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A Quest for Consistency: The Meaning of 'Direct' in the Foreign Trade Antitrust Improvements Act

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A QUEST FOR CONSISTENCY: THE MEANING OF DIRECT IN THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

RICHARD LOBAS

ABSTRACT

This note argues that the United States courts need to apply a more consistent interpretation of the meaning of "direct" within the context of the Foreign Trade Antitrust Improvements Act (FTAIA). The FTAIA serves to apply U.S. antitrust law, specifically the Sherman Act, to trade or commerce with foreign nations. One scenario in which this law may be applied is when trade or commerce with a foreign nation has a "direct, substantial, and reasonably foreseeable" effect on domestic commerce. However, courts purport to apply different standards to determine whether an effect is direct, leading to confusion and inconsistency. Contributing to this is an apparent lack of substantive difference between the two leading "tests" of directness. In order to provide for consistent application of the FTAIA, and thus facilitate U.S. business interests in an increasingly globalized economy, courts need to adopt a consistent, practical approach to directness in the context of the FTAIA.

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I. INTRODUCTION

For over a century, the Sherman Antitrust Act has regulated commerce within the borders of the United States. Signed into law in 1890 by President Benjamin Harrison, this landmark piece of legislation aims to quell anticompetitive practices, with the goal of protecting the free market.[1] As time progressed and the United States economy became more globalized, the question of the application of the Sherman Act to trade with foreign nations arose. Originally governed by Supreme Court cases like *American Banana Co. v. United Fruit Co.* and *United States v. Aluminum Co. of America*, the extraterritorial application of United States antitrust law was confusing and inconsistent. While the body of law surrounding application of U.S. antitrust law has changed in recent years, much of this confusion and inconsistency remain in its application. This presents a problem for businesspeople transacting abroad. Without certainty in the application of U.S. antitrust law, a "possible transaction may die on the drawing board."[2]

In 1982, Congress passed the Foreign Trade Antitrust Improvement Act ("FTAIA") as a statutory solution to inconsistent application of U.S. antitrust law.[3] The FTAIA is codified as an amendment to the Sherman Act, providing guidance for when the Sherman Act is applicable to trade with foreign nations.[4] The provision of the FTAIA on which this note will focus is §6a, which states that the Sherman Act will not apply to trade or commerce with foreign nations unless such

[1] 15 U.S.C. § 1 (2004).

[2] H.R. Rep. No. 97-686, at 2 (1982).

[3] *Id.*

[4] *Id.*

conduct "has a direct, substantial, and reasonably foreseeable effect" on domestic, import, or export commerce in the United States.[5]

While courts have generally been able to agree on the meaning of "substantial" and "foreseeable" in this context,[6] there has been disagreement over the meaning of "direct." There are two main approaches to the meaning of "direct" in the context of the FTAIA. The Ninth Circuit, in *United States v. LSL Biotechnologies*, held that an effect is considered "direct" if it follows as an immediate consequence of an entity's activity.[7] However, in *Minn-Chem, Inc. v. Agrium, Inc.,* the Seventh Circuit held that an effect is "direct" if there is merely a "reasonably proximate causal nexus" between the conduct and the domestic effect.[8] The various approaches to the application of the FTAIA have led to the very confusion and inconsistency Congress sought to avoid.

In this note, I set forth background information about the FTAIA, then go on to explain further the disagreement among courts surrounding the proper meaning of "direct" as contained in the statute. Then, I argue that courts should abandon the "reasonably proximate causal nexus" test, as it represents a meaningless departure from the "immediate consequence" standard serving only to complicate FTAIA analysis. I further argue that Courts should universally adopt the "immediate consequence" standard, and I go on to set forth a practical means of doing so. Finally, I explain how my approach to the "immediate consequence" standard is consistent with both statutory interpretation and legislative intent.

II. An Overview of the Foreign Trade Antitrust Improvements Act

The application of the Sherman Act to extraterritorial conduct is limited to foreign activity that has an anticompetitive effect on U.S. commerce.[9] This principle has its origins in case law but was codified in 1982 as the Foreign Trade Antitrust Improvement Act ("FTAIA").[10] In pertinent part, the act states as follows:

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[5] Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1982).

[6] *See* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 856 (7th Cir. 2012) (stating that foreseeability and substantiality are relatively straightforward).

[7] United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004).

[8] *Minn-Chem, Inc.*, 683 F.3d at 857.

[9] Richard A. Givens, Antitrust: An Economic Approach § 2.02 (2013).

[10] H.R. Rep. No. 97-686, at 2 (1982).

> *[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –*
>
> *1. such conduct has a direct, substantial, and reasonably foreseeable effect-*
>
> *A. on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or*
>
> *B. on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and*
>
> *2. such effect gives rise to a claim under the provisions of [the Sherman Act], other than this section.*[11]

The Supreme Court has said that Congressional intent in passing the FTAIA was to "clarify, perhaps to limit, but not to *expand* in any significant way, the Sherman Act's scope as applied to foreign commerce."[12] As is evident from this judicial interpretation and the text of the statute, the FTAIA excludes conduct involving trade or commerce with foreign nations from the purview of the Sherman Act. However, two categories of conduct are exempt from this exclusion.

The first category of conduct involving trade or commerce with foreign nations that the FTAIA permits the Sherman Act to reach is "import trade or import commerce."[13] This is expressly stated in the first line of the statute and is consistent with the principle established by case law that the Sherman Act is meant to apply to imports where conduct has actual and intended effects on U.S. commerce.[14] Thus, import trade and commerce are excluded at the very beginning of the FTAIA, just as domestic interstate commerce is excluded from its reach.[15] The relevant inquiry to determine if conduct falls within this category is relatively straightforward: "whether the defendant's alleged anticompetitive behavior was directed at an import market."[16]

The FTAIA then goes on to exclude from the Sherman Act's reach all conduct involving trade or commerce with foreign nations, only to "bring back into the statute's reach conduct that

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[11] 15 U.S.C. § 6a (2015).

