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In Need of Direction: An Evaluation of the "Direct Effect" Requirement Under Foreign Trade Antitrust Improvements Act

Claire L. Leonard

Washington and Lee University School of Law

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In Need of Direction: An Evaluation of the “Direct Effect” Requirement Under the Foreign Trade Antitrust Improvements Act[†]

Claire L. Leonard*

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I. Introduction

Courts have long struggled with the question of when American antitrust laws apply to foreign anticompetitive conduct.¹ The precise extraterritorial reach of U.S. antitrust laws remains uncertain as the global economy becomes increasingly interdependent and international trade barriers evaporate.² Courts face the daunting task of balancing two competing interests: (1) encouraging vigorous antitrust enforcement against

1. See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 353–58 (1909) (considering the extraterritorial application of the Sherman Act for the first time since the statute's enactment).

2. 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, 511 (2014) (evaluating the extraterritorial reach of U.S. antitrust law); see also Diane P. Wood, *Foreword* to MARK R. JOELSON, *AN INTERNATIONAL ANTITRUST PRIMER*, at xi, xi (2d ed. 2001) (“The volume of international transactions has exploded: old political barriers to trade and commerce have fallen; and the world of cyberspace is quickly erasing what is left of national boundaries for economic purposes.”).

anticompetitive conduct that harms American commerce and (2) accommodating the antitrust regimes of foreign nations.³

The Sherman Act⁴ makes illegal every contract, combination, or conspiracy in restraint of interstate or foreign commerce.⁵ Congress enacted the statute in 1890 to “secure equality of opportunity to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.”⁶ Soon thereafter, the question arose as to whether and to what extent the Sherman Act applied extraterritorially.⁷ At first, the U.S. Supreme Court strictly limited the Sherman Act’s application to when conduct occurred overseas.⁸ Some years later, Judge Learned Hand took a different approach, declaring that the Sherman Act applies to foreign conduct that has an “effect” on U.S. commerce.⁹ Subsequent judicial applications of Judge Hand’s “effects test” produced varied expressions of the standard and created confusion among courts and the antitrust community.¹⁰

In 1982, Congress enacted the Foreign Trade Antitrust Improvements Act¹¹ (FTAIA) with the intention of clarifying the

3. 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. SERV. AM. L. 415, 430–31 (2005) (summarizing the problems associated with balancing interests when evaluating the extraterritorial reach of the antitrust laws).

4. 15 U.S.C. § 1 (2012).

5. *Id.*

6. *Charles A. Ramsay Co. v. Associated Bill Posters*, 260 U.S. 501, 512 (1923).

7. See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 359 (1909) (analyzing the Sherman Act’s extraterritorial reach for the first time).

8. See *id.* at 355–56 (refusing to apply U.S. antitrust laws to conduct occurring in Panama and Costa Rica).

9. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443–44 (2d Cir. 1945) (articulating a two-part “effects test” in which American antitrust laws may reach foreign conduct that intended to affect and actually effected domestic commerce).

10. See H.R. REP. NO. 97-686, at 2 (1982) (noting that “courts differ[ed] in their expression[s] of the proper test”); Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 310–13 (2007) (discussing the confusion resulting from different phrasings of the effects test).

11. 15 U.S.C. § 6a (2012).

international reach of U.S. antitrust laws.¹² The FTAIA provides that foreign conduct is outside of the scope of the Sherman Act unless it “has a *direct*, substantial, and reasonably foreseeable effect” on domestic or import commerce and “such effect gives rise to a claim under the [Sherman Act].”¹³ Since the FTAIA’s passage, courts and practitioners alike have struggled to determine the meaning of the word “direct.”¹⁴ In a globalized economy, the precise meaning of direct becomes even more elusive—and even more significant—in the face of complex corporate structures and elaborate supply chains that span numerous countries.¹⁵

A split amongst the U.S. Courts of Appeals has emerged regarding the proper test for determining whether foreign conduct has a sufficiently direct effect on U.S. commerce to trigger application of the Sherman Act.¹⁶ The U.S. Court of Appeals for the Ninth Circuit says an effect is direct if it follows as an “immediate consequence” of the anticompetitive conduct.¹⁷ Meanwhile, the U.S. Courts of Appeals for the Second and Seventh Circuits have endorsed a different standard in which directness requires a “reasonably proximate causal nexus” between conduct and effect.¹⁸ The U.S. Supreme Court has yet to weigh in.

12. See H.R. REP. NO. 97-686, at 2 (seeking to clarify the Sherman Act’s reach with respect to international transactions).

13. 15 U.S.C. § 6a (emphasis added).

14. See ANTITRUST MODERNIZATION COMM’N, REPORT & RECOMMENDATIONS 225 (2007), http://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf (“The complex wording of [the FTAIA], however, has also resulted in ambiguities. The territorial scope of the Sherman Act and who may bring a claim under it thus remains unclear.”).

15. See Delrahim, *supra* note 3, at 415 (discussing the need for antitrust laws to respond to the “increasing interdependency of the global economy”); see also Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL’Y INT’L BUS. 1, 74 (1992) (“The growing significance of international trade and investment has increasingly led the United States and other nations to devote regulatory attention to conduct occurring abroad.”).

16. See *infra* Part III (discussing the diverging tests for direct effect).

17. See *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (articulating the immediate consequence test).

18. See *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 398 (2d Cir. 2014) (adopting the reasonably proximate causal nexus test); *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc) (same).

This Note considers whether the proper test for a direct effect under the FTAIA is (1) if the effect follows as an immediate consequence of the anticompetitive conduct, as the Ninth Circuit has held, or (2) if there is a reasonably proximate causal nexus between the conduct and the effect, as the Second and Seventh Circuits have held. Ultimately, this Note recommends that courts adopt the reasonably proximate causal nexus test because (1) it is an appropriate construction of the statutory language given the FTAIA's purpose and history and (2) it provides the flexibility necessary to address anticompetitive conduct in the context of a complex global economy. Part II first describes the development of extraterritorial application of U.S. antitrust law. It then summarizes the FTAIA's enactment and significant interpretations. Part III presents the diverging interpretations of what constitutes a direct effect under the FTAIA. Part IV evaluates the merits of each test and argues that the reasonably proximate causal nexus test is the superior standard. Finally, Part V urges courts to consider important policy concerns when interpreting the FTAIA.

II. History of U.S. Antitrust Law's Extraterritorial Reach

Section 1 of the Sherman Act declares that “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations” is illegal.¹⁹ Enacted in 1890, the Sherman Act avows to “preserve[] free and unfettered competition”²⁰ and to “protect United States consumers from the consequences of anticompetitive conduct.”²¹

A textual analysis of Section 1 reveals that Congress intended the Sherman Act to extend to at least some foreign commerce.²² Commerce “with” foreign nations refers to “business

19. 15 U.S.C. § 1 (2012).

20. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

21. *LSL Biotechnologies*, 379 F.3d at 693 (Aldisert, J., dissenting); see also Joseph P. Bauer, *The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to American Banana?*, 65 ME. L. REV. 3, 5 (2012) (describing the purposes of the Sherman Act as “enhancement of consumer welfare, the promotion of competition, and compensation of the victims of antitrust violations”).

22. See 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN

transactions between some portion of the United States and a foreign country, going in either direction.”²³ This is made clear when juxtaposed with Congress’s use of “among” to refer to interstate commerce.²⁴ Congress certainly intended the Sherman Act to apply to commerce between individual states, but it did not intend for it to apply to commerce between two foreign nations.²⁵ Thus, the Sherman Act may reach foreign commerce. The question remains, however, exactly *when* such foreign activity comes within the Sherman Act’s scope.

A. *The Sherman Act’s Extraterritorial Reach Before 1982*

The Supreme Court first addressed the Sherman Act’s extraterritorial reach in *American Banana Co. v. United Fruit Co.*²⁶ In *American Banana*, an Alabama corporation alleged that a New Jersey corporation engaged in anticompetitive activity in Panama and Costa Rica.²⁷ The Court concluded the Sherman Act did not extend to conduct occurring abroad.²⁸ Justice Oliver Wendell Holmes recognized the importance of respecting a sovereign nation’s authority over acts occurring within its own jurisdiction.²⁹ The Court articulated the “territoriality test,”

ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 272a, at 274–75 (3d ed. 2006) (summarizing the Sherman Act’s applicability to foreign conduct).

23. *Id.* ¶ 272a, at 275.

24. See 15 U.S.C. § 1 (prohibiting anticompetitive activity “among the several States” (emphasis added)); see also AREEDA & HOVENKAMP, *supra* note 22, ¶ 272i, at 286 (noting the absence of “express authority to regulate commerce ‘among’ foreign nations”).

25. See AREEDA & HOVENKAMP, *supra* note 22, ¶ 272i, at 286 (“[T]he language would not obviously reach commerce from, say, Ecuador to Germany, for that would ordinarily be considered commerce ‘among’ foreign nations or ‘purely foreign’ commerce.”).

26. 213 U.S. 347 (1909).

27. See *id.* at 354 (summarizing the plaintiff’s allegations).

28. See *id.* at 355 (explaining that “the acts causing the damage were done . . . outside the jurisdiction of the United States,” and finding it “entirely plain that what defendant did in Panama or Costa Rica is not within the scope of the [Sherman Act]”).

29. See *id.* at 356 (indicating that such overreaching “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” (citation omitted)).

noting “the general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”³⁰

Courts have since abandoned *American Banana*'s territoriality standard and replaced it with the “effects test.”³¹ In *United States v. Aluminum Co. of America (Alcoa)*,³² Judge Learned Hand construed the Sherman Act to mean a “state may impose liabilities . . . for conduct outside its borders that has consequences within its borders which the state reprehends.”³³ He further concluded that American antitrust laws extend to foreign acts that are intended to affect U.S. commerce and actually have such an effect.³⁴ *Alcoa* dictated that “the situs of the *effects* as opposed to the *conduct*” determined whether U.S. antitrust laws applied.³⁵ Thus, anticompetitive activity that “restrain[s] the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.”³⁶ Following *Alcoa*, it became “abundantly plain that some extraterritorial application of the Sherman Act [was] proper.”³⁷

30. *Id.*

31. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1181 (E.D. Pa. 1980) (“*American Banana* has never been explicitly overruled. However, its authority has been so eroded by subsequent case law as to have been effectively limited to its specific factual pattern.”); *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979) (stating that “history has proven *American Banana* to be not a seminal decision but an aberration”); AREEDA & HOVENKAMP, *supra* note 22, ¶ 272c, at 278 (“Since at least 1945, the *American Banana* test has been rejected.”).

32. 148 F.2d 416 (2d Cir. 1945). The Second Circuit sat as a court of last resort because the Supreme Court lacked a quorum. *Id.* at 421. Thus, the *Alcoa* decision carries the precedential weight of a Supreme Court opinion.

