4-1-2009

The United States as Global Cop: Defining the 'Substantial Effects' Test in U.S. Antitrust Enforcement in the Americas and Abroad

Jordan A. Dresnick

Kimberley A. Piro

Israel J. Encinosa

The United States as Global Cop: Defining the 'Substantial Effects' Test in U.S. Antitrust Enforcement in the Americas and Abroad

Jordan A. Dresnick,[1] Kimberley A. Piro,[2] & Israel J. Encinosa[3]

CONTENTS

---

1. Jordan A. Dresnick practices antitrust law and commercial litigation with Holland & Knight LLP in Miami, Florida. He holds a B.A. with Distinction in Quantitative Finance from the University of Virginia, where he was elected to Phi Beta Kappa, and a J.D., *magna cum laude*, from the University of Miami, where he was an editor of the *Inter-American Law Review* and was elected to the Order of the Coif.

2. Kimberley A. Piro will join the Antitrust Division of the United States Department of Justice in Washington, D.C. as an Honors Attorney in September 2009. She holds a B.A. in Economics from Washington University in St. Louis, and a J.D. from the William and Mary School of Law, where she served as the Symposium Editor of the William & Mary Environmental Law and Policy Review.

3. Israel J. Encinosa practices antitrust law and commercial litigation with Holland & Knight LLP in Miami, Florida. Mr. Encinosa formerly practiced antitrust litigation with an international firm in Chicago, Illinois. He holds a J.D. from the University of Chicago School of Law and a B.A. from Boston College.

I. OPENING REMARKS[4]

The world of antitrust has changed dramatically from the early days of Periclean Athens, when price-fixing grain dealers were put to death.[5] From its meager beginnings in the guise of the

4. The opinions expressed in this paper do not represent those of Holland & Knight LLP, the United States Department of Justice, or their affiliates. The authors would like to thank Professor Kenneth Elzinga of the University of Virginia, who has inspired five decades of antitrust attorneys and scholars. We would also like to acknowledge the late Professor Alan Swan of the University of Miami for his guiding light and the editorial board of the Inter-American Law Review for unyielding dedication.

5. Abbott B. Lipsky, Jr., *The Evolving Architecture of International Trade: The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?*, 26 FLETCHER F. WORLD AFF. 59, 60 (2002); *see also* R. Hewitt Pate, Antitrust Law in the U.S. Supreme Court, *available at* http://www.usdoj.gov/atr/public/speeches/204136.htm ("Little has changed over the last century in terms of the

Sherman Act,[6] the notion of antitrust enforcement has grown exponentially in modern times.[7] Society has become accustomed to the proliferation of high-profile antitrust matters[8] and the degree to which competition laws continue to blow the delicate winds of trade.[9] As our world evolves into one global village, the antitrust enforcement agencies and their respective governing statutes and laws have become interwoven into a blanket laden with novel means of curtailing unchecked competitive and trade practices.[10]

Not surprisingly, the United States has been at the helm of the ship, steering our marketplace toward a land and an era in which competition blossoms.[11] The antitrust laws and procedures of the United States have become the global standard to which both developed and developing nations hold themselves. At the same time, the Antitrust Division of the United States Department of Justice has remained vigilant of antitrust infractions committed abroad.[12] DOJ press releases, replacing the well known

---

wording of our antitrust statutes. The Sherman Act was enacted in 1890, and the Clayton Act in 1914, and the legislative amendments since that time have been minimal. Yet U.S. antitrust law has come a long way indeed in those years through judicial interpretations of the law.").

6. Sherman Act, 15 U.S.C. §§ 1-7 (2009).

7. Gary Minda, *Antitrust at Century's End*, 48 SMU L. REV. 1749, 1754-55 ("Antitrust law once reflected a political consensus informed by a general popular distrust of private monopoly power. The popular consensus that launched the antitrust movement and led to the enactment of the Sherman Antitrust Act was erected upon a rough political ideal of the social value of curbing the excesses of private economic power.").

8. *See generally* F. Hoffman-LaRoche, Ltd. v. Empagran, 124 S. Ct. 2359 (2004); Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

9. Some scholars have taken a "Darwinian" view of antitrust policy, arguing that competition law should be focused more on efficiency rather than a general sentiment against big business. *See generally* Walter Adams & James W. Brock, *The Antitrust Vision and Its Revisionist Critics*, 35 N.Y.L. SCH. L. REV. 939, 942 (1990) (finding that the Chicago School approach to antitrust is that, with the exception of price fixing, a firm should be left to its own interests and it will then make the best choice for consumers).

10. S. Lynn Diamond, *Empagran, the FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOK. J. INT'L L. 805, 809 (2006) ("With rampant globalization, instantaneous communication, and multinationals building products with components from all over the world and selling them far from where they are produced, it may be argued that there no longer are independent, national markets.").

11. D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters In Free Trade Agreements*, 83 CHI. KENT L. REV. 231, 240 (2008) (describing antitrust as a regulatory tool to improve societal well-being, correct market malfunctions, and evolved to a market-based organization of the economy).

12. *See generally* R. Shyam Khemani and Ana Carrasco-Martin, *The Investment*

perp-walk,[13] have bragged of foreign defendants agreeing to confinement in U.S. prisons and the payment of substantial fines to the U.S. government for conduct committed abroad, involving foreign corporations, and often bearing relatively little nexus to the United States.[14]

A consequence of transnational economic activity in a progressively more universal world is the extraterritorial application of antitrust laws and policy to business transactions that affect foreign lands.[15] Despite a healthy array of opinions by the U.S. Supreme Court, Circuit Courts of Appeals, and District Courts, the federal courts have taken to the famed words of French philosopher Rene Descartes: "Dubito, ergo cogito, ergo sum" ("I doubt, therefore I think, therefore I am."). In a peculiarly circuitous path, jurists have largely refrained from orating on a precise definition of "substantial effects."[16] The jurisprudence has fundamentally glossed over the effect required for the application of U.S. antitrust laws and the granting of jurisdiction by federal courts. Replete with recent examples, this article examines the origins of the substantial effects test from its inception in the middle of the 20th century to the curvaceous road that lies ahead. We treat enforcement between the Americas with particular emphasis, bearing in mind our unique geographic nexus.

This article proceeds as follows. Section II presents an introduction to the current state of U.S. competition law, from its early

---

Climate, Competition Policy, and Economic Development in Latin America, 83 CHI. KENT L. REV. 67 (2008).

13. *See* Lauro v. Charles, 219 F.3d 202, 203 (2d Cir. 2000) ("The "perp walk"—as it is popularly known—is a widespread police practice in New York City in which the suspected perpetrator of a crime, after being arrested, is "walked" in front of the press so that he can be photographed or filmed.").

14. *See, e.g.*, Dep't of Justice Press Release, British Hose Manufacturer Agrees to Plead Guilty and Pay $4.5 Million for Participating in Worldwide Bid-rigging Conspiracy (Dec. 1, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/239884.htm (stating that corporate defendant that manufactures marine hose in England agreed to pay $4.54 million dollar fine for conspiracy in the "off-shore extraction."); Dep't of Justice Press Release, Former British Airways Executive Agrees to Plead Guilty to Participating in Price-Fixing Conspiracy on Air Cargo Shipments (Sept. 30, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/237809.htm (stating that British national, who was former Commercial General Manager for British Airways World Cargo, agreed to serve eight months in prison in the United States for participating in meetings, conversations and communications that resulted in higher air cargo rates in the United States).

15. *See generally* Carlos Di Ponio, *Competition, Cooperation, and Conflict: An Assessment of the Extraterritorial Application and Enforcement of Competition Laws in Canada and the United States*, 13 MICH. ST. J. INT'L L. 283, 283 (2005).

16. *See* discussion *infra* Part IV.

inception to the complex web of evolution today. Section III describes the existing legal scholarship on the international enforcement of U.S. antitrust laws. Section IV traces through the early history of American antitrust jurisprudence and details the development of the substantial effects test through the 20th century. Section V provides analysis and discussion about the manner in which the substantial effects test bears upon criminal enforcement, the private plaintiff's bar, civil enforcement by the United States, and what lies beyond the breaking waves of the current sea. Section VI briefly opines as to thoughts for research. Finally, the conclusion is found in section VII.

II. THE EVOLUTION OF ANTITRUST LAW & POLICY

U.S. antitrust laws[17] have long been regarded as a forceful statement of American economic policy.[18] The notion of antitrust law and policy grew out of a weary suspicion and concern for the enormous trusts[19] that were cultivated in the 19th century by corporations seeking to conceal true business arrangements.[20] While the federal antitrust law originated in the Sherman Act of 1890,[21] many jurists and scholars view the words as merely a congressional mandate to develop a federal common law of competition.[22] The Act was left vague to vest the judiciary with substantial responsibility for the interpretation.[23] The Sherman Act prohibits

17. The Sherman Act, 15 U.S.C. §§ 1-7 (2009), the Clayton Act, 15 U.S.C. §§ 12-27 (1994), and the Robinson-Patman Antidiscrimination Act, 15 U.S.C. §§ 13-13b, 21a (2004) form the three significant U.S. antitrust laws.

18. Note, *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws*, 114 HARV. L. REV. 2122, 2124 (2001) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985) (The Supreme Court has consistently emphasized "the fundamental importance to American democratic capitalism of the regime of the antitrust laws.").

19. At the time of the passage of the Sherman Act, "trust" referred to monopolistic behavior; many monopolies created trusts to maintain their businesses. The trusts provided a means for cartel members to enforce monopolistic practices.

20. Robert L. Bradley, Jr., *On the Origins of the Sherman Antitrust Act*, 9 CATO. J. 737, 737-38 (1990) ("[T]he passage of the Sherman Act was motivated by widespread hostility toward monopoly-considered to be detrimental to the interests of consumers and small business and also antithetical to democratic institutions."), *available at* http://www.cato.org/pubs/journal/cj9n3/cj9n3-13.pdf.

21. Chapter 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2009)).

22. Rudolph J. Peritz, *Frontiers of Legal Thought I: A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 269 (1990).

23. Douglas H. Ginsburg, *The Antitrust Paradox: A Policy at War with Itself: Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J.L. & PUB. POL'Y 449, 449 (2008).

business arrangements in restraint of trade (Section 1) and attempts to monopolize (Section 2).[24] Despite the statute's clear wording prohibiting "every *contract, combination . . . or conspiracy* in restraint of trade,"[25] thousands of cases have progressed through the evolving jurisprudence of the Sherman Act to produce the contemporary understanding that applies to unreasonable restraints. Numerous scholars have pointed to the promotion of efficient allocation of economic resources set by the Sherman Act.[26]

Nearly a quarter century after the passage of the Sherman Act, the U.S. Congress responded to the growing fears of monopolies and anticompetitive practices by passing the Clayton Act.[27] This Act was driven in large part by the Sherman Act's deficiencies in providing individuals with causes of action for antitrust infractions.[28] The Clayton Act was designed to supplement the Sherman Act and provides for the advancement of competition by addressing the following four areas: (1) outlawing the use of price discrimination between different purchasers where the pricing significantly weakens competition or tends to create a monopoly;[29] (2) prohibiting "exclusive dealings" by which a sale is made contingent upon a buyer agreeing not to work with a competitor, and the "exclusive dealing" results in significantly weakened competition or a "tying arrangement" in which the sale is made contingent upon the buyer agreeing to purchase a second product, and where the result substantially harms competition;[30] (3) proscribing mergers and acquisitions that result in substantially lessened competition, and (4) forbidding one person from being a director of two or

24. Sherman Act of 1890, Chapter 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2009); *see also* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.").

