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The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization: The Need to Amend the Foreign Trade Antitrust Improvements Act (FTAIA) & Vigorously Apply International Comity

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Some may think it is an interesting hobby, others may call it a waste of money, but the best term to describe my passion for collecting athletic sneakers is to simply say I am a "sneaker-head." Since I was 14-years-old I began collecting various Nike athletic shoes, specifically Jordan's and Air Force 1's. While my passion for collecting athletic shoes has been unrelenting, the method of my purchases has changed drastically over the past 10-years. Rather than going to my local brick-and-mortar, the majority of my purchases are now executed via the internet. E-commerce platforms have depleted my territorial limitations and have allowed me to diversify my sneaker collection. In addition, these e-commerce platforms have made me a more educated consumer. Because these platforms are easily accessible and provide transparent pricing, I can price shop and attempt to get my favorite sneakers at the lowest cost.

While there are many benefits to e-commerce, and the benefits certainly outweigh the costs, it is necessary to discuss the costs to ensure laws are in place to protect consumers, producers, and distributors alike. Thus, one of the biggest concerns with the paradigm presented above is: which nation's laws will apply in the event of dispute? The supply chain may include a Chinese manufacturer that makes the shoe, a German seller that designs the shoe under its brand, an Indian e-commerce company that connects the German seller with various buyers, and a U.S. consumer.

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This paper examines the complexities of choice of law, in this new age of globalization, through the lens of the Sherman Anti-Trust Act. The Sherman Act was enacted by Congress in 1890 to: (1) ensure economic competition, (2) provide new businesses a shot at entry, and (3) prevent companies from extracting supra-competitive profits. Initially, the Act was limited to conduct occurring in the United States; however, in lieu of globalization, courts began a gradual process of expanding the extraterritorial application of the Sherman Anti-Trust Act to any situation that had an effect on U.S. commerce. Today, despite Congress' attempt to limit the extraterritorial application of the Sherman Anti-Trust Act to only conduct that has a "direct, substantial, and reasonably foreseeable effect on commerce in the United States," there are hardly any mechanisms to limit the extraterritorial application of the Sherman Anti-Trust Act. Specifically, the Foreign Trade Antitrust Improvements Act ("FTAIA") has become obsolete in the current age of globalization, the Supreme Court does not take international comity seriously, and there may be another expansion of the extraterritorial application of the Sherman Act with the Supreme Court's recent finding in Apple v. Pepper that consumers have standing to bring anti-trust claims against Consumer-to-Consumer ("C2C") e-commerce platforms.

This broad application of the Sherman Anti-Trust Act has led many foreign nations to enact blocking statutes. Between the breadth of the extraterritorial application of the Sherman Act and the conflicting foreign blocking statutes, the choice of law uncertainty has been exacerbated and will certainly have adverse economic effects on all stakeholders involved in the supply chain. Thus, this paper further prescribes courses of action for all three branches of the United States government to ensure e-commerce continues to excel and provide benefits for its consumers, producers, and e-commerce platforms.

INTRODUCTION

In 1890, using its Constitutional power "to regulate commerce with foreign Nations, and among the several States,"[1] the United States Congress passed the Sherman Anti-Trust Act.[2] The Sherman Act, which is considered "the most important and frequently enforced competition law of the United States," was enacted to "curb concentrations of power that interfere with trade and reduce economic competition."[3] According to Lina M. Khan, a legal scholar at Columbia Law School, Congressional intent to promote competition was not just for the benefit of consumers but a means of "prevent[ing] large firms from extracting wealth from

1. U.S. CONST. art. I, § 8, cl. 3.
2. Sherman Antitrust Act, ch. 647, 26 Stat. 210 (1890).
3. Donald E. Knebel, *Extraterritorial Application of U.S. Antitrust Laws: Principles and Responses*, 8(2) JINDAL GLOBAL L. REV. 181, 182 (Sept. 14, 2017). *Sherman Antitrust Act*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/event/Sherman-Antitrust-Act (last visited August 19, 2019).

[both] producers and consumers in the form of monopoly profits."[4] In addition, by ensuring competition, Congress hoped "new businesses and entrepreneurs [would have] a fair shot at entry."[5] While the goals of the Sherman Act are clear, through a review of legislative history, "nothing in the Sherman Act or its legislative history sheds light on whether the Act was intended or expected to be enforceable against persons who committed the prohibited acts outside the territory of the United States."[6]

Initially, courts across the United States were skeptical that the Sherman Act was to be applied extraterritorially—generally opting to apply U.S. law only when transactions took place solely within its territory.[7] However, after World War II courts began to expand the extraterritorial application of the Sherman Act to conduct that had an anticompetitive effect on U.S. commerce.[8] While this expansive application of the Sherman Act has its origins in case law, Congress went on to codify the court's view of the Sherman Anti-Trust Act with the passage of the Foreign Trade Antitrust Improvement Act ("FTAIA").[9] The FTAIA was an express act of Congress that the Sherman Anti-Trust Act was to be applied extraterritorially to any conduct that had a "direct, substantial, and reasonably foreseeable effect on commerce in the United States."[10] However, in an increasingly globalized market nearly all transactions have a "direct, substantial, and reasonably foreseeable effect on commerce in the United States."[11] Thus, because the test for determining the scope of the Sherman Act has become toothless in the age of globalization, this paper advocates for a more comprehensive analysis that respects international comity. Specifically, this paper focuses on the adverse effects and potential retaliatory response of the international community if the Sherman Act goes through another iteration of expansion by permitting consumers standing against Consumer-to-Consumer ("C2C") e-commerce platforms that merely "connect buyers and multiple sellers online."[12]

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4. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 740 (2017).

5. *Id.* at 741.

6. Knebel, *supra* note 3, at 183.

7. *Id. See also* Russell J. Weintraub, *Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a Choice-of-Law Approach*, 70 TEX. L. REV. 1799, 1807 (1992).

8. Knebel *supra* note 3, at 190. *See also* Peter Vanham, *A Brief History of Globalization*, World Economic Forum (Jan. 17, 2019), http://www.weforum.org/agenda/2019/01/how-globalization-4-0-fits-into-the-history-of-globalization/.

9. 15 U.S.C. § 6a (1982).

10. *Id.*

11. *Id.*

12. Adam Levy, *The 7 Largest E-Commerce Companies in the World*, (Dec. 26, 2018) (explaining that a "C2C e-commerce business [i.e. eBay] create[s] a marketplace to connect buyers and multiple sellers online…[it] merely facilitate[s] e-commerce through their platform." This compares to the traditional Business-to-Consumer ("B2C") e-commerce platform where "a business sells a good or service [directly] to an individual consumer. . .[i.e.] Walmart.), http://www.fool.com/investing/2018/12/26/the-7-largest-e-commerce-companies-in-the-world.aspx.

E-commerce, which "refers to commercial transactions conducted online," connects local consumers with producers around the world.[13] Some of the most successful e-commerce platforms include companies like: Amazon, Wal-Mart, Alibaba, JD.com, Shopify, eBay, and Rakuten.[14] Because of the expansive reach of e-commerce platforms, consumers are no longer limited to their local brick-and-mortar shops. As a result, e-commerce has become an integral part of consumer life because it provides consumers with a convenient way to shop, enhances consumer experience, and enables access to higher quality goods.[15] By 2022, it is projected that e-commerce revenue will exceed $638 billion in the U.S. alone.[16] While e-commerce has given consumers more purchasing options, and corporations access to a larger market, the "direct, substantial, and foreseeable effects" of trading through e-commerce platforms will certainly lead to an increase in Sherman Anti-Trust Act litigation against e-commerce companies that are incorporated and operated outside the United States.[17] Not only will these foreign corporations have a heightened fear of being criminally prosecuted, by an aggressive United States Department of Justice, but these foreign corporations may be subject to private consumer claims based on the recently decided United States Supreme Court case *Apple v. Pepper*.[18]

Since 1914, when Congress enacted a complimentary statute to the Sherman Anti-Trust Act, known as the Clayton Act, consumer's had standing to bring private anti-trust claims so long as they were "direct-purchasers" of the alleged anti-trust violator.[19] While the direct purchaser rule has become well-developed by the courts, and would apply to traditional e-commerce platforms that use a Business-to-Consumer ("B2C") model, the Supreme Court was only recently given the opportunity to apply the direct purchaser rule to situations where a U.S. consumer wanted to sue an online e-commerce platform that utilized a C2C platform.[20] In *Apple v. Pepper*, the Supreme Court determined whether a U.S. consumer had standing to bring a private anti-trust claim against a U.S. distributor who delivered

13. *What is eCommerce?*, ECOMMERCE GUIDE, http://ecommerceguide.com/guides/what-is-ecommerce/ (last visited Mar. 14, 2019).

