COMPETITION, COMITY, AND CONFUSION: RECONCILING THE FTAIA'S IMPORT EXCLUSION WITH ITS DIRECT EFFECTS PROVISION

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The debate surrounding the Sherman Act's extraterritorial scope represents a tension between two competing objectives: protecting the U.S. economy from foreign anticompetitive conduct on one hand and respecting the sovereign authority of other nation-states on the other. Applying U.S. law abroad risks undermining sovereign authority by regulating foreign economies, though such regulation appears necessary in some cases to protect U.S. consumers.

Congress's attempt to square these objectives through enacting the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) failed to settle the matter. The statute left courts with two new questions: how to distinguish "import" from "nonimport" commerce, and how to determine when anticompetitive conduct that exclusively occurs abroad has a direct effect on the U.S. economy.

This Note examines the circuit split over both questions. This Note then argues that reading the FTAIA's two provisions together necessitates a narrow interpretation of "import commerce" and a proximate cause standard for the direct effects provision. By construing "imports" narrowly and "direct" broadly, courts can balance protecting competition and respecting international comity. This interpretation not only aligns with the text and legislative intent of the FTAIA but also promotes a more coherent and effective approach to antitrust enforcement for both the U.S. enforcement agencies and private plaintiffs seeking redress for antitrust harms originating from outside the United States.

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INTRODUCTION

In 1987, Hazera Quality Seeds ("Hazera"), an Israeli company, sued its American competitor for a breach of contract in an Israeli court.[1] Eventually, the two settled and agreed to a "Restrictive Clause" that banned Hazera from

1. *See* United States v. LSL Biotechnologies, 379 F.3d 672, 674–75 (9th Cir. 2004).

selling certain genetically modified seeds in Mexico.[2] In response, the United States filed an antitrust complaint against the American company.[3] The government claimed that the agreed market exclusion eliminated "one of the few firms . . . likely to develop seeds" to be eventually sold in the United States during the winter months.[4] Though agreements between competitors to divide markets geographically are generally considered per se unlawful[5] under the Sherman Act,[6] the district court dismissed the complaint.[7] The court cited to the Foreign Trade Antitrust Improvements Act of 1982[8] (FTAIA), which places limits on applying the Sherman Act abroad.[9] Though the court concluded that "potentially limiting the development of seeds for Mexico cultivation does not have a direct effect on U.S. domestic commerce,"[10] the court noted it was "unclear" which standard applied.[11]

Under the FTAIA, the Sherman Act does not apply to conduct involving trade with foreign nations, unless[12] it is either "import commerce" or satisfies two conditions: (1) it has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic, import, or export commerce *and* (2) such effect gives rise to the plaintiffs' Sherman Act claim.[13] However, the FTAIA—

2. *See id.* at 675.

3. *See id.*

4. *See id.* at 676. Technically speaking, the "Restrictive Clause" in the settlement agreement prevented Hazera from selling the seeds in all of North America. *Id.* The district court divided the complaint into separate domestic and foreign components because "North America" covered both markets. *See id.*

5. *See infra* Part I; *see, e.g.*, Lenhoff Enters., Inc. v. United Talent Agency, Inc., 729 F. App'x 528, 530 (9th Cir. 2018) ("Certain restraints—such as horizontal agreements among competitors to fix prices or divide markets—are 'per se' unlawful." (citing State Oil Co. v. Khan, 522 U.S. 3, 10 (1997))).

6. 15 U.S.C. §§ 1–7.

7. The government's complaint was so "defective" that the domestic part of the complaint was dismissed under Federal Rule of Civil Procedure 12(b)(6). *LSL Biotechnologies*, 379 F.3d at 676; United States v. LSL Biotechnologies, Inc., No. 00CV529, 2002 WL 31115336, at *6 (D. Ariz. Mar. 28, 2002), *aff'd sub nom.*, *LSL Biotechnologies*, 379 F.3d 672. "To seek immediate appellate review," the United States requested the district court dismiss the domestic component with prejudice and then immediately appealed to the Ninth Circuit. *LSL Biotechnologies*, 379 F.3d at 676; *see also* Brief for Appellant United States of America at 4 n.3, *LSL Biotechnologies*, 379 F.3d 672 (No. 02-16472) ("To avoid any ambiguity about the finality of the March 28, 2002 order, the United States timely moved to amend the judgment to change the dismissal of the action to 'with prejudice.'" (citing FED. R. CIV. P. 59(e))).

8. 15 U.S.C. § 6a.

9. *LSL Biotechnologies*, 379 F.3d at 676; *see also LSL Biotechnologies*, 2002 WL 31115336, at *6.

10. *LSL Biotechnologies*, 2002 WL 31115336, at *5.

11. *See id.* at *4 ("The Court agrees with the Government that . . . [previous caselaw] is unclear whether the FTAIA's 'direct, substantial, and reasonably foreseeable effects' standard . . . applies to antitrust actions involving foreign conduct.").

12. F. Hoffmann-La Roche Ltd. v. Empagran S.A. (Empagran I), 542 U.S. 155, 162 (2004) ("This technical language initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach.").

13. 15 U.S.C. § 6a; *Empagran I*, 542 U.S. at 161–62.

referred to by courts as "awkward[]," [14] "cumbersomely worded," [15] and "inelegantly phrased" [16]—leaves both the import exclusion [17] and the direct effects provision unclear. This ambiguity is further complicated by the inclusion of "import commerce" within the direct effects provision as one of several areas of U.S. commerce that could be harmed for a foreign Sherman Act claim to be actionable. [18] As such, courts have struggled to delineate the boundaries between these distinct conditions and to define the standards required for both. [19]

Because the Restrictive Clause excluded Hazera only from Mexico, the restriction did not count as "import commerce," but it did trigger application of the direct effects provision. [20] On appeal, the U.S. Court of Appeals for the Ninth Circuit addressed the provision but first noted that "[f]ederal courts have struggled for decades to determine" when the Sherman Act applies to "allegations of foreign restraints of trade." [21] To this end, the court held that an effect is "direct" under the FTAIA if it "follows as an immediate consequence of the defendant's activity," [22] proceeding from its cause "in time or space without deviation or interruption." [23]

Since Hazera had not yet developed the actual seeds contemplated by the settlement at the time of suit, [24] the Ninth Circuit agreed with the lower court's dismissal. [25] The court noted that Hazera's potential contribution to the U.S. economy was "speculative at best and doubtful at worst." [26] The ban certainly did not cause any immediate harm on the U.S. economy and, as such, the Sherman Act did not apply. [27]

Sitting by designation, Chief Judge Ruggero J. Aldisert dissented, urging the court to instead adopt a proximate cause standard for "direct," based on

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14. *See* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 854 (7th Cir. 2012).

15. *See* Biocad JSC v. F. Hoffmann-La Roche, 942 F.3d 88, 95 (2d Cir. 2019).

16. *See* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997). The statute has also been referred to as "a web of words." United States v. Hui Hsiung, 778 F.3d 738, 751 (9th Cir. 2015).

17. The U.S. Court of Appeals for the Seventh Circuit noted in *Minn-Chem* that calling that provision an exclusion or exception is "not an accurate description" because the FTAIA does not apply to import commerce at all. 683 F.3d at 854. As such, the Sherman Act applies outright. *See id.* However, this Note will continue to refer to the provision as the "import exclusion," as this is the popular terminology. *See, e.g.*, *Biocad JSC*, 942 F.3d at 99; Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 466 (3d Cir. 2011) (referring to the import trade or commerce "exception").

18. *See* 15 U.S.C. § 6a(1)(A)–(B) (requiring the adverse effect to be on domestic trade, export trade, or "import trade . . . with foreign nations").

19. *See infra* Part II.

20. *See* United States v. LSL Biotechnologies, 379 F.3d 672, 679–82 (9th Cir. 2004).

21. *See id.* at 677 (citing Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 423–24 (5th Cir. 2001) ("The history of this body of case law is confusing and unsettled.").

22. *Id.* at 680.

23. *See id.*

24. *Id.* at 676.

25. *Id.* at 681.

26. *Id.*

27. *Id.*

"a relationship of logical causation,"[28] while noting the Restrictive Clause restrained trade in the very seeds grown in Mexico "expressly for shipment to the United States."[29] Other courts have agreed with this dissent,[30] giving rise to a circuit split among the U.S. Courts of Appeals.[31] Specifically, these courts have held that for an effect to be "direct," there need only be a "reasonably proximate causal nexus" between a defendant's conduct and an adverse effect on U.S. commerce,[32] imputing liability in the absence of intervening causes.[33] According to the U.S. Court of Appeals for the Second Circuit, this interpretation would bring more foreign commercial activity within the Sherman Act's reach "while still addressing antitrust law's classic aversion to remote injuries."[34] In turn, this would be consistent with the Sherman Act's absolute bar on private suits by indirect purchasers.[35]

As for the import exclusion, the debate largely revolves around the condition's outer bounds. Whereas some courts interpret the exclusion narrowly to apply only to transactions between foreign and domestic U.S. firms,[36] other courts have held the import exclusion extends to include conduct "directed at [a U.S.] import market."[37] Ultimately, existing interpretations of the FTAIA fall short because they consider the statute's

28. *See id.* at 693 (Aldisert, J., dissenting).

29. *See id.* at 694–95 ("I am convinced that there is no persuasive reason why a restraint on selling seeds in Mexico cannot have a 'direct' effect on United States domestic commerce in tomatoes.").

30. *See, e.g.*, Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 857 (7th Cir. 2012) (citing *LSL Biotechnologies*, 379 F.3d at 683–91 (Aldisert, J., dissenting)).

31. There is also a circuit split on whether the FTAIA is a substantive element of a foreign antitrust claim or a jurisdictional limitation on the courts. *Compare In re* Monosodium Glutamate Antitrust Litig., 477 F.3d 535, 536 (8th Cir. 2007) (affirming the dismissal of a complaint under the FTAIA for lack of subject matter jurisdiction), *with* Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 408 (2d Cir. 2014) ("The FTAIA [is] substantive."). The debate is largely settled, however, following *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), and its progeny. *Id.* at 515 (holding that a statutory requirement must explicitly "speak in jurisdictional terms" to impose a jurisdictional limitation, rather than a substantive claim element (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982))); *see Lotes Co.*, 753 F.3d at 403–09 (noting that post-*Arbaugh* courts that have addressed the substantive/jurisdictional FTAIA question have all "reached the same conclusion"); *see also* Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 439 n.4 (6th Cir. 2012) (describing this debate without ruling on it).

32. *See, e.g.*, *Minn-Chem, Inc.*, 683 F.3d at 857; *Lotes Co.*, 753 F.3d at 411.

33. *See Minn-Chem, Inc.*, 683 F.3d at 854.

34. *Lotes Co.*, 753 F.3d at 411.

35. *See* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 821–23 (7th Cir. 2015) (citing Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977)); Apple Inc. v. Pepper, 139 S. Ct. 1514, 1521 (2019) ("The bright-line rule of *Illinois Brick* . . . means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue.").

36. *See Minn-Chem, Inc.*, 683 F.3d at 855.

37. Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 470 (3d Cir. 2011). To be clear, this means trade "directed at an import market" (or purely foreign and domestic transactions) would be *excluded* from the FTAIA, indicating that the Sherman Act would apply outright. *See Minn-Chem, Inc.*, 683 F.3d at 854. The U.S. Court of Appeals for the Third Circuit further stated that "[f]unctioning as a physical importer . . . is not a necessary prerequisite" to satisfy the import exclusion. *Animal Sci. Prods.*, 654 F.3d at 470.

provisions in isolation rather than as an integrated whole. This Note offers a novel interpretation of the FTAIA that addresses this issue.

Specifically, to be internally consistent, the FTAIA requires a narrow definition of "import commerce," as only "transactions in which a good or service is being sent directly into the United States with no intermediate stops,"[38] coupled with a proximate cause standard for "direct" in the direct effects provision.[39] This reading best aligns with the broader U.S. antitrust legal regime and is most consistent with the FTAIA's text and legislative history. Part I of this Note considers the Sherman Act's policy of competition and limits on private suits, its historical application to foreign commerce, and the legislative history of the FTAIA. This legal history underpins the policy tensions that motivate the competing interpretations of the FTAIA. Part I ends with the U.S. Supreme Court's analysis of this tension in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*[40] ("*Empagran I*"), along with a discussion on international comity[41] and how comity factors into the federal enforcement agencies'[42] decision to bring a U.S. antitrust suit against foreign defendants.[43] Part II of this Note looks at the different interpretations of the FTAIA among the U.S. Courts of Appeals amid this background. Part III proposes a new interpretation that makes the best sense of the statute's text in light of the broader statutory framework.

