

Winter 1-1-2016

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### Recommended Citation

John J. Miles, *The Meaning of "Direct" Effect on Domestic Commerce Under the Foreign Trade Antitrust Improvements Act*, 73 Wash. & Lee L. Rev. 541 (2016), <https://scholarlycommons.law.wlu.edu/wlulr/vol73/iss1/13>

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# The Meaning of “Direct” Effect on Domestic Commerce Under the Foreign Trade Antitrust Improvements Act

John J. Miles\*

Claire Leonard’s Note discusses a question that has received relatively little attention in the case law or commentary involving the ability of the Sherman Antitrust Act<sup>1</sup> to reach unlawful conduct occurring in a foreign country but affecting commerce and competition in the United States: What standard should courts apply in determining whether that conduct has a “direct” effect on U.S. commerce, and if the domestic effect is also substantial and foreseeable, whether the conduct is subject to the Sherman Act under the Foreign Trade Antitrust Improvements Act (FTAIA) of 1982.<sup>2</sup> When, for example, is the effect of a price-fixing conspiracy occurring abroad but affecting the price of the product in the United States sufficiently direct and thus potentially subject to the Sherman Act to permit recovery of damages by American consumers? As Ms. Leonard’s Note and this Comment explain, the circuits are split on this question, and, as trade between the United States and other countries worldwide continues to expand, the question needs a uniform answer.

The extraterritorial application of U.S. antitrust law to conduct occurring abroad can raise sensitive international political issues. Over 130 countries now have their own competition laws, so one could argue that relief should be sought under those laws.<sup>3</sup> While most are similar to U.S. antitrust law,

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1. 15 U.S.C. §§ 1–2 (2012) (prohibiting agreements unreasonably restraining competition, monopolization, attempted monopolization, and conspiracies to monopolize affecting commerce among the states or with foreign nations).

2. *Id.* § 6a.

3. Claire L. Leonard, *In Need of Direction: An Evaluation of the “Direct*

however, the competition policies of countries differ, as do the details of their laws, their interpretation, the aggressiveness of enforcement, and remedies. Nevertheless, care is warranted when the United States attempts to apply its competition rules to foreign parties or conduct occurring in foreign countries. On the other hand, the United States would seem to have a legitimate interest in protecting its consumers and markets from anticompetitive effects resulting domestically, regardless of where they originated or by whom they were implemented.

Ms. Leonard's Note admirably outlines the history and case development regarding the application of the Sherman Act to violations that occur in foreign lands but affect U.S. commerce.<sup>4</sup> As she explains, barely some nineteen years after passage of the Sherman Act in 1890, the Supreme Court, in *America Banana Co. v. United Fruit Co. (Alcoa)*,<sup>5</sup> held that application of U.S. antitrust law to violations occurring elsewhere depended on the locus of the unlawful conduct—if overseas, U.S. antitrust laws were inapplicable, regardless of the effect on commerce or competition in the United States.<sup>6</sup> That conclusion was effectively overruled in 1945, when the Second Circuit (the Supreme Court lacking a quorum), in *United States v. Aluminum Co. of America*,<sup>7</sup> held that regardless of where the unlawful conduct occurred, the Sherman Act applied if the challenged actions “[1] were intended to affect imports and [2] did affect them.”<sup>8</sup> The court emphasized that for the Sherman Act to apply, the parties and conduct had to satisfy both the intent and effects elements.<sup>9</sup> As to the latter, it

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*Effect” Requirement Under the Foreign Trade Antitrust Improvements Act*, 73 WASH. & LEE L. REV. 489 (2016).

4. See *id.* at Part II (outlining the history of U.S. antitrust law's extraterritorial reach).

5. 213 U.S. 347 (1909).

6. See *id.* at 355–56 (explaining that “the general and almost universal rule is the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done”).

7. 148 F.2d 416 (1945).

8. *Id.* at 444; see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (citing *Alcoa* for the proposition 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”).

