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From Sea to Shining Sea: A New Approach to Interpreting the Foreign Trade Antitrust Improvements Act

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FROM SEA TO SHINING SEA: A NEW APPROACH TO INTERPRETING THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

ABSTRACT

The Foreign Trade Antitrust Improvements Act (FTAIA) was passed in 1982 to govern the application of the Sherman Act to antitrust violations that occurred abroad. While the statute received little attention in its early years, public and private plaintiffs have recently begun to collect large fines and penalties under its jurisdiction. As the number of parties subject to these judgments has continued to grow, the increasing focus on the FTAIA has caused uneven development of the statute: while certain aspects of the FTAIA were defined and refined by judicial interpretation, other language in the statute remained underdeveloped.

This Comment focuses on the requirement within the FTAIA that conduct from a foreign entity must have a "direct, substantial, and reasonably foreseeable effect" on United States commerce. This section of the FTAIA forms the basis of the statute. That is, to satisfy the FTAIA the effect of the defendant's conduct must have a "direct, substantial, and reasonably foreseeable effect" on American commerce and that effect must "give[] rise to a claim" under the Sherman Act. The "direct, substantial, and reasonably foreseeable effect" requirement is greatly underdeveloped: some courts have interpreted certain words in the phrase, while others have provided no guidance as to the standard by which the effect requirement is judged.

This Comment proposes a new interpretation of the "direct, substantial, and reasonably foreseeable effect" requirement of the FTAIA. This new interpretation provides courts with the means to interpret a section of the FTAIA by balancing previous judicial attempts at deciphering the statute with the intent of the members of Congress who drafted it. By considering whether the anticompetitive conduct proximately causes the harmful effect on U.S. commerce, creates a substantial effect on the price and volume of the good, and the effect is reasonably foreseeable to an ordinary businessperson in the foreign entity's market, this Comment's interpretation will give businesses, practitioners, and judges a lens that will help clarify the FTAIA. This unified

approach to interpreting the FTAIA also provides an efficient remedy to the confusion created by contradicting interpretations of the statute.

INTRODUCTION

Enforcement of the Sherman Act against international cartels and antitrust violations beyond the borders of the United States has become big business for both private litigants and the government. The recent success of the Department of Justice (DOJ) demonstrates how lucrative prosecuting these overseas violations can be. The DOJ recently obtained a settlement in which nine Japan-based companies and two executives paid more than $740 million in criminal fines for their involvement in conspiracies to fix the prices of auto parts.[1] The DOJ collected over $1.1 billion dollars in criminal antitrust fines in the 2013 fiscal year,[2] tying its record for highest total antitrust fines collected in a fiscal year.[3] These massive figures draw attention away from an interesting anomaly within antitrust-law enforcement. While impressive fines continue to mount against foreign entities, certain aspects of the law that governs these claims, the Foreign Trade Antitrust Improvements Act (FTAIA), have not been extensively interpreted by U.S. courts.

The FTAIA allows U.S. courts to hold foreign companies liable for violations of the Sherman Act. The FTAIA only applies to conduct involving export trade or export commerce.[4] For a court to allow for Sherman Act liability under the FTAIA, the conduct must satisfy two conditions. First, the conduct must have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.[5] Second, the effect must "give[] rise to a claim" brought by

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[1] Press Release, U.S. Dep't of Justice, Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars (Sept. 26, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/300969.pdf.

[2] Antitrust Div., *Criminal Enforcement, Fine and Jail Charts Through Fiscal Year 2013*, U.S. DEP'T JUST., http://www.justice.gov/atr/public/criminal/264101.html (last visited Feb. 6, 2015).

[3] The total fines collected in fiscal year 2013 tied the total fines collected in fiscal year 2012. *Id.* FY2012 also saw the DOJ tie its largest judgment ever in a court proceeding when it was awarded a $500 million dollar judgment against AU Optronics. Antitrust Div., *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More*, U.S. DEP'T JUST., http://www.justice.gov/atr/public/criminal/sherman10.pdf (last updated Feb. 4, 2015).

[4] Any conduct involving "import trade or import commerce" bypasses FTAIA analysis and is only evaluated under the Sherman Act. 15 U.S.C. § 6a (2012). This is commonly referred to as the "import exception." *See, e.g.*, Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 471 n.11 (3d Cir. 2011).

[5] 15 U.S.C. § 6a(1). The language of the FTAIA provides a more convoluted definition of what commerce falls within the definition of the statue. Courts, however, have recognized that the FTAIA applies to all non-import, nondomestic commerce. *See* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 854 (7th Cir. 2012) (en banc). This Comment refers to this non-import, nondomestic commerce as either "commerce" or "U.S. commerce" for simplicity purposes.

the plaintiff under the Sherman Act.[6] Courts that have discussed the FTAIA often focus on how these requirements apply to civil procedure[7] or on the "gives rise to a claim" prong.[8] In contrast, little to no discussion has occurred regarding the "direct, substantial, and reasonably foreseeable effect" requirement of the FTAIA. The underdevelopment of the "direct, substantial, and reasonably foreseeable effect" requirement of the FTAIA has caused confusion in the lower courts.

A comparison of hypothetical scenarios illuminates this confusion.[9] First, imagine that a group of international companies that produce a computer component, decide to collude and charge a higher price for the component.[10] The cartel sells the price-fixed component to different companies that assemble the computer outside of the United States.[11] These assembled computers, which contain the price-fixed component, are then sold to consumers throughout the world.[12] Second, imagine a similar group of international companies that produce a component of televisions.[13] These international companies engage in conduct similar to that in the previous example: they collude and charge a higher price and then sell to different companies that assemble the televisions outside of the United States.[14] Again, the assembled

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[6] 15 U.S.C. § 6a(2).

[7] A circuit split had emerged concerning whether the FTAIA limited the subject matter jurisdiction of the court or created a substantive element of an antitrust claim. *Compare, e.g.*, United States v. LSL Biotechs., 379 F.3d 672, 683 (9th Cir. 2004) (stating that the FTAIA limits the subject matter jurisdiction of the court), *with* Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 408 (2d Cir. 2014) (stating that the FTAIA sets out a substantive element of an antitrust claim), *Minn-Chem*, 683 F.3d at 852 (same), and *Animal Sci. Prods.*, 654 F.3d at 466 (same). Whether the FTAIA affects subject matter jurisdiction or a substantive element of the claim creates different pleading requirements for a motion to dismiss. *See* Abbott B. Lipsky, Jr. & Kory Wilmont, *The Foreign Trade Antitrust Improvements Act: Did* Arbaugh *Erase Decades of Consensus Building?* 12 ANTITRUST SOURCE, Aug. 2013, art. no. 3, at 1, 1–2. However, the Ninth Circuit recently reversed its position, thereby eliminating the circuit split. *See* United States v. Hui Hsiung, —F.3d—, 2015 WL 400550 (9th Cir. 2014).

[8] On remand from the Supreme Court, the District of Columbia Circuit held that the effect must be the proximate cause of the harm suffered by the plaintiff in order to "give[] rise to a claim" under the FTAIA. Empagran, S.A. v. F. Hoffmann-La Roche, Ltd., 417 F.3d 1267, 1271 (D.C. Cir. 2005), *enforcing* 542 U.S. 155 (2004). *Contra In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 987 (9th Cir. 2008) (holding that "but for" causation meets the requirements of the FTAIA).

[9] These hypothetical scenarios are based on the facts from *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F. Supp. 2d 555 (D. Del. 2006) and *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F. Supp. 2d 953 (N.D. Cal. 2011).

[10] *See Intel*, 452 F. Supp. 2d at 557.

[11] *See id.* at 560.

[12] *See id.*

[13] *See TFT-LCD*, 822 F. Supp. 2d at 955.

[14] *See id.*

televisions are sold to consumers throughout the world.[15] Thus, these two hypothetical scenarios contain identical facts, with the only difference being the actual product involved in the anticompetitive conduct.

These hypothetical scenarios are based on actual cases. The courts in these cases reached different conclusions regarding antitrust liability. The computer hypothetical is modeled on the facts of *In re Intel Corp. Microprocessor Antitrust Litigation*, a case in which the plaintiff argued that foreign price-fixing by the defendant resulted in reduced revenue and hurt the plaintiff's ability to compete in the United States.[16] The court held that the chain of events that eventually resulted in the alleged reduction in competition in the United States was not sufficiently "direct."[17] In contrast, the television hypothetical is modeled on the facts of *In re TFT-LCD (Flat Panel) Antitrust Litigation*, a case in which the plaintiff claimed that inflated prices created by the defendant's foreign conduct were passed on to U.S. consumers.[18] The court in *TFT-LCD* held that the foreign companies were subject to antitrust liability based on the "direct" effect their actions had in the United States.[19] While the actual cases contain more nuances than the brief hypothetical scenarios above, the issue remains the same: similar situations have received different treatment from judges interpreting the "direct, substantial, and reasonably foreseeable effect" prong of the FTAIA.

The "direct, substantial, and reasonably foreseeable effect" prong of the FTAIA forms the basis of the statute. This prong defines the effect on U.S. commerce that must be shown to have a claim under the statute, which in turn is analyzed in the second prong of the FTAIA to determine whether that effect on U.S. commerce "gives rise to" the plaintiff's claim.[20] Judicial interpretation of the FTAIA focuses almost exclusively on this "gives rise to" prong of the FTAIA.[21] Proceeding to the "gives rise to" analysis without clearly defining

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15 *See id.*

16 452 F. Supp. 2d at 560–61.

17 *Id.*

18 822 F. Supp. 2d at 955.

19 *Id.* at 966. Interestingly, the court did not find that the behavior complained of fell into the import exemption of the FTAIA even though the evidence presented in the opinion implies that some number of LCD panels ended up in the United States. *See id.* at 955 (explaining that alleged conduct caused "end-users to pay inflated prices in the United States for electronic items that contained LCD panels").

20 15 U.S.C. § 6a (2012).

21 *See* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 389–90 (2d Cir. 2002) (reversing decision by the lower court based on improper analysis of whether the effect gave rise to plaintiff's claim), *abrogated by* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (stating that independent harm to foreign

the effect as required under the first prong of the FTAIA essentially ignores a key assumption for the second prong: there was a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce as required by the FTAIA.[22] By including this language, Congress sought to demonstrate that not all effects on U.S. commerce would be illegal under the FTAIA.[23] If courts do not take the time to develop a clear standard for the effect requirement and apply it to each case, their decisions could lead to false positives under the FTAIA. Specifically, the courts could improperly find liability for effects on U.S. commerce that are not "direct, substantial, and reasonably foreseeable" but still give rise to a claim under the FTAIA. Thus, the FTAIA would function improperly by over-expanding the range of effects on U.S. commerce that fall under the statute.