Since the FTAIA incorporates "import commerce" within the direct effects provision, imports must be defined narrowly as only domestic purchases of foreign goods and services. A broader reading of "import commerce" would conflate "imports" as commerce falling within the direct effects provision with "imports" as an independent basis for Sherman Act applicability. Put differently, "import commerce" cannot function as the default category and the specific carve-out. This reading also serves Congress's goal for the FTAIA not to expand the Sherman Act's scope.[44] In turn, a proximate cause standard is required to empower the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively, the "Agencies") to protect U.S. competition. This standard also respects comity interests, as

38. *See Minn-Chem, Inc.*, 683 F.3d at 854–55.

39. *See id.* at 857.

40. 542 U.S. 155 (2004).

41. "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 543 n.27 (1987).

42. These federal enforcement agencies are the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ).

43. *Cf.* Makan Delrahim, Assistant Att'y Gen., Remarks at the 46th Annual Fordham Competition Law Institute Conference on International Antitrust Law and Policy (Sep. 12, 2019), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-46th-annual-fordham [https://perma.cc/8KTG-4K3Q] ("Our role is to protect competition for American consumers, workers, and entrepreneurs. It is not to play international antitrust cop where U.S. commerce is not affected. Consumers and businesses alike are best served when countries avoid using the antitrust laws to expand their sphere of influence.").

44. *See infra* Part III.A.

foreign plaintiffs are limited by the "gives rise to" requirement in their ability to bring U.S. suits.[45] Only this interpretation strikes the proper balance between respecting the sovereign authority of foreign states in economic governance and protecting the U.S. economy from antitrust violations abroad.

I. INTERNATIONAL APPLICATION OF THE SHERMAN ACT, 1909–1982

The Sherman Act, the principal statute establishing the American antitrust legal regime, has always been concerned with foreign anticompetitive conduct.[46] Part I broadly discusses the Sherman Act and the longstanding difficulty in applying the statute to foreign conduct, situating the FTAIA's passage as Congress's attempt[47] to provide a legislative solution.

Specifically, section 1 of the Sherman Act makes it illegal to engage in any "contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[48] Section 2 makes it illegal to "monopolize or attempt to monopolize . . . trade or commerce among the several States, or with foreign nations," or to conspire to do so.[49] While the two sections distinguish between concerted action and single firm action,[50] both sections aim to deter anticompetitive conduct in the U.S. economy.[51] This is because, as the Supreme Court has stated, "[i]n the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces 'yield the best allocation' of the Nation's resources."[52]

45. *See infra* Part III.

46. 15 U.S.C. §§ 1–2; *see* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION 1 (2017), https://www.justice.gov/atr/internationalguidelines/download [https://perma.cc/SMB8-77UE] ("[T]he federal antitrust laws have applied to 'commerce with foreign nations' since their inception.").

47. *See* H.R. REP. NO. 97-686, at 2 (1982) ("[C]ourts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists.").

48. 15 U.S.C. § 1.

49. *Id.* § 2.

50. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 190 (2010) ("The meaning of the term 'contract, combination . . . , or conspiracy' is informed by the 'basic distinction' in the Sherman Act 'between concerted and independent action' that distinguishes § 1 of the Sherman Act from § 2." (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 767 (1984))).

51. *See id.* at 190–92.

52. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2147 (2021) (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.27 (1984)).

Because of this policy of competition, some conduct, such as agreements to fix prices between horizontal competitors,[53] is deemed per se unlawful.[54] Such conduct "always or almost always tend[s] to restrict competition and decrease output."[55] Other conduct is judged under the "rule of reason," in which courts conduct a "fact-specific assessment" of market power[56] and structure[57] to assess the effect on competition.[58] Though certain conduct has been evaluated under the rule of reason in some eras and condemned as per se unlawful in others,[59] as conceptions of "anticompetitive conduct" have changed over time,[60] the Sherman Act's central aim has always been the protection of competition itself.[61]

As the Supreme Court has stated, "[t]he heart of our national economic policy long has been faith in the value of competition."[62] To this end, private plaintiffs can pursue antitrust suits under the Clayton Act.[63] Part I.A discusses this private cause of action, its purpose, and some of the limitations placed on private plaintiffs when pursuing an antitrust suit.

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53. To price fix is to agree between competitors to sell a given good or service at a predetermined price. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940) ("[P]rices are fixed . . . if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon."). In competitive economies, price fixing is only possible through agreement, as the fixed price is necessarily not one determined by market forces. *See id.* at 221–23.

54. *See id.* at 224 n.59 ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.").

55. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988).

56. "Market power is the ability to raise prices profitably by restricting output." Ohio v. Am. Express Co., 138 S. Ct. 2274, 2288 (2018) (emphasis omitted).

57. A "relevant market" is "the area of effective competition" between firms. *See id.* at 2285 (citing Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 466–67 (1992)).

58. *See id.* at 2284; *see, e.g.*, Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 973–77 (9th Cir. 2023) (discussing the test for a relevant market in the context of in-app purchases within the popular game Fortnite).

59. *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–58 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), and holding that vertical nonprice restraints are subject to the rule of reason).

60. *Compare* ROBERT H. BORK, THE ANTITRUST PARADOX 421, 435 (1978) (noting that "[t]he only goal that should guide interpretation of the antitrust laws is the welfare of consumers" and that "Antitrust was originally conceived as a limited intervention in free and private processes for the purpose of keeping those processes free"), *with* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 743 (2017) ("Focusing antitrust exclusively on consumer welfare is a mistake. . . . Congress passed antitrust laws to safeguard against excessive concentrations of economic power.").

61. *See* United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 337 (1897) ("Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life.").

62. Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951).

63. 15 U.S.C. § 15.

A. Private Suits, Limitations, and the Indirect Purchaser Doctrine

While the Department of Justice and the Federal Trade Commission are the public institutions within the executive branch that enforce the federal antitrust laws,[64] private plaintiffs are allowed to sue, recover damages, and seek injunctions for violations of the antitrust laws under the Clayton Act. Unlike the Agencies, private plaintiffs are entitled by right to recover treble damages—three times the value of damages sustained—plus the cost of suit.[65] This private cause of action exists to "supplement[] official [antitrust] enforcement"[66] and promote "the public interest in vigilant enforcement of the antitrust laws."[67]

Access to treble damages as a remedy by right is a distinct feature of U.S. antitrust remedies.[68] However, the antitrust laws place certain restrictions on private plaintiffs that do not apply to the Agencies.[69] The direct purchaser rule is one such restriction, first articulated by the Supreme Court in *Illinois Brick Co. v. Illinois*.[70] In *Illinois Brick*, the Court held that a downstream purchaser may sue only if it bought directly from the alleged anticompetitive entity.[71] As clarified in *Apple Inc. v. Pepper*,[72] only "[w]hen there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue."[73] This "bright-line rule" bars potential plaintiffs from suing those who are "two or more steps removed" from the defendant in a supply chain.[74]

The Supreme Court has explained that there are three rationales behind barring indirect purchasers from antitrust recovery.[75] First, barring indirect purchasers from recovering treble damages avoids duplicative liability against defendants.[76] Second, barring recovery will avoid the difficulty involved in measuring recovery across complex supply chains.[77] Finally, granting direct purchasers the complete value of treble damages encourages "vigorous private enforcement of the antitrust laws."[78] Attempting to apportion recovery across the supply chain dilutes this incentive, as indirect

64. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 46, at 1.

65. § 15. This also includes attorneys' fees. *See id.*

66. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 511 (2008) (comparing antitrust treble damages to punitive damages in a private maritime case).

67. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 241 (2013) (Kagan, J., dissenting) (quoting Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 329 (1955)).

68. *See Empagran I*, 542 U.S. 155, 167–68 (2004) (discussing the "dramatic[]" disagreement between U.S. remedies and other countries' "less generous remedial schemes").

69. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 728 (1977).

70. 431 U.S. 720 (1977).

71. *Id.* at 728.

72. 139 S. Ct. 1514 (2019).

73. *Id.* at 1522.

74. *Id.* at 1521.

75. *See id.* at 1524; *see also* Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 214 (1990) (collecting cases).

76. *See Ill. Brick Co.*, 431 U.S. at 730.

77. *See id.* at 731–32 (noting that the "economist's hypothetical model" does not reflect economic reality).

78. *Id.* at 745.

purchasers often have minimal stakes and are unlikely to bring suit on their own.[79]

B. Evolution of Extraterritorial Antitrust Jurisprudence

Before the enactment of the FTAIA in 1982, courts developed a body of federal common law to determine the extraterritorial reach of the Sherman Act.[80] Though reflecting the same commitment to competition seen in domestic doctrine, the history of applying the Sherman Act to foreign conduct demonstrates how courts have, over time, confronted the unavoidable issue of foreign sovereignty when extending U.S. law beyond its borders.

Part I.B.1 discusses *American Banana Co. v. United Fruit Co.*,[81] where the Supreme Court discussed sovereignty and relied on a conflict of laws rule to determine that territorial boundaries were the general limit of U.S. law. Part I.B.2 then turns to *United States v. Aluminum Co. of America*[82] ("*Alcoa*") and the "effects test," which addressed the Sherman Act's applicability when foreign conduct in fact produces an adverse effect on U.S. commerce prior to the enactment of the FTAIA.

1. Conflict of Laws and *American Banana*

The Supreme Court first addressed the Sherman Act's applicability to foreign conduct in 1909 in *American Banana*.[83] In that case, the defendant, a New Jersey corporation, was accused of inducing the Costa Rican government to seize the Alabama-based plaintiff's plantation and railroad construction site located in the Republic of Panama.[84] The plaintiff also alleged that the defendant drove "purchasers out of the market . . . compelled

79. *See id.* at 747.

80. *See* 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, 416 (2005).

81. 213 U.S. 347 (1909).

82. 148 F.2d 416 (1945).

83. *See generally Am. Banana Co.*, 213 U.S. 347.

84. *Id.* at 354–55. Technically, the plantation was built within territory then-owned by the Republic of Colombia, known then as the "United States of Colombia." *See id.* at 353; *see also Building the Panama Canal, 1903-1914*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1899-1913/panama-canal [https://perma.cc/FA3P-TJ83] (last visited Aug. 22, 2025). After Congress's prior vote for the president to acquire the Colombian territory, failed U.S.-Colombia negotiations, and eventual U.S. warships sent by the president "in support of Panamanian independence," the territory declared itself the Republic of Panama later that November. *Id.*; *see Am. Banana Co.*, 213 U.S. at 354. Two weeks later, in exchange for U.S. military support, Panama gave the United States "a monopoly for the construction, maintenance and operation of any system of communication by means of canal or railroad across its territory between the Caribbean Sea and the Pacific ocean." *See* Convention for the Construction of a Ship Canal, Pan.-U.S., Nov. 18, 1903, 33 Stat. 2234 [hereinafter Hay-Bunau-Varilla Treaty]. Costa Rica then seized the Alabama corporation's plantation the following year in July and "stopped the construction and operation of the plantation and railway." *Am. Banana Co.*, 213 U.S. at 354–55.

producers to come to its terms, and . . . prevented the plaintiff from buying for export and sale."[85]

To determine whether the plaintiff sufficiently alleged a section 1 Sherman Act violation, the Supreme Court relied on a conflict of laws rule derived from the common law of torts.[86] Specifically, the Court held that the legality of an action "must be determined wholly by the law of the country where the act is done."[87] This is because, as the Court explained, one jurisdiction subjecting an individual in a foreign territory to its own laws "not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."[88] As such, the Court held that a statute's applicability was necessarily limited to govern only "the territorial limits over which the lawmaker has general and legitimate power."[89] The Court explained:

> The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be complained of elsewhere in the courts. The fact, if it be one, that *de jure* the estate is in Panama does not matter in the least; sovereignty is pure fact.[90]

Therefore, as the injury was solely within Costa Rica's territory and jurisdiction, the Court found the defendant's alleged acts fell outside the scope of the Sherman Act.[91] The Court noted that a "conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law."[92] In the end, the Court affirmed the dismissal of the complaint, and the plaintiff's plantation and unfinished railroad were to remain in the possession[93] of Costa Rica.[94]

85. *Am. Banana Co.*, 213 U.S. at 355 ("The plaintiff has tried to induce the government of Costa Rica to withdraw its soldiers and also has tried to persuade the United States to interfere, but has been thwarted in both by the defendant and has failed.").

86. *Id.* at 356–57.

87. *Id.* at 356 (citing Slater v. Mexican Nat'l R. Co., 194 U.S. 120 (1904)).

88. *Id.*

89. *Id.* at 357.

90. *See id.* at 357–58 (citation omitted) (citing Underhill v. Hernandez, 168 U.S. 250 (1897)).

91. *Id.*

92. *Id.* at 359.

93. *See id.* at 355, 358–59 ("The government of Costa Rica remained in possession down to the bringing of the suit."). *But cf.* Hay-Bunau-Varilla Treaty, *supra* note 84, art. VI ("[This treaty shall not] invalidate the titles or rights of private land holders.").

