



## Notre Dame Law Review

Volume 90 | Issue 5

Article 11

8-2015

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### Recommended Citation

Jeffrey H. Smith, *Call Me, Maybe? The Seventh Circuit's Call in Motorola Mobility*, 90 Notre Dame L. Rev. 2063 (2015).

Available at: <http://scholarship.law.nd.edu/ndlr/vol90/iss5/11>

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# CALL ME, MAYBE? THE SEVENTH CIRCUIT'S CALL IN *MOTOROLA MOBILITY*

*Jeffrey H. Smith\**

## INTRODUCTION

Global supply chains are prolific throughout modern business, provide unique business advantages in a globalized economy, and should be protected to some degree by American antitrust law. A supply chain is defined as a “network created amongst different companies producing, handling and/or distributing a specific product.”<sup>1</sup> In its most basic form, a supply chain encompasses each step from the supplier to the final consumer in the production of a good or in the administration of a service.<sup>2</sup> Globalization or the use of a *global* supply chain refers to the practice of “sourcing, manufacturing, transporting and distributing products outside of your native country.”<sup>3</sup> Global supply chains have become an integral part of current business practice, specifically in the technology market.<sup>4</sup> For example, in producing the iPhone 6, Apple uses displays from South Korea, cameras from Japan, chips from Taiwan, and manufacturing facilities in China.<sup>5</sup>

American businesses that utilize global supply chains are at a high risk of being the victim of anticompetitive activity by foreign cartels. Many businesses that hope to remain competitive in the globalized economy have begun to expand abroad.<sup>6</sup> A common organizational strategy involves the establishment by a domestic parent company of a foreign subsidiary that acts

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1 *Definition of Supply Chain*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/supplychain.asp> (last visited Apr. 16, 2015).

2 *Id.*

3 Dave Blanchard, *How to Manage a Global Supply Chain*, INDUSTRYWEEK (Aug. 15, 2012), <http://www.industryweek.com/supply-chain/how-manage-global-supply-chain>.

4 *Next-Generation Supply Chains: Efficient, Fast and Tailored*, PwC 5 (2013), <http://www.pwc.com/GlobalSupplyChainSurvey2013>.

5 *How and Where iPhone Is Made: Comparison of Apple's Manufacturing Process*, COMPARECAMP (Sept. 27, 2014), <http://comparecamp.com/how-where-iphone-is-made-comparison-of-apples-manufacturing-process/>.

6 *See Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842, 846 (7th Cir. 2014).

as a link in the parent's global supply chain.<sup>7</sup> Generally, this allows the parent to more efficiently manufacture a product, ease distribution, or gain some other business advantage.<sup>8</sup> However, an issue arises when the foreign subsidiary is the victim of anticompetitive conduct abroad. Does a domestic company have a cause of action against a foreign cartel who violates the Sherman Act? This is the issue at the heart of *Motorola Mobility v. AU Optronics* and similar cases: whether anticompetitive activity abroad which affects a domestic company's foreign subsidiaries can give rise to an antitrust claim in the United States under the Sherman Act and the Foreign Trade Antitrust Improvements Act (FTAIA).<sup>9</sup>

*Motorola Mobility, Inc. v. AU Optronics Corp.*<sup>10</sup> involved a domestic technology company, Motorola Mobility (Motorola) that utilizes a global supply chain to manufacture and distribute electronic devices, including cellular phones.<sup>11</sup> The defendants, AU Optronics Corp. (AU Optronics), sold LCD panels to Motorola and its foreign affiliates to be incorporated into Motorola's phones.<sup>12</sup> Motorola alleged that the defendants engaged in anticompetitive conduct by taking part in a global price-fixing conspiracy that resulted in the price of the LCD panels rising to an unsustainable point.<sup>13</sup> The District Court granted summary judgment for the defendants, holding that Motorola had failed to satisfy the FTAIA. Motorola appealed the judgment to the Seventh Circuit. The Seventh Circuit affirmed the District Court's grant of summary judgment but subsequently vacated its opinion and granted rehearing. Upon rehearing, the Seventh Circuit again affirmed the District Court's holding in favor of AU Optronics.

This Note seeks to establish that the Seventh Circuit should have held in *Motorola Mobility* that the FTAIA's "direct . . . effect" requirement is satisfied when a foreign subsidiary suffers a harm due to anticompetitive activity abroad and there exists a reasonably proximate causal nexus between that harm and the domestic effect in the United States. Furthermore, the "gives rise to" requirement of the FTAIA sufficiently accounts for concerns of international comity and, under the facts of this case, causes Motorola's claim to

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7 See, e.g., *id.*

8 Global supply chains are advantageous to a business for a number of reasons. They allow a business to follow existing customers as they expand internationally. Blanchard, *supra* note 3. They also provide the opportunity to "leverage . . . worldwide purchasing power, reduce materials inventories, eliminate waste[,] and improve efficiency." *Id.* Furthermore, effective supply chains and supply chain management are key components of business success. In a survey by Price Waterhouse Coopers, forty-five percent of participants saw their supply chain as a strategic asset. PwC, *supra* note 4, at 4. Notably, those who viewed their supply chain as an asset reported achieving seventy percent higher performance in "on time in full" delivery and inventory turnover, which resulted in better margins and had a significant impact on the bottom line. *Id.*

9 See *Motorola Mobility*, 746 F.3d 842.

10 No. 09 C 6610, 2014 WL 258154, at \*1 (N.D. Ill. Jan. 23, 2014).

11 *Id.*

12 *Id.*

13 *Id.*

fail. Part I explores the history of the Sherman Antitrust Act and its international application before and after the FTAIA, beginning with *American Banana Co. v. United Fruit Co.* and extending through *Hartford Fire Ins. Co. v. California*. Part II describes the statutory language of the FTAIA. Part III discusses the consensus of the circuits that, after *Arbaugh v. Y & H Corp.*, the FTAIA goes to the merits of a plaintiff's claim. Section IV.A will discuss the recent circuit agreement regarding the second prong of the FTAIA—when an injury “gives rise to” a claim under the Sherman Act. Section IV.B will analyze the two competing tests for determining whether the “direct . . . effect” requirement—the first prong of the FTAIA—has been satisfied and will argue that the “reasonably proximate causal nexus” test is the appropriate standard. Part V will apply this standard to the facts in *Motorola Mobility* and will ultimately conclude that the “direct effects” requirement was satisfied but that the domestic effect failed to “give rise to” a Sherman Act claim, with the conclusion that the Seventh Circuit should have administered its holding in accordance with this reasoning.

## I. A BRIEF HISTORY: THE SHERMAN ANTITRUST ACT APPLIED ABROAD

### A. *A Strict Interpretation: American Banana*

The international reach of the Sherman Act was first considered by the Supreme Court in *American Banana Co. v. United Fruit Co.*<sup>14</sup> In that case, the defendant owned banana plantations in Central America and was in the business of exporting them to the United States.<sup>15</sup> The plaintiff, a competitor in the market, brought a claim in the United States under the Sherman Act.<sup>16</sup> The Supreme Court determined that the Sherman Act did not reach acts that took place in Panama and Costa Rica.<sup>17</sup> Despite the fact that both parties to the litigation were American corporations, the Supreme Court held 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.”<sup>18</sup> The Court further reasoned that to hold otherwise would result in an “interference with the authority of another sovereign” and would be “contrary to the comity of nations.”<sup>19</sup>

### B. *A Softening Standard: Alcoa and Timberlane*

Over time, the strict interpretation of the international reach of the Sherman Act gradually softened and courts began exercising jurisdiction over certain extraterritorial actions that affected competition in the United

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14 213 U.S. 347 (1909).

15 *Id.* at 354.

16 *Id.* at 348.

17 *Id.* at 357.

18 *Id.* at 356.

19 *Id.*

States.<sup>20</sup> Two important circuit court cases emerged before Congress passed the FTAIA in 1982. These are the Second Circuit's opinion in *United States v. Aluminum Co. of America (Alcoa)*<sup>21</sup> and the Ninth Circuit's opinion in *Timberlane Lumber Co. v. Bank of America*.<sup>22</sup>

In *Alcoa*,<sup>23</sup> the Second Circuit was confronted with the issue of whether the Sherman Act extended to a foreign subsidiary's acts outside of the United States when those acts had an effect on competition in the United States.<sup>24</sup> In a landmark decision, Judge Learned Hand developed an intent/effects test for determining when extraterritorial activity could be subject to liability under the Sherman Act.<sup>25</sup> Under this test, in order for extraterritorial activity to fall within the reach of the Sherman Act, the activities at issue must have been "intended to affect imports" and must have actually affected them.<sup>26</sup> Judge Hand proceeded to determine that the defendant in that case had both intended to affect and did affect the imports involved and was therefore subject to the Sherman Act.<sup>27</sup> Notably, the court did not address what the outcome would be if only one of the elements was satisfied.<sup>28</sup>

In contrast, in *Timberlane*, the Ninth Circuit rejected the intent/effects test articulated by Judge Hand.<sup>29</sup> *Timberlane* involved a number of parties, some principal, some subsidiary, some foreign, and some domestic.<sup>30</sup> Ultimately, it was determined that the defendants' actions occurred primarily in Honduras and that a majority of the effect was felt there as well.<sup>31</sup> As a result, the district court dismissed the case for its failure to satisfy the intent/effects test.<sup>32</sup> The Ninth Circuit reversed, stating that the test did not adequately take into consideration a number of other significant factors, including comity.<sup>33</sup> As a result, the court developed a more nuanced approach, which required three steps and the consideration of numerous factors.<sup>34</sup> While this approach may have offered a more tailored result on a case-by-case basis, it was often criticized for the burden it imposed on courts and the inconsistent outcomes it produced.<sup>35</sup>

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20 Joseph P. Bauer, *The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to American Banana?*, 65 ME. L. REV. 3, 7–8 (2012).

21 *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

22 549 F.2d 597 (9th Cir. 1976).

23 *Alcoa* was decided over thirty-five years after *American Banana*.

24 *Alcoa*, 148 F.2d at 421–22, 444–45.

25 *Id.* at 444.

26 *Id.*

27 *Id.* at 444–45.

28 *Id.* at 443–44.

29 *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 612 (9th Cir. 1976).

30 *Id.* at 603–04.

31 *Id.* at 597.

32 *Id.* at 601.

33 *Id.* at 615.