33. *Id.* at 443 (citations omitted).

34. See *id.* at 443–44 (articulating the appropriate standard for assessing whether U.S. antitrust law covers foreign conduct); see also H.R. REP. NO. 97-686, at 5 (1982) (summarizing the *Alcoa* test); AREEDA & HOVENKAMP, *supra* note 22, ¶ 272d, at 179–80 (explaining the *Alcoa* decision).

35. H.R. REP. NO. 97-686, at 5 (1982) (citation omitted).

36. *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962) (rejecting the *American Banana* test when conduct “had an impact within the United States and upon its foreign trade”).

37. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1185 (E.D. Pa. 1980).

The effects test, however, led to confusion among courts regarding the nature and extent of effects required.³⁸

B. The Foreign Trade Antitrust Improvements Act of 1982

1. Statutory Language

In 1982, Congress enacted the FTAIA to clarify the extraterritorial reach of U.S. antitrust law.³⁹ The statute provides that 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].⁴⁰

This effectively means the antitrust laws do not apply to most foreign anticompetitive conduct.⁴¹ The FTAIA initially

38. Compare *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1974) (looking to whether the conduct “directly affect[s] the flow of foreign commerce into or out of this country”), with *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 822 (N.D. Cal. 1957) (requiring a “direct and substantial restraint” (emphasis added)), and *United States v. Gen. Elec. Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949) (asserting that foreign conduct “must have had a direct and substantial effect” (emphasis added)), with *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 883 (5th Cir. 1982) (requiring conduct to “directly or substantially affect” U.S. commerce in order to come “within the scope of the Sherman Act” (emphasis added)), and *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979) (“[I]t is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not [d]e minimis.”).

39. See H.R. REP. NO. 97-686, at 2 (indicating the statute’s purpose).

40. 15 U.S.C. § 6a (2012).

41. See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158 (2004) (discussing the FTAIA’s text); AREEDA & HOVENKAMP, *supra* note 22,

excludes all export and other commercial activities occurring abroad from the Sherman Act's scope.⁴² It then provides an exception bringing "such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce . . . *and* (2) has an effect of a kind that antitrust law considers harmful."⁴³ The FTAIA does not apply to import trade and import commerce because that activity is already subject to the Sherman Act.⁴⁴

2. Congressional Purpose

Congress enacted the FTAIA in 1982 with two primary purposes: (1) to clarify the scope of the Sherman Act's jurisdiction with respect to foreign transactions and (2) to boost American exports.⁴⁵ Various courts had reached different conclusions regarding the precise nature and extent of the effect required under *Alcoa*.⁴⁶ Congress intended the FTAIA's objective "direct, substantial, and reasonably foreseeable" test to "serve as a simple and straightforward clarification of existing American law and the Department of Justice enforcement standards."⁴⁷ Thus, the Act was supposed to provide "a clear benchmark" for

¶ 272i, at 288 (same).

42. See *Empagran*, 542 U.S. at 162 (interpreting the FTAIA's technical language).

43. *Id.*

44. See 15 U.S.C. § 6a (covering conduct with foreign nations "other than import trade or import commerce"); H.R. REP. NO. 97-686, at 9 ("[I]t is important that there be no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the [Sherman Act].") (quoting *Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 99 (1981) (statement of James R. Atwood, Partner, Covington & Burling)); *id.* at 10 (clarifying that "import transactions are not" covered by the FTAIA amendment).

45. See H.R. REP. NO. 97-686, at 2 (clarifying the Sherman Act "to make explicit [its] application only to conduct having a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce or domestic exports" and seeking "to promote American exports").

46. See *id.* at 5 (discussing inconsistencies in courts' application of the *Alcoa* test).

47. *Id.* at 2.

businesspeople, the legal community, and America's trading partners.⁴⁸

The FTAIA is primarily concerned with American consumers and exporters.⁴⁹ The Act provides that the antitrust laws do not apply to wholly foreign transactions or export trade unless the requisite effect is felt within the United States.⁵⁰ Accordingly, the Sherman Act does not reach conduct that causes purely foreign injury.⁵¹ In enacting the FTAIA, Congress aimed to “*release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm.”⁵² This limitation reflects Congress's fear that expansive extraterritorial reach of the U.S. antitrust laws would expose American courts to litigation “at the behest of foreign interests in cases having only minimal consequences for American economic interests.”⁵³

C. Early Interpretations of the FTAIA

The FTAIA initially garnered little attention after its passage in 1982.⁵⁴ About a decade later, courts began wrestling

48. *Id.* at 2–3.

49. See AREEDA & HOVENKAMP, *supra* note 22, ¶ 272i, at 287 (“[T]he concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers.”); see also H.R. REP. NO. 97-686, at 2 (hoping the FTAIA would “encourage the business community to engage in efficiency producing joint conduct in the export of American goods and services”); 127 CONG. REC. H779 (daily ed. Mar. 4, 1981) (statement of Rep. Peter W. Rodino) (noting that the bill aims to allow “American firms greater freedom when dealing internationally while reinforcing the fundamental commitment of the United States to a Competitive domestic marketplace”).

50. See H.R. REP. NO. 97-686, at 10 (establishing that “wholly foreign transactions . . . are covered by the amendment” if they satisfy the effect requirement).

51. See *F. Hoffman–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004) (“The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets.”).

52. *Id.* at 166.

53. AREEDA & HOVENKAMP, *supra* note 22, ¶ 272i, at 287.

54. See, e.g., *United States v. LSL Biotechnologies*, 379 F.3d 672, 678 (9th Cir. 2004) (“Federal courts did not shower the FTAIA with attention for the first decade after its enactment.”); Delrahim, *supra* note 3, at 419 (“For several years,

with the statute and interpreting its technical, inelegant language.⁵⁵ In *Hartford Fire Insurance Co. v. California*,⁵⁶ the Supreme Court resolved any lingering tension between *American Banana* and *Alcoa*, declaring: “[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”⁵⁷

Courts have interpreted the antitrust laws, including the FTAIA, with an eye towards the principle of comity.⁵⁸ As a general interpretive rule, ambiguous statutes are normally construed “to avoid unreasonable interference with the sovereign authority of other nations.”⁵⁹ Courts must assume Congress judiciously considered other nations’ sovereign interests when drafting legislation.⁶⁰ Because the underlying purpose of the antitrust laws is to protect American consumers and American commerce, “U.S. law should not supplant the policy choices that other countries have made” when the injury is felt outside of the United States.⁶¹ The Supreme Court has warned of the “serious

courts seemed to avoid the FTAIA, and it attracted little attention well into the 1990s.”)

55. See, e.g., *LSL Biotechnologies*, 379 F.3d at 698 (noting “the case reporters have steadily filled with decisions interpreting this previously obscure statute”); *Empagran*, 542 U.S. at 162 (characterizing the FTAIA’s language as “technical”); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (“The FTAIA is inelegantly phrased . . .”).

56. 509 U.S. 764 (1993).

57. *Id.* at 796 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986)).

58. See Delrahim, *supra* note 3, at 421 (emphasizing that courts should construe “U.S. antitrust laws, like other U.S. laws,” to avoid undue interference with the legitimate interests of foreign sovereigns); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (AM. LAW INST. 1987) (“[A] state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”).

59. *F. Hoffman–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (citations omitted).

60. See *id.* (discussing the assumption that legislators account for other sovereigns’ legitimate interests).

61. Delrahim, *supra* note 3, at 421 (explaining the importance of comity when enforcing U.S. antitrust laws); see also *Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308, 314 (1978) (“Congress’ foremost concern in passing the antitrust laws was the protection of Americans.”).

risk of interference with a foreign nation's ability to independently regulate its own commercial affairs."⁶² Application of U.S. antitrust laws to foreign conduct, however, may still accord with the principle of comity as long as it "reflect[s] a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused."⁶³

While the FTAIA aimed to clarify the extraterritorial reach of U.S. antitrust law, the amendment actually left many questions unanswered.⁶⁴ One interpretative issue is whether the FTAIA's restrictions on the Sherman Act's extraterritorial scope are jurisdictional or substantive in nature.⁶⁵ A substantive statutory provision defines the elements essential for a meritorious claim, whereas subject matter jurisdiction relates to a court's power to hear a case.⁶⁶ The substantive-versus-jurisdictional distinction matters because it affects, for example, how courts handle disputed facts and dictates when a party may raise a claim.⁶⁷

Initially, courts treated the FTAIA's limitations as jurisdictional constraints rather than substantive elements of a

62. *Empagran*, 542 U.S. at 165; *see also* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies.").

63. *Empagran*, 542 U.S. at 165 (citations omitted).

64. *See, e.g.*, *Huffman*, *supra* note 10, at 285 ("Far from bringing clarity to the law of extraterritorial antitrust enforcement, the FTAIA has introduced confusion into a regime that, before its enactment, was a modestly successful common-law scheme.").

65. *Compare* *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 952 (7th Cir. 2003) (en banc) (deeming the FTAIA's limitations to be jurisdictional), *overruled by* *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc), *with* *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 469 (3d Cir. 2011) (holding that "the FTAIA imposes a substantive merits limitation rather than a jurisdictional bar").

66. *See* *Morrison v. Nat'l Austrl. Bank Ltd.*, 561 U.S. 247, 254 (2010) (explaining the difference between subject-matter jurisdiction and merits questions in the context of extraterritorial securities law); *Animal Science*, 654 F.3d at 467 (discussing substantive and jurisdictional limitations with respect to the FTAIA).

67. *See* *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 852–53 (7th Cir. 2012) (en banc) (explaining the importance of the distinction). For example, the distinction controls whether a party uses a motion to dismiss for failure to state a claim, per Federal Rule of Civil Procedure 12(b)(6), or a motion to dismiss for lack of subject matter jurisdiction, per Rule 12(b)(1). *Id.*

claim.⁶⁸ This changed after *Arbaugh v. Y&H Corp.*,⁶⁹ an employment discrimination case in which the Supreme Court announced a bright-line test to determine when statutory requirements are jurisdictional:

If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.⁷⁰

Since *Arbaugh*, the federal courts of appeal have determined that the FTAIA's requirements go to the merits of a Sherman Act claim rather than to the court's subject matter jurisdiction.⁷¹

Another major issue is whether the FTAIA codified existing common law standards—as applied in *Alcoa* and its progeny—or introduced a new dimension to antitrust law.⁷² This critical

68. See, e.g., *United Phosphorus*, 322 F.3d at 952 (characterizing FTAIA inquiries as jurisdictional because the “FTAIA limits the power of the United States courts (and private plaintiffs) from nosing about where they do not belong”); *Filetech S.A. v. Fr. Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998) (describing the FTAIA's limitations as jurisdictional). But see *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (“[T]he extraterritorial reach of the Sherman Act . . . has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct.”). Although the *Hartford Fire* majority “had no need to engage the dissenters on the ‘element’ versus ‘jurisdiction’ point,” Justice Scalia’s dissent still sheds light on the issue. *United Phosphorus*, 322 F.3d at 956 (Wood, J., dissenting).