94. Finally, "[w]hen the United States took over title" of the previous French canal development company in Panama in 1903, "they . . . treat[ed] it as an enormous railroad engineering project." J. David Rogers, *The American Engineers That Built the Panama Canal*, *in* ENGINEERING THE PANAMA CANAL 112, 112 (2014).

2. *Alcoa* and the Original "Effects Test"

Over thirty years later, in *Alcoa*, the Second Circuit[95] addressed a foreign aluminum cartel and distinguished the cartel's direct harm to the U.S. domestic aluminum market from the wholly foreign injury considered in *American Banana*.[96] By doing so, the court articulated the "effects" test, which the Supreme Court eventually endorsed[97] before the passage of the FTAIA.

Specifically, *Alcoa* concerned an alleged conspiracy among the American corporation Aluminum Company of America ("Alcoa"), the Canadian company Aluminum Limited ("Limited"), and the alliance between Limited and other European companies based in Switzerland (the "Alliance").[98] Because Alcoa was a domestic corporation alleged to have acted within the United States, there was no question that its conduct could be analyzed[99] under the Sherman Act.[100]

As for the Alliance, the agreement between Limited and the European companies meant that each firm would meet and fix prices for aluminum.[101] Price fixing was then, and continues to be, per se unlawful.[102] As such, the Alliance "would clearly have been unlawful, had [it] been made within the United States."[103] Therefore, for the question of liability, the court was "concerned only with whether Congress chose to attach liability to . . . conduct outside the United States."[104]

In an opinion authored by Judge Learned Hand, the court cited *American Banana* and stated that "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."[105] However, "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for

95. The Second Circuit was sitting as the court of last resort because the Supreme Court could not reach a quorum. *See Alcoa*, 148 F.2d 416, 421 (2d Cir. 1945).

96. *See id.* at 443.

97. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (citing *Alcoa*, 148 F.2d at 444).

98. *Alcoa*, 148 F.2d at 422–23.

99. Ultimately, the court held that Alcoa monopolized the domestic aluminum ingot market, noting that "among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them." *See id.* at 428–29 (citing 21 CONG. REC. 2457 (1890)). *But cf.* BORK, *supra* note 60, at 48–49 (critiquing *Alcoa* and arguing the court "trade[d] off consumer welfare for unarticulated social values").

100. *See Alcoa*, 148 F.2d at 424–25. The court also discussed Alcoa's potential involvement in the Alliance but eventually "conclude[d] that 'Alcoa' was not a party to the 'Alliance,' and did not join in any violation" of section 1, "so far as concerned foreign commerce." *Id.* at 442.

101. *Id.*

102. *See* United States v. Gen. Dyestuff Corp., 57 F. Supp. 642, 646–47 (S.D.N.Y. 1944); *supra* Part I.A.1.

103. *Alcoa*, 148 F.2d at 444.

104. *Id.* at 443.

105. *Id.*

conduct outside its borders that has consequences within its borders which the state reprehends."[106]

Unlike in *American Banana*, where the effect of the defendant's section 1 violation was purely experienced within the jurisdiction of Costa Rica,[107] the Second Circuit found an adverse effect in the United States arising from the Alliance's price fixing agreement.[108] As such, the court held that the Alliance was unlawful if it was "intended to affect imports and did affect them."[109] Finding that Limited did have such intent, and had such effect on U.S. commerce through its involvement in the Alliance, the court ruled against Limited and held it violated section 1 of the Sherman Act.[110] In the years following *Alcoa*, the Supreme Court appeared to adopt the effects test, stating 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."[111]

However, application of the "effects test" was inconsistent. Some courts framed the test as requiring a direct effect on either imports or exports; other courts did not require a direct effect at all, so long as it was not de minimis.[112]

To clarify the extraterritorial scope of the Sherman Act, Congress enacted the FTAIA in 1982.[113] The congressional record states that under the FTAIA, the Sherman Act is excluded from exports and from wholly foreign transactions "absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor."[114] The record continues, stating the FTAIA "achieves an important objective of freeing American-owned firms that operate entirely abroad or in United States export trade from the possibility of dual and conflicting antitrust regulation."[115]

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106. *Id.* (citing RESTATEMENT (FIRST) OF CONFLICT OF L. § 65 (A.L.I. 1934)); *see* RESTATEMENT (FIRST) OF CONFLICT OF L. § 65 (A.L.I. 1934) ("If consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof.").

107. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 355 (1909).

108. *Alcoa*, 148 F.2d at 444. Ordinarily, horizontal price fixing agreements, ones between firms at the same level of product distribution, are per se unlawful. *See supra* Part I.A.1; *see, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

109. *Alcoa*, 148 F.2d at 444.

110. *Id.* at 445.

111. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (citing *Alcoa*, 148 F.2d at 444). In *Hartford Fire Insurance Co.*, the Court specifically mentioned the FTAIA, but it noted, at the time, that it was "unclear . . . whether the [statute] amends existing law or merely codifies it." *Id.* at 796–97 n.23.

112. *See* Gerard F. Bifulco, Comment, *From Sea to Shining Sea: A New Approach to Interpreting the Foreign Trade Antitrust Improvements Act*, 64 EMORY L.J. 869, 879 n.57 (2015) (collecting cases).

113. *See* Mark S. Popofsky, *Extraterritoriality in U.S. Jurisprudence*, *in* 3 ISSUES COMPETITION L. & POL'Y 2417, 2426 (2008).

114. H.R. REP. NO. 97-686, at 9–10 (1982) ("It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not.").

115. *Id.* at 10 ("When their activities lack the requisite domestic effects, they can operate on the same terms, and subject to the same antitrust laws that govern their foreign-owned competitors.").

According to the Supreme Court, "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."[116]

C. The "Technical Language" of the FTAIA

The FTAIA's "technical language"[117] reads:

> [The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under [the Sherman Act].[118]

If the Sherman Act applies only because of injury to export business, then it "shall apply to such conduct only for injury to export business in the United States."[119] While many courts require proximate causation to "give rise to" a claim under 15 U.S.C. § 6a(2), some scholars argue the legislative history suggests that indirect spillover effects are sufficient to satisfy this prong, and only but-for causation is required.[120]

The Supreme Court has explained that the FTAIA first places "*all* (nonimport) activity involving foreign commerce" outside of the Sherman Act's reach.[121] Conduct is then brought back within the statute's reach if two conditions are met.[122] First, the conduct "sufficiently affects American commerce, *i.e.*, it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import or (certain) export commerce."[123] Second, it

116. *Empagran I*, 542 U.S. 155, 169 (2004).

117. *See id.* at 162.

118. 15 U.S.C. § 6a. Together, the direct effects provision and "gives rise to" requirement are sometimes collectively referred to as the "domestic effects exception," as satisfying both sections excludes foreign business activity from the FTAIA's general bar on Sherman Act applicability. *See, e.g.*, Biocad JSC v. F. Hoffmann-La Roche, 942 F.3d 88, 94–95 (2d Cir. 2019) (referring to 15 U.S.C. § 6a(1)–(2) in its entirety as the "domestic effects exception").

119. § 6a.

120. *Compare* Empagran S.A. v. F. Hoffmann-La Roche, Ltd. (Empagran II), 417 F.3d 1267, 1271 (D.C. Cir. 2005), *and In re* Monosodium Glutamate Antitrust Litig., 477 F.3d 535, 538 (8th Cir. 2007), *with* Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 327 (2007).

121. *Empagran I*, 542 U.S. at 162.

122. *Id.*

123. *Id.* (quoting 15 U.S.C. § 6a(1)–(2)).

"has an effect of a kind that antitrust law considers harmful, *i.e.*, the 'effect' must 'giv[e] rise to a [Sherman Act] claim.'"[124]

The FTAIA restrains who may bring suit under the Sherman Act in ways that resemble the direct purchaser doctrine under the Clayton Act through its "gives rise to" provision.[125] This restriction, first interpreted by the Supreme Court in *Empagran I*, requires the domestic harm alleged to specifically give rise to the plaintiff's particular claim at issue.[126] In *Empagran I*, the Court explained that requiring a nexus between the domestic harm and the plaintiff's claim avoids unreasonably infringing on other states' sovereignty, a concern embodied by the principle of international comity, without justification for the interference.[127]

Part I.C.1 explains the Supreme Court's reasoning for holding that the alleged injury in the United States must give rise to the plaintiff's specific claim in *Empagran I*. Part I.C.2 discusses international comity further, which serves as the principle motivating the majority opinion in *Empagran I*, with special attention given to the Agencies' stated comity considerations.

1. Section 6a(2): Who Can Bring a Claim Under the FTAIA

In *Empagran I*, the Supreme Court examined an alleged section 1 violation from a foreign vitamin cartel.[128] In the complaint, the foreign plaintiffs alleged that anticompetitive harm arose exclusively from overseas transactions, despite the cartel's clear adverse effect on U.S. domestic commerce.[129] In the opinion, the Court held that under the FTAIA, the Sherman Act "does not apply where the plaintiff's claim rests solely on the independent foreign harm."[130]

As the Court explained, any application of U.S. antitrust law overseas risks serious "interference with a foreign nation's ability independently to regulate its own commercial affairs."[131] This interference is reasonable, the Court noted, provided that it reflected a congressional effort to address domestic harm.[132] Applying U.S. law to redress harms suffered by foreign plaintiffs as a result of foreign injury, however, still potentially interferes with the state's ability to regulate its own economy without the same justification.[133]

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124. *Id.* (alteration in original) (quoting 15 U.S.C. § 6a).
125. *See id.* at 159.
126. *See id.*
127. *See id.* at 164–65.
128. *Id.* at 159. This price-fixing would normally be considered per se unlawful. *See* FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 434–35 (1990).
129. *Empagran I*, 542 U.S. at 159.
130. *Id.*
131. *Id.* at 165.
132. *Id.* (citing *Alcoa*, 148 F.2d 416, 443–44 (2d Cir. 1945)).
133. *Empagran I*, 542 U.S. at 165 (citing RESTATEMENT (THIRD) FOREIGN RELS. L. OF THE U.S. § 403(2) (A.L.I. 1987)).

As such, any injury suffered by plaintiffs located abroad was not the type of harm that Congress sought to forbid with the FTAIA.[134]

Interpreting the FTAIA otherwise, the Court warned, would allow any foreign plaintiff to use U.S. courts to sue foreign defendants, so long as "a different plaintiff had a cause of action against" any cartel member responsible for injuries in the United States.[135] This could turn American courts into global tribunals, since foreign plaintiffs have incentives to seek the generous treble damages guaranteed by U.S. law under the Clayton Act.[136]

Additionally, allowing a foreign plaintiff to circumvent their own local antitrust laws "would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive" to cooperate with their host countries' local antitrust authorities in return for local prosecutorial amnesty.[137] Most countries, including the United States, offer amnesty programs for whistleblower cartel members that share secrets exposing their global cartels.[138] These incentives would be massively reduced, the Court warned, if whistleblowing cartel members were at risk of incurring treble damages in the U.S. after sharing information with their local authorities.[139] Nonetheless, the Court noted that FTAIA merely requires that the domestic harm cause the plaintiff's injury; the Clayton Act, with its limitations on private plaintiffs, still determines who can sue.[140]

The Court explained that its decision relied on a canon of statutory interpretation rooted in prescriptive comity, which aims to "avoid unreasonable interference with the sovereign authority of other nations."[141] "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."[142] As for prescription, "[u]nder international law, a [sovereign] state is subject to limitations on . . . jurisdiction to prescribe, *i.e.*, to make its law applicable" to activities, relations, and people.[143] As such, prescriptive comity is "the respect sovereign nations afford each other by

134. *Id.* at 165–66. Instead, Congress intended the FTAIA to "release domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm." *Id.* at 166.

135. *Id.* (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 273 (Supp. 2003)).

136. *Id.* at 166–67.

137. *Id.* at 168.

138. *See id.*

139. *See id.*; *see also* Brief of the Governments of the Federal Republic of Germany & Belgium as Amici Curiae Supporting Petitioners at 29–30, *Empagran I*, 542 U.S. 155 (2004) (No. 03-724) ("[T]he interests in disclosure and reform are greatly hindered when a company risks the imposition of treble damages in a U.S. court for confessing to another nation or authority that it has participated in an international conspiracy.").

140. *Empagran I*, 542 U.S. at 173.

141. *Id.* at 164 (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting)).

142. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 543 n.27 (1987).