34 *Id.*

35 See Bauer, *supra* note 20, at 9 ("While this far more nuanced approach had the potential virtue of increasing the likelihood of reaching a 'correct' result, it was criticized

### C. *Considerations of Comity: Hartford Fire*

*Hartford Fire Ins. Co. v. California*<sup>36</sup> involved domestic and foreign insurers and reinsurers who allegedly violated the Sherman Act by engaging in conspiracies to affect the American insurance market.<sup>37</sup> The London reinsurers who were named as defendants did not contest that the court had jurisdiction but argued that this was an improper application of the Sherman Act to foreign conduct.<sup>38</sup> While holding that this was not an improper application of the Sherman Act, the majority addressed the FTAIA only so far as to determine that considerations of international comity were not present in the statute and therefore need not have been considered.<sup>39</sup> However, Justice Scalia argued in dissent that considerations of international comity—"the respect sovereign nations afford each other by limiting the reach of their laws"<sup>40</sup>—counseled strongly against application of the Sherman Act in this instance.<sup>41</sup> Relying on § 403 of the *Restatement (Third) of the Foreign Relations Law of the United States*, Justice Scalia determined that application of United States law in that situation would have been unreasonable and should therefore have been avoided.<sup>42</sup>

## II. THE FTAIA

In an attempt to resolve the conflict regarding the application of the Sherman Act extraterritorially, Congress passed the Foreign Trade Antitrust Improvement Act in 1982.<sup>43</sup> The purpose of the legislation was to codify an effects test for determining the extraterritorial reach of the Sherman Act.<sup>44</sup> Congress had two primary concerns that led to the passing of the statute. First, Congress was concerned that United States courts would be overwhelmed with lawsuits regarding actions that had minimal effect on domestic commerce and primarily served foreign interests.<sup>45</sup> Second, Congress was of the opinion that the inconsistent application of the Sherman Act internation-

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by numerous courts and commentators for the increased burden it placed on courts and parties, as well as the uncertainty of result it presaged.”).

36 509 U.S. 764 (1993).

37 *Id.* at 770–71.

38 *Id.* at 794–95.

39 *Id.* at 798.

40 *Empagran S.A. v. F. Hoffman-La Roche, Ltd. (Empagran II)*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) (quoting *Hartford Fire*, 509 U.S. at 817 (Scalia, J., dissenting)).

41 *Hartford Fire*, 509 U.S. at 819.

42 *Id.* at 818–22.

43 Export Trading Company Act of 1982, Pub. L. No. 97-290, tit. IV, §§ 401–03, 96 Stat. 1233, 1246–47 (codified at 15 U.S.C. § 6a (2012)).

44 Morgan Franz, Comment, *The Competing Approaches to the Foreign Trade Antitrust Improvements Act: A Fundamental Disagreement*, 41 PEPP. L. REV. 861, 866–67 (2014); Edward Valdespino, Note, *Shifting Viewpoints: The Foreign Trade Antitrust Improvement Act, a Substantive or Jurisdictional Approach*, 45 TEX. INT'L L.J. 457, 461 (2009) (citing H.R. REP. NO. 97-686, at 2 (1982)).

45 Valdespino, *supra* note 44, at 461.

ally was having a detrimental effect on international commerce.<sup>46</sup> Therefore, the FTAIA provides as follows:

[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.<sup>47</sup>

The FTAIA begins by placing all extraterritorial activity other than import trade and import commerce<sup>48</sup> outside the reach of the Sherman Act. It then pulls some activity back within the Act's reach when two requirements are satisfied.<sup>49</sup> These two requirements comprise what is often referred to as the "domestic effects exception." First, the conduct must have a "direct, substantial, and reasonably foreseeable effect" on domestic commerce,<sup>50</sup> and second, *the effect* must "give [ ] rise to" a Sherman Act claim.<sup>51</sup> Three important interpretive questions stem from the language of the statute. Is the FTAIA procedural or substantive?<sup>52</sup> What constitutes a direct, substantial, and reasonably foreseeable effect?<sup>53</sup> And when does an effect give rise to a claim under the Sherman Act?<sup>54</sup>

### III. THE FTAIA IS A SUBSTANTIVE STATUTE

One issue that has been widely disputed is whether the FTAIA delineates a limitation on subject matter jurisdiction or reaches the substantive merits of a claim. The Supreme Court addressed this issue generally in *Arbaugh v. Y & H Corp.*<sup>55</sup> A number of FTAIA cases both pre- and post-*Arbaugh* regarded dismissals for failure to satisfy the FTAIA as dismissals for lack of subject mat-

46 *Id.*

47 15 U.S.C. § 6a (2012).

48 It is outside the scope of this Note to establish what exactly constitutes import trade or import commerce. This Note is primarily concerned with the impact of the FTAIA on anticompetitive activity in global supply chains. U.S. purchasers operating global supply chains rarely import or purchase goods directly from foreign sellers. Instead, purchasers often move goods purchased abroad through the supply chain until they reach the United States. This type of activity must satisfy the FTAIA's domestic effects exception and does not fall under import activity.

49 15 U.S.C. § 6a.

50 *Id.* § 6a(1).

51 *Id.* § 6a(2).

52 *See infra* Part III.

53 *See infra* Section IV.B.

54 *See infra* Section IV.A.

55 546 U.S. 500 (2006).

ter jurisdiction.<sup>56</sup> At this time, all four circuits that have addressed the issue interpret the FTAIA as a substantive statute. The Second, Third, Seventh, and Ninth Circuits all agree that the FTAIA is not jurisdictional and reaches the merits of the antitrust claim.<sup>57</sup> The implications of this distinction are minimal but not insignificant.

#### A. *History: The FTAIA Before Arbaugh*

Prior to *Arbaugh*, the FTAIA was widely considered a limitation on subject matter jurisdiction.<sup>58</sup> Both *Hartford Fire*<sup>59</sup> and *Empagran II*<sup>60</sup> were decided prior to *Arbaugh*. Neither of these cases directly addressed whether the FTAIA dealt with the substantive merits of an antitrust claim or whether it embodied a limit on subject matter jurisdiction. Yet *Hartford Fire's* discussion was focused on determining whether the district court should refrain from exercising "jurisdiction" over the antitrust claims.<sup>61</sup> In *Empagran II*, the defendants moved to dismiss for both lack of subject matter jurisdiction and failure to state a claim.<sup>62</sup> The Supreme Court did not address the distinction in *F. Hoffman-LaRoche Ltd. v. Empagran S.A. (Empagran I)*,<sup>63</sup> but on remand, the D.C. Circuit dismissed the case for lack of subject matter jurisdiction.<sup>64</sup> These cases represent federal court practice before the decision in *Arbaugh*.<sup>65</sup> During the time period after the passing of the FTAIA but before the decision in *Arbaugh*, courts did not always clearly distinguish between their analyses under 12(b)(1) and 12(b)(6) motions, and as a result the reliability of these holdings is questionable.<sup>66</sup> In order to address the issue of

56 See *infra* Section III.B.

57 See *infra* Section III.C.

58 Franz, *supra* note 44, at 863.

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

60 *Empagran II*, 417 F.3d 1267 (D.C. Cir. 2005).

61 *Hartford Fire*, 509 U.S. at 769–70 (stating that "a group of foreign defendants argues that the principle of international comity requires the District Court to refrain from exercising jurisdiction over certain claims against it" and concluding that "the principle of international comity does not preclude District Court jurisdiction over the foreign conduct alleged").

62 *Empagran II*, 417 F.3d at 1269; see also *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, No. civ.001686TFH, 2001 WL 761360, at \*1 (D.D.C. June 7, 2001) (describing the defendants' motion to dismiss).

63 *F. Hoffman-LaRoche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004).

64 *Empagran I*, 542 U.S. 155; *Empagran II*, 417 F.3d at 1269.

65 See Franz, *supra* note 44, at 868–69 (citing *Empagran II*, 417 F.3d at 1269; *McBee v. Delica Co.*, 417 F.3d 107, 122–23 (1st Cir. 2005); *United States v. LSL Biotechnologies*, 379 F.3d 672, 679 (9th Cir. 2004); *United States v. Anderson*, 326 F.3d 1319, 1329–30 (11th Cir. 2003); *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 717 (6th Cir. 2003); *United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 951–52 (7th Cir. 2003); *Turicentro S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 300 (3d Cir. 2002); *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 286 (4th Cir. 2002); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 390 (2d Cir. 2002); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 421 (5th Cir. 2001)).

66 Franz, *supra* note 44, at 869.



when statutes are jurisdictional, the Supreme Court granted certiorari in *Arbaugh*.<sup>67</sup>

### B. *Arbaugh*

The Supreme Court decided *Arbaugh* in 2006.<sup>68</sup> It was the first of a series of decisions seeking to establish a standard for determining when a statute imposed a jurisdictional limitation as opposed to an additional element of a claim.<sup>69</sup> In *Arbaugh*, the plaintiff was an employee who brought an action against her employer for sexual harassment under Title VII.<sup>70</sup> After the jury returned a verdict in the plaintiff's favor, the defendant moved to dismiss for lack of subject matter jurisdiction.<sup>71</sup> The motion was based on a limitation in the statute that required an employer to have fifteen employees or more on its payroll.<sup>72</sup> The trial court vacated the judgment, the Fifth Circuit affirmed, and the Supreme Court granted certiorari,<sup>73</sup> acknowledging that the Court had been "less than meticulous" when distinguishing between language that was jurisdictional and language that imposed an additional element of a claim for relief.<sup>74</sup> The Court laid down a "bright line" rule: "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue."<sup>75</sup> Ultimately, the Court determined that the statute at issue imposed an additional element to the claim rather than a jurisdictional limitation.<sup>76</sup>

### C. *Post-Arbaugh Agreement*

All four of the circuits that have directly addressed the substantive/jurisdictional issue after the decision in *Arbaugh* have held that the requirements of the statute are substantive and go to the merits of the claim. Prior to the

67 *Id.* at 873.

68 *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006).

69 Franz, *supra* note 44, at 873. "*Arbaugh* set forth a seemingly bright-line 'clearly states' test, but that test was subsequently modified by later applications that made clear that the Court was not embracing a categorical approach." *Id.* (footnotes omitted). *Arbaugh* was later refined by a number of cases. *Id.* at 875–80. The most important of these with respect to the FTAIA was the Supreme Court's 2010 decision in *Morrison v. National Australia Bank Ltd.* *Id.* at 878. In determining whether a statute was jurisdictional, the Court reasoned that "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question." *Id.* at 878 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010)). "The FTAIA fits neatly into this formula . . ." *Id.* at 886; *see also* *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (en banc) (noting that the case at bar was difficult to distinguish from *Morrison*).

70 *Arbaugh*, 546 U.S. at 503–04.

71 *Id.* at 504.

72 *Id.*

73 *Id.* at 509.

74 *Id.* at 511.

75 *Id.* at 515–16 (footnote omitted).

76 *Id.* at 516.

recent decisions in *United States v. Hui Hsiung*<sup>77</sup> and *Lotes Co. v. Hon Hai Precision Industry Co.*,<sup>78</sup> the Ninth and Second Circuits treated the FTAIA as jurisdictional in *United States v. LSL Biotechnologies*<sup>79</sup> and *Filetech S.A. v. France Telecom S.A.*,<sup>80</sup> respectively. Notably, both of those decisions were made before the Supreme Court issued its decision in *Arbaugh*. On the other hand, the Seventh and Third Circuits, in *Minn-Chem, Inc. v. Agrium, Inc.*<sup>81</sup> and *Animal Science Products, Inc. v. China Minmetals Corp.*<sup>82</sup> respectively, relied on *Arbaugh* in holding that the FTAIA went to the merits of an antitrust claim and was not jurisdictional in nature.