[12] F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004).

[13] 15 U.S.C. § 6(a) (2015).

[14] United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945).

[15] *Minn-Chem, Inc.*, 683 F.3d at 854 (stating that import trade and commerce are excluded at the outset of the FTAIA).

[16] Animal Sci. Prod., Inc. v. China Minmetals Corp., 654 F.3d 462, 470 (3d Cir. 2011), quoting Turicentro S.A. v. Am. Airlines, Inc., 303 F.3d 293, 303 (3d Cir. 2002).

has a 'direct, substantial, and reasonably foreseeable effect on domestic or import commerce.'"[17] This provision of the FTAIA has led to confusion in application that can be distilled to two issues: (1) whether this provision establishes a jurisdictional or a substantive requirement; and (2) the meaning of a "direct, substantial, and reasonably foreseeable effect."[18]

The first issue has significant implications within the context of application of the FTAIA. This is due to the burdens the respective parties must bear depending on which type of requirement the "direct, substantial, and reasonably foreseeable effect" language is determined to be. Under Federal Rule of Civil Procedure 12(b)(1), a plaintiff is required to establish that a court has proper subject matter jurisdiction, prior to adjudicating the merits of the claim.[19] However, if this language sets forth a substantive requirement, the defendant must bring a Rule 12(b)(6) motion for failure to state a claim, and if denied file a motion for summary judgment which could lead to extremely costly discovery.[20] While throughout most of the statute's history courts have interpreted the FTAIA to be jurisdictional, there is recent consensus among the courts that the provision is actually substantive and to be considered an element of an antitrust claim.[21] This soundness of this principle is outside the scope of this note.

The second issue, the actual meaning of "direct, substantial, and foreseeable effect," is the subject of significant confusion and disagreement among courts.[22] The source of confusion and disagreement surrounds the interpretation of the word "direct," as the meaning of "substantial" and "foreseeable" are not typically in dispute.[23] However, there are two main approaches to the meaning of "direct" in the context of the FTAIA. The Ninth Circuit, in *United States v. LSL Biotechnologies*, held that an effect is considered "direct" if it follows as an immediate

[17] *Minn-Chem, Inc.*, 683 F.3d at 856.

[18] Givens, *supra* note 9.

[19] *Id.*

[20] *Id.*

[21] *Id. See also Minn-Chem, Inc.*, 683 F.3d at 852 (holding that the FTAIA sets forth an element of an antitrust claim).

[22] *Current Circuit Splits*, 9 SETON HALL CIR. REV. 131, 135 (2012).

[23] Givens, *supra* note 9.

consequence of an entity's activity.[24] However, in *Minn-Chem, Inc. v. Agrium, Inc.*, the Seventh circuit held that an effect will be "direct" if there is merely a "reasonably proximate causal nexus"[25] between the party's anti-competitive conduct and the domestic effect.

III. "Direct, Substantial, and Reasonably Forseeable" effect

A. The "Immediate Consequence" Standard in United States v. LSL Biotechnologies

In 2004, the Ninth Circuit decided *United States v. LSL Biotechnologies*, confronting the question of the definition of "direct" as used in the FTAIA. There, the court examined a non-compete agreement between a United States company holding patent rights to a type of genetic technology, and an Israeli developer of tomato seeds.[26] The government argued that the non-compete agreement had two deleterious effects on commerce in the United States: it made innovations on the part of the Israeli company less likely, and it allowed defendants to charge more for their seeds.[27] The Ninth Circuit found that these effects were not "direct," thus the FTAIA exception did not apply, and application of the Sherman act in such a situation would be unlawful.[28] In defining "direct," the court adopted the reasoning of the Supreme Court in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).[29]

In *Republic of Argentina*, the Supreme Court determined the meaning of "direct" in the context of the Foreign Sovereign Immunities Act ("FSIA").[30] Although contained in a different

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[24] United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004).

[25] *Minn-Chem, Inc.*, 683 F.3d at 857.

[26] *LSL Biotechnologies*, 379 F.3d at 674-675.

[27] *Id.* at 681.

[28] *Id.*

[29] *Id.* at 680.

[30] Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992). The Foreign Sovereign Immunities Act is codified at 28 U.S.C. § 1605. In pertinent part, that statute states:

> "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--
>
>> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>>
>> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

statute, the word "direct" was used in a nearly identical way as in the FTAIA.[31] In this case, the Supreme Court unanimously decided that an effect is "direct" if it follows as an "immediate consequence of the defendant's activity."[32] Aside from this baseline assertion, the phrase "immediate consequence" is left unelaborated.[33] However, in applying this standard, the court considers as dispositive the fact that "money that was supposed to have been delivered to a New York bank for deposit was not forthcoming."[34]

> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;
> (4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;
> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--
>> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or
>
> (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable."

[31] *LSL Biotechnologies*, 379 F.3d at 680. The Foreign Sovereign Immunities Act (FSIA), in using the term "direct," states that sovereign immunity will not extend to commercial activity outside the United States that causes a direct effect in the United States. 28 U.S.C § 1605(a)(2). Thus, the use of direct there is analogous to the use of "direct" in the FTAIA, in that both refer to measuring the remoteness of an effect on the United States to commercial conduct outside the United States.