14. Mayank Pratap, *The World's Five Largest eCommerce Companies*, (Jan. 31, 2019), http://hackernoon.com/the-worlds-five-largest-ecommerce-companies-8dd94dc22614. See also Levy, *supra* note 12.

15. *Consumers are Changing E-Commerce Preferences*, MATERIAL HANDLING & LOGISTICS (Sept. 13, 2018), http://www.mhlnews.com/technology-automation/consumers-are-changing-e-commerce-preferences.

16. Kaleigh Moore, *Ecommerce 101 + The History of Online Shopping: What the Past Says About Tomorrow's Retail Challenges*, BIG COMMERCE: ECOMMERCE NEWS, http://www.bigcommerce.com/blog/ecommerce (last visited Mar. 14, 2019).

17. 15 U.S.C. § 6a (1982).

18. Knebel, *supra* note 3, at 182. *See also* Apple v. Pepper, 139 S. Ct. 1514 (2019).

19. 15 U.S.C. §15 (a) (1914). *See also infra* Part IVa.

20. Levy, *supra* note 12.

a good where prices were set by a third party.[21] The Court held that consumers who purchased apps for their iPhones through Apple's App Store had standing to sue Apple, a "Consumer-to-Consumer (C2C)" e-commerce platform, because the consumer was a "direct-purchaser" from Apple.[22] With this Supreme Court decision there will undoubtedly be an increase in litigation against C2C platforms.[23] Specifically, regarding the extraterritorial application of the Sherman Anti-Trust Act, there will likely be a windfall of litigation against C2C e-commerce companies that are incorporated and operated outside the United States because: (1) the Clayton Act would expand "direct purchaser standing" to consumers against C2C e-commerce platforms, and (2) there are no mechanisms to minimize the extraterritorial application of the Sherman Anti-Trust Act against e-commerce companies that are incorporated and operate outside the U.S.[24]

Part I of this paper chronicles the Supreme Court's changing view regarding the extraterritorial application of the Sherman Anti-Trust Act; the Act's current extraterritorial application; and the international community's retaliatory response to the Act's expansive use. Part II explains the main arguments that were heard by the lower courts in *Apple v. Pepper*. Part III provides background to the direct purchaser rule, which was established in *Illinois Brick Co. v. Illinois*, *Hanover Shoe v. United Shoe Machinery Co.*, and *Kansas v. UtiliCorp United Inc*.[25] In addition, Part III discusses the narrow exceptions to the direct purchaser rule.[26] Part IV analyzes the adverse economic and political effects of applying the Sherman Anti-Trust Act extraterritorially, and the need to expand the international comity exceptions as a result of the Supreme Court's decision in *Apple v. Pepper*. The paper concludes by prescribing courses of action for all three branches of the United States government to ensure e-commerce continues to excel and provide benefits for its consumers, producers, and e-commerce platforms alike.

I. INTERPRETING THE EXTRATERRITORIAL APPLICATION OF THE SHERMAN ANTI-TRUST ACT

It is unlikely that the 51st Congress, which enacted the Sherman Anti-Trust Act, had anticipated the Act to apply extraterritorially. However, in the age of globalization

21. Apple v. Pepper, 139 S. Ct. 1514 (2019).

22. *Id. See also* Levy, *supra* note 12.

23. Daniel T. Fenske & Gabriel K. Gillett, *Justice Department Urges Supreme Court to Resolve Scope of Illinois Brick in Case with Major Implications for Tech Industry*, Jenner & Block LLP, http://jenner.com/system/assets/publications/18077/original/Antitrust%20Alert%20-%20Apple%20v.%20Pepper.pdf?1527707234 (last visited Mar. 14, 2019). See also Andreas Rivera, *What is C2C?*, (July 20, 2018) (discussing the growth of C2C online platforms), http://www.businessnewsdaily.com/5084-what-is-c2c.html.

24. Levy, *supra* note 12.

25. *Infra* Part IVa.

26. *Infra* Part IVb.

it has become increasingly important to reconcile if the Sherman Act will apply to foreign entities engaged in commerce with consumers both in the United States and internationally. Over the past century—with vast improvements in technology, transportation, and the execution of multilateral treaties—the United States has seen an exponential growth in international trade.[27] On a macro-level, with an export industry valued at $1.547 trillion US dollars in 2017, the United States is the second largest export economy in the world.[28] On the other side of the balance sheet, the United States sits as the largest import economy in the world with $2.408 trillion U.S. dollars of goods coming into the U.S. in 2017.[29] While the sale of goods and services via e-commerce platforms only accounted for 6.5% of the U.S. economy in 2016; from 2006 to 2016 "the digital economy grew at an average annual rate of 5.6%, outpacing overall U.S. economic growth of 1.5% per year."[30]

It is unclear how much of this growth occurred as a result of the emergence of C2C e-commerce platforms; however, it is clear that the affluence of the U.S. position in the import-export industry is a growing product of individual consumers. LED TVs, greeting cards, plastic disposable gloves, cotton t-shirts, sneakers, cordless drills, Christmas lights, leather handbags, are some of the many products that have originated in foreign territories and made its way to American consumers through the chain of distribution or manufacture.[31] Thus, with the growth of e-commerce and the deterioration of territorial boundaries, it has become increasingly pervasive to settle the issue of which nation's laws should apply in the event of a trade dispute. Specifically, should U.S. anti-trust law be applied in a situation where a U.S. citizen purchased a product from an Indian producer on a C2C platform that is incorporated and operated in China? To help answer this question it is imperative to understand the history of the extraterritorial application of the Sherman Anti-Trust Act. Part I.A discusses the limited extraterritorial application that consumed the courts throughout the early parts of the 20th Century. Part I.B describes the case led expansion of the extraterritorial application of the Sherman Anti-Trust Act. Part I.C explains Congress' attempt to limit the overly expansive extraterritorial application of the Sherman Anti-Trust Act with the enactment of the FTAIA. Part I.D

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27. Bennett O'Brien, *Four Major Ways International Trade Has Changed Over the Past One Hundred Years*, TRADE READY (Jan. 13, 2015), http://www.traderead y.ca/2015/trade-takeaways/four-ways-international-trade-changed-one-hundred-years/.

28. *Top 20 Export Countries Worldwide in 2017 (in billion U.S. dollars)*, STATISTA, http://www.statista.com/statistics/264623/leading-export-countries-worldwide/ (last visited Mar. 14, 2019).

29. *Leading Import Countries Worldwide in 2017 (in billion U.S. dollars)*, STATISTA, http://www.statista.com/statistics/268184/leading-import-countries-worldwide/ (last visited Mar. 14, 2019).

30. *Initial Estimates Show Digital Economy Accounted for 6.5 Percent of GDP in 2016*, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, http://www.ntia.doc.gov/blog/2018/initial-estimates-show-digital-economy-accounted-65-percent-gdp-2016 (last visited Apr. 6, 2019).

31. David Yanofsky, *Explore All $506 Billion in Goods that the U.S. Imported from China in 2017*, QUARTZ (Mar. 22, 2018), http://qz.com/1232833/explore-all-506-billion-in-goods-that-the-us-imported-from-china-in-2017/.

provides the current extraterritorial application of the Sherman Anti-Trust Act, which disregards international comity and is not limited by the FTAIA.

A. *Territorial Limits of the Sherman Anti-Trust Act: American Banana Co.*

The expansive extraterritorial application of the Sherman Anti-Trust Act is a fairly recent phenomenon. Initially, the Supreme Court was skeptical to apply the Sherman Act extraterritorially. The Court tended to uphold the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[32] Essentially, because Congress did not explicitly express that the Sherman Anti-Trust Act should apply extraterritorially, the Court presumed that the U.S. law "could not be construed to reach conduct outside the territorial limits of the United States.[33] The idea that a nation's laws are "supreme within a jurisdiction but generally powerless outside it" is referred to as the territorial principle.[34] The seminal case that limited the extraterritorial application of the Sherman Act was *American Banana Co. v. United Fruit*.[35] In this case, an Alabama corporation sued a New Jersey corporation for violating the Sherman Anti-Trust Act.[36] The plaintiff claimed that the New Jersey corporation "with [the] intent to prevent competition and to control and monopolize the banana trade, bought the property and business of several of its previous competitors" located in Panama and Costa Rica.[37] Despite both plaintiff and defendant being incorporated within the United States, the Supreme Court held that because the alleged unlawful actions took place "outside of the jurisdiction of the United States . . . they [are not] governed by the act of Congress."[38]

B. *Expansion of the Extraterritorial Application of the Sherman Act & International Comity*

By the end of World War II, courts across the United States began "a gradual process of reversing the holding of [*American Banana*] and expanding the reach of U.S. anti-

32. Morrison v. National Australia Bank Ltd., 561 U.S. 247, 251 (2010) (citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 255 (1991)).