In addition, the different interpretations of the "direct, substantial, and reasonably foreseeable effect" requirement present interpretation problems for judges, practitioners, and foreign companies. Judges have started to rely on different standards to define "direct," "substantial," and "reasonably foreseeable."[24] These differing standards may overwhelm practitioners when preparing their arguments and assessing their clients' potential liability. Because of the myriad of ways the effect requirement is interpreted, an attorney risks losing the case by not addressing all of the interpretations of these terms. The lack of clarity created by the different interpretations of the FTAIA also forces companies to second-guess their involvement in certain behavior that may be legal abroad but potentially illegal in the United States.

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consumers cannot form the basis of FTAIA claim), *as recognized in* JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 176 (2d Cir. 2004).

[22] *See, e.g.*, *In re* Monosodium Glutamate Antitrust Litig., No. Civ.00MDL1328(PAM), 2005 WL 1080790 at *4–5 (D. Minn. May 2, 2005) (demonstrating where a court assumes a "direct, substantial, and reasonably foreseeable effect" without discussion in order to address whether that effect "gives rise to" the alleged injury), *aff'd*, 477 F.3d 535 (8th Cir. 2007).

[23] H.R. REP. NO. 97-686, at 9–10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494–95 ("[T]here should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor."). This language mirrors the over-breadth concern that the Supreme Court has discussed for over a century in the context of the applicability of the U.S. antitrust laws. *See, e.g.*, *Empagran*, 542 U.S. at 169 ("[T]he FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce."); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 355, 357 (1909) (stating that "[i]t is surprising to hear it argued that [acts outside of the United States] were governed by the [Sherman Act]" and that the broad language of the Sherman Act applied to "every one subject to such legislation, not all that the legislator subsequently may be able to catch").

[24] *See infra* Part II.A.1, B.1, C.1.

To remedy the confusion over how to interpret the requirement of a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce within the FTAIA, this Comment proposes definitions for each word in this prong of the statute. First, conduct is "direct" if it proximately causes the effect in the United States. Second, conduct is "substantial" if the alleged anticompetitive conduct's effect on the price and volume of the good in the United States is in turn "substantial." Third, conduct is "reasonably foreseeable" if an objective businessperson could foresee the conduct affecting the United States. This Comment proposes that courts should unite around this unified definition of what a "direct, substantial, and reasonably foreseeable effect" is under the FTAIA. This will provide a clear, consistent, and efficient standard for assessing what effect anticompetitive conduct must have on U.S. commerce to fall within the purview of the U.S. antitrust laws.

The definitions proposed in this Comment are grounded in existing case law.[25] Indeed, some courts have used parts of the proposed definitions in their analysis of the FTAIA,[26] and one court has seemingly used all three.[27] However, no court has adopted all three definitions together on a consistent basis in interpreting the FTAIA. This Comment will focus on why these definitions most accurately embody the purpose of the FTAIA[28] and how their consistent adoption can create a more efficient mechanism for enforcing the FTAIA.[29]

Part I of this Comment will provide background on the development of the effects requirement as first created by the courts and then codified in the FTAIA using the "direct, substantial, and reasonably foreseeable" language. Part I will also demonstrate the confusion created by Supreme Court and lower court decisions concerning the effects language within the FTAIA. Part II will develop the new, unified standard proposed by this Comment for interpreting the FTAIA by analyzing each individual phrase within the "direct, substantial, and reasonably foreseeable" language of the statute. Within Part II, this Comment will highlight different approaches taken by the courts in interpreting the phrase, present the most appropriate definition given these judicial interpretations, and provide a test case for how each element of the

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25 *See infra* Part II.
26 *See infra* Part II.A.1, B.1, C.1.
27 *See infra* Part II.D.
28 *See infra* Part II.A.2, B.2, C.2.
29 *See infra* Part III.

new, unified standard should be interpreted in practice. Part III will discuss the implications of the new standard for interpreting the FTAIA.

I. THE EFFECTS REQUIREMENT AND FOREIGN ANTITRUST VIOLATIONS: AN ELUSIVE STANDARD

While the phrase "direct, substantial, and reasonably foreseeable" was created by the drafters of the Foreign Trade Antitrust Improvements Act, requiring a certain effect on U.S. commerce to raise an antitrust claim in the United States based on foreign conduct was not a novel concept to courts.[30] The legislative history of the FTAIA[31] demonstrates that the statutory phrasing was a modification of the "effects" test first created by Judge Learned Hand in *United States v. Aluminum Co. of America (Alcoa)*.[32] Although the "direct, substantial, and reasonably foreseeable" language was meant to be a "simple and straightforward clarification of existing American law,"[33] a lack of guidance by Congress and subsequent treatment by the Supreme Court and lower courts have created uncertainty as to the correct standard required under the FTAIA.

This Part focuses on the effects requirement, which public and private parties must meet before holding an international entity liable under U.S. antitrust law since the passage of the Sherman Act. This Part outlines the three phases of development of the effects requirement, which culminated in the modern understanding of the "direct, substantial, and reasonably foreseeable effect" requirement under the FTAIA. The first section of this Part discusses the creation of the "effects" test in *Alcoa* and the difficulties of applying the *Alcoa* standard in subsequent decisions. The second section lays out the text of the FTAIA, with the relevant legislative history to understand the considerations of the legislators who passed the law. This section also generally demonstrates how the statute is meant to function according to the Supreme Court. The third section provides a sampling of cases interpreting the "direct, substantial, and reasonably foreseeable effect" requirement under the

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[30] This requirement was first discussed in *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 443–44 (2d Cir. 1945).

[31] H.R. REP. NO. 97-686, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490 ("Since Judge Learned Hand's opinion in [*Alcoa*], it has been relatively clear that it is the situs of the effects . . . that determines whether United States antitrust law applies. There remains, however, some disparity . . . regarding the quantum and nature of the effects required to create jurisdiction.").

[32] 148 F.2d at 416.

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

FTAIA. This section discusses the lack of guidance provided by the only two Supreme Court cases that have interpreted the FTAIA and lays out two examples of current interpretations of the FTAIA effect requirement to highlight the difficulty courts have interpreting the statute.

A. The "Effects" Test Under Alcoa

Beginning at the turn of the century, U.S. courts wrestled with the issue of when to apply American antitrust laws to foreign activities and foreign entities.[34] Inconsistency in the original standard used to apply the antitrust laws to foreign entities centered on whether and to what degree considerations of international comity should be weighed when determining liability.[35] Much of this inconsistency was driven by the Supreme Court. After denying liability on the basis of international comity in *American Banana Co. v. United Fruit Co.*,[36] the Court found two British entities liable in *United States v. American Tobacco Co.* without any discussion of international comity.[37] Judge Learned Hand's opinion in *Alcoa* jettisoned these comity considerations.[38] In their place, he created the initial "effects" test that would serve as the basis for adopting the FTAIA nearly four decades later.

Acting as the court of last resort,[39] the Court of Appeals for the Second Circuit in *Alcoa* famously found that the largest[40] domestic producer of aluminum violated Section 2 of the Sherman Act by monopolizing the market for virgin aluminum ingot.[41] Judge Hand also discussed applying the U.S. antitrust laws to Aluminum Limited, an entity incorporated in Canada to take

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[34] *Compare* Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (declining to extend the Sherman Act to foreign conduct), *with* United States v. Am. Tobacco Co., 221 U.S. 106 (1911) (Sherman Act extended to British companies), *and* United States v. Sisal Sales Corp., 274 U.S. 268 (1927) (Sherman Act extended to Mexican company).

[35] The Court in *American Banana* denied application of the Sherman Act on the basis of international comity but provided no guidance on how to weigh comity considerations in other decisions. *Am. Banana*, 213 U.S. at 355–57.

[36] *See id.* at 356 ("For another jurisdiction . . . to treat [a foreign entity] according to its own notions . . . would be an interference with the authority of another sovereign, contrary to the comity of nations . . . .").

[37] *See Am. Tobacco Co.*, 221 U.S. at 181–84.

[38] Judge Hand made no reference to comity in the entirety of his opinion. *See Alcoa*, 148 F.2d 416 (2d Cir. 1945).

[39] The Court of Appeals for the Second Circuit became the court of last resort after four members of the Supreme Court disqualified themselves from hearing the case. E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 253 n.14 (5th ed. 2009).

[40] For all essential purposes, Alcoa was the only domestic producer of aluminum at that time.

[41] *Alcoa*, 148 F.2d at 432.

over the properties of Alcoa outside of the United States.[42] This foreign corporation was owned by the same individuals who owned Alcoa[43] and had entered into two separate agreements with corporations from France, Germany, Switzerland, and Great Britain.[44]

Judge Hand acknowledged that the two agreements, which limited the amount of aluminum available,[45] were clearly violations of Section 1 of the Sherman Act.[46] The issue, however, was whether the Act should apply to foreign entities.[47] Judge Hand highlighted two scenarios that demonstrated his hesitancy to apply the Sherman Act to foreign entities. First, Judge Hand feared that holding parties liable for anticompetitive behavior affecting the United States regardless of the magnitude of its effect would result in an overly broad interpretation of the Sherman Act.[48] Second, Hand feared that finding liability for any intentional acts targeting the United States despite the absence of any anticompetitive effect would cause confusion by forcing lower courts to decide between competing canons of statutory construction.[49]

To avoid these over-breadth and statutory construction concerns, Judge Hand crafted a test that required both intent and an effect on the United States to find a foreign entity liable under the Sherman Act. Specifically, Judge Hand stated that "[b]oth [agreements] were unlawful, though made abroad, if they were intended to affect imports and did affect them."[50] Using this new standard, Hand found that the foreign aluminum producer's agreements violated Section 1 of the Sherman Act.[51]

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[42] *Id.* at 439.

[43] *Id.* at 440.

[44] *Id.* at 442–43.

[45] The first agreement in 1931 created a system of quotas for aluminum ingot production, and a second agreement in 1936 created a system of royalties to replace the initial "unconditional" quota system, which forced the entity producing more than its fixed quota under the agreement to pay a royalty fee. *Id.* at 442–43.

[46] *Id.* at 444.

[47] *Id.* at 443.

[48] *Id.* ("Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States . . . . Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.").

[49] *Id.* at 443–44 ("That situation might be thought to fall within the doctrine that intent may be a substitute for performance in the case of a contract made within the United States; or it might be thought to fall within the doctrine that a statute should not be interpreted to cover acts abroad which have no consequence here.").

[50] *Id.* at 444.

[51] Hand found that the parties involved in the earlier agreement did not intend to cover imports. However, the latter agreement, which superseded the earlier agreement, clearly targeted the United States. *Id.*

Alcoa was a groundbreaking opinion regarding the application of the Sherman Act to foreign conduct, but it did not articulate a completely satisfactory standard that could be applied to future cases. Judge Hand focused on the effect that the conduct had on the United States but did not discuss *how much* of an effect on the United States was required.[52] The only guidance Hand gave in determining whether the effect amounted to a Sherman Act violation was that "we shall assume that the Act does not cover agreements, even though they intended to affect imports or exports, unless its performance is shown actually to have some effect on them."[53] Hand provided no guidance as to the meaning of the "some effect" language of his opinion.[54] Instead, under Hand's framework, a successful demonstration of intent to affect U.S. commerce shifted the burden to the defendant to prove the conduct did not have an effect on the United States to avoid liability under the antitrust laws.[55] Instead of remanding to the lower court to apply this new test, Hand denied Alcoa an opportunity to demonstrate the lack of effect created in the United States. Hand cited precedent dictating that no inquiry into price effects was required given a finding of intent and dismissed statistics of the actual effects of the agreement on U.S. commerce used in the lower court as non-conclusive.[56] Hand's opinion seemed more concerned with whether the foreign party intended to affect the United States than with either what the actual effect of the foreign conduct was or how the standard created in *Alcoa* would be applied in subsequent decisions.