9. The Second Circuit noted, for example, that many restraints on competition in foreign countries would have repercussions in the United States without the perpetrators intending that they do so, but that “Congress certainly

noted that it “should not impute to Congress an intent to punish all who its courts can reach, for conduct which has no consequences within the United States,” but that “it is settled law . . . that any state may impose liabilities even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.”<sup>10</sup>

The *Alcoa* formulation for extraterritorial application was helpful as a general matter, focusing the analysis on effects on domestic commerce and competition, but it left many specific questions unanswered. How substantial must the effect be? How direct? Is the intent element meant to require merely that an effect in the United States be foreseeable or must there be a more specific intent? Must the effect in the United States be what gives rise to the plaintiff’s claim? These and other issues led to significant confusion in the lower courts about precisely what the test was.<sup>11</sup> Although most applied the general intent and domestic-effect requirements of *Alcoa*, their interpretations sometimes added different glosses and thus no totally uniform standard emerged.<sup>12</sup>

As a result, Congress sought to “clarify, perhaps to limit, but not to *expand* . . . the Sherman Act’s scope as applied to foreign commerce”<sup>13</sup> and establish a uniform test by amending the Sherman Act through passage of the FTAIA in 1982.<sup>14</sup> But if Congress’s intent was to “clarify” this question, few would opine that it succeeded. Far from a model of concise statutory drafting,

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did not intend the [Sherman] Act to cover them,” and it “assume[d] that the Act does not cover agreements, even though intended to affect imports or exports unless [their] performance is shown actually to have had some effect upon them.” *Alcoa*, 148 F.2d at 443; *see also Hartford Fire Ins.*, 509 U.S. at 797 n.24 (explaining that “the general understanding [is] that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States”).

10. *Alcoa*, 148 F.2d at 443.

11. Leonard, *supra* note 3, at 498–99.

12. Differences in the standards are described in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1177–89 (E.D. Pa. 1980), *aff’d in part and rev’d in part sub nom. In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev’d sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

13. *F. Hoffman–LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004).

14. Note that the FTAIA applies only to claims under the Sherman Act, not to claims under the Clayton, Robinson-Patman, or Federal Trade Commission Acts.

FTAIA provides, for purposes here, that the Sherman Act does not apply to foreign commerce—period—unless (1) the commerce is import commerce, *or* (2)(a) the unlawful foreign conduct has a “direct, substantial, and reasonably foreseeable effect”<sup>15</sup> on non-import domestic commerce, *and* (b) the domestic “effect gives rise to”<sup>16</sup> the plaintiff’s Sherman Act claim.

The FTAIA leaves unanswered many questions. Why should import commerce be subject to the Sherman Act, regardless of whether its domestic effect meets the FTAIA requirements? The *Alcoa* standard raises other questions. What role, if any, does comity with foreign countries, which FTAIA does not mention, play in the analysis?<sup>17</sup> Under what circumstances does the domestic effect of the violation give rise to the claim? And what standards apply in determining whether the effect on domestic commerce from the conduct is “direct,” “substantial,” and “reasonably foreseeable”?

Ms. Leonard’s Note takes on one part of the last question—how “direct” the relationship between the unlawful conduct and its domestic effect must be for the conduct to fall within the Sherman Act. In particular, her Note considers whether the domestic effect must follow as an immediate consequence of the defendant’s conduct, or, resulting in broader coverage, whether there need only be a reasonably proximate causal connection between the foreign conduct and its domestic effect. To some

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15. 15 U.S.C. § 6a(1) (2012).

16. *Id.* § 6a(2).