[32] *LSL Biotechnologies*, 379 F.3d at 680 (citing *Republic of Argentina*, 504 U.S. at 618).

[33] *Republic of Argentina*, 504 U.S. at 618.

[34] *Id.* at 619. However, while this factor is set out by the court in applying the "immediate consequence" standard, it is of little help in the application of that standard to the FTAIA. The direct influx of money into a bank account in the United States from a foreign entity would likely be considered import commerce, which is a provision of the FTAIA in and of itself. *See Minn-Chem, Inc.*, 683 F.3d at 854.

The Second Circuit Court of Appeals elaborates a bit further on the meaning of "direct" as used in the Foreign Sovereign Immunities Act.[35] In *Guirlando v. T.C. Ziraat Bankasi A.S.*, the court references the Supreme Court's decision in *Weltover*, but goes a step further by referencing the lower court case that led to the Supreme Court's review of *Weltover*.[36] The court states that by "immediate," we meant "between the foreign state's commercial activity and the effect, there was no 'intervening element.'"[37] The court goes on to say that "We have held that the 'requisite immediacy' is lacking where the alleged effect 'depend[s] crucially on variables independent of' the conduct of the foreign state.[38]

Even after the court in *United States v. LSL Biotechnologies* applies the "immediate consequence" standard, we are left with very little in the way of future guidance. The court in that case does, however, consider several factors that tend to indicate that an effect did not result as an "immediate consequence" of defendant's conduct, including whether an effect depends on uncertain intervening developments, or whether an effect is speculative or doubtful.[39]

B. The "Reasonably Proximate Causal Nexus" Standard in Minn-Chem, Inc. v. Agrium, Inc.

In 2012, the Seventh Circuit decided *Minn-Chem, Inc. v. Agrium, Inc.*, in which the court specifically rejected the Ninth Circuit's definition of "direct" in the context of the FTAIA.[40] In *Minn-Chem, Inc.*, the court found that actions taken by foreign manufacturers to restrict the global supply of potash[41] in order to fix prices that would eventually be used in the United States had a sufficiently "direct" effect on commerce in the United States.[42] In arriving at this conclusion, the

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[35] Guirlando v. T.C. Ziraat Bankasi A.S., 602 F.3d 69, 74 (2nd Cir. 2010).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *LSL Biotechnologies*, 379 F.3d at 681.

[40] *Minn-Chem, Inc.*, 683 F.3d at 857 (stating that in this court's view the Ninth Circuit was too quick to adopt the definition of "direct" set forth in the FSIA).

[41] Potash is an alchemical name for the compound potassium carbonate, K_2CO_3. *Potash Definition*, ABOUT.COM, http://chemistry.about.com/od/chemistryglossary/g/Potash-Definition.htm (last visited Nov. 25, 2004).

[42] *Minn-Chem, Inc.*, 683 F.3d at 860.

court adopted an approach to the meaning of "direct" that was first advanced by the Department of Justice's Antitrust Division: that this term means only a "reasonably proximate causal nexus."[43]

In elaborating upon this standard, the court in *Minn-Chem, Inc.* emphasizes that the word "direct" is used along with the terms "substantial" and "reasonably foreseeable" as part of an integrated phrase.[44] The court further reasons that the word "direct" addresses the "classic concern about remoteness," but engages in a fact-specific inquiry, thereby not providing a standard by which "remoteness" should be judged in future cases.[45] However, it is evident that the court's interpretation of "direct" as a "reasonably proximate causal nexus" covers a broader range of effects than the more restrictive "immediate consequence" standard adopted by the Ninth Circuit in *LSL Biotechnologies.*[46]

C. There is No Meaningful Difference in the Application of the "Immediate Consequence" and "Reasonably Proximate Causal Nexus" Standards

The cases *LSL Biotechnologies* and *Minn-Chem, Inc.* are similar in that they provide little guidance for application of their respective tests by future courts. Both of these 'tests' are largely nominal, simply assigning labels to ad hoc factual analysis. As such, it is difficult to predict their outcomes when applied to different sets of facts. It is unclear that there would be a differing result when these respective tests are applied to the same sets of facts. Through an examination of instances in which courts apply these tests, it becomes evident that there is no meaningful difference between the two, outside of the superficial connotations of the terms "immediate" and "reasonably proximate." However, it is clear that the existence of these competing labels adds to confusion in the application of United States antitrust law to extraterritorial conduct. As such, it is necessary to eliminate one of these labels, and set forth definitive guidelines as to how courts should apply the remaining standard. In order to properly assert which label should prevail as proper, future application is a relevant concern.

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[43] *Id.* at 856 (citing Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. AM. L. 415, 430 (2005)).

[44] *Id.* at 857.

[45] *Id.*

[46] *Id.* (recognizing that the "immediate consequence" test is a stricter test than the "reasonably proximate causal nexus" test the court adopts in this case).

D. Minn-Chem, Inc.'s Superficial Rejection of the "Immediate Consequence" Standard

To illustrate the aforementioned assertion, one needs to look no further than *Minn-Chem, Inc*. The question of the difference between the two standards can be framed through querying when an effect would be attenuated enough from its cause so as to not be considered an "immediate consequence," but still "reasonably proximate."[47] The types of cause-effect relationships that exist beyond the reach of the "immediate consequence" test[48] are especially difficult to define, because the facts in *Minn-Chem, Inc.*, where the court rejected the "immediate consequence" standard, seem to fit within that very test the court purports to reject.

