NEW YORK LAW SCHOOL

NYLS Law Review

Volume 58
Issue 3 *Exploring Civil Society through the Writings of Dr. Seuss™*

Article 12

January 2014

Understanding the Limits of the Foreign Trade Antitrust Improvement Act Using Tort Law Principles as a Guide

RENE H. DUBOIS
New York Law School, 2013

VOLUME 58 | 2013/14

RENE H. DUBOIS

Understanding the Limits of the Foreign Trade Antitrust Improvement Act Using Tort Law Principles as a Guide

58 N.Y.L. Sch. L. Rev. 707 (2013–2014)

ABOUT THE AUTHOR: J.D., New York Law School, 2013.

I. INTRODUCTION

The global reach of U.S. antitrust law under the Foreign Trade Antitrust Improvement Act (FTAIA) has been much debated.[1] In recent years, this debate has focused on whether foreign plaintiffs can use the U.S. legal system to remedy their foreign antitrust injuries resulting from alleged anticompetitive effects on U.S. markets.[2] Less focus, however, has been devoted to understanding the scope of the FTAIA with respect to domestic plaintiffs who have been injured in the United States by foreign anticompetitive conduct.[3] This lack of focus stems from the limited case law interpreting the FTAIA's requirement of showing a direct, substantial, and reasonably foreseeable effect on U.S. commerce. The antitrust community often refers to this requirement as the "domestic effects" exception.[4] If a company's conduct fits within the domestic effects exception, the FTAIA will apply, giving U.S. courts subject matter jurisdiction over the case.

Indeed, while courts have analyzed the domestic effects exception in FTAIA litigation, most courts have struggled with defining the substantive limits imposed by each individual requirement of the exception.[5] Most notably, courts have failed to define "direct," the first requirement of the exception. Absent clear guidance on

1. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (2012).

2. *See, e.g.*, Susan E. Burnett, *U.S. Judicial Imperialism Post* Empagran v. F. Hoffmann-Laroche*? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust*, 18 Emory Int'l L. Rev. 555 (2004) (criticizing the FTAIA's second prong and arguing for a stronger nexus between foreign plaintiffs' harms and U.S. domestic effects); Stephanie A. Casey, *Balancing Deterrence, Comity Considerations, and Judicial Efficiency: The Use of the D.C. Circuit's Proximate Cause Standard for Determining Subject Matter Jurisdiction over Extraterritorial Antitrust Cases*, 55 Am. U. L. Rev. 585 (2005) (suggesting the adoption of proximate cause in cases involving foreign plaintiffs); Ryan A. Haas, *Act Locally, Apply Globally: Protecting Consumers from International Cartels by Applying Domestic Antitrust Law Globally*, 15 Loy. Consumer L. Rev. 99 (2003); Evan Malloy, Comment, *Closing the Antitrust Door on Foreign Injuries: U.S. Jurisdiction over Foreign Antitrust Injuries in the Wake of* Empagran, 38 Tex. Tech. L. Rev. 395 (2006); Andrew Stanger, *Analyzing U.S. Antitrust Jurisdiction over Foreign Parties After* Empagran S.A. v. F. Hoffman-Laroche, Ltd., 2003 BYU L. Rev. 1453 (2003) (analyzing the second prong of the FTAIA); Eric Taffet, *The Foreign Trade Antitrust Improvements Act's Domestic Injury Exception: A Nullity for Private Foreign Plaintiffs Seeking Access to American Courts*, 50 Colum. J. Transnat'l L. 216 (2011); Kelly Tucker, Note, *In the Wake of* Empagran*—Lights Out on Foreign Activity Falling Under Sherman Act Jurisdiction? Courts Carve Out a Prevailing Standard*, 15 Fordham J. Corp. & Fin. L. 807 (2009) (exploring the avenues of suit available to foreign and domestic plaintiffs post *Empagran*).

3. 15 U.S.C. § 6a (providing that the Sherman Act shall not apply to conduct involving trade or commerce with foreign nations unless such conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. import commerce).

4. Another term used in the antitrust arena to describe this requirement is the "direct effects" exception. For consistency, this article uses the term "domestic effects." *See* Ian Simmons & Bimal Patel, *One Hundred Years of (Attempted) Solitude: Navigating the Foreign Trade Antitrust Improvements Act*, 24 Antitrust 72, 74 (2010); Publishers Editorial Staff, Corporate Counsel's Guide to International Antitrust § 8:8 (2013) ("There are two recognized exceptions—the 'effects exception' and the 'import trade or commerce exception.'").

5. At least one court has defined the "reasonably foreseeable" requirement. Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 471 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012) (defining "reasonably foreseeable" as whether the effect would have been known to an objective, reasonable person making practical business decisions).

what connection is required between foreign anticompetitive conduct and domestic effects to meet the "direct" requirement, U.S. companies purchasing products from foreign companies will find it difficult to determine whether they can remedy their antitrust injuries under U.S. antitrust law. The following hypothetical illustrates this struggle.

Suppose that foreign company A, which manufactures input component parts, restricts the supply of these component parts in an effort to artificially raise prices in foreign markets. Foreign company A then sells the component parts to foreign company B by forcing it into higher-priced contracts. In turn, foreign company B incorporates the component parts into final products that are then sold to U.S. company C at higher prices. Lastly, these products are sold to U.S. consumers at higher prices.[6] From an antitrust law perspective, U.S. company C and its consumers will have paid a higher price than they would have paid had foreign company A not forced foreign company B into anticompetitive contracts. But is foreign company A liable to U.S. company C under U.S. antitrust laws? Should foreign company A be held accountable, if at all, under the laws of the country where foreign company A committed the anticompetitive acts?

Not surprisingly, it is difficult to imagine that foreign antitrust regimes offer adequate legal remedies to protect companies like U.S. company C and its consumers.[7] The most obvious reason being that the harm caused by foreign company A's conduct is generally not felt in the country where it operates.[8] This raises the question: Does the FTAIA allow U.S. companies to seek a remedy under U.S. antitrust law for injuries arising out of anticompetitive activities in foreign markets? The answer depends on the legal standard adopted for the individual requirements of the domestic effects exception.

---

6. Of course, this example is far from just a hypothetical. *See, e.g.*, Charles Duhigg & Keith Bradsher, *How the U.S. Lost Out on iPhone Work*, N.Y. Times (Jan. 21, 2012), http://www.nytimes.com/2012/01/22/business/apple-america-and-a-squeezed-middle-class.html?pagewanted=2&_r=1 ("For technology companies, the cost of labor is minimal compared with the expense of buying parts and managing supply chains that bring together components and services from hundreds of companies."); *see also* Alicia Batts & Keith Butler, *Recovery in the United States for Price-Fixing Abroad: The Future of FTAIA Litigation*, CPI Antitrust Chron., Nov. 16, 2011, at 2, *available at* https://www.competitionpolicyinternational.com/recovery-in-the-u-s-for-price-fixing-abroad-the-future-of-ftaia-litigation/ ("As global economic trade has increased, so has the number of price-fixing plaintiffs who have sought recovery in U.S. courts under U.S. antitrust laws for damages suffered as a result of cartel activity abroad.").

7. Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 860 (7th Cir. 2012) ("The host country for the cartel will often have no incentive to prosecute it. [Foreign countries] would logically be pleased to reap economic rents from other countries; their losses from higher prices for [the product] used . . . are more than made up by the gains from the cartel price their exporters collect."). *But see, e.g.*, Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding Application of Their Competition Laws, 30 I.L.M. 1487 (Sept. 23, 1991).

8. Similarly, U.S. antitrust law is grounded in the same principle. Indeed, the FTAIA does not concern itself with any conduct—domestic or foreign—that affects only foreign markets. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582–84 (1986) ("Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies.").

Defining the applicable legal standard of the domestic effects exception is crucial to protecting competition in the United States, especially when U.S. international trade has significantly increased over the past decades.[9] Above all, the meaning of "direct" is at the core of understanding Congress's desire to protect U.S. companies and their consumers from foreign anticompetitive practices without compromising the intended reach of U.S. antitrust law. But what does "direct" mean in the context of the domestic effects exception? Until now, only the Seventh and Ninth Circuits have defined "direct," and each has reached a different interpretation.[10] This difference in opinion underscores the need for a precise meaning of "direct" under the FTAIA.[11]

Unfortunately, neither court has clarified how "direct" fits within the overall scheme of the domestic effects exception. The Seventh Circuit in *Minn-Chem, Inc. v. Agrium, Inc.*, defined "direct" as a "reasonably proximate causal nexus."[12] This overly broad interpretation fails to clarify the outer limits of U.S. antitrust law. In stark contrast, the Ninth Circuit in *United States v. LSL Biotechnologies, Inc.*, defined "direct" as an "immediate consequence."[13] This narrow interpretation overly restricts the reach of U.S. antitrust law. Notwithstanding these divergent interpretations, some commentators argue that the FTAIA's domestic effects exception merely codified existing common law interpreting "direct."[14] But until a definitive interpretation is adopted, courts must continue to wrestle with the statute's language.[15]

---

9. In 1990, for example, import and export commerce of trade in goods and services reached approximately $500 billion. In 2010, those levels reached over $2 trillion. *See* Natalie Soroka, U.S. Dep't of Com., Int'l Trade Admin., U.S. Trade Overview (2012), *available at* http://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_002065.pdf; *see also* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 Law & Pol'y Int'l Bus. 1, 74 (1992) ("The growing significance of international trade and investment has increasingly led the United States and other nations to devote regulatory attention to conduct occurring abroad.").

10. *Minn-Chem*, 683 F.3d at 860; United States v. LSL Biotechnologies, Inc., 379 F.3d 672, 683 (9th Cir. 2004).

11. *LSL*, 379 F.3d at 684 (Aldisert, J., dissenting) ("Although other appellate courts have dodged the critical issue on which this appeal turns, this panel has decided to face the dragon in his teeth and stop tap dancing around the meaning of the word 'direct.'").

12. 683 F.3d at 857.

13. 379 F.3d at 680 (citing Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 618 (1992)).

14. 1B Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 272 (3d ed. 2006) (arguing that the FTAIA was merely a codification of the existing "direct effects" test); *see also LSL*, 379 F.3d at 689 (Aldisert, J., dissenting) (agreeing with Hovenkamp and Areeda that the FTAIA was meant to codify the existing "direct effects" test).

15. Some academics and commentators have argued for and against amending the FTAIA but agree that, in principle, this solution may be implausible. *See, e.g.*, Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 Hous. L. Rev. 285, 337, 345 (2007) ("Amendments to the FTAIA should be avoided as almost certainly ineffective at accomplishing their intended result and possibly deleterious to the worthy goal of 'respect[ing] appropriate jurisdictional boundaries.'") (citation omitted); Taffet, *supra* note 2, at 250–52 (suggesting possible congressional clarification of the domestic effects exception but recognizing the danger of exposing the statute to the political process).

This note proposes that courts interpreting "direct" under the domestic effects exception should use a legal standard found in tort law doctrine—the scope of risk standard. The scope of risk standard draws from common law principles that have been extensively analyzed in tort law jurisprudence.[16] From a qualitative viewpoint, tort law and antitrust law share similar goals: both seek to deter harmful behavior by holding actors accountable for harms caused by their conduct, and both seek to compensate the victim for any injuries resulting from this harmful conduct.[17] Analyzing the term "direct" through the lens of established tort law causation principles will provide greater clarity to courts applying the domestic effects exception in future FTAIA litigation. What is more, the scope of risk standard is consistent with the purpose of the FTAIA: to provide certainty to the business community in assessing whether U.S. antitrust laws apply to international business transactions.[18] Indeed, the scope of risk standard will help courts focus on furthering Congress's goal of limiting U.S. antitrust law to transactions that have a "direct" effect on U.S. commerce.