17. International comity, an important consideration in setting limits on the extraterritorial scope of U.S. laws, basically means “getting along” with foreign jurisdictions by respecting the policies, laws, and decisions of foreign countries in U.S. laws and courts. Leonard, *supra* note 3, at 503–04, 531–32. The Supreme Court, in *F. Hoffman–LaRoche v. Empagran S.A.*, recognized this, explaining that it realized that application of American antitrust laws could “interfere with a foreign nation’s ability to independently regulate its own commercial affairs.” *F. Hoffman–LaRoche*, 542 U.S. at 165. But trumping that, the Court explained that American courts have long held that “application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they . . . redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.” *Id.* Or as the Seventh Circuit en banc has noted, “Foreigners who want to earn money from the sale of goods or services in American markets should expect to have to comply with U.S. law.” *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 854 (7th Cir. 2012).

extent, this question strikes me as one of how many angels can dance on the head of a pin, and we might wonder how much practical effect the difference will have in future decisions. But as countries in the global economy become more economically integrated, foreign transactions increase, and the Antitrust Division prosecutions of global cartels affecting U.S. commerce increase, a consistent, universally applied standard would seem warranted. The Supreme Court has not spoken to the issue, and the question needs an answer.

The disagreement stems primarily from conflicting decisions of the Ninth and Seventh Circuits. As Ms. Leonard's Note explains, in *United States v. LSL Biotechnologies*,<sup>18</sup> which one judge described as "a case of first impression,"<sup>19</sup> a majority of the panel, relying primarily on the definition of direct in a Supreme Court decision<sup>20</sup> involving a different statute, the Foreign Sovereign Immunities Act (FSIA), held that for the effect on domestic commerce to be direct under the FTAIA, it must "follow as an immediate consequence of the defendant's" unlawful conduct.<sup>21</sup> Some eight years later, the Seventh Circuit, in *Minn-Chem, Inc. v. Agrium, Inc.*,<sup>22</sup> explicitly rejected that meaning of the word and the Ninth Circuit's analysis, holding instead that the effect is direct for purposes of the FTAIA if there was "a reasonably proximate causal nexus" between the unlawful conduct and its domestic effect.<sup>23</sup>

Which standard is more appropriate? Ms. Leonard opts for the "reasonably proximate causal nexus" standard and explains her reasoning. I am not sure. Indeed, based on the analyses of the two courts, I question whether there is a "right" answer with

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18. 379 F.3d 672 (9th Cir. 2004).

19. *Id.* at 683 (Aldisert, J., dissenting).

20. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

21. *LSL*, 379 F.3d at 680.

22. 683 F.3d 845 (7th Cir. 2012).

23. *Id.* at 857 (quoting Maken Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. OF AM. L. 415, 430 (2005)). The *Minn-Chem* court pointed out that this is the standard applied by the Antitrust Division. *See id.* at 856–57 ("The other school of thought has been articulated by the Department of Justice's Antitrust Division . . .").

underlying significant support. But forced to make a choice, I would agree with Ms. Leonard's conclusion.

Neither decision offers strongly convincing rationales for its conclusion. The antitrust context in which the issue arose in *LSL* was somewhat strange to begin with. The case was a civil enforcement action by the Antitrust Division challenging a horizontal market-allocation agreement between an American firm, LSL, and an Israeli firm, Hazera, regarding particular tomato seeds they were to develop together or on their own and then market.<sup>24</sup> They agreed that LSL would have the exclusive right to market the seeds in North America and thus that Hazera would not compete there—a horizontal market-allocation agreement.<sup>25</sup> As it turned out, LSL developed such a seed, but Hazera did not,<sup>26</sup> and thus, the agreement had no effect on competition between them or on U.S. commerce. Only if and when Hazera did develop a seed would the market-allocation agreement certainly restrain competition and have an effect on domestic commerce.<sup>27</sup> The Ninth Circuit held that because Hazera had no seed and whether it would ever develop one of its own was “speculative at best,” the agreement had no direct effect on domestic commerce, suggesting that a plaintiff subjected to foreign conduct violating the antitrust laws but falling within FAITA could never challenge it before actual harm resulted. And interestingly, under this analysis, it would have done the Antitrust Division no good had the court chosen the “reasonably proximate causal nexus” standard rather than the “immediate consequence” standard because there was no domestic effect at all.<sup>28</sup> Given its view, one wonders why the majority even went to

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24. See *United States v. LSL Biotechnologies*, 379 F.3d 672, 674 (9th Cir. 2004) (summarizing the relationship between the parties and the basis for LSL's claim).