25. The Sherman Act, 15 U.S.C. § 1.

26. Note, *supra* note 18, at 2125 ("Not only do the antitrust laws purportedly yield the most efficient allocation of economic resources, producing both the lowest possible prices and the highest quality for the greatest number, they simultaneously provide an environment conducive to the preservation of our democratic, political, and social institutions." (citing Terry Calvani, *What is the Objective of Antitrust?*, *in* ECONOMIC ANALYSIS AND ANTITRUST LAW 7, 8 n.7, 12-13 (Terry Calvani & John Siegfried eds., 2d ed. 1988) and quoting *Northern Pacific Railway*, 356 U.S. at 4 (internal quotations omitted))).

27. Clayton Antitrust Act of 1914, ch. 323, 38 Stat. 730 (1914).

28. *See* Jaafar A. Riazi, *Finding Subject Matter Jurisdiction over Antitrust Claims of Extraterritorial Origin: Whether the Seventh Circuit's Approach Properly Balances Policies of International Comity and Deterrence*, 54 DEPAUL L. REV. 1277, 1280 (2005).

29. Clayton Act, Section 2, codified at 15 U.S.C. § 13.

30. Clayton Act, Section 3, codified at 15 U.S.C. § 14.

more competing corporations.[31] The Act provides for enforcement by the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice, as well as by private parties. The Clayton Act also sets forth two of the most effective means for curtailing anticompetitive behavior: injunctive relief and treble damages plus costs and attorney's fees.[32]

The U.S. Department of Justice (DOJ), by means of the Antitrust Division, has exclusive jurisdiction over enforcement of the Sherman Act.[33] The DOJ shares enforcement of the Clayton Act with the Federal Trade Commission (FTC).[34] In a similar vein to the changing landscape of the enactment of federal legislation, the Antitrust Division has changed its position on federal enforcement through the years.

By the 1970s, the DOJ was warmed by the fire sparked from a growing concern over industry in the U.S. that international enforcement of domestic antitrust law could have a stippling effect on foreign trade.[35] The 1977 Antitrust Enforcement Guidelines for International Operations ("1977 Guidelines") acted as a conductor at an orchestra, setting the tone for the Antitrust Division's enforcement regime.[36] The 1977 Guidelines were meant to "provide a working statement of government enforcement policy" while ensuring that U.S. antitrust laws should only be applied extraterritorially where there is a substantial and foreseeable effect on domestic commerce.[37] The 1977 Guidelines were written with two main purposes in mind: "to protect the American consuming public by assuring it the benefit of competitive products and ideas produced by foreign competitors as well as domestic

---

31. Clayton Act, Section 7, codified at 15 U.S.C. § 18.

32. William J. Tuttle, *The Return of Timberlane: The Fifth Circuit Signals a Return to Restrictive Notions of Extraterritorial Antitrust*, 36 VAND. J. TRANSNAT'L L. 319, 328 (2003).

33. Jeffrey N. Neuman, *Through a Glass Darkly: The Case Against Pilkington plc. Under the New U.S. Department of Justice International Enforcement Policy*, 16 NW. J. INT'L L. & BUS. 284, 290 (1995) (citing Stephen J. Squeri, *Government Investigation and Enforcement: Antitrust Division*, 847 PLI/CORP. 11, 16 (June-July 1994)).

34. *Id.*

35. *See generally* Tuttle, *supra* note 32, at 338 (citing *United States Dep't of Justice Antitrust Guide for Int'l Operations*, *in* 55 ANTITRUST & TRADE REG. REP. (BNA) No. 799 (Feb. 1, 1977)).

36. David A. Harris, *United States v. Pilkington plc and Pilkington Holdings, Inc.: The Expansion of International Antitrust Enforcement by the United States Justice Department*, 20 N.C.J. INT'L L. & COM. REG. 415, 421-22 n.63 (1995) (citing *Antitrust Division, U.S. Dep't of Justice, Antitrust Guide for Int'l Operations*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1 (Feb. 1, 1977)).

37. Tuttle, *supra* note 32, at 338.

competitors and to protect American export and investment opportunities from restriction imposed by a bigger or less principled competitor" abroad.[38]

Despite the broad language of the Sherman act, the legislative history and words of the statute are devoid of application of the Act to foreign commerce, suggesting that legislators intended the Act to apply exclusively to domestic trade.[39] With the growth of foreign trade at the end of the 20th century, the Congress responded by passing the Foreign Trade and Antitrust Improvements Act of 1982 (FTAIA).[40] The FTAIA covers trade or commerce with foreign nations where the trade or commerce has "a direct, substantial, and reasonably foreseeable effect" on commerce in the United States.[41] The intent was clearly to limit enforcement of U.S. antitrust law abroad where there was no clear effect on consumers in the United States.[42] Much as with the broad construction of the Sherman Act, the FTAIA itself was void of description of what constitutes a "direct, substantial, and foreseeable" effect.[43] The result has been a significant volume of cases leaving more questions unanswered about the requirements to

38. Lori B. Morgan & Helaine S. Rosenbaum, *Recent Development: U.S. Dep't of Justice Antitrust Enforcement Policy*, 34 HARV. INT'L L.J. 192, 194 (1993).

39. 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, 591 (2005); *see also* Note, *supra* note 18, at 2127 (concluding that Congress intended the Sherman Act's reference to "foreign nations" to mean foreign restraints on U.S. commerce only to the extent that such restraints affect commerce in the United States.).

40. Pub. L. No. 97-290 § 402, 96 Stat. 1233, 1246 (1982) (codified at various sections of 15 U.S.C. sections 6a, 45a (2009)).

41. *Id.*; *see also* F. Hoffmann-La Roche, Ltd v. Empagran S.A., 542 U.S. 155, 161 (2004) ("The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets. It does so by removing from the Sherman Act's reach, (1) export activities and (2) other commercial activities taking place abroad, unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States.") (internal citations omitted)).

42. Tuttle, *supra* note 32, at 345; *see, e.g.*, Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001) (holding that FTAIA does not apply where a Norwegian oil corporation that conducts business solely in the North Sea brought a claim under U.S. antitrust law against several foreign and domestic defendants that conspired to fix bids and allocate customers, territories, and projects because the resulting inflated prices for heavy-lift barge services in the North Sea involved injury that occurred abroad and resulted from effects in a non-domestic market).

43. *See id.*

bring a claim as relating to "a direct, substantial, and reasonably foreseeable effect" on commerce in the United States.[44]

Faced with a growing appetite for *laissez faire* economics,[45] the Antitrust Division formally adopted the 1988 Antitrust Enforcement Guidelines for International Operations ("1988 Guidelines").[46] The guidelines proposed a more "relaxed" approach to enforcing U.S. antitrust law abroad.[47] The overarching goal of the 1988 Guidelines was to "yield the best allocation of resources, lowest prices, and the highest quality products and services for consumers."[48] The Guidelines appeared to restrict the DOJ's focus to adverse effects on competition that would harm U.S. consumers through a reduction in output or increase in prices.[49]

The tenure of the 1988 guidelines was short-lived, as the Antitrust Division issued a press release in 1992 that effectively returned to the 1977 Guidelines.[50] The change essentially rendered the DOJ to the heyday of applying enforcement of U.S. antitrust laws to foreign commercial conduct that adversely affects

---

44. *See, e.g.,* Eurim-Pharm GmbH v. Pfizer, Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984) (holding foreign price-fixing of antibiotics is not covered by United States antitrust law where scheme has no demonstrable direct, substantial, reasonably foreseeable, anticompetitive domestic effect); *c.f.* Inquivosa SA v. Ajinomoto Co. (*In re* Monosodium Glutamate Antitrust Litig.) 477 F.3d 535 (D. Minn. 2007) (for claims relating to the "gives rise to" language of the Foreign Trade Antitrust Improvements Act of 1982, foreign corporate buyers are required to show that domestic effects of anticompetitive conduct were direct or proximate under the plaintiff's Sherman Act claim); United States v. LSL Biotechnologies, 379 F.3d 672 (9th Cir. 2004) (holding that district court did not have subject matter jurisdiction under FTAIA in claim brought by United States for foreign restraint of trade arising under contract's restrictive clause that banned foreign company from selling long shelf-like tomato seeds in North America where the direct effects on domestic commerce were speculative).

45. Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U.L. REV. 936, 958 (1987) (Under the rising tide that lifted the boat of 1980s economic thought, the Chicago School taught that "[i]n antitrust, the most minimal law, given the existence of the statutes, is law that proscribes only clear cartel agreements and mergers that would create a monopoly in a market that included all perceptible potential competition. Let us review the characteristics that underlie this minimalist approach to antitrust.").

46. Tuttle, *supra* note 32, at 347.

47. Dean Brockbank, *The 1955 International Antitrust Guidelines: The Reach of U.S. Antitrust Law Continues to Expand*, 2 J. INT'L LEGAL STUD. 1, 21 (1996).

48. Tuttle, *supra* note 32, at 347 (quoting *United States Dep't of Justice 1988 Antitrust Enforcement Guidelines for Int'l Operations, in* 55 ANTITRUST & TRADE REG. REP. (BNA) No. 1391 (Nov. 17, 1988)).

49. *Id.*

50. Morgan & Rosenbaum, *supra* note 38, at 192.

U.S. exports where the conduct would have been prosecuted had it occurred within the United States.[51] The changes reflected a rising tide meant to protect U.S. exporters and extended the tight reach of the 1988 Guidelines, whose focus was mainly related to "adverse effects on competition that would harm U.S. consumers by reducing output or raising prices."[52]

To aid with international enforcement efforts, Congress passed the International Antitrust Enforcement Assistance Act in 1994 (IAEAA).[53] The IAEAA was designed to enhance obtaining foreign-located antitrust evidence by authorizing the DOJ and FTC to share antitrust evidence with foreign competition law enforcement agencies on a reciprocal basis.[54] The IAEAA also authorized the U.S. enforcement agencies to assist their foreign counterparts with prosecutions abroad;[55] however, this coordination was only allowed where there was an agreement in place in which the foreign government agreed to help the United States in domestic prosecutions by gathering evidence in that foreign country.[56] There are currently cooperation agreements in place between the United States and the following countries throughout the Americas: Brazil,[57] Canada,[58] and Mexico.[59] The agreements all proclaim: "the purpose of this Agreement is to promote cooperation, including both enforcement and technical cooperation, between the competition authorities of the Parties, and to ensure

51. *Id.*

52. *Id.*

53. 15 U.S.C. §§ 6201-12 (2009).

54. International Antitrust Enforcement Assistance Act of 1994, 103 P.L. 438 (1994).

55. 15 U.S.C. § 6202(a).