The Second Circuit in *Lotes* specifically overruled *Filetech* and held that the requirements of the FTAIA “go to the merits of an antitrust claim rather than to subject matter jurisdiction.”<sup>83</sup> In *Lotes*, the plaintiff was a Universal Serial Bus (USB) connector manufacturer that alleged that defendants used the threat of litigation to put their business at risk and establish a monopoly on the market.<sup>84</sup> The court relied on *Arbaugh* in overruling its precedent and reasoned that “nothing in the statute ‘speak[s] in jurisdictional terms or refer[s] in any way to the jurisdiction of the district courts.’”<sup>85</sup> Accordingly, the statute refers to elements of a claim, not limitations on jurisdiction.

The Ninth Circuit in *Hui Hsiung* did not specifically overrule *LSL Biotechnologies* but nonetheless held that the FTAIA imposed substantive requirements rather than jurisdictional limitations.<sup>86</sup> In *LSL Biotechnologies*, there was no discussion about whether the statute was jurisdictional in nature; the court assumed that it encompassed jurisdictional limitations.<sup>87</sup> As a result, the court in that case concluded that the FTAIA was not satisfied and therefore the court lacked subject matter jurisdiction over the foreign restraint of trade.<sup>88</sup> When confronted with the issue again in *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, the court declined to resolve the question.<sup>89</sup> Finally, in *Hui Hsiung*, the Ninth Circuit directly addressed whether the FTAIA was jurisdictional. Citing intervening Supreme Court precedent and relying on the decisions in the Second, Third, and Seventh Circuits, the Ninth Circuit held that “[t]he FTAIA does not limit the power of the federal

77 758 F.3d 1074 (9th Cir. 2014).

78 753 F.3d 395 (2d Cir. 2014).

79 379 F.3d 672 (9th Cir. 2004).

80 157 F.3d 922 (2d Cir. 1998).

81 683 F.3d 845 (7th Cir. 2012) (en banc).

82 654 F.3d 462 (3d Cir. 2011).

83 *Lotes*, 753 F.3d at 405.

84 *Id.* at 399–401.

85 *Id.* at 405 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006)).

86 *United States v. Hui Hsiung*, 758 F.3d 1074, 1087 (9th Cir. 2014).

87 *Id.*

88 *United States v. LSL Biotechnologies*, 379 F.3d 672, 683 (9th Cir. 2004).

89 *Hui Hsiung*, 758 F.3d at 1087 (citing *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 985 n.3 (9th Cir. 2008)).

courts; rather, it provides substantive elements under the Sherman Act in cases involving nonimport trade with foreign nations.”<sup>90</sup>

#### D. *Implications of Substantive Interpretation*

An interpretation that the FTAIA is a substantive statute that reaches the merits of a claim would have the following effects. First, the complaint would be attacked under a 12(b)(6) motion to dismiss for failure to state a claim as opposed to a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.<sup>91</sup> This will subject a pleading under the FTAIA to the heightened requirements of *Ashcroft v. Iqbal*<sup>92</sup> and *Bell Atlantic Corp. v. Twombly*.<sup>93</sup> Second, the burden will rest on defendants to prove that no genuine issue of material fact exists rather than requiring the plaintiff to establish that the court has subject matter jurisdiction.<sup>94</sup> Finally, courts may no longer dismiss actions *sua sponte* for lack of subject matter jurisdiction.<sup>95</sup>

#### IV. TWO CAUSAL INQUIRIES: “DIRECT . . . EFFECT” AND “GIVES RISE TO”

The FTAIA requires two separate causal inquiries when determining whether a foreign activity falls within the domestic effects exception of the statute. The first inquiry requires that the foreign activity have a “direct, substantial, and reasonably foreseeable effect” on domestic commerce.<sup>96</sup> The circuits disagree over the standard necessary to satisfy this prong of the FTAIA. The Second Circuit requires that there exist a reasonably proximate causal nexus between the foreign anticompetitive activity and the domestic effect felt in the United States.<sup>97</sup> Alternatively, the Ninth Circuit has held that an effect is “direct” only if it follows as an immediate consequence of the foreign activity.<sup>98</sup> The Second Circuit’s proximate cause standard is the appropriate one for reasons that will be discussed below. The second causal inquiry requires that the domestic effect—assuming that there is one under the first inquiry—“give rise to” a Sherman Act claim.<sup>99</sup> Since the Supreme Court’s holding in *Empagran I*, courts have consistently held that in order to satisfy this prong of the FTAIA, a plaintiff must establish that the domestic effect *proximately caused* his injury.<sup>100</sup>

90 *Id.* at 1088.

91 Franz, *supra* note 44, at 896.

92 556 U.S. 662 (2009).

93 550 U.S. 544 (2007).

94 Franz, *supra* note 44, at 896. Accordingly, if a plaintiff survives a 12(b)(6) motion, the defendants will have to go through a lengthy and expensive discovery process. *Id.*

95 Sylvie K. Kern, *The FTAIA—A Changing Landscape*, COMPETITION, Spring 2012, at 1, 13.

96 15 U.S.C. § 6a(1) (2012).

97 *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 398 (2d Cir. 2014).

98 *United States v. Hui Hsiung*, 758 F.3d 1074, 1094 (9th Cir. 2014).

99 15 U.S.C. § 6a(2).

100 *See infra* Section IV.A.

A. “Gives Rise to”: A Domestic Effect Must Proximately Cause the Plaintiff’s Injury

The most significant Supreme Court case following the passing of the FTAIA was *Empagran I*.<sup>101</sup> *Empagran I* addressed the second requirement of the FTAIA—when an effect “gives rise to” a Sherman Act claim. The question presented in *Empagran I* was whether “anticompetitive price-fixing activity that [was] in significant part foreign, that cause[d] some domestic antitrust injury, and that independently cause[d] separate foreign injury” gave rise to a Sherman Act claim for a foreign plaintiff.<sup>102</sup> The case involved an antitrust action brought on behalf of domestic and foreign purchasers of vitamins, alleging that the vitamin manufacturers and distributors engaged in an international price-fixing conspiracy.<sup>103</sup> The price-fixing activity led to higher vitamin prices in the United States and independently led to higher vitamin prices in other countries as well.<sup>104</sup> The plaintiffs originally argued that because the anticompetitive activity caused a domestic effect, which gave rise to a Sherman Antitrust claim for a United States entity, the FTAIA exception was satisfied.<sup>105</sup> In other words, if anticompetitive activity that occurred abroad affected the United States, then affected foreign plaintiffs could satisfy the FTAIA’s “gives rise to” prong by alleging that a Sherman Antitrust Act claim could be brought by a domestic entity, and therefore the foreign anticompetitive activity gave rise to the claim.<sup>106</sup> The Court rejected the argument, holding that a domestic purchaser could bring a claim under the Sherman Act and FTAIA but a foreign purchaser could not bring a claim based solely on a foreign harm.<sup>107</sup> Stated differently, *the domestic effect* must give rise to the foreign harm specifically, not a Sherman Act claim generally. The Court relied on principles of comity, reasoning that it must “construe[ ] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.”<sup>108</sup> The Court emphasized that its holding relied on the fact that the adverse foreign effect was “independent of any adverse domestic effect.”<sup>109</sup>

The plaintiffs also advanced an alternative argument.<sup>110</sup> They claimed that the domestic effect in the United States did “give rise to” their injury because “but for” the raised costs in the United States that resulted from the price fixing, the price-fixed vitamins would have been undercut by the United States’ market and therefore they would never have suffered their

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101 *Empagran I*, 542 U.S. 155 (2004).

102 *Id.* at 158.

103 *Id.* at 159.

104 *Id.*

105 *Id.* at 160.

106 *Id.* at 159.

107 *Id.*

108 *Id.* at 164.

109 *Id.*

110 *Id.* at 175.

injury.<sup>111</sup> The Supreme Court remanded to the D.C. Circuit to determine whether this “but for” condition was sufficient to satisfy the FTAIA’s requirement.<sup>112</sup>

When the Supreme Court remanded the case in *Empagran I*, it was left to the D.C. Circuit to determine whether “but for” causation was sufficient to satisfy the “gives rise to” requirement of the FTAIA.<sup>113</sup> On remand, the D.C. Circuit held that “but for” causation was “simply not sufficient to bring anti-competitive conduct within the FTAIA exception,”<sup>114</sup> and that the domestic effect must proximately cause the plaintiff’s injury in order for it to satisfy the FTAIA.<sup>115</sup> In applying the proximate cause standard, the D.C. Circuit determined that the domestic effects cited by the plaintiffs did not give rise to their claims under the Sherman Act.<sup>116</sup> The court reasoned that maintaining supercompetitive prices in the United States may have indirectly facilitated the increased prices paid by the plaintiffs, but the ultimate cause of the increased prices was price fixing that occurred outside of the United States.<sup>117</sup> The court also stated that the fact that the defendants “knew or could foresee the effect of their allegedly anti-competitive activities in the United States on the [plaintiffs’] injuries abroad or had as a purpose to manipulate United States trade does not establish that ‘U.S. effects’ proximately caused the [plaintiffs’] harm.”<sup>118</sup>

The circuits that have addressed the matter since the decision in *Empagran II* have agreed that proximate cause is the proper standard.<sup>119</sup> An almost identical set of facts was present in *In re Monosodium Glutamate Antitrust Litigation*, in which foreign plaintiffs sought to bring a Sherman Act claim under the FTAIA.<sup>120</sup> The plaintiffs contended that the defendants—foreign sellers—were engaged in global price fixing and that, because of the domestic effect of higher prices in the United States, the defendants were able to maintain their supercompetitive prices.<sup>121</sup> Therefore, the domestic effect of higher prices in the United States gave rise to the plaintiffs’ injury.<sup>122</sup> Following the D.C. Circuit’s holding in *Empagran II*, the Eighth Circuit determined that the domestic effect must be the proximate cause of

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111 *Id.*

112 *Id.*

113 *Empagran II*, 417 F.3d 1267, 1269 (D.C. Cir. 2005).

114 *Id.* at 1270–71.

115 *Id.* at 1271.

116 *Id.*

117 *Id.* Supercompetitive pricing, as it is used throughout the Note, refers to pricing above that which would ordinarily be sustainable in a competitive market.

118 *Id.*

119 See *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 414 (2d Cir. 2014); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 987 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538–39 (8th Cir. 2007).

120 *In re Monosodium Glutamate*, 477 F.3d at 537.

121 *Id.* at 536–37.

