of the protection of U.S. antitrust law.

Indeed, the panel fundamentally misapprehends what the FTAIA is about. As Judge Wood explained in her dissent in *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942

(7th Cir. 2003)—later adopted by the full court in *Minn-Chem*—its primary purpose is to *protect American companies* from being "subject to potentially stricter U.S. antitrust laws when they were conducting business wholly in foreign markets." *Id.* at 962 (emphasis added). A second purpose was to "assure foreign countries and their citizens that they would not be swept into a U.S. court to answer under U.S. law for actions that were of no legitimate concern to the United States." *Id*. But there is no basis on which to read the statute as the panel does—as limiting the reach of U.S. law in cases where the conduct may occur abroad, but that conduct has concededly deleterious effects in U.S. markets. That is just the kind of conduct of "legitimate concern to the United States"; it is why the FTAIA has a direct-*effects* exception, even for foreign "conduct." As the Supreme Court has specifically held, the FTAIA "remov[es] from the Sherman Act's reach . . . commercial activities taking place abroad, *unless* those activities adversely affect . . . imports to the United States." *Empagran*, 542 U.S. at 161 (emphasis added).

Having selectively quoted Judge Wood's dissent in *United Phosphorus* regarding the FTAIA's purposes, App. 8, the panel extends the same treatment to the *Minn-Chem*. Focusing on the fact that the deliveries were made to Motorola's foreign subsidiaries, the panel quotes *Minn-Chem* for the proposition that "U.S. antitrust laws are not to be used for injury to foreign customers." App. 6. But here is what *Minn-Chem* says in full: "*Empagran* is consistent with the interpretation we adopt here. While it holds that the U.S. antitrust laws are not to be used for injury to foreign customers, it goes on to reaffirm the well-established principle that *the U.S. antitrust laws reach foreign conduct that harms U.S. commerce*." 683 F.3d at 858 (emphasis added). Again, the panel fully concedes that this is a case involving harms to U.S. commerce—that the rule that it has adopted insulates foreign conduct that both raises "the prices of many products exported to the United States" and "would be forbidden by the Sherman Act." App. 8.

II. The Panel's Decision Eviscerates *Minn-Chem* And Conflicts With *Empagran*

A. The panel ruling cannot be reconciled with *Minn-Chem*.

The guts of *Minn-Chem*'s holding about the FTAIA's direct-effects exception is that "direct" should not be read too strictly—that it encompasses "reasonably proximate" effects, not only "immediate" ones. 683 F.3d at 857 (adopting DOJ position). The key reason is that demanding a more "immediate consequence on import or domestic commerce comes close to ignoring the fact that straightforward import commerce has *already been excluded* from the FTAIA's coverage." *Id.* (emphasis added). Without once citing the "reasonably proximate" standard, the panel's decision leaves those guts all over the floor.

Indeed, the panel's opinion all but limits *Minn-Chem*'s legal standard to the isolated facts of that case—i.e., instances where the cartel "took steps outside the United States to drive up the price of a product . . . and then . . . *sold that product to U.S. customers*." App. 5 (quoting *Minn-Chem*, emphasis by panel). But that is contrary to *Minn-Chem*'s own teaching that the direct-effects exception should extend beyond the import-commerce exclusion (which, of course, can handle cases where the cartel's product is directly sold to U.S. customers). *Minn-Chem* was actually an easy case under the import-commerce *exclusion*, and it only considered the direct-effects *exception* to make doubly sure that cartel members who did not sell in the United States could be held jointly and severally liable for harms caused by other members' U.S. imports. *See* 683 F.3d at 855-56. Yet this panel essentially limits *Minn-Chem* to that scenario alone.

In fact, the panel's only nod to *Minn-Chem* is to say that component price-fixing effects on finished products are "remote"—which, the panel notes, is a "term used in *Minn-Chem*"—and that this case is like a hypothetical *Minn-Chem* described where "action in a foreign country filters through many layers and finally causes a few ripples in the United States." App. 4-5. But

en banc rulings cannot be reduced to sound bites, and that is an unfair description of the case at bar. The effect of defendants' admitted price fixing, which they *knew* would involve U.S.-bound products, filtered here through just one formal layer—a wholly owned subsidiary—before directly injuring a U.S. company and its American consumers.