69. 546 U.S. 500 (2006).

70. *Id.* at 515–16 (analyzing whether a statutory limitation in Title VII of the Civil Rights Act of 1964 affects subject matter jurisdiction or constitutes a “substantive element of the claim on the merits”).

71. See *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014) (“[T]he requirements of the FTAIA are substantive and nonjurisdictional in nature.”); *Minn-Chem*, 683 F.3d at 852 (adopting rule “that the FTAIA spells out an element of the claim”); *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 469 (3d Cir. 2011) (overruling earlier precedent construing “the FTAIA as imposing a jurisdictional limitation on the application of the Sherman Act”).

72. See *United States v. LSL Biotechnologies*, 379 F.3d 672, 678 (9th Cir. 2004) (noting that “many courts have debated whether the FTAIA established a new jurisdictional standard or merely codified the standard applied in *Alcoa* and its progeny”).

question ultimately informs the meaning of direct and thus the proper test for determining the Sherman Act's extraterritorial reach.⁷³ If the FTAIA merely codified existing law, then precedent must guide any judicial interpretation of the word direct.⁷⁴ If the FTAIA articulated a new dimension of antitrust law, however, then courts interpret the meaning of direct from scratch because the pre-FTAIA common law does not guide their analysis.⁷⁵

In *Hartford Fire*, the Supreme Court raised this question—without answering it—in the context of an alleged conspiracy among London reinsurance companies to manipulate the primary insurance market in the United States.⁷⁶ The Court noted that it is “unclear . . . whether the [FTAIA's] ‘direct, substantial, and reasonably foreseeable effect’ standard amends existing law or merely codifies it. We need not address [this] question[] here.”⁷⁷ The issue of whether Congress intended to substantively change the preexisting common law standards remains open to debate.⁷⁸

III. Diverging Tests for Direct Effect

Following the FTAIA's enactment, the legal community struggled to define the word direct.⁷⁹ The Ninth Circuit was the first “to face the dragon in his teeth and stop tap dancing around

73. See *infra* notes 74–75 and accompanying text (explaining significance of codification debate).

74. See *LSL Biotechnologies*, 379 F.3d at 691 (Aldisert, J., dissenting) (“I am guided by contemporary definitions of the term as well as relevant precedent, including that which preexisted by the FTAIA.”).

75. Cf. *id.* at 679–80 (majority opinion) (interpreting the FTAIA anew without relying on existing common law standards).

76. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 770–78 (1993) (summarizing the case).

77. *Id.* at 796 n.23 (citation omitted).

78. See Delrahim, *supra* note 3, at 418 (“The common law standard for the reach of the Sherman Act to foreign conduct may or may not have changed with the enactment of the FTAIA . . .”).

79. See Huffman, *supra* note 10, at 315 (“[D]irect, substantial, and reasonably foreseeable’ is not self-defining and has created interpretive difficulties.”); Sowell, *supra* note 2, at 514 (“[T]he FTAIA has merely added to the mounting confusion surrounding the application of American antitrust laws to foreign conduct.”).

the meaning of the word ‘direct.’”⁸⁰ Since then, two other circuits have tackled the issue and reached a different conclusion.⁸¹

A. Immediate Consequence Test

The Ninth Circuit articulated the immediate consequence test in *United States v. LSL Biotechnologies*.⁸² In *LSL Biotechnologies*, the government brought an antitrust action challenging a noncompete agreement between LSL Biotechnologies (an American corporation) and Hazera (an Israeli corporation).⁸³ These companies sought to develop a genetically-altered tomato seed that would produce ripe tomatoes with enough shelf life to travel from the growing locations to the various markets without spoiling.⁸⁴ The agreement allocated to each party exclusive territories to sell long shelf-life seeds, and LSL Biotechnologies received North America in the deal.⁸⁵ The government challenged the agreement as a “naked restraint of trade” because it “unreasonably reduc[ed] competition to develop better seeds for fresh-market, long shelf-life tomatoes for sale in the United States.”⁸⁶

A divided panel of the Ninth Circuit affirmed the district court’s dismissal of the government’s complaint because the noncompete agreement did not have a direct effect on U.S. commerce, as required by the FTAIA.⁸⁷ The Ninth Circuit announced that a direct effect “follows as an immediate consequence” of the conduct at issue.⁸⁸ The effect cannot depend

80. *United States v. LSL Biotechnologies*, 379 F.3d 672, 684 (9th Cir. 2004) (Aldisert, J., dissenting).

81. *See infra* Parts III.B.1–2 (presenting an alternative test adopted by the Second and Seventh Circuits).

82. 379 F.3d 672 (9th Cir. 2004).

83. *Id.* at 674.

84. *Id.*

85. *Id.* at 674–75.

86. *Id.* at 675.

87. *See id.* (“[T]he United States has not presented us with sufficient evidence to conclude that the district court clearly erred in ruling on the existing pleadings that Hazera’s exclusion does not yet have a direct effect on domestic commerce.”).

88. *Id.* at 680 (citing *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618

on uncertain and intervening events.⁸⁹ In reaching this conclusion, the majority cited a dictionary published contemporaneously with the FTAIA's enactment, which defined direct as "proceeding from one point to another in time or space without deviation or interruption."⁹⁰

The Ninth Circuit majority also relied on the Supreme Court's interpretation of the term direct in the Foreign Sovereign Immunities Act (FSIA).⁹¹ The FSIA states, in relevant part, that sovereign immunity of foreign nations does not extend to conduct "outside the territory of the United States . . . that . . . causes a direct effect in the United States."⁹² In *Republic of Argentina v. Weltover, Inc.*,⁹³ the Supreme Court interpreted this provision and determined that an effect is direct under the FSIA if it is an immediate consequence of the conduct.⁹⁴ *Weltover* denied that the FSIA section at issue "contains any unexpressed requirement of 'substantiality' or 'foreseeability'" qualifying the requisite direct effect.⁹⁵

In interpreting the FTAIA's legislative history, the *LSL Biotechnologies* court rejected the contention that "the FTAIA merely codified the existing common law regarding when the Sherman Act applies to foreign conduct."⁹⁶ The court refused to apply *Alcoa's* effects test anymore.⁹⁷ It believed *Alcoa* only required "some substantial effect in the United States."⁹⁸ Thus,

(1992)).

89. *See id.* at 681 ("An effect cannot be 'direct' where it depends on such uncertain intervening developments.").

90. *Id.* at 680 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1981)).

91. 28 U.S.C. § 1602 (2012).

92. *Id.* § 1605(a)(2) (emphasis added).

93. 504 U.S. 607 (1992).

94. *See id.* at 618 (defining "direct effect" under the FSIA).

95. *Id.* The Court's statement is relevant because the FTAIA, unlike the FSIA, does contain express requirements of foreseeability and substantiality. *See infra* notes 125–130 and accompanying text (differentiating between the FSIA and FTAIA).

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

97. *See id.* (concluding that the FTAIA's promulgation precludes any reliance on *Alcoa*).

98. *Id.* at 679 (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993)).

the court viewed the directness requirement as a new ingredient the FTAIA added to existing extraterritorial standards.⁹⁹ So it interpreted the word direct anew—that is, not considering prior antitrust common law interpretations—and formulated the immediate consequence test.¹⁰⁰

Judge Aldisert, a seasoned antitrust jurist, criticized the majority's interpretation of direct in his dissenting opinion.¹⁰¹ He asserted that the FTAIA's use of the word direct is “merely a codification of antitrust law in place prior to the enactment of the FTAIA.”¹⁰² He further contended the direct effects requirement has been an integral part of antitrust law before and after the FTAIA's passage in 1982.¹⁰³ To support this proposition, Judge Aldisert pointed to historical case law (dating back to 1898), the *Restatement (Second) of Foreign Relations of the United States* (1965), the Department of Justice's (DOJ) Antitrust Guide for International Operations (1977), and the American Bar Association (ABA) Section of Antitrust Law's Report Concerning Legislative Proposals to Promote Export Trading (1981).¹⁰⁴

Next, Judge Aldisert rejected the majority's characterization of the *Alcoa* decision.¹⁰⁵ In *Alcoa*, Judge Learned Hand stated that “the ingot fabricated by ‘Alcoa,’ necessarily had a *direct effect* upon the ingot market.”¹⁰⁶ Thus, the *LSL Biotechnologies* majority's contention that *Alcoa* did not contemplate a directness

99. See *id.* (contending that Congress would not have said “direct, substantial, and reasonably foreseeable” if it meant to require only “some substantial effect”); *id.* at 680 n.6 (stating that the FTAIA, not the common law, provides the source of the directness requirement).

100. See *id.* at 680 (interpreting direct and failing to consult common law extraterritoriality standards to inform the analysis).

101. See *id.* at 692 (Aldisert, J., dissenting) (rejecting the majority's interpretation of direct).

102. *Id.* at 683.

103. See *id.* at 685–87 (asserting that the “direct effects” test has long been “part and parcel of antitrust law”).

104. See *id.* at 685–91 (detailing the history of extraterritorial antitrust law from 1898 through the FTAIA's passage in 1982). See also *infra* Part IV.A.3 for an in-depth discussion of pre-FTAIA extraterritorial standards.

105. See *United States v. LSL Biotechnologies*, 379 F.3d 672, 687 (9th Cir. 2004) (Aldisert, J., dissenting) (criticizing the majority's analysis of *Alcoa*).

106. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (emphasis added).

requirement actually “runs counter to the explicit teachings of *Alcoa*.”¹⁰⁷

Judge Aldisert also criticized the majority’s reliance on one particular definition of the word direct.¹⁰⁸ Courts assume that Congress intends words to carry “their ordinary, contemporary, common meaning.”¹⁰⁹ The definition used by the majority—“proceeding from one point to another in time or space without deviation or interruption”¹¹⁰—is but one of seven main meanings in the same dictionary, many of which are ordinary and common.¹¹¹ Thus, it is arbitrary to select one definition and “declare it the ‘plain meaning’ in the abstract.”¹¹² Rather, deducing the meaning of direct requires consideration of the various contemporaneous definitions as informed by the statute’s history and context.¹¹³

Alternatively, Judge Aldisert proposed a definition synonymous with proximate cause in light of the history of extraterritoriality and the overall purpose of antitrust law.¹¹⁴ While Judge Aldisert could not convince the other Ninth Circuit panelists of this position, his definition gained traction eight years later when the issue came before the Seventh Circuit.¹¹⁵

107. *LSL Biotechnologies*, 379 F.3d at 687. Judge Aldisert noted that both Phillip E. Areeda and Herbert Hovenkamp, leading commentators on this issue, echoed his view of *Alcoa*: “As Judge Hand made clear in his *Alcoa* opinion, the Sherman Act would govern the world unless significant/direct/intended effects were required, for American commerce is affected in some degree by every force affecting the world’s markets in which we buy or sell.” *Id.* (quoting 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 272, at 363 (2d ed. 2000)).