33. Knebel, *supra* note 3, at 185. *See also American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (explaining "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done")

34. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 Mich. L. Rev. 2448, 2455 (1999) (explaining that the territorial principle was widely accepted by the courts throughout the early parts of the 20th Century, and received the endorsement of the coveted legal scholar Joseph Beale).

35. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

36. *Id.*

37. *Id.* at 354.

38. *Id.* at 355.

trust laws."[39] Through a broad interpretation of Congressional power "to regulate Commerce with foreign Nations," and largely through judicial policy-making, courts began to allow plaintiffs the opportunity to rebut the presumption that the Sherman Act only applies within the territory of the United States by asserting either: (1) Congress intended the application of U.S. law to a particular set of facts, or (2) the particular fact pattern is not extraterritorial in the first place so that the presumption is inapplicable.[40]

The United States Court of Appeals for the Second Circuit, in *United States v. Aluminum Co. of America* ("*Alcoa*"), established the modern-day test for plaintiffs to overcome the presumption of limited extraterritorial application of the Sherman Anti-Trust Act.[41] In *Alcoa*, the United States Department of Justice brought a Sherman Anti-Trust Act claim against a United States aluminum company for "monopolizing interstate and foreign commerce, particularly in the manufacture and sale of [its] aluminum."[42] The United States Department of Justice claimed that the aluminum company monopolized the market through its exclusive contracts with international distributors. Despite the transgressions occurring outside of the United States, the Court permitted the United States Department of Justice to pursue claims under the Sherman Anti-Trust Act.[43] The Court explained "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[44] Thus, because the Court found that enough evidence was present to show the aluminum companies actions affected the trade and the commerce of the United States, the Sherman Anti-Trust Act applied regardless of the location of the transaction and residence of the parties.[45] More succinctly stated by the Southern District Court of New York over 20 years after the *Alcoa* decision, "[t]he antitrust laws of this country extend to any activity (unless plainly and clearly exempted by statute), whether carried on by a foreigner or a citizen, which affects the trade and the commerce of the United States."[46]

The Supreme Court of the United States affirmed the Second Circuit's expansive extraterritorially application of the Sherman Anti-Trust Act, in *Hartford Fire*

39. Knebel, *supra* note 3, at 186.

40. Lea Brilmayer, *New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 658 (2011)(explaining that proving what Congress wants is a "thankless (and probably fruitless) endeavor; thus, most plaintiffs today attack the presumption against extraterritoriality by asserting facts that show "the 'focus' of the substantive law in question is something that took place in the United States"). *See also* U.S. CONST. art. I, § 8, cl. 3.

41. Knebel, *supra* note 3, at 187.

42. United States v. Aluminum Co. of America, 148 F.2d 416, 421 (2d Cir. 1945).

43. *Id.*

44. *Id.* at 443.

45. *Id.*

46. Sabre Shipping Corp. v. American President Lines, Lmtd., 285 F.Supp. 949, 953 (S.D.N.Y. 1968).

Insurance Co. v. California.[47] In *Hartford Fire Insurance Co.*, a British Insurance company was sued under the Sherman Anti-Trust Act by 19 states in the United States for "engaging in various conspiracies aimed at forcing other primary insurers to change the terms of their standard domestic commercial general liability insurance policies."[48] The Supreme Court found that the facts of the case were sufficient to rebut the presumption of territorial application of the Sherman Anti-Trust Act, and that "this Court has repeatedly upheld [Congressional] power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected."[49] However, the Supreme Court went a step further and acknowledged that "a court may decline to exercise Sherman Act jurisdiction over foreign conduct…by the employment of comity analysis."[50] Comity refers to "the respect nations afford each other by limiting the reach of their laws."[51] Section 403 of Restatement (Third) of the Foreign Relations Law of the United States provides a list of factors that a court may consider when deciding whether to apply U.S. law or respect a foreign nations laws.[52] The factors are coveted to be "neutral criteria" that assist court's in deciding "the law of the state whose interest is clearly greater."[53] Some of these factors were outlined in Justice Scalia's dissenting opinion in *Hartford Fire Insurance Co.*, and include:

> [T]he extent to which the activity takes place within the territory [of the regulating state]…the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated…the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted…the extent to which another state may have an interest in regulating the activity…and the likelihood of conflict with the regulation by another state.[54]

As expected, since Justice Scalia's opinion came as a dissent, the Supreme Court did not find that international comity barred the extraterritorial application of the Sherman Act in *Hartford*. The majority opined that "[t]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United

47. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).
48. *Id.* at 764.
49. *Id.* at 813-14.
50. *Id.* at 798.
51. Knebel, *supra* note 3, at 198 (citing Hartford Fire Ins. Co., 509 U.S. at 817).
52. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987).
53. Weintraub, *supra* note 7, at 1802.
54. Hartford Fire Ins. Co., 509 U.S. at 818-19. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987).

States antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct."[55] Instead, the majority held that in order to bar the application of the Sherman Act against persons subject to the laws of a non-U.S. authority, the non-U.S. law must require the action being challenged so that "compliance with the laws of other countries is…impossible."[56] In other words, the Supreme Court limited the defense of international comity to only scenarios where it would be impossible to comply with both U.S. and the foreign nation's laws. Making the international comity analysis even more obscure, in lieu of the Supreme Court's *Hartford* decision, is the fact that "many nations share our faith in the value of competition, and as of 2017, over 130 jurisdictions have enacted antitrust laws as a means to ensure open and free markets, promote consumer welfare, and prevent conduct that impedes competition."[57] Thus, it is unlikely that foreign nations have laws that directly conflict with the United States law to the extent where it would be impossible to comply with both nations' laws.

While not expressed in *Hartford*, because the majority deemed international comity was unfounded given the alleged facts, the Supreme Court has explained that when evaluating international comity, courts shall not evaluate the legitimacy of the foreign nation's law and accept the validity of it under the "act of state doctrine."[58] According the Supreme Court in *Underhill v. Hernandez*:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgement on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign power as between themselves.[59]

Nevertheless, the Supreme Court's ruling in *Hartford* is significant for two reasons. First, the ruling affirmed and expanded the extraterritorial application of the Sherman Anti-Trust Act to situations where United States interests are affected. Second, the holding narrowed a defendant's ability to claim that international comity should apply as a bar to the extraterritorial application of the Sherman Anti-Trust Act. Specifically, the Supreme Court limited the international comity defense to only situations where the laws of the United States and the foreign nation's laws are in such conflict that adhering to one law would per se make you violate the other law.

55. Hartford Fire Ins. Co., 509 U.S. at 799.
56. Knebel, *supra* note 3, at 198–99 (citing Hartford Fire Ins. Co., 509 U.S. at 799).
57. Knebel, *supra* note 3, at 202.
58. *Id.* at 199–200.
59. *Id.* (citing Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

C. Blocking Statutes & The Foreign Trade Antitrust Improvements Act (FTAIA)

The broad application of the Sherman Anti-Trust Act, and the narrow exception to barring the Act through international comity, led many foreign nations to enact blocking statutes to "protect their nationals from criminal [and civil] proceedings in [the United States] where the claims to jurisdiction by those courts [were] excessive and constitute[d] an invasion of sovereignty."[60] Many of the United States' closest allies—the United Kingdom, Australia, Canada, France, Italy, South Africa, the Netherlands—enacted blocking statutes that:

> [T]riggered the issuing of conflicting injunctions, [] given rise to a spate of foreign statutes designed to thwart discovery in the United States proceedings…[and] the most extreme example of outrage at the extraterritorial application of our anti-trust law is the United Kingdom's 'Clawback Act.' This statute goes far beyond simply denying recognition to the United States decrees and permits suits in the United Kingdom to recover any part of the judgement already paid that exceeds compensatory damages.[61]

In addition, even U.S. companies opposed the broad application of the Act because they felt it "handicapped [them] in competing for off-shore business against foreign firms that were not subject to the strict antitrust constraints imposed by U.S. law."[62]

To quell the concerns of both foreign nations and domestic companies, the United States Congress enacted the FTAIA. The FTAIA, which went into effect in 1982, provided protection for export transactions by "imposing additional requirements for establishing a Sherman Act claim involving foreign commerce that is not import trade or import commerce."[63] Specifically, in order to bring an anti-trust claim, the FTAIA required "the conduct to have a direct, substantial, and reasonably foreseeable effect on commerce in the United States."[64] In other words, a foreign exporter would not be subject to prosecution under the Sherman Anti-Trust Act if it engaged in an anticompetitive act (i.e. price fixing) that did not "have a direct, substantial, and reasonably foreseeable effect on commerce in the United States."[65] As is apparent by the FTAIA statute, corporations that are engaged in import commerce are "unaffected by the FTAIA and remain[] subject to the

60. *Id.* at 192 (citing Rio Tinto Zinc Corp. v. Westinghouse Electric Corp. 1 A11 E.R. 434, 459 (H.L. 1978)).