Judge Hand's new focus on the relationship between the foreign conduct and the effect on the United States had a lasting impact on the application of United States antitrust law to foreign entities. However, the original standard created in *Alcoa* requiring "some effect" on the United States failed to provide satisfactory guidance to lower courts attempting to determine which effects would result in liability. The lack of development into what facts and situations would satisfy the "some effect" requirement caused uneven application of the *Alcoa* "effects" test in subsequent lower court decisions[57] and created the need for Congressional intervention.

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52 *Id.* at 444.

53 *Id.*

54 *Id.*

55 *See id.* at 444–45.

56 *See id.* (citing Socony-Vacuum Oil Co. v. United States, 310 U.S. 150 (1940)). Ironically, the statistics demonstrated that gross domestic imports of aluminum had *increased* during the agreement. *Id.*

57 *Compare* Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc., 383 F. Supp. 586, 587 (E.D. Pa. 1974) (framing the effects inquiry as whether conduct "directly affect[s] the flow of foreign commerce into or out of the country"), *with* Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F. Supp. 680, 687

B. Redefining the Effects Requirement: The Foreign Trade Antitrust Improvements Act

Congress began its attempt to remedy the recurring issue of extraterritorial application of the United States' antitrust laws in March of 1981.[58] From the start, the sponsors[59] of the FTAIA explained that a new law was needed to remove uncertainty in the manner in which antitrust laws were applied to conduct abroad.[60] The FTAIA was passed in 1982.[61] The law set out a new effect standard for applying the Sherman Act to foreign actors: conduct which "has a direct, substantial, and reasonably foreseeable effect" on U.S. commerce.[62] The relevant[63] section of the new restriction on the scope of the Sherman Act read as follows:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
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> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.[64]

(S.D.N.Y. 1979) (stating that the standard was such that "it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not *de minimis*").

58 127 CONG. REC. 3538–39 (1981).

59 The Act's cosponsors in the U.S. House of Representatives were Peter W. Rodino (N.J.) and Robert McClory (Ill.). *Id.*

60 127 CONG. REC. 3538 (1981); *see also* H.R. REP. NO. 686, at 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494 ("[T]he ultimate purpose of this legislation is to promote certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions . . . .").

61 Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1233, 1246 (codified as 15 U.S.C. §§ 6a, 45(a)(3) (2012)).

62 15 U.S.C. § 6a.

63 The statute also amended the Federal Trade Commission Act. § 403, 96 Stat. at 1246–47.

64 15 U.S.C. § 6a.

While some courts have noted the awkward phrasing of the statute,[65] the Supreme Court in *F. Hoffman-La Roche Ltd. v. Empagran S.A.* clarified how courts should analyze claims under the FTAIA.[66] The Court explained that the FTAIA initially removes Sherman Act liability from all activities involving foreign commerce.[67] The statute, however, allows the Sherman Act to apply in two distinct circumstances.[68] First, Sherman Act liability applies to any conduct by foreign entities that involves "import trade or import commerce."[69] In this instance, no other provisions of the FTAIA apply, and the court simply assesses the conduct under the Sherman Act to determine whether a foreign company is liable.[70] Second, Sherman Act liability attaches to any conduct that has a "direct, substantial, and reasonably foreseeable effect" on American commerce and when that effect "gives rise to a claim" under the Sherman Act.[71]

The legislative history to the FTAIA stated that the "direct, substantial, and reasonably foreseeable effect" requirement in the statute was "a simple and straightforward clarification of existing American law."[72] Yet the FTAIA contained the same flaw as Judge Hand's opinion in *Alcoa*—the operative terms of the statute, including "direct, substantial, and reasonably foreseeable," were not defined. Congress seemingly left the interpretation of these terms to the courts, perpetuating the confusion that began with the *Alcoa* decision.

In addition to not defining the terms of the statute, Congress provided limited guidance to the courts in the legislative history of the FTAIA. First, the legislative history notes that the FTAIA was designed to incorporate certain aspects of Judge Hand's effects test, including focusing the basis of antitrust liability on whether the conduct had an effect on the United States.[73] Second, the legislative history notes that the FTAIA was drafted to *specifically reject*

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65 *See* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997) (stating that the FTAIA is "inelegantly phrased").

66 542 U.S. 155, 161–62 (2004).

67 *Id.* at 162.

68 *Id.* (citing 15 U.S.C. § 6a).

69 *Id.* at 161–62 (citing 15 U.S.C. § 6a).

70 *Id.* (citing 15 U.S.C. § 6a).

71 *Id.* (citing 15 U.S.C. § 6a).

72 H.R. REP. NO. 97-686, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487–88.

73 *See id.* at 2–3, 9–10 (noting that the FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the U.S. economy); *id.* at 9–10 ("[T]here should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor."); *id.* at 5 ("Since Judge Learned Hand's opinion . . . it has been relatively clear that it is the situs of the effects . . . that determines whether U.S. antitrust law applies.").

Hand's intent test, stating that "[t]he subcommittee chose a formulation based on foreseeability rather than intent to make the standard an objective one."[74] Third, the legislative history addressed the potential violations caused by "spillover" effects based on actions by an international cartel.[75] Armed with a new statute and limited legislative history, the courts were tasked with defining how the effects requirement, first defined in *Alcoa*, was changed by the FTAIA.

C. The FTAIA and the Courts: A Clearer Standard?

Following the passage of the FTAIA, subsequent treatment of the statute by the courts perpetuated the confusion the statute sought to remedy. Lacking a clear standard from Congress for the new "direct, substantial, and reasonably foreseeable" language in the FTAIA, courts throughout the United States were forced to define the phrase on their own. This section demonstrates how the lack of guidance affected various courts' attempts to define what a "direct, substantial, and reasonably foreseeable effect" is under the FTAIA. The first subsection considers the two Supreme Court decisions that discuss the FTAIA and demonstrates the limited interpretation and guidance the Court has provided. The second subsection provides two examples of particularly lacking interpretations of the FTAIA's effects phrase to demonstrate interpretation issues perpetuated by Congress and the Supreme Court in their treatment of the FTAIA.

1. The Supreme Court and the FTAIA: Missed Opportunities

One important source of confusion concerning the FTAIA for the lower courts has been the Supreme Court's treatment of the FTAIA. The Supreme Court has only taken two cases that raised issues under the FTAIA. Its first opportunity to discuss the FTAIA was *Hartford Fire Insurance Co. v. California*.[76] *Hartford Fire* involved a group of reinsurance companies in the United Kingdom conspiring to manipulate insurance forms to deny coverage for U.S. consumers.[77] The Court noted that the reinsurers had apparently

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[74] *Id.* at 9.

[75] *Id.* at 13 ("Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a 'spillover' effect on commerce within this country . . . the cartel's conduct would fall within the reach of our antitrust laws.").

[76] 509 U.S. 764 (1993).

[77] *Id.* at 774–76.

conceded jurisdiction[78] and then went on to revive the *Alcoa* test by stating, "[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[79] In one sentence, the Supreme Court ignored the FTAIA's scope of application for U.S. antitrust laws abroad, electing instead to resurrect the *Alcoa* standard.

The Court in *Hartford Fire* did, however, briefly discuss the FTAIA in a footnote.[80] Writing for the majority, Justice Souter noted that "it is unclear how [the FTAIA] might apply to the conduct alleged here,"[81] seemingly mimicking Judge Hand's approach in *Alcoa* in refusing to provide lower courts with an example for future application of the FTAIA. Justice Souter also wrote that it was unclear "whether the [FTAIA's] 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it."[82] After acknowledging the uncertainty contained within the FTAIA, Souter concluded the footnote by stating that the court "need not address these questions here."[83] Thus, the Supreme Court acknowledged the issues facing lower courts in interpreting the FTAIA but chose to avoid fixing these issues by utilizing the *Alcoa* "effects" test as precedent and did not elaborate on the FTAIA.

The other opportunity for the Supreme Court to interpret the FTAIA came in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*[84] Beyond elaborating on how the FTAIA functioned,[85] the Court did not clarify how the "direct, substantial, and reasonably foreseeable effect" requirement in the FTAIA should be defined. Instead, the Court found that the FTAIA did not allow Sherman Act liability to attach when foreign conduct caused foreign harm and when that foreign harm was the basis of the claim.[86] The court justified its finding on two grounds: (1) international comity, and (2) that "the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce."[87] Thus, the Court in *Empagran* did not have the

78 *Id.* at 795.
79 *Id.* at 796 (citing *Alcoa*, 148 F.2d 416, 444 (2d Cir. 1945)).
80 *Id.* at 796–97 n.23.
81 *Id.*
82 *Id.*
83 *Id.*
84 542 U.S. 155 (2004).
85 *See supra* text accompanying notes 67–71.
86 *Empagran*, 542 U.S. at 166.
87 *Id.* at 169.

opportunity to clarify the FTAIA due to a unique set of circumstances. Because no domestic effect was alleged, the Court did not have any "effect" to assess to help demonstrate what "direct, substantial, and reasonably foreseeable" meant in the context of a live case. Following *Empagran*, the Court has not taken an appeal that presents a legal question concerning the FTAIA.

2. The Lower Courts and the FTAIA: Confusion and Variance

The majority of cases interpreting the FTAIA have come from the lower courts. With limited guidance from Congress and the Supreme Court, lower courts have been forced to give meaning to "direct, substantial, and reasonably foreseeable" on their own.

Some courts have provided the text of the FTAIA within their opinions but failed to develop the language within their analysis. *Kruman v. Christie's International PLC* involved price-fixing in foreign auctions.[88] The court provided a lengthy excerpt of the legislative history of the FTAIA and acknowledged that the conduct must have a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce.[89] Yet when the court discussed whether the conduct of the auction houses met the standard set in the FTAIA, the analysis was nonexistent. The court wrote that "it would be appropriate for the United States to provide remedies for injuries suffered in consequence of overt acts that occurred outside this country only if those acts . . . had direct, substantial and reasonably foreseeable effects" and that such injuries "did not occur in this case."[90] The court failed to support its decision that the standard was not met with any discussion of the effects requirement in the FTAIA.[91] Instead, the court continued discussing why extending the Sherman Act to this action would be unsatisfactory and proceeded to respond to objections to their ruling by the plaintiff.[92] At no point in the opinion did the court state how the conduct failed to meet the effects requirement of the FTAIA or why the plaintiff's theory did not prove that the conduct had the requisite effect.