108. *See id.* at 692 (critiquing the majority’s interpretation).

109. *Pioneer Inv. Serv. Co. v. Brunswick Assocs. LP*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

110. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 640 (1981).

111. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 692 (9th Cir. 2004) (Aldisert, J., dissenting) (discussing other definitions).

112. *Id.*

113. *See id.* (requiring consideration of the FTAIA’s context and history in defining direct).

114. *See id.* at 692–94 (arguing that the most appropriate definition is “characterized by or giving evidence of a close especially logical, causal, or consequential relationship” (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 640 (1981))).

115. *See infra* Part III.B.1 (describing the Seventh Circuit’s adoption of the reasonably proximate causal nexus standard).

B. Reasonably Proximate Causal Nexus Test

The Seventh and Second Circuits have endorsed a competing approach, under which an effect is direct—for FTAIA purposes—when there is a reasonably proximate causal nexus between the conduct and effect.¹¹⁶ The Antitrust Division of the Department of Justice and the Federal Trade Commission have also endorsed this test.¹¹⁷

1. U.S. Court of Appeals for the Seventh Circuit

In *Minn-Chem, Inc. v. Agrium Inc.*,¹¹⁸ American purchasers of potash¹¹⁹ accused foreign potash producers of participating in an international cartel that “restrained global output of potash in order to inflate prices.”¹²⁰ The plaintiffs alleged that defendants conspired to fix prices in various foreign countries and used those inflated prices as benchmarks for sales in the United States.¹²¹ The Seventh Circuit considered whether the defendants’ allegedly anticompetitive conduct had the requisite direct, substantial, and reasonably foreseeable effect on U.S. commerce.¹²²

The Seventh Circuit ultimately affirmed the district court’s denial of defendants’ motion to dismiss.¹²³ In doing so, the court interpreted the FTAIA’s domestic-injury exception and

116. *See* *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 398 (2d Cir. 2014) (articulating the reasonably proximate causal nexus test); *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 856–57 (7th Cir. 2012) (en banc) (same).

117. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party at 13–14, *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015) (No. 14-8003) [hereinafter DOJ & FTC Motorola Brief] (arguing in favor of the proximate cause standard).

118. 683 F.3d 845 (7th Cir. 2012) (en banc).

119. Potash is “a naturally occurring mineral used in agricultural fertilizers and other products.” *Id.* at 848.

120. *Id.* at 849.

121. *Id.*

122. *See id.* at 859 (analyzing whether the defendants’ conduct satisfied the FTAIA’s requirements).

123. *See id.* (“It is no stretch to say that the foreign supply restrictions, and the concomitant price increases forced upon the Chinese purchasers, were a direct—that is, proximate—cause of the subsequent price increases in the United States.”).

determined that directness is synonymous with proximate cause.¹²⁴ Judge Wood, writing for the majority, reasoned that the nexus test is more consistent with the statutory language than the immediate consequence test.¹²⁵ The court criticized the Ninth Circuit for using the Supreme Court's interpretation of the FSIA to interpret the FTAIA.¹²⁶ The two statutes have distinct textual differences: the FSIA requires only a "direct" effect, while the FTAIA requires a "direct, substantial, and reasonably foreseeable" effect.¹²⁷ Furthermore, the Supreme Court in *Weltover* announced that the FSIA does not contain an unexpressed requirement of foreseeability or substantiality.¹²⁸ The FTAIA, on the other hand, explicitly includes the words "substantial" and "foreseeable."¹²⁹ Thus, Congress signaled that the words direct, substantial, and foreseeable are to be interpreted as an integrated phrase.¹³⁰ The Seventh Circuit explained that adding the concept of immediacy or certainty on top of the "direct, substantial, and reasonably foreseeable" requirements "results in a stricter test than the complete text of the statute can bear."¹³¹

The reasonably proximate causal nexus test properly excludes "foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce."¹³² Judge Wood noted that this approach addresses the classic concern about

124. *See id.* at 856–57 (considering "what it takes to show 'direct' effects" and announcing that "the term 'direct' means only 'a reasonably proximate causal nexus'").

125. *See id.* ("We are persuaded that the [reasonably proximate causal nexus] approach is more consistent with the language of the statute.").

126. *See id.* ("In our view, the Ninth Circuit jumped too quickly to the assumption that the FSIA and the FTAIA use the word 'direct' in the same way.").

127. *Compare* 28 U.S.C. § 1605(a)(2) (2012) (FSIA), *with* 15 U.S.C. § 6a (2012) (FTAIA).

128. *See* *Republic of Arg. v. Weltover, Inc.* 504 U.S. 607, 618 (1992) (analyzing the use of direct in the FSIA).

129. *See* *Minn-Chem, Inc. v. Agrium Inc.*, 845 F.3d 845, 857 (7th Cir. 2012) (en banc) (explaining that there is no need to read "substantial" and "foreseeable" into the statute).

130. *See id.* (reading direct, substantial, and reasonably foreseeable as an integrated phrase).

131. *Id.*

132. *Id.*

remoteness—that courts “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.”¹³³ Just as tort law cuts off recovery for injuries too remote from the cause of an injury, the FTAIA excludes from the Sherman Act’s scope foreign activities “too remote from the ultimate effects on U.S. domestic or import commerce.”¹³⁴

2. U.S. Court of Appeals for the Second Circuit

The Second Circuit also adopted the reasonably proximate causal nexus test in *Lotes Co. v. Hon Hai Precision Industry Co.*¹³⁵ The plaintiff in *Lotes* was a Taiwanese corporation that designs and manufactures universal serial bus (USB) connectors that are incorporated into electronics manufactured abroad and later sold in the United States.¹³⁶ By endorsing the reasonably proximate causal nexus approach, the court widened the split as to what constitutes a direct effect under the FTAIA.¹³⁷ Judge Katzmann, writing for the majority, criticized the Ninth Circuit’s reliance on a single definition of direct in the dictionary,¹³⁸ when “the same dictionary also defines ‘direct’ as ‘characterized by or giving evidence of a close especially logical, causal, or consequential relationship.’”¹³⁹ Given the various alternative definitions offered in that particular dictionary, relying solely on the first definition listed was arbitrary and insufficient.¹⁴⁰

133. *Id.* (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945)).

134. *Id.*

135. *See Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 398 (2d Cir. 2014) (requiring “a reasonably proximate causal nexus between the conduct and the effect” to satisfy the FTAIA’s directness component).

136. *Id.* at 399–400.

137. *Compare Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc) (adopting the reasonably proximate causal nexus test), *with United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (adopting the immediate consequence test).

138. *See Lotes*, 753 F.3d at 410 (discussing the definition cited in *LSL Biotechnologies*).

139. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 640 (1981)).

140. *See id.* (“[T]he relative order of the common dictionary definitions of a

The Second Circuit also found the Ninth Circuit's reliance on the interpretation of a "nearly identical term" in the FSIA to be inappropriate.¹⁴¹ Judge Katzmann reiterated the Supreme Court's warning that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."¹⁴² The FSIA differs from the FTAIA in critical respects and therefore cannot be relied upon in interpreting the ambiguous language of the FTAIA.¹⁴³

The Second Circuit determined that *LSL Biotechnologies'* interpretation of the word direct violates the "cardinal principle of statutory construction" that statutes must be construed, if reasonably possible, so that "no clause, sentence, or word shall be superfluous, void, or insignificant."¹⁴⁴ If direct is read to mean immediate, the separate "reasonably foreseeable" requirement "would be rob[bed] . . . of any meaningful function, since we are hard pressed to imagine any domestic effect that would be both 'immediate' and 'substantial' but not 'reasonably foreseeable.'"¹⁴⁵

While the court ultimately decided the case based on the FTAIA's second prong,¹⁴⁶ the Second Circuit nonetheless announced its adoption of the reasonably proximate causal nexus test to satisfy the FTAIA's directness requirement.¹⁴⁷

single term does little to clarify that term's meaning with a particular context. When a word has multiple definitions, usage determines its meaning." (quoting *Chi. Truck Drivers v. Leaseway Transp. Corp.*, 76 F.3d 824, 828 n.4 (7th Cir. 1996))).

141. *See id.* (noting that "[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even the same section" (quoting *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007))).

142. *Id.* (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009)).

143. *See id.* at 410–11 (analyzing the differences between the FSIA and FTAIA). See also *infra* Part IV.A.2 for further discussion about using the FSIA to interpret the FTAIA.

144. *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 411 (2d Cir. 2014) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

145. *Id.*

146. *See* 15 U.S.C. § 6(a)(2) (2012) (requiring the effect "give rise to" an antitrust cause of action).

147. *See Lotes*, 753 F.3d at 398 (determining that the direct requirement is satisfied "even if the effect does not follow as an immediate consequence of the defendant's conduct, so long as there is a reasonably proximate causal nexus between the conduct and the effect").

3. Department of Justice and Federal Trade Commission

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC)—the governmental entities charged with enforcing the federal antitrust laws—endorse the reasonably proximate causal nexus test.¹⁴⁸ The DOJ, in its *LSL Biotechnologies* brief, urged that the most pertinent definition of direct for FTAIA purposes is “characterized by or giving evidence of a close especially logical, causal, or consequential relationship.”¹⁴⁹ The DOJ highlighted that courts also utilize the concepts of directness and proximate causation when confronting antitrust standing inquiries in private plaintiffs’ suits.¹⁵⁰ When determining which injuries the antitrust laws may properly redress, courts look at the directness of the injury sustained to determine whether it is too remote from the antitrust violation to warrant relief.¹⁵¹ In the standing context, courts equate remoteness and directness with the concept of proximate cause.¹⁵² The DOJ and FTC maintain that courts should similarly employ proximate causation to the FTAIA directness inquiry.¹⁵³

The DOJ and FTC assert that “[p]roximate causation is a ‘flexible concept that generally refers to the basic requirement that . . . there must be some direct relation between the injury asserted and the injurious conduct alleged.’”¹⁵⁴ This standard filters out “causal connections ‘so attenuated that the

148. See DOJ & FTC Motorola Brief, *supra* note 117, at 1, 13–14 (arguing in favor of the proximate cause standard); Delrahim, *supra* note 3, at 430 (“[T]he correct interpretation of ‘direct’ in the FTAIA is a reasonably proximate causal nexus.”). Makan Delrahim is the former Deputy Assistant Attorney General of the Department of Justice’s Antitrust Division. *Id.* at 415.