Most radically, the panel holds that the effect of component price fixing on U.S. commerce would be "remote" even if a U.S. company like Motorola purchased the components *itself* in the United States and simply had them delivered to foreign manufacturing sites. App. 5. In other words, it is not enough for defendants to pick the pockets of U.S. companies by selling price-fixed components to U.S. plaintiffs knowing full well that their products are headed for the U.S. Instead, cartel members must actually import the products themselves for the effect of the cartel's conduct to be direct and thus not immune from the U.S. antitrust laws under the FTAIA. This renders the direct-effects exception into a mere vestigial tail on the body of the import-commerce exclusion in the precise way *Minn-Chem* forbids.

In truth, the anticompetitive effects of component price fixing on finished products are in no way remote and pose a real danger to U.S. companies and consumers. For that reason, the Justice Department has consistently prosecuted such conduct consistent with the FTAIA. As it has explained, "a contrary rule [i.e., the panel's] would leave U.S. commerce vulnerable to anticompetitive conduct involving components incorporated into finished products abroad that increases the prices of those finished products to U.S. purchasers in a non-remote, substantial, and reasonably foreseeable way." Br. of the United States and F.T.C. as *Amici Curiae* at 12, *Lotes Co. v. Hon Hai Precision Indus. Co.*, No. 13-2280 (2d Cir. Oct. 10, 2013) (Dkt. No. 73). Not to put too fine a point on it, but the government's brief in *Minn-Chem*—which the Court strongly approved, *see* 683 F.3d at 857—discusses *this very case*:

> Suppose, for example, that a conspiracy of foreign manufacturers fixed the price of inputs sold to other foreign manufacturers which incorporate the input into finished goods sold in the United States. If successful, the conspirators' restraint of trade in the inputs … would proximately cause effects on import commerce in the finished goods, notably by increasing the price. This effect should be viewed as direct, and therefore, the direct effects exception would apply. . . .

See Br. of the United States and the F.T.C. as *Amici Curiae* at 7-8, *Minn-Chem, Inc. v. Agrium, Inc.*, No. 10-1712 (7th Cir. Jan. 18, 2012) (Dkt. No. 64). Without briefing, the panel failed to consider that it was abandoning the very theory of "direct" effects that *Minn-Chem* had endorsed.

The panel's framing of the comity concerns in this case is equally contrary to *Minn-Chem*. The panel avers that sales occurring abroad between foreign companies are a matter exclusively for foreign antitrust authorities. App. 7-8. But *Minn-Chem*'s very holding was that U.S. antitrust law may be applied to *foreign* defendants, that sold exclusively to *foreign* companies, based on the effects those sales had on U.S. commerce. *See* 683 F.3d at 857-58. The panel's version of comity mistakenly focuses on where the defendants engaged in (some of) their conduct—specifically, where the LCD panels were delivered. Decades of international antitrust law, reviewed in *Minn-Chem*, have correctly focused on where the effects are felt. *Id.*

B. The panel ignores *Empagran*'s construction of the requirement that a domestic effect "give rise to" a Sherman Act claim.

The effect of the panel's decision is exacerbated by its conclusion that the domestic effect it acknowledges does not "give rise to a claim" under the antitrust laws. App. 5-7. This only further limits the reach of U.S. law, even in cases where direct effects on U.S. commerce are plainly anticompetitive. The panel's ruling cannot be reconciled with *Empagran*'s holding that the FTAIA's "gives rise to" prong is satisfied when defendants' conduct makes a domestic plaintiff suffer "an effect of a kind that antitrust law considers harmful." 542 U.S. at 162. That is obviously true of Motorola here; the panel did not suggest otherwise.

Motorola was injured through the anticompetitive effects of defendants' conduct in several different ways. Most obviously, Motorola's phones were more expensive because of the inflated price of a key component. Some of that harm no doubt fell upon U.S. consumers—as the panel recognized, App. 6—and U.S. law unambiguously holds that Motorola is the proper party to complain about the injury that passes through to them. *See Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). Moreover, a cartel victim in Motorola's shoes will inevitably sell fewer phones and make fewer profits because of the higher prices the cartel imposes on the industry. Not only that, but Motorola competes at home and abroad with cartel members. Finally, Motorola's U.S. parent company repatriated the profits from the foreign subsidiaries at issue, and so, at the bottom line, it experienced all possible harms associated with the cartel's overcharging activity—no one has ever even argued otherwise. In short, there is no way to maintain that Motorola did not suffer "an effect of a kind that antitrust law considers harmful," *Empagran*, 542 U.S. at 162, and that is what the FTAIA requires, precisely because Congress was concerned with conduct with anticompetitive effects in this country.