While the court in *Kruman* left much to be desired in determining why the effect was not "direct, substantial, and reasonably foreseeable," the court at least answered whether the standard was met. In contrast, in *In re Monosodium*

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88 129 F. Supp. 2d 620 (S.D.N.Y. 2001), *aff'd in part, vacated in part*, 284 F.3d 384 (2d Cir. 2002) (affirming antitrust liability under the FTAIA).

89 *Id.* at 624–25.

90 *Id.* at 625–26.

91 *Id.* at 626.

92 *Id.*

Glutamate Antitrust Litigation,[93] the court began by discussing causation before ever defining what the effect on the United States was and whether this effect fulfilled the FTAIA.[94] In this case, the plaintiff claimed that a global price-fixing scheme had exerted "direct and substantial" effects on the price of MSG in the United States.[95] The court echoed some of the effects requirement language of the FTAIA when it said, "Plaintiffs allege that prices in the United States were directly and substantially linked to prices Plaintiffs paid,"[96] but the analysis seemed to go to causation rather than effect.[97] There was no discussion of whether the price-fixing conduct abroad caused the effect of increased prices in the United States,[98] much less whether that effect was the "direct, substantial, and reasonably foreseeable" consequence of the conduct. The court denied the motion to dismiss, thereby confirming that the plaintiff had met the FTAIA effect standard without discussing what evidence the plaintiff brought forward to prove the first prong of the FTAIA and how that evidence was satisfactory.[99]

Kruman and *Monosodium Glutamate* present extreme examples of courts ignoring the FTAIA. Most lower courts interpret at least one part of the "direct, substantial, and reasonably foreseeable effect" standard.[100] Nevertheless, these decisions all support a common theme: the FTAIA has suffered from a lack of a clearly defined effects standard since its inception. While other sections of the statute have subsequently been given a uniform definition by the courts,[101] the requirement that foreign conduct have a "direct, substantial, and reasonably foreseeable effect" on American commerce remains largely undefined, and courts fail to analyze each operative phrase in the requirement separately. Therefore, a unified definition of "direct, substantial, and reasonably foreseeable" is necessary to fully enable the FTAIA to function as Congress

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93 No. Civ.00MDL1328(PAM), 2005 WL 1080790 (D. Minn. May 2, 2005), *aff'd*, 447 F.3d 535 (8th Cir. 2007).

94 *Id.* at *2–3.

95 *Id.* at *1.

96 *Id.* at *4.

97 The court immediately followed the quoted passage by stating that "[t]hese allegations aver a far more direct causal relationship between the domestic effect and Plaintiff's injury." *Id.* at *5.

98 The increase in prices was the apparent "effect" under the FTAIA.

99 *Id.* at *8.

100 *See, e.g.*, CSR Ltd. v. CIGNA Corp., 405 F. Supp. 2d 526, 549–50 (D.N.J. 2005) (finding that the effects of an Australian entity were not sufficiently "direct" without discussing "substantial" or "reasonably foreseeable").

101 *See, e.g.*, *supra* note 8 (discussing the District of Columbia's treatment of the "gives rise to" element of the FTAIA when considering *Empagran* on remand).

intended it to: by preventing every possible effect caused by foreign conduct from serving as the basis for an antitrust claim in the United States.

II. A NEW, UNIFIED STANDARD FOR INTERPRETING THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

While the Foreign Trade Antitrust Improvements Act was intended to be "a simple and straightforward clarification"[102] of the situations in which foreign conduct would give rise to liability under American antitrust laws, the resulting interpretations of the effects requirement have only caused more confusion. Lacking guidance from the text of the statute, its accompanying legislative history, and Supreme Court opinions, most courts refuse to acknowledge, much less develop, the effects requirement under the FTAIA. Those opinions that have developed the effects language often only focus on one of the words contained in the clause without elaborating on the definition of the other words in the effects test.

This Part proposes a new, unified standard for interpreting the "direct, substantial, and reasonably foreseeable effect" requirement of the FTAIA. Courts should perform an analysis of each operative phrase within the effects requirement to determine whether the defendant's conduct caused a sufficient effect on the United States. First, conduct is "direct" if it proximately causes the effect in the United States. Second, conduct is "substantial" if the alleged anticompetitive conduct's effect on the price and volume of the good in the United States is in turn "substantial." Third, conduct is "reasonably foreseeable" if an objective businessperson could foresee the conduct affecting the United States. These tests, when applied together, yield an interpretation of the FTAIA courts can apply uniformly.

This Part will develop the proposed standards for the "direct," "substantial," and "reasonably foreseeable" language within the FTAIA in three separate sections.[103] Within each section discussing the specific phrases, the discussion will include three subsections: (1) a survey of current interpretations of the phrase by courts,[104] (2) a discussion of how the adopted standard best serves the purpose of the FTAIA,[105] and (3) a test case where the proposed standard was either successfully used or the analysis by the court

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[102] H.R. REP. NO. 97-686, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487–88.
[103] *See infra* Part II.A, B, C.
[104] *See infra* Part II.A.1, B.1, C.1.
[105] *See infra* Part II.A.2, B.2, C.2.

closely mirrors the method proposed by this Comment.[106] This Part will conclude with a discussion of *Minn-Chem, Inc. v. Argium, Inc.*,[107] a recent decision that most closely exhibits the analysis using the unified standard proposed by this Comment.[108]

A. Direct

The inclusion of a directness requirement represents a change from the *Alcoa* effects standard to the FTAIA.[109] Under *Alcoa*, it was sufficient to show that the conduct "did affect" U.S. commerce.[110] Congress acknowledged this change within the legislative history by stating that applying Sherman Act liability to conduct which caused indirect effects that fit the *Alcoa* definition[111] would be a "miscarriage of Congressional intent."[112] Beyond this guidance, Congress left the task of defining how "direct" the effect must be to the lower courts.

This section develops the "proximate cause" standard that courts should use to determine whether an effect is "direct" under the FTAIA. The first subsection discusses the two ways the lower courts have interpreted "direct" thus far, specifically reviewing how courts apply the "immediate consequence" standard and the "proximate cause" standard to assess whether the alleged anticompetitive effect was "direct."[113] The second subsection presents the argument for why the "proximate cause" standard is the optimal standard for interpreting the "direct" requirement set out by the FTAIA.[114] Finally, the third subsection reintroduces the *Intel Corp. Microprocessor* decision as a test case for the new standard.[115]

1. Courts' Interpretations of "Direct"

Lower courts have interpreted "direct" in two distinct manners. One method is to find that conduct causes a direct effect if the effect is "an

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106 *See infra* Part II.A.3, B.3, C.3.

107 683 F.3d 845 (7th Cir. 2012).

108 *See infra* Part II.D.

109 United States v. LSL Biotechs., 379 F.3d 672, 679 (9th Cir. 2004) ("Unlike the FTAIA, the *Alcoa* test does not require the effect to be 'direct.'").

110 *Alcoa*, 148 F.2d 416, 444 (2d Cir. 1945).

111 Foreign conduct was illegal "if [it was] intended to affect imports and did affect them." *Id.*

112 H.R. REP. NO. 97-686, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490.

113 *See infra* Part II.A.1.

114 *See infra* Part II.A.2.

115 *See infra* Part II.A.3.

immediate consequence of the defendant's activity."[116] The Ninth Circuit took this interpretation from two sources: the dictionary and the Supreme Court's decision in *Republic of Argentina v. Weltover, Inc*.[117] The court turned to *Republic of Argentina*, a case which interpreted provisions of the Foreign Sovereign Immunities Act,[118] because the court found the language in dispute in *Republic of Argentina* was "nearly identical" to the language used in the FTAIA.[119] The "immediate consequence" standard requires that the anticompetitive conduct immediately cause the effect on U.S. commerce.[120] The effect would not qualify as "direct" under this standard if there were any intervening events between the anticompetitive conduct and the effect on U.S. commerce.[121] This "immediate consequence" standard for a direct effect has been adopted by courts within the jurisdiction of the Ninth Circuit[122] as well as by other federal courts.[123]

The other method applied by courts in determining directness is the "proximate cause" approach.[124] The Seventh Circuit adopted the definition used by the Department of Justice, which defined a "direct" effect as an effect having "a reasonably proximate causal nexus" with the anticompetitive conduct.[125] The court accepted the proximate cause standard as being more in line with the language of the FTAIA than the "immediate consequence"

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116 United States v. LSL Biotechs., 379 F.3d 672, 680 (9th Cir. 2004) (citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992), and WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1980)).

117 *Id.*

118 *See* 28 U.S.C. § 1605(a)(2) (1988) (currently codified at 28 U.S.C. § 1605(a)(2) (2012)).

119 *LSL Biotechs.*, 379 F.3d at 680.

120 *Id.* at 680–82.

121 *Id.*

122 *See, e.g.*, *In re* TFT-LCD (Flat Panel) Antitrust Litig., 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011).

123 *See, e.g.*, CSR Ltd. v. CIGNA Corp., 405 F. Supp. 2d 526, 545 (D.N.J. 2005).

124 Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 856–57 (7th Cir. 2012) (en banc). This proximate cause is different from the proximate cause standard used by courts in analyzing the "gives rise to a claim" language of the FTAIA. 15 U.S.C. § 6a(2) (2012). In theory, this creates a proximate cause "two-step": the court must first determine if the conduct proximately caused the effect on the United States, and then must determine if that effect proximately caused the claim that the plaintiff brings forward.

125 *See Minn-Chem*, 683 F.3d at 856–57 (citing Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. AM. L. 415, 430 (2005), and Brief for Appellant United States of America at 38, United States v. LSL Biotechs., 379 F.3d 672 (9th Cir. 2004) (No. 02-16472), *available at* http://www.justice.gov/atr/cases/f200200/200243.pdf).

approach since it more squarely addressed[126] the concerns of remoteness that came with the extension of Sherman Act liability to activity abroad.[127]

2. *The Best Approach Under a Unified Standard: Proximate Cause*

The contrasting tests announced by the Seventh Circuit in *Minn-Chem* and the Ninth Circuit in *LSL Biotechnologies* create uncertainty for which standard courts will apply in determining if an effect is "direct." Instead of randomly choosing between these standards, all courts should adopt the *Minn-Chem* "proximate cause" standard. The *Minn-Chem* "proximate cause" standard more accurately addresses the concerns of Congress while giving the FTAIA an appropriate scope.