122 *Id.* at 539.

the foreign plaintiff's injury in order to "give rise to" a Sherman Act claim.<sup>123</sup> The court then reasoned that while fixed prices in the United States may have been a necessary part of the price-fixing scheme, it was not significant enough to be the direct cause, instead constituting "merely one link in the causal chain."<sup>124</sup>

Again, in *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, a foreign purchaser alleged that foreign sellers of DRAM artificially inflated prices through a global price-fixing arrangement.<sup>125</sup> The foreign purchaser advanced the same argument presented in *Empagran II*, alleging that the domestic effect of higher prices in the United States allowed the sellers to maintain supercompetitive prices and therefore caused the foreign purchaser's injury.<sup>126</sup> The Ninth Circuit agreed with the D.C. Circuit in *Empagran II*, holding that "but for" causation is insufficient for the FTAIA and that a proximate cause standard must be applied, as it is the most consistent with principles of comity.<sup>127</sup> Applying this standard, the court determined that the foreign purchasers had not adequately demonstrated that the domestic effect rather than the overall price-fixing scheme had caused their injury.<sup>128</sup> The court further acknowledged that the U.S. price of DRAM may have facilitated the existence of supercompetitive prices but was insufficient to satisfy the proximate cause requirement imposed by the FTAIA.<sup>129</sup>

Most recently, the Second Circuit in *Lotes Co. v. Hon Hai Precision Industry Co.*<sup>130</sup> also adopted a proximate cause standard for the "gives rise to" prong of the FTAIA.<sup>131</sup> The facts presented in *Lotes* are distinct from the cases described above, but the argument and outcome were the same. In *Lotes*, the plaintiff was a Universal Serial Bus (USB) connector manufacturer.<sup>132</sup> As part of the USB market, competitors worked together to achieve a universal standard, which is beneficial to both the producers and the consumers.<sup>133</sup> The inherent risk in this process is that patent holders may threaten suit if the universal design potentially infringes their patent.<sup>134</sup> In order to avoid this, parties agree by contract to allow the production of

123 *Id.* at 538–39.

124 *Id.* at 540.

125 *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984 (9th Cir. 2008).

126 *Id.*

127 *Id.* at 987. The Ninth Circuit again acknowledged this as the proper standard in *United States v. Hui Hsiung*, 758 F.3d 1074, 1094 (9th Cir. 2014) ("Thus, as we have noted, 'but for causation cannot suffice for the FTAIA domestic injury exception to apply and [we] therefore adopt a proximate causation standard.'" (quoting *In re DRAM Antitrust Litig.*, 546 F.3d at 987) (alteration in original) (internal quotation marks omitted)).

128 *In re DRAM Antitrust Litig.*, 546 F.3d at 988–89.

129 *Id.* at 989.

130 753 F.3d 395 (2d Cir. 2014).

131 *Id.* at 414.

132 *Id.* at 399.

133 *Id.* at 399–400.

134 *Id.*

potentially infringing products.<sup>135</sup> The plaintiff contended that the parties had signed such an agreement but that the defendants then used the threat of litigation to put their business at risk and establish a monopoly on the market.<sup>136</sup> The plaintiff further argued that the foreign activity caused prices in the United States to increase, constituting a domestic effect and “giving rise to” a Sherman Act claim.<sup>137</sup> Applying the proximate cause standard, the court held that this argument had the same fatal flaw as those before it. Higher prices in the United States were not the proximate cause of the plaintiff’s injury. The threatened infringement suit and exclusionary conduct were the cause of the injury.<sup>138</sup> The court further reasoned that if any causal chain existed, it ran in the opposite direction.<sup>139</sup> The exclusionary conduct hurt the plaintiff, which in turn caused prices in the United States to rise. This runs entirely counter to the requirement of the FTAIA that the domestic effect be the *cause* of the plaintiff’s injury, not the effect of it.

As these cases demonstrate, the circuits are generally in accord with respect to the proper standard for the second prong of the FTAIA. In order for a plaintiff’s injury to “give rise to” a Sherman Act claim, the domestic effect of foreign anticompetitive conduct must proximately cause the plaintiff’s injury. Notably, at this time, the Seventh Circuit has not expressly adopted this standard.<sup>140</sup> Regardless, this is the appropriate standard. As illustrated in the case law above, holding that “but for” causation was sufficient to satisfy the FTAIA would allow entirely foreign plaintiffs to bring a claim in the United States against entirely foreign defendants simply because a price-fixing scheme affected the United States economy. Such a possibility is inconsistent with the concerns of comity expressed both by Congress when it passed the FTAIA and Justice Scalia in his dissenting opinion in *Hartford Fire*.

### B. Interpreting “Direct Effect”

While consensus surrounds the proximate cause standard for the “gives rise to” prong of the FTAIA, the circuits are split with regard to what standard appropriately represents the “direct, substantial and reasonably foreseeable effect” requirement of the FTAIA. This inquiry is the first in the two-step dance of the FTAIA. First, the foreign act must cause a domestic effect. That domestic effect must then subsequently give rise to a Sherman Act

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135 *Id.*

136 *Id.* at 400–01.

137 *Id.* at 414.

138 *Id.* at 414–15.

139 *Id.* at 414.

140 The standard was, however, listed as one of the grounds of dismissal in both the now-vacated *Motorola Mobility* opinion authored by Judge Posner and in his opinion on rehearing. *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842, 845 (7th Cir. 2014), *vacated and reh’g granted*, No. 14-8003 (7th Cir. July 1, 2014); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2014). Judge Posner’s analysis of the issue however was relatively sparse. See *infra* subsection V.C.2.

claim. Two standards have developed in the circuits for determining when a foreign action has a direct, substantial, and reasonably foreseeable effect on domestic commerce. The first subsection below will describe the “immediate consequence” test developed in *United States v. LSL Biotechnologies* and employed by the Ninth Circuit. The second subsection will describe the “reasonably proximate causal nexus” test developed by the Seventh Circuit in *Minn-Chem* and adopted by the Second Circuit in *Lotes*. The third subsection will seek to establish that the “reasonably proximate causal nexus” test is the correct interpretation.

### 1. The Ninth Circuit’s “Immediate Consequence” Test

In *LSL Biotechnologies*, LSL Biotechnologies, Inc. (LSL) and Hazera Quality Seeds, Inc. (Hazera) entered into a joint venture.<sup>141</sup> The goal of the venture was to supply fresh tomatoes to northern states during winter months.<sup>142</sup> LSL is an American corporation that develops genetically modified seeds.<sup>143</sup> It began working with Hazera to develop a genetically modified tomato seed that would produce a tomato with a longer shelf life.<sup>144</sup> As the relationship “withered,” litigation ensued.<sup>145</sup> Hazera brought suit in Israel, which led to mediation and an addendum to the original contract.<sup>146</sup> The restrictive clause at issue in this case was included in the agreement, which ultimately forbade Hazera from competing with LSL in North American markets.<sup>147</sup>

The United States subsequently filed an antitrust suit claiming that the restrictive clause was a “naked restraint of trade in violation of Section 1 of the Sherman Act.”<sup>148</sup> It alleged that the agreement “has harmed and will

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141 *United States v. LSL Biotechnologies*, 379 F.3d 672, 674 (9th Cir. 2004).

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.* at 674–75.

147 *Id.* at 675. The agreement read:

Subsequent to the termination of the Agreement hereunder, Hazera shall not engage, directly or indirectly, alone, with others and/or through third parties, in the development, production, marketing or other activities involving tomatoes having any long shelf life qualities. However, in the event that Hazera shall be requested by any third party to produce seeds of tomatoes having long shelf life qualities, Hazera may engage in such activities only if all of the following conditions are met: (A) the subject tomatoes do not have or involve long shelf life qualities which are included in LSL’s proprietary rights; (B) Hazera shall not engage in such production prior to the year 2000 or prior to the expiration of 5 years following the termination of the Agreement, whichever occurs later, and (C) Hazera has obtained LSL’s advanced written consent, which shall not be unreasonably withheld . . . LSL shall determine whether or not the proposed cooperation may involve any of its proprietary rights and shall not unreasonably withhold its consents to such production.

*Id.*

148 *Id.* (internal quotation marks omitted).



continue to harm American consumers by unreasonably reducing competition to develop better seeds for . . . tomatoes for sale in the United States.”<sup>149</sup> Furthermore, “[b]ut for the [restrictive clause], Hazera would likely be a significant competitor of [LSL] in North America.”<sup>150</sup> As a result of the restrictive clause, LSL and the other named defendants collectively held more than seventy percent of the “fresh market tomato seeds” market.<sup>151</sup> The government alleged two anticompetitive domestic effects. First, the restrictive clause eliminated from the market “one of the few firms with the experience, track record and know-how” to effectively compete.<sup>152</sup> Second, the restrictive clause allowed for price fixing because the defendants could charge more for the seeds or a license to use the seeds than they would be able to if Hazera could compete in the market.<sup>153</sup> LSL moved to dismiss and the district court granted the motion.<sup>154</sup>

The Ninth Circuit began its analysis by discussing the history of the Sherman Act’s foreign application and prior Supreme Court jurisprudence, focusing on *Hartford Fire’s* failure to determine whether the FTAIA’s “direct, substantial and reasonably foreseeable effect” standard amends existing law or merely codifies it.<sup>155</sup> The court reasoned that if the FTAIA simply codified prior jurisprudence, then Judge Hand’s intent/effects test would be the controlling inquiry.<sup>156</sup> If, however, the FTAIA amended existing law, the direct effect standard could be interpreted without reference to the intent/effects test and a new standard would need to be developed.<sup>157</sup> The court relied on the House Report corresponding to the FTAIA and Congress’s choice of language to determine that Congress did not intend to codify the intent/effects test.<sup>158</sup> First, the court determined that the purpose of the FTAIA was “to more clearly establish when antitrust liability attaches to international business activities.”<sup>159</sup> Relying on this purpose, the court concluded that it would be a “serious departure from the goal of achieving clarity for

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149 *Id.* (internal quotation marks omitted).

150 *Id.* (alteration in original) (internal quotation marks omitted).

151 *Id.*

152 *Id.* at 676 (internal quotation marks omitted).

153 *Id.* at 676.

154 *Id.* Initially, the district court split the plaintiff’s claims into foreign and domestic components. The court then dismissed the domestic components under a 12(b)(6) motion for failure to state a claim and dismissed the foreign components under 12(b)(1) motion for lack of subject matter jurisdiction. *Id.*

155 *Id.* at 678.

156 *Id.*

157 *Id.* at 678–79.

158 *Id.* at 679.

159 *Id.* (quoting H.R. REP. NO. 97-686, at 2492 (1982)).