149. Brief for Appellant United States of America at 36, *United States v. LSL Biotechnologies, Inc.*, 379 F.3d 672 (9th Cir. 2004) (No. 02-16472) [hereinafter DOJ LSL Biotechnologies Brief].

150. *Id.*

151. See *id.* at 36–37 (citing *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477 n.12 (1982)) (describing antitrust standing inquiries).

152. See *id.* at 37 (citing *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477 nn.12–13 (1982)) (analogizing proximate cause to remoteness and directness).

153. See DOJ & FTC Motorola Brief, *supra* note 117, at 14 (comparing the FTAIA directness issue to the remoteness issue in antitrust standing analyses).

154. *Id.* at 13 (quoting *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014)).

consequence is more aptly described as mere fortuity.”¹⁵⁵ The DOJ and FTC maintain that proximate causation is the appropriate test for determining when the Sherman Act may reach foreign anticompetitive conduct.¹⁵⁶

IV. Evaluation of the Direct Effect Tests

A. Immediate Consequence Test

As articulated by the Seventh Circuit, Second Circuit, and Judge Aldisert in his *LSL Biotechnologies* dissent, the immediate consequence test has three significant flaws: (1) it is based on an improper definition of direct; (2) it inappropriately relies on the FSIA to interpret the FTAIA; and (3) it misinterprets the FTAIA’s legislative history and the preexisting common law standard.¹⁵⁷

1. Definition of Direct

When interpreting ambiguous statutory language, courts assume that Congress intends words to carry “their ordinary, contemporary, common meaning.”¹⁵⁸ In analyzing the word direct as employed by the FTAIA, the Ninth Circuit in *LSL Biotechnologies* selected one definition, without explanation, and treated it as the plain meaning.¹⁵⁹ The definition employed by the majority—“proceeding from one point to another in time or space without deviation or interruption”—is only one of many ordinary and common meanings of the term direct.¹⁶⁰ The same

155. *Id.* at 14 (quoting *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014)).

156. *Id.* at 13–14; *see also* Delrahim, *supra* note 3, at 430 (“In the Division’s view, the correct interpretation of ‘direct’ in the FTAIA is a reasonably proximate causal nexus.”).

157. *See infra* Parts IV.A.1–3 (evaluating the immediate consequence test).

158. *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

159. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 679–80 (9th Cir. 2004) (looking to a contemporaneous definition in considering “what Congress meant by ‘direct’”).

160. *See id.* (discussing other definitions).

dictionary also contains six additional main meanings of direct, which are similarly contemporaneous with the FTAIA.¹⁶¹ Usage of a word in context should determine its meaning when it has multiple alternative definitions.¹⁶² The majority failed to adequately articulate why its particular definition is appropriate in light of the FTAIA's context and history.¹⁶³

Because a definition centered on geography and time forms the basis of the immediate consequence test, the standard too narrowly focuses on the spatial and temporal separation between the conduct and effect.¹⁶⁴ This fails to adequately consider the complex nature of the global economy and that “anticompetitive injuries can be transmitted through multi-layered supply chains.”¹⁶⁵ A lapse of time between when the anticompetitive conduct occurred and when the effect is felt does not necessarily mitigate the harm. Perpetrators could easily design schemes to avoid antitrust injury by ensuring that the conduct and harmful effect do not occur sequentially.¹⁶⁶

2. Use of Direct in Other Statutes

Another rule of statutory construction cautions courts not to “apply rules applicable under one statute to a different statute

161. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1981)).

162. *See* *Chi. Truck Drivers v. Leaseway Transp. Corp.*, 76 F.3d 824, 828 n.4 (7th Cir. 1996) (“[T]he relative order of the common dictionary definitions of a single term does little to clarify that term’s meaning within a particular context. When a word has multiple definitions, usage determines its meaning.”).

163. *See LSL Biotechnologies*, 379 F.3d at 680 (dedicating only one paragraph to considering dictionary definitions); *see also id.* at 692 (Aldisert, J., dissenting) (“It would be arbitrary simply to pick one definition and declare it the ‘plain meaning’ in the abstract. Determining the meaning of ‘direct’ requires the consideration of definitions as informed by the FTAIA’s context and history.”).

164. *See Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 412 (2d Cir. 2014) (critiquing the immediate consequence test).

165. *Id.*

166. *See id.* at 413 (“Indeed, given the important role that American firms and consumers play in the global economy, we expect that some perpetrators will design foreign anticompetitive schemes for the very purpose of causing harmful downstream effects in the United States.”).

without careful and critical examination.”¹⁶⁷ Words frequently “have different shades of meaning, and consequently may be variously construed . . . when they occur in different statutes.”¹⁶⁸ The Ninth Circuit in *LSL Biotechnologies* presented a very cursory analysis of the FSIA’s use of the term direct and failed to explain the justification for relying on the FSIA in interpreting the FTAIA.¹⁶⁹ Without careful and critical examination, the FSIA’s use of direct provides an insufficient basis for interpreting the FTAIA in the same way.¹⁷⁰

The two statutes differ in critical respects.¹⁷¹ The FSIA’s overarching purpose is to grant foreign nations sovereign immunity¹⁷² and to serve as “the sole basis for obtaining *jurisdiction* over a foreign state in” American courts.¹⁷³ The FTAIA, on the other hand, is a *substantive* antitrust statute that clarifies “the Sherman Act’s scope as applied to foreign commerce.”¹⁷⁴

Furthermore, the statutes have significant textual differences.¹⁷⁵ The FSIA does not extend sovereign immunity to

167. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).

168. *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

169. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (interpreting the meaning of direct in just two paragraphs).

170. *See Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc) (“[T]he Ninth Circuit jumped too quickly to the assumption that the FSIA and the FTAIA use the word ‘direct’ in the same way.”).

171. *See Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 410–11 (2d Cir. 2014) (comparing the FSIA and the FTAIA).

172. *See* 28 U.S.C. § 1604 (2012) (establishing that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided” by certain statutory exceptions).

173. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (emphasis added).

174. *F. Hoffman–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (citing H.R. REP. NO. 97-686, at 2–3 (1982)). At the time the Ninth Circuit decided *LSL Biotechnologies*, the courts still considered the FTAIA a jurisdictional rather than substantive statute. *See, e.g., LSL Biotechnologies*, 379 F.3d at 679 (“Our precedent supports the conclusion that the FTAIA provides the guiding standard for jurisdiction over foreign restraints of trade.”). However, courts now treat the FTAIA as delineating a substantive element of an antitrust claim. *Supra* notes 65–71 and accompanying text.

175. *See infra* notes 176–180 and accompanying text (analyzing the textual differences between the FSIA and the FTAIA).

extraterritorial conduct that has a “direct effect” in the United States.¹⁷⁶ The FTAIA, by contrast, contains the more extensive phrase “direct, substantial, and reasonably foreseeable effect.”¹⁷⁷ The Supreme Court in *Weltover* explicitly stated that the FSIA lacks “any unexpressed requirement of ‘substantiality’ or ‘foreseeability.’”¹⁷⁸ This means that a direct effect provides the baseline of the FSIA’s extraterritorial jurisdiction.¹⁷⁹ The FTAIA, however, requires more—it demands an effect that is not only direct, but also substantial and reasonably foreseeable.¹⁸⁰

In creating the immediate consequence test, the Ninth Circuit erroneously relied on the FSIA to interpret the FTAIA without careful and critical consideration of the important differences between the two statutes.¹⁸¹

3. *The FTAIA’s Legislative History and Existing Common Law Standards*

The Ninth Circuit in *LSL Biotechnologies* misinterpreted the pre-FTAIA legal landscape when it determined that the FTAIA added an additional requirement to the existing common law standard for extraterritoriality.¹⁸² The majority believed that, “[un]like the FTAIA, the *Alcoa* test d[id] not require the effect to be ‘direct’” and only mandated “some substantial effect in the

176. See 28 U.S.C. § 1605(a)(2) (declining to extend sovereign immunity to “an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States”). In other words, the FSIA provides jurisdiction over a foreign state for certain foreign conduct that has a “direct effect on the United States.” *Id.*

177. 15 U.S.C. § 6a(1) (2012).

178. *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992).

179. See *id.* at 617–18 (rejecting the contention that under the FSIA “an effect is not ‘direct’ unless it is both ‘substantial’ and ‘foreseeable’”).

180. See *United States v. LSL Biotechnologies*, 379 F.3d 672, 692 n.5 (9th Cir. 2004) (Aldisert, J., dissenting) (comparing the *sine qua non* of the FSIA and FTAIA provisions at issue).

181. See *supra* notes 167–180 and accompanying text (contending that the FSIA should not serve as the basis for interpreting the word direct in the FTAIA).

182. See *LSL Biotechnologies*, 379 F.3d at 679 (rejecting the contention that “the FTAIA merely codified the existing common law regarding when the Sherman Act applies to foreign conduct”).

United States.”¹⁸³ However, *Alcoa* did in fact contemplate a directness requirement.¹⁸⁴ In analyzing the effect of *Alcoa*’s anticompetitive behavior in manufacturing aluminum ingot, Judge Hand discussed how “the ingot fabricated by ‘Alcoa,’ necessarily had a direct effect upon the ingot market.”¹⁸⁵ The *Alcoa* decision emphasized the need for “significant and direct effects” on U.S. commerce.¹⁸⁶ The *LSL Biotechnologies* majority erred in concluding the FTAIA added a brand new component previously unknown to traditional extraterritorial antitrust law.¹⁸⁷

The more appropriate reading is that Congress intended to *codify*, rather than add a new dimension to, the existing common law effects test.¹⁸⁸ “Directness” was integral to extraterritorial antitrust law when Congress enacted the FTAIA.¹⁸⁹ All of the requirements in the FTAIA—directness, substantiality, and foreseeability—were present in the earlier case law.¹⁹⁰ The *Restatement (Second) of Foreign Relations Law of the United States*, in effect at the time of the FTAIA’s promulgation in 1982,

183. *Id.* (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993)); *see also id.* (“[A]pplying the *Alcoa* test would render meaningless the word ‘direct’ in the FTAIA.”).

184. *See AREEDA & HOVENKAMP, supra* note 22, ¶ 272i, at 292–93 (“As Judge Hand made clear in his *Alcoa* opinion, the Sherman Act would govern the world unless significant/direct/intended effects were required, for American commerce is affected in some degree by every force affecting the world’s markets in which we buy and sell.”).

185. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945).