As the Seventh Circuit acknowledges, the "immediate consequence" standard put forward in *LSL Biotechnologies* does not match the FTAIA.[128] The phrase "immediate consequence" comes from the Supreme Court's interpretation of the Foreign Sovereign Immunities Act, a statute that does not require "substantial" or "reasonably foreseeable" effects alongside "direct."[129] Interpreting "direct" to mean an "immediate consequence" of the defendant's actions in the context of the FTAIA would essentially eliminate the distinction between conduct *involving* imports and conduct *affecting* imports.[130] Conduct *involving* import trade or commerce, such as importing a price-fixed good into the United States, bypasses the procedural requirements of the FTAIA and goes straight to Sherman Act analysis.[131] Conduct *affecting* import trade or commerce, such as price-fixing a good outside of the United States such that prices within the United States rise in response must fulfill the additional requirements of the FTAIA.[132] The "immediate consequences" interpretation of "direct" blurs this line to an unworkable degree and frustrates attempts to clarify the FTAIA.[133]

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126 *Id.* at 857–58. The approach of the Seventh Circuit may actually cause more concern about remoteness than the *LSL Biotechnologies* test, depending on whether one views "proximate cause" or "immediate consequence" as a clearer, more applicable standard.

127 *Id.* at 857.

128 *Id.* at 856–57.

129 *Id.* at 857.

130 *Id.* at 857–58.

131 15 U.S.C. § 6a (2012).

132 *Id.*

133 *Minn-Chem*, 683 F.3d at 857 ("To demand a foreseeable, substantial, and 'immediate' consequence on import or domestic commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage.").

Courts should instead use the "proximate cause" standard of the Seventh Circuit when determining if conduct has a direct effect on U.S. commerce.[134] The "proximate cause" standard preserves the import exemption while creating a workable standard. Courts could employ the approach demonstrated in *Minn-Chem* by listing out the chain of events between the conduct and the effect in the United States and then explaining either why the chain demonstrates a direct effect or at what point in the chain the effect becomes indirect.[135]

The only hesitation courts should have with adopting the "proximate cause" standard is due to its name: proximate cause is often a consideration in foreseeability, and it is important to give both FTAIA terms "direct" and "reasonably foreseeable" meaning. The court in *Minn-Chem* noted that the directness language in the FTAIA was meant to address remoteness concerns and that using a "reasonably proximate causal nexus" standard adequately remedied these concerns.[136] The court discussed foreseeability in a different section of the opinion and applied a different test to assess whether the conduct had a "reasonably foreseeable" effect on U.S. commerce.[137] While the name may elicit some confusion when first used by the courts, use of the phrase should become more commonplace as long as courts continue to note that the proximate cause in the directness inquiry is separate from proximate cause in the foreseeability inquiry.

Requiring courts to acknowledge the chain of events connecting the anticompetitive conduct to the effect on U.S. commerce makes the FTAIA's directness requirement easier for courts to apply and others to understand. By documenting the chain of events from the anticompetitive conduct to that conduct's effect on U.S. commerce and signaling when that chain becomes indirect, courts put the burden on practitioners to develop a careful chain of events by which the international anticompetitive conduct is linked to the harmful effect in the United States. The court then examines this chain of events to make the proximate cause assessment and determine if the conduct "directly" affects the United States.

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134 The Second Circuit recently had the opportunity to review a lower court's decision to apply *LSL Biotechnologies* instead of *Minn-Chem*. *See* Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 409–13 (2d Cir. 2014). While the Second Circuit affirmed the lower court's dismissal of an FTAIA claim, its lengthy discussion favoring the *Minn-Chem* approach over *LSL Biotechnologies* aligns with the recommendations of this Comment.

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

136 *See id.* at 856–57.

137 *See id.* at 856, 859.

3. *The Standard in Practice:* Intel Corp. Microprocessor

An example of the "proximate cause" standard in practice will help illuminate the benefits of this proposal. Although the opinion did not specifically refer to the "proximate cause" standard, the court in *Intel Corp. Microprocessor* applied an analysis similar to this Comment's proposed proximate cause standard.[138] The court in *Intel* addressed an international cartel that fixed the price of microprocessors.[139] The court specifically focused on the directness of the conduct of the plaintiff and the effect in the United States. The theory advanced by the plaintiff involved a long, convoluted set of actions between the defendant's alleged anticompetitive conduct and the alleged effect on U.S. commerce. The plaintiff's allegations, as characterized by the defendant and adopted by the court, were that

> a deal between Intel and a German retailer to promote Intel-based systems directly affect [sic] U.S. commerce because it reduces AMD's German subsidiary's sales of German-made microprocessors in Germany, which in turn affects the profitability of the U.S. AMD parent, which in turn affects the funds that AMD has for discounting to U.S. customers, which in turn affects the discounts that it offers in particular U.S. transactions, which in turn affects its competitiveness in the United States, and which in turn affects U.S. commerce.[140]

After restating the lengthy chain of events proposed by the plaintiff, the court rejected the directness claim because of the "speculative and changing factors" involved, including issues with financing, research, and political and economic conditions.[141]

The decision in *Intel* is a model for how this Comment's endorsed standard should operate. By focusing on the chain of events between the defendant's conduct and the effect on the United States, the court provided a definitive answer as to why the connection was not sufficiently "direct."[142] *Intel* demonstrates how early decisions under the standard would help practitioners: future claimants under the FTAIA would know that decisions that involve the "speculative and changing factors" mentioned in the opinion will be viewed skeptically by the court.[143] As more cases involving the FTAIA come before

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138 *In re* Intel Corp. Microprocessor Antitrust Litig., 452 F. Supp. 2d 555, 560–61 (D. Del. 2006).
139 *Id.* at 557.
140 *Id.* at 560 (internal citations and quotation marks omitted).
141 *Id.* at 560–61.
142 *Id.*
143 *Id.*

the courts, the definition of "direct" would be refined to such a degree that the standard would be satisfactorily clear to practitioners.

Certainly, this factually intensive, case-by-case analysis may not be an immediate improvement over the current unclear approach a court might take in assessing the FTAIA's directness requirement. However, as courts begin to put forward chains of contact between foreign conduct and effects in the United States, more defined standards would begin to develop. Additionally, continued use of the "proximate cause" standard as a test for determining directness would remedy any potential name confusion between the "proximate cause" standard and the foreseeability standard. Therefore, courts should apply a standard whereby the court requires a detailed description of the link and should include that description with their opinion along with their proximate cause determination of whether the conduct directly causes the effect.

B. Substantial

Unlike "direct" and "reasonably foreseeable," the "substantial" requirement of the FTAIA is a remnant of the effects test articulated in *Alcoa*.[144] From its beginning, practitioners took a fact-intensive approach to demonstrating substantiality.[145] Judge Hand's opinion in *Alcoa* required that the anticompetitive conduct have some level of impact on the United States market but provided no useful metric by which to measure that effect.[146] The legislative history is similarly sparse. While the drafters noted that "[p]resumably a *de minimis* standard creates a lower threshold than a 'substantial effects' test," this is the only discussion of the "substantial" effect requirement separate from the language adopted by the FTAIA.[147] While an

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[144] The legislative history of the FTAIA approves of Hand's effects test in *Alcoa* but goes on to reject the subjective intent requirement in favor of reasonable foreseeability. *See* H.R. REP. NO. 97-686, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490. Further, the court in *LSL Biotechnologies* noted the "direct" requirement of the FTAIA was not present in *Alcoa*. United States v. LSL Biotechs., 379 F.3d 672, 679 (9th Cir. 2004). Therefore, the only remaining element that could refer to the *Alcoa* system endorsed by the drafters is the "substantiality" requirement. *See* H.R. REP. NO. 97-686, at 5.

That "substantiality" comes from *Alcoa* is ironic given the lack of guidance Judge Hand provided for applying the "effects" test in the opinion. Perhaps the "substantiality" basis from *Alcoa* consisted of Hand requiring "some effect" from the foreign conduct in order to find liability. *Alcoa*, 148 F.2d 416, 444 (2d Cir. 1945).

[145] *See* 148 F.2d at 444–45 (using statistics to attempt to prove effect of conduct).

[146] Instead, Judge Hand shifted the burden to the defendant to prove that the cartel did not have any effect on the market. *Id.* at 444.

[147] H.R. REP. NO. 97-686, at 6.

effect that has a greater than *de minimis* impact is a starting point for creating a standard for what "substantial" means, it leaves much to be desired.

This section develops the "price and volume" standard, which courts should use to determine whether an effect is "substantial" under the FTAIA. The first subsection demonstrates two examples of the fact-intensive inquiry courts usually use to determine "substantiality."[148] The second subsection argues for the "price and volume" standard to interpret "substantial" within the context of the FTAIA.[149] Finally, the third subsection utilizes the *United Phosphorus* decision to demonstrate a model application of the "price and volume" standard.[150]

1. Courts' Interpretations of "Substantial"

Courts that have discussed the substantiality of the effects created by foreign anticompetitive conduct often provide a highly factual account of what actually occurred in the U.S. marketplace. *In re Static Random Access Memory (SRAM) Antitrust Litigation* involved a price-fixing conspiracy that targeted the U.S. market.[151] In its discussion of the conduct by the defendants, the court noted that one defendant alone billed or shipped over $1.7 billion of SRAM to the United States.[152] While the court did not specifically acknowledge that this figure went to the substantiality of the effect of the alleged anticompetitive conduct, this figure likely helped the court determine that the effect was sufficient to find that this conduct fell within the FTAIA.

A lack of substantiality can enable courts to deny liability under the FTAIA. *United States v. LSL Biotechnologies, Inc.* involved a price-fixing claim based on a noncompete clause signed between producers of tomato seeds.[153] The discussion of the court, which focused in part on the relationship of the seeds to the tomatoes that they produced, seemed to allow the court to attack the substantiality of the effect this noncompete clause had on the U.S. market. The court noted that a large quantity of tomatoes produced by the defendants never even made it to the United States.[154] Even for those tomatoes

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148 *See infra* Part II.B.1.

149 *See infra* Part II.B.2.

150 *See infra* Part II.B.3.

151 No. 07–md–01819 CW, 2010 WL 5477313, at *1 (N.D. Cal. Dec. 31, 2010).

152 *Id.* at *5.

153 No. 00CV529, 2002 WL 3115336 at *1, *6 (D. Ariz. Mar. 28, 2002), *aff'd*, 379 F.3d 672 (9th Cir. 2004).

154 *Id.* at *6.

that did make it to the United States, the price-fixed seeds constituted less than 1% of the final cost of the tomato, thereby discrediting any argument that the effect of this noncompete clause was substantial.[155] Thus, the court used the lack of a substantial effect on the United States as a reason to find the effect insufficient to warrant antitrust liability under the FTAIA.

2. The Best Approach Under a Unified Standard: Price and Volume

The examples from *SRAM* and *LSL Biotechnologies* demonstrate an analysis of "substantial" effects that creates a double-edged sword. While the courts in these cases actually provide a discussion of what makes the effect of the anticompetitive conduct on U.S. commerce substantial, their fact-based inquiries do not provide a standard that courts could apply uniformly beyond the facts of a particular case. But any substantiality analysis of the effect of anticompetitive conduct will need to be fact intensive. To remedy this issue, courts should focus on two factual categories: (1) whether the conduct has an effect on the price of the good in the United States, and (2) the total volume of the good that enters the United States.

After a plaintiff satisfactorily alleges a "direct" connection between the conduct and the effect, the substantiality evaluation should provide the court a framework to measure the effect's magnitude. The focus of the substantiality inquiry should be on the effect the conduct has on the price and volume of the good available.