In *Minn-Chem, Inc.*, a global potash cartel restricted supply of that commodity in order to artificially raise prices in markets outside the United States.[49] Those artificially elevated prices were then used in sales to U.S. customers.[50] The "effect" of elevated prices in the U.S. market caused by the price fixing in other markets seems sufficiently direct under the "immediate consequence" standard, at least as set forth in *LSL Biotechnologies*. In that case, the court found the effect in question not to be an "immediate consequence" of defendant's conduct, but did set forth scenarios in which such a standard may be met.[51] One such scenario provided by the court is where a foreign competitor (plaintiff) somehow demonstrates that its exclusion by the defendant causes existing players in the market to invest less in research and development of new products.[52] It is difficult to see how artificially elevated prices in the U.S. as a result of price fixing in foreign markets is more "remote" than the loss of potential innovations as a result of decreased spending on research and development because a market competitor has been excluded.[53]

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[47] It would be of no use to analyze the reverse here. If an effect satisfies the "immediate consequence" standard, logic suggests it would also be considered direct under the "reasonably proximate causal nexus test." *See Id.* (emphasizing that the "immediate consequence" is a stricter standard than the "reasonably proximate causal nexus" standard).

[48] The "gap" referred to here is meant to denote effects that would be considered to have the required "reasonably proximate causal nexus" but not close enough to be an "immediate consequence."

[49] *Id.* at 859.

[50] *Id.* The "effect" in question here is the elevated prices in the U.S. market and the conduct being examined is the price fixing in other markets.

[51] *LSL Biotechnologies*, 379 F.3d at 681.

[52] *Id.*

[53] The prospect of innovations as a result of research and development, even where it can be shown that a market competitor has been excluded, seem a bit speculative. These speculative effects on commerce in the United States

In rejecting the *LSL Biotechnologies*' "immediate consequence" standard, the *Minn-Chem, Inc.* court seems infatuated with the term "immediate" in a shallow, abstract sense, rather than its actual application in *LSL Biotechnologies*. For example, the court states that "superimposing the idea of immediate consequence" on top of the full phrase results in a stricter test than the statute can bear"[54] but goes no further in explaining what the result of such an interpretation would entail. Seemingly, the *Minn-Chem, Inc.* court rejects the "immediate consequence standard" based on the connotation of the word "immediate," rather than its use in the context of FTAIA analysis.[55] For this reason, it seems as though *Minn-Chem, Inc.* is not so much rejecting the test set forth in *LSL Biotechnologies*, but rather rejecting the labeling of the standard as "immediate."

E. Other Cases Applying Minn-Chem, Inc.'s "Reasonably Proximate Causal Nexus" Standard

Since the Seventh Circuit decided *Minn-Chem, Inc.*, few Courts have had the opportunity to expound upon the "reasonably proximate causal nexus" standard. In fact, one of the only Courts to address the meaning of "direct" within the FTAIA and citing *Minn-Chem, Inc.* in the process is the United States District Court for the Eastern District of New York.[56] In *In re Vitamin C Antitrust Litigation*, that court addressed a situation involving a prototypical scenario invoking a directness analysis as it relates to the application of the FTAIA.

In *In re Vitamin C Antitrust Litigation*, the court addressed a scenario in which defendants, a variety of Chinese manufacturers, conspired to suppress competition through fixing the price and controlling export sales volumes of vitamin C offered for sale to customers both inside and outside of the United States.[57] The court was specifically dealing with the question of whether

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are not typically considered an "immediate consequence." *See* Lotes Co., Ltd. V. Hon Hai Precision Industry Co. Ltd., WL 2099227 *1, *7 (S.D.N.Y. 2013).

[54] *Minn-Chem, Inc.*, 683 F.3d at 857. The full phrase here meaning "direct, substantial, and reasonably foreseeable." The *Minn-Chem* court, in this portion of the opinion, is making the argument that this should be interpreted as an integrated phrase. This, however, comes after an express trifurcation of the phrase on the previous page. *Id.* at 856 (treating the elements "substantial" and "reasonably foreseeable" as separate and distinct by addressing them separately and pointing out the analysis of each is straightforward in this case).

[55] The *Minn-Chem, Inc.* court states that "[t]o demand a forseeable, substantial, and 'immediate' consequence on import or domestic commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage," evidently substituting its own understanding of the term "immediate" rather than adopting that of the *LSL Biotechnologies* court. *Id.* at 857. Rather than exploring the factors the *LSL Biotechnologies* court used to define when an effect was "immediate," the *Minn-Chem, Inc.* court simply dismisses the term as too strict.

[56] *In re* Vitamin C Antitrust Litigation, 904 F.Supp.2d 310 (E.D.N.Y. 2012).

[57] *Id.*

anticompetitive activity involved in transactions between those Chinese manufacturers and foreign (non-U.S.) had the requisite effect on the United States market (direct, substantial, and reasonably foreseeable) to trigger the "domestic effects" exception to the FTAIA, thereby bringing that anticompetitive conduct within the purview of the Sherman Act. Thus, the court dealt with a scenario in which the Chinese defendants were being sued in United States court, under United States law, in connection with transactions that took place wholly outside of the United States. The court ultimately determined that the foreign transactions in question did have the requisite effect, giving a great deal of weight to the fact that the defendants knew that the goods being transacted would be shipped directly to the United States.[58]

F. Cases Applying the "Immediate Consequence" Standard

In *Lotes Co., Ltd. v. Hon Hai Precision Industry Co. Ltd.*[59] the court utilizes the "immediate consequence" test in its FTAIA analysis.[60] *Lotes Co.* involved a dispute between Chinese corporations that manufacture and sell USB 3.0 connectors to producers of notebooks, desktops, and servers.[61] Plaintiff Lotes alleged that defendant's anticompetitive behavior was designed to exclude Lotes from several competitive markets or raise Lotes' costs of production.[62] Lotes suggested that this conduct would have the effect of raising prices to U.S. consumers "across the