25. *Id.*

26. See *id.* (“To date, Hazera has not developed a long shelf-life tomato seed.”).

27. See *id.* at 675 (explaining the “Restrictive Clause” of the LSL-Hazera agreement addendum and its ban on selling long shelf-life tomato seeds in North America).

28. In determining whether an agreement affects interstate commerce for purposes of § 1 of the Sherman Act, the Court examines the harm that would result if the conspiracy were successful rather than whether the conspiracy had any actual effect. See *Summit Health v. Pinhas*, 500 U.S. 322, 330–32 (1991)

the trouble of defining direct. Perhaps the court should have done what others had—dodge the issue.<sup>29</sup>

That aside, the Ninth Circuit's reasoning in settling on the "immediate consequence" standard does not seem strong. The court appeared to view the issue as whether, in passing the FTAIA, Congress intended merely to codify the common law intent and effect requirements of *Alcoa* and its progeny or whether it intended to establish a new standard.<sup>30</sup> As Ms. Leonard's Note explains, common law on the issue would favor the "reasonably proximate causal nexus" meaning of direct over requiring that the domestic effect be the "immediate consequence" of the conduct.

In holding that an effect is direct only if it follows as an *immediate* consequence of the defendant's conduct, the Court appeared to rely primarily on two factors. First, it consulted a dictionary and found that one definition of direct is "proceeding from one point to another in time or space without deviation or interruption."<sup>31</sup> The problem is that this is only one of several dictionary definitions of the word; others suggest that the consequence need not be immediate.<sup>32</sup> For example, the dissenting judge pointed out that the very same dictionary from

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(determining that, as in all cases involving § 1 of the Sherman Act in which the per se rule applies, it is the agreement itself that is unlawful). The federal antitrust enforcement agencies would apply the same principle in foreign commerce situations. See U.S. DEPT OF JUSTICE & FTC, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.121 Illustrative Example B (1995) (noting that circumstances triggering the application of the FTAIA requires agencies to "focus on the potential harm that would ensue if the conspiracy were successful, not on whether the actual conduct in furtherance of the conspiracy had in fact the prohibited effect upon interstate or foreign commerce").

29. See *LSL*, 379 F.3d at 684 (Aldisert, J., dissenting) ("Although other appellate courts have dodged the critical issue . . . , this panel has decided to face the dragon in his teeth and stop tap dancing around the meaning of the word direct" (quotation omitted)).

30. See *id.* at 678 ("[M]any courts have debated whether the FTAIA established a new jurisdictional standard or merely codified the standard applied in *Alcoa* and its progeny.").

31. *Id.* at 680 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1982)).

32. See *id.* at 692 (Aldisert, J., dissenting) (noting that the same dictionary source utilized by the majority "contains seven main meanings in the adjective form, encompassing 31 more specific subsidiary meanings").

which the majority drew its definition also defined direct as “a close especially logical, causal, or consequential relationship.”<sup>33</sup> Thus, the majority’s choosing one dictionary meaning over others seems very weak support for its conclusion.<sup>34</sup>

Second, the Court relied on the Supreme Court’s decision in *Republic of Argentina v. Weltover, Inc.*,<sup>35</sup> where the question was the meaning of direct as used in an entirely different statute, the FSIA.<sup>36</sup> That statute provides, in part, that sovereign immunity from U.S. law does not apply to foreign *states* where their conduct causes a direct effect in the United States.<sup>37</sup> But reliance on the meaning of direct in the FSIA seems questionable. All else equal, the circumstances under which a foreign *government* should be liable under U.S. law should be narrower than those under which private parties are. In sum, the majority opinion does not seem well-reasoned or supported.

In the Seventh Circuit’s *Minn-Chem* decision, the plaintiffs, U.S. purchasers of potash from foreign producers, alleged that several foreign and U.S. producers had agreed on prices to charge in foreign countries and then used those as benchmarks for prices to charge in the United States.<sup>38</sup> After first holding that the FTAIA’s substantiality and foreseeability requirements were clearly met,<sup>39</sup> the court focused on the

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

34. *See id.* (“It would be arbitrary simply to pick one definition and declare it the ‘plain meaning’ in the abstract.”).