143. RESTATEMENT (THIRD) FOREIGN RELS. L. OF THE U.S. § 401 (A.L.I. 1987).

limiting the reach of their laws," exercised by legislatures and assumed to be present by courts interpreting ambiguous statutes.[144]

2. International Comity as a Legislative Limit

"Comity is a necessary outgrowth of our international system of politically independent, socio-economically interdependent nation states."[145] Just as goods, capital, and people cross borders, so too can "national interests."[146] However, comity considerations are outweighed "when the strong public policies of the [domestic] forum are vitiated by the foreign act."[147] Although the boundaries are uncertain, comity considerations end when there is sufficient prejudice to local public policy.[148]

Courts have the discretion to decline exercising their jurisdiction where international comity considerations come into play.[149] This discretion to abstain on comity grounds is reviewed by appellate courts for abuse of discretion.[150] This is referred to as the "comity of courts" and occurs when matters are found to be more appropriately adjudicated elsewhere.[151] Usually, courts decide to decline jurisdiction by considering whether there is a "true conflict" between American law and the law of the other sovereign state involved.[152] However, federal courts will not decline jurisdiction, even with a conflict of laws, if doing so conflicts with the policy of the United States.[153] Nevertheless, this discretionary limitation on the judiciary is

144. *Hartford Fire Ins. Co.*, 509 U.S. at 817 (Scalia, J., dissenting).

145. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984).

146. *See id.*

147. *Id.*

148. *See id.* at 938.

149. *See* JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 424 (2d Cir. 2005) (discussing the discretionary powers of national courts to decline jurisdiction when faced with international comity concerns).

150. *See id.*

151. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (distinguishing "comity of the courts" from "prescriptive comity").

152. *See, e.g.*, *In re* Vitamin C Antitrust Litig., 8 F.4th 136, 140 (2d Cir. 2021). A true conflict occurs when "compliance with the laws of both countries is . . . impossible." *Id.* at 147 (alteration in original) (quoting *Hartford Fire Ins. Co.*, 509 U.S. at 799). Though some courts only look at a "true conflict," other courts consider more factors in this determination. *Compare* Royal & Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc., 466 F.3d 88, 93 (2d Cir. 2006) (remanding when the lower court abstained to exercise jurisdiction, noting there is not an "articulat[ed] . . . list of factors a district court should consider when exercising its discretion to abstain"), *with* Compañía de Inversiones Mercantiles S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V., 58 F.4th 429, 470 (10th Cir. 2023) (stating that "in general, we will not consider an international comity issue" in the absence of a true conflict).

153. *See* United States v. All Assets Held in Acct. No. XXXXXXXX, 83 F. Supp. 3d 360, 372–73 (D.D.C. 2015) (declining to abstain from adjudication on comity grounds in an in rem action seeking forfeiture of properties allegedly involved in conspiracy to launder funds by the Nigerian military regime).

distinct from prescriptive comity, which is a limit on the legislature, although both derive from the same overarching comity principle.[154]

Although the U.S. government is not constrained by the FTAIA's "gives rise to" provision and has a claim whenever there is sufficient harm to U.S. commerce outright,[155] the Agencies conduct their own comity analysis when deciding whether to pursue antitrust actions abroad.[156] The Agencies periodically promulgate guidelines for practitioners and courts regarding their international antitrust enforcement policies.[157] The current guidelines, released in 2017, specifically state that the Agencies only seek an antitrust remedy when it is: (1) necessary to address harm to U.S. commerce and consumers and (2) consistent with the Agencies' comity analysis.[158] Beyond a simple conflict of laws,[159] the Agencies consider whether significant interests of any foreign sovereign will be affected by an action and whether U.S. objectives are better achieved by foreign enforcement.[160] In addition, the Agencies consider the existence of intent to affect the United States, or an actual effect on the U.S. economy, in their analyses.[161]

Ultimately, both the judiciary and the executive branch exercise discretion when considering suits that implicate international comity concerns. Though courts necessarily consider comity only after the Agencies decide to bring suit, courts often defer to the executive branch in their comity analysis.[162] As such, while private plaintiffs are limited both by the "gives rise to" provision and by courts' discretion,[163] the Agencies are generally afforded greater deference in balancing issues of international comity when bringing international antitrust suits, particularly where broader U.S. policy interests are implicated.[164]

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154. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

155. *See* Delrahim, *supra* note 80, at 425.

156. *See* Diane P. Wood, Deputy Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., Speech Before the Greater Cleveland International Lawyers Group: International Enforcement at the Antitrust Division (Jan. 17, 1995).

157. *See generally* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 46.

158. *See id.* at 47.

159. It is important to note that "[t]he Agencies do not view the mere existence of blocking statutes as creating a conflict of law for purposes of the comity analysis." *Id.* at 39 n.144.

160. *See id.* at 27–29.

161. *Id.*

162. *See, e.g.*, United States v. All Assets Held in Acct. No. XXXXXXXX, 83 F. Supp. 3d 360, 371–72 (D.D.C. 2015) ("[B]ecause the [e]xecutive has already done the balancing in deciding to bring the case in the first place, the doctrine of international comity does not bar this lawsuit." (quoting United States v. One Gulfstream, G-V Jet Aircraft, 941 F. Supp. 2d 1, 10–11 (D.D.C. 2013))); *cf.* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) (discussing deferral "to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions" in the context of foreign sovereign immunity).

163. *See In re* Vitamin C Antitrust Litig., 8 F.4th 136, 142 n.7 (2d Cir. 2021).

164. *See* United States v. All Assets Held at Bank Julius Baer & Co., 772 F. Supp. 2d 205, 210 n.3 (D.D.C. 2011) ("[A] case in which the United States is the plaintiff would seem a particularly unsuitable candidate for abstention on international comity grounds.").

II. DEBATES BETWEEN BORDERS: THE DIFFERING INTERPRETATIONS BY THE U.S. COURTS OF APPEALS

After *Empagran I*, questions remain as to the FTAIA's scope. How direct of an effect must foreign anticompetitive conduct have on U.S. commerce to qualify as actionable, and what business activity qualifies as foreign commerce, rather than as import commerce? Clarifying the ambiguous scope of the two distinct FTAIA pathways requires answering these questions.

The U.S. Courts of Appeals are split on how best to resolve these questions. As for the direct effects provision, the two principal interpretations require the anticompetitive conduct to either be an "immediate consequence"[165] of the injury to U.S. commerce or to just have a "reasonably proximate causal nexus"[166] from the harm to the injury. As for the import exclusion, it has been read narrowly by some courts to only apply to transactions where "a good or service is being sent directly into the United States, with no intermediate stops."[167] Other courts include commerce "directed at an import market" within the import exception.[168] These divergent interpretations not only highlight the statute's ambiguity but also the tension between safeguarding domestic competition and maintaining international comity.

Part II addresses these splits in authority. Part II.A examines courts' varying interpretations of the direct effects provision, namely the "immediate consequence" standard set forth by the Ninth Circuit and the "reasonably proximate nexus" standard embraced by the U.S. Courts of Appeals for the Seventh and Second Circuits. Part II.B addresses the import exclusion, the Seventh Circuit's narrow interpretation, and the expansive test held by the U.S. Courts of Appeals for the Third and Second Circuits.

A. Direct Effects, Diverging Decisions

The Ninth Circuit first addressed the ambiguity in the direct effects provision in *United States v. LSL Biotechnologies*,[169] holding that for conduct to qualify as "direct," it must have an immediate consequence on U.S. commerce.[170] Part II.A.1 discusses *LSL Biotechnologies* and the Ninth Circuit's justifications for that standard. A few years after *LSL Biotechnologies*, the Seventh Circuit held in *Minn-Chem, Inc. v. Agrium, Inc.*[171] that "direct" only required a proximate cause relationship between the foreign harm and domestic injury. Part II.A.2 discusses the Seventh Circuit's

165. *See* United States v. Hui Hsiung, 778 F.3d 738, 758 (9th Cir. 2015).
166. *See* Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 411 (2d Cir. 2014).
167. *See* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 854 (7th Cir. 2012).
168. *See* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 470 (3d Cir. 2011).
169. 379 F.3d 672 (9th Cir. 2004); *see supra* Introduction.
170. *See LSL Biotechnologies*, 379 F.3d at 680 (noting a "nearly identical term" in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2)).
171. 683 F.3d 845 (7th Cir. 2012).

reasoning behind its holding in *Minn-Chem* and the additional reasons in favor of the proximate cause standard that the Second Circuit offered in *Lotes Co. v. Hon Hai Precision Industry Co.*[172]

1. The Ninth Circuit's Immediate Consequence Standard in *LSL Biotechnologies*

In *LSL Biotechnologies*, the Ninth Circuit addressed an agreed geographic market division between the U.S.-based company LSL Biotechnologies and the Israeli Hazera.[173] Normally, territorial market allocations are per se unlawful under the Sherman Act.[174] However, the court held that this activity, as alleged, was not an immediate consequence of any harm to U.S. consumers and was barred under the FTAIA.[175]

In its holding, the court defined "direct" as "proceeding from one point to another in time or space without deviation or interruption."[176] As such, to qualify as an "immediate consequence," challenged foreign conduct must presently affect U.S. commerce without any "intervening developments."[177]

Although the alleged anticompetitive effects in *LSL Biotechnologies* were "speculative,"[178] as the seeds did not yet exist, the Ninth Circuit identified certain activities that could potentially qualify as an immediate consequence: "where the foreign competitor already has the good in hand," or where a competitor's exclusion causes "existing market players to invest less in the research and development of new products."[179]

In its opinion, the court first relied on the canon against superfluity, aimed "to avoid [statutory] constructions that render words meaningless."[180] This canon meant that the FTAIA did not simply codify the *Alcoa* test, as *Alcoa*'s effects test "[did] not require the effect to be 'direct.'"[181]

Then, to define "direct," the court relied on a definition in Webster's Third New International Dictionary, as it was published "contemporaneously with the enactment of the FTAIA."[182] That dictionary defined "direct" as "proceeding from one point to another in time or space without deviation or interruption."[183]

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172. 753 F.3d 395 (2d Cir. 2014).
173. *LSL Biotechnologies*, 379 F.3d at 675.
174. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972).
175. *LSL Biotechnologies*, 379 F.3d at 681.
176. *Id.* at 680.
177. *Id.*
178. *Id.* at 682.
179. *Id.* at 681.
180. *Id.* at 679; *see also* Popofsky, *supra* note 113, at 2431 ("If direct merely provided a shorthand for ordinary principles of proximate cause, that arguably would flout this interpretive principle by depriving the foreseeability requirement of independent meaning.").
181. *LSL Biotechnologies*, 379 F.3d at 679.
182. *Id.* at 680.
183. *Id.* (quoting *Direct*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1981)).

The court then relied on a "nearly identical term"[184] in the Foreign Sovereign Immunities Act of 1976[185] (FSIA) to further support this definition of "direct." The FSIA grants foreign states immunity from suit by removing federal subject matter jurisdiction, unless certain enumerated criteria are met.[186] The Supreme Court has held that, under the FSIA, an effect is "direct" if it "follows as an immediate consequence of the defendant's activity."[187]

In support of the Ninth Circuit, scholars have noted that interpreting "direct" identically in both the FSIA and FTAIA reflects a coherent approach in addressing similar foreign-related issues.[188] This is because, they argue, both statutes were enacted pursuant to Congress's power to regulate foreign commerce,[189] and both reflect considerations of international comity.[190] Under the FSIA, only under enumerated exceptions, "such as where the sovereign engages in foreign commercial activity," can a foreign state be liable for the "direct effect[s]" it causes in the United States.[191]

Even broadly speaking, advocates have argued that the immediate consequence standard, as a bright-line rule,[192] better considers comity principles.[193] In contrast, scholars argue, proximate causation is a notoriously slippery doctrine.[194] Having a bright-line rule that clearly indicates the statute's limitations better protects against courts infringing on

184. *Id.*

185. 28 U.S.C. § 1605(a)(2).

186. *See id.* § 1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."). The FSIA states that sovereign immunity does not extend to commercial conduct "outside the territory of the United States . . . that . . . causes a direct effect in the United States." *Id.* § 1605(a)(2). The FSIA is a jurisdictional limit on the federal courts outside of the commercial activity exception and other enumerated exceptions. *See* Republic of Arg. v. NML Cap. Ltd., 573 U.S. 134, 142 (2014).

187. *LSL Biotechnologies*, 379 F.3d at 680 (quoting *Republic of Arg.*, 504 U.S. at 618); *see also id.* (rejecting argument that the FSIA "contains any unexpressed requirement of 'substantiality' or 'foreseeability'" (quoting *Republic of Arg.*, 504 U.S. at 618)). In *Republic of Argentina*, the Court's rejection of that argument was despite the congressional record to those requirements, as that passage referenced jurisdiction to legislate, rather than to adjudicate. 504 U.S. at 617–18.

188. *See* Stephen McIntyre, *The FTAIA's "Domestic Effects" Exception: Why the Ninth Circuit Got It Right*, 30 COMPETITION 113, 120 (2020); *see also* Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement*, 60 SMU L. REV. 103, 141 n.246 (2007) (noting "the FSIA analysis is instructive" for FTAIA interpretation).