186. AREEDA & HOVENKAMP, *supra* note 22, ¶ 272i, at 292–93.

187. *See infra* notes 188–216 and accompanying text (arguing that the FTAIA codified existing law).

188. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 685–91 (9th Cir. 2004) (Aldisert, J., dissenting) (tracing the history of the effects test and highlighting Congress’s codification of this existing standard); *see also AREEDA & HOVENKAMP, supra* note 22, ¶ 272i, at 292 (suggesting that codification of prior law is the better reading of the FTAIA).

189. *See infra* notes 190–198 and accompanying text (detailing prevalence of a directness requirement).

190. *See, e.g., Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979) (considering the “[e]xistence of intent to harm or affect American commerce and its foreseeability”); *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 822 (N.D. Cal. 1957) (requiring a “direct and substantial restraint”); *United States v. Gen. Elec. Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949) (asserting that foreign conduct “must have had a direct and substantial effect”).

included directness, substantiality, and foreseeability as prerequisites to extraterritorial application of domestic law.¹⁹¹

After *Alcoa* and its subsequent judicial interpretations, the DOJ announced its view on the application of antitrust laws to foreign conduct in its Antitrust Guide to International Operations, released in 1977.¹⁹² Congress summarized the DOJ's stance in the FTAIA's House Report:

United States antitrust laws should be applicable to an international transaction “when there is a *substantial* and *foreseeable* effect on the United States commerce,” and that it would be a miscarriage of Congressional intent to apply the Sherman Act to “foreign activities which have no *direct* or intended effect on United States consumers or export opportunities”¹⁹³

Thus, in 1977—five years prior to the FTAIA's enactment—the DOJ understood that extraterritorial application of the antitrust laws required foreign transactions to have a substantial, foreseeable, *and* direct effect on the United States.¹⁹⁴

In October 1981, the ABA Section of Antitrust Law submitted a report to Congress regarding the proposed legislation on extraterritorial antitrust law.¹⁹⁵ The report examined existing case law applying the effects test articulated in *Alcoa*.¹⁹⁶ Even

191. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (AM. LAW INST. 1965) (providing that a state's laws may reach “conduct that occurs outside its territory and causes an effect within its territory if . . . the effect within the territory is *substantial*” and “it occurs as a *direct* and *foreseeable* result of the conduct outside the territory” (emphasis added)).

192. See ANTITRUST DIVISION, U.S. DEP'T OF JUST., ANTITRUST GUIDE TO INT'L OPERATIONS 6–7 (1977) [hereinafter DOJ ANTITRUST GUIDE] (remarking that “[t]he application of U.S. antitrust law to overseas activities raises some difficult questions”).

193. H.R. REP. NO. 97-686, at 5 (1982) (emphasis added) (citing DOJ ANTITRUST GUIDE, *supra* note 192, at 6–7).

194. See DOJ ANTITRUST GUIDE, *supra* note 192, at 9 (presenting DOJ's interpretation of the Sherman Act's extraterritorial scope).

195. See Am. Bar Ass'n, Section of Antitrust Law, *Report to Accompany Resolutions Concerning Legislative Proposals to Promote Export Trading* 10 (1981) [hereinafter *ABA Antitrust Section Report*] (commenting on legislative proposals affecting extraterritorial reach of U.S. antitrust law), *reprinted in The Commission on the International Application of the U.S. Antitrust Laws Act: Hearing on S. 432 Before the S. Comm. on the Judiciary*, 97th Cong. 216–51 (1981).

196. See *id.* at 10–21 (analyzing cases using *Alcoa*'s effects test).

though the various formulations of the test were not linguistically identical to the standard propounded by the DOJ in its guidelines, “in substance, the tests were, for the most part, applied quite similarly.”¹⁹⁷ The ABA report determined that, despite the variations in wording, “there [was], with rare exception, no *significant* inconsistency between judicial precedents and the Justice Department’s view of the effects test.”¹⁹⁸

While the FTAIA’s legislative history does not explicitly answer whether or not the FTAIA codified the common law extraterritorial standards, it still remains informative on the question.¹⁹⁹ The House Report indicated that the FTAIA was to “serve as a simple and straightforward clarification of existing American law and the Department of Justice enforcement standards.”²⁰⁰ In the wake of *Alcoa*, “courts ha[d] arrived at different formulations of the nature and quantum of ‘effects’ needed” to permit application of the Sherman Act to foreign conduct.²⁰¹ The Report discussed the existing case law and whether the differing articulations of the effects test led to

197. *Id.* at 10.

198. *Id.*

199. See Delrahim, *supra* note 3, at 418 (commenting that the common law standard “may or may not have changed with the enactment of the FTAIA in 1982; the legislative history does not answer this question”); see also Ryan A. Haas, *Act Locally, Apply Globally: Protecting Consumers from International Cartels by Applying Domestic Antitrust Law Globally*, 15 LOY. CONSUMER L. REV. 99, 106 (2003) (describing how the FTAIA’s legislative history is open to various interpretations).

200. H.R. REP. NO. 97-686, at 2 (1982).

201. *Id.* at 5 (citing cases applying the effects test in the wake of *Alcoa*). Compare, e.g., *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1974) (looking to whether the conduct “directly affect[s] the flow of foreign commerce into or out of this country”), with *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 822 (N.D. Cal. 1957) (necessitating a “direct *and* substantial restraint” (emphasis added)), and *United States v. Gen. Elec. Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949) (asserting that foreign conduct “must have had a direct *and* substantial effect” (emphasis added)), with *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 883 (5th Cir. 1982) (requiring conduct to “directly or substantially affect[]” U.S. commerce in order to come “within the scope of the Sherman Act” (emphasis added)), and *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979) (“[I]t is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not [d]e minimis.”).

consistent or divergent results.²⁰² It did not decide the question, however.²⁰³

Regardless of whether or not the various judicial formulations produced inconsistent outcomes, the bill sought to prescribe a “single, clear standard” that would “provide assurances against private plaintiff’s [sic] successfully proposing different standards than those employed by the Department of Justice.”²⁰⁴ This would “allow consistent precedent to develop by providing more definite touchstones to guide the parties and the courts.”²⁰⁵

Well-established principles of statutory construction counsel against reading the FTAIA as substantively changing the preexisting extraterritoriality standards.²⁰⁶ Courts must read “statutes which invade the common law . . . with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”²⁰⁷ Similarly, when a statute amends a preexisting statute, courts likewise “do not presume that the revision worked a change in the underlying substantive law unless an intent to make such a change is clear.”²⁰⁸

The FTAIA does not show a clear intention to abandon the longstanding common law because the Supreme Court announced that the FTAIA is “unclear” as to whether it amends existing

202. Compare H.R. REP. NO. 97-686, at 5–6 (summarizing the viewpoint that there is “no *significant* inconsistency between judicial precedents and the Justice Department’s view of the effects test” (quoting *ABA Antitrust Section Report*, *supra* note 195, at 10)), with *id.* at 6 (“Judicial decisions are rife with inconsistencies regarding the types of effects on the domestic economy that must be demonstrated in order to establish U.S. antitrust jurisdiction over an international transaction.” (quoting *Foreign Trade Antitrust Improvements Act, Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 108 (1981) (statement of Martin F. Connor, Business Roundtable))).

203. See *id.* at 6 (“The Committee need not choose between these competing views to conclude that legislative clarification is appropriate.”).

204. *Id.*

205. *Id.*

206. See *infra* notes 207–210 and accompanying text (discussing a new statute’s effect on existing law).

207. *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

208. *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993).

law.²⁰⁹ The legislative history, moreover, does not clearly express an intention to make significant changes to prior interpretations of the Sherman Act's extraterritorial reach.²¹⁰ Congress intended the FTAIA to be a "clarification of *existing* American law."²¹¹ Because the statute does not explicitly indicate a contrary intention, the FTAIA should not be read as altering the settled extraterritorial standards that predated its enactment.²¹²

The promulgation of the "direct, substantial, and reasonably foreseeable" standard in the FTAIA likely codified the direct effects requirement set forth in the teachings of *Alcoa* and its progeny, the *Restatement of Foreign Relations Law*, and the DOJ's Antitrust Guide to International Operations.²¹³ Even if it did not codify, Congress certainly did not intend the FTAIA to erase decades of common law.²¹⁴ The *LSL Biotechnologies* court erred in interpreting the word from scratch.²¹⁵ Relevant precedent, including that which preexisted the FTAIA, should have informed the Ninth Circuit's analysis of the term direct when it formulated the immediate consequence test.²¹⁶

B. Reasonably Proximate Causal Nexus Test

The reasonably proximate causal nexus test is the more appropriate standard because it (1) employs a fitting definition of

209. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797 n.23 (1993) (declaring it "unclear . . . whether the [FTAIA's] 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it"). The Supreme Court declined to decide the issue, however. See *id.* ("We need not address th[is] question[] here.").

210. See *Delrahim*, *supra* note 3, at 418 (commenting that the common law standard "may or may not have changed with the enactment of the FTAIA in 1982; the legislative history does not answer this question").

211. H.R. REP. NO. 97-686, at 2 (2012) (emphasis added).

212. *Supra* notes 206–210 and accompanying text.

213. *Supra* notes 182–205 and accompanying text.

214. *Supra* notes 206–212 and accompanying text.

215. See *United States v. LSL Biotechnologies*, 379 F.3d 672, 691 (9th Cir. 2004) (Aldisert, J., dissenting) (criticizing the majority's decision to interpret the word direct anew).

216. *Supra* notes 182–212 and accompanying text.

the word direct; (2) corresponds with the statute's plain language; and (3) comports with the purposes of the FTAIA.²¹⁷

1. Definition of Direct

Given that the FTAIA codified existing common law extraterritoriality standards,²¹⁸ relevant precedent predating the Act informs any interpretation of the word direct.²¹⁹ There are numerous contemporaneous definitions of direct that are both ordinary and common.²²⁰ One such definition is “characterized by or giving evidence of a close especially logical, causal, or consequential relationship.”²²¹ Because statutory interpretation is a “holistic endeavor,” the inquiry does not end at finding an ordinary meaning.²²² In accordance with the fundamental principle of statutory construction, the “meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”²²³ Here, the FTAIA's context and history must inform any construction of the meaning of direct.²²⁴ The most pertinent definition of direct is one that focuses on logical

217. See *infra* Parts IV.B.1–4 (evaluating the reasonably causal nexus test).

218. See *supra* Part IV.A.3 (arguing that the FTAIA codified prior common law).

219. See *United States v. Texas*, 507 U.S. 529, 534 (1993) (“[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles . . .” (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952))); *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (noting that when interpreting a statute amending a preexisting statute, courts “do not presume that the revision worked a change in the underlying substantive law unless an intent to make such a change is clearly expressed”).