61. Weintraub, *supra* note 7, at 1800–01.

62. Knebel, *supra* note 3, at 193 (citing Abbott Lipsky & Kory Wilmot, *The Foreign Trade Improvements Act: Did Arbaugh Erase Decades of Consensus Building?*, ANTITRUST SOURCE 3, (2013).

63. *Id.* at 194.

64. 15 U.S.C. § 6a (1982).

65. *Id.*

Sherman Act."[66] Nevertheless, the FTAIA was a good faith effort by the legislative branch to: (1) improve the nation's international relations, (2) ensure U.S. domestic companies were not disadvantaged, and (3) provide "a unified legal standard to determine whether the U.S. antitrust law applies to foreign transactions."[67]

D. FTAIA's Failure to Withstand Time & International Comity Is Not Taken Seriously

The FTAIA temporarily eased the concerns of both the international community and U.S. based exporters; however, the legislation failed in terms of unifying the standard to determine whether U.S. anti-trust law applies to foreign transactions. The clause "direct, substantial, and reasonably foreseeable," has become a product of "judicial interpretation…[which] has created significant circuit splits."[68] Specifically, the word "direct" has been construed differently among the Ninth and Seventh Circuits.[69] The Ninth Circuit Court of Appeals "has interpreted the term 'direct' to require that the effect on U.S. commerce follow as an 'immediate consequence' of the defendant's conduct."[70] Conversely, the Seventh Circuit has broadly "construed the term 'direct'…to denote a 'reasonably proximate causal nexus.'"[71] Nevertheless, as the global economy becomes more integrated the split in the way courts define "direct" has become irrelevant.

Most trades that take place today have a direct impact that is both: (1) of immediate consequence, and (2) the reasonable proximate causal nexus. Especially with C2C e-commerce platforms, which serve to create "liquidity" in the market by connecting sellers with many buyers, it is foreseeable that this platform will proximately cause a multi-national transaction that causes an immediate consequence to a U.S. producer.[72] For example, if Alibaba were selling adidas sneakers on its platform, at an anti-competitive price, Nike would be instantly harmed because a customer (whether a U.S. or foreign citizen) will buy the cheaper and similar product on the platform rather than purchase through Nike. This harm is of immediate consequence to the Nike's of the world, and Alibaba certainly is

66. Knebel, *supra* note 3, at 196.

67. Lauren Giudice, *What Effects Are "Direct" Enough to Satisfy the FTAIA: An Analysis of 2014 FTAIA Decisions*, BOSTON UNIVERSITY SCHOOL OF LAW: INTERNATIONAL LAW JOURNAL (Apr. 29, 2015), http://www.bu.edu/ilj/2015/04/29/what-effects-are-direct-enough-to-satisfy-the-ftaia-an-analysis-of-2014-ftaia-decisions/.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Michael Greenberger, *Closing Wall Street's Commodity and Swaps Betting Parlors: Legal Remedies to Combat Needlessly Gambling Up the Price of Crude Oil Beyond What Market Fundamentals Dictate*, 81 GEO. WASH. L. REV. 707, 714 (2013) (explaining that liquidity means "the commodity producer and consumer will always have enough available market participants to close out a contract when needed").

able to foresee it being the proximate causal nexus to this harm. Thus, the FTAIA has become an obsolete and toothless statute in the age of globalization.

The United States Department of Justice has exemplified the ease of proving a transaction has a "direct, substantial, and reasonably foreseeable effect on commerce in the United States."[73] The success of the Justice Department has led to its aggressive pursuit of criminal anti-trust claims against foreign companies operating outside the United States.[74] Since 1999, "about 90 percent of fines of $10 million for criminal violations of U.S. antitrust laws [] have been levied against non-U.S. defendants for conduct occurring outside the U.S. Twenty-eight percent of those fines have been in excess of $100 million, with the largest, a fine of $650 million, levied in 2017."[75]

Moreover, with the Supreme Court's ruling in *Apple v. Pepper*, C2C e-commerce companies that are incorporated and operated outside the U.S. will undoubtedly be exposed to higher levels of private claims under the Sherman Anti-Trust Act. These foreign e-commerce companies would be subject to the Sherman Anti-Trust Act under two theories, either the e-commerce company may be: (1) defined as a company engaged in import commerce, in which the Sherman Anti-Trust Act automatically applies and FTAIA is irrelevant; or (2) viewed as a company engaged in conduct that will have a "direct, substantial, and foreseeable effect on commerce in the United States."[76] Regardless, with both the FTAIA becoming obsolete and the Supreme Court's potential expansion of standing for consumers to sue C2C e-commerce platforms as "direct purchasers," litigation against foreign e-commerce corporations will proliferate to the demise of the global economy.[77]

While the international community has been slow to enact up-to-date and effective blocking statutes, there will certainly be a resurgence by foreign nations to adopt statutes that would limit the scope of the Sherman Anti-Trust Act. For one, with globalization making the FTAIA affectively obsolete, the international community will strive to pressure the United States to adopt a new unified standard that expressly respects international comity. Second, advances in technology, like C2C e-commerce, will exacerbate the likelihood that the international community will: (1) adopt new and effective blocking statutes, and (2) pressure Congress to amend the current FTAIA to be more restrictive in its extraterritorial application. Specifically, with Supreme Court's decision in *Apple v. Pepper*, the international community will look for ways to protect its e-commerce platforms from litigious activity brought in the United States under U.S. anti-trust law.

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73. 15 U.S.C. § 6a (1982).
74. Knebel, *supra* note 3, at 182.
75. *Id.*
76. 15 U.S.C. § 6a (1982).
77. Fenske, *supra* note 23.

II. PROCEDURAL HISTORY OF *APPLE V. PEPPER*

One of the most important value-adds to the iPhone, which occurred a year after the release of the product, was the access iPhone users got to Apple's "App Store."[78] The App Store is "an internet site where iPhone users can find, purchase, and download iPhone apps."[79] The applications offered in the App Store are intended to enhance the iPhone user experience by offering applications that provide entertainment, financial assistance, food and drink recommendations, health and fitness directives, and more.[80] When the App Store opened, on July 10, 2008, five-hundred applications were available to its users.[81] Some of the apps released were developed in-house by Apple employees; however, the majority of the apps were developed by third-party developers.[82] Initially, 25 percent of the apps available in the App Store were offered to iPhone users for free.[83] Of the remaining 75 percent of apps, 90 percent were sold at a modest fee of $9.99 or less.[84]

In order to gain access to iPhone users, via the App Store, third-party app developers had to pay Apple "a commission on each third-party app purchased for use on an iPhone."[85] The arrangement between Apple and the third-party developer worked akin to royalty payments: "[w]hen a customer purchase[d] a third-party iPhone app, the payment [wa]s submitted to the App Store. Of that payment, 30% [went] to Apple and 70% [went] to the developer."[86] In addition to charging third-party developers in exchange for access to its platform, Apple placed stringent user agreements on both third-party developers and iPhone customers. To control the content in the App Store, Apple "prohibit[ed] app developers from selling iPhone apps through channels other than the App Store, threatening to cut off sales by any developer who violate[d] this prohibition."[87] Similarly, Apple discouraged iPhone users from downloading apps from unapproved platforms and "threaten[ed] to void iPhone warranties if they d[id] so."[88] Apple's control over third-party app developers and iPhone users led Stephen Schwartz, Edward Hayter,

78. Jason Snell & Peter Cohen, *Apple Opens iTunes App Store*, MACWORLD (July 10, 2008), http://www.macworld.com/article/1134380/app_store.html.

79. In re Apple iPhone Antitrust Litigation, 846 F.3d 313, 315–16 (9th Cir. 2017).

80. APPLE'S APP STORE, http://www.apple.com/ios/app-store/ (last visited Jan. 28, 2019).

81. *Apple's App Store Launches with More than 500 Apps*, APPLE INSIDER (July 10, 2008), http://appleinsider.com/articles/08/07/10/apples_app_store_launches_with_more_than_500_apps.

82. In re Apple iPhone Antitrust Litigation, 846 F.3d 313, 316 (9th Cir. 2017).

83. Thomas Ricker, *Jobs: App Store Launching with 500 iPhone applications, 25% Free*, ENGADGET (July 10, 2008), http://www.engadget.com/2008/07/10/jobs-app-store-launching-with-500-iphone-applications-25-free/.

84. *Id.*

85. *In re* Apple iPhone Antitrust Litigation, 846 F.3d 313, 316 (9th Cir. 2017).

86. *Id.*

87. *Id.*

88. *Id.*

Eric Terrell, and Robert Pepper ("Plaintiffs") to file an antitrust lawsuit against Apple.