189. *See* McIntyre, *supra* note 188, at 122; *see also* U.S. CONST. art. I, § 8.

190. *See* McIntyre, *supra* note 188, at 123 ("[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States." (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983))).

191. *Id.* (quoting 28 U.S.C. § 1605(a)(2)).

192. *But see Antitrust—Foreign Trade Antitrust Improvements Act—Second Circuit Adopts* Minn-Chem *Test for Domestic Effects.*—Lotes Co. v. Hon Hai Precision Industry Co., *753 F.3d 395 (2d Cir. 2014)*, 128 HARV. L. REV. 759, 763 (2014) (arguing that the immediate consequence test, "though stricter, has not in practice mitigated" comity concerns).

193. *See* McIntyre, *supra* note 188, at 123.

194. *See* Claire L. Leonard, Note, *In Need of Direction: An Evaluation of the "Direct Effect" Requirement Under the Foreign Trade Antitrust Improvements Act*, 73 WASH. & LEE L. REV. 489, 526 (2016).

foreign states' commercial affairs.[195] Moreover, scholars argue that a bright-line rule is more in line with congressional intent, since the FTAIA was intended to clarify the Sherman Act's scope.[196]

2. Proximate Causation in *Minn-Chem, Inc.*

The Seventh Circuit later addressed the standards for both the import exclusion and the direct effects provision in *Minn-Chem, Inc. v. Agrium, Inc.* This section addresses the court's holding solely with respect to the direct effects provision.[197]

In *Minn-Chem*, U.S. companies filed a complaint against an international cartel alleged to have fixed the price of potash.[198] Potash is very scarce globally, save for in the few countries where the plaintiffs alleged the cartel was located.[199] When the complaint was filed in 2008, the United States was the second-largest global potash consumer, second only to China.[200] The complaint alleged that the cartel members produced around 71 percent of the world's potash.[201] To maintain prices, the cartel allegedly "would first negotiate prices in Brazil, India, and China" and then would increase prices in the United States.[202] Moreover, some cartel members were alleged to have been exclusively responsible for non-U.S. activity; one such firm, for example, conducted all of the marketing and sales efforts for the other cartel members in every market except for the United States and Canada.[203]

To address the allegations of non-U.S. price-fixing, the court analyzed the direct effect provision and held that conduct must be a proximate cause of an adverse domestic effect to be actionable.[204] This proximate cause rule requires a relationship of "logical causation," rather than one based on time or geography.[205] Since the complaint alleged that the cartel members' foreign supply restrictions led to a price increase overseas that resulted in

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195. *See* Richard Lobas, Note, *A Quest for Consistency: The Meaning of Direct in the Foreign Trade Antitrust Improvements Act*, 5 GLOB. BUS. L. REV. 1, 17 (2016); *see also* Christopher J. Frisina, *Creating Ambiguity in Directness: The Potential for Chaos in Antitrust Enforcement After* Minn-Chem v. Agrium, 3 BUS. & BANKR. L.J. 97, 122–23 (2015).

196. *See* Lobas, *supra* note 195, at 20–21; *see also* Frisina, *supra* note 195, at 123–24.

197. For a discussion regarding the Seventh Circuit's holding with respect to the import exclusion, see *infra* Part II.B.1.

198. Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 848 (7th Cir. 2012).

199. *See id.* ("[O]ver half of global capacity [is] located in just two regions—Canada and the former Soviet Union.").

200. *See id.* at 849.

201. *See id.*

202. *Id.* The opinion further details the ways in which the cartel was alleged to have violated section 1 of the Sherman Act, including output restrictions and the exchange of sensitive information. *See id.* at 850.

203. *See id.* at 855–56 (noting that the plaintiffs were seeking to hold firms like Canpotex jointly and severally liable, "perhaps under a conspiracy theory" to "presumably" avoid *Illinois Brick*'s prohibition on "pass on" damages).

204. *See id.* at 857.

205. *See* United States v. LSL Biotechnologies, 379 F.3d 672, 693 (9th Cir. 2004) (Aldisert, J., dissenting) (describing that proximate cause "focuses on consequential relationships").

elevated U.S. prices, the court held that the plaintiffs properly alleged the requisite direct effect.[206]

In its opinion, the court cited to *LSL Biotechnologies*[207] and argued that even though "direct" was found in the FSIA's commercial activity exception, this shared interpretation between the two statutes was misguided.[208] According to the Seventh Circuit, the Supreme Court interpreted the FSIA with the immediate consequence standard only after rejecting a suggestion in the FSIA's legislative history that the word "direct" also meant foreseeable and substantial.[209] Here, the court reasoned that since the text of the FTAIA includes "substantial" and "foreseeable" as additional requirements, it had to be read differently from the FSIA.[210]

Additionally, the court reasoned that requiring the effect to be an immediate consequence—in addition to being substantial and foreseeable—would impose a stricter test than what the FTAIA's text can bear[211] and make those two requirements superfluous.[212] This stricter test would come "close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage."[213] While addressing similar allegations with respect to the direct effects provision in *Lotes Co. v. Hon Hai Precision Industry Co.*,[214] the Second Circuit noted that, in practice, it is hard "to imagine any domestic effect that would be both 'immediate' and 'substantial' but not 'reasonably foreseeable.'"[215] According to the Second Circuit, the immediate consequence standard would therefore collapse the direct effects provision into the import exclusion.[216]

Turning away from the immediate consequence standard, the Seventh Circuit endorsed the "reasonably proximate causal nexus" standard, advocated for by the DOJ's Antitrust Division.[217] The court stated that "direct" as a proximate cause requirement aligns with the larger antitrust concern for remoteness, as indicated in the original effects test set forth in *Alcoa*.[218] In support, the Second Circuit also noted that "courts continue to analyze [domestic] antitrust standing by considering [directness] . . . using familiar principles of proximate causation."[219] The Second Circuit noted in *Lotes Co.* that the FTAIA cuts off recovery for remote domestic injury similar to how tort law cuts off recovery for remote injuries.[220]

206. *See Minn-Chem, Inc.*, 683 F.3d at 859.
207. *Id.* at 856–57.
208. *See id.*
209. *See id.* at 857 (citing Republic of Arg. v. Weltover, Inc., 504 U.S. 607 (1992)).
210. *See id.*
211. *Id.*
212. *See id.*
213. *Id.*
214. 753 F.3d 395 (2d Cir. 2014).
215. *Id.* at 411.
216. *Id.*
217. *See Minn-Chem, Inc.*, 683 F.3d at 857 (quoting Delrahim, *supra* note 80, at 430).
218. *See id.*
219. *Lotes Co.*, 753 F.3d at 412 (citing Blue Shield of Va. v. McCready, 457 U.S. 465, 476–77 & n.13 (1982)).
220. *See id.*

The Seventh Circuit also explained that a proximate cause standard best addressed concerns about foreign cartels generally.[221] "The host country for the cartel will often have no incentive to prosecute it" because the host country would be incentivized to reap the economic benefits gained from the exporting cartel; the higher prices experienced in the host country "are more than made up by the gains from the cartel price their exporters collect."[222] Since export cartels are often exempt from a country's antitrust laws, "[i]t is the U.S. authorities or private plaintiffs who have the incentive" to pursue such Sherman Act violations.[223]

However, as the Seventh Circuit observed, foreign defendants need not worry about U.S. law without their conduct meeting the FTAIA's high bar.[224] On top of this, foreign defendants are still protected by the "gives rise to" provision,[225] since, for example, not all restraints of trade are ultimately unlawful under the U.S. antitrust laws.[226] Put another way, according to the court, even if foreign defendants create the requisite effect on U.S. commerce, they will not be liable without an actual Sherman Act violation.[227]

The Seventh Circuit's approach has garnered scholarly support. For one thing, scholars argue that the proximate cause standard "preserves the import exemption while creating a workable standard" where courts can trace the chain of events between conduct and effect to determine liability.[228] Additionally, the intent behind the flexible standard parallels the intent behind the antitrust standing requirements generally. "Just as Congress did not intend the FTAIA to permit suits for all foreign restraints on competition . . . it did not intend to permit every person injured by an antitrust violation, no matter how tangentially, to recover damages."[229] And, as scholars warn, the stricter immediate consequence standard would create incentives that reward international cartels for finding territorial ways to obfuscate their anticompetitive conduct.[230] Given this interconnectedness, a more flexible standard that can be applied on a case-by-case basis better

221. *See Minn-Chem, Inc.*, 683 F.3d at 860.

222. *Id.*

223. *Id.*

224. *See id.* at 857 ("This is a standard with teeth.") (collecting cases).

225. *See id.* at 858 ("[W]e note that § 6a(2) will protect many a foreign defendant.").

226. *See id.* (citing Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 21–22, 24 (1979)); *see also Broad. Music, Inc.*, 441 U.S. at 21–22 (finding that alleged price-fixed "blanket licenses" are legal as a "different product" than individual licenses).

227. *Id.*

228. *See, e.g.*, Bifulco, *supra* note 112, at 890. *But see* Lobas, *supra* note 195, at 17–18 (suggesting that the immediate consequence standard is a "chain of causation" test).

229. *See* John J. Miles, Colloquium, *The Meaning Of "Direct" Effect on Domestic Commerce Under the Foreign Trade Antitrust Improvements Act*, 73 WASH. & LEE L. REV. 541, 550–54 (2016) (arguing that each factor considered in antitrust standing analysis is more consistent with proximate cause in "direct effects").

230. *See* Popofsky, *supra* note 113, at 2431.

maintains the cooperative relationship with diplomatic allies.[231] This will, in turn, lead to more international antitrust enforcement outright.[232]

B. Interpretations of the Import Exclusion

Like the direct effects provision, courts interpreting the import exclusion have interpreted the provision in two ways.[233] The Seventh Circuit has interpreted the provision narrowly, as requiring the foreign defendants to actually conduct import transactions with U.S. consumers to qualify.[234] Part II.B.1 addresses the Seventh Circuit's narrow definition. On the other hand, the Third and Second Circuits only require that such conduct involving imports be "directed at an import market."[235] Part II.B.2 looks at this expanded rule and its justifications.

1. The Seventh Circuit's Narrow Exclusion

In *Minn-Chem*, the Seventh Circuit held that the import exclusion only covers trade involving foreign sellers and domestic buyers.[236] That year (2012), the United States consumed 6.2 million tons of potash, of which 5.3 million were imports, amounting to around 85 percent of total U.S. consumption.[237] These imports were largely sold by the cartel members into the United States.[238] Given the allegations in the complaint,[239] the Seventh Circuit's test was easily satisfied.[240]

In finding for this narrow rule, the court first noted that the FTAIA was enacted with respect to international comity concerns, since it limited U.S. law to cover only conduct with the requisite adverse effect on the United States.[241] However, the court reasoned, by maintaining antitrust scrutiny over imports, Congress recognized that "there was no need for this self-restraint with respect to imports."[242] This is because the applicability of U.S. law to transactions sent directly to the United States is both "predictable

231. *See* Leonard, *supra* note 194, at 527–29 ("The reasonably proximate causal nexus standard has the flexibility and breadth to encompass the policy concern of maintaining international enforcement cooperation.").

232. *See id.*

233. *See In re* Hard Disk Drive Suspension Assemblies Antitrust Litig., No. 19-md-02918, 2024 WL 1354466, at *2–3 (N.D. Cal. Mar. 29, 2024) (describing the debate).

234. *See* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 818 (7th Cir. 2015).

235. *See* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 470 (3d Cir. 2011); Biocad JSC v. F. Hoffmann-La Roche, 942 F.3d 88, 97 (2d Cir. 2019).

236. *See* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 854–55 (7th Cir. 2012) (describing imports as "transactions in which a good or service is being sent directly into the United States, with no intermediate stops").

237. *See id.* at 849.

238. *See id.*

239. *See supra* Part II.A.2.

240. *See Minn-Chem, Inc.*, 683 F.3d at 858. Here, the Seventh Circuit additionally held that *Alcoa* still applied and, as such, imports were still measured by the *Alcoa* standard. *See id.* at 857.

241. *See id.* at 854.