[the court] to conclude that Congress meant only ‘some substantial effect’<sup>160</sup> when it said ‘direct, substantial, and reasonably foreseeable effect.’<sup>161</sup>

Having determined that the FTAIA amends existing law, the court proceeded to determine that an effect is direct when it “follows as an *immediate consequence* of the defendant’s activity.”<sup>162</sup> In drawing this conclusion, the Ninth Circuit relied on the Supreme Court’s interpretation of the Foreign Sovereign Immunities Act (FSIA). The FSIA states that “immunity does not extend to commercial conduct ‘outside the territory of the United States . . . that [ ] causes a *direct effect* in the United States.’”<sup>163</sup> In *Republic of Argentina v. Weltover*, the Supreme Court interpreted “direct effect” in the statute to require that an effect follow as an *immediate consequence* of the defendant’s activity.<sup>164</sup> Relying on the Supreme Court’s interpretation of the “direct effect” language used in the FSIA, the court determined that “direct” in the FTAIA requires that the domestic effect be the “immediate consequence” of the foreign action.<sup>165</sup> The Ninth Circuit noted that the Supreme Court rejected the assertion that the term “direct” contains any unexpressed requirement of substantiality or foreseeability.<sup>166</sup> Instead, the “immediate consequence” inquiry focuses on “the spatial and temporal separation between the defendant’s conduct and the relevant effect.”<sup>167</sup>

The court then proceeded to apply this standard to the facts at bar and determined that the domestic effect was not the immediate consequence of the foreign action. As outlined above, the government asserted that the restrictive clause had two domestic effects:

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160 *Id.* (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993)). This would be the result of the codification of *Alcoa* and the subsequent caselaw related to applying the Sherman Act abroad.

161 *Id.* (quoting 15 U.S.C. § 6a(1) (2012)).

162 *Id.* at 680 (emphasis added).

163 *Id.* (alteration in original) (emphasis added) (quoting 28 U.S.C. § 1605(a)(2)). Section 1605(a)(2) reads in full:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . .

(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.

28 U.S.C. § 1605(a) (emphasis added).

164 *Republic of Arg. v. Weltover*, 504 U.S. 607, 618 (1992); *see also LSL Biotechnologies*, 379 F.3d at 680.

165 *LSL Biotechnologies*, 379 F.3d at 680.

166 *Id.* Incredibly, the court does not address why the “substantial” and “reasonably foreseeable” qualifiers are included in the language of the statute. For further analysis of this discrepancy, see *infra* subsection V.B.1.

167 *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 412 (2d Cir. 2014) (describing *LSL Biotechnologies*’ immediate consequence standard).

(1) the agreement makes less likely possible innovations from Hazera in the creation of heartier tomato seeds that will allow consumers to enjoy higher quality, better tasting winter tomatoes and that will allow United States farmers to grow long shelf-life tomatoes, and (2) the Restrictive Clause may also allow defendants to profitably charge more for their seeds (or more for a license to use seeds with the RIN gene) than they otherwise could.<sup>168</sup>

With respect to the first potential effect, the court reasoned that there is no evidence that Hazera could compete with LSL in North America given LSL's patent and intellectual property rights.<sup>169</sup> Furthermore, no evidence was provided that Hazera was in a better position to compete with LSL than other players in the market were.<sup>170</sup> The court concluded by stating that "any innovation that Hazera would bring to American consumers is speculative at best and doubtful at worst."<sup>171</sup> The "effect cannot be 'direct' where it depends on such uncertain intervening developments."<sup>172</sup> Two points undermined the government's second allegation that LSL would artificially raise prices. First, the government produced no evidence that LSL had inflated or would have inflated the prices it charged for its proprietary seeds.<sup>173</sup> Second, the United States had recently made an agreement with Mexican farmers to set a floor price on tomatoes shipped from Mexico to the United States, thereby artificially raising the price of tomatoes themselves, despite the cost of the seeds to the farmers.<sup>174</sup> As a result of this reasoning, the Ninth Circuit determined that the government failed to establish there was a direct domestic effect that resulted from the restrictive clause. Therefore, the court dismissed the case for failure to satisfy the FTAA's direct effect requirement.<sup>175</sup>

The "immediate consequence" standard was reaffirmed by the Ninth Circuit in *United States v. Hui Hsiung*.<sup>176</sup> In that case, the defendants were a group of LCD panel manufacturers who allegedly conspired to artificially inflate the price of LCD panels. The defendants were indicted for violating the Sherman Act.<sup>177</sup> Two categories of LCD panels were involved in the case: those that were directly imported into the United States, and those sold

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168 *LSL Biotechnologies*, 379 F.3d at 681 (quoting Complaint, *United States v. LSL Biotechnologies, Inc.*, No. 00-CV-529, 2002 WL 31115336 (D. Ariz. Mar. 28, 2002)) (internal quotation marks omitted).

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.* The court goes on to note that there may be situations where the exclusion of a foreign competitor could result in a "direct" effect. The court gives the example of a competitor who has a competitive product already developed. The court even posits that a competitor who can demonstrate that less investment has been made in research and development as a result of their exclusion from the market. *Id.*

173 *Id.* at 682.

174 *Id.*

175 *Id.* at 683.

176 758 F.3d 1074 (9th Cir. 2014).

177 *Id.* at 1077-79.

abroad and incorporated into finished products that customers in the United States would purchase.<sup>178</sup> The imported panels fell outside the FTAIA and were therefore subject to the Sherman Act.<sup>179</sup> The panels sold abroad and eventually purchased in the United States fell under the FTAIA, and therefore the United States was required to prove the anticompetitive activity had a “direct” effect on domestic commerce.<sup>180</sup> The court stated that conduct has a “direct” effect “if it follows as an immediate consequence of the defendant[’s] activity.”<sup>181</sup> Ultimately, the court declined to determine whether the foreign sales of the panels and their subsequent incorporation into goods sold in the United States was sufficiently “direct.” Instead, the court determined that the verdict could be sustained solely on the grounds that the imported panels violated the Sherman Act.<sup>182</sup>

## 2. The “Reasonably Proximate Causal Nexus” Test

The Seventh Circuit addressed how to interpret the FTAIA’s “direct . . . effect”<sup>183</sup> requirement in *Minn-Chem, Inc. v. Agrium, Inc.*<sup>184</sup> In *Minn-Chem*, the plaintiffs brought a Sherman Antitrust claim against the defendants—a group of foreign potash producers. The plaintiffs were domestic potash purchasers who alleged that the producers participated in a global conspiracy to fix potash prices by restraining output to artificially raise prices.<sup>185</sup> The complaint alleged that over approximately five years potash prices had increased at least 600%. The evidence strongly suggested that this was not the result of

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178 *Id.* at 1090–92. The court noted that “import trade” as used in the FTAIA means what it says: “[T]ransactions that are directly between the [U.S.] plaintiff purchasers and the defendant cartel members *are* the import commerce of the United States.’ . . . So too are transactions between the foreign defendant producers of TFT-LCDs and purchasers located in the United States.” *Id.* at 1090 (quoting *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 855 (7th Cir. 2012) (en banc)).

179 *Hui Hsiung*, 758 F.3d at 1091–92. Keep in mind that the FTAIA places all conduct involving trade with foreign nations outside of the Sherman Act except for import trade or qualifying conduct under the domestic effects exception. Therefore, import commerce falls outside the FTAIA and is therefore subject to the Sherman Act. See *supra* Part II.

180 *Id.* at 1092. The United States would also have had to prove that the “direct” effect “gives rise to” a Sherman Act claim, a standard discussed *infra* in Section IV.A, and the court ultimately declined to apply the FTAIA because the imported panels were sufficient to sustain the verdict in the case. *Id.* at 1094.

181 *Id.* at 1094 (quoting *United States v. LSL Biotechnologies*, 379 F.3d 672, 674, 680–81 (9th Cir. 2004)).

182 *Hui Hsiung*, 758 F.3d at 1094. The court noted:

We need not determine the outer bounds of import trade by considering whether commerce directed at, but not consummated within, an import market is also outside the scope of the FTAIA’s import provisions because at least a portion of the transactions here involves the heartland situation of the direct importation of foreign goods into the United States.

*Id.* at 1090 n.7.

183 15 U.S.C. § 6a(1) (2012).

184 683 F.3d 845 (7th Cir. 2012) (en banc).

185 *Id.* at 848.

normal market fluctuation.<sup>186</sup> The court began by determining the appropriate interpretation of the FTAIA's "direct effect" language.<sup>187</sup> It then applied this standard to the factual scenario present in the case.

The Seventh Circuit adopted the "reasonably proximate causal nexus" interpretation of "direct . . . effect" in *Minn-Chem*.<sup>188</sup> The court began its analysis with the language of the statute—"direct, substantial, and reasonably foreseeable."<sup>189</sup> The court then established that the foreign activity's effect on domestic commerce was clearly substantial.<sup>190</sup> The complaint alleged that 5.3 million tons of potash was imported into the United States in 2008 and that the price by that time had increased 600% over the previous five years.<sup>191</sup> Next, the court reasoned that the foreseeability requirement was easily met.<sup>192</sup> The cartel controlled 71% of the world's supply of a homogeneous commodity and was charging supercompetitive prices for that commodity.<sup>193</sup> Without any evidence of potentially undercutting the price (none was presented), the expected outcome is that consumers would pay artificially inflated prices for the commodity.<sup>194</sup>

Finally, the court addressed the meaning of "direct" as used in the statute. The court rejected the Ninth Circuit's "immediate consequence" interpretation presented in *LSL Biotechnologies* and embraced the "reasonably proximate causal nexus" interpretation advanced by the Department of Justice's Antitrust Division.<sup>195</sup> The court began by stating that the Ninth Circuit relied on the Supreme Court's definition of "direct" in the FSIA in determining that "direct" meant "immediate consequence."<sup>196</sup> The Seventh Circuit further noted that when the Supreme Court interpreted the term "direct" in the FSIA, it adopted the immediate consequence definition only after refusing to impute unexpressed substantiality and foreseeability requirements onto the definition of "direct."<sup>197</sup> Unlike the FSIA, the court in *Minn-Chem* reasoned, there was no need to impute these requirements onto the FTAIA;

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186 *Id.* at 849.

187 *Id.* at 856. The Seventh Circuit acknowledges that purchases directly from the producers would constitute import commerce and would not need to satisfy the domestic effects exception of the FTAIA. *Id.* at 855. However, because some of the named defendants included firms whose activities fell outside of the import transactions categorization, it was necessary to determine whether the conduct satisfied the "direct . . . effect" requirement of the FTAIA. *Id.* at 855–56. One example of a defendant the court mentioned was Canpotex, which acted as a marketing and sales agent and whose actions were an important element of the price inflation scheme. *Id.*

188 *Id.* at 857.

189 *Id.* at 854.

190 *Id.* at 859.

191 *Id.* at 849.

192 *Id.* at 859.

193 *Id.* at 849.

194 *Id.* at 858–59.

195 *Id.* at 857.

196 *Id.* at 856.