The panel avoided this simple inquiry—did Motorola suffer *anticompetitive* effects?—by focusing instead on whether a U.S. plaintiff would have a literal Sherman Act claim against the defendants respecting the conduct at issue. It reasoned that U.S. consumers have no claim because they are downstream from Motorola U.S., and Motorola U.S. has no claim because it is downstream from its own subsidiaries. On this view, because Motorola chose to create foreign subsidiaries that took the deliveries, defendants' conduct can never "give rise to" a claim by *any* U.S. plaintiff—only the foreign subsidiaries, which the panel views as wholly foreign plaintiffs, could possibly have a claim. App. 5-7. The panel cites no relevant authority for this dramatic proposition; in fact, it is irreconcilable with not only *Empagran*, but *Minn-Chem* and the FTAIA.

The specific holding of *Minn-Chem* was that members of the potash cartel who *did not sell* in the United States could still be liable, consistent with the FTAIA, to U.S. plaintiffs complaining about the effects of their foreign sales on domestic prices paid to *other* cartel members. *Minn-Chem* expressly acknowledged that the plaintiffs did not have a literal Sherman Act claim directly against these foreign-only-sales members because of *Illinois Brick*. *See* 683 F.3d at 855-56. Yet the fact that these defendants' conduct alone did not amount to an independently viable Sherman Act claim was irrelevant; the only question from the standpoint of FTAIA immunity was whether plaintiffs who *otherwise* had a cause of action were complaining about the anticompetitive effects to which these defendants' conduct had contributed. *Id.* at 856; *see also Empagran*, 542 U.S. at 162. Again, the panel simply says nothing on this point.

More than being foreclosed by *Minn-Chem*, the panel's rule substitutes a happenstance for the factors of concern to the FTAIA by focusing on (what seem to be) questions of corporate common law instead of injuries to the American economy. For example, the panel's invocation of the point that Motorola obviously cannot sue itself (*i.e.*, its foreign subsidiaries) alleging that the imported phones were more expensive proves the opposite of the panel's point: The panel believes this shows that Motorola has no claim; what it actually shows is that Motorola and its wholly owned subsidiaries function as a common enterprise from the standpoint of antitrust law and economics, and Motorola U.S. fully suffers the anticompetitive effects of defendants' conduct through those subsidiaries. The panel's only support for the contrary proposition is one old, out-of-circuit, un-briefed, non-antitrust decision about holding a parent to its decisions about the corporate form. *See* App. 6-7 (quoting *Costco*, 97 F.3d at 380)). The panel pays no mind to decisions going the other way in more relevant circumstances. *See, e.g.*, *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981) ("Chrysler's contention that it has been

injured" through harms to foreign subsidiaries "Chrysler South African and Chrysler Australia . . . is also an allegation of 'antitrust injury.' As a shareholder of those subsidiaries, Chrysler has pleaded injury which reflects the anticompetitive nature of the challenged conduct.").

More importantly, Motorola is not trying—as in *Costco*—to offensively pierce its own corporate veil to obtain a right held by a subsidiary. Everyone agrees that Motorola currently holds the subsidiaries' claims, *at least* because those claims have been assigned to it as the parent company. Because Motorola has a cause of action, the only question here, as in *Minn-Chem* and *Empagran*, is whether Motorola's case concerns the anticompetitive effects of defendants' conduct on U.S. commerce. And there is no disputing that it does.

The panel's contrary ruling removes protections from the U.S. economy and U.S. consumers for reasons that have nothing to do with competition law. Motorola formed the subsidiaries at issue for various reasons, including foreign tax and corporate concerns. There is no basis to suppose that the FTAIA would attribute consequence to those decisions when it comes to denying antitrust protections to Motorola and *the entire American economy*—the panel cites nothing to suggest that Congress had such an intent, because it of course did not. Indeed, the legislative history of the direct-effect exception is strongly to the contrary:

> This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. As previously set forth, it is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States.