There is an economic justification for focusing on these effects. A common price manipulation implicated in antitrust violations is an artificial inflation of prices above market equilibrium.[156] In this situation, supply and demand for the product move in opposite directions in response to the artificial inflation: while demand drops, supply increases.[157] Under perfect competition, price would move back toward the original market equilibrium when firms changed to alternative suppliers willing to provide the good at the prevailing market

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155 *Id.*

156 Joseph E. Harrington, Jr., *Optimal Cartel Pricing in the Presence of an Antitrust Authority*, 46 INT'L ECON. REV. 145, 145 (2005).

157 When antitrust violators engage in cartel behavior, they fix a higher market price. Because less quantity is demanded at the higher price point, society incurs a deadweight loss. In the event that the cartel does not have full control over the market price, transaction costs may also be a barrier to affected buyers. *See, e.g.*, William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 478–79 (1980); John G. Ranlett & Robert L. Curry, Jr., *Economic Principles: Monopoly, Oligopoly, and Competition Models*, ANTITRUST L. & ECON. REV., Spring 1968, at 107, 138.

price. However, due to cartel activity preventing the availability of other suppliers or high transaction costs in changing suppliers, many of the entities[158] that would have standing to bring claims under the FTAIA would not have the luxury of switching immediately to buying other goods at the new, and lower, equilibrium market price.[159] These entities would be unable to switch immediately to a supplier offering the good at a lower price due to high transaction costs.[160] Therefore, the inflated price will cause harm to the plaintiff with standing to bring the suit.

Another common market manipulation that gives rise to antitrust liability includes restricting the amount of the good produced from reaching the market.[161] Such a reduction of volume has an effect regardless of whether the good produced anticompetitively is a smaller component of a finished product or a final good that is sold directly to consumers. By reducing supply, anticompetitive firms enjoy a higher equilibrium price for the duration of the production shortage. Again, those with standing to bring claims likely cannot immediately shift to a new supplier and must therefore either pay the higher price or provide less of the good to the consumers it services. Therefore, the court can use the increased price paid by the plaintiffs or the decreased output by the plaintiff as a representation of how "substantial" the effect is on the plaintiff. By demonstrating this effect across multiple competitors, the plaintiff can further demonstrate how the conduct "substantially" affects the United States.

While this calculation may seem complicated and convoluted, it is already employed by courts and parties and is thus a workable solution. Parties and government agencies that successfully bring antitrust claims must often provide an initial remedy for the court to evaluate.[162] If successful, the plaintiff

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158 This applies to both private parties and the United States government.

159 *See* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 859 (7th Cir. 2012) (en banc) (stating that price increases abroad "almost immediately" increased prices for U.S. imports).

160 *See generally* Paul J. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L. ECON. & ORG. 95, 96, 103 (2002) (explaining a transaction cost approach to valuing remedies and general barriers imposed by transaction costs in market violations). Examples of transaction costs that infringe upon the ability of companies to purchase other goods at the market price include being bound by a contract or having to spend time searching for new suppliers.

161 Page, *supra* note 157, at 478–79.

162 *See, e.g.*, Complaint at 38–39, Gage's Fertilizer & Grain, Inc. v. Agrium Inc. (*In re* Potash Antitrust Litig. (II)), 667 F. Supp. 2d 907 (N.D. Ill. 2009) (No. 1:08-cv-06910).

then provides a more detailed remedy for the court to evaluate.[163] This "price and volume" standard for measuring substantiality roughly mirrors the calculations used in proposing these remedies. While asking plaintiffs to calculate remedies at an earlier stage in the proceeding may be onerous, courts would benefit greatly from such information earlier in the proceedings. If courts already found the effect to be sufficiently direct, plaintiffs' ability to immediately present the substantiality of the effect would keep plaintiffs from hiding the exact magnitude of the price or volume effect alleged from the judge until the end of the trial. Therefore, the "price and volume" standard would create a clearer understanding of what plaintiffs must present in order for the effect of the anticompetitive conduct to be found sufficiently "substantial" under the FTAIA.

3. *The Standard in Practice:* United Phosphorus

The courts that discuss substantiality in their opinions usually do not provide the detailed discussion suggested by the "price and volume" standard.[164] The rare instance in which the necessary figures are assessed demonstrates the merits of the "price and volume" standard. *United Phosphorus* involved a claim concerning chemicals used in the creation of tuberculosis medicine.[165] Companies from India attempted to show that the defendant prevented the sale of the chemicals to individuals throughout the world, including the United States.[166] In rejecting the claim due to failure to satisfy the effects requirement of the FTAIA, the court focused on how little of the chemical was actually purchased in the United States.[167] Even before the alleged anticompetitive activity by the defendant, only one company in the United States purchased the chemical.[168] The U.S. company's purchases represented 0.4% of the world's production of the chemical, which totaled less

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163 *See, e.g.*, Sentencing Memorandum at 7–30, United States v. AU Optronics Corp., No. CR-09-0110 SI (N.D. Cal. Sept. 11, 2012), 2012 WL 3966339 (providing a detailed explanation of the penalty calculation based upon market impact).

164 *See* Metallgesellschaft AG v. Sumitomo Corp. of Am., 325 F.3d 836, 842 (7th Cir. 2003). Whether the lack of detail is a function of the style of the opinion as written or a lack of discussion in the pleadings is unclear. However, this standard encourages judges to include the pertinent facts used to determine "substantiality" in their opinions for purposes of clarity and ease of access.

165 United Phosphorous, Ltd. v. Angus Chem. Co., 131 F. Supp. 2d 1003, 1007 (N.D. Ill. 2001), *aff'd*, 322 F.3d 942 (7th Cir. 2003), *overruled on other grounds by* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845 (7th Cir. 2012) (en banc) (stating that *United Phosphorus* improperly found the FTAIA to set forth a jurisdictional limit on power of the federal courts instead of an element of the antitrust claim).

166 *Id.*

167 *Id.* at 1013.

168 *Id.* at 1012.

than $25,000.[169] The court accordingly rejected the antitrust claim since the alleged anticompetitive conduct lacked a "substantial" effect on U.S. commerce.[170]

The approach taken by the court in *United Phosphorus* serves as a useful model of how the proposed "price and volume" standard to assess substantiality should be applied. The court discussed how the plaintiffs' claim did not fulfill the "direct, substantial, and reasonably foreseeable" prong of the FTAIA, but the specific focus of its inquiry was on the "substantial" aspect of the statute.[171] The court then provided hard figures on how small the effect truly was before dismissing the claim.[172] By providing this information explicitly within the opinion, the court sent a clear signal as to what type of foreign conduct would not meet the substantiality requirement under the FTAIA.

C. Reasonably Foreseeable

Of the three operative phrases included in the first prong of the FTAIA, "reasonably foreseeable" would seem to be the easiest to define. Congress dedicated an entire section of the legislative history of the FTAIA to the "reasonably foreseeable" requirement and developed a fairly sophisticated definition of the phrase in two specific passages.[173] The House Report stated that "[t]he test is whether the effects would have been evident to a reasonable person making practical business judgments, not whether actual knowledge or intent can be shown."[174] The legislative history goes on to state that "a defendant confronted with evidence that his past conduct has had direct and substantial effects within this country could not argue that continued effects of this type flowing from similar future conduct were not 'reasonably foreseeable.'"[175] Nevertheless, courts have interpreted the phrase inconsistently despite Congress's guidance on the meaning of the language.

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169 *Id.* at 1013.

170 *See id.*

171 *See id.* The connection was clearly direct, seeing as any changes to the market for the chemical was likely to affect the only consumer in the United States. The connection was also reasonably foreseeable on similar grounds. *Id.*

172 *Id.*

173 H.R. REP. NO. 97-686, at 8–9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2493–94.

174 *Id.* at 9.

175 *Id.*

This section develops the "objective businessperson" standard that courts should use in determining whether an effect is "reasonably foreseeable" under the FTAIA. The first subsection demonstrates the subjective and objective approaches taken by the courts following the passage of the FTAIA.[176] The second subsection presents the argument for the "objective businessperson" standard for interpreting "reasonably foreseeable" within the context of the FTAIA.[177] Finally, the third subsection utilizes the *SRAM* decision to demonstrate a model application of the proposed standard.[178]

1. Courts' Interpretations of "Reasonably Foreseeable"

Courts that specifically interpret the "reasonably foreseeable" phrase of the effects requirement of the FTAIA utilize one of two standards. One method of interpretation involves endorsing the subjective intent requirement discussed in *Alcoa*.[179] This method was employed by the Supreme Court in *Hartford Fire*, a case that seemingly involved a foreign anticompetitive conspiracy within the scope of the FTAIA.[180] Justice Souter, however, found the international firms liable under *Alcoa*, stating, "[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[181] Souter briefly addressed the FTAIA in a footnote, explaining that even if the FTAIA differed from *Alcoa*, the conduct in this case clearly fulfilled the requirements of the statute.[182] Lower courts have also endorsed this perpetuation of the *Alcoa* intent standard.[183]

The other method of interpreting the "reasonably foreseeable" requirement is to give the phrase an objective meaning. In *Animal Science Products, Inc. v. China Minmetals Corp*., the Third Circuit reviewed a case in which plaintiffs claimed a group of international firms conspired to fix the price of

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176 *See infra* Part II.C.1.

177 *See infra* Part II.C.2.

178 *See infra* Part II.C.3.

179 Judge Hand explained that the agreements in *Alcoa* were unlawful "if they were intended to affect imports and did affect them." *Alcoa*, 148 F.2d 416, 444 (2d Cir. 1945).

180 Hartford Fire Ins. Co. v. California, 509 U.S. 764, 774–76 (1993).

181 *Id.* at 796.

182 *Id.* at 796–97 n.23 ("Also unclear is whether the Act's 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it. We need not address these questions here. Assuming that the FTAIA's standard affects this litigation, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements." (citation omitted)).

183 *See, e.g.*, Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 438 (6th Cir. 2012).

magnesite.[184] The lower court dismissed the complaint in part based on the inability of the parties to prove that the cartel intended to affect U.S. commerce.[185] The Third Circuit noted that "the FTAIA's effects exception does not contain a 'subjective intent' requirement" and went on to explain that "the FTAIA's 'reasonably foreseeable' language imposes an objective standard: the requisite 'direct' and 'substantial' effect must have been 'foreseeable' to an objectively reasonable person. The text of the statute—'reasonably foreseeable'—makes plain that an objective standard applies."[186] The court vacated and remanded the issue to the lower court, stating that the standard for "reasonably foreseeable" was "whether the alleged domestic effect would have been evident to a reasonable person making practical business judgments."[187]

2. *The Best Approach Under a Unified Standard: The Objective Businessperson*

Applying an objective standard to determine whether the effect caused by the foreign conduct is "reasonably foreseeable" best serves the purpose and function of the FTAIA. An objective standard gives the language the meaning intended by Congress while creating a proper bar for certain foreign behavior.