Following this introduction, Part II of this note briefly reviews the extraterritorial reach of U.S antitrust law before the FTAIA was enacted. Part III examines the case law that has analyzed the domestic effects exception and the circuit split that has emerged over the meaning of "direct."

Part IV analyzes the scope of risk standard in tort law and suggests that, when determining directness under the FTAIA, courts should consider whether the anticompetitive effect on U.S. domestic commerce was proximately caused by the foreign actor's anticompetitive conduct. This inquiry will focus on the scope of risks that made the actor's conduct anticompetitive in the first place. In this way, courts will analyze each requirement of the domestic effects exception conjunctively. As a result, the law governing the extraterritorial reach of U.S. antitrust law under the FTAIA will develop consistently throughout the courts.

Part V highlights the benefits of this new approach and demonstrates the applicability of the scope of risk standard to the hypothetical posed in the introduction and to the facts from the Seventh and Ninth Circuit cases. The scope of risk standard isolates the relationship between the foreign conduct and the resulting effect on U.S. markets from other considerations such as reasonable foreseeability and substantiality. As a result, courts can appropriately consider the facts distinct to each requirement of the domestic effects exception.

---

16. *See* Robert E. Keeton, Legal Cause in the Law of Torts 1–20 (1963); Warren Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 Colum. L. Rev. 20 (1939).

17. *See* Practising L. Inst. N.Y.C., Antitrust Law Answer Book 31 (Joe Sims et al. eds., 2012) ("Any person who is injured in his or her 'business or property' as a result of conduct forbidden by the federal antitrust laws may file a private lawsuit under section 4 of the Clayton Act."); Dan B. Dobbs et al., Dobbs' Law of Torts § 10 (2d ed. 2013) ("Today's tort law has much grander aims. All of the aims are laudable, but sometimes one of them will conflict with another. The most commonly mentioned aims of tort law are (1) compensation of injured persons and (2) deterrence of undesirable behavior."); *see also* Michael A. Carrier, *A Tort-Based Causation Framework for Antitrust Analysis*, 77 Antitrust L.J. 991, 1004 (2011) ("[O]n a broad level, the antitrust and tort fields share similar goals in seeking to deter and compensate for behavior that falls below certain standards and causes certain types of harm.").

18. *See infra* notes 47–49 and accompanying text.

Finally, Part VI briefly discusses international comity concerns between the United States and foreign sovereigns. It suggests that the scope of risk standard will further Congress's intent to balance the international reach of U.S. antitrust law against the need to respect the legal regimes of sovereign nations.

II. BRIEF HISTORY OF THE EXTRATERRITORIAL REACH OF U.S. ANTITRUST LAW

A. The Extraterritorial Reach of U.S. Antitrust Law Before the FTAIA

Long before the FTAIA, U.S. courts had difficulty defining the reach of U.S. antitrust law.[19] This difficulty stemmed from applying the Sherman Act, the landmark statute regulating U.S. competition, to international transactions. The Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with Foreign nations, is declared to be illegal."[20] In applying this broad provision to international transactions, two different schools of thought emerged.[21] One school of thought, which was first introduced in the famous opinion by Justice Holmes in *American Banana v. United Fruit Co.*, focused on a strict territoriality approach: if the alleged anticompetitive conduct occurred in another country, that country's laws should govern.[22] Because most businesses conducted transactions locally, the rationale behind this approach seemed logical to the Court at the time. This logic, although simple in application, did not stand the test of time.[23] Indeed, the globalization of trade, the rise of multinational corporations, and the emergence of new economies forced lawmakers and the judiciary to rethink how U.S. antitrust law would govern foreign business transactions.[24]

As a result of the globalization of commerce, a competing school of thought began to garner support. This competing approach focused on a broader interpretation of U.S. antitrust laws: the Sherman Act would regulate *any* alleged anticompetitive conduct that was intended to produce, and indeed produced, an "effect" on U.S

19. *See* Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What Is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 Tex. Int'l L.J. 11, 13 (2003).

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

21. *See, e.g.*, Areeda & Hovenkamp, *supra* note 14, ¶ 272c.

22. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he 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."); Simmons & Patel, *supra* note 4, at 72 ("Justice Holmes took the former view, often referred to as the 'territoriality' approach . . . .").

23. *See* United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 443 (2d Cir. 1945); Simmons & Patel, *supra* note 4, at 72 ("Over time, as economies worldwide grew more interdependent, the influence of this 'territoriality' logic faded.").

24. *See generally* Robert Pachike, *Globalization, Interdependence, and Sustainability*, *in* 1 Introduction to Sustainable Development 187 (David V.J. Bell & Yuk-kuen Annie Cheung eds., 2009), *available at* http://www.eolss.net/Sample-Chapters/C13/E1-45-03-16.pdf.

domestic commerce.[25] This "effects" principle was drawn from the seminal *Alcoa* case, where Judge Hand succinctly stated: "[It] is settled law . . . that 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 . . . ."[26] From the *Alcoa* decision up until the enactment of the FTAIA, courts used different tests to determine whether foreign anticompetitive conduct fell under the Sherman Act's purview.[27] As a consequence, the application of the "effects" principle became unclear, inconsistent, and failed to define the scope of the extraterritorial reach of the Sherman Act.[28]

Although the FTAIA was enacted in 1982, in part to clarify the "effects test,"[29] the Supreme Court, eleven years later in *Hartford Fire Insurance Co. v. California*, returned to the broader school of thought articulated in the *Alcoa* decision.[30] In *Hartford Fire,* the Supreme Court addressed a conspiracy allegation involving the market for reinsurance, with U.K. insurers owning the lion's share of the market.[31] The conspiracy involved both U.S. and U.K. insurers who targeted primary insurance markets in the United States by forcing certain primary insurers to change the standard terms in their policies for the benefit of the conspirators' business.[32] Without placing much reliance on the FTAIA, the Court effectively adopted the *Alcoa* "effects test" and held that the Sherman Act applies to "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[33] Based on this "effects test," the Court further held that a restraint on reinsurance in the United Kingdom had a sufficiently "direct" effect on primary insurance in the United

25. Simmons & Patel, *supra* note 4, at 72. Under common law this had become known as the "effects test." Under the "effects test," the location of the alleged conduct was irrelevant; instead, the guiding force was whether the alleged anticompetitive conduct produced meaningful effects on U.S. commerce. *Id.*

26. *Alcoa*, 148 F.2d at 443.

27. After the *Alcoa* decision, the circuit courts created different analytical frameworks under the "effects test." *Compare* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976) (employing a three-part balancing test for extraterritorial jurisdiction that combines elements of a pure jurisdictional inquiry with general comity concerns), *with* Nat'l Bank of Can. v. Interbank Card Ass'n, 666 F.2d 6, 8–9 (2d Cir. 1981) (finding that the threshold question is whether the conduct "can be foreseen to have any appreciable anticompetitive effect on United States commerce"). This note briefly explores the issue of prescriptive comity, and will argue that the scope of risk standard, understood as a limitation of liability when interpreting "direct" under the FTAIA, furthers Congress's goal in addressing foreign conduct that affects only U.S domestic commerce. *See* discussion *infra* Part VI.

28. The hearing records to the proposed bill for the FTAIA suggest that ambiguities existed in the precise legal standard to be used in determining whether American antitrust law applied to a particular transaction. *See* H.R. Rep. No. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487 [hereinafter *FTAIA Report*].

29. While not its primary purpose, Congress also sought to clarify the existing uncertainty in the extraterritorial application of the Sherman Act to foreign conduct. *See id.*

30. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

31. *Id.*

32. *Id.* at 764.

33. *Id.* at 796.

States.[34] But the Court did not explicitly address the FTAIA's applicability. Without much scrutiny, the Court held that the circumstances met the domestic effects exception.[35] In doing so, the Court left open the question of whether the statute was meant to codify the *Alcoa* "effects test."[36]

The *Hartford Fire* decision presumably furthered the debate on whether the statute's domestic effects test was meant to replace or codify existing common law.[37] Notwithstanding this debate, this note posits that, unless Congress or the Supreme Court resolves the codification issue and adopts a clear standard, courts will continue to face difficulty interpreting the FTAIA. The next section explores the FTAIA in more detail.

B. The Foreign Trade Antitrust Improvement Act

Amid the uncertainty surrounding the scope of U.S. antitrust law as applied to transactions involving foreign commerce, U.S. businesspeople and legal practitioners grew cautious in their business dealings, fearing possible antitrust violations. One major problem was that antitrust concerns often prevented potential transactions from gaining momentum.[38] The inherent difficulty and the high costs of determining whether potential transactions would run afoul of U.S. antitrust law prevented businesses from beginning fruitful negotiations.[39] As a result, businesses grew concerned that U.S. antitrust laws were counterproductive, and undermined their

34. *Id.* at 775, 796.

35. *Id.* at 797.

36. *Hartford Fire*, 509 U.S. at 796 n.23 ("Also unclear is whether the Act's 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it. We need not address these questions here. Assuming that the FTAIA's standard affects this litigation, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements.").

37. Areeda & Hovenkamp, *supra* note 14, at ¶ 272c; *see also* Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. Ann. Surv. Am. L. 415, 418–19 (2005) ("The common law standard for the reach of the Sherman Act to foreign conduct may or may not have changed with the enactment of the FTAIA in 1982; the legislative history does not answer this question . . . ."); Huffman, *supra* note 15, at 313 (reasoning that "[t]he FTAIA codified a version of the Alcoa effects test"). To be sure, the House Report does indicate that the FTAIA would "serve as a simple and straightforward clarification of existing American law and the Department of Justice enforcement standards." *FTAIA Report*, *supra* note 28, at 2487–88.

38. *FTAIA Report*, *supra* note 28, at 2491 ("As the business roundtable has stated, 'antitrust considerations typically enter the picture long before a business transaction is explored in depth.'"); *see also* Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 SMU L. Rev. 2151, 2158 (2003).

39. *FTAIA Report*, *supra* note 28, at 2491; *see also* Saul P. Morgenstern & Margaret A. Prystowsky, *Competition & Antitrust Law*, *in* International Corporate Practice: A Practitioner's Guide to Global Success § 26:1 (Carole L. Basri ed., 2008) ("Competition laws affect many activities that are central to doing business—pricing, marketing, licensing, joint ventures, mergers and acquisitions, participation in trade and professional associations, even social contract with employees of competitors . . . .").

ability to compete.[40] In response to these growing concerns, Congress enacted the FTAIA as part of the Export Trading Company Act of 1982.[41] The FTAIA provides that the Sherman Act

> shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a *direct, substantial, and reasonably foreseeable effect*—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.[42]

Although Congress had various reasons for enacting the FTAIA,[43] legal commentators agree that Congress's overriding purpose was to help promote and encourage U.S. export trade.[44] To further this purpose, Congress exempted from the Sherman Act "export transactions that did not injure the United States economy."[45] In this way, small and large U.S. businesses could enter into business arrangements, such as joint-

40. *FTAIA Report*, *supra* note 28, at 2489 (recognizing that antitrust law was prohibiting and discouraging pro-competitive export activities).

41. 15 U.S.C § 6a (2012).

42. *Id*. (emphasis added).

43. *See* Huffman, *supra* note 15, at 304–05.