220. See *e.g.*, 4 OXFORD ENGLISH DICTIONARY 702 (2d ed. 1989) (defining direct as, *inter alia*, “[s]traight; undeviating in course; not circuitous or crooked” and “[p]roceeding from antecedent to consequent, from cause to effect, etc.; uninterrupted, immediate”).

221. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1981).

222. See *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (contending that statutory construction “must account for a statute's full text, language as well as punctuation, structure, and subject matter”).

223. *Deal v. United States*, 508 U.S. 129, 132 (1993).

224. See *United States v. LSL Biotechnologies*, 379 F.3d 672, 692 (9th Cir. 2004) (Aldisert, J., dissenting) (“Determining the meaning of ‘direct’ requires the consideration of definitions as informed by the FTAIA's context and history.”).

causation—rather than temporal or spatial relationships—because it comports with the FTAIA’s plain language and serves the statute’s fundamental goals.²²⁵

2. Plain Language

The structure of Section 6a(1) supports the position that courts should interpret the term direct as a causation concept.²²⁶ The interpretative maxim *noscitur a sociis*, that “a word is known by the company it keeps,” informs the analysis.²²⁷ This doctrine is applied “where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.”²²⁸ Thus, direct, as used in the FTAIA, cannot be interpreted in isolation—instead, “direct, substantial, and reasonably foreseeable” should be read as an integrated phrase.²²⁹

Defining direct as a term of causation—meaning not too remote—makes sense when the word is read in conjunction with the substantiality and foreseeability requirements.²³⁰ If direct means not too remote, then the three requirements of Section 6a(1) are: (1) the effect is not too remote from American commerce (direct); (2) the effect makes a meaningful impact on such commerce (substantial); and (3) “the effect bears a reasonable relationship to the actor’s expectations and was not merely serendipitous” (reasonably foreseeable).²³¹

225. See *infra* Parts IV.B.2–3 (arguing for defining direct in terms of proximate causation).

226. See *infra* notes 227–237 and accompanying text (analyzing the provision’s plain language).

227. See *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) (explaining the *noscitur a sociis* doctrine).

228. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

229. See *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc) (suggesting that Congress, in putting the words direct, substantial, and foreseeable together, signaled that the words “had to be interpreted as part of an integrated phrase”).

230. See *infra* notes 231–237 and accompanying text (explaining why remoteness is the better interpretation).

231. See *Delrahim*, *supra* note 3, at 430 (arguing that the most natural reading of direct is as a term of causation).

On the other hand, if direct means certainty (as required in the immediate consequence test),²³² then the reasonably foreseeable requirement is robbed of its meaning.²³³ Reasonably foreseeable covers a “broad range of possibilities, from effects that are very likely to effects that are not particularly likely but still plainly possible.”²³⁴ If an effect must be reasonably certain (or at least not uncertain), then the effect cannot simultaneously be somewhat likely or merely possible.²³⁵ Therefore, defining direct to mean reasonably certain “drastically shrinks the scope of ‘reasonably foreseeable’ to the point of rendering that term largely meaningless, a result that Congress cannot be presumed to have intended.”²³⁶ This reading of the FTAIA would violate the “cardinal principle of statutory construction” that statutes must be construed so that “no clause, sentence, or word should be superfluous, void, or insignificant.”²³⁷

3. Consistent with the Purposes of the FTAIA

Statutory construction is a “holistic endeavor”²³⁸ and courts must consider a statute’s underlying purpose and policy when interpreting a given provision.²³⁹ The reasonably proximate

232. See *United States v. LSL Biotechnologies*, 379 F.3d 672, 681 (9th Cir. 2004) (incorporating notion of certainty into the immediate consequence test because “[a]n effect cannot be ‘direct’ where it depends on . . . uncertain intervening developments”).

233. See *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 411 (2d Cir. 2014) (“Reading ‘direct’ as ‘immediate’ would rob the separate ‘reasonabl[e] foreseeab[ility]’ requirement of any meaningful function”); Delrahim, *supra* note 3, at 430 (asserting that the concept of “immediate consequence” is not reconcilable with the FTAIA’s “reasonably foreseeable” requirement).

234. Delrahim, *supra* note 3, at 430 n.78.

235. See *id.* (contending that reasonably foreseeable encompasses the concepts of “somewhat likely” and “merely possible”).

236. *Id.*

237. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (internal quotation marks omitted).

238. *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

239. See *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (“Over and over we have stressed that ‘[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.’”

causal nexus test is more consistent with the FTAIA's language because it aptly addresses antitrust law's classic concern about remote injuries.²⁴⁰ In *Alcoa*, Judge Learned Hand stressed that courts "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."²⁴¹ The word direct in the FTAIA serves to "exclude[] from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce."²⁴² Similarly, proximate cause, as used in tort law, "cuts off recovery for those whose injuries are too remote from the causal event."²⁴³ Interpreting direct to mean proximate cause enables the FTAIA to properly exclude remote injuries.²⁴⁴

Proximate causation, while not easily defined, is essentially a flexible concept that, at minimum, requires "some direct relation between the injury asserted and the injurious conduct alleged."²⁴⁵ Any given injury has "countless causes, and not all should give rise to legal liability."²⁴⁶ Because liability cannot attach to "every conceivable harm that can be traced" to the allegedly wrongful

(quoting *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850)).

240. See *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc) (articulating that the DOJ's proximate cause standard is superior to the immediate consequences test because it better address remoteness).

241. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

242. *Minn-Chem*, 683 F.3d at 857.

243. *Id.*; see also *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2645 (2011) (Roberts, C.J., dissenting) (stating that proximate cause "excludes from the scope of liability injuries that are too remote, purely contingent, or indirect" (internal quotation marks omitted) (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268–274 (1992))).

244. See *supra* notes 239–243 and accompanying text (explaining why proximate cause properly deals with remote activities that the FTAIA seeks to exclude from the Sherman Act's scope).

245. *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (citations omitted) (internal quotation marks omitted); see also *id.* ("The idea of proximate cause . . . defies easy summary."); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) (characterizing the "proximate-cause inquiry" as "not easy to define").

246. See *CSX Transp.*, 131 S. Ct. at 2637 ("In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." (quoting W. PAGE KEETON ET AL., *PROSSER & KEETON ON TORTS* § 41, at 264 (5th ed. 1984))); *Paroline*, 134 S. Ct. at 1719 ("Every event has many causes . . . and only some of them are proximate, as the law uses that term.").

act, proximate cause demands a “causal connection between the wrong and the injury.”²⁴⁷ Deeming one event to be the proximate cause of another “means that it was not just *any* cause, but one with a *sufficient connection* to the result.”²⁴⁸ A proximate-cause requirement serves to preclude liability for causal connections so tenuous that the outcome is better characterized as “mere fortuity.”²⁴⁹

Courts have significant experience with the proximate-cause inquiry, and it is a familiar concept in the antitrust world.²⁵⁰ At the time of the FTAIA’s enactment, private plaintiffs’ antitrust standing treated the concepts of directness and proximate cause as comparable.²⁵¹ Using proximate cause principles, courts today continue to evaluate antitrust standing by considering the “directness or indirectness of the asserted injury.”²⁵²

The reasonably proximate causal nexus test “incorporates all of this useful judicial experience.”²⁵³ The doctrine also provides the legal vocabulary for “excluding conduct deemed too remote from its injurious effect.”²⁵⁴ Interpreting direct to mean proximate cause further serves the overall purpose of U.S. antitrust law—to protect American consumers from the harmful consequences of anticompetitive conduct.²⁵⁵ By requiring a causal

247. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 533 n.26 (1983).

248. *Paroline*, 134 S. Ct. at 1719 (emphasis added).

249. *Id.* (citation omitted).

250. *See Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 412 (2d Cir. 2014) (“[C]ourts have long applied notions of proximate causation, using the language of ‘directness,’ in determining what types of injuries the antitrust laws may properly redress.”).

251. *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 476 nn.12–13 (1982) (discussing historical antitrust standing inquiries that equated remoteness with directness and characterizing the terms as analogous to the concept of proximate cause).

252. *See Associated Gen. Contractors*, 459 U.S. at 540 (analyzing antitrust standing by evaluating the directness of the injury); *Blue Shield*, 457 U.S. at 476–77 & n.13 (using a proximate-cause analysis to determine when “a particular injury is too remote” to warrant antitrust standing).

253. *Lotes*, 753 F.3d at 398.

254. *Id.* at 412.

255. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 693 (9th Cir. 2004) (Aldisert, J., dissenting) (describing the Sherman Act’s “fundamental purpose” as “protect[ing] United States consumers from the consequences of anticompetitive conduct”); *see also United States v. Topco Assocs., Inc.*, 405 U.S.

connection between any alleged foreign wrongdoing and the injurious effect, the FTAIA excludes conduct with only remote injuries and thereby allows the Sherman Act to focus on conduct that sufficiently harms U.S. commerce.²⁵⁶

4. Weaknesses of the Reasonably Proximate Causal Nexus Test

While the reasonably proximate causal nexus test is superior to the immediate consequence test, it is not without flaws.²⁵⁷ Because the test is less stringent than the immediate consequence standard, it is vulnerable to exceedingly liberal interpretations, which “risks unreasonable interference with the sovereignty of foreign countries.”²⁵⁸ The proximate cause doctrine is “notoriously slippery” and nebulous.²⁵⁹

The proximate causal nexus test also requires a fact-intensive analysis to determine whether the conduct and domestic effect are sufficiently direct.²⁶⁰ It will depend on factors such as “the structure of the market and the nature of the commercial relationships at each link in the causal chain.”²⁶¹ The reasonably proximate causal nexus test could lead to uncertainty

596, 610 (1972)

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

256. See *supra* notes 238–255 and accompanying text (detailing how a proximate cause standard helps the FTAIA serve its intended purposes).

257. See *infra* notes 258–262 and accompanying text (describing the weaknesses of the test).

258. Recent Case, *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, 759 (2014).

259. See *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 412 (2d Cir. 2014) (discussing proximate causation).

260. See Recent Case, *supra* note 258, at 763–64 (critiquing the reasonably proximate causal nexus test).

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

because any analysis will be case-specific and therefore more difficult for companies to gauge their exposure to antitrust liabilities.²⁶²

V. Policy Considerations

Courts need to adopt an interpretation of the term direct that both reflects a loyal construction of the FTAIA and also addresses antitrust infractions in the context of an increasingly global economy. The standard should “mitigate friction between different nations’ antitrust regimes and provide more clarity to foreign actors.”²⁶³

Due to the FTAIA’s ambiguity and the “myriad of fact patterns that can arise,” policy considerations will likely “play a large role in ultimately deciding the scope of the FTAIA.”²⁶⁴ Comity concerns are even more important today because many countries now have their own antitrust enforcement regimes—the United States is not the only competition watchdog anymore.²⁶⁵

262. See Recent Case, *supra* note 258, at 764 (“[A] proximate cause standard does not provide useful guidance to individual and corporate actors in foreign markets. . . . [T]hey must constantly evaluate whether their actions have ‘proximate effects’ on U.S. markets—if this impact can be determined ex ante at all.”).