56. *Id.* at 6207.

57. United States of America, *Agreement between the Government of the United States of America and the Government of the Federal Republic of Brazil regarding Cooperation between their Competition Authorities in the Enforcement of their Competition Laws*, Oct. 26, 1999, available at: http://www.usdoj.gov/atr/public/international/3776.htm.

58. United States of America, *Agreement between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws,* August 1995, *available at* http://www.usdoj.gov/atr/public/international/docs/0316.htm; United States of America, *Agreement between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of their Competition Laws*, October, 2004, *available at* http://www.usdoj.gov/atr/public/international/docs/205732.htm.

59. United States of America, *Agreement between the Government of the United States of America and the Government of the United Mexican States regarding the Application of their Competition Laws*, July 7, 2000, *available at* http://www.usdoj.gov/atr/icpac/5145.htm.

that the Parties give careful consideration to each other's important interests in the application of their competition laws."[60]

Despite the ambitious hopes for the IAEAA, foreign nations have not been in thunderous applause. For example, both Japan and the European Union expressed strong skepticism in helping the United States prosecute foreign companies (the effect of which may disadvantage companies operating in Japan and the EU), as well as concerns that such foreign cooperation might render the DOJ and FTC with unchecked power.[61] With the foreign outcry against the IAEAA and attempts thereafter to harmonize international enforcement efforts, the DOJ and FTC began to herald an international code of enforcement agency as a "utopian goal and a matter for the distant future at best."[62]

In 1995, the Clinton administration issued a revised version of the Antitrust Enforcement Guidelines for International Operations ("1995 Guidelines").[63] With apparent backing from the federal courts,[64] the DOJ issued a comparatively more pro-enforcement position with regard to extraterritorial antitrust violations.[65] The guidelines included an emphasis on enforcing the Sherman Act internationally.[66] The clearly-defined goals provided that government agencies would enforce antitrust laws to the "fullest extent," enforcement would not discriminate on nationality grounds or the nexus of the alleged violation, and the agencies would endeavor to observe international comity[67] to the greatest

60. *See, e.g., id.*

61. William P. Connolly, *Lessons to be Learned: The Conflict in International Antitrust Law Contrasted with Progress in International Financial Law*, 6 FORDHAM J. CORP. & FIN. L. 207, 228-30 (2001).

62. Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 380 (1997) (citing *U.S. Trade Official Cannot Foresee Prospect of International Antitrust Code*, 66 ANTITRUST & TRADE REG. REP. (BNA) 548 (May 12, 1994)).

63. United States Dep't of Justice and the Federal Trade Commission, *Antitrust Enforcement Guidelines for Int'l Operations, reprinted in* 68 ANTITRUST & TRADE REG. REP. (BNA) No. 1707 (Special Supp.) (Apr. 6, 1995).

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

65. *See, e.g.*, James S. McNeil, *Extraterritorial Antitrust Jurisdiction: Continuing the Confusion in Policy, Law, and Jurisdiction*, 28 CAL. W. INT'L L.J. 425, 449-50 (1998).

66. *See supra* note 63, at 1.

67. Generally, U.S. courts have held that they will not abstain from enforcing U.S. antitrust laws due to international comity. As a result of antitrust jurisprudence discussed below, *Hartford Fire Ins. Co.* has left us to answer the resounding question of how far the extraterritorial reach of U.S. antitrust laws extend? *See* Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275, 287 n.46 (2002).

extent possible.[68]

Many commentators have opined on the manner in which the federal government's policy has shifted over the years toward a stance that favors extraterritorial enforcement against foreign business conduct that adversely harms both U.S. consumers and exporters.[69] As discussed in the following two sections reviewing existing legal scholarship and federal court cases, there has been substantial and an almost constant ebb of jurisprudence related to extraterritorial enforcement of U.S. antitrust law.[70]

III. A Survey of Existing Scholarship

Many scholars have explored the manner in which the changing array of DOJ Guidelines, federal statutes, and the ensuing interpretations by courts have affected competition law in the U.S. and abroad.[71] Most agree that "[a]side from a few recent efforts at picking low-hanging fruit, attempts to harmonize national antitrust laws have failed, leaving convergence largely in the independent discretion of national authorities."[72] There is also general consensus that private antitrust actions have two main goals: to deter future conduct and to provide redress to injured parties.[73] The question hinges on what level of U.S. law or international agreement is required to shape an informed understanding of the relationship between private remedies and deterrence with respect to foreign conduct that affects domestic markets.[74]

Most commentators have interpreted the mix of cases involving domestic enforcement of international antitrust action as taking either a narrow or broad view of the FTAIA.[75] The former proscribes an open interpretation of the FTAIA, namely that the

68. McNeil, *supra* note 65, at 450 (citing Diane P. Wood, *The 1995 Antitrust Enforcement Guidelines for International Operations: An Introduction, Address Before the American Bar Association Antitrust Section* (Apr. 5, 1995), 1995 WL 150745 (D.O.J.)).

69. *See* Marino Lao, *Jurisdictional Reach of the U.S. Antitrust Laws: Yokosuka and Yokota, and "Footnote 159" Scenarios*, 46 Rutgers L. Rev. 821, 871 (1994).

70. *See* McNeil, *supra* note 65, at 451 ("[T]he evolution of DOJ enforcement policy from the 1977 Guidelines' effects on commerce, to the 1988 Guidelines' effects on consumers, to the expansive 1995 Guidelines' *Hartford Fire* conflict limitation has contributed to international mistrust of United States antitrust enforcement.").

71. *See generally* Note, *supra* note 18, at 2122.

72. Edward T. Swaine, *The Local Law of Global Antitrust*, 43 Wm. and Mary L. Rev. 627, 640 (2001) (internal citations omitted).

73. Mehra, *supra* note 67, at 280.

74. *Id.* at 322.

75. Salil K. Mehra, *Foreign Plaintiffs in U.S. Courts: Ends and Means*, 16 Loy. Consumer L. Rev. 347, 351-55 (2004).

"effect" on U.S. commerce does not need to form the basis for a plaintiff's injury.[76] The narrow view, on the other hand, mandates that the plaintiff's claim arise out of an injury related to domestic commerce.[77]

The following section sets forth the path by which U.S. antitrust laws have evolved through the modern century.

IV. THE EVOLUTION OF THE SUBSTANTIAL EFFECTS TEST

A. *The Evolution of the "Effects" Standard*

Over the past one hundred years, there has been a significant shift in the federal government's treatment of domestic antitrust claims arising from acts committed overseas.[78] The Supreme Court expressed its most recent stance on the extraterritorial application of antitrust laws in 1993.[79] In *Hartford Fire Insurance*, the Court held that the Sherman Act was appropriately applied to extraterritorial conduct because the defendants intended for their actions to have a substantial effect in the

---

76. *See, e.g.*, Kruman v. Christie's Int'l PLC, 284 F.3d 384, 399-400 (2d Cir. 2002) (Where a conspiracy to rig auctions for art, antiques, and collectibles had effects on U.S. commerce, buyers and sellers injured by the foreign effects of that conspiracy could maintain a Sherman Act claim.); Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338, 351 (D.C. Cir. 2003) (where the anticompetitive conduct satisfied the requisite harm on domestic commerce under the FTAIA, a foreign plaintiff may bring suit solely for alleged injury sustained by that conduct's effect on foreign commerce. The anticompetitive conduct itself must have violated the Sherman Act and the conduct's harmful effect on the United States' commerce must have given rise to a claim by someone, even if not the foreign plaintiff who was before the court.).

77. *See, e.g.*, Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001) (holding that FTAIA does not apply where a Norwegian oil corporation that conducts business solely in the North Sea brought a claim under U.S. antitrust law against several foreign and domestic defendants that conspired to fix bids and allocate customers, territories, and projects, because the resulting inflated prices for heavy-lift barge services in the North Sea involved injury that occurred abroad and resulted from effects in a non-domestic market).

78. Donald J. Smythe, *The Supreme Court and the Trusts: Antitrust and the Foundations of Modern American Business Regulation from Knight to Swift*, 39 U.C. DAVIS L. REV. 85, 96 (2005) ("[T]he Supreme Court's early antitrust decisions were a watershed in the history of American constitutional law that in many ways laid the groundwork for the expansive role the federal government would later take in regulating the social and economic life of the nation."); Carol B. Swanson, *Antitrust Excitement in the New Millennium: Microsoft, Mergers, and More*, 54 OKLA. L. REV. 285, 286 ("Antitrust law, the protector of frogs and other competitors in the American pond, has long been a storied feature of our culture. Since its inception in 1890, this characteristically American institution has undergone a considerable evolution, ebbing and flowing through banner years of exuberant enforcement and milder times of reticent retreat." (internal citations and quotations omitted)).

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

United States, and such an effect resulted.[80] Furthermore, the Antitrust Division has prosecuted many foreign corporations and individuals for engaging in foreign conduct that violates the Sherman and Clayton Acts;[81] the Division has indicated that it is "committed to rooting out corruption that harms American consumers and the competitive process, whether the criminal conduct takes place here in the United States or overseas."[82]

It is unlikely that such international enforcement by the Justice Department would have been permitted by the federal courts in the early twentieth century.[83] In 1909, the Supreme Court addressed whether an American plaintiff could recover damages against an American defendant for harms suffered abroad as a result of the defendant's conduct on foreign soil.[84] The defendant attempted to control the banana trade in a portion of Central America by interfering with the plaintiff's banana plantation in Panama and the connecting railway.[85] To resolve the issue, the Court first stated "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[86] The Court further found it highly unlikely that Congress intended for the Sherman Act to be applied to criminal acts committed in Panama or Costa Rica.[87] In this particular instance, the Court held that the defendant's conduct in Central America clearly did not fall within the scope of the Sherman Act, and ultimately affirmed judgment for the defendant, dismissing the plaintiff's complaint.[88]

---

80. *See id.* at 796.

81. *See, e.g.*, Press Release, Dep't of Justice Antitrust Division, Three Foreign Executives Indicted for Their Roles in LCD Price-Fixing Conspiracy (Feb. 3, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/242162.htm [hereinafter DOJ Antitrust Division, Three Foreign Executives Indicted].

82. Press Release, Dep't of Justice Antitrust Division, Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine Hose and Related Products (Dec. 10, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/240307.htm [hereinafter DOJ Antitrust Division, Japanese Executive Pleads Guilty].

83. This is caused in large part by a progression toward a global economy. Joel Klein, former Assistant Attorney General of Antitrust opined, "[T]he economy is shifting. There's a paradigmatic shift from fundamental, domestic economies to global economies, and no matter what people or politicians say, the truth of the matter is that the economy will become increasingly globalized." Joel I. Klein, *Antitrust Enforcement in the Twenty-First Century*, 32 CONN. L. REV. 1065, 1066 (2000).

84. *See generally* American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

85. *See id.* at 354-55.

86. *Id.* at 356.

87. *See id.* at 357.