44. Beckler & Kirtland, *supra* note 19, at 13 (stating that "Congress's goal [was to] facilitat[e] the domestic export of goods by exempting certain export trade from the Sherman Act's reach"); Huffman, *supra* note 15, at 305 (analyzing Congress's intent to facilitate export trading activities); *see also FTAIA Report*, *supra* note 28, at 2487 (expounding that the purpose of promoting U.S. export trading was a result of an "apparent perception among businessmen that American antitrust laws [were] a barrier to joint export activities that promote efficiencies in the export of American goods and services[,]" and although Congress recognized that the FTAIA would not "be a panacea for the many problems that [affected] American export trade," it did believe that the FTAIA would "encourage the business community to engage in efficiency producing joint conduct in the export of American goods and services"); *see also A Bill to Amend the Sherman Act and Clayton Act to Exclude from the Application of Such Acts Certain Conduct Involving Exports*: *Hearing on S. 795 Before the S. Comm. on the Judiciary*, 97th Cong. 1-10 (1981) [hereinafter *FTAIA Hearing*] (statement of Hon. Strom Thurmond, Chairman, S. Comm. on the Judiciary) (recognizing that, even if such perception is erroneous, the business community perceives that under existing law, collective export activity may give rise to liability under the antitrust laws).

45. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796–97 n.23 (1993).

selling and joint-venture agreements, despite their anti-competitiveness, so long as these agreements affected only foreign markets.[46]

At the same time, Congress addressed the scope of the Sherman Act with respect to international transactions.[47] Congress enacted the FTAIA intending to clarify the "proper test for determining whether the United States antitrust jurisdiction over international transactions exists."[48] This test ostensibly created a straightforward, objective standard providing courts with jurisdiction for antitrust claims where a foreign company's anticompetitive conduct has a "direct, substantial, and reasonably foreseeable effect on U.S. commerce."[49]

But this new test is anything but straightforward. For one, Congress did not expressly define what constitutes "direct" or "substantial."[50] Further, few courts have provided meaningful interpretations of the FTAIA,[51] let alone specific definitions of "direct," "substantial," and "reasonably foreseeable."[52] So, then, how should courts confront the domestic effects exception? One view may be that the common law

46. At the Senate hearing it was stated that the "purpose to this legislation is to aid the efforts of American business to compete vigorously and effectively throughout the world." *See FTAIA Hearing*, *supra* note 44, at 1.

47. *See* Spencer Weber Waller, *The Twilight of Comity*, 38 Colum. J. Transnat'l L. 563, 574 (2000) (describing the uncertainty of the scope of U.S. antitrust law to international transactions).

48. *FTAIA Report*, *supra* note 28, at 2487. Indeed, the House Report stated that a related problem was the "effects test" articulated by Judge Hand in *Alcoa*, and the precise limitations that U.S. antitrust law had involving foreign conduct. *Id.* at 2490.

49. *FTAIA Report*, *supra* note 28, at 2487–88 ("[E]nactment of a single, objective test—the 'direct, substantial, and reasonably foreseeable effect' test will serve as . . . [a] clear benchmark . . . for our businessmen, attorneys and judges as well as our trading partners."). Before the FTAIA was enacted, courts did not use the words "reasonably foreseeable" under the common law "direct effects" test. Instead, they focused on the subjective element of an actor's intent. The FTAIA removes any inquiry into the actor's subjective intent. *Id.* at 2494 ("An intent test might encourage ignorance of the consequences of one's actions, which in this context, would be an undesirable result."). This highlights the debate around whether the FTAIA was meant to codify existing common law. Huffman, *supra* note 15, at 313.

50. *See* Huffman, *supra* note 15, at 317 (recognizing the ambiguity with placing "direct" and "substantial" in the conjunctive). The House Report did, however, provide guidance on what it meant by "reasonably foreseeable." *FTAIA Report*, *supra* note 28, at 2494 ("The test is whether the effects would have been evident to a reasonable person making practical business judgments, not whether actual knowledge or intent can be shown."). *But see* Am. Bar Ass'n, Sec. of Antitrust Law, Report to Accompany Resolutions Concerning Legislative Proposals To Promote Export Trading 10 (1981) (recognizing that "courts and commentators may not always see eye to eye on what constitutes 'substantiality' and 'foreseeability'").

51. Simmons & Patel, *supra* note 4, at 72 ("[F]rom 1982 to 1997, no court construed the meaning of the FTAIA, even though forty-six decisions mentioned the statute."); *see also* United States v. LSL Biotechnologies, Inc., 379 F.3d 672, 678 (9th Cir. 2004) ("Federal courts did not shower the FTAIA with attention for the first decade after its enactment."); Turicentro, S.A. v. Am. Airlines Inc., 303 F.3d 293, 299 (3d Cir. 2002) ("Although passed two decades ago, few federal courts have had occasion to apply the [FTAIA].").

52. *See, e.g.*, United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 952 (7th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1003 (2003) (treating the FTAIA as jurisdictional in nature); Carpet Group Int'l v. Oriental Rug Imps. Ass'n, Inc., 227 F.3d 62, 71–72 (3d Cir. 2000) (finding that the FTAIA did not apply because anticompetitive conduct affected import commerce); Caribbean Broad. Sys., Ltd. v. Cable & Wireless, PLC, 148 F.3d 1080, 1086 (D.C. Cir. 1998) (holding that the court had subject matter jurisdiction when plaintiff's complaint alleged harm to U.S. advertisers).

"effects test" from *Alcoa* should govern the analysis of the terms "direct, substantial, and reasonably foreseeable."[53] But critics of this view accurately point out an important distinction between the "effects test" and the domestic effects exception: the domestic effects exception focuses on objective criteria[54] whereas the "effects test" focuses on a subjective inquiry of whether an actor intends to reduce competition in the United States.[55] Pre-FTAIA cases, therefore, provide limited guidance on the limitations imposed by the conjunctive requirements of the domestic effects exception because terms like "reasonable foreseeability" and "substantiality" were not central to the analysis. Today, the FTAIA is the governing law for antitrust cases involving foreign transactions, and courts must interpret the domestic effects exception when deciding whether the Sherman Act controls the conduct in question.[56]

The Ninth and Seventh Circuits recently interpreted the FTAIA and tackled the definition of "direct" head on.[57] In *United States v. LSL Biotechnologies, Inc.*, the Ninth Circuit was the first court to expressly define "direct" under the domestic effects exception; it held that an effect is "direct" if it "follows as an immediate consequence of the defendant's activity."[58] Eight years later, the Seventh Circuit in *Minn-Chem v. Agrium, Inc.* expressly rejected the *LSL* definition as too restrictive; instead, it defined "direct" as a "reasonably proximate causal nexus" between conduct and effect.[59] Although both definitions arguably give teeth to this opaque statute, neither definition provides a clear standard that can be applied uniformly in future FTAIA cases. The next Part will describe how the Ninth and Seventh Circuits' inconsistent definitions lead to problematic results when analyzing the domestic effects exception.

III. THE CIRCUIT SPLIT

In many ways, the FTAIA proves difficult to interpret.[60] Many scholars, academics, and judges opine that the FTAIA is anything but unequivocal.[61] Perhaps

53. Judge Aldisert's dissent in *LSL* supports this position. *LSL*, 379 F.3d at 684 ("I believe that the new statute merely codified existing antitrust law in the use of the word 'direct.'").

54. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

55. *See, e.g.*, Nat'l Bank of Can. v. Interbank Card Ass'n, 666 F.2d 6, 9 (2d Cir. 1981); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291–92 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 605 (9th Cir. 1976).

56. *See LSL*, 379 F.3d at 688.

57. *Compare* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 856 (7th Cir. 2012), *with LSL*, 379 F.3d at 680.

58. *LSL*, 379 F.3d at 680.

59. *Minn-Chem*, 683 F.3d at 857.

60. *See* Areeda & Hovenkamp, *supra* note 14, ¶ 272 (opining that the FTAIA is "cumbersome" and contains "inelegant language").

61. Simmons & Patel, *supra* note 4, at 72; Delrahim, *supra* note 37, at 419 (recognizing the opinion that the FTAIA is "inelegantly phrased"); Turicentro, S.A. v. Am. Airlines Inc., 303 F.3d 293, 300 (3d Cir. 2000); *see also* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997) ("The FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it.").

that is why no settled definition of "direct" under the domestic effects exception exists. Nevertheless, the Ninth and Seventh Circuits have at least attempted, albeit without consensus, to clarify the global reach of U.S. antitrust law. These two competing approaches are detailed in the next section.

A. The Ninth Circuit's "Immediate Consequence" Approach

In 2004, the Ninth Circuit addressed a restraint-on-trade antitrust case involving a private joint venture that sought to distribute fresher and better tasting tomatoes to the northern part of the United States during the winter season.[62] Shortly after the joint venture failed, the U.S. government brought suit and challenged a noncompetition agreement between the producers of the long-shelf-life tomato seeds at issue.[63] Specifically, the agreement between LSL Biotechnologies, Inc. and Hazera, a foreign company based in Israel, restricted Hazera from selling long-shelf-life tomato seeds in North America; it did, however, permit Hazera to sell other types of seeds, including seeds for growing tomatoes in greenhouses.[64] Based on this noncompetition agreement, the U.S. government alleged that American consumers would be harmed, because this agreement unreasonably reduced competition to "develop better seeds for fresh market, long-shelf-life tomatoes for sale in the United States."[65] The government supported these allegations of potential anticompetitive effects on the U.S. markets in two ways. First, the government argued that the agreement would hinder the research and development of fresher tomato seeds, because Hazera was less likely to develop these seeds absent an ability to market them in the United States.[66] Second, the government argued that because Hazera was a major player in the production of these seeds, the exclusion of Hazera from the market would allow LSL to charge more for its seeds than it otherwise would.[67]

The district court dismissed the government's complaint on two grounds. First, the court held that the complaint failed to establish anticompetitive effects in the U.S. markets.[68] It did so by adopting the defendant's argument that the noncompetition agreement did not have a direct effect on the tomato market in the United States because the agreement covered the development of seeds and not tomatoes.[69] This distinction was significant for the district court because it found that the price increase in the seeds—which contributed less than 1% to the cost of the tomatoes—could have

62. *LSL*, 379 F.3d at 674.

63. *Id.* at 675.

64. *Id.*

65. *Id.*

66. *Id.* at 676.

67. *Id.*

68. *Id.* at 674.

69. United States v. LSL Biotechnologies, Inc., No. 00CV529, 2002 WL 31115336, at *12–13 (D. Ariz. Mar. 28, 2002).

only a negligible effect on the price of the tomatoes.[70] Second, the court reasoned that it lacked jurisdiction over the claim that restricting the sale of seeds in Mexico violated the Sherman Act, because the defendant's activity was limited to the development of seeds in Mexico, and therefore the defendant had no control over the related prices being charged for the tomatoes in the U.S. markets.[71] On appeal, the Ninth Circuit affirmed the district court and found that the government failed to allege any conduct that had a "'direct, substantial, and reasonably foreseeable effect' on [U.S.] domestic commerce or import trade."[72]

The Ninth Circuit construed "direct" by primarily relying on two different sources: a dictionary definition from 1982 and a Supreme Court case—*Republic of Argentina v. Weltover, Inc.*—concerning the Foreign Sovereign Immunities Act (FSIA).[73] *Weltover* held that a "direct effect" is one that follows as an "immediate consequence of the defendant's activity."[74] In applying this definition to the domestic effects exception of the FTAIA, the Ninth Circuit reasoned that "[a]n effect cannot be 'direct' where it depends on such uncertain intervening developments."[75] On that basis, the Ninth Circuit concluded that the agreement restricting Hazera from developing the long-shelf-life seeds was not "direct" because there was an intervening development—Hazera's ability to create these long-shelf-life seeds—that, according to the court, was "speculative at best."[76] Accordingly, the Ninth Circuit concluded that the domestic effects exception was not met.[77]

In 2006, the U.S. District Court for the District of Delaware followed the *LSL* approach in *In re Intel Corp. Microprocessor Antitrust Litigation*.[78] AMD, a microprocessor manufacturer, alleged that its competitor Intel had willfully monopolized the microprocessor market by engaging in harmful business practices that affected the sale of AMD's microprocessors in foreign countries.[79] To show a direct effect on U.S. competition, AMD argued that, although AMD's manufacturing was in Germany, and it assembled final products in Malaysia, Singapore, and China, "Intel's foreign conduct and the foreign harm it caused [were] inextricably bound with Intel's domestic conduct restraining trade and the resulting domestic antitrust

70. *Id.* at *18.