[58] *Id.* at 318. While *In re Vitamin C Antitrust Litigation* does cite *Minn-Chem, Inc.*, this case deals primarily with the interesting issue of what constitutes "import" commerce. As previously mentioned throughout this note, the FTAIA excludes from the purview of the Sherman Act all trade and commerce with foreign nations, but then provides two exceptions to that general rule: the "import" exception and the "domestic effects" exception. While the "imports" exception is generally outside the scope of this note, the court in *In re Vitamin C Antitrust Litigation* intertwines the two issues. The case deals with the unique scenario in which the *transactions* for the goods took place between Chinese manufacturers and foreign (non-U.S.) purchasers, but the goods were to be shipped directly to the United States. This was due to the original foreign purchasers were acting simply as resellers, already having U.S. buyers lined up at the time of purchase of the Vitamin C from the Chinese manufacturers, or, the "foreign" purchasers were actually multinational corporations with a significant presence within the United States. Regardless, the goods were to be shipped into the United States, even though the actual exchange of money was wholly foreign. The court ultimately determined that even if this was not considered "import commerce" and thus within the "import" exception of the FTAIA, the effect the transactions had on the U.S. market was sufficiently "direct" so as to satisfy the "domestic effects" exception, thus subjection the transaction to the Sherman Act.

[59] *Lotes Co., Ltd.,* WL 2099227 at *7.

[60] *Id.* This case does not specifically reject the "reasonably proximate causal nexus" test set forth in *Minn-Chem, Inc.* However, it does adopt the "immediate consequence" standard for directness under the FTAIA, and previously cited *Minn-Chem, Inc.* during the court's jurisdictional discussion. *See id.* at 6.

[61] *Id.* at *2.

[62] *Id.* at *3.

full range of products incorporating USB 3.0 connectors."[63] The court determined that defendant's conduct had "neither a direct, substantial, nor reasonably foreseeable effect on domestic commerce."[64]

While *Lotes Co.* contributes to uncertainty over which test should govern, it does provide a bit of guidance on how the "immediate consequence" test should be applied. The court, in finding the effects insufficiently "direct" notes that the USB connectors are manufactured, sold, and incorporated into end-stage products outside the U.S.[65] Only after a convoluted stream of purchasing and incorporation into other products are the goods shipped to the U.S. for distribution. [66] These "ripple effects" on U.S. markets are not sufficiently "direct" to allow application of the Sherman Act.[67] Further still, the supposed effects of defendant's conduct are not quantifiable.[68] Finally, the court notes that a "whole host of factors other than the price of USB 3.0 connectors influence the price of domestic computer products."[69] These factors are all indicative of an effect on domestic commerce that is not sufficiently "direct" so as to allow application of the Sherman act under the FTAIA standards.[70] Again, however, it is not clear that the effect in *Lotes Co.* would be "direct" enough to satisfy the *Minn-Chem, Inc.* "reasonably proximate causal nexus" standard and lead to a different result, were that test applied. As such, this set of facts may be applied to either test and lead to the same result.

Another court that applied the "immediate consequence" standard was the United States District Court for the Northern District of California, in *In re Transpacific Passenger Air Transp. Antitrust Litigation*.[71] That case involved a situation in which defendants, various airlines,

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[63] *Id.*

[64] *Id.* at *7.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at *10.

[69] *Id.*

[70] *Id.* (applying these factors in utilizing the immediate consequence standard).

[71] *In re* Transpacific Passenger Air Transp. Antitrust Litigation, 2011 WL 1753738 *1, *4 (N.D. Cal. May 9, 2011).

conspired to fix, raise, maintain, and/or stabilize air passenger travel, including associated surcharges, for international flights between the United States and Asia/Oceania.[72] The court examined two distinct "domestic effects" of this conduct: 1. that travelers using price-fixed air transportation services are able to allocate a smaller fraction of their total travel budget to the purchase of commercial goods and services during their stay in the United States; and 2. U.S. residents and citizens paid more for air passenger transportation services, whether those services were purchased in the United States or elsewhere in the world.[73]

With regard to the first alleged effect, that travelers, as a result of price-fixed air transportation services were able to spend less on commercial goods while in the United States, the Court quickly dismisses this as "indirect," citing the "immediate consequence" standard.[74] In doing so, the court states that this assertion makes assumptions about travelers' spending habits that are by no means "certain," that it was mere speculation that travelers may have spent more money in the United States if the alleged anti-competitive conduct had not taken place, and that the alleged "effect" was dependent upon too many intervening developments.[75]

However, in addressing the second alleged effect of defendant's allegedly anti-competitive conduct, the court determines that the domestic effect was sufficiently direct.[76] The court determined that since prices for air travel in the United States were higher as a result of defendant's alleged price-fixing and other anti-competitive conduct, those higher prices were a direct enough result of that conduct so satisfy the "domestic effects" exception of the FTAIA.[77]

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[72] *Id.* at *1.

[73] *Id.* at *4.

[74] *Id.* at *5.

[75] *Id.*

[76] *Id.*

[77] *Id.* While the court states that the effect of increased prices for air travel is sufficiently direct so as to implicate the "domestic effects" exception to the FTAIA, it does so in a conclusory manner. There is very little analysis involved in the court's determination on this point. This is likely because the "directness" involved here is inherent. The anti-competitive activity at issue in this case is price-fixing. That is, several airlines conspired to keep prices of air travel high. There can be no attenuation between the anti-competitive conduct and the domestic effect here, because the anti-competitive conduct itself was to raise prices.