242. *Id.* (citing *Empagran I*, 542 U.S. 155, 161 (2004)).

to foreign entities and necessary for the protection of U.S. consumers."[243] As such, the court concluded, these transactions are not subject to the FTAIA's extra layer of protection, which exists in the direct effects provision and the "gives rise to" provision.[244]

Advocates and scholars who support this narrow reading of the import exclusion cite a few benefits to this approach. First, a narrow reading distinguishes between the direct effects provision and the import exclusion.[245] This is because "[t]o give the [direct effects provision] meaning, the [import exclusion] must be given a relatively strict construction."[246] Those advocates argue that anything broader than a narrow interpretation of "import commerce" would bring a large amount of foreign conduct within the Sherman Act's reach,[247] contrary to the Supreme Court's recognition that the FTAIA was intended to clarify, but not expand in any significant way, the Sherman Act's scope. Blurring the line between the import exclusion and the direct effects provision is an affront to this purpose. Since imports are not subject to the substantial and foreseeability requirements, a broad import exclusion would necessarily expand the scope of the Sherman Act outright.[248]

2. Broadening Imports in *Animal Science Products*

In contrast to the Seventh Circuit, the Second and Third Circuits interpret the import exclusion broadly, stating that the exclusion captures all conduct "directed at an import market."[249] The Third Circuit delineated the outer boundary of this rule in *Animal Science Products, Inc. v. China Minmetals Corp.*[250]

In *Animal Science Products*, the Third Circuit addressed allegations of a Chinese cartel fixing the price of magnesite.[251] The lower court originally

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

244. *See id.*

245. *See* Robert D. Sowell, *New Decisions Highlight Old Misgivings: A Reassessment of the Foreign Trade Antitrust Improvements Act Following* Minn-Chem, 66 FLA. L. REV. 511, 538–39 (2014).

246. Brief for Defendants-Appellees China Minmetals Corp. and China National Minerals Co., Ltd. at 15, Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011) (No. 10-2288).

247. *Cf.* Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Import & Export Corp., 702 F. Supp. 2d 320, 382 n.62 (D.N.J. 2010) ("A policy point made by Plaintiffs warrants a comment. . . . 'Congress specifically adopted the effects test in the FTAIA to balance the concern for over-extending the antitrust laws to foreign trade in precisely the sort of situation present here.'" (citing H.R. REP. NO. 97–696, at 9–12 (1982))), *vacated sub nom.*, *Animal Sci. Prods. Inc.*, 654 F.3d 462 (3d Cir. 2010).

248. *Cf. id.* at 383 n.63 (noting issue of relationship between the "collusive agreement and the actual imports into the United States . . . fall within the scope of the Sherman Act, rather than the FTAIA").

249. *Animal Sci. Prods., Inc.*, 654 F.3d at 463.

250. 654 F.3d 462 (3d Cir. 2011).

251. *See id.* at 464. Magnesite is an input in the creation of steel and cement. *Id.* at 464 n.1.

dismissed the complaint against the cartel on the basis of the import exclusion.[252] Specifically, the lower court held that the activity did not qualify as imports, since the defendants were not physical importers to the United States.[253]

As for the import exclusion, the lower court first stated that the exclusion applied in a simple example "where the buyer 'X' goes to country 'Y' and—upon purchasing goods from the selling entity 'Z'—brings these goods into the United States."[254] Due to the "infinitely more complicated" examples of conduct found in modern trade,[255] the lower court rejected any interpretation that reduced the exclusion to a "simplistic model [that] would automatically transform any foreign seller into a United States importer if the sellers' goods reach the United States without a detour."[256] The lower court instead held that the import exclusion applied when the seller engaged their agents or a contracted third party to physically tender the goods into the United States.[257]

In a brief opinion, the Third Circuit characterized the lower court's rule as overly narrow.[258] Although the import exclusion "must be given a relatively strict construction" to give it meaning,[259] it is not necessary that the defendants physically tender goods and services into the United States.[260] Instead, it is sufficient that the alleged anticompetitive behavior "was directed at an import market."[261] Put another way, the import exclusion only "requires that the defendants' conduct target import goods or services."[262] Notably, as later clarified by the Second Circuit, conduct "directed at an

252. *See id.* at 467–68. Technically, the lower court held that because the commerce did not qualify under either the import exclusion or the direct effects provision, the statute deprived the court of subject matter jurisdiction; as such, the lower court dismissed the complaint sua sponte. *See id.* at 464–65. As for the direct effects provision, which had not yet been interpreted by the Third Circuit, the lower court applied the immediate consequence standard. *See Animal Sci. Prods., Inc.*, 702 F. Supp. 2d at 337. In addition to the expansive import exclusion, the Third Circuit also held in *Animal Science Products* that the FTAIA was a substantive element of an international antitrust claim rather than a jurisdictional limit on the federal courts. *See Animal Sci. Prods. Inc.*, 654 F.3d at 467–68; *see also supra* note 31 (discussing the debate over whether the FTAIA is a substantive element of a foreign antitrust claim or a jurisdictional limitation on the courts).

253. *Animal Sci. Prods.*, 702 F. Supp. 2d at 372–73. However, the court dismissed these importer claims without prejudice due to factual issues, giving the plaintiffs another "opportunity to produce detailed and, hopefully, more abundant factual proof than the sole exhibit fortuitously provided to them by Defendants." *Id.* at 383.

254. *Id.* at 370.

255. *See id.* at 370.

256. *See id.* at 372.

257. *See id.* at 372–74 ("In light of the foregoing, it appears that the term 'importer' . . . would be best read as referring to the 'main force' behind the physical movement of goods to the United States.").

258. *See* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 470 (3d Cir. 2011).

259. *Id.* (citing Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n, 227 F.3d 62, 72 (3d Cir. 2000)).

260. *Id.*

261. *Id.* (citing Turicentro, S.A. v. Am. Airlines Inc., 303 F.3d 293, 303 (3d Cir. 2002)).

262. *See id.*

import market" does not require a subjective intent.[263] In light of this decision, the complaint, on remand, failed to meet the direct purchaser rule.[264] Although the plaintiffs filed a second amended complaint,[265] the parties eventually settled out of court.[266]

Other scholars and lawyers have advocated for this broad rule. Professor Joseph P. Bauer argues that this broad import rule is more consistent with "the evolving nature of international trade," as it better affords "protection under the antitrust laws for American consumers."[267] In support of this idea, Lizl Leonardo notes that a narrow rule undermines this protection and "place[s] more weight on international comity concerns than on the protection of U.S. consumers."[268] Given the interconnected nature of global economies, Leonardo argues that a price-fixing cartel necessarily will not be effective without being global; price-fixing located only in one region will not work because the market will reallocate the sale of the price-fixed good to the region where it is sold at a lower price.[269] Because a cartel considers the product flow among regions when establishing the price floor, Leonardo argues that U.S. consumers are still at risk under a narrow rule.[270] Moreover, because antitrust penalties abroad are "significantly lower" than U.S. remedies, other countries' competition law cannot be relied on to protect American consumers.[271] According to advocates, the Third Circuit's broad rule ultimately allows for better protection of U.S. consumers.[272]

III. CLARITY THROUGH CONVERGENCE: READING THE FTAIA'S IMPORT EXCLUSION IN CONCERT WITH THE DIRECT EFFECTS PROVISION

Having looked at how courts address the ambiguity in the FTAIA's two pathways for Sherman Act applicability, this Note argues that courts adopt a

263. *See* Biocad JSC v. F. Hoffmann-La Roche, 942 F.3d 88, 99–100 (2d Cir. 2019). The Second Circuit, directly citing the Third Circuit, has held the same rule with the same reasoning. *See id.*

264. *See* Animal Sci. Prods., Inc. v. China Minmetals Corp., 34 F. Supp. 3d 465, 524 (D.N.J. 2014) ("I have dismissed the complaint for failure to allege standing.").

265. *See generally* Second Amended Class Action Complaint, *Animal Sci. Prods., Inc.*, 34 F. Supp. 3d 465 (No. 05-4376).

266. *See generally* Stipulation of Dismissal with Prejudice of the Alleged Claims Against Defendants, *Animal Sci. Prods., Inc.*, 34 F. Supp. 3d 465 (No. 05-4376).

267. *See* Joseph P. Bauer, *The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to* American Banana*?*, 65 ME. L. REV. 3, 21–23 (2012) (arguing against a narrow rule for imports).

268. *See* Lizl Leonardo, Comment, *A Proposal to the Seventh and Ninth Circuit Split: Expand the Reach of the U.S. Antitrust Laws to Extraterritorial Conduct That Impacts U.S. Commerce*, 66 DEPAUL L. REV. 175, 204–05 (2016).

269. *See id.* at 203–04.

270. *See id.*

271. *See id.* at 209 (citing Brief of Amicus Curiae Economists and Professors in Support of Petitioner at 24, Motorola Mobility LLC v. AU Optronics Corp., 576 U.S. 1022 (2015) (mem.) (No. 14-1122)).

272. *See id.* at 204.

particular interpretation of the FTAIA depending on their own specific policy goals. Specifically, the FTAIA was enacted with two competing policy objectives in mind: the protection of domestic competition and the respect for international comity.[273] In advocating for the interpretations of either the import exclusion or the direct effects provision, proponents often argue not only that their reading better aligns with a specific policy goal, but also that the opposing interpretation fails to adequately address that same goal.[274] These advocates, implicitly or otherwise, are choosing which policy to prioritize: protecting competition or respecting comity. Though courts and commentators have briefly emphasized the importance of keeping each provision distinct, they lack consensus on which interpretation would maintain this distinction and achieve the proper policy balance.[275] This confusion as to the right balance to strike is a result of the statute's "convoluted"[276] text and unclear legislative history. The FTAIA need not be so limited.

Part III of this Note proposes an approach that aims to reconcile both objectives: a narrow interpretation of the import exclusion out of respect for comity in conjunction with a broad proximate cause standard for the term "direct" to protect competition. This interpretation is most in line with the statute's text, aligns with Congress's goal of clarifying the extraterritorial reach of the Sherman Act,[277] and ultimately strikes the right balance between two competing policy objectives.

Part III.A argues for a narrow reading of the import exclusion in conjunction with a proximate cause standard for direct effects. Part III.B discusses the benefits of this cohesive framework and its broader normative implications.

A. Why Isolated Interpretations Fail

Part III.A.1 argues for a narrow import exclusion. Part III.A.2 argues against the immediate consequence standard and in favor of the proximate cause standard to address the limitations of the narrow import exclusion.

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273. *See supra* Part II.

274. *Compare* Lobas, *supra* note 195, at 17 (arguing that "conservatively interpret[ing] the meaning of 'direct'" with the immediate consequence standard is necessary "to prevent unreasonable interference with [foreign] sovereignty"), *with* Bauer, *supra* note 267, at 22–23 (stating that a narrow reading of imports "limit[s] protection under the antitrust laws for American consumers . . . undermin[ing] the goals of the antitrust regime"), *and* Jeffrey H. Smith, Note, *Call Me, Maybe?: The Seventh Circuit's Call in* Motorola Mobility, 90 NOTRE DAME L. REV. 2063, 2087 (2015) (arguing that the immediate consequence standard is "insufficient to adequately protect American plaintiffs").

275. *Compare supra* Part II.A.1, *with supra* Part II.A.2.

276. Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 465 (3d Cir. 2011) (quoting Turicentro, S.A. v. Am. Airlines Inc., 303 F.3d 293, 300 (3d Cir. 2002)).

277. *See* H.R. REP. NO. 97-686, at 2 (1982).

1. Why a Narrow Import Exclusion

The import exclusion must be narrowly construed such that it applies only to conduct in which a foreign firm sends goods or services to a domestic firm or consumer.[278] As noted by the Ninth Circuit, the "task when interpreting legislation is to give meaning to the words used by Congress."[279]

Starting with the text, the FTAIA states that the Sherman Act does not apply to foreign trade[280] unless the effect of such trade affects domestic commerce, import commerce, or export commerce.[281] However, Congress explicitly carved out from that general bar[282] commerce that is "import trade or import commerce" in the initial parenthetical.[283] Although every transaction involving a foreign firm is generally unreachable by the Sherman Act without an effect on U.S. commerce, the FTAIA places back within its reach those specific transactions that are between a foreign firm and domestic consumer outright.[284]

Broadening that parenthetical to include all conduct "directed at an import market"[285] creates a broader test than the text of the statute can bear. The direct effects provision specifically lists "import commerce" as one of the types of commerce that could be affected by foreign conduct to be actionable.[286] Specifically, subsections (A) and (B) state that actionable foreign conduct must have an adverse effect on "trade or commerce which is not trade or commerce with foreign nations," i.e., domestic commerce, "on import trade or import commerce" or "on export trade."[287] As the Supreme Court has frequently held, "identical words and phrases within the same statute should normally be given the same meaning."[288] Including more than simple import transactions as something to be affected by foreign commerce under the direct effects provision conflates the two distinct categories of import commerce and purely foreign commerce that Congress intentionally separated. Moreover, this also merges the exclusion for import commerce generally with the direct effects provision. Because the direct effects provision applies to conduct affecting imports, such conduct cannot simultaneously be categorized as import commerce and as affecting import

278. *See, e.g.*, Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 857 (7th Cir. 2012).
279. United States v. LSL Biotechnologies, 379 F.3d 672, 679 (9th Cir. 2004).
280. *See* 15 U.S.C. § 6a.
281. *Id.*
282. *See Empagran I*, 542 U.S. 155, 162 (2004).
283. § 6a ("[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce).").
284. *See id.*
285. *See* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 470 (3d Cir. 2011).
286. *See* § 6a.
287. *Id.*
288. FCC v. AT&T Inc., 562 U.S. 397, 408 (2011) (quoting Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007)); *see* Env't Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007) (stating identical words have the same meaning unless context suggests otherwise); H.R. REP. NO. 97-686, at 6 (1982) ("Finally . . . it is appropriate for Congress to formulate a standard to be applied uniformly throughout the federal judicial system.").

commerce. The Third Circuit may have recognized as much when it urged that the import exclusion "must be given a relatively strict construction,"[289] though the court did not heed its own warning.