71. *Id.*

72. *LSL*, 379 F.3d at 679–80.

73. *Id.* at 680 (discussing Republic of Arg. v. Weltover, Inc., 504 U.S. 607 (1992), where the Supreme Court interpreted the Foreign Sovereign Immunities Act, a statute that forecloses immunity to commercial conduct that has a "direct" effect on the United States). In analogizing to that case, the Ninth Circuit stated that "the Court reject[ed] the suggestion that ['direct'] contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Id.*

74. *Id.*

75. *Id.* at 681.

76. *Id.* at 681–82.

77. *Id.*

78. 452 F. Supp. 2d 555, 560–61 (D. Del. 2006).

79. *Id.* at 557–59.

injury to AMD."[80] Intel moved to dismiss the case for failing to meet the requirements of the domestic effects exception.[81]

As a threshold matter, the court adopted *LSL*'s interpretation of "direct" to mean an "immediate consequence" of the alleged anticompetitive conduct with no intervening developments.[82] The court then reasoned that AMD's allegations could be characterized as a speculative "chain of effects . . . full of twists and turns" that were themselves speculative.[83] Because AMD's allegations of anticompetitive effects on the U.S. market rested on speculative factors affecting its business and investment decisions in the global market, the court determined that these effects were akin to "ripple effects" and therefore could not be direct.[84] Although the court used different phraseology to describe the lack of directness, it endorsed the "immediate consequence" standard.

B. The Seventh Circuit's "Reasonably Proximate Causal Nexus" Approach

The Seventh Circuit in *Minn-Chem, Inc. v. Agrium, Inc.* took a different approach than the Ninth Circuit by broadly construing the meaning of "direct." In *Minn-Chem,* the court addressed a global price-fixing case involving the production and sale of potash, a naturally occurring mineral used in agricultural fertilizers.[85] Direct and indirect purchasers of potash brought suit against Agrium and other major potash producers that dominated the industry by alleging that they conspired to inflate global prices in violation of the Sherman Act.[86] Specifically, the purchasers alleged that foreign producers of potash, which were primarily located in Russia and Belarus, conspired to restrain the global output of potash in an effort to artificially inflate prices in foreign markets.[87] Producers then negotiated prices in foreign

80. *Id.* at 559.

81. *Id.*

82. *Id.* at 560 (quoting *LSL*, 379 F.3d at 680–81).

83. *In re Intel*, 452 F. Supp. 2d at 560.

84. *Id.* at 563. *But see In re* TFT-LCD Antitrust Litig., 822 F. Supp. 2d 953, 954–55 (N.D. Cal. 2011). *TFT-LCD* involved allegations that producers of flat panel LCD displays engaged in a global price-fixing conspiracy. *Id.* at 954–55. The district court implicitly adopted the *LSL* definition of "direct" as an "immediate consequence" but came to a different conclusion than the *Intel* court. *In re TFT-LCD*, 822 F. Supp. 2d at 964. Focusing on the chain of events alleged, the court reasoned that an effect could still be direct even when there is a complex manufacturing process. *Id.* The court focused on the changes in the effects on U.S. commerce from the beginning of the alleged anticompetitive conduct to the end of the defendant's alleged anticompetitive conduct. *Id.* The court stated that "because the effect of defendants' anticompetitive conduct did not change significantly between the beginning of the process (overcharges for LCD panels) and the end (overcharges for televisions, monitors, and notebook computers), the effect proceeded without deviation or interruption from the LCD manufacturer to the American retail store." *Id.* Even though the court did conclude that the domestic effects exception was met, its endorsement of *LSL*'s definition of direct remains problematic. *See infra* Part V.

85. Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845 (7th Cir. 2012).

86. *Id.*

87. *Id.* at 848.

countries such as China, Brazil, and India, and used those prices as benchmarks for sales in U.S. markets.[88] As a result, the price of potash in the United States increased 600%; a strong indication of anticompetitive conduct.[89] The district court concluded that there was a sufficient "nexus" between the anticompetitive conduct in the foreign countries and the price increase in the United States.[90] A Seventh Circuit panel reversed the district court and upheld the defendants' motion to dismiss on the grounds that the plaintiffs' allegations about benchmarked prices did not demonstrate a "strong enough" relationship with domestic potash sales to establish a "direct" effect.[91] In an en banc rehearing, the Seventh Circuit affirmed the district court and held that the FTAIA's domestic effects exception was met.[92]

The court rejected the Ninth Circuit's borrowed interpretation of "direct" from *Republic of Argentina v. Weltover, Inc.*[93] The court explained that a critical distinction between the FSIA at issue in *Weltover* and the FTAIA was the presence of additional qualifiers: the FSIA does not use concepts of "substantiality" and "foreseeability" and the FTAIA expressly does.[94] This distinction, the court reasoned, was crucial in understanding the meaning of "direct" under the FTAIA, because "superimposing the idea of an 'immediate consequence' results in a stricter test than the complete text of the [FTAIA] can bear."[95]

The Seventh Circuit adopted a broader standard. The court borrowed its interpretation of "direct" from the Department of Justice, which defined "direct" to mean a "reasonably proximate causal nexus" between conduct and effect.[96] The court found support for this interpretation by analogizing the tort law principle of proximate cause. The court reasoned that a "reasonably proximate causal nexus" standard supports the plain language and purpose of the FTAIA because it limits liability where the connection between the conduct and the effect is too attenuated.[97] The court stated, "Just as tort law cuts off recovery for those whose injuries are too remote from the cause of an injury, so does the FTAIA exclude from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S domestic or import commerce."[98]

---

88. *Id.* at 849.

89. *Id.*

90. *In re* Potash Antitrust Litig., 667 F. Supp. 2d 907, 926–27 (N.D. Ill. 2009).

91. Minn-Chem, Inc. v. Agrium, Inc., 657 F.3d 650, 662 (7th Cir. 2011).

92. *Minn-Chem*, 683 F.3d at 861.

93. *Id.* at 857.

94. *Id.* ("Critically, the Supreme Court in *Weltover* reached its definition of 'direct' for FSIA purposes only after refusing to import from the legislative history of that statue the notion that an effect is 'direct' only if it is both 'substantial' and 'foreseeable.'").

95. *Id.*

96. *Id.* at 856–57.

97. *See id.* at 857–58.

98. *Id.* The court found that this interpretation was consistent with the Supreme Court's most recent confrontation with the FTAIA in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), which

Applying this "remoteness" standard, the court found that the alleged supply restrictions in the foreign markets, which resulted in benchmark pricing for U.S. imports, were a direct cause of the resulting price increases in the United States.[99] The court concluded: "It is no stretch to say that the foreign supply restrictions, and the concomitant price increases forced upon the Chinese producers, were a direct—that is, proximate cause of the subsequent price increases in the United States." The Seventh Circuit therefore held that the requirements of the domestic effects exception were met.[100]

C. The Problem with Both Approaches

The two approaches above provide strikingly different standards for limiting the reach of U.S. antitrust law under the FTAIA. While both approaches are guided by a concern for limiting liability when anticompetitive conduct does not have a sufficient effect on U.S. domestic commerce, the critical difference is how the courts have chosen to cut off this liability. On the one hand, the Ninth Circuit was primarily concerned with the speculative nature of the growth of long-shelf-life tomato seeds and the corresponding effect the "lack of growth" would have on competition in the U.S. market.[101] On the other hand, the Seventh Circuit was less concerned with "immediacy" or "speculation" and more focused on a form of logical causation. This causation centered on whether the alleged supply reductions of potash and resulting price increases were too "remote" to have an effect in the United States.[102] Although both interpretations may have led to reasonable conclusions under the facts of these specific cases, the precise meaning of "direct" remains unclear in light of the other elements of the domestic effects exception. To some extent, both definitions leave some important questions unanswered.

---

adopted a stricter causation standard under the second requirement of the FTAIA. In *Empagran*, foreign and domestic purchasers of vitamins filed an action against vitamin suppliers in the United States alleging that they had entered into a price-fixing conspiracy in violation of the Sherman Act. *Id.* at 159. The foreign purchasers had alleged that, but for supracompetitive vitamin prices in the United States, they would not have suffered an antitrust injury on their foreign purchasers. *Id.* at 175. The idea being that, had the U.S. prices not been implicated, the foreign purchasers could have pursued an arbitrage theory, purchasing the vitamins at lower prices in the United States and then exporting and selling them back in their respective country. The *Empagran* court held that foreign purchasers failed to establish that the domestic effect to U.S. commerce "gave rise" to its Sherman Act claim because an independent foreign injury was insufficient to satisfy the causation requirement under the second prong of the FTAIA. *Id.* at 155.

99. *Minn-Chem*, 683 F.3d at 859.

100. *Id*. at 860–61.

101. *LSL*, 379 F.3d at 680 ("We find no express allegation that Hazera has actually produced a modified seed that can be successfully grown in North America for long-shelf-life winter tomatoes. In sum, the record reveals that such seeds do not yet exist and the prospect of Hazera developing seeds . . . is at best speculative.").

102. *Minn-Chem*, 683 F.3d at 859.

1. The Problem with the Ninth Circuit's Approach

First, the Ninth Circuit's emphasis on the lack of "immediacy" between the speculative nature of the tomato seeds and the resulting anticompetitive effects in the United States leaves an important question unexamined: If the government had been able show that Hazera's innovation in the growth of long-shelf-life tomato seeds was certain, would the Ninth Circuit's standard of "immediate consequence" still have been a barrier to finding liability under the FTAIA? Certainly, the relevant market in the United States was fresh winter tomatoes, but the alleged anticompetitive conduct was the restriction on growing tomato seeds, not the related tomatoes. So then, does it follow that a restraint on growing long-shelf-life tomato seeds does not have an *immediate* effect on the tomato market in the United States? The district court in *LSL* adopted this precise reasoning. The district court determined that a tomato seed is related to, but not the same thing as, a tomato.[103] As a result, the district court held that there was no "direct" effect on the U.S. winter tomato market.[104]

In a leading antitrust treatise, law professors Phillip E. Areeda and Herbert Hovenkamp offer a compelling reason why the *LSL* formulation of "direct" is generally incongruent with U.S. antitrust law.[105] The treatise states that "[t]he majority found indirectness by noting that the agreement operated to restrain the development of seeds for long-shelf-life tomatoes; it did not operate to restrain the sale of seeds that already existed."[106] The authors argue that agreements restricting a competitor's ability to invest in research and development can be even more anticompetitive than a restriction on the production of an existing commodity.[107] The authors further suggest that a macro view of the economy, which appears to be a logical perspective when analyzing competition law in international markets,[108] shows that most restraints are on "intermediate goods."[109] Thus, *LSL*'s stringent standard, which requires an "immediate" nexus between the actor's anticompetitive conduct and the resulting domestic effect, reflects the narrowness of the court's opinion. Fundamentally, the

103. United States v. LSL Biotechnologies, Inc., No. 00CV529, 2002 WL 31115336, at *5–6 (D. Ariz. Mar. 28, 2002).

104. *Id.* at *5.

105. Areeda & Hovenkamp, *supra* note 14, ¶ 272.

106. *Id.*

107. *Id.*

108. *See* Paul Hofer et al., *Principles of Competition Policy Economics*, Asia Pac. Antitrust Rev., 2004, at 4, *available at* http://www.nera.com/extImage/03Economicssjc4-7.pdf ("As markets globalise, competition policy is spreading as well . . . . As a result, no serious evaluation of difficult competition policy questions can be undertaken without an understanding of the relevant economics of 'how markets work.'"). *But see* Alan Delvin, *Antitrust in an Era of Market Failure,* 33 Harv. J.L. & Pub. Pol'y. 558, 604 (2010) (claiming that "the fundamental tenets of microeconomics that underlie modern U.S. antitrust jurisprudence remain unscathed").