88. *See id.* at 357, 359; William S. Dodge, *Extraterritoriality and Conflict-of-laws*

Fewer than forty years later, the Court of Appeals for the Second Circuit (designated as a court of last resort)[89] recognized an exception to the rule from *American Banana*. In *United States v. Aluminum Co. of America* ("*Alcoa*"), the Second Circuit acknowledged that foreign conduct that produces consequences within the borders of the United States may be within the federal government's reach.[90] Among myriad issues was whether Alcoa and Aluminum Limited had engaged in an unlawful conspiracy, based in Europe, which restrained competition in the aluminum market in various countries.[91] Judge Learned Hand, writing for the court, established the "effects test" to determine whether the Sherman Act governs anticompetitive conduct that takes place outside of the United States.[92] Under *Alcoa*, for the Sherman Act to apply to a defendant who participated in an anticompetitive extraterritorial agreement, the defendant must have (1) intended for the agreement to have an effect on imports into the United States, and; (2) the agreement must have had such an effect.[93]

While some federal courts applied *Alcoa's* "effects test" to determine the applicability of the Sherman Act to foreign conduct,[94] others chose to modify the rule.[95] As a result, the precise

---

Theory: An Argument for Judicial Unilateralism, 39 HARV. INT'L L.J. 101, 102 (noting that from a statutory interpretation vantage, the case purports that when a statute is silent, it should be interpreted as applying only to conduct that falls within the territory of the United States).

89. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 421 (2d Cir. 1945) (indicating that the Supreme Court gave the Second Circuit authority to act as the court of last resort for this case).

90. *See id.* at 443-44.

91. *See id.* at 422, 441-43.

92. *See id.* at 443-44.

93. *See id.* at 444. There has been significant debate over the notion of an intended and foreseeable effect. *C.f.* Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1313 n.15 (comparing *Aluminum Co. of Am.* (holding that effect must be "intended" and that it must occur in fact), *with* ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INT'L OPERATIONS 6 (1977), *reprinted in* APPENDIX TO PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 173, 184 (J. Griffin ed. 1979) (stressing that foreseeability of effect is the decisive factor)).

94. *See, e.g.*, *In re* Uranium Antitrust Litigation, 617 F.2d 1248, 1253-54 (7th Cir. 1980) (applying the "effects test" as developed in *Alcoa* in an action against foreign uranium producers).

95. *See, e.g.*, Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 613 (9th Cir. 1976) (adding the element of international comity to the "effects test," thus creating a tripartite analysis); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1187 (E.D. Pa. 1980) (describing the many variations of the effects test across jurisdictions).

standard became blurred.[96] In 1982, however, Congress passed the Foreign Trade Antitrust Improvements Act (FTAIA) to address "conduct involving trade or commerce with foreign nations."[97] The FTAIA makes clear that the Sherman Act does not apply to foreign trade or commerce unless certain conditions are met; specifically, the Act applies when:

> (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 this Act, other than this section.[98]

Despite the passage of the FTAIA, the Supreme Court applied a common law substantial effects rule to establish that the Sherman Act applies to the extraterritorial conduct at issue in *Hartford Fire Insurance*.[99] The Court appeared reluctant to apply the FTAIA because it was both "unclear how it might apply to the conduct alleged" and "unclear . . . whether the Act's 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it."[100] Because the Court believed that the facts at issue would have satisfied the FTAIA standard as well, the Court chose not to explicitly address these uncertainties.[101]

Thus, the Supreme Court applied a substantial effects test in *Hartford Fire Insurance*, much like the "effects test" from *Alcoa*, despite the existence of a statute that appeared to be on point. This decision, of course, decreased the importance of the FTAIA. According to the First Circuit, "[t]he FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it. We emulate this example and do not rest our ultimate conclusion

---

96. *See* United States v. LSL Biotechnologies, 379 F.3d 672, 677-78 (9th Cir. 2004).

97. Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2000).

98. *Id.*

99. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993). Although the Court does not use the FTAIA to justify application of the Sherman Act to the defendant's conduct, it does look to the FTAIA in its discussion of international comity. *See id.* at 798.

100. *Id.* at 796 n.23.

101. *See id.*

about Section One's scope upon the FTAIA."[102] The opinion from the First Circuit is particularly important, as it extended the rule from *Hartford Fire Insurance*, which dealt with a civil issue, to the criminal realm.[103]

Many courts, however, began to consistently apply the FTAIA to determine whether extraterritorial conduct could be reached by the Sherman Act.[104] In 2004, the Ninth Circuit recognized that although some courts did not initially apply the FTAIA to Sherman Act cases, the statute is becoming much more widely used.[105] Previously, there had been a great deal of debate over whether the statute "established a new jurisdictional standard or merely codified the standard applied in Alcoa and its progeny."[106] The Ninth Circuit concluded that, because the statutory language was different from the common law effects test, the FTAIA was in fact a new jurisdictional standard.[107] Furthermore, the Supreme Court applied the FTAIA to determine Sherman Act jurisdiction in 2004.[108]

B. The Elements of the Foreign Trade Antitrust Improvements Act

Currently, the FTAIA appears to be the relevant standard for determining whether extraterritorial anticompetitive conduct comes under jurisdiction of the Sherman Act.[109] The FTAIA begins with the proposition that the Sherman Act does not "apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations."[110] It then creates an exception to this general rule, laying out the conditions that must

102. United States v. Nippon Paper Industries Co., 109 F.3d 1, 5 (1st Cir. 1997) (citation omitted).

103. *See id.* at 9.

104. *See, e.g.*, United States v. LSL Biotechnologies, 379 F.3d 672, 679 (9th Cir. 2004) (stating that the court "must adhere to the FTAIA in determining whether a district court has subject matter jurisdiction over an alleged foreign restraint of trade"); United Phosphorus, Ltd. v. Angus Chemical Co., 131 F. Supp. 2d 1003, 1007-09 (N.D. Ill. 2001) (indicating the FTAIA as the relevant statute for determining whether extraterritorial conduct falls under U.S. jurisdiction for a case involving foreign plaintiffs and defendants); Boyd v. AWB Limited, 544 F. Supp. 2d 236, 242-43 (S.D.N.Y. 2008) (applying FTAIA to determine whether U.S. farmers could bring suit against an Australian wheat producer for monopolizing the sale of wheat to Iraq).

105. *See LSL Biotechnologies*, 379 F.3d at 678.

106. *Id.*

107. *See id.*

108. *See* F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 158-59. (2004).

109. *See id.*

110. Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2000).

be met for the courts to apply the Sherman Act to extraterritorial conduct.[111] This is known as the "domestic-injury exception" to the FTAIA.[112] Many scholars have noted that this exception has been instrumental in providing "self-help" to U.S. consumers injured by foreign business conduct.[113]

Previously, under the common law standard used by the Supreme Court in *Hartford Fire Insurance*, Sherman Act jurisdiction was predicated on a showing that: (1) the defendant intended for its conduct to have a substantial effect in the United States, and (2) such an effect resulted.[114] To satisfy the domestic-injury exception of the Foreign Trade Antitrust Improvements Act, however, the plaintiff must demonstrate that (1) the defendant's conduct produced a direct, substantial and reasonably foreseeable effect in the United States; and (2) that such effect gives rise to a claim under the Sherman Act.[115] While the focus of this article deals with judicial interpretation of "substantial effects," it is appropriate to briefly discuss the other aspects of the standard.[116]

C. *Direct Effect*

In *LSL Biotechnologies*, the Ninth Circuit borrowed its reasoning from the Supreme Court to develop a definition for "direct."[117] This case involved a joint venture contract between LSL Biotechnologies, an American corporation, and Hazera, an Israeli corporation. Together, the two companies sought to develop tomatoes with a longer shelf life through genetic alteration.[118] The contract contained a Restrictive Clause that would have prevented Hazera from selling such modified tomato seeds to Mexico.[119] The government asserted that this agreement would: (1) decrease the likelihood that Hazera would develop such tomato

111. *See id.*

112. *See F. Hoffmann-La Roche Ltd.*, 542 U.S. at 159.

113. *See* D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 46 (2007).

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

115. 15 U.S.C. § 6a.

116. It is also important to note that the notion of international comity is not explicitly recognized in either standard. Once a greater consideration, the significance of international comity has faded over time. *See Hartford*, 509 U.S. at 798 (resolving the international comity issue, declaring that the "only substantial question in this litigation is whether 'there is in fact a true conflict between domestic and foreign law'").

117. *See* United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004).

118. *See id.* at 674.

119. *See id.* at 677.

seeds; and (2) allow LSL Biotechnologies to charge higher prices for their tomato seeds.[120]

Although the Supreme Court had not defined a "direct effect" in the context of the FTAIA, it had done so for the Foreign Sovereign Immunities Act, which contained similar language.[121] Reinforcing that interpretation, the Ninth Circuit found that "an effect is "direct" if it follows as an immediate consequence of the defendant's activity."[122] The Ninth Circuit concluded that the Restrictive Clause at issue in *LSL Biotechnologies* did not produce a direct effect in the United States, finding that "any innovation that Hazera would bring to American consumers is speculative at best and doubtful at worst . . . . Hazera's delivery of long shelf-life seeds to North American growers depends on Hazera first creating such seeds, a development that is certainly not guaranteed."[123] Thus, given the uncertainty associated with the development of a new product, the court found that the defendants' agreement did not create an "immediate consequence" in the United States. The Ninth Circuit did, however, leave the door open, as it acknowledged that there are circumstances where excluding a "potential foreign competitor" may impose a direct effect in the United States.[124]

Moreover, the Ninth Circuit explicitly recognized that while the FTAIA requires that the defendant's conduct produce a "direct effect," the *Alcoa* standard lacked a "direct effect" element.[125] This clearly marks a departure from the common law standard, which requires only a substantial effect to be produced in the United States, and stresses the importance of direct effects analysis. In the progeny following *LSL Biotechnologies*, various federal district courts have adopted the direct effects analysis as presented by the Ninth Circuit.[126]

D. Reasonably Foreseeable Effect

Courts have been less explicit regarding the interpretation of "reasonably foreseeable" in the context of the FTAIA. Because the

120. *See id.* at 680-81.
121. *See id.* at 680.
122. *Id.*
123. *Id.* at 681.
124. *See id.*
125. *See id.* at 679.
126. *See, e.g.*, *In re* Intel Corp. Microprocessor Antitrust Litig. v. Intel Corp., 452 F. Supp. 2d 555, 560 (D. Del. 2006); CSR Ltd. v. Cigna Corp., 405 F. Supp. 2d 526, 545 (D.N.J. 2005); Boyd v. AWB Limited, 544 F. Supp. 2d 236, 244 (S.D.N.Y. 2008).

common law standard accounted for an element of intent, the "reasonably foreseeable" element has been viewed as connected to the former intent requirement.[127] It has also been argued that in drafting the FTAIA, Congress wanted "to make explicit the requirement that the effect be 'reasonably foreseeable' rather than based on 'intent.'"[128] As a practical matter, it appears that foreign conduct that produces a substantial effect in the United States is likely to satisfy the reasonable foreseeability requirement as well.[129]

E. Gives Rise to a Claim under the Sherman Act

Once it has been established that the defendant's foreign conduct produced a direct, substantial, and reasonably foreseeable effect in the United States, the plaintiff must show that this effect gave rise to a claim under the Sherman Act.[130] The Supreme Court recently addressed this issue in the 2004 *Empagran* decision. In *Empagran*, foreign and domestic vitamin purchasers claimed that they were harmed by a global price-fixing conspiracy created by foreign and domestic vitamin manufacturers.[131] The Court found that although the price-fixing conduct produced the requisite effects, the effects experienced by consumers in the United States were independent from the effects experienced by the plaintiffs abroad.[132] The Court held that the FTAIA exception for jurisdiction "does not apply where the plaintiff's claim rests solely on the independent foreign harm."[133] As a result, the FTAIA exception did not apply because the effects in the United States did not give rise to the Sherman Act claim asserted by the foreign plaintiffs.