The subjective standard can potentially hinder the effectiveness of the FTAIA because it may be both narrower and broader than the objective standard. On one side is the situation in which the plaintiff successfully demonstrates that the defendant intended its conduct to affect the United States. In this scenario, the objective and subjective tests align: the company can be presumed to be a "reasonable person making practical business judgments."[188] It is likely that *Hartford Fire* falls into this category because

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184 654 F.3d 462, 464 (3d Cir. 2011). Magnesite is a mineral "used, among other things, to melt steel, make cement, and clean wastewater." *Id.* at 464 n.1.

185 *Animal Sci. Prods.*, 702 F. Supp. 2d at 349. The court also interpreted substantial to include an intent requirement: specifically that "defendants' conduct was actually 'intended/consciously meant'" to produce an effect in the United States. *Id.* at 338 (citations omitted).

186 *Id.* at 471.

187 *Id.*

188 *See id.* In this instance the standards not only align but the subjective standard is broader than the objective standard. Under an objective standard, a wise attorney would bring forward a few business people to demonstrate the foreseeability of the effects of the defendant's conduct on the United States. A court may question any attorney who only brings forward one individual for their foreseeability demonstration. However, if the defendant is the one person who is brought forward, the court would have little doubt as to whether the effect of the anticompetitive conduct was reasonably foreseeable. In this way, the subjective standard is broader than the objective standard.

evidence of subjective intent provided ample justification for Justice Souter's quick handling of the claim under the *Alcoa* effects test[189] and "plainly met the requirements" of the FTAIA.[190] Thus, courts would properly find defendants liable of antitrust violations under the FTAIA if they intended their actions to affect the United States.

The issue with the subjective standard and the FTAIA arises when the plaintiff cannot prove that the defendant intended its conduct to have a domestic effect. In this scenario, the analysis under the objective and subjective tests can produce different results. While the company may still be presumed to be an objective entity, its individual lack of foreseeability does not dictate that *every* company or "reasonable person making practical business judgments" is also ignorant of the potential effects.[191] The FTAIA's legislative history illustrates this concern when it explains that "[a]n intent test might encourage ignorance of the consequences of one's actions, which in this context, would be an undesirable result."[192] This concern was echoed in *Animal Science Products*, where the lower court dismissed the claim because the plaintiff failed to demonstrate the subjective intent of the defendant to affect the United States.[193] On appeal, the Third Circuit vacated and remanded, holding that the correct inquiry focused on whether the effect of the anticompetitive conduct was objectively foreseeable, a requirement that could be met by the plaintiff without demonstrating subjective intent.[194] Thus, the subjective standard conflicts with the objective standard in that a party can still meet its requirements under an objective test even if it cannot prove the subjective intent of the defendant.

This Comment's proposed standard, the "objective businessperson" standard, focuses on the key modifier included in the legislative history: the effects should be foreseeable to a person "making practical business

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189 *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–96 (1993).

190 *See id.* at 796–97 n.23.

191 H.R. REP. NO. 97-686, at 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494. In this instance, the subjective test would be narrower than the objective test. The possibility of false negatives in this scenario, where anticompetitive conduct would be incorrectly viewed to have a reasonably foreseeable effect on U.S. commerce, provides a compelling reason why the subjective standard should not be used to analyze the FTAIA's reasonably foreseeable requirement.

192 *Id.*

193 Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 702 F. Supp. 2d 320, 349 (D.N.J. 2010), *rev'd sub nom.* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 471 (3d Cir. 2011).

194 *See Animal Sci. Prods.*, 654 F.3d at 471.

judgments."[195] Courts should repeatedly emphasize this important modifier to the reasonable person. By including this language in the FTAIA's legislative history in their formation of the test they suggested was appropriate, the FTAIA's drafters focused on a narrow group of people to shape the scope of a standard into which most business activity would fall.

The narrow group of people that the legislative history mentions should fall into two categories. First, there are those working for the defendant who are familiar with how the entity operates and interacts with the markets. These people would logically be involved in making "practical business judgments" since their actions dictate the entity's function on a day-to-day basis.[196] Second, there are those who are intimately familiar with the industry in which the defendant operates. These individuals, who would likely include bankers and large investors, may have a better perspective of the potential effects of anticompetitive conduct in regards to the FTAIA. Because they are familiar with numerous entities within the market but are also outsiders, they would view the market without the narrow focus of a company within the market. Accordingly, each of these groups of individuals should be considered a person "making practical business judgments" under the language of the FTAIA.[197]

In determining what is "reasonably foreseeable" under the "objective businessperson" standard, the judge would focus on the chain of actions between the anticompetitive conduct of the defendant and the effect on the United States. It is important to differentiate the inquiry required in this instance from the inquiry used to determine if an effect was "direct," since the proposed "proximate cause" test for directness is named similarly to a test often used in determining foreseeability. Under a "proximate cause" directness inquiry, the court would look at the chain of events and determine whether that chain supports a finding of directness.[198] In a "reasonably foreseeable" inquiry, the court determines whether the chain itself is foreseeable to an objective businessperson. These individual inquiries, along with the "substantial" analysis, would form the basis of FTAIA applicability under this Comment's proposal.

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195 H.R. REP. NO. 97-686, at 9.

196 There is a strong argument that not all individuals within an entity would qualify as making "practical business judgments." As formulated, this Comment suggests the proper test to determine which individuals are liable would mirror considerations used by the courts to determine who is an insider when assessing insider trading under Rule 10b-5. That discussion, however, is beyond the scope of this Comment.

197 H.R. REP. NO. 97-686, at 9.

198 *See supra* Part II.A.2–3.

The proposed "objective businessperson" standard is a heightened form of the reasonable person standard. Applying the "objective businessperson" standard creates a greater likelihood that the activities performed by a foreign entity would come under antitrust scrutiny. But, as the global economy becomes more complicated, it will be harder for objective businesspeople to assess the effects of anticompetitive conduct on the U.S. economy and thus to "reasonably foresee" these effects. Concluding that the anticompetitive effects on U.S. commerce will become harder for objective businesspeople to foresee is admittedly not intuitive: as the world economy becomes more interconnected and markets near perfect competition, it will be easier to find an effect on U.S. commerce resulting from anticompetitive conduct. However, the effect on U.S. commerce resulting from anticompetitive conduct may only come after multiple steps in a chain of events, thereby making it in fact *harder* for objective businesspeople to foresee the chain of events between the anticompetitive conduct and the effect on U.S. commerce.

This is especially likely given the chains of events that plaintiffs would put forward under the "direct" element of the unified standard. In contrast to the objective businessperson, a reasonable person is unlikely to foresee that a chain of events, which meets the "proximate cause" standard for directness, can cause the effect required under the FTAIA. A reasonable person standard would constrict the FTAIA, rendering it less effective than currently enforced. Therefore, the "objective businessperson" standard strikes the proper balance of implicating foreign conduct which is reasonably foreseeable to effect U.S. commerce to individuals familiar with the practices of an entity while not demanding plaintiffs demonstrate subjective intent to effect U.S. commerce.

3. *The Standard in Practice:* Static Random Access Memory

While *Animal Science Products* was remanded on the issue of foreseeability, the lower court never wrote an opinion applying the objective standard set forth by the Third Circuit. In *SRAM*, the Northern District of California assessed whether the alleged anticompetitive conduct was reasonably foreseeable in a way that closely resembles the "objective businessperson" test.[199] *SRAM* involved an international cartel accused of inflating the price of SRAM computer chips.[200] While discussing defendant's

[199] *In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819 CW, 2010 WL 5477313 at *2, *5 (N.D. Cal. Dec. 31, 2010).

[200] *Id.* at *1.

intent to target the United States, the court explained that "an inchoate hope or intention" of targeting the United States was not adequate to find liability under the FTAIA.[201]

The discussion of targeting went on to identify an instance in which the court found the defendants conduct potentially warranted liability under the FTAIA. Plaintiffs had brought forward evidence that the defendants had produced certain types of SRAM products to be sold through a chain of manufacturers with the specific purpose of having the SRAM product incorporated into a final good sold in the United States.[202] The court acknowledged that if the plaintiffs provided more evidence of this specific targeting by the defendants, subsequent domestic price inflation could meet the requisite effect requirement under the Act.[203]

SRAM represents an interpretation of the FTAIA that could serve as a useful model for the "objective businessperson" standard. The court looked at the connection between the defendant's conduct and the effect on the United States and offered an answer as to whether such a connection would be "reasonably foreseeable."[204] By focusing on this connection, courts can consistently identify whether certain foreign behavior will have a "reasonably foreseeable" effect under the FTAIA.

D. Applying the New Unified Standard: Minn-Chem

This Part has set forward three standards by which to measure the domestic effects prong of the FTAIA: directness under a "proximate cause" standard, substantiality under a standard focusing on the "price and volume" of the good, and reasonable foreseeability based on an "objective businessperson" standard. While the previous sections have provided models of how each standard would operate individually,[205] this section will evaluate all three standards simultaneously. *Minn-Chem, Inc. v. Agrium, Inc.*,[206] a recent decision from the Seventh Circuit, provides a satisfactory model for this Comment's proposed

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201 *Id.* at *7.

202 *Id.*

203 *Id.*

204 The court did not explicitly state that this discussion went to whether the conduct was "reasonably foreseeable." However, this type of discussion would be the type intended under the "objective businessperson" standard.

205 *See supra* Part II.A.3, B.3, C.3.

206 683 F.3d 845, 848–51, 857–59 (7th Cir. 2012) (en banc).

unified standard: in addition to providing detailed facts, the court performed an analysis similar to the analysis advocated by this Comment.

Minn-Chem involved a complaint that a global cartel had formed to limit the supply of the commodity potash, which is commonly used in fertilizers among other goods. The defendants allegedly controlled 71% of the world's supply of potash.[207] By allegedly limiting the supply of potash, the cartel gained the ability to inflate prices.[208] The complaint alleged that the cartel was able to maintain and increase profits despite the declining potash demand.[209]

Turning to the FTAIA, the Seventh Circuit separated the complaint into allegations involving entities that sold potash directly to U.S. consumers and allegations involving entities that did not.[210] The direct purchase of potash constituted "import commerce," which bypassed the FTAIA and went straight into a Sherman Act analysis for antitrust violations.[211] The foreign purchases, however, did not involve import commerce and therefore had to be evaluated under the FTAIA, including whether the conduct of inflating prices abroad had a "direct, substantial, and reasonably foreseeable" effect on the U.S. economy.[212]

The Seventh Circuit engaged in a lengthy discussion of the meaning of "direct" before evaluating the connection between defendant's alleged anticompetitive conduct and the alleged effect on U.S. commerce.[213] The complaint alleged that the cartel first limited the amount of potash available internationally to disturb the market price of the commodity.[214] With increased demand for the limited supply, the cartel allegedly then set prices for potash abroad and then used those prices as benchmarks for prices in the United States.[215] The foreign price increases "almost immediately" appeared in the prices paid for U.S. imports.[216] Therefore, the court found that the chain of

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207 *Id.* at 849.