109. Areeda & Hovenkamp, *supra* note 14, ¶ 272 ("Under the majority's reading, an agreement involving United States and foreign automobile companies preventing the foreign companies from developing fuel-efficient automobile engines would be an 'indirect' restraint . . . . [T]his seems to be a rather myopic view of how research and distribution works in the economy.").

court's "immediate consequence" standard ignores the appropriate economic and business considerations in international antitrust law cases.[110]

2. The Problem with the Seventh Circuit's Approach

Does the Seventh Circuit's definition solve the problem found in *LSL*? On some level, a "reasonably proximate causal nexus" standard is even more problematic than the "immediate consequence" approach. The Seventh Circuit's standard finds no support in any Supreme Court precedent, let alone in the historical analysis of the extraterritorial reach of U.S. antitrust law.[111] Perhaps that is why the Seventh Circuit in *Minn-Chem* had difficulty applying the "reasonably proximate causal nexus" standard to the facts in that case. In *Minn-Chem*, the court summarily discussed the chain of events—negotiated prices, supply reductions, price increases, and then benchmark prices affecting U.S. consumers—but did not explain how this chain of events met the "reasonably proximate causal nexus" standard. Instead, the court concluded that it was "no stretch" that the alleged foreign conduct was the proximate cause of the price increases in the United States.[112] But Congress did not ask whether the effect is a "stretch" from the conduct. While the court may have used "stretch" as a shorthand phrase, it leaves future courts with the difficulty of applying an otherwise amorphous standard.

IV. PROPOSAL FOR A NEW STANDARD

A. The Intersection Between Tort Law and Antitrust Law

Tort law and antitrust law have a long and pervasive history in U.S. jurisprudence.[113] What is less ubiquitous, however, is the intersection of these bodies of law. Although antitrust law has developed through many common law doctrines, the reliance on specific tort law principles has been less notable.[114] Recently, however, Professor Michael Carrier explored principles of tort law, and argued for a tort-based framework for causation in the context of proving antitrust injury and determining causation in domestic monopolization cases.[115]

110. *See* Am. Bar. Ass'n, Antitrust Law Developments 1151 (Jonathan I. Gleklen et al. eds., 7th ed. 2012) ("[T]he international dimension of economic activity sometimes calls for the application of special substantive rules not appropriate in the purely domestic context.").

111. For a historical analysis of case law, antitrust reports, and congressional history of the extraterritorial reach of U.S. antitrust law before the enactment of the FTAIA, see Judge Aldisert's dissent in *United States v. LSL Biotechnologies, Inc.*, 379 F.3d 672, 684–96 (9th Cir. 2004) (providing an extensive analysis of the history of the extraterritoriality of U.S antitrust law before the FTAIA).

112. Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 859 (7th Cir. 2012).

113. *See* Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 Minn. L. Rev. 1097, 1098 (1993).

114. Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 Yale L.J. 2216, 2233 (2012) ("[A]ntitrust law owes many of its most prominent features to common law methods of development . . . . Both tort and contract remedies presented problems, however.").

115. Carrier, *supra* note 17, at 425.

Carrier argued that tort law causation principles like "cause in fact" and "legal cause" could prove helpful in analyzing whether certain domestic anticompetitive behavior, such as monopolization, "caused" the type of injury that antitrust law was intended to prevent.[116] Carrier then provides a burden-shifting framework that would improve the monopolization analysis, and argues that antitrust plaintiffs should have a remedy, even where other market forces may have contributed to their injury.[117]

Similarly, this note uses the well-understood theories of tort law to clarify the necessary link between foreign conduct and anticompetitive effects on U.S. commerce, especially where the definition of "direct" under the FTAIA currently lacks uniformity in the courts.[118] The meaning of "direct" under the FTAIA should derive from tort law causation principles that limit liability by determining the appropriate scope of a defendant's liability.[119] One such principle is the scope of risk standard. The scope of risk standard limits an actor's liability to a set of harms risked by the actor's conduct.[120] Applying the scope of risk standard to the "direct" requirement will further Congress's desire to have a straightforward, objective way of determining directness under the FTAIA.[121]

Some legal practitioners caution that, in an increasingly interconnected global economy, an expansive interpretation of the domestic effects exception would likely open U.S. courts to a flood of lawsuits, because a large number of foreign transactions ultimately have some effect on U.S. commerce.[122] The scope of risk standard addresses this concern by limiting liability when the alleged effect on U.S. commerce is outside the risks created by the foreign actor's conduct. Furthermore, the scope of risk standard balances the need to carefully apply U.S. antitrust law to foreign

116. *Id.* at 408.

117. *Id.* at 414–26.

118. *See generally id.* (addressing two types of causation principles in tort law: factual cause and legal cause). While this note will also focus on the application of tort law principles to U.S. antitrust law, it will address a narrower issue that has been plaguing the courts: the relationship between a foreign competitor's conduct and an alleged anticompetitive effect on U.S. import commerce as understood under the FTAIA's domestic effects exception. This note does not, however, address whether a plaintiff who successfully alleges a domestic effect would be able to prove an injury that the antitrust laws were meant to protect.

119. Dobbs et al., *supra* note 17, § 198.

120. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 (2010) (describing the effect of applying the scope of risk standard, stating that "an actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious.").

121. *FTAIA Report*, *supra* note 28, at 2487.

122. Simmons & Patel, *supra* note 4, at 72. Others have noted that opponents to the floodgate theory have meritorious arguments too. They argue that the FTAIA expressly requires that any effect on U.S. commerce must be substantial. Because of this substantiality requirement, legal commentators feel "confident that only the most egregious of cases—those that have a substantial effect on the U.S. economy—will thus be allowed in federal court." Thomas Köster & H. Harrison Wheeler, *Appellate Courts Split on the Interpretation of the Foreign Trade Antitrust Improvements Act: Should the Floodgates Be Opened?*, 14 Ind. Int'l & Comp. L. Rev. 717, 727 (2004).

conduct against the need to maintain the powerful deterrent effect of these laws.[123] Because the scope of risk standard derives from proximate cause principles, a discussion of the proximate cause doctrine is warranted.

The general purpose of the proximate cause doctrine is to limit the liability under a particular substantive law.[124] Under this premise, a wrongdoer should not be held liable for any harm, even if it is foreseeable, unless the risks associated with the harm offend the policies of the law under which the actor is being held accountable.[125] Because the domestic effects exception expressly incorporates the concept of "foreseeability," analyzing the FTAIA by using principles of proximate cause is apt.[126]

Most important, courts have already used the proximate cause analysis in other antitrust settings.[127] For example, when faced with antitrust standing issues under the Clayton Act,[128] some courts have used the proximate cause analysis to determine the causal link between the alleged injury and the remedy afforded under the statute.[129] Similar to its use under the Clayton Act, proximate cause analysis under the FTAIA will allow courts to protect competition and deter wrongdoers from violating U.S. antitrust laws, while denying recovery to those harms which fall outside the ambit of the FTAIA. Proximate cause analysis has also been useful in interpreting other provisions of the FTAIA. For example, courts have used the proximate cause analysis to determine whether the effect on U.S. commerce "gives rise" to a conspiracy claim under the Sherman Act.[130] For these reasons, proximate

123. Joseph P. Bauer, *The Foreign Trade Antitrust Improvement Act: Do We Really Want to Return to* American Banana*?*, 65 Me. L. Rev. 3, 19 (2012) (comparing decisions that reflect a "substantive shift away from vigorous enforcement of the antitrust laws and towards greater permissiveness of defendants' anticompetitive behavior").

124. William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1450–51 (1985) ("[Proximate cause] is concerned with when to deny recovery to those actually injured by a defendant's conduct for reasons derived from the policies that underlie the applicable substantive rules.").

125. *See id.*

126. Notions of foreseeability play a vital role in proximate cause analysis. *See* Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928); Carrier, *supra* note 17. Professor Carrier recognizes the crossroad between tort law and antitrust law when dealing with notions of factual causation: "[T]ort law tests the connection between the breach of a duty and a plaintiff's harm, and antitrust doctrine focuses on the link between challenged conduct and anticompetitive effect." *Id.* at 1004.

127. *See, e.g.*, *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 199–201 (9th Cir. 1973); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir. 1964); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962).

128. 15 U.S.C. § 12 (2012). The Clayton Act governs standing and damages in antitrust lawsuits.

129. *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 477 (1982) ("In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of 'proximate cause.'"); *see also* Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement*, 60 SMU L. Rev. 103, 107 (2007) (recognizing that one of the primary limitations in antitrust standing is the idea of proximate cause).

130. The FTAIA provides a two-step causation framework. This article focuses on step one (the domestic effects exception), which inquires whether some alleged foreign conduct caused an effect on U.S. import

cause, and more specifically the scope of risk doctrine, should be applied to antitrust cases implicating the FTAIA's domestic effects exception.[131]

Courts have long used proximate cause to limit an actor's liability based on principles of public policy.[132] An illustrative example is the famous case of *Palsgraf v. Long Island Rail Road Co.*, where Justice Andrews articulated why the common law cuts off liability even when there are harms that may have been caused by a particular act:

> What we mean by the word "proximate" is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace series of events beyond a certain point. This is not logic. It is practical politics. . . . We regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. But somewhere they reach the point where they cannot say the streams come from any one source.[133]

In some sense, Justice Andrews foreshadowed what would be a recurring issue not only in tort law, but also in other areas of law where the scope of liability question is critical. Today, courts regularly engage in proximate cause analysis when determining the scope of liability for a particular harm.[134] To be sure, proximate cause analysis has its shortcomings.[135] Analyzing proximate cause is often problematic

---

commerce. Step two asks a very different question: whether the U.S. effect (once established in step one) has caused an injury that the Sherman Act was meant to redress. *See, e.g.*, Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267, 1271 (D.C. Cir. 2005) (holding that the direct effect must proximately cause the claimed injuries); *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 988 (9th Cir. 2008) (same); *In re* Monosodium Glutamate (MSG) Antitrust Litig., 477 F.3d 535, 539 (8th Cir. 2007) (same). Because "the proximate cause standard is consistent with general antitrust principles, which typically require a direct causal link between the anticompetitive practice and plaintiff's damages," a proximate cause, rather than but-for, standard is proper. *DRAM*, 546 F.3d at 988.

131. *See* Dobbs et al., *supra* note 17, § 198 n.6 ("[s]cope of liability limitations are fundamental and can apply in any kind of case in which damages must be proven, not merely in negligence cases."). Because concepts of proximate cause and scope of risk are policy-driven doctrines, they have found their place in multiple areas of the law, such as contracts, torts, and civil rights. *See, e.g.*, Hadley v. Baxendale, (1854) 156 Eng. Rep. 145 (contracts case); Martinez v. California, 444 U.S. 277 (1980) (civil rights case); Gibson v. Cnty. of Washoe, Nev., 290 F.3d 1175 (9th Cir. 2002) (constitutional case); Baylor v. United States, 407 A.2d 664 (D.C. 1979) (criminal case).

132. *McCready*, 457 U.S. at 495 n.13.

133. 248 N.Y. 339, 352–53 (1928) (Andrews, J., dissenting).

134. *See, e.g.*, Kenneth S. Abraham, The Forms & Functions of Tort Law 103, 124 (3d ed. 2007); Dobbs et al., *supra* note 17, § 198; W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 43, at 281 (5th ed. 1984).