In the future, plaintiffs may argue that antitrust injury experienced abroad was connected to the domestic effects pro-

127. *See* McBee v. Delica Co., 417 F.3d 107, 120 n.9 (1st Cir. 2005).

128. *LSL Biotechnologies*, 379 F.3d at 690 (Aldisert, J., dissenting) (noting also that foreseeability was not included in the initial draft of the FTAIA and was probably a point of debate in Congress). *See id.* at 691.

129. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 n.23 (1993). The Court found that the conduct at issue produced a substantial effect in the United States and was subject to Sherman Act jurisdiction under the common law. Without engaging in any explicit analysis, the Court also concluded that the conduct at issue would satisfy the direct, substantial and reasonably foreseeable requirement of the FTAIA. *See id.*

130. *See* Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2000).

131. *See* F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 159 (2004).

132. *See id.* at 163-64.

133. *Id.* at 159.

duced by the foreign conduct.[134] In *Empagran*, the Court did not address this argument, as it was not addressed by the lower courts.[135] It is unclear whether the FTAIA exception would be applicable to a situation where foreign conduct produced a direct, substantial and reasonably foreseeable effect in the United States, and such effect in turn created foreign harm.

On remand, the District of Columbia Circuit found that the domestic injury exception requires a direct or proximate causal relationship between the domestic effect and the foreign injury, not merely a "but for" relationship.[136] The Eighth and Ninth Circuits have also adopted the proximate cause test for applying the second prong of the domestic-injury exception of the FTAIA.[137] Thus, a plaintiff would need to establish a direct causal relationship between the direct, substantial and reasonably foreseeable domestic effect and the antitrust injury.

F. Judicial Application of the Substantial Effects Standard

The domestic-injury exception of the FTAIA creates a two-prong test for determining when the Sherman Act may be applied to conduct involving commerce with foreign nations.[138] Whereas many elements of this standard were not explicitly applied before the enactment of the FTAIA, substantiality of effect has long been a consideration by the courts.[139] The following examples demonstrate judicial application of the substantial effects standard both at common law and as part of the domestic-injury exception of the FTAIA.

The first two cases, *Hartford Fire Insurance* and *Nippon Paper*, demonstrate the ability of United States law to reach foreign defendants for engaging in extraterritorial conduct having "substantial effects" in the United States. The cases following those involve more detailed analyses of what constitutes "substantial effects."

---

134. *See* CSR Ltd. v. Cigna Corp., 405 F. Supp. 2d 526, 552 n.17 (D.N.J. 2005).

135. *See id.*

136. Empagran S.A. v. F. Hoffmann-Laroche, 417 F.3d 1267, 1270-71 (D.C. Cir. 2005).

137. *See* Inquivosa SA v. Ajinomoto Co. (*In re* Monosodium Glutamate Antitrust Litig.), 477 F.3d 535, 538-39 (8th Cir. 2007); Centerprise Int'l Inc. v. Micron Technology, Inc. (*In re* Dynamic Random Access Memory Antitrust Litig.), 546 F.3d 981, 988 (9th Cir. 2008).

138. *See* Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2000).

139. *See Hartford Fire Ins. Co.* 509 U.S. at 796.

i. Hartford Fire Ins. Co. v. California

In this case, a group of plaintiffs alleged that the defendants "conspired in violation of § 1 of the Sherman Act to restrict the terms of coverage of commercial general liability (CGL) insurance available in the United States."[140] Among the defendants was a group of London-based reinsurers who had allegedly conspired to limit the availability of CGL insurance in the United States, particularly in the State of California.[141] The district court dismissed the claims against the London-based defendants, citing reasons of international comity.[142] The Court of Appeals reversed this dismissal, finding that "the principle of international comity was no bar to exercising Sherman Act jurisdiction."[143] The Supreme Court found that Sherman Act was appropriately applied to the London defendants, indicating that extraterritorial conduct that is both intended to create a substantial effect in the United States and does create such an effect is within the scope of the Sherman Act.[144]

The Court concluded that conspiring to influence the United States insurance market as the London reinsurers were alleged to have done met the substantial effects standard.[145] Because such effect was intended and experienced in the United States, the location of the conduct was not a relevant factor. Although *American Banana* suggests that conduct taking place overseas is not within reach of the United States, multiple opinions since that time have clarified this rule; extraterritorial conduct that harms the United States may be within jurisdiction.[146]

The British defendants argued that the charges against them should have been dismissed because of international comity.[147] The Court found that international comity would lead to dismissal only in cases where the domestic and foreign rule came into conflict.[148] Because it was possible for the defendants to simultaneously adhere to American and English law, international comity did not present a bar to Sherman Act jurisdiction here.[149]

---

140. *Id.* at 770.
141. *See id.* at 795.
142. *See id.* at 778.
143. *Id.* at 779.
144. *See id.* at 796.
145. *See id.*
146. *See* discussion *supra* Part IV.A.
147. *See Hartford Fire Ins. Co.*, 509 U.S. at 797.
148. *See id.* at 798.
149. *See id.* at 799.

ii. United States v. Nippon Paper Industries Co.

Several years later, the First Circuit addressed a similar issue in the criminal context. In *Nippon Paper*, the United States charged a Japanese corporation with engaging in price-fixing of thermal fax paper distributed to North America.[150] Because the entirety of the anticompetitive conduct took place in Japan, the First Circuit needed to address whether the United States could convict a foreign corporation for violating the Sherman Act, given that the acts at issue took place in a foreign country.[151]

To resolve this question, the First Circuit looked to *Hartford Fire Insurance* rather than the FTAIA.[152] The court found that because "civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One's jurisdictional reach,"[153] and the statutory language for civil and criminal matters are identical, the court also had jurisdiction over this prosecution (provided that the conduct had an intended and substantial effect in the United States).[154] Whether the defendant's conduct had a substantial effect was not at issue because the First Circuit's decision simply reversed the lower court's dismissal.[155]

iii. United Phosphorus, Ltd. v. Angus Chemical Co.

In a suit filed in the Northern District of Illinois, chemical manufacturers from India and the United States alleged that other chemical corporations "attempted to monopolize, monopolized and conspired to monopolize the market for certain chemicals in violation of § 2 of the Sherman Antitrust Act."[156] More specifically, the plaintiffs argued that the defendants interfered with their intentions to manufacture certain chemicals.[157] Because the alleged conduct involved international commerce, the court applied the FTAIA to determine whether the Sherman Act could apply to the defendants.[158]

---

150. United States v. Nippon Paper Industries Co., 109 F.3d 1, 2-3 (1st Cir. 1997).
151. *See id.* at 4-5.
152. *See* discussion *supra* Part IV.F.
153. United States v. Nippon Paper Industries Co., 109 F.3d 1 (1st Cir. 1997).
154. *See id.* at 10-11.
155. *See id.* at 2. The lower court held that "a criminal antitrust prosecution could not be based on wholly extraterritorial conduct" and dismissed the indictment. *Id.*
156. United Phosphorus, Ltd. v. Angus Chemical Co., 131 F. Supp. 2d 1003, 1006 (N.D. Ill. 2001).
157. *See id.* at 1007.
158. *See id.* at 1007-09.

Ultimately, the court found that the plaintiffs failed to demonstrate the requisite level of domestic effect necessary for the domestic-injury exception of the FTAIA to apply for a variety of reasons.[159] First, the court found that plaintiffs did not intend to sell one of the chemicals at issue in the United States; had it attempted this, plaintiffs would not even have found buyers.[160] Moreover, had the plaintiffs made sales to the United States, these sales would have been made in "tiny volumes"—"such sales would not amount to any kind of "substantial effect" on domestic commerce."[161]

iv. Dee-K Enters. v. Heveafil Sdn. Bhd.

This case came before the Court of Appeals for the Fourth Circuit. Two domestic companies brought suit against Southeast Asian rubber thread producers for fixing prices.[162] The district court applied the common law substantial effect test to determine jurisdiction. Although the district court found that the defendants had in fact engaged in price-fixing that was intended to have a substantial effect in the United States market, the court held (based on a jury finding) that the defendants' behavior did not produce such an effect and ruled in the defendants' favor.[163]

On appeal, the Fourth Circuit affirmed the lower court's use of the common law substantial effect test as well as the result; plaintiffs had failed to demonstrate that the defendants' foreign conduct produced a substantial effect in the domestic market.[164] According to the plaintiffs' appellate brief, the defendants "had over $50 million in U.S. sales, raised their U.S. prices over 40%, and controlled more than half of the U.S. market."[165] The court held, however, that the price-fixing conduct did not meet the substantial effects standard even though the plaintiffs claimed to have "purchased substantial quantities of extruded rubber thread from defendants."[166]

---

159. *See id.* at 1009.

160. *See id.* at 1012-13.

161. *Id.* at 1012. According to the plaintiff's catalogues, the chemical at issue was offered in 1-gram to 500-gram quantities. The prices ranged from $142 to $ 18,600 per kilogram. The court concluded that these quantities were not sufficient and could not rise to the level of requisite effects. *Id.*

162. *See* Dee-K Enters. v. Heveafil Sdn. Bhd., 299 F.3d 281, 283 (4th Cir. 2002).

163. *See id.*

164. *See id.* at 283, 296.

165. Brief of Petitioner-Appellant at 1, Dee-K Enters. v. Heveafil Sdn. Bhd., 299 F.3d 281 (4th Cir. 2002)(01-1894).

166. *See Dee-K Enters.*, 299 F.3d at 284. The plaintiffs did not appear to submit

v. Metallgesellschaft AG v. Sumitomo Corp. of Am.

In this matter argued to the Seventh Circuit, American and English copper short-sellers brought suit against several corporations for cornering the copper market on the London Metals Exchange (LME).[167] The District Court held for lack of subject matter jurisdiction under the FTAIA.[168] The Seventh Circuit, reversed, finding that the evidence presented by the plaintiffs was sufficient to satisfy the domestic-injury exception of the FTAIA.[169] The Court based its decision on several significant factors: the plaintiffs engaged in copper trading in New York, the trading at issue was regulated by the Commodities Future Trading Commission, New York traders had to contact London Metals Exchange traders in order to complete the trades, and physical copper was delivered to domestic LME warehouses.[170] The court concluded that "[t]hese ties are enough to satisfy the standards imposed by the FTAIA."[171]

vi. In re Dynamic Random Access Memory

In this case, the Northern District of California granted the defendant's motion to dismiss the plaintiff's claim for lack of subject matter jurisdiction under the FTAIA.[172] The plaintiff, a British corporation, alleged that the defendants, electronic corporations "engaged in a global conspiracy to fix prices for DRAM, an electronic microchip."[173] According to the plaintiff, the defendants raised prices for DRAM in the United States, which led to an increase in worldwide prices that harmed the plaintiff.[174] The court stated that the defendant's conduct produces a substantial effect in the United States under the FTAIA "if it involves a sufficient volume of US commerce and is not a mere 'spillover effect.'"[175] Because of the existence of a price-fixing conspiracy and the "large volume" of commerce in the United States, the court

numerical data to back up this claim; they demonstrated a rise in the prices, but the defendants argued that prices rose due to other factors. *See id.* at 285.