197 *Id.* at 857.

instead, Congress expressly included them in the statute.<sup>198</sup> The court concluded:

The word “direct” addresses the classic concern about remoteness—a concern, incidently [sic], that has been at the forefront of international antitrust law at least since Judge Hand wrote in *Alcoa* that “[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.”<sup>199</sup>

Applying this standard, the court determined that the effects of the foreign cartel’s actions were sufficiently “direct” to satisfy the FTAIA’s requirement.<sup>200</sup> As alleged by the plaintiffs, the defendants restricted supply in order to set artificially high prices for potash. The court reasoned that “[i]t is no stretch to say that the foreign supply restrictions, and the concomitant price increases forced upon the Chinese purchasers, were a direct—that is, proximate—cause of the subsequent price increases in the United States.”<sup>201</sup> The Seventh Circuit then affirmed the order of the district court denying the motion to dismiss for failure to state a claim.<sup>202</sup>

The Second Circuit was the most recent circuit court to address the FTAIA’s direct effect requirement. In *Lotes Co. v. Hon Hai Precision Industry Co.*, the Second Circuit adopted a proximate causation standard for the FTAIA’s “direct . . . effect” requirement.<sup>203</sup> Recall that in *Lotes*, the plaintiff was a USB connector manufacturer that contended it signed an agreement with the defendants that would allow the plaintiffs to produce USB technology without being sued for patent infringement. The plaintiff further alleged that despite this agreement, the defendants used the threat of patent litigation to put its business at risk and establish a monopoly on the market.<sup>204</sup>

In an analysis substantially similar to the Seventh Circuit’s in *Minn-Chem*, the court in *Lotes* rejected the Ninth Circuit’s interpretation of “direct” in the FTAIA. The court acknowledged that the Supreme Court arrived at its definition of “direct” in *Weltover* after determining that there was no unexpressed requirement of substantiality or foreseeability.<sup>205</sup> On the other hand, the FTAIA expressly requires substantiality and foreseeability.<sup>206</sup> Next, the court applied the “cardinal principle of statutory construction,” reasoning that if “direct” requires an immediate consequence, the reasonable foreseeability

198 *Id.*

199 *Id.* (alteration in original) (quoting *Alcoa*, 148 F.2d 416, 443 (2d Cir. 1945)).

200 *Id.* at 859–60.

201 *Id.* at 859.

202 *Id.* at 861.

203 See *Lotes Co v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 398 (2d Cir. 2014).

204 *Id.* at 399–401. For a more robust description of the factual scenario present in *Lotes*, see text accompanying notes 130–39.

205 *Id.* at 411.

206 *Id.*

requirement present in the statute would be rendered superfluous.<sup>207</sup> Third, the court noted that courts have a great deal of experience applying proximate cause standards. This is significantly more useful than *LSL Biotechnologies*' immediate consequence standard, which focuses on spatial and temporal separation between the conduct and effect.<sup>208</sup>

Most importantly, the court in *Lotes* acknowledged that the "complex manufacturing process" at issue in the case "is increasingly common in our modern global economy, and [that] antitrust law has long recognized that anticompetitive injuries can be transmitted through multi-layered supply chains."<sup>209</sup> These harms would be unreachable under an immediate consequence interpretation of the FTAIA's direct effect requirement. The court further stated that "[t]here is nothing inherent in the nature of outsourcing or international supply chains that necessarily prevents the transmission of anticompetitive harms or renders any and all domestic effects impermissibly remote and indirect."<sup>210</sup> This language suggests that given an appropriate factual scenario, the court would hold sufficiently proximate an anticompetitive harm that permeated a global supply chain. Moreover, the court recognized this type of anticompetitive harm as a real threat, stating that it "expect[ed] that some perpetrators will design foreign anticompetitive schemes for the very purpose of causing harmful downstream effects in the United States."<sup>211</sup> Ultimately, the discussion is dicta, as the court in *Lotes* declined to determine whether the facts presented established a "direct" effect under the FTAIA.<sup>212</sup> The court instead determined that the effect did not "give[ ] rise to" the plaintiff's claims.<sup>213</sup> Nonetheless, the court laid groundwork for future cases involving antitrust harms passed through a global supply chain.

### 3. "Reasonably Proximate Causal Nexus" Is the Appropriate Standard

First, a proximate cause standard should be adopted because it is most consistent with the statutory language. Second, concerns for international comity should not bear as much weight in this inquiry, as they are sufficiently addressed by the requirement that the domestic effect "give rise to" the Sherman Act claim. Third, a proximate cause standard is necessary to protect American interests in an ever-expanding global economy that relies on complex global supply chains for efficiency and success. These considerations weigh heavily in favor of a proximate cause analysis, and therefore the circuits should follow the precedent in *Minn-Chem* and *Lotes* and hold that the

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207 *Id.* (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) (internal quotation marks omitted).

208 *Id.* at 411–12.

209 *Id.* at 412.

210 *Id.* at 413.

211 *Id.*

212 *Id.*

213 *Id.* at 413–15 (quoting 15 U.S.C. § 6a(2) (2012)).

FTAIA's direct effect prong is satisfied when the foreign action is the proximate cause of the domestic effect.

Interpreting "direct" in the FTAIA to require a "reasonably proximate causal nexus" is most consistent with the text of the statute. The FTAIA couples "direct" with additional substantiality and foreseeability requirements. These qualifiers lend weight to a proximate cause interpretation because the three statutory requirements—"direct," "foreseeable," and "substantial"—are regularly used to determine the limits of proximate causation.<sup>214</sup> Furthermore, the Ninth Circuit's interpretation of the statutory language is untenable. As the Ninth Circuit interprets the FTAIA direct effect requirement, the domestic effect must be an "immediate consequence" of the foreign action.<sup>215</sup> This reading of the statute necessarily dismisses—as the Ninth Circuit acknowledges<sup>216</sup>—any "substantial" or "reasonably foreseeable" requirement. This directly conflicts with the language of the statute. Unlike the FSIA, there is no need to read into the statute requirements of substantiality and foreseeability because Congress expressly included those requirements in its text. Congress would not have qualified the term "direct" if it did not intend the effect to be "substantial" or "reasonably foreseeable."<sup>217</sup> As a result, a proximate cause standard is more consistent with the language of the statute than the immediate consequence standard.

Furthermore, the Ninth Circuit's interpretation of the statute makes the "substantial and reasonably foreseeable effect" language superfluous. It is a well-known canon of statutory interpretation that if two interpretations are possible and one results in superfluity while another does not, then the interpretation that gives effect to all of the language in the statute is favored.<sup>218</sup> If a "direct" effect is defined to require an immediate consequence and noth-

214 See RESTATEMENT (SECOND) OF TORTS § 431 (1965) ("The actor's negligent conduct is a legal cause of harm to another if . . . his conduct is a *substantial* factor in bringing about the harm . . . ." (emphasis added)); *Proximate Cause*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("A cause that is legally sufficient to result in liability . . . [a]lso termed (in both senses) *direct* cause . . . ."); D.E. Buckner, Annotation, *Foreseeability as an Element of Negligence and Proximate Cause*, 100 A.L.R.2d 942, § 1 (1965) ("[M]any courts also regard '*foreseeability*' to be an essential element in the definition of 'proximate cause . . . ." (emphasis added)).

215 *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004). The Ninth Circuit also defined "direct" as "the spatial and temporal separation between the defendant's conduct and the relevant effect." *Lotes*, 753 F.3d at 412 (describing the *LSL Biotechnologies* test). It is difficult to understand why either of these two factors—time and space—would be legally significant in assessing whether a legally cognizable harm has occurred in an antitrust setting. Moreover, the Ninth Circuit gives no guidance as to why these factors are or should be legally relevant. The use of this test would be especially unusual when the alternative is a proximate cause standard, whose entire purpose is to distinguish between those harms that are recognizable at law and those that are too attenuated to give rise to a cause of action.

216 *LSL Biotechnologies*, 379 F.3d at 680.

217 Reasonable foreseeability is also often used when determining whether an action is the proximate cause of an effect, further demonstrating that a better interpretation of the language results in a proximate cause standard. See Buckner, *supra* note 214, § 1.

218 *Lotes*, 753 F.3d at 411 (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).



ing more, there is no need for the substantiality and foreseeability language. This is especially true with respect to reasonable foreseeability. An “immediate consequence” is well beyond being reasonably foreseeable; instead, an “immediate consequence” is almost certain to happen. Stated differently, an immediate consequence is always reasonably foreseeable, but a reasonably foreseeable consequence, while necessary for an immediate consequence, is not always an immediate consequence. As a result, an “immediate consequence” interpretation of “direct” completely discards the need for a “reasonably foreseeable” requirement and renders it superfluous. Therefore, because an “immediate consequence” interpretation will result in superfluous language in the statute, the proximate cause interpretation should be adopted.

Instead of abiding by this canon of statutory construction, the Ninth Circuit appears to rely on the canon of consistent usage and uses the definition of “direct” declared by the Supreme Court in relation to the FSIA.<sup>219</sup> While the FSIA does relate substantially in subject matter,<sup>220</sup> it is an entirely different statute. The Supreme Court has acknowledged that the meanings of words can vary greatly from statute to statute.<sup>221</sup> Thus, because giving “direct” a different meaning than it has in the FSIA does not violate a canon of construction and giving it the same meaning creates superfluity in the statute, “direct” should be defined as requiring proximate causation.

Moreover, applying a proximate cause standard for the “direct” effect requirement of the FTAIA adequately accounts for concerns of international comity. By applying a proximate cause standard for the “gives rise to” prong of the FTAIA, the courts ensure that a plaintiff’s claim is the result of an effect on commerce in the United States. This requirement alone is sufficient to ensure that the United States antitrust laws do not overreach into the sovereignty of other nations. As currently interpreted, only a plaintiff whose injury results from an anticompetitive effect in the United States—e.g., the purchase of artificially inflated priced goods from the U.S. market—will result in a cause of action under the “gives rise to” limitation. The courts have held that neither a price-fixing scheme that causes the United States market to be artificially inflated, thereby maintaining the inflated price throughout the world, nor the purchase of price-fixed items abroad and the eventual effect of that artificial inflation on the United States market is sufficient to “give rise to” a Sherman Act claim. As a result, the “gives rise to”

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219 *LSL Biotechnologies*, 379 F.3d at 680.

220 The Foreign Sovereign Immunities Act “codifies foreign nations’ sovereign immunity from suit, and ‘provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.’” *Lotes*, 753 F.3d at 410 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)).

221 “Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even the same section.” *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

limitation effectively eliminates all claims except those stemming from effects in the U.S. market—which, while some may have international implications, are clearly of sufficient U.S. interest to provide remedies in U.S. courts. As the Supreme Court stated in *Empagran I*, “application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.”<sup>222</sup>

A proximate cause standard also has practical advantages over the direct effects standard. The purpose of antitrust law is to protect American consumers from anticompetitive activity.<sup>223</sup> Global supply chains are prevalent in the market and anticompetitive harms that occur along the way will often be transferred downstream to consumers.<sup>224</sup> Therefore, antitrust law should protect domestic victims of this anticompetitive activity. However, due to the nature of global supply chains, an “immediate consequence” standard would be insufficient to adequately protect American plaintiffs. Because there are often multiple links in the global supply chain, a number of harms that are eventually passed onto American consumers will not be the “immediate consequence” of the anticompetitive activity. As the Second Circuit stated in *Lotes*, it is a real possibility “that some perpetrators will design foreign anticompetitive schemes for the very purpose of causing harmful downstream effects in the United States.”<sup>225</sup> Under the immediate consequence standard, these harms will go without remedy because foreign defendants will be able to hide behind the layers of the American plaintiff’s supply chain. This does not have to be the case.<sup>226</sup> As argued above, applying a proximate cause standard for the “direct . . . effects” prong of the FTAIA will not prevent the courts from respecting international comity because they can rely on the “gives rise to” prong to filter out foreign plaintiffs seeking a forum in the United States. As a result, the remaining plaintiffs have established that the domestic effect of the defendant’s conduct gave rise to their antitrust claim and need only establish that the defendant’s conduct had a sufficiently “direct” effect on the U.S. market. By applying a proximate cause standard at this point, the court may acknowledge the ubiquity of global supply chains and the need for some protection of American plaintiffs and consumers, while still preventing the use of the United States as a forum for claims in which the United States has little to no vested interest in their outcomes.