Finally, a broad interpretation of the import exclusion risks interfering with international comity. Because the Supreme Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations,"[290] in line with prescriptive comity as a limit on the legislature,[291] any ambiguity should suggest interpreting the FTAIA narrowly as to not expand the Sherman Act's reach.[292] Instead, reading the import exclusion where "it is not a necessary prerequisite" for defendants to be an actual importer[293] eliminates the required threshold test of the direct effects provision on conduct for all but the most remote foreign activity.[294] It also removes the requirement that the plaintiff's injury have a nexus to the domestic harm, as required by the FTAIA's "gives rise to" provision.[295] Removing the extra limitations on private suits risks interfering with foreign economies without the justification that such conduct has actually harmed the United States.[296] It is patently unreasonable to apply U.S. law to protect foreign plaintiffs without such a domestic nexus; foreign plaintiffs, if able, will seek treble damages[297] against foreign defendants[298] if U.S. law allows them. This is because the American antitrust regime is unique in offering treble damages by law,[299] and, as such, foreign plaintiffs are greatly incentivized to pursue such remedies. A broad import exclusion would disrupt international economies without the justification provided by the direct effects provision and the "gives rise to" provision. As a result, it is necessary to narrowly construe the import exclusion.

2. Why the Immediate Consequence Standard Fails

The immediate consequence standard is an inappropriate pairing with a narrow import exclusion because it is both incorrect in isolation and risks failing to protect domestic competition from foreign harm. The Ninth Circuit and scholars argue that the immediate consequence standard is more

289. *See Animal Sci. Prods., Inc.*, 654 F.3d at 470.
290. *Empagran I*, 542 U.S. 155, 164 (2004).
291. *See id.*
292. *See id.* at 169.
293. *See Animal Sci. Prods., Inc.*, 654 F.3d at 470.
294. *See supra* Part II.B.2. This naturally depends on the interpretation of the direct effects provision.
295. *See supra* Part I.C.1.
296. *See Empagran I*, 542 U.S. at 165.
297. *See supra* Part I.
298. *See, e.g.*, Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81, 83–85, 97 (S.D.N.Y. 1995) (denying English defendants' motion to dismiss under the FTAIA and on grounds of international comity against Danish plaintiff for a contract "executed in England").
299. *See Empagran I*, 542 U.S. at 167–68.

consistent with the FTAIA's text and legislative history.[300] These arguments are legally unsound.

For the Ninth Circuit's textualist argument, the court defined "direct" by first relying on Webster's Third New International Dictionary, published contemporaneously with the FTAIA.[301] That dictionary contains "seven main meanings" of "direct," with one notable definition being "characterized by or giving evidence of a close, especially logical, causal, or consequential relationship."[302] This definition is squarely in line with the concept of proximate cause found in the common law of torts.[303]

The Ninth Circuit's reliance on a "nearly identical term" in the FSIA is similarly misplaced. As the Second Circuit noted, the purpose and the language of the FSIA and the FTAIA are explicitly different in key respects.[304] The FSIA codifies the grant of sovereign immunity to foreign states and is an explicit jurisdictional limit on the federal courts.[305] The FTAIA, on the other hand, limits the extraterritorial reach of the Sherman Act, is considered a substantive element of an international Sherman Act claim, and governs the conduct of private commercial entities.[306]

While it is true that both statutes were enacted pursuant to Congress's power under the Commerce Clause,[307] it is worth noting that "direct," as used in the context of Commerce Clause jurisprudence, often invokes the doctrine of proximate cause.[308] Additionally, while it is true that international comity concerns are considered when interpreting both statutes,[309] the affected parties differ. The FSIA addresses foreign governments as defendants in their official capacity as sovereign entities, and the commercial activity exception to the FSIA treats these governments as private parties only after a heightened showing.[310] In contrast, the FTAIA analysis can only occur after a defendant is found to have been acting as a private party.[311] As such,

300. *See supra* Part II.A.1.

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

302. *Id.* at 692 (Aldisert, J. dissenting) (quoting *Direct*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1981)); *see also* Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 410 (2d Cir. 2014).

303. *See LSL Biotechnologies*, 379 F.3d at 692.

304. *See Lotes Co.*, 753 F.3d at 411.

305. *See* 28 U.S.C. § 1605(a)(2); Republic of Arg. v. NML Cap. Ltd., 573 U.S. 134, 142 (2014).

306. *See supra* note 31 and accompanying text.

307. *See Lotes Co.*, 753 F.3d at 410.

308. *See LSL Biotechnologies*, 379 F.3d at 693–94 (Aldisert, J. dissenting) (noting that, since Commerce Clause cases hold that Congress can regulate intrastate sales that directly affect interstate commerce, "'direct' and 'indirect' . . . must not be read too narrowly" (quoting Carter v. Carter Coal Co., 298 U.S. 238, 327–28 (1936) (Cardozo, J., dissenting))).

309. *Compare Empagran I*, 542 U.S. 155, 175 (2004), *with Republic of Arg.*, 573 U.S. at 140.

310. *See Republic of Arg.*, 573 U.S. at 142.

311. This is because "the FSIA 'must be applied by the district courts in every action against a foreign sovereign,'" Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434–35 (1989), and "a foreign state engages in commercial activity for the purposes of the FSIA only where it acts in the manner of a private player within the market." Attestor

foreign sovereigns are already afforded broader protections against Sherman Act suits; federal courts are only granted jurisdiction if the foreign sovereign's conduct meets the FSIA's heightened immediate consequence standard[312] and a court finds that the sovereign was acting as a commercial entity.[313]

Moreover, the immediate consequence standard risks collapsing the direct effects provision into the import exclusion. As the Second Circuit notes, any conduct that would create a "substantial" and "reasonably foreseeable" effect on U.S. commerce necessarily will be an immediate consequence of such effect.[314] Although the Ninth Circuit would be concerned about surplusage between "direct" and "reasonably foreseeable," these are still distinct standards.

For directness, courts require, at a minimum, that the foreign anticompetitive conduct be beyond a "situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States."[315] On the other hand, the "requisite 'direct' and 'substantial' effect must have been 'foreseeable' to an objectively reasonably person making practical business judgments."[316] Directness requires the effect to be not overly attenuated; reasonable foreseeability requires the conduct to be analyzed objectively.[317]

Proximate cause, on the other hand, is a better standard to govern the direct effects test. Foreign states often exempt their exports from antitrust scrutiny, which disincentivizes them from pursuing suits for exports, as the host country's gains would necessarily offset any damage caused by the anticompetitive injury.[318] Finally, proximate causation is more in line with antitrust law's concern for remote injury.[319]

B. Benefits of a Cohesive Framework

The greatest benefit to interpreting the direct effects provision with a proximate cause standard is that it forms a cohesive framework in

Master Value Fund LP v. Argentina, 113 F.4th 220, 230–31 (2d Cir. 2024) (quoting Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek, 600 F.3d 171, 176 (2d Cir. 2010)).

312. *Cf.* Am. Banana v. United Fruit Co., 213 U.S. 347, 358 (1909) ("The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act.").

313. *See, e.g.*, Filetech S.A. v. Fr. Telecom S.A., 304 F.3d 180, 181–82 (2d Cir. 2002) (dismissing an antitrust action against a French government-owned telecommunications firm for lack of subject matter jurisdiction under the FSIA).

314. *See* Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 411 (2d Cir. 2014).

315. United States v. Hui Hsiung, 778 F.3d 738, 760 (9th Cir. 2015) (citing Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 860 (7th Cir. 2012)).

316. Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 471 (3d Cir. 2011).

317. *See* H.R. REP. NO. 97-686, at 9 (1982) (adding the "reasonably foreseeable" requirement to the FTAIA to "avoid . . . inquiries into the actual, subjective motives of defendants").

318. *See infra* Part III.B.

319. *See supra* Part II.A.2; *see also supra* Part I.A.1.

conjunction with a narrow import exclusion. This is because the proximate cause standard can address many concerns for protecting competition that the narrow import exclusion standard cannot. This broad rule still respects international comity due to the "gives rise to" requirement and the direct purchaser rule under *Illinois Brick*. Part III.B.1 addresses the doctrinal benefits to this approach. Part III.B.2 discusses the larger normative impact of such a framework.

1. Why Proximate Cause Works with Narrow Imports

A proximate cause standard for the direct effects provision in conjunction with a narrow import exclusion strikes the correct balance between protecting domestic competition and respecting international comity. As for competition, a rule that extends the Sherman Act to apply to more conduct will necessarily prevent more anticompetitive behavior.[320] Deterrence, naturally, increases as the law applies to a broader scope of conduct.[321]

This framework also respects international comity in two ways. First, since the Agencies conduct their own comity analysis before bringing suit,[322] foreign governments are more likely to agree with U.S. enforcement when pursued by the executive branch, as these actions reflect deliberate consideration of international relations.[323] In one such example, as the Seventh Circuit notes, "[n]o nation has objected to the DOJ's successful prosecution of foreign companies and even citizens of that country."[324] Plus, at any rate, when the Agencies pursue suit against a foreign firm in contravention of the interests of a foreign country, the protection of domestic competition necessarily outweighs comity considerations. This is because comity considerations end when there is sufficient prejudice to local public policy.[325] This analysis of competition as public policy is best made by the executive branch, as it is the political branch primarily entrusted with maintaining relations with other sovereign states.[326] As the Supreme Court has stated, "[when] regulating commercial relations with foreign governments . . . the Federal Government must speak with one voice."[327]

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320. *See supra* Part II.A.2.

321. *See, e.g.*, John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 429–30 (2017) (discussing how robust enforcement deters cartels and anticompetitive behavior). Not only is this principle fairly self-evident for deterrence within the antitrust context, but also for the law at large.

322. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 46, at 47.

323. *See* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 827 (7th Cir. 2015).

324. *See id.* at 827.

325. *See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 933 (D.C. Cir. 1984).

326. *See In re* Vitamin C Antitrust Litig., 8 F.4th 136, 161–62 (2d Cir. 2021) ("[T]he Constitution primarily entrusts foreign relations to the Executive Branch.").

327. Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) (discussing the Constitutional power to lay "imposts and duties on imports" with "no concurrent state power").

Second, comity concerns raised with respect to private plaintiffs' ability to bring suit under a broader direct effects provision are unfounded. Although private plaintiffs are not bound by the same comity analysis before they may bring suit, private plaintiffs are subject to two restrictions that sufficiently respect comity interests: the "gives rise to" provision[328] and the direct purchaser rule.[329] The former limitation requires that each private plaintiff's harm still be tied to U.S. commerce, with the requisite adverse effect.[330] The latter ensures that only those directly harmed by an antitrust violation—typically the first buyers in the supply chain—can sue.[331] This prevents suits from cascading down a complex global supply chain and avoids interference with other states' economies that comity concerns aim to avoid. Similar to the policy reasons justifying the *Illinois Brick* rule,[332] any benefits to protecting competition from enforcement by non-U.S. purchasers are explicitly outweighed by the risk to foreign sovereignty that could occur from suits by plaintiffs suffering from purely foreign harm.[333]

Despite the Third Circuit's broad interpretation of the import exclusion in *Animal Science Products*, which rendered the "gives rise to" provision inapplicable, the plaintiffs were still limited by the direct purchaser rule.[334] The lower court ultimately dismissed the complaint because the purchasers were too far removed from the defendants' conduct.[335] As per the rationale in *Illinois Brick Co.*, proximate cause can allow courts to ensure that the effect on U.S. commerce is not too remote.[336] Overall, this cohesive FTAIA framework prioritizes protecting domestic competition over international comity only when deemed necessary by the branch of government best equipped to make that determination.[337]

2. A Balanced Framework for Respecting Sovereignty and Addressing Antitrust Injury

Although protecting competition has always been the central objective of the American antitrust laws, its exact contours have been debated by courts

328. *See generally Empagran I*, 542 U.S. 155 (2004).

329. *See generally* Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

330. *See Empagran I*, 542 U.S. at 175 (vacating and remanding for lack of nexus between the foreign plaintiff's harm and the injury to U.S. commerce under 15 U.S.C. § 6a(2)).

331. *See id.* at 173.

332. *See Ill. Brick Co.*, 431 U.S. at 740–41.

333. *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) ("No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum.").