167. Metallgesellschaft AG v. Sumitomo Corp. of Am., 325 F.3d 836, 836-37 (7th Cir. 2003).

168. *See id.* at 837.

169. *See id.* at 841-42.

170. *See id.* at 842.

171. *Id.*

172. *See In re* Dynamic Random Access Memory Antitrust Litig., 2006 WL 515629 at *1 (N.D. Cal. Mar. 1, 2006).

173. *Id.*

174. *Id.*

175. *Id.* at 2.

found that the foreign conduct at issue satisfied the first prong of the FTAIA domestic-injury exception.[176]

vii. Sun Microsystems Inc. v. Hynix Semiconductor Inc.

This case also involves the DRAM conspiracy; the plaintiff computer companies asserted that the defendant's price-fixing conduct caused them to pay higher prices for DRAM.[177] Given the foreign conduct at issue, the Northern District of California applied the FTAIA to determine whether the conduct fell under the domestic-injury exception.[178] The court held that "a domestic effect is established here by virtue of plaintiffs' allegations that defendants' conduct led to higher prices for DRAM in the United States, which in turn formed the predicate for plaintiffs' domestic agreements to pay higher prices for DRAM."[179] Thus, the substantial effect standard was met because prices increased in the United States as a result of the price-fixing conspiracy.

viii. Boyd v. AWB Limited

Turning to the east coast, the Southern District of New York recently addressed the substantial effects issue. In *Boyd*, wheat farmers from the United States brought suit against an Australian corporation who allegedly acquired and maintained a monopoly on selling wheat to Iraq.[180] For the court to have jurisdiction over this issue, the plaintiff needed to demonstrate that the defendant's wheat sales to Iraq produced a "direct, substantial, and reasonably foreseeable effect" in the United States.[181]

The plaintiff claimed that the defendant's conduct prevented the United States from participating in the Iraqi wheat market, resulting in low projected Ending Stocks for American wheat, which is closely associated with domestic wheat prices.[182] The court, however, recognized that because numerous factors affect

176. *See id.* at 3. The district court did not explicitly address the numbers but cited to the plaintiff's complaint with regard to the "large volume" of commerce. Plaintiff's complaint indicates that DRAM sales that were directly affected by the conspiracy for two of the defendants totaled over two billion U.S. dollars. *See* Complaint at 17, *In re* Dynamic Random Access Memory Antitrust Litig., 2006 WL 515629 (N.D. Cal. Mar. 1, 2006).

177. *See* Sun Microsystems Inc. v. Hynix Semiconductor Inc., 534 F. Supp. 2d 1101, 1104 (N.D. Cal. 2007).

178. *See id.* at 1109-10.

179. *Id.* at 1113.

180. *See* Boyd v. AWB Ltd., 544 F. Supp. 2d 236, 239 (S.D.N.Y. 2008).

181. *See id.* at 243.

182. *Id.* at 244.

Ending Stocks, the foreclosure of the Iraqi wheat market "simply could not have been a substantial factor among the total mix of global inputs that determine Ending Stocks, and hence wheat prices, in the United States."[183] Therefore, contrary to plaintiff's argument, activity within a geographic submarket does not necessarily have a direct or substantial impact on the global market.

G. Extraterritorial Enforcement by the Department of Justice Antitrust Division

Scott Hammond, the Deputy Assistant Attorney General for Criminal Enforcement at the Division, recently indicated that "[t]he Antitrust Division will vigorously pursue individuals who engage in antitrust crimes targeting U.S. businesses and consumers no matter where those individuals live or commit the crime . . . . Today's charges should make clear that there are no safe havens for international cartels that violate the U.S. antitrust laws."[184] Over the past year, the Antitrust Division has brought charges against a number of foreign defendants for engaging in price fixing and bid rigging conspiracies that affect the United States. More specifically, the Division has recently prosecuted individuals and corporations involved in price fixing of liquid crystal display panels, price fixing in the air cargo industry, and bid rigging of marine hose sales.

i. Liquid Crystal Display Panels

Last November, the Department charged Chunghwa Pictures Tubes, Ltd., LG Display Co. Ltd., and Sharp Corporation with fixing prices of liquid crystal display (LCD) panels in violation of § 1 of the Sherman Act.[185] The Department alleged that these three companies held meetings in various locations, including the United States, to determine LCD panel prices, and subsequently "issu[ed] price quotations in accordance with the agreements reached."[186] Furthermore, Sharp was charged with additional conspiracies regarding the sale of LCD panels to Dell, Apple and Motorola. The Department reported that Sharp's revenues from

183. *Id.* at 245.

184. DOJ Antitrust Division, Three Foreign Executives Indicted, *supra* note 81.

185. Press Release, Dep't of Justice Antitrust Division, LG, Sharp, Chunghwa Agree to Plead Guilty, Pay Total of $585 Million in Fines for Participating in LCD Price-Fixing Conspiracies (Nov. 12, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/239349.htm.

186. *Id.*

LCD sales for the 2007-2008 fiscal year totaled $6.8 billion.[187] The informations filed by the government assert that the activities of the three companies "were within the flow of, and substantially affected, interstate and foreign trade and commerce."[188] Additionally, four foreign executives have agreed to plead guilty for their part in this conspiracy, and three foreign executives were indicted; these executives face criminal fines and jail time in the United States.[189]

ii. Air Cargo

The Department has also been investigating a conspiracy to fix prices on air cargo transportation services.[190] The defendant corporations are based in many countries, including Chile, Brazil, Japan, Israel, the United Kingdom, France, Denmark, and the Netherlands.[191] As of last January, "a total of 12 airlines and three executives have pleaded guilty or agreed to plead guilty in the Justice Department's ongoing investigation into price fixing in the air transportation industry."[192] The affected routes included those to and from the United States and many of the conspirators' meetings took place within the United States.[193] In addition to meeting to discuss setting cargo rates and setting rates in accordance with those discussed at the meetings, these airlines also engaged in monitoring and enforcement of these agreed-upon rates.[194]

In the informations filed by the DOJ, the Antitrust Division asserted that the conspirators "transported substantial quantities

187. *Id.*

188. Information, United States v. Chunghwa Pictures Tubes, Ltd. at para. 10, Case No. CR 08-0804 WHA (N.D. Cal. 2008), *available at* http://www.usdoj/atr/cases/f239300/239376.htm; Information, United States v. LG Display Co. Ltd. at para.11, Case No. CR 08-0803 VRW (N.D. Cal. 2008), *available at* http://www.usdoj.gov/atr/cases/f239300/239375.htm; Information, United States v. Sharp Co. at para.10, Case No. CR 08-0802 PJH (N.D. Cal. 2008), *available at* http://www.usdoj.gov/atr/cases/f239300/239374.htm.

189. *See* DOJ Antitrust Division, Three Foreign Executives Indicted, *supra* note 81; Press Release, Dep't of Justice Antitrust Division, Four Executives Agree to Plead Guilty in Global LCD Price-Fixing Conspiracy (Jan. 15, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/241541.htm.

190. *See* Press Release, Dep't of Justice Antitrust Division, Lan Cargo S.A., Aerolinhas Brasileiras S.A. and El Al Israel Airlines Ltd. Agree to Plead Guilty for Fixing Prices on Air Cargo Shipments (Jan. 22, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/241710.htm.

191. *See id.*

192. *Id.*

193. *See id.*

194. *See id.*

of cargo, in a continuous and uninterrupted flow of interstate and foreign commerce, between various foreign countries and the United States, including through various U.S. airports to final destinations in various States" and that these activities substantially affected "interstate and foreign trade and commerce."[195]

iii. Marine Hose

The Department's marine hose bid-rigging investigation has also resulted in a number of foreign convictions. The alleged conspirators manufacture marine hose, which is "a flexible rubber hose used to transfer oil between tankers and storage facilities."[196] Marine hose manufacturers from Japan, the United Kingdom and Italy were charged for engaging in a variety of anticompetitive activities, including dividing market shares among themselves, creating and enforcing marine hose price lists, and agreeing not to compete for bids.[197] Furthermore, during the conspiracy period, the defendants sold marine hose directly to American customers and accepted payment for these products in the United States.[198]

The following section presents an analysis of the change in jurisprudence concerning extraterritorial enforcement of U.S. antitrust law.

V. Future Applications of the Substantial Effects Test in the Americas and Beyond

There remains little doubt that we live in a global economy.[199] The current economic crisis has made this all too clear. Cases like *Empagran*, involving domestic and foreign plaintiffs and domestic and foreign defendants, likewise make this clear.[200] As described in the preceding sections of the article, it is apparent that the United States (in fact, all three branches of the U.S. government)

195. *See* Information, United States v. Lan Cargo S.A. at para. 10, 11, Criminal No.: 1:09-cr-00015-JDB (D.C. 2009) , *available at* http://www.usdoj.gov/atr/cases/f241700/241783.htm.

196. DOJ Antitrust Division, Japanese Executive Pleads Guilty, *supra* note 82, at 1.

197. *See id.* at 1, 2.

198. *See id.* at 2.

199. Diamond, *supra* note 10, at 809 ("With rampant globalization, instantaneous communication, and multinationals building products with components from all over the world and selling them far from where they are produced, it may be argued that there no longer are independent, national markets.").

200. *See F. Hoffmann-La Roche Ltd.* 542 U.S. at 159 (plaintiffs in Empagran were foreign and domestic vitamin purchasers who claimed they were harmed by a global price-fixing conspiracy created by foreign and domestic vitamin manufacturers).

has taken affirmative steps to assert U.S. antitrust laws on individuals and entities beyond U.S. shores in the name of protecting U.S. businesses and consumers from anticompetitive harm that is hatched and/or carried out abroad. Because of the ever growing and changing economic ties between the U.S. and its next-door neighbors in the Americas, businesses and business executives throughout the Americas should pay particular attention not to run afoul of U.S. antitrust laws.