H.R. Rep. No. 97-686, at 11-12. The Supreme Court, moreover, has cautioned against turning decisions about how to structure corporate enterprises into dispositive antitrust inquiries. *See Copperweld Corp. v. Independence Tube*, 467 U.S. 752, 772 (1984) ("The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant . . . . [A] corporation may adopt the subsidiary form of organization for valid

management and related purposes."). That should be doubly so here, where Motorola's decisions about the corporate form would not only deprive *Motorola* of a remedy, but place defendants' conduct beyond the Sherman Act for *everyone*, the Justice Department included.

Finally, although an extended discussion exceeds what this format allows, we note that the panel's decision not to allow any briefing meant that it simply passed over key arguments—some regarding *the statutory text*. For example, the FTAIA either immunizes or leaves subject to the Sherman Act certain "conduct" based on whether it involves or affects U.S. commerce, *see* 15 U.S.C. § 6a. At a broad level, defendants' conduct against Motorola clearly involved U.S. commerce, because they shipped some components to Motorola in the U.S. So too even at a very granular level, because any particular delivery of price-fixed components to Motorola's foreign subsidiaries did not distinguish between LCD panels ultimately headed to the U.S. or to foreign customers: It was all the same product, all delivered to the same place, all at the same price Motorola determined in the United States. The import-commerce exclusion asks only whether that "conduct" involved or targeted imports (it did—see above);[2] and the direct-effects exception asks only whether the effect on U.S. commerce from that conduct was "direct" (it was—per *Minn-Chem*), "foreseeable" (it was—here, actually foreseen), and "substantial" (it was—nearly half the LCDs went to the U.S.). Although the panel and the district court divided Motorola's claims into various "buckets" based on a post-hoc analysis of where the defendants' panels happened to end up, from both defendants' own perspective and the perspective of the statute's actual text, the *conduct* made no such distinction and so is all equally subject to U.S. law. Such points, like all those discussed above, deserve at least one chance to be briefed.

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[2] The panel says *nothing* about the import-commerce exclusion, but it clearly applies here either because of the involvement of some U.S. commerce (*i.e.*, defendants' domestic deliveries) or under the "targeting" standard. *See Animal Science*, 654 F.3d at 470 ("Functioning as a physical importer . . . is not a necessary prerequisite." Inquiry is whether "defendants' conduct target[ed] import goods."). Notably, while *Minn-Chem* cites this standard with approval, 683 F.3d at 855, the panel does not even discuss it.

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CERTIFICATE OF SERVICE

I, Thomas C. Goldstein, hereby certify that on April 24, 2014, I served a copy of this petition on the defendants through the Court's CM/ECF filing system. I also provided a copy to counsel by email.

/s/ Thomas C. Goldstein
Thomas C. Goldstein

In the

United States Court of Appeals

For the Seventh Circuit

No. 14-8003

MOTOROLA MOBILITY LLC,

Plaintiff-Appellant,

v.

AU OPTRONICS CORP., *et al*.,

Defendants-Appellees.

Petition for Leave to Take an Interlocutory Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 09 C 6610 — **Joan B. Gottschall**, *Judge*.

SUBMITTED MARCH 13, 2014 — DECIDED MARCH 27, 2014

Before POSNER, KANNE, and ROVNER, *Circuit Judges*.

POSNER, *Circuit Judge*. This case is before us on the plaintiff's unopposed petition for leave to take an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), from an order that the district judge has certified for an immediate appeal. We grant the petition for reasons explained below; and because the petition and the defendants' response, together with the district judge's opinion explaining her order and the record in the district court, provide an ample basis for deciding the

appeal, we dispense with further briefing and with oral argument.

Motorola and its foreign subsidiaries buy liquid-crystal display (LCD) panels and incorporate them into cellphones manufactured by either the parent or the subsidiaries. The suit accuses several foreign manufacturers of the panels of having violated section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing on the prices to charge for them. Only about 1 percent of the panels were bought by, and delivered to, Motorola in the United States; the other 99 percent were bought by, paid for, and delivered to its foreign subsidiaries (mainly Chinese and Singaporean). Forty-two percent of all the panels were bought by the subsidiaries and incorporated by them into products that were then shipped to Motorola in the United States for resale by Motorola (which did none of the manufacturing). Another 57 percent of the panels were also bought by the subsidiaries, but were incorporated into products that were sold abroad as well (42 percent plus 57 percent plus 1 percent equals 100 percent of the allegedly price-fixed panels). The 57 percent never entered the United States, so never became domestic commerce. See 15 U.S.C. §§ 6a, 6a(1)(A). And so, as we're about to see, they can't possibly support the Sherman Act claim.