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<sup>222</sup> *Empagran I*, 542 U.S. 155, 165 (2004) (emphasis omitted).

<sup>223</sup> “Everyone is a consumer, and the most egregious form[s] of anticompetitive behavior . . . harm[ ] consumers without justification. It raises the prices they pay, transfers their wealth to the conspirators, and rarely, if ever, has redeeming virtues. The most basic purpose of antitrust law is to protect consumers from such behavior.” John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 *FORDHAM L. REV.* 2425, 2426 (2013) (referencing price fixing).

<sup>224</sup> *Lotes*, 753 F.3d at 413.

<sup>225</sup> *Id.*

<sup>226</sup> To so hold would truly be a backward step toward *American Banana*, a concern forwarded in Bauer, *supra* note 20.

## V. *MOTOROLA MOBILITY*

As introduced above, *Motorola Mobility* was an antitrust case brought under the Sherman Act and the FTAIA.<sup>227</sup> At the district court, the plaintiff, Motorola, lost on summary judgment for failing to satisfy the domestic effects exception of the FTAIA. Motorola appealed to the Seventh Circuit. The Seventh Circuit decided the case originally in March 2014. It vacated this opinion and granted rehearing in November 2014, and after further briefing and oral argument, the Seventh Circuit again affirmed the district court's holding.

### A. *Factual Background*

*Motorola Mobility* involved Motorola, the parent company, whose foreign subsidiaries were part of a global supply chain involved in the production of mobile phones. The defendants in the litigation allegedly participated in anticompetitive conduct by fixing the prices of a necessary component of the mobile phones, LCD screens.<sup>228</sup> The purchase of the LCD panels at issue in this case can be divided into three distinct categories:

- (1) purchases of LCD panels by Motorola that were delivered directly to Motorola facilities in the United States ("Category I");
- (2) purchases of LCD panels by Motorola's foreign affiliates that were delivered to the foreign affiliates' manufacturing facilities abroad, where they were incorporated into mobile phones that were later sold in the United States ("Category II"); and
- (3) purchases of LCD panels by Motorola's foreign affiliates that were delivered to the foreign affiliates' manufacturing facilities abroad and were later incorporated into mobile phones sold outside the United States ("Category III").<sup>229</sup>

The purchases in total cost Motorola over \$5 billion; however, of that amount, only one percent were actually purchased by Motorola—those purchases falling under Category I.<sup>230</sup> The remaining ninety-nine percent of the purchases were made by Motorola's foreign subsidiaries—those described in Categories II and III.<sup>231</sup> It was not disputed that the Category I purchases were subject to the Sherman Antitrust Act.<sup>232</sup>

The issue was whether price fixing the Category II and/or Category III panels was actionable under the Sherman Act. Motorola asserted that the negotiations occurred for the purchase of the price-fixed panels in the United States. The purchase of the panels, however, took place between

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227 See *supra* notes 9–13 and accompanying text.

228 *Motorola Mobility, Inc. v. AU Optronics Corp.*, No. 09 C 6610, 2014 WL 258154, at \*1 (N.D. Ill. Jan. 23, 2014).

229 *Id.* at \*1–3.

230 *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842, 843 (7th Cir. 2014), *vacated and reh'g granted*, No. 14-8003 (7th Cir. July 1, 2014).

231 *Id.*

232 *Id.* at 844.

Motorola's subsidiaries abroad and the foreign defendants.<sup>233</sup> These panels were then "immediately" incorporated into mobile phones and shipped to the United States—Category II panels—or to other locations—Category III panels.<sup>234</sup>

### B. *Vacated Opinion*

The Seventh Circuit's vacated opinion affirmed the district court's grant of summary judgment. First, the court reasoned that the domestic effect was "indirect—or 'remote.'"<sup>235</sup> The court reasoned that the "effect of component price fixing on the price of the product of which it is a component is indirect."<sup>236</sup> The court distinguished the facts from those in *Minn-Chem*, reasoning that in *Minn-Chem*, the cartel took steps to inflate the price of a "product that [was] wanted in the United States, and then (after succeeding in doing so) sold that product to U.S. customers."<sup>237</sup> Alternatively, the defendants in this case caused a rise in price *after* the sale of the products to *foreign* customers. Moreover, the court held that Motorola's claim failed to satisfy the "gives rise to" requirement of the FTAIA. The court determined that Motorola could not be sued "by its U.S. customers for an antitrust offense merely because the prices it charges for devices that include such components may be higher than they would be were it not for the price fixing."<sup>238</sup> Therefore, the "effect in the United States of the price fixing could not give rise to an antitrust claim."<sup>239</sup> The court concluded by noting the prevalence of global supply chains in the current economy<sup>240</sup> and predicted that to extend application of the Sherman Act to the activities of the defendants in this case would result in an "enormous[ ] increase [in] the global reach of the Sherman Act, creating friction with many foreign countries."<sup>241</sup>

### C. *Rehearing*

#### 1. Motorola's Argument

Motorola alleged that summary judgment was improperly granted because it had a valid claim under the Sherman Act. Motorola asserted that the fact that the panels were purchased and delivered abroad was not dispo-

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233 *Id.* at 843–44.

234 *Id.*

235 *Id.* at 844.

236 *Id.*

237 *Id.* at 844 (quoting *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 860 (7th Cir. 2012) (en banc)).

238 *Id.* at 845.

239 *Id.*

240 *Id.* at 846 (citing DICK K. NANTO, CONG. RESEARCH SERV., R40167, GLOBALIZED SUPPLY CHAINS AND U.S. POLICY 4–10 (2010), available at [http://assets.opencrs.com/rpts/R40167\\_20100127.pdf](http://assets.opencrs.com/rpts/R40167_20100127.pdf); Gregory Tasse, *Competing in Advanced Manufacturing: The Need for Improved Growth Models and Policies*, 28 J. ECON. PERSP. 27, 31–35 (2014)).

241 *Id.* at 846.

tive.<sup>242</sup> It further asserted that the Sherman Act applied because there was an anticompetitive effect on Motorola and United States consumers.<sup>243</sup> Specifically, Motorola claimed that the price-fixing activity abroad raised the prices of mobile phones in the United States, thereby directly causing a domestic effect and satisfying the direct effect requirement of the FTAIA.<sup>244</sup> It further maintained that “defendants affected [United States] commerce by negotiating, in the United States, the price for all panels . . . and that this effect on *U.S. prices* gave rise to any allegedly foreign injuries because the same price was applied to Motorola’s purchases at its subsidiaries abroad.”<sup>245</sup> Motorola concluded that this satisfied the proximate cause standard of the “gives rise to” requirement of the FTAIA because the foreign and domestic prices “arise from the same, *plaintiff-specific* negotiations and acts of conspiratorial price-fixing.”<sup>246</sup> Because the FTAIA was satisfied, the motion for summary judgment should have been reversed.

## 2. The Seventh Circuit’s Holding

The Seventh Circuit’s opinion after rehearing generally followed the same line of reasoning as its vacated opinion, but it failed to provide much substantive analysis of the FTAIA and its requirements. With respect to the direct effect requirement of the FTAIA, the court assumed without deciding that the activity at issue was sufficiently direct.<sup>247</sup> The court did not expressly adopt a test for the first prong of the FTAIA and therefore did not apply either the proximate cause standard or the immediate consequence standard. Instead, the court stated that the facts before it were distinguishable from those in *Minn-Chem*—where the Seventh Circuit found the effect sufficiently “direct”—but were not equivalent to what the court said in *Minn-Chem* would “definitely block liability under the Sherman Act.”<sup>248</sup> As a result, the court provided no guidance for determining when an effect is “direct” but simply assumed that Motorola had satisfied the requirement in this case.<sup>249</sup> The court also addressed the “gives rise to” requirement and held that Motorola’s claim failed to satisfy this prong of the FTAIA because it was injured abroad when it purchased the price-fixed component.<sup>250</sup> The court

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242 Appellant’s Reply Brief at 1, *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014) (No. 14-8003).

243 *Id.*

244 *Id.* at 10–12.

245 *Id.* at 17.

246 *Id.* at 18.

247 *Motorola Mobility LLC v. AU Optronics Corp.*, 773 F.3d 816, 819 (7th Cir. 2014).

248 *Id.*

249 *Id.* (“We’ll assume that the requirement of a direct, substantial, and reasonably foreseeable effect on domestic commerce has been satisfied.”).

250 *Id.* at 823. That is the extent of the analysis. The court’s reasoning reads as follows: “Remember that the [FTAIA] requires that the effect of an anticompetitive practice on domestic U.S. commerce must, to be subject to the Sherman Act, give rise to an antitrust cause of action. [Motorola] . . . would have been injured abroad when [it] purchased the price-fixed components.” *Id.*

did not even acknowledge Motorola's argument that because the inflated prices both in the United States and abroad were the result of plaintiff-specific negotiations that occurred in the United States, the proximate cause requirement of the "gives rise to" prong of the FTAIA was satisfied. Instead, the bulk of the opinion was dedicated to *Illinois Brick's* indirect purchaser doctrine and concerns for international comity.<sup>251</sup> Ultimately, the court correctly ruled for the defendants, but the reasoning of the opinion left a number of FTAIA questions unanswered and unnecessarily applied the indirect purchaser doctrine to an FTAIA claim.

#### D. *More FTAIA, Less Illinois Brick*

First, because the court failed to mention a standard in both the vacated opinion and the opinion following rehearing, the Seventh Circuit should have reaffirmed its holding in *Minn-Chem* that an effect is "direct" when the plaintiff establishes a "reasonably proximate causal nexus." The court should have then determined that the foreign anticompetitive activity in this case proximately caused a domestic effect and therefore that the first prong of the FTAIA was satisfied—rather than simply assuming it was met. The Seventh Circuit correctly stated that the second requirement of the FTAIA—that the domestic effect "give rise to" a Sherman Act claim—was not satisfied, but only dedicated a paragraph to this analysis. Instead of focusing on the indirect purchaser doctrine—a doctrine that has never before been applied in an FTAIA analysis<sup>252</sup>—the court should have analyzed how the facts at bar failed to satisfy the "gives rise to" requirement of the FTAIA. In the end, the court correctly granted summary judgment for the defendants. However, it should have focused its analysis as this Note proposes because it complies more consistently with prior precedent, accounts for considerations of comity and foreign sovereignty, and does not unnecessarily expand the reach of *Illinois Brick* and the indirect purchaser doctrine.