334. *See* Animal Sci. Prods., Inc. v. China Minmetals Corp., 34 F. Supp. 3d 465, 524 (D.N.J. 2014) (dismissing for lack of antitrust standing under the direct purchaser rule).

335. *See id.*

336. *Compare* United States v. Hui Hsiung, 778 F.3d 738, 762 (9th Cir. 2015) (affirming a conviction brought by the DOJ for foreign defendants participating in a global LCD conspiracy), *with* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2014) (dismissing claims brought by a private plaintiff for purchases from the same conspiracy due to the "gives rise to" provision and, on separate grounds, the direct purchaser rule).

337. *See In re* Vitamin C Antitrust Litig., 8 F.4th 136, 161–62 (2d Cir. 2021).

and scholars[338] since the enactment of the Sherman Act.[339] Modern antitrust debate has arguably centered on measurable harms, such as injury to market activity, which allows for relatively clear comparisons.[340]

Nonetheless, by explicitly addressing foreign commercial activity, the FTAIA deliberately incorporates an immeasurable policy objective into this antitrust analysis: the respect for sovereign authority in a globalized economy.[341] This interpretation of the FTAIA recognizes the inherent difficulty in striking this balance by leaving the responsibility of international enforcement to the political branches.[342]

Specifically, as for Congress, this reading directly aligns with the canon of interpretation based on prescriptive comity, which presumes legislatures limit the reach of their laws.[343] Here, a narrow import exclusion ensures that U.S. law applies to foreign companies without restriction only in the most limited circumstances. As the Seventh Circuit recognizes, "[t]he applicability of U.S. law to transactions in which a good or service is being sent directly into the United States, with no intermediate stops, is both fully predictable to foreign entities and necessary for the protection of U.S. consumers."[344]

Although it is a narrower standard than the broader "directed at an import market" rule, this narrow rule will still protect the U.S. economy because direct imports play a significant role in total U.S. consumption.[345] Moreover, many direct imports, even if not immediately consumed, continue further within domestic supply chains to eventually become consumed domestically

338. *See supra* note 60 (comparing differing policy goals throughout antitrust doctrinal development); *see, e.g.*, *supra* note 99 (discussing the debate within the context of *Alcoa*).

339. *See* Daniel Francis, *Antitrust Without Competition*, 74 DUKE L.J. 353, 357–58 (2024) (arguing that "there is no single 'true' way to essentialize the circumstance of competition").

340. *But see* Rebecca H. Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 5 (2016) (discussing the challenges present with comparing pro- and anticompetitive effects with the rule of reason for section 1 liability).

341. *See supra* Introduction.

342. *See* Bank Markazi v. Peterson, 578 U.S. 212, 234 (2016) (noting foreign affairs is "a domain in which the controlling role of the political branches is both necessary and proper").

343. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

344. *See* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 854 (7th Cir. 2012); *supra* Part II.B.1.

345. One concerning example is trade in "critical goods," as defined by the Cybersecurity and Infrastructure Security Agency as goods "critical to economic activity and welfare," because over a third of aggregate demand is met by imports. *See* Fernando Leibovici, *Critical Goods and International Trade Dependence in the U.S.*, FED. RSRV. BANK OF ST. LOUIS (Aug. 26, 2021), https://www.stlouisfed.org/on-the-economy/2021/august/critical-goods-trade-dependence [https://perma.cc/5NTG-TWGL] (noting in figure 1 the impact of "critical goods," as defined by the Cybersecurity and Infrastructure Security Agency, on the U.S. economy in 2015); *see also Mineral Import Dependence: A Threat to US Economic and National Security*, MINERALS MAKE LIFE (Feb. 13, 2024), https://mineralsmakelife.org/blog/mineral-import-dependence-a-threat-to-us-economic-and-national-security/ [https://perma.cc/HXH5-7STS] ("[T]he U.S. is reliant on imports for more than one-half of the country's consumption of 49 minerals and 100 percent import-dependent for 15 of them.").

or exported after further development from U.S. businesses.[346] Direct imports, evidently, play an important role in the U.S. economy, and the unqualified application of the antitrust laws to this activity is crucial to protect U.S. consumers.[347]

On the other hand, a broad direct effects provision with a proximate cause standard still empowers the Agencies to protect U.S. consumers from the substantial antitrust harms resulting from non-U.S. trade. This is important because domestic harm can and does result from anticompetitive conduct occurring exclusively abroad, especially within markets for scarce resources located outside of the United States.[348] This risk is particularly heightened by the fact that countries often exempt cartels from local antitrust laws if such cartels are only exporting to other countries.[349] For illustration, the United States exempts certain exports in the same way.[350]

At the same time, applying U.S. law overseas greatly risks infringing on those states' sovereignty, which could harm U.S. diplomacy. Foreign governments frequently voice concerns when American antitrust suits risk violating their national interests.[351] In one such instance, the United Kingdom's House of Lords stated that it considered the use of "the wide investigatory procedures" against non-Americans outside of the United States to be "an infringement of the . . . sovereignty of the United Kingdom."[352] As such, many countries have enacted "blocking statutes" that grant their governments the discretion to prohibit those within their

346. *See, e.g.*, Leibovici, *supra* note 345 (noting the significance of imports for goods necessary for national security).

347. That being said, courts are still able to exercise their discretion when a true conflict exists between U.S. and foreign law. *See In re* Vitamin C Antitrust Litig., 8 F.4th 136, 143 (2d Cir. 2021) (dismissing action on comity grounds and finding a true conflict when "defendants could not comply with both Chinese law and U.S. antitrust law").

348. *See, e.g.*, Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 848–50 (7th Cir. 2012) (noting that over half of all potash occurred naturally in only Canada, Russia, and Belarus).

349. *See* Competition Act, R.S.C. 1985, c. C-34 (Can.) ("No person shall be convicted of" a competition offense "that relates only to the export of products from Canada."); Michael Ristaniemi, *Export Cartels and the Case for Global Welfare*, 2017 GLOB. ANTITRUST REV. 173, 174–75 (noting export cartels, as "welfare decreasing and widespread," pose a nontariff barrier to trade and a challenge to economic trade liberalization).

350. *See, e.g.*, 15 U.S.C. § 62 ("Nothing contained in the Sherman Act shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade.").

351. *See* Donald E. Knebel, *Extraterritorial Application of U.S. Antitrust Laws: Principles and Responses*, 8 JINDAL GLOB. L. REV. 181, 191 (2017) (discussing the United Kingdom's blocking statute).

352. *See id.* ("Lord Wilberforce, writing for the majority, noted that '[i]t is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack.'" (alteration in original) (quoting Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] AC 547 (HL) 616–17 (appeal taken from Eng.))).

jurisdiction from complying[353] with U.S.-court-ordered discovery.[354] Such an extreme measure demonstrates the genuine risk to diplomacy and effective enforcement[355] that can result from the extraterritorial application of U.S. law. Moreover, overseas application of the Sherman Act undermines the effectiveness of other states' antitrust regimes, since cartel members will be less likely to participate in local amnesty programs if they remain at risk of treble damages in U.S. courts.[356] The Agencies, therefore, are the appropriate institutions to pursue these international suits, as they are in a position to properly balance comity interests with the harm to the U.S. economy.[357]

Though a proximate cause direct effects provision still requires the effect of foreign conduct to be substantial and foreseeable, this will not result in real gaps in enforcement. For one thing, antitrust regimes found in other countries are often as thorough as the American approach.[358] Moreover, any difference in approach is specifically the type of legal difference[359] intended to be respected by international comity concerns.[360] Finally, the Agencies can rely on bilateral treaties and U.S. participation in international organizations as other ways outside of Sherman Act suits to enforce antitrust interests.[361]

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353. *See id.* at 193. One example is the Protection of Trading Interests Act 1980, from the United Kingdom, which "gives the Secretary of State authority to prohibit compliance with a requirement directed to 'a person or persons in the United Kingdom to produce to any court, tribunal or authority of an overseas country any commercial document which is not within the territorial jurisdiction of that country.'" *Id.* at 192 (quoting Protection of Trading Interests Act 1980, c. 11, § 2 (UK)).

354. *See id.* In many instances, federal courts demand discovery anyway. *See* M.J. Hoda, *The* Aérospatiale *Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It*, 106 CALIF. L. REV. 231, 233–34 (2018) (noting the high frequency of U.S. courts compelling discovery requests to foreign parties despite blocking statutes). This forces foreign defendants to either "*violate their own countries' laws*" or face U.S. penalties. *Id.*

355. *See* Delrahim, *supra* note 80, at 423 ("When our trading partners fear that the results of their efforts will be applied in follow-on treble damages actions in our courts, the U.S. government is less able to obtain the cooperation and best efforts of foreign authorities.").

356. *See Empagran I*, 542 U.S. 155, 168 (2004); *see also supra* note 139 and accompanying text.

357. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 46, at 28–29. Ultimately, the Agencies are better positioned to draw on the federal government's broader tools of statecraft in advancing the national interest.

358. *See* Michael Ristaniemi, *Convergence, Divergence or Disturbance—How Major Economic Powers Approach International Antitrust*, CONCURRENCES, no. 3, 2018, at 1, 1–3 (comparing the U.S., European Union, and Chinese antitrust regimes).

359. For example, "[t]he foundational differences between U.S. monopoly law and EU dominance law and policy are quite significant and derive from diverse historical contexts." *See* James Keyte, *Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge*, 33 ANTITRUST 113, 114 (2018) (comparing section 2 with its European analogue).

360. *Cf.* Butters v. Vance Int'l, Inc., 225 F.3d 462, 467 (4th Cir. 2000) ("FSIA immunity presupposes a tolerance for the sovereign decisions of other countries that may reflect legal norms and cultural values quite different from our own.").

361. *See generally Antitrust Cooperation Agreements*, ANTITRUST DIV.: U.S. DEP'T OF JUST., https://www.justice.gov/atr/antitrust-cooperation-agreements [https://perma.cc/53N9-

Private plaintiffs, strongly incentivized by the idea of receiving treble damages to pursue U.S. suits, are meaningfully limited by a narrow import exclusion, the "gives rise to" provision, and the direct purchaser rule. Because private plaintiffs do not consider diplomatic concerns in their decision to bring an antitrust suit, limitations are appropriate in all but the clearest instances of domestic injury. Although courts may abstain from exercising jurisdiction in certain instances,[362] the judiciary is ill-equipped and ill-suited to stop private plaintiffs from seeking antitrust remedies on the basis of complex foreign policy analysis.[363] At any rate, when courts abstain from exercising their jurisdiction out of respect for comity interests, the antitrust harm still continues.[364] Only the Agencies' measured approach to U.S. antitrust enforcement can both safeguard the interests of domestic consumers and affirm respect for the sovereignty of other nations.

Overall, this conception of the FTAIA strikes the right balance to address domestic antitrust injury while reducing the possibility of U.S. legal overreach into other sovereign states.

CONCLUSION

The FTAIA, enacted in 1982, represented an attempt by Congress to clarify the extraterritorial reach of the Sherman Act.[365] The need for this clarification was obvious. *American Banana*'s conflict of laws rule, based solely on territorial boundaries, was unfit to address the newly interconnected global economy nearly fifty years later.[366] The effects test in *Alcoa*, while an improvement, did not provide a workable standard for courts to apply.[367] The FTAIA, however, confused courts more than it clarified the law.[368]

This Note attempts to provide a workable framework for courts with a narrow reading of the import exclusion and a broad proximate cause standard for the direct effects provision. This reading of the FTAIA aligns with the text of the statute and its legislative history.[369] Moreover, it preserves the goal of antitrust law to protect competition while allowing U.S. law to respect the authority of other sovereign states.[370] Ultimately, this reading of the

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AHBT] (last visited Sep. 7, 2025). Ultimately, the political branches are more capable of effectuating these strategic decisions because the federal government "possess[es] significant diplomatic tools and leverage [that] the judiciary lacks." United States v. Bankasi, 120 F.4th 41, 58 (2d Cir. 2024) (citing Munaf v. Geren, 553 U.S. 674, 702–03 (2008)); *see, e.g.*, *supra* notes 84–94 (discussing U.S. involvement in Panamanian independence contemporaneous with the Supreme Court's refusal to extend the Sherman Act extraterritorially in *American Banana*).

362. *See supra* Part I.C.2.

363. *See In re* Vitamin C Antitrust Litig., 8 F.4th 136, 161–62 (2d Cir. 2021).

364. *See, e.g.*, *id.* at 163 (dismissing the plaintiffs' complaint with prejudice on comity grounds for admitted vitamin price-fixing).

365. *See supra* Introduction.

366. *See supra* Part I.B.1.

367. *See supra* Part I.B.2.

368. *Compare supra* Part II.A.1, *with supra* Part II.A.2.

369. *See supra* Part III.B.1.

370. *See supra* Part III.B.2.

FTAIA properly strikes the balance between the policy goals of protecting U.S. competition and respecting international comity in the twenty-first century.