263. *Id.* at 759.

264. Robert Connolly, *Why Motorola Mobility Was a Good Decision for Global Cartel Enforcement*, CARTEL CAPERS (Feb. 6, 2015), <http://cartelcapers.com/blog/motorola-mobility-good-decision-global-cartel-enforcement/> (last visited Nov. 16, 2015) (on file with the Washington and Lee Law Review).

265. See *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 826 (7th Cir. 2015) (“No longer is the United States ‘the world’s competition policeman,’ as it used to be called, because other nations have stricter antitrust laws, in some respects, than ours.”), *cert. denied*, 135 S. Ct. 2837 (2015); see also Scott D. Hammond, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Address at the 56th Annual Spring Meeting of the ABA Section of Antitrust Law: Recent Developments, Trends, and Milestones in the Antitrust Division’s Criminal Enforcement Program 18 (Mar. 26, 2008), <http://www.justice.gov/atr/public/speeches/232716.pdf> (“Seemingly with each passing day, the antitrust community learns of a foreign government that has enacted a new antitrust law, created a new cartel investigative unit, obtained a record antitrust fine, or adopted a new corporate leniency program.”); Andreas Mundt, Chair, Int’l Competition Network, Focus, Inclusiveness and Implementation—The ICN as a Key Factor for Global Convergence in Competition Law 2 (Sept. 5, 2013), <http://internationalcompetitionnetwork.org/>

Governmental antitrust enforcement has proliferated around the world.²⁶⁶ In 2014, global penalties for price-fixing reached a record-breaking total of \$5.3 billion—thirty-one percent more than the 2013 total.²⁶⁷ For comparison, the DOJ Antitrust Division issued penalties totaling \$861.4 million in the 2014 fiscal year²⁶⁸ and \$1.02 billion in the 2013 fiscal year.²⁶⁹

Competition authorities in Asia issued record-level antitrust fines of over \$1.7 billion in 2014.²⁷⁰ This represents a significant increase when compared to Asian fines in prior years—the 2013 penalties totaled \$1.2 billion, and the average of the previous five years (2008–2012) also equaled \$1.2 billion.²⁷¹ This dramatic rise in enforcement in Asia comes as authorities “have become increasingly emboldened by maturing competition laws—many of which are only a few years old.”²⁷²

uploads/library/doc924.pdf (noting that the International Competition Network now has 126 agency members from 111 jurisdictions).

266. See Robert E. Connolly, *Why the Motorola Mobility Decision was Good for Cartel Enforcement and Deterrence*, CPI ANTITRUST CHRON., Jan. 2015, at 3–4 (describing the “dramatic” increase in antitrust prosecutions and fines); see also *supra* note 265 and accompanying text (noting expansion in number of governmental enforcement regimes); *infra* notes 267–272 and accompanying text (discussing increased enforcement).

267. Caroline Binham, *Global Fines for Price-Fixing Hit \$5.3bn Record High*, FIN. TIMES (Jan. 6, 2015, 4:44 PM), <http://www.ft.com/intl/cms/s/0/83c27142-95a8-11e4-b3a6-00144feabdc0.html#axzz3RT9wzz1A> (last visited Nov. 16, 2015) (on file with the Washington and Lee Law Review).

268. ALLEN & OVERY, GLOBAL CARTEL ENFORCEMENT: 2014 YEAR IN REVIEW 4 (2015), <http://www.allenoverly.com/publications/en-gb/Documents/Cartel%20report.pdf>. The DOJ’s fiscal year runs from October to September. *Id.*

269. *Division Update Spring 2014*, U.S. DEP’T OF JUST., <http://www.justice.gov/atr/division-update/2014/division-update-spring-2014> (last visited Nov. 16, 2015) (on file with the Washington and Lee Law Review).

270. See Peter Dahl, *Asia Antitrust Watchdogs Issue Record Fines*, DW (Jan. 8, 2015), <http://www.dw.de/asia-antitrust-watchdogs-issue-record-fines/a-18176691> (last visited Nov. 16, 2015) (reporting Asian antitrust penalties in 2014) (on file with the Washington and Lee Law Review); see also *Competition Law Developments in East Asia—December 2014*, NORTON ROSE FULBRIGHT (Dec. 2014), <http://www.nortonrosefulbright.com/cn/knowledge/publications/124572/competition-law-developments-in-east-asia-december-2014> (last visited Nov. 16, 2015) (same) (on file with the Washington and Lee Law Review).

271. See *Competition Law Developments in East Asia—December 2014*, *supra* note 270 (summarizing antitrust fines in East Asia).

272. Dahl, *supra* note 270.

International enforcement cooperation “has dramatically changed the landscape from the days when a company could fix prices worldwide and face significant sanctions in very few jurisdictions.”²⁷³ Cooperation among competition agencies is vital to effective detection and prosecution of anticompetitive behavior.²⁷⁴ Best efforts and “cooperation from foreign governments in global investigations” have greatly aided the DOJ’s ability to punish anticompetitive activity.²⁷⁵ Because governmental prosecutions serve as a primary deterrent to anticompetitive conduct, they are an essential component of global cartel enforcement.²⁷⁶ Thus, maintaining cooperative relationships with foreign agencies is necessary to deter illegal behavior.²⁷⁷ Mutual trust and respect among competition agencies are crucial to preserving this close cooperation.²⁷⁸

The reasonably proximate causal nexus standard has the flexibility and breadth to encompass the policy concern of maintaining international enforcement cooperation. In applying the reasonably proximate causal nexus test, courts should interpret the word direct narrowly in light of the important comity considerations.²⁷⁹ Treble damages often entice private

273. Connolly, *supra* note 264. For example, numerous jurisdictions initiated enforcement actions in the LCD cartel investigation, including the United States, European Union, Korea, Canada, Brazil, China, and Japan. *Id.*

274. *See id.* (“This cooperation takes many forms, both seen (coordinated dawn raids, MLAT treaties, extradition) and unseen (sharing of information.)”); *see also* Hammond, *supra* note 265, at 18 (stating that the “shared commitment” among competition enforcement authorities “to fighting international cartels has led to the establishment of cooperative relationships . . . in order to more effectively investigate and prosecute international cartels”).

275. Connolly, *supra* note 266, at 2; *see also* Hammond, *supra* note 265, at 18 (noting that “cooperation and assistance . . . from foreign governments, and from their own enforcement efforts,” have enhanced the DOJ’s enforcement capabilities).

276. *See* Hammond, *supra* note 265, at 2 (“The Division has long emphasized that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences.”).

277. *See* Connolly, *supra* note 264 (emphasizing the importance of international enforcement cooperation).

278. *Id.* (discussing how to maintain enforcement cooperation).

279. This comports with the Supreme Court’s prior warning that “rampant extraterritorial application of U.S. law ‘creates a serious risk of interference with a foreign nation’s ability to independently regulate its own commercial affairs.’” *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 824 (7th

plaintiffs, but courts must not allow this temptation to infringe on foreign sovereigns' interests in punishing antitrust violations that occur within their own borders.²⁸⁰ Courts must also be conscious of the significant differences between actions initiated by the DOJ and damages actions brought by private plaintiffs.²⁸¹ The DOJ, acting on behalf of the U.S. government, clearly "has reason to weigh comity and sovereignty concerns when bringing international . . . cartel case[s]."²⁸² Private plaintiffs, on the other hand, do not.²⁸³

Courts should construe the antitrust laws, including the FTAIA, so as to avoid undue encroachment into other nations' sovereign authority and legitimate interests.²⁸⁴ The Supreme Court has cautioned against overreaching, which poses a "serious risk of interference with a foreign nation's ability to independently regulate its own commercial affairs."²⁸⁵ The proximate causation doctrine, while admittedly amorphous, allows for accommodation of comity concerns because it is not a rigid and fixed standard.²⁸⁶ The reasonably proximate causal

Cir. 2015) (quoting *F. Hoffman–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004)).

280. See *F. Hoffman–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (citations omitted) (directing statutory construction that "avoid[s] unreasonable interference with the sovereign authority of other nations").

281. See *Motorola Mobility*, 775 F.3d at 826–27 (citing Robert E. Connolly, *Repeal the FTAIA! (Or at Least Consider it as Coextensive with Harford Fire)*, CPI ANTI-TRUST CHRON., Sept. 2014, at 3 (discussing problems with private antitrust suits)).

282. *Id.* at 826 (citing Robert Connolly, *Motorola Mobility and the FTAIA*, CARTEL CAPERS (Sept. 30, 2014), <http://cartelcapers.com/blog/motorola-mobility-ftaia/> (last visited Nov. 16, 2015) (on file with the Washington and Lee Law Review)).

283. *Id.* (citing Robert Connolly, *Motorola Mobility and the FTAIA*, CARTEL CAPERS (Sept. 30, 2014), <http://cartelcapers.com/blog/motorola-mobility-ftaia/> (last visited Nov. 16, 2015) (on file with the Washington and Lee Law Review)).

284. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) (emphasizing that "American antitrust laws do not regulate the competitive conditions of other nations' economies"); see also *Empagran*, 542 U.S. at 165 ("Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how to best protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?").

285. *Id.* at 165.

286. *Supra* Part IV.B.

nexus test permits comprehensive evaluations and affords courts the ability to properly consider a foreign sovereign's authority when analyzing whether foreign conduct may be redressed in the United States.

VI. Conclusion

Courts should adopt the Second and Seventh Circuit's reasonably proximate causal nexus test because it is superior standard to the immediate consequence test.²⁸⁷ It has the flexibility to address the increasingly complex nature of global commerce and the rapidly evaporating international trade barriers.²⁸⁸ The reasonably proximate causal nexus test is a loyal construction of the statute's plain language because it does not render any word meaningless. It also serves the FTAIA's fundamental goal of protecting domestic commerce.²⁸⁹ Furthermore, the test affords courts the opportunity to incorporate comity concerns into their analyses.²⁹⁰ While not a perfect standard, the reasonably proximate causal nexus test is currently the best option because it allows for zealous enforcement of the antitrust laws, as well as respectful consideration of the legitimate interests of foreign nations.

287. *Supra* Parts IV.B.1–3.

288. *See* *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 412–13 (2d Cir. 2014) (asserting that proximate causation can address the “kind of complex manufacturing process [that] is increasingly common in our modern global economy”).

289. *Supra* Part IV.B.2.

290. *Supra* Part V.