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251 *Id.* at 819–27. The Supreme Court's decision in *Illinois Brick Co. v. Illinois* "limits private treble damage actions to the antitrust violator's direct customers, leaving subsequent purchasers who often suffer substantial harm without a remedy." Matthew M. Duffy, Note, *Chipping Away at the Illinois Brick Wall: Expanding Exceptions to the Indirect Purchaser Rule*, 87 NOTRE DAME L. REV. 1709, 1709 (2012) (citing *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977)). The court's argument in *Motorola Mobility* is that Motorola, the parent, is a subsequent purchaser of its subsidiary and as a result, under *Illinois Brick*, the parent is left without a remedy. *Illinois Brick*, of course, did not deal with price fixing as applied to a global supply chain and there is dicta in that case that might indicate it should not be applied in Motorola's situation. Nevertheless, *Illinois Brick's* application is outside the scope of this Note. It is sufficient to say that the decision could have been made without expansion of the doctrine. See *supra* Section V.C.

252 See *supra* Parts I–IV. Moreover, *Illinois Brick* has not been applied even in cases with markedly similar factual scenarios. See *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395 (2d. Cir. 2014).

## 1. Proximate Cause Analysis: Direct Effect Requirement Was Satisfied

Proximate cause is generally thought of as a “cause that is legally sufficient to result in liability.”<sup>253</sup> Generally, it limits legal responsibilities to “those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.”<sup>254</sup> “Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.”<sup>255</sup> An action is the proximate cause of an effect when the conduct is a “substantial factor in bringing about the harm.”<sup>256</sup> When determining whether the conduct was a substantial factor to bringing about the harm, courts look to factors such as “whether the actor’s conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm” and a “number of other factors which contribute in producing the harm and the extent of the effect they have in producing it.”<sup>257</sup> As applied to supply chains, courts should analyze the “structure” of the supply chain and the “nature of the commercial relationships at each link in the causal chain.”<sup>258</sup>

Generally, concerns for international comity limit the extraterritorial application of United States law—the Seventh Circuit acknowledged this policy concern in its *Motorola Mobility* opinion.<sup>259</sup> However, concerns for international comity only need to be addressed by the FTAIA as a whole, not by each prong of the FTAIA. If a “direct” effect was the only requirement of the FTAIA and as a result the only mechanism by which international comity could be respected, then concerns for comity would and should limit the proximate cause analysis. However, concerns of international comity are properly accounted for in the “gives rise to” requirement of the FTAIA. By ensuring that all causes of action arise from a domestic effect under the “gives rise to” requirement, the United States ensures that it has a proper interest in the case before it opens the doors of its courts to the claim. Therefore, because comity is adequately addressed in the second prong of the statute, the “direct” effects inquiry should be limited by traditional notions of proximate cause rather than concerns for international comity. Thus, under the FTAIA courts should determine whether the anticompetitive action was the substantial, reasonably foreseeable, and direct (or proximate) cause of the domestic effect.

Here, the anticompetitive activity abroad produced a substantial domestic effect in the United States. The defendants fixed the price of LCD panels

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253 *Proximate Cause*, BLACK’S LAW DICTIONARY (9th ed. 2009).

254 *Id.*

255 W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 41 (5th ed. 1984).

256 RESTATEMENT (SECOND) OF TORTS § 431 (1965).

257 *Id.* § 433.

258 *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014).

259 *Motorola Mobility LLC v. AU Optonics Corp.*, 773 F.3d 816, 824 (7th Cir. 2014) (“The Supreme Court has warned that rampant extraterritorial application of U.S. law ‘creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.’” (quoting *Empagran I*, 542 U.S. 155, 165 (2004))).

in order to artificially inflate their prices. Defendants conceded that this activity had a substantial effect on the market. Regardless, Motorola purchased \$5 billion worth of panels, nearly half of which eventually entered the United States market. Therefore, even a small increase in the price of the panels would have a substantial impact on the market.

Furthermore, it was reasonably foreseeable that the anticompetitive action would result in a domestic effect. Basic logic would dictate that increasing the price of a component part would lead to an increase in price of the finished product. Moreover, Motorola alleged that defendants knew that the LCD panels would reach the market and that they intentionally targeted the United States market. Hence, it was reasonably foreseeable to the defendants that selling LCD panels for an artificially high price with the intent of them reaching the United States market would have an effect in that market.

Finally, the Seventh Circuit should have determined that the foreign defendant's anticompetitive activity was the direct or proximate cause of the domestic effect. The court assumes this in its opinion following rehearing, but in his vacated opinion, Judge Posner concluded that the domestic effect was too remote to impose liability because the anticompetitive activity occurred abroad and then filtered through layers of the supply chain before causing "a few ripples in the United States."<sup>260</sup> This reasoning, however, fails to acknowledge the simplicity of the supply chain in this case. The components were purchased at an artificially high price, and those fixed price components were incorporated into phones and "immediately" shipped to the United States.<sup>261</sup> As the court in *Lotes* stated, "[t]here is nothing inherent in the nature of outsourcing or international supply chains that necessarily prevents the transmission of anticompetitive harms or renders any and all domestic effects impermissibly remote and indirect."<sup>262</sup> Moreover, this appears to be a rather simple supply chain: purchasing to manufacturing to distribution. The defendant's conduct was the sole factor in bringing about the harm. Furthermore, the defendants were selling into a global supply chain, and they were aware that this chain was supplying phones to the United States.<sup>263</sup> It was the reasonable consequence of their action that the United States market would be affected. Neither the "structure" of the supply chain nor the "nature of the commercial relationships at each link in the causal chain"<sup>264</sup> provides any evidence that the price-fixing activity was not the proximate cause of the domestic effect. In fact, this would appear to be the exact situation in which anticompetitive activity affecting one link in the supply chain can be traced through to the domestic effect without concern

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260 *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842, 844 (7th Cir. 2014) (quoting *Minn-Chem, Inc. v. Agrium, Inc.* 683 F.3d 845, 860 (7th Cir. 2012) (en banc)).

261 See Appellant's Reply Brief, *supra* note 242, at 1–3.

262 *Lotes*, 753 F.3d at 413.

263 In fact, Motorola alleged that the defendants targeted the United States market. Appellant's Reply Brief, *supra* note 242, at 3.

264 *Lotes*, 753 F.3d at 413.



for intervening sales or supply chain complexities. Consequently, the court should have found that the anticompetitive activity at issue in this case was the proximate and therefore “direct” cause of the domestic effect.

## 2. Motorola Failed to Satisfy the “Gives Rise to” Requirement of the FTAIA

The circuits to address the “gives rise to” requirement of the FTAIA have all held that the domestic effect must proximately cause the plaintiff’s injury. It is insufficient to allege simply that an anticompetitive price-fixing conspiracy raised prices in the United States market, thereby causing a domestic effect, and that because the United States market prices were inflated, the plaintiff was harmed as a result of the inflated United States prices.<sup>265</sup> It is also insufficient to allege that foreign anticompetitive activity which harms the plaintiff and subsequently causes a domestic harm “gives rise to” a Sherman Act claim under the FTAIA. That was the case in *Lotes*, and because the facts of this case are strikingly similar, the reasoning of the Second Circuit in that case is particularly persuasive here.

Here, Motorola was injured when it purchased the price-fixed LCD panels through one of its subsidiaries abroad. Furthermore, because it overpaid for the LCD panels, that cost was passed on through its global supply chain and eventually caused a rise in the price of mobile phones in the United States. As described above, this resulted in a sufficiently proximate domestic effect under the “direct” effect requirement of the FTAIA. This is not, however, sufficient to satisfy the “gives rise to” requirement of the statute. The harm here occurred when Motorola purchased the LCD panels and not—as Motorola has argued—when the negotiations occurred because without Motorola’s purchase of price-fixed phones there would never have been a domestic effect in the United States. Thus, the price fixing harmed Motorola before it manifested itself in the United States. Motorola’s injury “gave rise to” the domestic effect, not vice versa. Unfortunately for Motorola, this fact dooms its claim. The FTAIA requires that the domestic effect “gives rise to” the Sherman Act claim. The domestic effect in this case was downstream of Motorola in the flow of causation. Consequently, Motorola now finds itself upstream of the domestic effect and without a paddle. The Seventh Circuit’s vacated opinion also reached this conclusion. Judge Posner reasoned that Motorola’s claims against the defendants were not based on the rise in price of the goods in the United States but rather “on the effect of the alleged price fixing on Motorola’s foreign subsidiaries.” That price fixing occurred abroad and was independent of the United States market. Consequently, upon rehearing, the Seventh Circuit should have endorsed this line of reasoning and held that the domestic effect did not “give rise to” Motorola’s Sherman Act claim. Instead, the court dove into an analysis of the indirect

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<sup>265</sup> See *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007) (rejecting this “but for” line of reasoning); *Empagran II*, 417 F.3d 1267, 1270 (D.C. Cir. 2005) (same).

purchaser doctrine, relying heavily on *Illinois Brick* to bar recovery by Motorola. The application of this doctrine was unnecessary because, as argued above, the FTAA disposes of Motorola's claim.<sup>266</sup>

#### CONCLUSION

*Motorola Mobility* provides a case study in the application of domestic antitrust law to foreign anticompetitive conduct. Congress enacted the FTAA in order to provide guidance to the courts in this regard. However, the legislation is ambiguous and the circuits have disagreed on how to interpret the statutory language. As argued in this Note, the FTAA should be interpreted as a substantive limitation on Sherman Act claims that apply to extraterritorial conduct. Furthermore, the domestic effects exception should be construed as a dual proximate cause analysis. In doing so, the courts properly account for considerations of international comity while maintaining potential causes of action for United States purchasers affected by anticompetitive activity abroad. The prevalence and necessity of global supply chains in today's markets weigh strongly against a presumption that anticompetitive activity occurring somewhere along the chain is too remote to satisfy the "direct" effect requirement. This is especially true when considering that the "gives rise to" limitation ensures that there is an adequate United States interest in the anticompetitive activity and correspondingly respects concerns for international comity. Applying these principles to the facts presented in *Motorola Mobility*, the Seventh Circuit should have found that Motorola's claim satisfied the direct effect requirement of the domestic effects exception but failed to satisfy the "gives rise to" requirement.

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<sup>266</sup> Notably, rather than expansion, some have recognized the failing of *Illinois Brick* and have called for broader exceptions "allow[ing] indirect purchasers to sue more frequently." Duffy, *supra* note 251, at 1729. "By targeting situations where the policy weaknesses . . . are most acute, indirect purchasers can and should be successful in seeking recovery." *Id.* This is perhaps one of those situations but, again, this is a topic for another note.