The Plaintiffs asserted two claims against Apple: (1) unlawful monopolization of an aftermarket for iPhone applications in violation of Section 2 of the Sherman Act, and (2) attempted monopolization of the same aftermarket.[89] The aftermarket refers to the selling of apps to iPhone users, which the "Plaintiffs contend that Apple ha[d] instituted…'an anticompetitive scheme to monopolize the aftermarket for iPhone applications in order to control and derive supracompetitive profits from the distribution of iPhone apps worldwide.'"[90] The Plaintiffs complaint centered around the 30 percent commission that Apple received from the sale of third-party developer's apps.[91] The Plaintiffs claimed that as a result of the "supracompetitive 30% fee" developers set a price that offset its high royalty fee, which subsequently harmed the consumer since they were forced to pay an inflated price for the app.[92] Compounding the issue, the Plaintiffs asserted that Apple had controlled its monopoly and ensured its profits by prohibiting consumers from shopping for Apps on other sites outside the App Store in fear of voiding their warranty.[93] According to the Plaintiffs complaint, "Apple ha[d] 'cornered 100% of the distribution market for iPhone applications' and effectively 'foreclosed iPhone customers from buying software from any source other than Apple.'"[94] As a result of Apple's system, the "Plaintiffs summarily conclude[d] that they have been injured by Apple's conduct because they paid more for their iPhone apps than they would have paid in a competitive market."[95]

On December 2, 2013, after hearing the case at hand, the United States District Court of the Northern District of California granted Apple's Motion to Dismiss on the grounds that the Plaintiffs lacked standing to bring an antitrust claim.[96] Specifically, the Court found that the Plaintiffs lacked standing under Section 4 of the Clayton Act.[97] Section 4 of the Clayton Act, which will be covered in greater detail in Part IV, requires the claimant in an antitrust claim to be "the first party in the chain of distribution to purchase a price-fixed product."[98] Hence, "indirect purchasers are precluded from suing based on unlawful overcharges passed on to them by intermediaries in the distribution chain who purchased directly from the

89. *In re* Apple iPhone Antitrust Litigation, No. 11-CV-06714-YGR, 2013 WL 6253147, at *1 (N.D. Cal. 2013).

90. *Id.*

91. *Id.* at *2.

92. *Id.*

93. In re Apple iPhone Antitrust Litigation, 846 F.3d 313, 316 (9th Cir. 2017).

94. In re Apple iPhone Antitrust Litigation, No. 11-CV-06714-YGR, 2013 WL 6253147, at *1 (N.D. Cal. 2013).

95. *Id.* at *2.

96. *Id.* at *6–7.

97. *Id.* at *3.

98. *Id.* at *3.

alleged antitrust violator."[99] While the United States District Court of the Northern District of California acknowledged three, potentially four, exceptions that would give an indirect purchaser standing in an antitrust violation; the court found that "none of the exceptions applied to the Plaintiffs and the 30 percent figure for which Plaintiffs complain is not a fixed fee, but a cost passed-on to consumers by independent developers. As such, any injury to Plaintiffs is an indirect effect resulting from the software developers' own costs."[100] The Plaintiffs appealed the United States District Court of the Northern District of California's ruling on the grounds that the Court "erred in characterizing them as indirect purchasers from Apple, and therefore without statutory standing."[101]

On January 12, 2017, the United States Ninth Circuit Court of Appeals reversed the lower court's decision and remanded the case back to the United States District Court of the Northern District of California to be heard on its merits.[102] The United States Ninth Circuit Court of Appeals analyzed Section 4 of the Clayton Act using the same criteria set forth by the lower court, and acknowledged that "the general rule is that only 'the overcharged direct purchaser, and not others in the chain of manufacture or distribution,' has standing to sue."[103] However, the Ninth Circuit Court of Appeals used most of the opinion distinguishing whether Apple is a manufacturer or producer, or whether it is a distributor. The Court explained that if Apple is determined to be a manufacturer or producer, then the Plaintiffs would be considered indirect purchasers.[104] Conversely, if Apple is determined to be a distributor from whom Plaintiffs purchased directly, Plaintiffs would have standing under Section 4 of the Clayton Act to bring the antitrust claim against Apple.[105] Under this framework, the Ninth Circuit Court of Appeals found that Apple was a distributor of the iPhone apps, selling the apps with a thirty percent markup directly to purchasers through its App Store.[106] The Court reversed and remanded the case back to the district court because it found that Plaintiffs were direct purchasers of iPhone apps from Apple and had standing to sue under Section 4 of the Clayton Act.

Apple filed a timely petition for writ of certiorari to the Supreme Court of the United States on August 2, 2017.[107] In its petition for writ of certiorari, Apple asked the Court to answer the question of "whether consumers may sue anyone who delivers goods to them for antitrust damages, even when they seek damages based

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99. *Id.*

100. In re Apple iPhone Antitrust Litigation, No. 11-CV-06714-YGR, 2013 WL 6253147, at *6 (N.D. Cal. 2013).

101. In re Apple iPhone Antitrust Litigation, 846 F.3d 313, 317 (9th Cir. 2017).

102. *Id.* at 325.

103. *Id.* at 320–21.

104. *Id.* at 322.

105. *Id.*

106. *In re* Apple iPhone Antitrust Litigation, 846 F.3d 313, 324–25 (9th Cir. 2017).

107. *Apple v. Pepper*, SCOTUSblog, https://www.scotusblog.com/case-files/cases/apple-v-pepper/ (last visited Jan. 28, 2019).

on prices set by third parties who would be the immediate victims of the alleged offense."[108] The Court granted certiorari on June 18, 2018, and heard the case on November 26, 2018.

III. SECTION 4 OF THE CLAYTON ACT: DIRECT PURCHASER RULE & ITS NARROW EXCEPTIONS

Whether a consumer has standing to bring an antitrust claim depends on if a court classifies a consumer as a direct-purchaser from the alleged malfeasant. With few exceptions, the Supreme Court has strictly adhered to a narrow interpretation of the "direct purchaser rule." Section III.A provides background to the direct purchaser rule, which was established in *Illinois Brick Co. v. Illinois*, *Hanover Shoe v. United Shoe Machinery Co.*, and *Kansas v. UtiliCorp United Inc*. Section III.B provides a caveat to the direct purchaser rule, and articulates the narrow exceptions recognized by the Supreme Court.

A. The Direct Purchaser Rule

The crux of whether a plaintiff has standing to bring an antitrust lawsuit centers around the Courts interpretation of Section 4 of the Clayton Action, which states:

> 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 United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.[109]

The language adopted by Congress is broad and appears to provide standing to "any person," regardless of their position in the chain of distribution, so long as some injury occurred because of an antitrust violation.[110] However, over time, "the Supreme Court has limited those who may sue for antitrust damages…[to] only 'the overcharged direct purchasers, and not others in the chain of manufacture or distribution.'"[111] This rule has come to be known as the direct purchaser rule.[112]

The first case where the Court limited standing to only direct purchasers was *Hanover Shoe v. United Shoe Machinery.*[113] In *Hanover Shoe*, Hanover Shoe, the plaintiff, sued United Shoe Machinery for charging supracompetitive rates in

108. *Id.*
109. 15 U.S.C. §15 (a)
110. *In re* Apple iPhone Antitrust Litigation, 846 F.3d 313, 320 (9th Cir. 2017).
111. *Id.* (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977)).
112. Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 208 (1990)
113. Hanover Shoe v. United Shoe Machinery Co., 392 U.S. 481 (1968).

violation of the Sherman Anti-Trust Act for the lease of its manufacturing equipment. United Shoe Machinery claimed that Hanover Shoe had no standing under Section 4 of the Clayton Act because it passed on its manufacturing costs to its customers and did not bear the cost of the injury.[114] Essentially, United Shoe Machinery claimed that the only party harmed by its high leasing costs were the customers of Hanover Shoe, who were forced to pay inflated costs for shoes because Hanover Shoe passed the burden of its manufacturing costs by setting a higher price on its goods. The court rejected United Shoe Machinery's "defensive use of pass-on theory" and held that because Hanover Shoe was a "direct purchaser from the machine manufacturer they were injured by the full amount of the overcharge irrespective of who ultimately bears the cost of that injury."[115]

The Court rejected the defensive use of pass-on theory for two reasons. First, the Court held that it is "virtually unascertainable" to prove that an intermediary had passed on the costs of an overcharge to its customers.[116] According to the Supreme Court there are "[a] wide range of factors that influence a company's pricing policies…[and] a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price."[117] Second, the Court rejected the defensive use of pass-on theory because, had it permitted the defense to United Shoe Machinery, it would be nearly impossible for the customer to "meet the challenge that [the manufacturer] passed on the higher price to customers."[118]

Practically speaking, these difficulties will likely cause customers not to proceed in litigation because they would only have "a tiny stake in a lawsuit and little interest in attempting a class action."[119] Thus, "those who violate the antitrust laws…would retain the fruits of their illegality because no one was available who would bring suit against them."[120] As a result, Hanover Shoe was permitted to proceed on the merits of its case against United Shoe Machinery because it was a direct purchaser of the company and a prima facie case of an antitrust violation was asserted by the plaintiff.[121]