135. Carrier, *supra* note 17, at 415 ("To be sure, causation analysis is not the same in every jurisdiction, and concepts like proximate cause often are unclear."); *see also McCready*, 457 U.S. at 476–78 n.13 ("And the use of such terms only emphasizes that the principle of proximate cause is hardly a rigorous analytic tool."). Indeed the Restatement of Torts suggests that the precise terminology of proximate cause, at least in the context of negligence cases, is not universal. The Restatement of Torts opposes the use of the phrase "proximate cause" because the term does not accurately reflect the idea of a limitation of liability. Instead, the Restatement advocates a "scope of liability" term, which focuses on that idea that tort law

because the justifications for determining when to limit liability are given different weight based on various considerations.[136] These considerations include fairness, foreseeability, logic, and past experience. As a result, courts often disagree about which considerations are most important in a proximate cause analysis.[137] Justice Andrews elucidated a few legal standards that are helpful in resolving the uncertainty in a proximate cause analysis. First, a court could ask whether "there was a natural and continuous sequence between cause and effect."[138] Second, a court may inquire whether "by the exercise of prudent foresight[,] could the result be foreseen?"[139] Third, a court could ask whether the "result [is] too remote from the cause, and . . . consider remoteness in time and space."[140] Fourth, a court may look to see if there was a "direct connection between [cause and effect], without too many intervening causes."[141] Lastly, a court may ask whether one was "a substantial factor in producing the other."[142] Despite the different facts that would be relevant to each of these considerations, one thing remains clear: in all of these various standards, a practical judgment grounded in fairness is being made to limit a wrongdoer's liability.

---

draws a line on when to impose liability, even when the actor may have, in fact, caused the resulting harm. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 6 (2010). Dobbs concurs with this terminology. *See* Dobbs et al., *supra* note 17, § 198.

136. "[Proximate cause is] an instrument of fairness and policy, although the conclusion is frequently expressed in the confusing language of causation, 'foreseeability' and 'natural and probable consequences' . . . . The determination of proximate cause by a court is to be based upon mixed considerations of logic, common sense, justice, policy and precedent." Zaza v. Marquess & Nell, Inc., 675 A.2d 620, 635 (1996) (citation omitted); Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, Harper, James & Gray on Torts § 18.8 (3d ed. 2007) (explaining that proximate cause "prevents clarity of thought and meaningful analysis").

137. Joseph A. Page, Torts: Proximate Cause 18–25 (2003) (explaining that courts employ a variety of proximate cause tests). The Restatement Third of Torts comments that notions of "substantiality" and "foreseeability" are inquiries that have often been ingrained in a proximate cause analysis. These notions generally provide a basis for assisting a judge on when to limit an actor's liability. At the same time, the Restatement vehemently opposes the use of "geography" and "time" to describe or define proximate cause. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 cmt. j (2010).

138. *Palsgraf*, 248 N.Y.2d at 354; *see also* Page, *supra* note 137, at 50. Criticism of this formulation is commonplace. Indeed, the Restatement contends that "[o]ne major problem with the 'natural and continuous' language is that it fails to confront the essential concern of the proximate-cause limitation: actors should not be held liable when the risk-producing aspects of their conduct cause harm other than that which was risked by the tortious conduct." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 cmt. b (2010).

139. *Palsgraf*, 248 N.Y.2d at 354.

140. *Id.*; *see also* Keeton, *supra* note 16, at 42 ("A consequence is not too remote if it is direct."). While Justice Andrews may be correct in arguing that time and space are relevant under a remoteness inquiry, the Restatement makes an important clarification: in many cases there will be more than one proximate or legal cause. On that premise, an actor's harmful conduct need not be close in time or space to the plaintiff's harm to be a proximate or legal cause. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 cmt. b (2010).

141. *Palsgraf*, 248 N.Y.2d at 354.

142. *Id.*

Shifting these concepts to antitrust policy, Congress decided to limit liability in international antitrust cases by using the FTAIA as the central mechanism.[143] The FTAIA is at the forefront of Congress's policy to protect competition in the United States while ensuring that U.S. antitrust laws reach only foreign conduct that affects U.S. import commerce.[144] In considering this balance, Congress chose to limit liability to cases where there is a sufficient nexus between anticompetitive conduct and the resulting anticompetitive effects.[145] To find this nexus, courts must conclude that the alleged conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. import commerce.[146] Congress, however, failed to discuss two essential aspects of this nexus requirement. First, Congress did not explicitly define what each individual term of this requirement means.[147] Second, and perhaps more crucial, Congress did not explicitly address whether each individual requirement of the domestic effects exception must be analyzed before finding that the exception has been met.[148] As a result, some courts have considered the domestic effects exception conceptually but have failed to interpret what each individual requirement means.[149] Other courts have left some individual requirements out of their analysis entirely.[150] Ignoring that each individual requirement must be satisfied grants courts more discretion than Congress intended. Put another way, courts must apply each requirement to the facts to determine whether an effect on U.S. commerce is one that the FTAIA was meant to reach. Otherwise, courts will continue to conflate the relevant factual considerations for "directness" with the separate factual considerations for "reasonable foreseeability" and "substantiality," two concepts frequently analyzed under proximate cause.[151]

---

143. *See supra* Part II.

144. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004). ("[C]ourts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused."); *see also* Huffman, *supra* note 15, at 306 (discussing Congress's protectionist approach in preferring U.S. businesses and consumers over foreign businesses and consumers).

145. Edward D. Cavanaugh, *The FTAIA and* Empagran*: What Next?*, 58 SMU L. Rev. 1419, 1442 (2005).

146. *Id.* at 1424; 15 U.S.C. § 6a (2012).

147. *See* 15 U.S.C. § 6a (2012).

148. *See id.*

149. CSR Ltd. v. Cigna Corp., 405 F. Supp. 2d 526 (D.N.J. 2006) (discussing the "domestic effects" exception and relying on *Hartford Fire* to adjudicate plaintiffs' claim under the FTAIA).

150. El Cid, Ltd. v. N.J. Zinc Co., 551 F. Supp. 626, 629 (S.D.N.Y. 1982) (concluding that the effect on foreign commerce need not be both substantial and direct).

151. The prevailing approach to the limit of liability issue under a proximate cause analysis is foreseeability. *See, e.g.*, Dobbs et al., *supra* note 17, § 198 ("The most general and pervasive approach to . . . proximate cause holds that a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct and to the class of persons he put at risk by that conduct."). In some cases, substantiality is also a factor:

To illustrate, consider the hypothetical posed in Part I of this note. In summary, suppose that a group of foreign manufacturers conspire to fix the price of inputs by reducing their output sold to other foreign manufacturers. These inputs are then refined into finished goods sold at supracompetitive prices in the United States. Does this foreign conduct have a "direct effect" on U.S. commerce under the FTAIA? The outcome under the "reasonable proximate causal nexus" standard will depend on the strength of the nexus between the markets for the inputs and the markets for the finished goods. In some instances, this inquiry will be straightforward—if the input is a major component of the final product, any supracompetitive pricing in the foreign market will generally have a reasonable proximate causal nexus to the inflated prices of the finished goods in the United States.[152]

But in other instances, the inquiry may be more difficult. If foreign manufacturers of major component parts conspire to increase prices "directly" in foreign markets and such conduct results in unintended ripple effects on the prices of finished goods in the United States, the "reasonable proximate causal nexus" standard might capture more conduct than necessary.[153] This is true even if the foreign manufacturers could reasonably foresee the anticompetitive effects of their behavior and even if the effects on U.S. markets are substantial, because their conduct must "directly" cause these effects.

Under the "immediate consequence" standard, surely it could be argued that the higher-priced finished goods and the concomitant anticompetitive effect on U.S. markets depended on uncertain intervening transactions. That is, once the input or component part leaves the hands of the alleged conspirator, intervening steps in the ordinary chain of production may affect the finished good.[154] Similarly, other factors like general market conditions, financing costs, economic forces of supply and demand, and geopolitical instabilities are all intervening events that could contribute to the resulting anticompetitive effect on U.S. markets.

But if all of that were true, then any alleged foreign anticompetitive conduct involving inputs manufactured on a global scale would always fail the "direct"

> In the past, we have said that harm is 'proximate' in a legal sense if prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission in question. In other words, human experience teaches that the same harm can be expected to recur if the same act or omission is repeated in a similar context.
>
> McCain v. Fla. Power Corp., 593 So. 2d 500, 503 (Fla. 1992).

152. Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., No. 12 Civ. 7465(SAS), 2013 WL 2099227, at *10 (S.D.N.Y May 14, 2013) (distinguishing *In re TFT-LCD* on the grounds that, in that case the effects from increasing the component parts, which were a major component of the final product sold in the United States, were easily quantifiable).

153. *In re* Intel Corp. Microprocessor Antitrust Litig., 452 F. Supp. 2d 555, 561 (D. Del. 2006) (quoting Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267, 1270–71 (D.C. Cir. 2005)).

154. *See In re* TFT-LCD Antitrust Litig., 822 F. Supp. 2d 953 (N.D. Cal. 2011). In this case, defendants argued that, because the manufacturing process for LCD products contained a complex production chain that involved multiple sales before the end product reached the United States, the U.S. economy was not "directly affected" by the alleged conspiracy. *Id.* at 962.

requirement, an overly narrow result Congress did not intend.[155] This is true for at least three reasons. First, natural market forces and economic conditions of supply and demand, by definition, are not intervening causes because they operate independently from any anticompetitive conduct that takes place.[156] Second, spillover and ripple effects, while understandably part of the FTAIA equation, are not appropriately analyzed under the "direct" requirement because they relate to the quantitative effect on U.S. markets.[157] Therefore, these effects should be analyzed under the substantiality requirement. In this way, courts may appropriately focus on the economic relationship between anticompetitive behavior and the quantification of the resulting anticompetitive effects.[158] Third, defining "direct" as an "immediate consequence" makes the domestic effects exception superfluous, because the FTAIA expressly exempts import commerce from scrutiny under its prefatory language. Not only does it make it superfluous, but it also is irreconcilable with the import commerce exception of the FTAIA, which already controls direct import commerce. In other words, if a foreign manufacturer sells a product to a U.S. domestic purchaser directly—undeniably import commerce—any alleged effect on the United States

155. At least one law professor has supported this proposition. *See* Huffman, *supra* note 15, at 347 n.353 ("[A]lthough a domestic plaintiff purchasing in a foreign market may not be suffering harm due to a domestic effect, if that same plaintiff is purchasing an input for use in a domestic manufacturing operation, the situation might be different."); *see also In re TFT-LCD*, 822 F. Supp. 2d at 963–64 ("At bottom, defendants' proposed definition of 'direct effect' is too narrow . . . adopting a definition of 'direct' under which only the first sale of a product could satisfy the standard would exclude from the Sherman Act's reach a significant amount of anticompetitive conduct that has real consequences for American consumers."). *But see* United Phosphorus, Ltd. v. Angus Chem. Co., 131 F. Supp. 2d 1003, 1014 (N.D. Ill. 2001), *aff'd*, 322 F.3d 942 (7th Cir. 2003) (en banc) ("The FTAIA explicitly bars antitrust actions alleging restraints in foreign markets for inputs . . . that are used abroad to manufacture downstream products . . . but may later be imported into the United States.") (citation omitted).

156. *See* Dobbs et al., *supra* note 17, § 204 ("An intervening cause is a new cause that comes into play after the defendant's negligent conduct. If the intervening force is in operation at the time the defendant acted, it is not an intervening cause at all."). This observation is premised on the notion that the cartel did not artificially create these market conditions through their market power; instead they were independently in operation during the cartel's anticompetitive conduct. *See* Hofer et al., *supra* note 108, at 6 ("Modern quantitative techniques and empirical econometric methods allow sophisticated analyses of cartel effects, while controlling for changes in the market that may also have had an effect on prices but were independent of the cartel (e.g., an increase in demand).").