35. 504 U.S. 607 (1992).

36. *See id.* at 618 (holding that Argentina’s bond payment rescheduling had a direct effect in the United States, where Argentina was to perform its ultimate contractual obligations, even though the bond holders were foreign corporations).

37. *See* 28 U.S.C. § 1605(a)(2) (2012) (codifying general exceptions to the jurisdictional immunity of a foreign state).

38. *See* *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 849 (7th Cir. 2012) (noting that “by 2008 potash prices had increased at least 600%” and that the “plaintiffs assert that this increase cannot be explained by a significant uptick in demand, changes in the cost of production, or other changes in input costs”).

39. *See id.* at 856 (determining that “the potash cartel described in the Complaint is one for which the requirements of substantiality and foreseeability are easily met” and that foreseeability is also straightforward because the international cartel controlled 71% of the world’s supply of a homogeneous

meaning of direct.<sup>40</sup> It rejected the Ninth Circuit's reliance on the Supreme Court's definition of the term as used in the FSIA.<sup>41</sup> Noting that the FSIA includes no requirements of substantiality and foreseeability while the FTAIA does, it explained that the three requirements as used in the FTAIA should not be considered as separate, independent requirements.<sup>42</sup> But because "Congress put them there, . . . it signaled that the word 'direct' used along with [substantiality and foreseeability] must be interpreted as part of an integrated phrase" because "[s]uperimposing the idea of 'immediate consequence' on top of the full phrase [including substantiality and foreseeability] results in a stricter test than the complete text of the statute can bear."<sup>43</sup> Direct imports might meet this "immediate consequence" requirement, but they were already explicitly excluded from coverage under the FTAIA.

Second, the court explained that the direct-effect requirement merely reflected the classic concern that the effect not be *too* remote from its cause.<sup>44</sup> Then, without much further explanation, the court concluded that the "reasonably proximate causal nexus" meaning of direct was more consistent with the language of the statute.<sup>45</sup>

Neither *LSL* nor *Minn-Chem* seems to present convincing rationales for their results. But two factors lead me to agree with Ms. Leonard's conclusion that the more encompassing "reasonably proximate causal nexus" meaning is the better choice than the more exclusionary "immediate consequence" meaning.

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commodity).

40. *See id.* ("The question that has caused more discussion among various courts and commentators is what it takes to show 'direct' effects.")

41. *See id.* at 857 (finding that the Ninth Circuit incorrectly assumed that the FSIA and the FTAIA use the word direct in the same manner).

42. *Id.*

43. *Id.*

44. *See id.* (explaining that the practical effect of direct-effect requirement excludes from the Sherman Act "foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce").

45. *Id.* More recently, the Second Circuit also rejected the "immediate consequence" meaning of direct for the same reasons as the Seventh Circuit in *Minn-Chem*. *See Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 398 (2d Cir. 2014) (rejecting the interpretation of "direct . . . effect" advanced by the Ninth Circuit).

First, if Congress had intended to adopt the “immediate consequence” meaning of direct, then it likely would not have included the foreseeability requirement because the two concepts are not separable; they must be read together because the concept of remoteness is part of both. Foreseeability, to me, connotes that an effect may not be the immediate consequence of the action but that the conduct and effect are sufficiently direct, or not so remote, that the defendants should have foreseen the effects that resulted. To me, that the effect must be foreseeable rules out the Ninth Circuit’s definition of direct as covering only an immediate consequence because foreseeability encompasses effects that are not immediate in the way the Ninth Circuit used that term.