208 The price of potash did not simultaneously increase for foreign purchasers and U.S. purchasers. American prices did, however, rapidly respond to foreign price increases. *Id.* at 856.

209 The complaint carefully described how the decreasing demand for potash was not a result of the inflated prices of the cartel. *Id.* at 849–50.

210 *Id.* at 858–59.

211 *Id.* at 855, 858–59.

212 *Id.* at 859.

213 *Id.* at 856–58.

214 *Id.* at 859.

215 *Id.*

216 *Id.*

events[217] established that the anticompetitive conduct proximately caused effects in the United States—or in other words that there was a "direct" effect.[218]

Moving to substantiality, the Seventh Circuit found that the plaintiffs stated that the price of potash increased 600% during the alleged conspiracy.[219] The court also noted that 5.3 million tons of potash were imported into the United States during the final year of the alleged conspiracy.[220] The court found that these figures "easily satisf[ied]" the substantial effects requirement.[221] The court noted that "wherever the [substantial effect] floor may be, it is so far below these numbers that we do not worry about it here."[222]

Finally, the Seventh Circuit discussed whether the price increase was a reasonably foreseeable effect of the defendant's conduct. The court performed this analysis on a macro and micro level. On the macro level, the court noted that it would be reasonably foreseeable that a price increase by a cartel with 71% of the world's supply of a product would be felt uniformly throughout the world.[223] On the micro level, the court focused on the three potential responses to a cartel price increase: cheating among cartel members, introducing a new entrant, and increasing prices in all markets.[224] Since any of these effects were reasonably foreseeable to a cartel, the court concluded that the allegations of the plaintiff satisfactorily demonstrated that the conduct of the cartel had a "direct, substantial, and reasonably foreseeable effect" on the United States.[225]

The approach taken by the Seventh Circuit in *Minn-Chem* embodies a model investigation of whether foreign behavior is sufficiently connected to domestic effects under the FTAIA. Structurally, the court discussed "direct," "substantial," and "reasonably foreseeable" in individual paragraphs.[226] This helped to define which aspects of the opinion apply to each operative phrase of the statute. Substantively, each discussion focused on specific facts alleged and

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217 Foreign supply of potash decreased, causing foreign potash prices to increase, which in turn caused domestic potash prices to increase.

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

219 *Id.* at 856.

220 *Id.*

221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.* at 859.

225 *Id.* at 860.

226 *Id.* at 856–57.

elaborated on why those allegations sufficed for each element.[227] The court also attempted to set out the standard for two of the operative phrases. The court provided a lengthy discussion justifying the use of proximate cause in determining directness and then explained how the case at hand fulfilled its definition.[228] While the court did not specifically elaborate on what makes conduct sufficiently substantial, its approach began to draw guidelines for future courts to follow.[229]

This Comment's only critique of the Seventh Circuit's approach is a minor one: at no point in the opinion does the court note the "reasonable person making practical business judgments" language used by the drafters of the FTAIA in formulating the legislative history to the Act.[230] In this case, the effects of the cartel's actions would be reasonably foreseeable, if not obvious, to most people, let alone objective businesspeople. However, there is good reason to clarify that the objective businessperson under the FTAIA is one who possesses more knowledge of the market than the reasonable person. This simple step by the Seventh Circuit would prevent false negatives within the reasonable foreseeability inquiry by promoting a broader standard for plaintiffs: while a reasonable person may not know the details of the potash industry, a person making reasonable business judgments in the industry should be aware of the potential implications of cartel behavior. Beyond this limited critique, the *Minn-Chem* opinion demonstrates an ideal model for application of the "direct, substantial, and reasonably foreseeable" test under the FTAIA.

III. IMPLICATIONS OF THE NEW, UNIFIED APPROACH

As the previous Part demonstrates, this Comment's approach is grounded in part in case law. Nevertheless, the approach is not yet employed consistently or uniformly. Encouraging courts to use the correct standards at each element, use them together, and apply them consistently when evaluating the Foreign Trade Antitrust Improvements Act will have myriad positive implications.

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227 *Id.* at 856–59.

228 *Id.*

229 Ideally, a court using the new standards will be able to give a more concise statement of the substantiality boundary than "wherever the floor may be" as the standards are more commonly provided. *See id.* at 856.

230 H.R. REP. NO. 97-686, at 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494.

First, this Comment's approach reduces conflicting interpretations of the "direct, substantial, and reasonably foreseeable" language of the FTAIA. As demonstrated in the previous Parts, courts already take numerous approaches in interpreting the prong: one court interpreted all phrases,[231] some interpret a few phrases,[232] and others barely interpret the language at all.[233] For those courts that have attempted to interpret the statute, the language has taken on various meanings, and courts will likely continue to create additional standards. This confusion can be remedied by consistently applying the unified framework advocated by this Comment, as demonstrated in *Minn-Chem*. In some regards, the past treatment of the first FTAIA prong sets the stage for the new approach: those courts that have largely ignored the "direct, substantial, and reasonably foreseeable" language of the FTAIA can now adopt this new approach and reduce confusion as to the meaning of the statutory language.

Second, this Comment's approach balances the concerns expressed in *Alcoa* and by the members of Congress who passed the FTAIA. Using a proximate cause standard for directness guarantees that only conduct that is sufficiently linked to the United States will be pursued by private plaintiffs and the government. Focusing on the substantiality of the effect in regard to price and volume will allow the courts to weed out the "*de minimis*"[234] effects that may be caused due to the global economy. Requiring an objective businessperson standard strikes the correct balance between holding international entities responsible while not expecting every reasonable person to understand the economic implications of international firm action or expecting attorneys to find evidence of subjective intent of the firms to affect the United States.

Third, the approach taken by this Comment allows the statute to function according to its express terms and helps judges by creating a simpler application of the statute. By allowing judges to clearly define when conduct has a "direct, substantial, and reasonably foreseeable effect," the new, unified standard proposed by this Comment makes it easier for courts to then discuss if the effect "gives rise to" the plaintiff's injury. By creating a framework that

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231 *Minn-Chem*, 683 F.3d at 856–57.

232 Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 466–68 (3d Cir. 2011).

233 *See* Kruman v. Christie's Int'l PLC 128 F. Supp. 2d 620, 624–27 (S.D.N.Y. 2001), *aff'd in part, vacated in part*, 284 F.3d 384, 394–95 (2d Cir. 2002) (affirming antitrust liability under the FTAIA); *In re* Monosodium Glutamate Antitrust Litig., No. Civ.00MDL1328(PAM), 2005 WL 1080790 at *4 (D. Minn. May 2, 2005), *aff'd*, 447 F.3d 535 (8th Cir. 2007).

234 H.R. REP. NO. 97-686, at 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2491.

encourages courts that have otherwise ignored some or all of the effects language in the FTAIA to more explicitly address each element in the first prong, this Comment's standard removes the possibility of results that are false positives. That is, courts that have previously only concerned themselves with whether the effect "gives rise to" the plaintiff's injury miss the important step of making sure the effect is "direct, substantial, and reasonably foreseeable." The unified approach advocated by this Comment removes that concern: only effects that are "direct, substantial, and reasonably foreseeable" under the proposed standards will be evaluated under the latter prong of the FTAIA, thereby removing the possibility of false positives.

Finally, the new, unified approach advocated by this Comment allows an otherwise underutilized section of the FTAIA to provide courts with a better platform to address other concerns within antitrust jurisprudence. This section of the FTAIA can adequately address an issue that has troubled courts with antitrust law: how the interactions of a complex economy actually affect U.S. consumers. By requiring plaintiffs to plead facts to inform the court of the actual connection between the conduct of the international entity and the effect on U.S. commerce, the court can more confidently rule on the applicability of the FTAIA and correctly dismiss a claim under the appropriate language of the statute.

These implications highlight a considerable need within the FTAIA's jurisprudence and demonstrate how the proposed standards could begin the process of clarifying the law and making the statute more effective. This solution would certainly not be an overnight success. Echoing the sentiment of the Seventh Circuit in *Minn-Chem* when it acknowledged that the "floor" of substantiality had not yet been established,[235] continued judicial application of the new standard would be required to create a semblance of a bright-line rule for each of the operative phrases. Nevertheless, the use of a consistent standard by the courts in interpreting the "direct, substantial, and reasonably foreseeable" effects requirement of the FTAIA will start the courts on a path towards a clearer and more effective statute.

CONCLUSION

The recent increase in litigation for alleged antitrust violations by foreign companies has drawn attention to the Foreign Trade Antitrust Improvements

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

Act, a deceivingly simple statute that has received limited judicial development. As the decisions continue to emerge and the fines associated with these antitrust violations continue to increase in both size and volume, the underdevelopment of the FTAIA could seriously undermine the intent of the statute. This is especially true in regard to the requirement that foreign conduct have a "direct, substantial, and reasonably foreseeable effect" on the United States, a section of the FTAIA that has been ignored or interpreted in a wide variety of ways by different courts.

This Comment proposes a new, unified standard for interpreting each phrase contained within the effects requirement of the FTAIA. Under the FTAIA, a plaintiff should only be allowed to allege an antitrust violation if the foreign conduct fulfills three standards. First, the conduct is "direct" in that it proximately causes the effect in the United States. Second, the conduct is "substantial" in that the conduct affects the price and volume of the good in the United States in a "substantial" way. Third, the conduct is "reasonably foreseeable" in that an objective businessperson could foresee the anticompetitive conduct affecting the United States.

By utilizing the standards advocated by this Comment, the courts would unify under an interpretation that is based primarily in case law. Courts could use this Comment's standards to reduce the inefficiency created by the varying definitions and provide meaning to an otherwise ignored statute. Giving each section of the FTAIA meaning allows the statute to function as Congress intended and allows a more natural reading that gives the FTAIA the ability to comprehend new developments in the global economy.

This Comment only breaks the surface of potential areas of interest within the FTAIA. This Comment does not explore how the new standard would interact with the interpretations of later parts of the FTAIA, including the "gives rise to" requirement and claims under the Sherman Act. Other areas of research left unexplored by this Comment include the specific standard that should be applied to determine whether an individual qualifies as an ordinary businessperson in the field and what role "pass-on" liability should play in FTAIA determinations.[236] Finally, as the global market becomes more integrated, two divergent trends emerge. Enforcement of U.S. antitrust laws against foreign companies becomes easier given the higher likelihood of the foreign antitrust violations impacting domestic commerce based on reduced

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[236] *See* Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

transaction costs and the greater interconnectivity of national markets. However, as markets become more complex, it becomes more difficult to anticipate the exact chain of events that gets a finished product into the United States. As these trends diverge, the workability of all standards within the FTAIA should continue to be evaluated.

These unexplored questions will hopefully be answered in later scholarship. Until then, this Comment takes an underutilized section of a statute of growing importance, gives that section a new, unified meaning, and hopes that the standards proposed spark a renewed interest in the "direct, substantial, and reasonably foreseeable effect" requirement of the FTAIA.

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