157. The legislative history supports this conclusion. *See FTAIA Report*, *supra* note 28, at 2498 ("[I]f a domestic export cartel were so *strong* as to have a spillover effect on commerce within this country by creating a world-wide shortage or artificially inflated world-wide price that had the effect of *raising* domestic prices—the cartel's conduct would fall within the reach of our antitrust laws."); *see In re Intel*, 452 F. Supp. 2d at 563 (reasoning that "ripple effects" were insufficient to provide a remedy under the FTAIA, because AMD's allegation of a *world-wide market* did not create jurisdiction with "substantial direct, effects on the domestic market").

158. *Compare* Huffman, *supra* note 15, at 317–18 (recognizing that pre-FTAIA case law has stood for the proposition that a "sufficient magnitude of effect can be a proxy for directness"), *with* Delrahim, *supra* note 37, at 430 (suggesting that nothing in the legislative history nor the language of the FTAIA supports a reading that "direct" and "substantiality" should be considered disjunctively because "[the FTAIA] imposes three separate requirements for the Sherman Act to reach foreign conduct").

would surely be an immediate consequence of the foreign manufacturer's alleged anticompetitive conduct.[159]

B. Scope of Risk Standard as a Solution

The solution to these competing approaches has two components. First, the proper interpretation of "direct" under the FTAIA is a limitation of liability grounded in a scope of risk analysis. Second, courts must analyze the factual allegations of "directness" independently of the other requirements of the domestic effects exception (i.e., "substantiality" and "reasonable foreseeability"). Borrowing from well-explored definitions of proximate cause under tort law, "direct" should be understood as an independent limitation on liability that focuses on the logical relationship between conduct and effect. In this way, liability will be limited to anticompetitive conduct that results from the risks that made the conduct anticompetitive in the first place. Focusing on the actor's risks seems logical because the FTAIA already considers the actor's expectations under the "reasonable foreseeability" requirement and the amount of harm to competition under the "substantiality" requirement.[160]

For example, the scope of risk standard in tort law limits liability to only those harms that result from risks created by the actor's wrongful conduct.[161] Generally, this requires considering whether the harm for which recovery is sought resulted from any of those risks.[162] Professor Dan B. Dobbs offers an extreme but clear example of the scope of risk analysis in a negligence action:

> [S]uppose that a surgeon negligently performs a vasectomy. Because the surgery was negligently performed, the patient fathers a child. The child, at the age of 13, sets fire to the plaintiff's barn. Is the surgeon liable for the loss of the barn? He was negligent in performing the vasectomy, and his negligence is a factual cause of the fire and the loss of the barn. Almost everyone will agree, however, that while the surgeon might be liable for something, he is surely not liable for loss of the plaintiff's barn. Courts are likely in such a case to say that the surgeon's negligence is not a proximate cause of the harm done, by which they mean that the harm was not within the scope of risks the defendant created. The risk he created was that the child's father would have a child against his wishes, but not that the child would be more likely than other children to set fire to barns.[163]

---

159. *See* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 845, 857 (7th Cir. 2012) ("To demand a foreseeable, substantial, and '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.").

160. Keeton, *supra* note 16, at 41 ("[W]hether consciously or subconsciously, a concept of risk is almost exclusively, if not exactly so, the determinant of directness and concurrence.").

161. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 cmt. e (2010).

162. *See id.*

163. Dobbs et al., *supra* note 17, § 198.

By analogy, under the FTAIA, the scope of risk standard would impose liability for only those anticompetitive effects that result from risks created by the alleged foreign actor's anticompetitive conduct.[164] This analysis is already implicit in a hypothetical discussed by the Department of Justice and the Federal Trade Commission in their antitrust enforcement guidelines (the "Guidelines").[165] In relevant part, the Guidelines posit the following scenario:

> [T]he foreign cartel produces a product in several foreign countries. None of its members have any U.S. production, nor do any of them have U.S. subsidiaries. They organize a cartel for the purpose of raising the price of the product in question. Rather than selling directly into the United States, however, the cartel sells to an intermediary outside the United States, which they know will resell the product in the United States. The intermediary is not part of the cartel.[166]

Here, the Guidelines limit the jurisdictional analysis to whether the "potential harm that would ensue if the conspiracy [i.e., the illegal agreement] were successful, not on whether the actual conduct in furtherance of the conspiracy had in fact the prohibited effect upon interstate or foreign commerce."[167] In other words, the central inquiry is whether the anticompetitive effect on U.S. markets is within the scope of the risks created only by the illegal anticompetitive agreement. This limited inquiry into the "anticompetitive agreement" does not concern itself with any future conduct by either the principal actors or any intermediaries in the chain of production. Nor does it compensate for any future intervening market forces or regulatory matters that could affect the execution of the agreement. Instead, as the scope of risk standard suggests, the inquiry focuses only on the range of harms risked under the initial agreement. While the Guidelines acknowledge that, under this scenario, the domestic effects exception would be met,[168] it is evident that the other factors of the exception—"reasonable foreseeability" and "substantiality"—must also be present. In short, the long-standing U.S. antitrust enforcement guidelines have implicitly adopted a scope of risk analysis that is supported by the purpose and plain language of the FTAIA.[169]

Using the scope of risk standard would not require courts to delve into other aspects of proximate cause often inherent in tort law cases such as the type and extent of harm caused by the actor's conduct. This is because the second section of the FTAIA

164. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 cmt. d (2010) ("The magnitude of the risk is the severity of the harm discounted by the probability that it will occur.").

165. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations § 3.12 (1995).

166. *Id.*

167. *Id.* By jurisdiction, of course, the Guidelines mean whether the conduct falls under the ambit of the FTAIA's domestic effects exception.

168. *Id.*

169. The Supreme Court reasoned that "the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce." F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004).

addresses whether the alleged anticompetitive effect "gives rise to" a claim covered under the substantive requirements of the Sherman Act.[170] This second section would determine whether antitrust law considers the effect on U.S. commerce harmful. Thus, the scope of risk standard narrows the inquiry to whether the alleged anticompetitive conduct had a "direct" effect on U.S. commerce. This, of course, is possible only because the FTAIA expressly requires separate inquiries into the "substantiality" and "reasonable foreseeability" of the effect. Moreover, the FTAIA's domestic effects exception, by definition, limits liability by providing jurisdiction only when there are anticompetitive—not procompetitive—effects on U.S. commerce. Put differently, the FTAIA is a self-contained limitation on the range of harms that can be redressed under U.S. antitrust laws, allowing courts to use the scope of risk standard without the difficulty found in tort law cases.

V. BENEFITS OF THE SCOPE OF RISK STANDARD

The scope of risk standard offers other analytical benefits. First, it is simple to apply. Courts can isolate the alleged foreign anticompetitive conduct and determine whether the alleged domestic effect falls under the range of harms risked by such conduct. This obviates the need for courts to inquire into other factors that may cause the effect because the scope of risk standard recognizes that an actor's conduct need not be the only cause of the plaintiff's harm.[171]

Second, by refining the directness analysis to focus only on the scope of risks created by the foreign conduct, courts will be less likely to conflate facts that are not supported by the appropriate consideration of "directness," "reasonable foreseeability," or "substantiality." In other words, each respective consideration takes on its own analysis so that "reasonable foreseeability" does not determine "directness" and vice versa.[172] This in turn eliminates the possibility of reaching an erroneous conclusion like in *Intel*, where the court deflected its attention from the relationship between the challenged foreign conduct and the U.S. domestic effect, and instead focused on other factors not relevant to the directness inquiry.[173]

170. In cases involving tort-based cause of actions, courts often discuss and evaluate the type of harms and extent of harm when determining whether to limit the liability of a defendant's conduct. However, courts typically note that "the manner in which the harm occurs is irrelevant to scope of liability so long as the harm is foreseeable or within the risk standard." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 cmt. o (2010). Because the FTAIA already requires foreseeability, the type-of-harm analysis should not be part of the equation.

171. *See* Dobbs et al., *supra* note 17, § 208.

172. Courts have found liability in cases when the harm was not foreseeable, but was nevertheless "direct." Keeton, *supra* note 16, at 44 ("Despite all the evidence we have marshaled for the proposition that the concept of reasonable foresight creeps into the criterion for determining whether causation is direct, the fact remains that some courts persistently declare that they will impose liability for direct causation even as to unforeseeable consequences.").

173. *See In re* Intel Corp. Microprocessor Antitrust Litig., 452 F. Supp. 2d 555, 561 (D. Del. 2006) ("As explained by the Court previously, these types of effects are not direct domestic effects of any alleged foreign conduct of Intel, but secondary and indirect effects that are also the by-product of numerous factors relevant to market conditions and the like.").

Third, the standard provides clear outer limits to the domestic effects exception.[174] In particular, the scope of risk standard focuses on the circumstances that existed at that time of the alleged anticompetitive conduct and the concomitant risks that were created by that conduct.[175] At the same time, the scope of risk standard provides courts with the flexibility needed in FTAIA cases, where balancing concerns of prescriptive comity with the desire to protect U.S. markets from harmful anticompetitive conduct is imperative.[176]

A. Applying the Scope of Risk Standard to the Hypothetical

Applying the scope of risk standard to the hypothetical posed in this note demonstrates its analytical benefits. As an initial matter, even if intervening factors, such as independent product decisions between the input and finished product manufacturers, contribute to the alleged effects on U.S. markets, a court should limit its focus to the alleged anticompetitive conduct. In this hypothetical, the alleged conduct in question is a deliberate output restriction of raw inputs marketed to intermediate companies. A court can examine whether a price increase on the end product was a concomitant harm that could result from this behavior. This examination would involve, among other things, a detailed evaluation of the challenged agreement between the cartel members to determine if this behavior has an adverse effect on competition in the relevant market.[177]

---

174. *In re* TFT-LCD Antitrust Litig., 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011) ("To be sure, the 'direct effect' requirement places concrete limits on the ability of a plaintiff to invoke the federal antitrust laws.").

175. *Id.* Unlike in *Intel,* the court in *TFT-LCD* rightly focused on the particular circumstances that existed at the time the alleged anticompetitive conduct took place and the corresponding risks that were created by that conduct. In effect, the court did not actually apply the immediate consequence approach, because if it did, then it would have reached the same conclusion that *Intel* reached, namely that there were "twists and turns" between the price increases in the component parts and the final end products. *Id.* at 964 ("Where, as here, the nature of the effect does not change in any substantial way before it reaches the United States consumer, the effect is an 'immediate consequence' of the defendant's anticompetitive behavior."). Instead, the *TFT-LCD* court isolated the foreign conduct and reasoned that, because the LCD products were a major component of the electronic products in the United States, there was no way to divorce the increased prices in the LCD market (the anticompetitive conduct) from the increase prices in the finished electronic products (the anticompetitive effect). *Id.* at 966. By the same token, the court could have analyzed the facts under the scope of risk standard and reached the same conclusion by reasoning that the increased U.S. prices of electronic products was a harm that resulted from the risks of price fixing the component LCDs in contravention of competition law. Had it adopted a scope of risk analysis, it could have avoided its attempt to clarify the Ninth Circuit's formulation of "immediate consequence" and adding additional confusion to an already complex set of standards.

176. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 cmt. e (2010) ("The risk standard appeals to intuitive notions of fairness and proportionality by limiting liability to harms that result from risks created by the actor's wrongful conduct, but no others. It also provides sufficient flexibility to accommodate fairness concerns raised by the specific facts of a case.").