Motorola says that it "purchased over $5 billion worth of LCD panels from cartel members [i.e., the defendants] for use in its mobile devices." That is incorrect. All but 1 percent of the purchases were made by Motorola's foreign subsidiaries, which are not plaintiffs in this litigation.

In response to a motion for partial summary judgment by the defendants, the district judge ruled that Motorola's claim regarding the 42 percent (plus the 57 percent, but we'll ig-

nore that, as a frivolous element of Motorola's claim) is barred by 15 U.S.C. § 6a(1)(A), a provision of the Foreign Trade Antitrust Improvements Act that says that the Sherman Act (only section 1 of that Act, but to simplify our opinion we'll now drop that qualification) "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations," and also, in either case, unless the "effect gives rise to a claim" under federal antitrust law. See, e.g., *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161–62 (2004); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 853–54 (7th Cir. 2012) (en banc).

We agree with the district judge and the parties that in the language of section 1292(b) the judge's order presents "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Motorola's antitrust suit against the defendants, now in its fifth year, is a complicated affair. If 99 percent of the transactions on which the suit is based can be eliminated from the litigation at a stroke (the 42 percent at issue in this appeal plus the 57 percent clearly barred by the Foreign Trade Antitrust Improvements Act from challenge under the Sherman Act) before the litigation moves into high gear, there will be a considerable economy. Although as we're about to explain we think the district judge's ruling correct, there is room for a difference of opinion, as evidenced by the fact that the judge presiding at the multidistrict-litigation phase of the proceeding had ruled

for Motorola on the issue of the Sherman Act's applicability to the 42 percent. So, as in *Minn-Chem, Inc. v. Agrium, Inc.*, *supra*, 683 F.3d at 848, which also involved an interlocutory appeal presenting issues under the Foreign Trade Antitrust Improvements Act, Motorola's appeal is properly before us and we proceed to the merits.

If the defendants conspired to sell LCD panels to Motorola in the United States at inflated prices, they would be subject to the Sherman Act because of the foreign trade act's exception for importing. That is the 1 percent, which is not involved in the appeal. Regarding the 42 percent, Motorola must show that the defendants' price fixing of the panels that they sold abroad and that became components of cellphones imported by Motorola had "a direct, substantial, and reasonably foreseeable effect" on commerce within the United States. There was (assuming price fixing is proved) doubtless *some* effect; and it was foreseen by the defendants if they knew that Motorola's foreign subsidiaries intended to incorporate some of the panels into products that they would sell to Motorola in the United States. And who knows what "substantial" means in this context? But what is missing from Motorola's case is a "direct" effect. The effect is indirect—or "remote," the term used in *Minn-Chem, Inc. v. Agrium, Inc.*, *supra*, 683 F.3d at 856–57, to denote the kind of effect that the statutory requirement of directness excludes.

The alleged price fixers are not selling the panels in the United States. They are selling them abroad to foreign companies (the Motorola subsidiaries) that incorporate them into products that are then exported to the United States for resale by the parent. The effect of component price fixing on the price of the product of which it is a component is

indirect, compared to the situation in *Minn-Chem*, where "foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) *sold that product to U.S. customers*." *Id*. at 860 (emphasis added). It is closer to the situation in which we said the foreign trade act would block liability under the Sherman Act: the "situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States." *Id*.

Motorola contends, and at this stage in the litigation we must assume the truth of the contention, that it determined what the subsidiaries paid for the LCD panels. It must have thought the price okay, or it wouldn't have let the subsidiaries pay it. It may or may not have known that it was a cartel price. But we cannot see what difference any of this makes. Suppose Motorola had bought the panels from the defendants outright, then resold the panels to its foreign subsidiaries, which used them in manufacturing cellphones that they then exported to the United States. The effect on prices in the United States would be the same as if the foreign subsidiaries had negotiated the price charged by the alleged cartel to Motorola, because the price would be the same—it would be the cartel price. And so the (indirect) effect on U.S. domestic commerce (the sale of the cellphones in the United States) would be the same.