Nine-years after *Hanover Shoe*, the Supreme Court developed the direct purchaser rule in *Illinois Brick Co. v. Illinois* by rejecting an attempt of a plaintiff to use the "pass-on theory offensively."[122] The State of Illinois, in its capacity as a

114. *Id.* at 487–88.
115. *Id.* at 494. *See also In re* Apple iPhone Antitrust Litigation, 846 F.3d 313, 321(9th Cir. 2017).
116. *Id.* at 493.
117. *Id.* at 492–93.
118. *Id.* at 494.
119. Hanover Shoe v. United Shoe Machinery Co., 392 U.S. 481, 494 (1968).
120. *Id.*
121. *Id*.
122. Illinois Brick Co. v. Illinois, 431 U.S. 720, 735 (1977).

purchaser of a building, initiated a lawsuit against a group of companies that manufactured and distributed concrete bricks. The concrete brick companies, who were allegedly engaged in a price fixing scheme, sold concrete bricks to a masonry contractor. The masonry company then installed and built a masonry structure for a general contractor, who then sold the entire building to the State of Illinois. The State claimed that they overpaid $3 million for the building as a result of the price fixing conspiracy between the concrete brick companies.[123] Essentially, the State asserted that the overcharge of the brick companies was passed on by the masonry contractor, to the general contractors, and now to the State. Thus, the State wanted to hold the first party in the chain of distribution liable for its antitrust violation under Section 1 of the Sherman Act.[124]

The Supreme Court of the United States rejected the State's attempt to "offensively use the pass-on theory," and dismissed the antitrust claim on the grounds that the State lacked standing as a direct purchaser of the concrete bricks.[125] The Court provided three policy reasons for its holding. First, "the reasoning of *Hanover Shoe* cannot justify unequal treatment of plaintiffs and defendants with respect to the permissibility of pass-on arguments."[126] Essentially, the Court held that "evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution."[127] The more rigorous review, associated with the offensive use of pass-on theory, would "clog the courts with protracted and expensive litigation."[128] Second, "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants."[129] By permitting an indirect purchaser standing, via the offensive use of pass-on theory, the indirect purchaser would be permitted to sue each party in the chain of distribution for the amount overcharged.[130] The multiplicity of lawsuits would "increase[] the possibility of inconsistent adjudications."[131] Third, allowing indirect purchasers to piecemeal its damages against multiple defendants (in this case the masonry contractor, general contractor, and the brick companies) would "reduce the effectiveness of antitrust laws by diluting the share of damages better-suited direct purchasers might secure by bringing suit."[132]

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123. *Id*. at 727.
124. *Id.* at 720.
125. *Id.* at 729.
126. *Id.* at 731.
127. *Id.* at 732.
128. In re Apple iPhone Antitrust Litigation, 846 F.3d 313, 321 (9th Cir. 2017).
129. Illinois Brick Co. v. Illinois, 431 U.S. 720, 735 (1977).
130. *Id.* at 732–33.
131. *Id.* at 730.
132. *In re* Apple iPhone Antitrust Litigation, 846 F.3d 313, 322 (9th Cir. 2017).

The last Supreme Court case that sets the foundation of what is now known as the direct purchaser rule is *Kansas v. UtiliCorp. United, Inc.*[133] In *UtiliCorp*, customers of a public utilities company initiated an antitrust lawsuit against a group of natural gas producers for price fixing. The customers attempted to offensively use the pass-on theory by stating the natural gas producers "conspired to inflate the price of their gas."[134] The chain of distribution started with the gas producers selling gas to the public utilities company, and then the public utilities company would distribute the gas to the customers at the inflated price. A similar lawsuit, claiming antitrust violations of the natural gas producers, was filed by the public utilities company against the natural gas producers.[135]

The customers conceded that they were direct purchasers of the public utilities company and only indirect purchasers of the gas producers; however, they urged the Court to allow for an exception to the direct purchaser rule and permit indirect purchaser suits in cases involving regulated public utilities that "pass on 100 percent of its costs to their customers."[136] The crux of the customers argument, to provide an exception to the "direct-purchaser rule," was that "[the] concerns in *Hanover Shoe* and *Illinois Brick* about the difficulties of apportionment, the risk of multiple recovery, and the diminution of incentives for private antitrust enforcement would not exist in such cases."[137] Despite these compelling reasons for the Supreme Court to disregard the "direct-purchaser rule," the Court remained steadfast to its narrow interpretation of the rule because it would be "inconsistent with precedent and imprudent….to create an exception for regulated public utilities."[138] The Supreme Court explained that while "the rationales of *Hanover Shoe* and *Illinois Brick* may not apply with equal force in all instances, ample justifications exist for the Court's stated decision not to carve out exceptions to the indirect purchaser rule for particular types of markets."[139] The Court dismissed the customers lawsuits, and affirmed that the direct purchaser—the public utilities company—was best situated to initiate suit.

B. Exceptions to The Direct Purchaser Rule

Despite the Supreme Court's strict application of the direct purchaser rule, the Court in *Illinois Brick* acknowledged that there may be two narrow exceptions where an indirect purchaser would be permitted standing under Section 4 of the Clayton Act to bring an antitrust claim. First, an indirect purchaser may have standing when a pre-existing cost-plus contract between the direct purchaser and

133. Kansas v. UtiliCorp. United, Inc., 497 U.S. 199 (1990).
134. *Id.* at 204.
135. *Id.* at 199.
136. *Id.* at 210.
137. *Id.* at 208.
138. *Id.*
139. *Id.* at 216.

indirect purchaser exists.[140] The Court rationalized that an indirect purchaser should have standing in this situation because "preexisting cost-plus contracts…make it easy to prove that the direct purchaser has not been damaged" and the overcharge was clearly allocated to the indirect purchaser.[141] Thus, the complexities that lead to protracted and expensive litigation do not exist when a cost-plus contract is present.[142] Second, an indirect purchaser may have standing when the price fixer owns or controls the direct purchaser.[143] In this situation, "there is no realistic possibility that the direct purchaser will file suit…and concerns with apportionment and double recovery are inapplicable."[144] Nevertheless, these scenarios did not present themselves in *Illinois Brick* and the State's claims were dismissed because they were indirect purchasers without standing. Likewise, these situations did not apply in *Apple v. Pepper*.[145]

IV. ADVERSE EFFECTS OF THE EXTRATERRITORIAL APPLICATION OF THE SHERMAN ANTI-TRUST ACT AND THE NEED FOR A MORE ROBUST INTERNATIONAL COMITY ANALYSIS AND EFFECTIVE BI-LATERAL TREATIES

After the Supreme Court hearing in *Apple v. Pepper*, which took place on November 26, 2018, many practitioners and legal scholars anticipated that the Supreme Court would hold that consumers have standing to bring Sherman Anti-Trust Act claims against C2C e-commerce platforms that merely connect sellers with buyers. The so-called "liberal bloc"—Justices Breyer, Ginsburg, Sotomayor, and Kagan—all "gave varying indications that they are inclined to find for the plaintiffs."[146] Justice Breyer, who appeared to simplify the chain of distribution or manufacture, implied that "iPhone users buy apps directly from Apple, the alleged monopolist, and direct buyers can always sue the alleged monopolist for an overcharge, even under *Illinois Brick*."[147] However, even more compelling that the Supreme Court would find in favor of consumer standing is the fact that Justices Gorsuch and Alito "both

140. Illinois Brick Co. v. Illinois, 431 U.S. 720, 732-36 (1977); *See also* State of Ariz. v. Shamrock Foods Co., 729 F.2d 1208 (9th Cir. 1984) (finding a cost-plus contract exists when an indirect purchaser buys a predetermined quantity of goods subject to an illegal price-fixing arrangement from a direct purchaser. Under such a contract, in setting the price at which to sell to indirect purchasers, the direct purchaser automatically adds a contractually predetermined sum to the price he had paid the seller.).

141. *Id.* at 736.

142. *Id.* at 732.

143. *Id.* at 736 n. 16.

144. Christopher T. Casamassima & Tammy A. Tsoumas, *The Illinois Brick Wall: Standing Tall*, KIRKLAND & ELLIS LLP, http://www.kirkland.com/files/standing_tall.pdf (last visited Jan. 28, 2019).

145. Apple v. Pepper, 139 S. Ct. 1514 (2019).

146. Cory L. Andrews, *Reading the Tea Leaves of Apple v. Pepper Supreme Court Oral Argument*, FORBES (Nov. 28, 2018, 9:00 AM), http://www.forbes.com/sites/wlf/2018/11/28/reading-the-tea-leaves-of-apple-v-pepper-supreme-court-oral-argument/#b4f4c3c664cb.