177. *See* Morgenstern & Prystowsky, *supra* note 39, at ch. 26 ("The final step in a market analysis is to evaluate the challenged restraint's future anticompetitive effects on the relevant market based on the market's economic realities. Where there are sound ways to determine anticompetitive effects based on direct evidence (for example, by showing a casual link to an actual price increase), an antitrust plaintiff may meet the burden of producing evidence without conducting an elaborate market analysis.").

If the answer to this inquiry is in the affirmative, then the "direct" standard would be met. By isolating this inquiry and focusing on the logical relationship between the foreign actor's anticompetitive conduct and the resulting anticompetitive effect, a court can properly analyze issues of intervening developments, ripple effects, and other economic forces[178] under the "reasonable foreseeability" and "substantiality" requirements.[179] In addition, this standard provides several benefits over the current approaches adopted by the courts in *LSL* and *Minn-Chem*.

B. Applying the Scope of Risk Standard to LSL *and* Minn-Chem

Applying the scope of risk standard to *LSL* and *Minn-Chem* highlights the benefits of using a tort-based approach to understand the relationship between foreign conduct and any resulting effect on U.S. markets. Indeed, had the *LSL* and *Minn-Chem* courts interpreted "direct" as an inquiry into whether the alleged effect on U.S. markets was a result of the scope of risks created by the actor's conduct, they would have reached a result more consistent with the purpose of the FTAIA.

For example, in *LSL,* the majority hinged its analysis on the "speculative" nature of Hazera's ability to grow its own version of long-shelf-life tomatoes.[180] Specifically, the court parsed through the government's pleading documents (which included a declaration from Hazera's president that spoke in purely forward-looking terms) before determining that this uncertainty could not be a "direct" effect.[181] The court concluded that "as a matter of common sense, regardless which of the many definitions of 'direct' one adopts, this fact is crucial to the 'direct effects' calculus."[182] The court erroneously conflated the facts, because the speculative nature of the conduct goes to the "reasonably foreseeable" inquiry and not to the "direct" requirement. In other words, the effect of increasing the price of tomatoes in the United States could not be foreseen from the agreement restricting Hazera from growing long-shelf-life tomato seeds because Hazera's ability to sell the seeds was uncertain. Had the court focused on the relationship between the alleged anticompetitive agreement and the potential harms—in this case, a restraint on competition in the U.S. tomato market—it would have addressed its concerns about certainty under the appropriate "reasonable foreseeability" standard.[183]

---

178. Hofer et al., *supra* note 108, at 6. ("Modern quantitative techniques and empirical econometric methods allow sophisticated analyses of cartel effects, while controlling for changes in the market that may also have had an effect on prices but were independent of the cartel . . . .").

179. *See* Dobbs et al., *supra* note 17, § 204 ("Such cases [namely, intervening acts and superseding causes] are simply subsets or particular examples of the basic scope of the risk problem and can be resolved under ordinary foreseeability rules . . . . However, the focus on temporal sequences in the superseding cause analysis tends to detract from the essential foreseeability analysis it purports to follow.").

180. United States v. LSL Biotechnologies, Inc., 379 F.3d 672, 681 n.7 (9th Cir. 2004).

181. *Id.*

182. *Id.*

183. *See* Delrahim, *supra* note 37, at 430 (suggesting that certainty does not fit in the "direct" analysis, largely because it would render the term "reasonably foreseeable" meaningless under the domestic effects exception).

Similarly, in *Minn-Chem*, the court did not analyze the contours of the domestic effects exception. After defining the term "direct" as a "reasonable proximate causal nexus," the court reasoned that the "alleged supply reductions led to price hikes in these foreign markets, and those increases showed up almost *immediately* in the prices of U.S. imports."[184] Immediacy—an element of time—was the standard adopted by the *LSL* court and precisely the same standard rejected in *Minn-Chem*.[185] Despite this internal inconsistency, the court determined that other intervening forces, like effects by regulatory structures (which could insulate the potash market from potential price increases) would not be enough to dismiss the complaint.[186] Impliedly, the court focused on the risks created by the cartel's conduct and whether the effect on the U.S. market was a result of those risks. The court emphasized that the alleged foreign benchmark prices created by the defendant's conduct was the direct cause of the price increase in the U.S. market.[187] Under the scope of risk standard, it would be hard to argue that a price effect in the U.S. market was not a result of the risk created by setting benchmark prices in the market where the cartel was relatively free to operate.[188] Thus, the Seventh Circuit could have reached the same conclusion using a scope of risk standard while avoiding any internal inconsistency.

VI. PUBLIC POLICY JUSTIFICATIONS FOR THE SCOPE OF RISK STANDARD UNDER THE FTAIA

Strong policy reasons also support using the scope of risk standard. It is undisputed that the extraterritorial reach of U.S. antitrust laws overlaps with our relations with foreign sovereigns.[189] Indeed, the Supreme Court reinforced the importance of U.S. antitrust laws in redressing domestic antitrust injury caused by foreign anticompetitive conduct.[190] While this may be true, Congress did not interject any notions of comity

184. Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 859 (7th Cir. 2012) (emphasis added). The court was correct to take issue with the "immediate consequence" standard. *See* DOBBS ET AL., *supra* note 17, § 208 ("And the defendant's misconduct is not too remote for liability merely because time or distance separates the defendant's act from the plaintiff's harm.") (citations omitted).

185. *Minn-Chem*, 683 F.3d at 857–58.

186. *Id.* at 859.

187. *Id.*

188. *See id.*

189. Consideration of prescriptive comity involves balancing seven factors, which were outlined in *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1977). The seven factors are: (1) the degree of conflict with foreign law or policy; (2) the nationality or allegiance of the parties and the locations or principal places of businesses or corporations; (3) the extent to which enforcement by either state can be expected to achieve compliance; (4) the relative significance of effects on the United States as compared with those elsewhere; (5) the extent to which there is explicit purpose to harm or affect American commerce; (6) the foreseeability of such effect; and (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. *Id.* at 614.

190. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 172–74 (2004).

in the domestic effects test.[191] But the FTAIA does not prevent courts from using the doctrine of comity to limit U.S. jurisdiction over international antitrust claims.[192] As a result, using the scope of risk standard—which provides greater clarity to the outer limits of the FTAIA—will ensure that U.S. laws do not "unreasonably interfere with the sovereign authority of other nations."[193]

The scope of risk standard accomplishes this in at least two ways. First, the scope of risk standard should limit liability in those cases where the alleged foreign conduct does not raise domestic antitrust concerns.[194] This limitation is consistent with the Guidelines, which are not concerned with any effects on U.S. markets that increase competition. Second, the scope of risk standard should prevent any concern that a foreign company that does not create risks that could produce anticompetitive effects on U.S. markets would violate the Sherman Act by properly isolating the foreseeability and substantiality standards from the "direct" analysis.[195] In sum, the scope of risk standard balances appropriate deterrence against inappropriate interference with foreign laws.

191. *FTAIA Report*, *supra* note 28, at 2488 ("If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity . . . or otherwise to take account of the international character of the transactions.").

192. *See In re* Ins. Antitrust Litig., 938 F.2d 919, 932 (9th Cir. 1991) (reasoning that because the FTAIA did not completely eliminate comity considerations, a *Timberlane* analysis was applicable to determine whether jurisdiction should be exercised), *aff'd in part, rev'd in part, and remanded sub nom*. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); McElderry v. Cathay Pac. Airways, 678 F. Supp. 1071, 1078–80 (S.D.N.Y. 1988) (declining jurisdiction on the basis of international comity in spite of a finding of sufficient anticompetitive effect on U.S. commerce). Some courts have even decided issues of comity before even analyzing the FTAIA. *See, e.g.*, *In re* Rubber Chems. Antitrust Litig., 504 F. Supp. 2d 777, 783 (N.D. Cal. 2007) ("[T]he principles of comity identified in [*Empagran*, 542 U.S. 155] are central to the question of statutory interpretation . . . and counsel this Court away from an interpretation of the FTAIA that would permit Plaintiffs to adjudicate its claims of foreign injury . . . .").

193. *See id.* (concluding, after an examination of the FTAIA's legislative history and the doctrine of comity, that this reading is consistent with congressional intent in enacting the statute).

194. Antitrust Enforcement Guidelines for International Operations, *supra* note 165, ch. 3.121, illus. C ("[I]n the absence of an agreement with respect to the U.S. market, sales into the U.S. market at non-predatory levels do not raise antitrust concerns.").

195. *In re* TFT-LCD Antitrust Litig., 822 F. Supp. 2d 953, 967 (N.D. Cal. 2011) ("In the Court's view, the concern identified in *SRAM* is better addressed through the requirement that the anticompetitive effects of a defendants' [sic] conduct on the United States be 'reasonably foreseeable.'") (citation omitted); *In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819 CW, 2010 WL 5477313, at *5–6 (N.D. Cal. Dec. 31, 2010) (holding that the plaintiff's evidence was insufficient to satisfy the second prong under the domestic effects exception, which requires that alleged conduct gives rise to the plaintiff's antitrust claims). In *SRAM*, the court was addressing the plaintiff's evidence that the SRAM products at issue were specifically designed to be sold to a particular manufacturer, to then be incorporated into a final product, which in turn would be targeted to the U.S. market. The court held that this evidence was insufficient to support jurisdiction under the FTAIA. Tellingly, the court in *TFT-LCD* recognized that, in effect, the *SRAM* court was making a determination of whether it was *foreseeable* to the defendants that there would be an effect on U.S. commerce because of the product specification and targeted market. But under a scope of risk analysis, the defendant should not be liable even for foreseeable harms if the actor's conduct, in principle, does not violate antitrust policy. This highlights the importance of properly analyzing each requirement of the FTAIA separately; indeed, the scope of risk standard would prevent courts from conflating notions of "direct" and "foreseeability" and provides clarity to complex factual scenarios usually inherent in FTAIA cases.

VII. CONCLUSION

Until recently, the domestic effects exception of the FTAIA did not receive much attention in understanding the extraterritorial reach of U.S. antitrust law.[196] As a result, few courts have attempted to interpret the meaning of "direct," leaving courts and litigants confused about the scope of the FTAIA. Lacking a concrete standard, courts have conflated the elements of "direct," "reasonably foreseeable," and "substantial," although the FTAIA provides that each one should be considered separately in a domestic effects exception analysis.

The Ninth and Seventh circuits have, however, recently defined "direct." For example, the Ninth Circuit narrowly defined "direct" as an "immediate consequence," which focuses on the immediacy and certainty of an effect on U.S. markets. In contrast, the Seventh Circuit defined "direct" as a "reasonably proximate causal nexus," which provides a broader view on what conduct would have an effect on U.S. markets. While each court reached different conclusions, neither interpretation provides a clear standard for determining when to impose liability for alleged anticompetitive foreign conduct affecting competition in the United States. In short, these competing approaches potentially harm competition by allowing certain business behavior that Congress intended to regulate, while at the same time deterring lawful business behavior that truly does not harm U.S. markets.

This note proposes a solution to this legal uncertainty by turning to established principles of tort law. Specifically, this note suggests that courts use a refined standard of proximate cause—the scope of risk standard—to define the "direct" requirement of the domestic effects exception. Under the scope of risk standard, courts can focus on the logical relationship between the alleged foreign conduct and the resulting effect on U.S. markets. The standard requires a simple inquiry into the harms risked by the alleged foreign conduct. The scope of risk standard is particularly useful under the FTAIA, where notions of "foreseeability" and "substantiality" expressly require separate consideration. Among other benefits, the scope of risk standard strikes an important balance in FTAIA cases: it provides courts with flexibility in analyzing complex international antitrust cases while also providing an outer limit to the reach of U.S. antitrust law consistent with the plain language and spirit of the FTAIA.

196. *See* Delrahim, *supra* note 37, at 427 ("It has attracted less attention than the *Empagran* issue, perhaps because it has not featured in any Supreme Court decisions or high-profile class actions against international cartels.").