While courts have applied both the "immediate consequence" and "reasonably proximate causal nexus" standards in the past, that application, under both standards, typically consists of ad hoc factual inquiry. Further, it is not clear that there is any substantive difference between the applications of the two tests. Contributing to uncertainty surrounding the meaning of "direct" in the FTAIA stems from the lack of future guidance from the courts. Thus, the only way to ensure consistent application of the FTAIA in future cases, and to keep that interpretation consistent with congressional purpose and international interests, is to name one standard as superior and provide guidelines by which that standard should be applied.

IV. "IMMEDIATE CONSEQUENCE" AS THE SUPERIOR STANDARD FOR DEFINITION OF "DIRECT"

A. Legislative Intent in Passing the FTAIA

In determining which test should apply in a court's determination of "directness" as it relates to the FTAIA, it is useful to understand the reasoning behind the legislature's decision to pass the law. In the face of an increasingly globalized economy, the legislature was required to shield the domestic economy from the harmful effect of anticompetitive activity taking place in foreign markets, where such conduct was not yet outlawed. However, at the same time, the legislature did not want to exclude United States companies from those markets through overly restrictive application of domestic antitrust law. The legislative result of these countervailing interests was the FTAIA, which, as is evident from an examination of the legislative history, was intended to catalyze, rather than limit, United States business activity abroad.[78]

House Report No. 97-686 details the legislative intent behind the passage of the FTAIA. In fact, in the very first line of the Report, under the "Purpose" section, it states "H.R. 5235 is one of several bills introduced in the 97th Congress that seek to promote American exports."[79] Further, one of the reasons the need for legislation in this area was being considered was because American

[78] The Supreme Court, in *F. Hoffmann-La Roche LTD v. Empagran S.A.*, speaks on the concern the legislature had with United States business interests abroad when passing the FTAIA. *Empagran*, 542 U.S. at 161. Specifically, the Court mentions that the FTAIA makes clear to American exporters, or other firms doing business abroad, that the Sherman Act does not prevent them from entering into any sort of business arrangements, *however anticompetitive*, so long as those arrangements adversely affect only outside markets. *Id.* In fact, that is the point of the *Empagran* holding: that the "gives rise" to a Sherman Act claim language in the FTAIA requires that the harmful effect of the anticompetitive conduct at issue must be felt within the United States. The FTAIA does not provide for a cause of action for foreign firms when their injury due to anticompetitive conduct is felt only in foreign markets.

[79] H.R. REP. NO. 97-686 at 2.

businessmen of the time considered American antitrust laws to be a "barrier to joint export activities that promote efficiencies in the export of American goods and services."[80] It is also evident that the legislature intended the "direct, substantial, and reasonably foreseeable effect" test to be simple and objective, serving as a clarification of American law. The legislature's intention that the FTAIA facilitate American business and serve as an objective clarification of American law should not be lost as the complexity of global transactions increases.

B. *The Type of Activity That Would Cause a Court to Undergo a "Directness" Analysis*

In order to properly evaluate how "direct" should be defined in the context of the FTAIA, it is useful to understand the type of conduct the standard will be used to judge. It is fairly obvious from the text of the FTAIA that the statute applies to trade or commerce involving United States exports.[81] However, less clear is whether the FTAIA contemplates trade or commerce that is wholly foreign, thereby subjecting that wholly foreign trade or commerce to the antitrust laws of the United States. The Supreme Court, in *F. Hoffman-La Roche Ltd. V. Empagran S.A.* considered this question, ultimately determining that the FTAIA applies not only to conduct involving exports, but also to commerce which is wholly foreign, so long as that activity has the requisite effect on the United States market.[82]

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[80] *Id.* Another reason for the passing of the FTAIA, according to this House Report was to clarify existing American law. That is, there had been inconsistency among the courts in the application of United States antitrust law to extraterritorial conduct, and the legislature hoped to clarify that law and provide an objective standard upon which Courts could further develop precedent.

[81] "Sections 1to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States." 15 U.S.C. § 6a (2015).

[82] *Empagran,* 542 U.S. at 161. While *Empagran* is an important case in FTAIA jurisprudence, it does not address the issue of the meaning of "direct." Rather, *Empagran* deals with the second prong of the FTAIA. That is, 15 U.S.C. § 6a(2), which requires that the conduct in question "gives rise to a claim under the provisions of section 1 to 7 of this title, other than this section." Specifically, the court addresses the issue of whether a foreign purchaser may bring a cause of action against a foreign defendant for a harmful effect that is felt in a foreign market, independent

The international comity concern surrounding the application of United States antitrust law to trade or commerce that is wholly foreign is inherent. In a globalized market, the United States must carefully balance the sovereignty of foreign nations, while also protecting the domestic marketplace. In fact, Congress anticipated that the FTAIA would have an effect on the sovereignty of foreign nations, even hoping that the passage of the law would have the effect of encouraging other nations to examine their own laws and take steps necessary to protect competition in their own markets.[83] With the Supreme Court's clarification in *Empagran* that wholly foreign trade or commerce may be reached by the Sherman Act through operation of the FTAIA, it is even more important to conservatively interpret the meaning of "direct" as used in the FTAIA so as to prevent unreasonable interference with the sovereignty of foreign nations.