147. *Id.*

expressed a belief that *Illinois Brick* was either wrongly decided or no longer relevant in the modern economy."[148]

The pundits' predictions were correct, and in a 5-4 decision, authored by Justice Kavanaugh, the Supreme Court held that consumers who purchased apps for their iPhones through Apple's App Store were direct purchasers from Apple under the *Illinois Brick* standard.[149] The logic of the Court was simple:

> [T]he iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer. The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged antitrust violator. [Thus,] the absence of an intermediary is dispositive…[and] the iPhone owners are direct purchasers from Apple.[150]

With this holding, consumers would presumably be able to hail C2C e-commerce companies, which are incorporated and operated outside the United States, into the United States for any alleged Sherman Anti-Trust Act violation. Thus, this decision may exacerbate the already aggrieved international community, lead to the enactment of more burdensome blocking statutes, and slow down the growth of the emerging C2C e-commerce platforms. In lieu of these economic threats, the current extraterritorial application of the Sherman Anti-Trust Act needs to be revised to limit its overly broad application. While the FTAIA was a good faith effort by Congress—to improve diplomatic relations, ensure U.S. domestic companies were not disadvantaged, and provide "a unified legal standard to determine whether the U.S. antitrust law applies to foreign transactions"—it has become obsolete in the age of globalization.[151]

Part V.A analyzes the adverse economic effects caused by the overly broad extraterritorial application of the Sherman Anti-Trust Act. In addition, Part IV.A provides a Congressional remedy to combat the looming prospect that foreign nations may be compelled to adopt more stringent blocking statutes because of the Supreme Court decision in *Apple v. Pepper*. Part IV.B explains the importance of expanding the international comity analysis in order to effectively remedy the pitfalls of the FTAIA. Particularly, Part IV.B advocates that more factors should be

148. *Id.*

149. Apple v. Pepper, 139 S. Ct. 1514 (2019).

150. *Id.* at 1521.

151. Lauren Giudice, *What Effects Are "Direct" Enough to Satisfy the FTAIA: An Analysis of 2014 FTAIA Decisions*, BOSTON UNIVERSITY SCHOOL OF LAW: INTERNATIONAL LAW JOURNAL (Apr. 29, 2015), http://www.bu.edu/ilj/2015/04/29/what-effects-are-direct-enough-to-satisfy-the-ftaia-an-analysis-of-2014-ftaia-decisions/.

used by courts when deciding whether to apply U.S. law or respect a foreign nations law. Part IV.C concludes by acknowledging that bi-lateral treaties have assisted the United States in enforcing the Sherman Anti-Trust Act against foreign companies; however, greater cooperation and more detailed treaties could help facilitate even more support for the extraterritorial application of the Sherman Act.

A. Adverse Political and Economic Effects

Before the FTAIA was enacted, in 1982, many of the United States' closest allies were disgruntled by the U.S. courts' expansive extraterritorial application of the Sherman Anti-Trust Act.[152] These nations confided in the territorial principle, and believed it "axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack."[153] The United Kingdom, one of the most outspoken allies against the United States' "attempt[] to impose [its] domestic laws on persons and corporations who are not U.S. nationals and who are acting outside the territory of the United States," viewed the extraterritorial application of the Sherman Anti-Trust Act as ironic given the fact "the United States was founded by those who took exception to little matters of taxation being imposed extraterritorially."[154] Thus, in an attempt to "protect their nationals from criminal [and civil] proceedings in foreign courts where the claims to jurisdiction [were] excessive and constitute[d] an invasion of sovereignty," foreign nations enacted blocking statutes to resist the extraterritorial application of the Sherman Act.[155]

The blocking statutes of each nation varied, but all served to "block the discovery of documents located in their countries and bar the enforcement of foreign judgements."[156] The United Kingdom achieved these goals with the Protection of Trading Interests Act, France with the French Blocking Law, Canada with the Foreign Extraterritorial Measures Act, and Australia with the Foreign Proceedings Act.[157] The conflicting laws between the United States and its foreign counterparts created tremendous uncertainty regarding what nation's laws would be applied in the event of a cross-border dispute. According to Nuno Limáo and Giovanni Maggi, economists from the University of Maryland and Yale University, "as the world becomes more integrated, the gains from decreasing trade-policy uncertainty

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152. *See supra* Part I.B.

153. Knebel, *supra* note 3, at 202 (citing Tinto Zinc Corp. v. Westinghouse Electric Corp., 1 A11 E.R. 434, 447 (H.L. 1978)).

154. *Id.* at 191–92 (citing David Lord Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NORTHWESTERN J. INT'L. & BUS. 1, 2 (1979)).

155. *Id.* at 191.

156. *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, 50 L. AND CONTEMPORARY PROBLEMS 197, 201 (1987).

157. *Id.* at 201–04.

should tend to become more important relative to the gains from reducing the levels of trade barriers."[158]

Essentially, for trade to prosper, it is more important to provide producers and consumers with predictability and certainty (regarding the rule of law) rather than enacting laws that focus on free trade economics. Accordingly, it is in the best interest of governments to focus on unifying its laws before negotiating for the elimination of tariffs or quotas. This is not to say that eliminating trade barriers is not vital to the health of the economy—in fact, tariffs, quotas, and other trade barriers are proven to adversely affect all parties involved in the chain of distribution—however, it is more important to unify laws before focusing on the elimination of any trade barriers.[159]

As mentioned in Part I.C., the complaints of U.S. exporters and foreign governments were heard, and the United States Congress enacted the FTAIA "to address the concerns of foreign governments that the effects test established in the *Alcoa* case had not made clear the magnitude of the U.S. effects required to support a claim under the Sherman Act."[160] Thus, the FTAIA was implemented to bring certainty to consumers and producers by requiring that "conduct must have a 'direct, substantial, and reasonably foreseeable effect'" for the Sherman Anti-Trust Act to apply extraterritorially.[161] This language provided the foreign community with temporary relief, and gave producers and consumers the certainty and predictability needed to establish confidence in the markets and continue trading.

However, since the passage of the FTAIA in 1982, the world has witnessed a remarkable increase in globalization, such that most conduct that takes place today has a "direct, substantial, and reasonably foreseeable effect" [162] on the U.S. economy. Epitomizing the obscureness of the FTAIA, is the fact that U.S. enforcement agencies—i.e. the U.S. Department of Justice and the Federal Trade Commission—have taken an aggressive approach to pursuing international anti-trust claims. In 2017, the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") published the *International Guidelines*—a publication "explaining how the agencies intend to enforce U.S. antitrust laws against conduct occurring outside the United States."[163] The *International Guidelines* have taken the broadest approach in determining if conduct is "direct"—finding if there is a "reasonably proximate causal nexus between the conduct and the effect" conduct is "direct"—and the narrowest view that international comity bars enforcement of

158. Nuno Limáo & Giovanni Maggi, *Uncertainty and Trade Agreements*, 7(4) AMERICAN ECON. J: MACROECONOMICS 1, 38 (2015).

159. Brent Radcliffe, *The Basics of Tariffs and Trade Barriers*, INVESTOPEDIA (Dec. 25, 2018), http://www.investopedia.com/articles/economics/08/tariff-trade-barrier-basics.asp.

160. Knebel, *supra* note 3, at 194.

161. 15 U.S.C. § 6a (1982).

162. *Id.*

163. Knebel, *supra* note 3, at 200.

U.S. antitrust laws only when it is impossible for the actor to comply with both U.S. law and its foreign nation's law.[164] Thus, because the FTAIA has become ineffective and there is a risk of further expansion of the extraterritorial application of the Sherman Anti-Trust Act with *Apple v. Pepper*, foreign nations will almost certainly strive to adopt modern and effective blocking statutes. These blocking statutes will revitalize uncertainty in the markets, and the global economy will be adversely affected.

In addition, because our world is more integrated, compared to the time when the FTAIA was implemented, the adverse economic effects may be worse if foreign nations pursue modern blocking statutes. To hedge against judicial uncertainty, corporations will likely react by hiring more robust legal teams. By re-allocating money to legal costs, with the hopes of avoiding potential litigation and ensuring compliance with all nations' laws, corporations would have foregone the opportunity to spend time and money on: (1) scaling its current line of products (which would decrease the price of goods for consumers), (2) enhancing the capabilities of its current line of products (which improve consumer capabilities and increase corporate profits), or (3) creating new and innovative products (which would benefit both consumers and producers). Thus, because corporations would be forced to spend more resources on avoiding litigation rather than research and development with the new blocking statutes, consumers, producers, distributors, and the economy as a whole will be adversely affected.