Motorola's claim is upended by another—and independent—requirement that must be satisfied for the statutory exemption in 15 U.S.C. § 6a(1)(A) to apply: the "effect" of the defendants' practice on domestic U.S. commerce must "give[] rise to" an antitrust claim. The effect

of the alleged price fixing on that commerce in this case is mediated by Motorola's decision on what price to charge U.S. consumers for the cellphones manufactured abroad that are alleged to have contained a price-fixed component. No one supposes that Motorola could be sued by its U.S. customers for an antitrust offense merely because the prices it charges for devices that include such components may be higher than they would be were it not for the price fixing. (We say may be, not would be, because Motorola's ability to pass on the higher price to consumers would depend on competition from other cellphones and on consumer demand for cellphones.) So the effect in the United States of the price fixing could not give rise to an antitrust claim. Motorola's claim against the defendants is based not on any illegality in the prices Motorola charges (in which event Motorola would be suing itself, as in William Gaddis's novel satirizing law, *A Frolic of His Own* (1994)), but rather on the effect of the alleged price fixing on Motorola's foreign subsidiaries. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, *supra*, 542 U.S. at 173–74. And as we said in the *Minn-Chem* case, "U.S. antitrust laws are not to be used for injury to foreign customers." 683 F.3d at 858. The subsidiaries are "foreign customers," being fully subject to the laws of the countries in which they are incorporated and operate—and "a corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties." *Disenos Artisticos E Industriales, S.A. v. Costco Wholesale Corp.*, 97 F.3d 377, 380 (9th Cir. 1996).

Furthermore, derivative injury rarely gives rise to a claim under antitrust law, especially a claim by the owner of or an

investor in the company that sustained the direct injury. *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 877 F.2d 1333, 1335–36 (7th Cir. 1989). Such a claim would be redundant, because if the direct victim received full compensation there would be no injury to the owner or investor—he or it would be as well off as if the antitrust violation had never occurred. If Motorola's foreign subsidiaries have been injured by violations of the antitrust laws in the countries in which they do business, they have remedies; if the remedies are inadequate, or if the countries don't have or don't enforce antitrust laws, these were risks that the subsidiaries (and hence Motorola) assumed by deciding to do business in those countries. What they didn't have if they overpaid was a claim under the Sherman Act; no more does their parent.

But we don't want to rest our decision entirely on the statutory language (the requirement of a "direct effect" on domestic commerce and the separate requirement that that "effect" give rise to a Sherman Act claim), without considering the practical stakes in the expansive interpretation urged by Motorola. The stakes are large and cut strongly against its position. Nothing is more common nowadays than for products imported to the United States to include components that the producers had bought from foreign manufacturers. See Gregory Tassey, "Competing in Advanced Manufacturing: The Need for Improved Growth Models and Policies," *Journal of Economic Perspectives*, vol. 28, no. 1, p. 27, 31–35 (Winter 2014); Dick K. Nanto, "Globalized Supply Chains and U.S. Policy" 4–10 (Congressional Research Service, CRS Report for Congress, Jan. 27, 2010), http://assets.opencrs.com/rpts/R40167_20100127.pdf (visited March 26, 2014). Motorola itself acknowledges "that a sub-

stantial percentage of U.S. manufacturers utilize global supply chains and foreign subsidiaries to effectively compete in the global economy." Many foreign manufacturers are located in countries that do not have or, more commonly, do not enforce antitrust laws, or whose antitrust laws are far more lenient than ours, especially when it comes to remedies. As a result, the prices of many products exported to the United States are elevated to some extent by price fixing or other anticompetitive acts that would be forbidden by the Sherman Act if committed in the United States. Motorola argues that "the district court's ruling would allow foreign cartelists to come to the United States" and "unfairly overcharge U.S. manufacturers." Not true; the defendants did not sell in the United States and, if they were overcharging, they were overcharging other foreign manufacturers—the Motorola subsidiaries.

The Supreme Court has warned that rampant extraterritorial application of U.S. law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, *supra*, 542 U.S. at 165. The Foreign Trade Antitrust Improvements Act was intended to prevent such "unreasonable interference with the sovereign authority of other nations." *Id.* at 164. The position for which Motorola contends would if adopted 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," a primary concern motivating the foreign trade act. *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 960–62 (7th Cir. 2003) (en banc) (dissenting opinion), over-

ruled on other grounds by *Minn-Chem, Inc. v. Agrium, Inc.*, *supra*. It is a concern to which Motorola is oblivious.

AFFIRMED.