C. Proposed Test and Practicability

1. Proposed Test for "Immediate Consequence" Standard - the "Chain of Causation" Test

The cases outlined above indicate several factors that may be indicative of when domestic effects are an "immediate consequence" of a foreign transaction. However, short of drawing analogies, these factors are an insufficient means of applying the "immediate consequence" standard to future cases. However, an appropriate test may be set forth by expounding upon a factor common in "immediate consequence" analysis: the existence of other causes that may have contributed to the domestic effects in question.[84]

Any cause that may have contributed to the domestic effect, outside of the defendant's actions that are specifically in question in a particular case, can properly be termed "intervening causes"[85] A standard for the application of the "immediate consequence" test is: where defendant's

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of any domestic effect. The ultimately decided that the harmful effect sued upon must be domestic, or at least stem from a domestic effect, rather than being wholly independent. *Id.*

[83] H.R. REP. NO. 97-686, at 9.

[84] A case that emphasizes this point is *Boyd v. AWB Ltd.* There, the court adopts the "immediate consequence standard for its definition of direct under the FTAIA when evaluating a plaintiff's claim that an Australian wheat company engaged in anticompetitive conduct in its dealings with Iran, allegedly causing a spike in wheat prices in the United States. Boyd v. AWB Ltd., 544 F.Supp.2d 236, 245 (2008). *Boyd* emphasizes that the presence of intervening factors including market conditions, crop yields, harvesting/transportation costs, etc. also impacted domestic wheat prices during the time in question. *Id.*

[85] *See id.* (referring to various causes of elevated wheat prices outside of defendant's conduct "intervening causes"). *See also Lotes Co.*, WL 2099227 at *7.

conduct is a "but-for" cause[86] of a domestic effect, and other intervening causes exist, query whether those intervening causes were themselves proximately caused by defendant's conduct. If so, the chain of causation between defendant's conduct and the domestic effect is unbroken, and the effect is an "immediate consequence" of that conduct. If not, the domestic effect is not an immediate consequence of defendant's activity. This proposed standard can be illustrated by its application to situations in two previous cases, one in which the requisite "direct" effect was not found, and one in which the effect was sufficiently direct.

2. Application of the Proposed Test to a Case Where the Effect is Not Sufficiently Direct

In *In re Intel Corp. Microprocessor Antitrust Litigation*, the court applied the "immediate consequence" standard and determined that the effects on U.S. commerce were not sufficiently direct.[87] In that case, Plaintiffs alleged that a deal between Intel and a German retailer promoting Intel-based systems in Germany effected the profitability of the German company's U.S. based parent corporation, thereby reducing the parent corporation's ability to compete in the U.S. market, effecting commerce in the U.S. In finding the effect on U.S. commerce not to be an "immediate consequence" and therefore not direct, the court reasoned that there were a multitude of factors, other than defendant's conduct, that contributed to plaintiff's revenue loss and subsequent inability to compete in the U.S. market, including cost of financing, market conditions, supply[88] and demand, success of innovative efforts, and political conditions.[89]

The "chain of causation" test of "immediate consequence" can be applied to the facts in *In re Intel Corp.* to arrive at the same result. In that case, there were multiple intervening factors none of which were proximately caused by defendant's conduct.[90] As a result of these multiple intervening factors, the chain of causation between defendant's conduct and the effect on U.S.

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[86] "But-for" causation is, put simply, "The cause without which the event could not have occurred." BLACK'S LAW DICTIONARY 250 (9th ed. 2009).

[87] *In re* Intel Corp. Microprocessor Antitrust Litig., 452 F.Supp.2d 555, 560 (D. Del. 2006).

[88] *Id.* at 561.

[89] *Id.*

[90] Some of the intervening factors the court mentions include cost of financing, various unfavorable market conditions at the time, issues with supply and demand, the lack of success with regard to research and development efforts, and political conditions. *Id.*

commerce was broken. Therefore, the effect was not an immediate consequence of defendant's conduct, and was not sufficiently direct under the FTAIA.

3. Application of the Proposed Standard to a Case where the Effect Was Found to be Sufficiently Direct under the FTAIA

In *TFT-LCD (Flat Panel) Antitrust Litigation*, the court applied the "immediate consequence" standard and found that the effect on the U.S. market caused by defendant's foreign conduct was sufficiently direct under FTAIA.[91] In that case, defendant allegedly engaged in a global price-fixing conspiracy, artificially raising the price for TFT-LCD panels.[92] As a result, consumers in the U.S. paid an inflated price for products containing defendant's TFT-LCD panels.[93] In reasoning that this effect was sufficiently direct, the court noted, "the nature of the effect does not change in any substantial way before it reaches the United States consumer"[94] Further, the effect proceeds "without deviation or interruption" from the TFT-LCD manufacturer to the U.S. retail establishment.[95]

The "chain of causation" test of "immediate consequence" can be applied to *TFT-LCD* to reach the same result. In that case, the court specifically notes that no intervening events contributed to the effect of higher prices in the U.S.[96] However, even if the act of manufacturers of end-stage products containing TFT-LCD panels charging higher prices to U.S. retailers is considered an intervening cause, the proposed definition of "immediate consequence" is still satisfied. The higher prices charged by manufacturers of end-stage products is proximately caused by the artificially inflated price of the TFT-LCD panels used as a component of the product.[97]

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[91] *In re* TFT-LCD (Flat Panel) Antitrust Litig., 822 F.Supp.2d 953 (N.D. Cal. 2011).

[92] *Id.* at 954-55.

[93] *Id.* at 963.

[94] *Id.* at 964.

[95] *Id.*

[96] *Id.*

[97] The court here emphasizes that the TFT-LCD panel in question was a major part of the end-stage product, so the price of this component has a great impact on the final price of the end-stage product itself. *Id.* at 964. This is contrasted with the circumstances in *Lotes Co.*, where the USB connector was a small component of the final product in which it was used, having little bearing on the price for which the end stage product was sold. *See Lotes Co.*, WL 2099227 at *10.