A. Analysis of History and Trends

As noted above, the willingness of the United States Congress, U.S. courts, and enforcement agencies to attack anticompetitive conduct occurring abroad has come full-circle since the turn of the previous century. In 1909, the United States Supreme Court was unwilling to apply the Sherman Act to acts committed in Central America, finding that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[201] A hundred years later, all branches of the U.S. government are quite willing to apply the antitrust laws (among others) of the United States to determine the legality of acts committed in other countries, including acts committed in the Americas.[202]

While there is little doubt that the United States is certainly amenable to address anticompetitive harm stemming from actions abroad, the difficulty lies in ascertaining where exactly the line is drawn and likely to be drawn in the future. As explained in this article, the central consideration in drawing this line has been the "substantial effects test." Utilizing this test, United States courts have both chosen to accept jurisdiction of cases concerning anticompetitive conduct abroad[203] and have also declined jurisdiction of such cases.[204]

This section analyzes whether any trends can be discerned

---

201. *See generally* American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

202. *See* cases collected *supra* Part IV.F.

203. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797 n.23 (1993); Dee-K Enters. v. Heveafil Sdn. Bhd., 299 F.3d 281, 283 (4th Cir. 2002); Metallgesellschaft AG v. Sumitomo Corp. of Am., 325 F.3d 836, 836-37 (7th Cir. 2003); *In re* Dynamic Random Access Memory Antitrust Litig., 2006 WL 515629 (N.D. Cal. Mar. 1, 2006); Sun Microsystems Inc. v. Hynix Semiconductor Inc., 534 F. Supp. 2d 1101, 1104 (N.D. Cal. 2007).

204. *See* United Phosphorus, Ltd. v. Angus Chemical Co., 131 F. Supp. 2d 1003, 1006 (N.D. Ill. 2001); Boyd v. AWB Ltd., 544 F. Supp. 2d 236, 239 (S.D.N.Y. 2008).

from the relevant cases. Specifically, are there factors that courts consider in applying the "substantial effects test" that make it more or less likely for a court to entertain jurisdiction over a particular case? Or, is the "substantial effects test" more often than not manipulated by the court to justify a desired result?

B. How Do Courts Apply the Substantial Effects Test?

As discussed above, the common law substantial effects test[205] came to be replaced by FTAIA's "direct, substantial and reasonably foreseeable" standard.[206] It is unclear, however, as a practical matter that this distinction is significant, or even at all different.

i. Direct and Reasonably Foreseeable Effect versus Substantial Effect

The FTAIA's requirement that the relevant effect be "direct," for example, appears to do little to alter or add to the predecessor common law analysis. At first blush the Ninth Circuit's description of the "direct effects" standard in *LSL Biotechnologies* appears to go beyond the common law substantial effects test.[207] The Ninth Circuit addressed "direct effects" separately and noted that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity."[208] Specifically, the *LSL Biotechnologies* court held that the alleged anticompetitive conduct did not result in a direct effect in the United States because the product (genetically altered tomatoes with longer shelf lives) had not yet been developed and, accordingly, the covenant which would have restricted one of the contracting parties from selling the product in Mexico at some point in the future did not result in a direct effect to American consumers as the agreement between the defendants created no "immediate consequence" in the United States.

The *LSL Biotechnologies* court, however, could have substituted the words "substantial effects" in place of "direct effects" and have come to exactly the same conclusion. In fact, it is difficult to imagine a substantial anticompetitive effect on United States con-

---

205. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945); *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1253-54 (7th Cir. 1980) (applying the "effects test" as developed in Alcoa in an action against foreign uranium producers); Hartford, 509 U.S. at 796.

206. Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2000).

207. *See* United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004).

208. *Id.*

sumers that would be classified by a court as anything other than direct. Further, though it is quite easy to envision the flip-side to that scenario—a direct effect that is not substantial—there would be no practical effect to drawing such a distinction as the predecessor common law test focused only on whether a given effect was "substantial" and therefore determining whether an effect is direct or indirect would merely be a superfluous and inconsequential inquiry in relation to the predecessor common law test. Accordingly, it appears that the FTAIA's "direct effects" standard is largely superfluous in light of the predecessor common-law analysis.[209]

Similarly, the "reasonably foreseeable effect" required by the FTAIA appears also to be merely superfluous in relation to the substantial effects requirement. Here too, it is hard to imagine an effect which is substantial on U.S. consumers, for instance, but is not reasonably foreseeable. Whether one views the inclusion of the "reasonably foreseeable effect" in the FTAIA as born from a desire to codify the common law intent requirement or not, as a practical matter, the requirement appears to be superfluous (as seems to have been the case with the intent requirement at common law). [210]

Accordingly, despite the courts' initial reluctance to adopt the FTAIA in place of the common law test announced in *Alcoa*, it appears to have been much ado about nothing in the end, as the primary inquiry remains whether anticompetitive acts abroad have a substantial effect on the United States. That said, it is difficult to discern where a particular court may choose to draw the "substantial effects" line in any given case.

ii. Drawing the Substantial Effects Line

To begin to determine how a given court regards the substantial effects principle, one must understand whether courts applying the substantial effects test are adhering to some idolized notion of a well-entrenched formulaic test or whether courts are

209. See The Rehnquist Court's Canons of Statutory Construction, http://www.csg.org/meetings/interbranch/Rehnquist_Courts_Canons.pdf (last accessed Mar. 3,2009) ("Avoid interpreting a provision in a way that would render other provisions of the Act superfluous or unnecessary.") (emphasis in original).

210. *See* Hartford, 509 U.S. at 797 n.23. The Court found that the conduct at issue produced a substantial effect in the United States and was subject to Sherman Act jurisdiction under the common law. Without engaging in any explicit analysis, the Court also concluded that the conduct at issue would satisfy the direct, substantial and reasonably foreseeable requirement of the FTAIA. *See id.*

simply manipulating what they perceive to be a fairly amorphous test to lead to a desired result (or, as is more often than not the case, something in the middle). The cases described in Section IV of this article may provide some insight.

As an initial matter, however, it is important to note that the phrase "substantial effects" has myriad definitions without reference to any of the cases. This is worth noting because most often (as is very much the case here) tests are born from a particular case, involving particular facts and those tests are then applied in numerous other contexts, involving vastly different facts and even distinct legal frameworks (as is the case with the substantial effects test which, for example, is used for Sherman Act § 1 and § 2 cases). Accordingly, knowing that courts have and will continue to apply the "substantial effects" test in cases which are distinct from the seminal cases, and perhaps distinct from all previous cases, it is advisable to take a step back and think about the different ways the phrase "substantial effects" can be interpreted.

At a macro level, the phrase "substantial effects" can be taken to mean either that (1) the effects are "important" or "significant" in a subjective or visceral manner; or that (2) the effects are sizeable or quantifiably large using some metric or seemingly objective standard. For example, a court may decide that an antitrust conspiracy in China that directly and undoubtedly affects a handful of U.S. consumers has a substantial effect in the U.S., even though, by almost any metric, the effect might be negligible at best with respect to the United States as a whole. Another court might look at the same facts and determine that the plaintiffs have come nowhere close to demonstrating substantial effects in the United States.

These are, perhaps, extreme examples, but they help to illustrate that similar facts are capable of being interpreted quite differently under the "same" test. And if, as is most likely the case in most cases, courts fall somewhere in the middle between completely subjective and rigidly adhering to a particular metric, it could make a substantial difference which side of that line courts tend to follow. If courts applying the "substantial effects" lean toward the subjective end of the spectrum, we can assume that courts would be more capable of construing the facts in a manner that leads to desired results. Even if we are not inclined to adopt so cynical a view, we would expect for results to be less predictable (at least with reference only to the test and excluding other poten-

tial biases). On the other hand, if courts were to lean more in the opposite direction by adhering to some recognized metric, we would expect much more predictability (which one might expect to more frequently lead to viscerally unappealing results). A review of relevant cases underscores the fact that courts do not appear to adhere to any particular metric, but instead look at a number of different factors when applying the "substantial effects" test. And even where courts base their decisions on quantitative factors, the metrics used lack uniformity and are susceptible to being manipulated to reach a desired outcome.

C. *Cases Where The Substantial Effects Test Was Held Not Satisfied*

In *United Phosphorus*, for example, the court found that the plaintiffs failed to demonstrate the requisite effect for several reasons, including that the plaintiffs never intended to sell one of the products at issue in the United States, and even had plaintiff attempted to do so, the sales to the United States would have been made in "tiny volumes"—"such sales would not amount to any kind of "substantial effect" on domestic commerce. Although the court that the "substantial effects" issue in quantitative terms—i.e., "tiny volumes"—it appears not to have gone into great detail.[211]

In *Boyd*, the Southern District of New York, in the § 1 context, rejected plaintiff's contention that the substantial effects requirements had been met with respect to a defendant foreign competitor who plaintiff alleged illegally maintained its monopoly in a foreign wheat market (the Iraqi wheat market).[212] Plaintiff argued that its inability to participate in the Iraqi wheat market resulted in a lower closing ticker price for Ending Stocks of American wheat commodities and assets (which plaintiff argued was closely associated with domestic wheat prices).[213] The court held, however, that because numerous factors affect Ending Stocks, the foreclosure of the Iraqi wheat market "simply could not have been a substantial factor among the total mix of global inputs that determine Ending Stocks, and hence wheat prices, in the United States."[214] It appears the *Boyd* Court was never faced with deter-

211. United Phosphorus, Ltd. v. Angus Chemical Co., 131 F. Supp. 2d 1003, 1012 (N.D. Ill. 2001).

212. *See* Boyd v. AWB Ltd., 544 F. Supp. 2d 236, 239 (S.D.N.Y. 2008).

213. *Id.* at 244.

214. *Id.* at 245.

mining whether the alleged anticompetitive conduct had a substantial effect on U.S. commerce; rather, the question answered by the *Boyd* Court was whether the foreclosure of the Iraqi wheat market had a substantial effect on Ending Stocks. The court appears to have satisfied itself, however, that any impact on domestic wheat prices would be negligible and therefore would not represent a substantial effect on U.S. commerce. In this way, the *Boyd* court considered a quantitative impact on U.S. commerce though it did not determine the precise effect based on the facts before it.

Accordingly, both *Boyd* and *United Phosphorus* seem to indicate that courts have found the "substantial effects" test to not be satisfied based on a pseudo-quantitative analysis focused on the effect to U.S. commerce. It is unclear whether these courts failed to quantify the effect more precisely merely because the majorities held it was unnecessary in light of the specific facts presented or, rather, because courts applying this test feel compelled to justify their decisions by pointing to a pseudo-quantitative analysis, though they do not actually base their decisions on such mathematical factors.

D. Cases Where The Substantial Effects Test Was Held To Be Satisfied

In *Sumitomo* the Seventh Circuit held that the evidence presented by plaintiffs was sufficient to satisfy the "substantial effects" test.[215] Among the factors it cited as most significant were: the plaintiffs engaged in copper trading in New York, the trading at issue was regulated by the Commodities Future Trading Commission, New York traders had to contact London Metals Exchange traders in order to complete the trades, and physical copper was delivered to domestic LME warehouses.[216] The court concluded that "[t]hese ties are enough to satisfy the standards imposed by the FTAIA."[217] Unlike the court in *United Phosphorus*, the Seventh Circuit in *Sumitomo* did not focus on quantitative factors, but rather focused on the nexus between the defendants, their alleged bad acts and the U.S. market. In fact, the *Sumitomo* Court concluded that the "ties" were sufficient to satisfy the stan-

215. Metallgesellschaft AG v. Sumitomo Corp. of Am., 325 F.3d 836, 836-37 (7th Cir. 2003).

216. *See id.* at 842.