The second reason I agree with Ms. Leonard’s conclusion is the similarity between this issue and that of when a plaintiff is a proper party to recover for an antitrust violation—when a plaintiff has so-called “antitrust standing.”<sup>46</sup> Just as Congress did not intend the FTAIA to permit suits for all foreign restraints on competition affecting domestic commerce however remote,<sup>47</sup> it did not intend to permit every person injured by an antitrust violation, no matter how tangentially, to recover damages.<sup>48</sup> There must be limiting factors in both situations; in fact, the purpose of both the antitrust standing requirements and the FTAIA is to limit—in the former case, the plaintiffs who may

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46. To recover damages for an antitrust violation, plaintiff must show that it has “antitrust standing” (specifically, that it is a proper party to bring the case). *See generally* *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 539–46 (1983) (discussing the factors courts examine and balance when determining whether a plaintiff has antitrust standing). The antitrust standing requirement significantly limits the universe of parties injured by the violation who may recover damages. *See, e.g., Del. Valley Surgical Supply, Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1119–20 (9th Cir. 2008) (noting that the Supreme Court has narrowly interpreted provisions of antitrust statutes affording remedies, in this case § 4 of the Clayton Act, “thereby constraining the class of parties that have statutory standing to recover damages through antitrust suits”).

47. *See Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 854 (7th Cir. 2012) (determining that Congress’s construction of the FTAIA indicates that they did not intend for the Sherman Act to apply to “every arrangement that literally can be said to involve trade or commerce with foreign nations”).

48. *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972) (“Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.”).

recover damages and in the latter case, in essence, who can recover for a violation in a foreign country.<sup>49</sup>

The Supreme Court provided the appropriate factors to examine for determining antitrust standing in *Associated General Contractors of California v. California State Council of Carpenters (AGC)*.<sup>50</sup> Some of those factors and the direct and foreseeability requirements of the FTAIA are quite similar. The Court explained preliminarily that the common law provided limits on recovery in tort and contract cases by examining factors such as “foreseeability and proximate cause, [and] directness of injury,”<sup>51</sup> and that although it did not debate these limitations when enacting Section 4(a) of the Clayton Act,<sup>52</sup> the statute authorizing recovery of damages in antitrust cases, it must have assumed that antitrust plaintiffs “would be subject to constraints comparable to well-accepted common law rules applied in comparable litigation.”<sup>53</sup> It would seem that Congress, aware of the common law on the extraterritorial application of the Sherman Act flowing from *Alcoa* and its progeny, would have had those principles in mind when enacting FTAIA. The “reasonably proximate causal nexus” meaning of direct embodies those principles to a much greater extent than the Ninth Circuit’s “immediate consequence” meaning. The Ninth Circuit suggested that Congress, in passing FTAIA, did not merely codify the common law but rather established a new “immediate consequence” standard.<sup>54</sup> There is no reason to believe that,

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49. See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983) (explaining that “Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might be traced to an antitrust violation”); see also *supra* notes 13–16 and accompanying text (describing Congress’s intent in passing the FTAIA).

50. See 459 U.S. 519 (1983) (determining that a labor union did not have standing to bring a lawsuit alleging that an association of employers conspired with third parties and members of the association to refuse to engage in collective bargaining).

51. *Id.* at 532.

52. The statute, read literally, would permit “any person” injured by an antitrust violation to recover damages. 15 U.S.C. § 15(a) (2012) (emphasis added).

53. *Associated Gen. Contractors*, 459 U.S. at 533.

54. See *United States v. LSL Biotechnologies*, 379 F.3d 672, 683 (9th Cir. 2004) (Aldisert, J., dissenting) (“The flash point of controversy, however, is whether the word ‘direct’ in the FTAIA is a new dimension added to traditional

however, particularly because the stated purpose of the statute was to “clarify” existing law,<sup>55</sup> not replace it.

In *AGC*, the Court explained that a plaintiff’s antitrust standing should depend on its “harm, the alleged wrongdoing by the defendants, and the relationship between them,”<sup>56</sup> just as the applicability of the Sherman Act to foreign conduct should depend on the relationship between the violation and its relationship to domestic commerce. The Court then cited six factors that courts should examine in determining whether a plaintiff is an appropriate party to recover damages and thus to have antitrust standing.<sup>57</sup> At least three seem directly relevant to the question of whether the Sherman Act should apply to unlawful conduct undertaken in foreign countries that affects U.S. commerce.<sup>58</sup> Each is more commensurate with the “reasonably proximate causal nexus” meaning of direct than with the “immediate consequence” meaning.