Thus, defendant's conduct originally in question (fixing the price of TFT-LCD panels) proximately caused the intervening cause, thus the chain of causation is left unbroken. As a result, the effect on U.S. commerce is an "immediate consequence" of defendant's foreign conduct, and is sufficiently direct under the FTAIA.

B. Consistency with Legislative Intent and Statutory Language

1. Congress Intended a Limitation rather than an Expansion

While legislative intent may not be clear through examining the text of the FTAIA, it is evident that this statute was enacted to limit the extraterritorial application of United States antitrust law.[98] One of the main catalysts for the codification of the FTAIA was growing concern among businesspeople that antitrust laws of the U.S. would have a negative effect on U.S. exporters.[99] The FTAIA was enacted to quell this concern by clarifying "when antitrust liability attaches to international business activities."[100] Specifically, United States antitrust law would be applicable "*only* to conduct "having a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce or domestic exports."[101] (Emphasis added). Here, "only" suggests a limitation, rather than an expansion. An examination of House Report No. 97-686 indicates that the function of the FTAIA is to limit the application of United States antitrust law, not to use it as a basis for expanding the range of conduct subject to said law.[102]

2. Consistency with Statutory Language

In addition to inconsistency with legislative intent, the "reasonably proximate causal nexus" standard is incompatible with the language of the statute. In adopting that standard, the court in *Minn-Chem, Inc.* stated, "No one needs to read the words "substantial" and "foreseeable" into the FTAIA. Congress put them there, and…signaled that the word "direct" used along with them had to be interpreted as part of an integrated phrase."[103] The court further reasoned, "super

[98] H.R. REP. NO. 97-686.

[99] *Id.* at 4.

[100] *Id.* at 7.

[101] *Id.* at 2.

[102] *Id.*

[103] *Minn-Chem, Inc.*, 683 F.3d at 857.

imposing the idea of 'immediate consequence' on top of the full phrase results in a stricter test than the statute can bear."[104] The court in *Minn-Chem, Inc.* would thus construe an effect as "direct" if it is "substantial" and "reasonably foreseeable." However, such a reading of the FTAIA is not supported by any interpretation of these three commonly used phrases. The terms "direct," "substantial," and "reasonably foreseeable" as used here have separate and distinct meanings, each of which provides for distinct criteria in establishing an exception to the FTAIA, and must be separately interpreted.

The phrases "direct," "substantial," and "reasonably foreseeable" are terms that permeate multiple areas of the law. They are frequently used to describe the same thing: the relationship between some cause and some effect. However, they have never been used interchangeably, that is, to describe identical relationships between a cause and effect. A relationship that is "direct" is not necessarily "substantial." Similarly, a relationship may be "direct" but not "reasonably foreseeable." Thus, using "substantial" and "reasonably foreseeable" to define "direct" is not a viable interpretation of the FTAIA.

To illustrate this point, an analogy may be drawn between the application of the Sherman act to extraterritorial activity through the exception under the FTAIA and the extension of Congress's power under the Commerce Clause to regulate local economic activity.[105] For years Congress was able to legislatively reach local activity under its Commerce Clause power if the local activity had a "direct" effect on interstate commerce.[106] However, this "direct" test was eventually replaced by a separate, distinct "substantial effects" test.[107] Under this later test, Congress was able to reach local economic activity if that activity's effects on interstate commerce were "substantial," even if the effects were indirect.[108] The variation between these two tests

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[104] *Id.*

[105] This analogy can be drawn in a similar fashion to the analogy used by the court in *LSL Biotechnologies* between the FTAIA and the FSIA. In the Supreme Court's commerce clause jurisprudence, the court is examining the relationship between some type of activity (local economic activity) and its effect on some type of commerce (interstate commerce). *See* United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[106] *Id.*

[107] *See* Houston E. & W. T. Ry. Co. v. United States, 234 U.S. 342 (1914) (adopting a substantial economic effects test instead of the previous direct effects test).

[108] In 1937, the Supreme Court officially adopted the substantial economic effects test, by which Congress could reach local economic activity if its effect on interstate commerce was substantial, even if not direct. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The point here is not the veracity of the analogy between

illustrates that the terms "direct" and "substantial" are distinct, especially with regard to an activity's effect on commerce. As a result, "direct, substantial, and reasonably foreseeable should not be considered an integrated phrase. Rather, each of these terms imposes a distinct element that must be shown in order to apply the domestic effects exception.

IV. CONCLUSION

In the face of an increasingly globalized society, the need for consistent application of United States antitrust law to foreign activity is more salient than ever. Courts have engaged in ad hoc analysis since the codification of the FTAIA in 1982, leading to disagreement among jurisdictions regarding the meaning of "direct" within the FTAIA. If the United States is to remain competitive in the global marketplace, businesspeople need clarity regarding when their dealings overseas may be subject to antitrust enforcement in the United States.

The Seventh Circuit's holding in *Minn-Chem, Inc.* represents a meaningless departure from the "immediate consequence" standard that serves only to confuse the application of the FTAIA to trade and commerce with foreign nations. In order to provide clarity, courts should universally adopt the "immediate consequence" interpretation of "direct." Further, to provide for consistent application of this interpretation, courts should adopt the "chain of causation test," which is not only practical, but consistent with Congressional intent and statutory language.

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commerce clause jurisprudence and FTAIA jurisprudence. Rather, it is to illustrate that the terms "direct" and "substantial" are distinct when discussed in the context of an activity's effect on commerce. Thus, "substantial" cannot be used to define "direct" in this context.