217. *Id.*

dards imposed by the FTAIA.[218]

On the other hand, the district court in *In re Dynamic Random Access Memory* focused its substantial effects analysis on the volume of commerce involved.[219] The court noted that conduct produces a substantial effect in the United States under the FTAIA "if it involves a sufficient volume of US commerce and is not a mere 'spillover effect.'"[220] The court held that the "substantial effects" test had been satisfied due to the "large volume" of commerce in the United States implicated by the price-fixing conspiracy. [221]

In *Sun Microsystems* (also involving the DRAM conspiracy), the court found that the substantial effects test was satisfied, noting that "a domestic effect is established here by virtue of plaintiffs' allegations that defendants' conduct led to higher prices for DRAM in the United States, which in turn formed the predicate for plaintiffs' domestic agreements to pay higher prices for DRAM."[222] Although the *Sun Microsystems* Court did not particularly emphasize the volume of commerce involved, it is possible the Court took that to be self-evident given the nature of the litigation.[223]

While the *Sumitomo* Court appears not to have focused on the specific quantitative effects of defendants alleged anticompetitive acts, the DRAM courts do appear to have addressed the issue in quantitative terms, albeit in general quantitative terms, i.e., "large volume."

It appears that a substantial number of courts, regardless of whether they find the "substantial effects" test to have been met, rely on general quantitative factors to support their decisions. The trend appears to be one of courts focusing on "substantial effects" on U.S. commerce as a whole (or, at least, large segments

218. *Id.*

219. *In re* Dynamic Random Access Memory Antitrust Litig., 2006 WL 515629 at 2.

220. *Id.* at 2.

221. *See id.* at 3. The district court did not explicitly address the numbers but cited to the plaintiff's complaint with regard to the "large volume" of commerce. Plaintiff's complaint indicates that DRAM sales that were directly affected by the conspiracy for two of the defendants totaled over two billion U.S. dollars. *See* Complaint at 17, *In re* Dynamic Random Access Memory Antitrust Litig., 2006 WL 515629 (N.D. Cal. Mar. 1, 2006).

222. Sun Microsystems Inc. v. Hynix Semiconductor Inc., 534 F. Supp. 2d 1101, 1113 (N.D. Cal. 2007).

223. As stated in *In re Dynamic Random Access Memory,* the Plaintiff's complaint indicates that DRAM sales that were directly affected by the conspiracy for two of the defendants totaled over two billion U.S. dollars. *See* Complaint at 17, *In re* Dynamic Random Access Memory Antitrust Litig., 2006 WL 515629 (N.D. Cal. Mar. 1, 2006).

of U.S. commerce), as opposed to potentially narrower segments, and relying on general quantitative observations (as opposed to precise ones) to justify their holdings.

What does this mean for future antitrust litigants? As previously noted, the fact that courts have not relied on a precise metric or set of metrics to determine whether the "substantial effects" test has been met likely means that it is more difficult to predict a court's end result (unless the case is at an extreme end of the spectrum). While some argue that less predictability (and more flexibility) is beneficial because it results in a higher deterrent effect, others argue that over-deterrence and commensurate inefficiencies should be avoided at all costs and that more precise standards should be formulated so as to provide businesses and individuals a clear rule to follow. In any event, the current trend should give foreign actors pause before engaging in behavior that could potentially inflict anticompetitive harm on U.S. commerce.

E. Ramifications for the U.S.'s Neighbors in the Americas

Beyond the general trend towards globalization, the countries of North, Central and South America have become increasingly interconnected. This, in turn, increases the likelihood that actions taken anywhere in the Americas will result in anticompetitive harm in the United States and therefore increases the risk that entities throughout the Americas will be exposed to liability for violating U.S. antitrust laws. Beginning in the 1980s and 1990s, for example, many countries in Latin America began liberalizing their economic policies, including their trade policies.[224] This had the effect of increasing trade between the United States and many Latin American countries, especially those that entered into free trade agreements with the United States. In fact, many such free trade agreements include antitrust provisions designed to curtail anticompetitive behavior in conjunction with liberalizing trade practices.[225]

Beginning in the mid to late-1990s a few countries in the Americas began entering into Antitrust Cooperation Agreements with the United States.[226] These countries include Mexico, Brazil

224. Sokol, *supra* note 11, at 237.

225. *Id.* at *242*.

226. United States Dep't of Justice, Antitrust Division, Antitrust Cooperation Agreements, http://www.usdoj.gov/atr/public/international/int_arrangements.htm (last visited Mar. 3, 2009).

and Canada.[227] The stated purpose of these agreements is to increase cooperation between the governments of the United States and these countries with respect to antitrust issues, including antitrust enforcement.[228] The agreements provide a framework pursuant to which antitrust enforcement agencies can work cooperatively, including by working together and exchanging information regarding investigations of alleged anticompetitive conduct.[229] In light of these agreements, there is a greater likelihood that businesses and individuals in the Americas will be prosecuted in the United States for anticompetitive acts substantially affecting U.S. commerce.

Although relatively few enforcement actions appear to have been brought against businesses and individuals in the Americas, there is good reason to believe that the DOJ will become more aggressive in prosecuting antitrust violations occurring abroad, including throughout the Americas.

The Obama administration has announced that it intends to aggressively enforce antitrust laws against international cartels. While on the campaign trail, President Obama stated that "[a]s president, I will direct my administration to reinvigorate antitrust enforcement . . . . My administration will take aggressive action to curb the growth of international cartels, working alone and with other jurisdictions to ensure that firms, wherever located, that collude to harm American consumers are brought to justice."[230] Additionally, the current economic downturn may make it more likely that enforcement agencies will heighten their enforcement activities. First, as businesses struggle to survive, business executives feel increasing pressure to maximize profits and this, in turn, increases the possibility that they may engage in anticompetitive activities. Second, because the lagging economy directly hurts consumers, enforcement agencies like the DOJ are perhaps more likely to aggressively pursue antitrust law violators who are causing further harm to already struggling consumers.

VI. THOUGHTS FOR FUTURE RESEARCH

Even in light of the significant legal scholarship in the inter-

227. *Id.*
228. *Id.*
229. *Id.*
230. Statement of Senator Barack Obama for the American Antitrust Institute, Sept. 27, 2007, http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

national enforcement of domestic antitrust law,[231] there is still much light to be shed by the academy. Given the dynamic legal definition of substantial effects used throughout the Circuit Courts of Appeal,[232] a future study may attempt to quantify a threshold level of injury requisite for a federal court to grant jurisdiction for an antitrust claim made against a foreign defendant. The legal world produces vast amounts of data, including detailed written opinions, reviews by legislators, expert witness reports, and settlements.[233] A quantitative analysis might seek to calculate whether, for example, a court's decision to grant jurisdiction is affected where twenty percent of a U.S.-based corporation's profits are adversely affected by a foreign corporation's anticompetitive conduct.

As we have seen, the courts have addressed the issue of determining the existence of a "direct, substantial, and reasonably foreseeable effect" on a case-by-case basis and have not promulgated any distinct test.[234] An empirical legal study could offer meaningful insight into the legal definition of "foreseeable" effects[235] by classifying the adverse financial effect required to create subject matter jurisdiction under the FTAIA.[236] The study might then consider whether the heightened costs in preparing for litigation curtails anticompetitive conduct abroad.

Future research may also consider studies on the international enforcement of cartels.[237] It is difficult to obtain reliable

231. *See, e.g.*, Ginsburg, *supra* note 23, at 449; Tuttle, *supra* note 32, at 345; Note, *supra* note 18, at 2127; Brockbank, *supra* note 47, at 21.

232. *See* discussion *supra* Part IV.

233. Lee Epstein & Gary King, *Empirical Research and the Goals of Legal Scholarship: The Rules of Inference*, 69 U. CHI. L. REV. 1, 20 (2002).

234. 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, 18 (2003).

235. *Hartford Fire Ins. Co.*, 509 U.S. at 795-96.

236. *See* McGlinchy v. Shell Chemical Co., 845 F.2d 802, 812-13 (9th Cir. 1988) (holding that injury exclusively to customers or potential customers located in a foreign nation and consequential injury to one U.S. export company was not sufficient for extraterritorial subject matter jurisdiction under the FTAIA).

237. *See, e.g.*, Andrew R. Dick, *When are Cartels Stable Contracts?*, 39 J. LAW & ECON. 241, 248 (1996) ("Researchers typically have emphasized price-fixing as the primary motive for export cartels' formation."); Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 517 (2004) ("Cartels are a focus of concern for many reasons. Cartels cause allocative inefficiency by reducing production in order to raise market price. This forces consumers to pay significantly more money for products, from luxuries like high-end art to necessities like vitamins and pharmaceuticals . . . . Cartels may also create productive inefficiencies when they

data on cartels, particularly those that are not prosecuted.[238] The U.S. Department of Justice Antitrust Division's Corporate Leniency Policy ("Amnesty Program") is the Department's most effective generator of cartel cases and is believed to be the most successful program in U.S. history for detecting significant commercial crimes.[239] Information gathered through the Amnesty Program could offer a unique glimpse not only into the smoked-filled rooms of price cartels, but also at the effects of international enforcement efforts on the ability to maintain the cartel.[240]

VII. CONCLUSION

There has been a meaningful shift in the expanse of extraterritorial U.S. antitrust jurisdiction throughout the latter half of the modern century. Trade between the Americas continues to grow at exponential rates. Domestic consumers and exporters alike face heightened risk of economic disenfranchisement from anticompetitive action committed abroad. There is a clear and pressing need for a unified, unwavering response from U.S. antitrust enforcement agencies. At the same time, domestic regulators must pay homage to foreign sovereignty and international comity.

There are understandably divergent interests among developed and developing nations. Some favor laws aimed at stimulating economic growth at home, even to the detriment of trade partners. Others maintain strict rules regulating anticompetitive infractions. Extraterritorial enforcement of U.S. antitrust jurisdiction is ultimately a derivative of a combination of foreign trade laws. As the clock continues to tick, winding around the parameters of an open-market, capitalistic society, the United States is

---

protect inefficient manufacturers, thus increasing the average production costs in an industry.").

238. Mehra, *supra* note 75, at 359.

239. Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 GEO. WASH. L. REV. 798, 799 (2001) ("Over the past five years, the Amnesty Program has been responsible for detecting and prosecuting more antitrust violations than all of [the Antitrust Division's] search warrants, consensual-monitored audio or video tapes, and cooperating informants combined. It is, unquestionably, the single greatest investigative tool available to anti-cartel enforcers.") (citing *U.S. Dep't of Justice, Status Report: Corporate Leniency Program* (2001)).

240. Leslie, *supra* note 237, at 517 (noting that cartels are inherently unstable because a cartel's continued existence is based on trust: each participant must trust its cartel partners not to cheat on the agreement by charging less than the fixed price or tell antitrust authorities about the cartel).

poised to continue it role as global cop, enforcing a decree against antitrust conduct. Still dangling above remains a largely undefined notion of substantial effects.