Overall, there is a significant risk that foreign nations will look towards blocking statutes to limit the extraterritorial application of the Act. The conflicting laws of the United States and international community will lead to judicial uncertainty, which will have an adverse impact on the global economy. Businesses will spend more time and money to avoid disputes; thus, undermining corporate profits, a customer's ability to purchase low cost goods, and the overall health of the global economy. The only certainty is that trade will slow down as a result of trade policy uncertainty. To avoid these adverse economic effects, it would be advantageous for the United States Congress to amend the FTAIA in a way that limits the effects of the extraterritorial application of the Sherman Anti-Trust Act. Specifically, Congress should limit the effects of the extraterritorial application of the Sherman Anti-Trust Act by expressly providing courts with a robust international comity analysis.

B. International Comity Test

As was discussed in Part I.B., comity refers to "the respect nations afford each other by limiting the reach of their laws."[165] Prior to the Supreme Court case *Hartford Fire Insurance Co*., which narrowed the comity analysis to only situations where it would be impossible for a foreign entity to comply with both U.S. and foreign nation's laws,

164. *Id.* at 201.

165. Knebel, *supra* note 3, at 198 (citing Hartford Fire Ins. Co., 509 U.S. at 817).

federal courts considered a host of factors to determine if the Sherman Anti-Trust Act was barred from applying extraterritorially. Section 403 of Restatement (Third) of the Foreign Relations Law of the United States provides eight factors a court should consider when deciding whether "a state may [or may] not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state."[166] These eight factors include: (1) the link of the activity to the territory of the regulating state; (2) the connection between the regulating state and the person principally responsible for the activity to be regulated; (3) the character, importance, extent, and degree of importance of the regulation to the regulating state; (4) the existence of justified expectations that might be protected or hurt by the regulation; (5) the importance of the regulation to the international political, legal, or economic system; (6) the extent to which the regulation is consistent with the traditions of the international system; (7) the extent to which another state may have an interest in regulating the activity; and (8) the likelihood of conflict with regulation by another state.[167]

Justice Scalia, in his dissenting opinion in *Hartford Fire Insurance Co.*, highlighted many of these factors and determined that international comity barred the Sherman Anti-Trust Act's extraterritorial application in that case.[168] However, the majority decided to narrow the comity analysis by only considering if "the non-U.S. law must require the action being challenged so that 'compliance with the laws of both countries is…impossible.'"[169] This narrow comity analysis has led to the broadening of the Sherman Anti-Trust Acts extraterritorial application, which jeopardizes the economic well-being of the global economy. While some courts have disregarded the Supreme Court's narrow comity analysis, by claiming that the Supreme Court "left unclear whether it was saying that the only relevant comity factor in that case was conflict with foreign law…or whether the Court was more broadly rejecting balancing of comity interests in any case where there is no true conflict," Congress should expressly provide federal courts with a broad range of factors it should consider to ensure the United States respects the laws of other nations.[170] Specifically, Congress should amend the FTAIA by explicitly providing that the Sherman Anti-Trust Act only applies extraterritorially in cases where it does not offend the sovereignty of a foreign nation.

In essence, to ensure the economic prosperity of the global economy, the United States Congress should be proactive in amending the FTAIA. Specifically, Congress should prescribe a broad international comity test for courts to consider when deciding if the Sherman Anti-Trust Act should apply extraterritorially. If international comity is taken seriously, unlike its most recent application by the

166. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987).

167. *Id.*

168. *See supra* text accompanying note 51.

169. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 765 (1993).

170. Mujica v. Airscan Inc., 771 F.3d 580, 600 (9th Cir. 2014).

Supreme Court in *Hartford Fire Insurance Co.*, there will be a greater degree of compliance by the international community and more certainty will be provided to consumers and producers. Moreover, federal courts should not wait until Congress amends the FTAIA. In fact, federal courts should, on its own accord, extensively apply an international comity analysis to every case where a foreign entity is involved. As was previously mentioned, some courts continue to apply a robust international comity analysis. Specifically, the Ninth Circuit Court of Appeals in *Mujica v. Airscan Inc.* considered:

[T]he location of the conduct in question, the nationality of the parties, the character of the conduct in question, the foreign policy interests of the United States, any public policy interests, the strength of the foreign governments' interests, and the adequacy of the alternative forum.[171]

Thus, until the United States Congress takes the necessary step to amend the FTAIA, federal courts should consider applying an international comity analysis to all cases that involve an international entity. By adopting a broad international comity analysis: (1) foreign nations would be less likely to adopt burdensome blocking statutes, (2) consumers and producers would have more certainty through unified laws, (3) the global economy will continue to prosper because of the certainty and predictability of the law, and (4) foreign nations may become more amenable to enter into bi-lateral treaties with the United States.

C. Bi-Lateral Treaties

While beyond the scope of this paper, it is important to note that the United States has attempted to use bi-lateral agreements to enhance international cooperation with the extraterritorial application of the Sherman Anti-Trust Act. In 1982, the United States and Australia signed the Agreement on Cooperation in Antitrust Matters "to minimize jurisdictional conflicts."[172] In 1991, "the United States and the EU reached an antitrust cooperation agreement that commits the parties to notify each other of imminent enforcement action, to share relevant information, and consult on potential policy changes."[173] In addition, "similar arrangements have been made between the United States and Canada."[174] Nevertheless, the provisions of these agreements provide that "U.S. courts are not a proper institution to balance interests of concerned countries within the context of private antitrust litigation…[and may require] the Government of the United States to participate in the litigation."[175] Given what was asserted in this paper, these bi-lateral treaties

171. *Id.* at 604.

172. RALPH FOLSOM ET AL. International Business Transactions in a Nutshell 400 (West Academic Publishing, 10th ed. 2016).

173. *Id.* at 401.

174. *Id.*

175. *Id.* at 400.

have had little effect in: (1) limiting the extraterritorial application of the Sherman Anti-Trust Act, and (2) gaining international cooperation.

However, if the United States Congress amends the FTAIA to ensure a broad international comity analysis is applied and/or the federal courts begin to take international comity more seriously, the international community may become more amenable to accepting the extraterritorial application of the Sherman Anti-Trust Act. The Executive Branch would have the opportunity to negotiate bi-lateral treaties that advocate for unified laws. The President of the United States, using the presidential power granted under Article II, Section 2, Clause 2, could "propose and chiefly negotiate agreements" that provide certainty regarding what nations laws will apply if a cross-border dispute were to arise. Thus, the President of the United States should attempt to negotiate bi-lateral treaties that advocate for unified laws with the intent of: (1) providing certainty and predictability to consumers and producers, and (2) achieving international support on the extraterritorial application of the Sherman Anti-Trust Act. After negotiating these bi-lateral agreements, the President of the United States should fast track the proposal for Congressional approval to avoid "regular legislative procedures…[that] can be time consuming."[176]

Conclusion: Bi-Lateral Treaties and New Comity of Nations Test

Overall, technological advances have enabled the exponential growth of the global economy. While producers and consumers have largely benefited from globalization, the contradictory laws between trading nations has created judicial uncertainty that may lead to adverse economic effects. The United States' aggressive pursuit of applying the Sherman Anti-Trust Act extraterritorially has led many foreign nations to adopt blocking statutes. These blocking statutes, while they were dormant for a period of time after the FTAIA was enacted, will have a resurgence following the further depletion of territorial boundaries with globalization. Specifically, because all conduct today has a "direct, substantial, and foreseeable impact on U.S. commerce," the FTAIA does not limit the extraterritorial application of the Sherman Act. Furthermore, in lieu of the *Hartford Fire Insurance Co.* case, courts have narrowed the ability of defendants to bar the extraterritorial application of the U.S. anti-trust laws to only situations where compliance with U.S. law and foreign law would be impossible.

The Sherman Act is likely to expand its extraterritorial reach, yet again, based on the outcome of the *Apple v. Pepper* case.[177] To avoid an economic lull, all three branches of the United States government need to work diligently to find solutions that provide: (1) consumers and producers with certainty and predictability as to

176. Christopher M. Davis, *Expedited or "Fast Track Legislative Procedures*, Congressional Research Service (Aug. 31, 2015), http://www.senate.gov/CRSpubs/445f5bac-e33d-403b-b78e-ab7d2610c421.pdf.

177. Apple v. Pepper, 139 S. Ct. 1514 (2019).

the law that will be applied with cross-border transactions, (2) foreign nations with confidence that the federal courts within the United States will respect the sovereignty of its nation, and (3) its citizens with assurance that they will not be victims of large corporations seeking supra-competitive profits. To achieve these goals, the United States Congress must amend the FTAIA to include a comprehensive international comity test that requires courts to balance the interests of all stakeholders. The federal courts of the United States, on its own accord, should begin to take the international comity analysis more seriously and apply it rigorously in all cases that involve cross-border transactions. Last, the President of the United States, in an effort to gain international support and avoid a resurrection of blocking statutes, needs to negotiate bi-lateral treaties that are more detailed and provide mechanisms for the extraterritorial application of the Sherman Anti-Trust Act.