The first is the degree of causal connection between the violation and the plaintiff’s injury—seemingly, whether the violation is the proximate cause because the Court had previously indicated that common law principles, including proximate cause of the injury, provide guidance.<sup>59</sup> The second factor is whether the defendants intended to cause the plaintiff’s harm.<sup>60</sup> This seems

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antitrust law that involves trade or commerce with foreign nations, as the majority concludes . . .”).

55. See *F. Hoffman–LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 169–70 (2004) (noting that the language and history of the FTAIA suggest that Congress designed the act to clarify (or perhaps to limit), but not to expand in any significant way, the Sherman Act’s scope as applied to foreign commerce).

56. See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983) (noting that the question of whether the union may recover for the injury it allegedly suffered cannot be answered simply by reference to the broad language of § 4 of the Clayton Act).

57. See *id.* at 537–45 (listing factors relevant to whether a plaintiff is a person injured in his business or property by reason of anything forbidden in antitrust laws, and therefore entitled to treble damages).

58. See *infra* notes 59–63 and accompanying text (analyzing each of the three factors which seem directly relevant to the Sherman Act’s international reach).

59. See *Associated Gen. Contractors*, 459 U.S. at 532–33, 537 (explaining that the common law required plaintiffs to prove, with certainty, both the existence of damages and the causal connection between the wrong and the injury).

60. *Id.*

akin to a foreseeability requirement. Intent and foreseeability are not synonymous but are closely related. Where a defendant intends to injure a plaintiff that injury is certainly foreseeable. The *Minn-Chem* court noted that an injury is foreseeable when the “effects . . . are a rationally expected outcome of the conduct.”<sup>61</sup> If they are a rationally expected outcome, they would seem to be intended. If the effect on domestic commerce must be immediate for the Sherman Act to apply, one has to wonder why Congress included the foreseeability requirement, which connotes a less direct relationship between the conduct and its effect.

The third factor is “the directness or indirectness of the asserted injury” or the “chain of causation between the [plaintiff’s] injury and the alleged restraints . . . .”<sup>62</sup> Here, the Court appeared to be using the term direct to connote “remoteness” between the plaintiff and the alleged violation. In *AGC*, the plaintiffs’ injury was too remote for antitrust standing because others were more directly injured by the violation and thus would be more appropriate plaintiffs; the plaintiffs were “more remote part[ies]” than others.<sup>63</sup>

*AGC* was decided after passage of the FTAIA, so one cannot argue that Congress simply drew the direct and foreseeable factors incorporated in the FTAIA from that decision. But these are common law concepts with which the FTAIA drafters were likely familiar and that seem to have application to both the question of when a plaintiff should have antitrust standing and the appropriateness of applying the Sherman Act to foreign conduct affecting domestic commerce. And they are familiar principles with which courts have substantial experience in applying.

The issue Ms. Leonard discusses is a narrow and relatively esoteric one about which little has been written. Decisions are

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61. See *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 856 (7th Cir. 2012) (analyzing whether the potash cartel described in the Complaint meets the requirements of “substantiality” and “foreseeability” under the FTAIA).

62. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 540 (1983).

63. See *id.* at 540–42 (determining that the injuries alleged by the Union were the indirect result of whatever harm may have been suffered by “certain” construction contractors and subcontractors); *id.* at 542 n.25 (appearing to tie directness of the injury and remoteness).

few and the rationales in those that do exist appear relatively weak. Thus, Ms. Leonard's Note is a welcome addition in answering and explaining what should be, but is not, a simple question—the meaning of a seemingly simple word. Particularly given the scant authorities and guidance, Ms. Leonard's Note handles the analysis well, and she reaches the right conclusion.