

Chapter 97

EXTRATERRITORIALITY IN U.S. JURISPRUDENCE

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The “extraterritorial” reach of U.S. antitrust laws has been a renewed subject of litigation and interest in recent years. This chapter explores the Sherman Act’s application to foreign conduct, from the initial cases challenging foreign conduct, through Congress’s enactment of the Foreign Trade Antitrust Improvements Act of 1982, to the Supreme Court’s decision in *Empagran* and its progeny. This chapter in particular focuses on current, unresolved issues in extraterritoriality, including the scope of comity, the Foreign Trade Improvement Act’s applicability when foreign and in-U.S. effects are intertwined, and the standing of private plaintiffs to challenge foreign conduct.

1. Introduction

For a century, courts, Congress, and enforcement agencies have struggled to define the Sherman Act’s applicability to conduct outside the United States. The Sherman Act’s evolving territorial scope reflects an uneasy tension between two opposing impulses: protecting American consumers from international cartels requires giving the Sherman Act *some* “extraterritorial” scope. However, condemning overseas conduct under American laws often draws the charge that American antitrust policy reflects “legal imperialism” and risks retaliation from other jurisdictions upon whose antitrust enforcement efforts American consumers too depend.

This chapter explores the “extraterritoriality” debate from the perspective of the evolution of the Sherman Act’s territorial reach. Section 2 traces the development of the Sherman Act’s applicability to foreign commerce from the earliest cases, through the *Timberlane* era, and finally to Congress’s intervention in the form of the Foreign Trade Antitrust Improvements Act. Section 3 then discusses the key current issues in extraterritoriality, including the boundaries between “foreign” and “domestic” commerce, the Sherman Act’s territorial scope in private antitrust litigation after *Empagran*, and the scope of the comity doctrine.

2. Foundations for applying the Sherman Act to foreign conduct

Understanding the evolving territorial scope of the Sherman Act is essential to put the current key extraterritoriality issues in context. This section explores the development of the Sherman Act’s application to overseas conduct, emphasizing judicial and congressional responses to the charge that the Sherman Act’s application to foreign conduct undermines international comity.

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2.1. *Interpreting the Sherman Act*

Determining the Sherman Act's territorial reach starts with the statutory text. The Act applies to "trade or commerce among the several States, *or with foreign nations.*"¹ This language tracks and implements Congress's power to "regulate Commerce with Foreign Nations."² The Supreme Court has construed the Sherman Act to reach the limit of Congress's power to regulate interstate commerce.³ But the same is not true with respect to foreign commerce. Just as the Act's flat prohibition of "restraints of trade" has not been read literally,⁴ so too "the full scope of the Sherman Act has never been applied in the field of international commerce."⁵ As is more fully discussed below, the Sherman Act reaches foreign conduct only when such conduct causes certain effects within the United States or on U.S. commerce.

The most important reason for this disjunction between the Sherman Act's domestic and international reach is the canon of construction that, when possible, a statute ought not be construed to violate the "law of nations."⁶ This maxim of statutory construction recognizes, it is said, that "[i]nternational law is part of our law."⁷ Judicial efforts to define the Sherman Act's territorial reach over the last century in large measure reflect the two key debates this precept has spawned. First, what principles of international law apply to interpreting the Sherman Act? Second, how should courts take these principles into account?

2.2. *Bases for jurisdiction to prescribe: The territorial and effects principles*

The most important applicable international law principle is the notion that a state exercises plenary authority within its territory. As Chief Justice John Marshall put it: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."⁸ The so-called territorial principle delimits "prescriptive jurisdiction"—the scope of a state's power to regulate conduct.⁹

States have a vital interest in countering external conduct that threatens their interests. Thus, the territorial principle has not been construed to forbid a state in all

1. 15 U.S.C. §§ 1, 2 (emphasis added); *see also* 15 U.S.C. § 44 (FTC Act applies to "commerce . . . with foreign nations"). Congress amended the Sherman Act and the FTC Act in 1982 to remove certain conduct and causes of action from this language's reach. *See infra* Section 2.4 (discussing the FTAIA).
2. U.S. CONST. art. I, § 8, cl. 3 (amended 1913).
3. *See Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 328-29 (1991); *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 558 (1944).
4. *See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 687 (1978) ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says.").
5. SPENCER W. WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 5:1 (2004).
6. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *See generally* AM. LAW INST., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) [hereinafter RESTATEMENT (THIRD)].
7. *Paquete Habana*, 175 U.S. 677, 700 (1900).
8. *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).
9. *See* RESTATEMENT (THIRD), *supra* note 6, at 235-36. Whether prescriptive jurisdiction implicates the subject matter jurisdiction of the federal courts remains an open, unresolved issue. *See infra* note 91.

circumstances from applying its laws to conduct undertaken abroad.¹⁰ For instance, U.S. courts early on recognized that a state permissibly may regulate the conduct of “its own citizens” abroad.¹¹ In addition to this so-called nationality principle, international law recognizes the protective principle, which permits states “to punish a limited class of offenses committed outside its territory by persons who are not its nationals—offenses directed against the security of the state.”¹²

The most important accommodation between strict territoriality and the reality that a state can be threatened by external conduct is the precept that the territorial principle can be applied “objectively.”¹³ The objective territorial principle (also known as the effects principle) recognizes that a “prohibition of effects is usually indivisible from regulation of causes.”¹⁴ As expressed by noted jurist John Bassett Moore at the time of the Sherman Act’s adoption, “a man who outside of a country wilfully [sic] puts in motion a force to take effect in it is answerable at the place where the evil is done.”¹⁵

The effects principle is rationalized as an objective application of the territoriality principle because, as Justice Oliver Wendell Holmes explained, when an actor intends to cause and actually causes detrimental effects in another state, the actor is treated “as if he had been present at the effect.”¹⁶ For this reason, it is said, “[t]he territorial effects doctrine is *not* an *extraterritorial* assertion of jurisdiction.”¹⁷

There is an inherent tension between the articulation of the territorial principle as “absolute and exclusive” and that principle’s objective application. Jurisdiction of a state cannot be exclusive if its citizens acting within the state are subject to punishment abroad for causing intended detrimental effects elsewhere. In such circumstances, one state may share *concurrent* jurisdiction with another state. The state where the conduct occurred may assert that it has a greater interest in regulating that behavior than the state in which the effects are felt. The story of the evolution of the Sherman Act’s territorial reach is largely one of courts striving to mediate this tension.

10. See *Laker Airways v. Sabena*, 731 F.2d 909, 923 (D.C. Cir. 1984).

11. *Apollon*, 22 U.S. (9 Wheat) 362, 370 (1824).

12. RESTATEMENT (THIRD), *supra* note 6, § 402.

13. See generally Eleanor M. Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is “Reasonableness” the Answer?*, 19 N.Y.U. J. INT’L L. & POL. 565, 583 (1987).

14. *Laker Airways*, 731 F.2d at 921.

15. JOHN BASSETT MOORE, U.S. DEP’T OF STATE, REPORT ON EXTRATERRITORIAL CRIME AND THE CUTTING CASE 23 (1887); see also 1 CHARLES C. HYDE, INTERNATIONAL LAW § 238 (2d rev. ed. 1945); 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 202 (1906). See generally 1 WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.5 (5th ed. 1996).

16. *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.”).

17. *Laker Airways*, 731 F.2d at 923 (emphasis added/emphasis in original); see also FUGATE, *supra* note 15, at 57 (“Thus, the courts have not purported to exercise extraterritorial jurisdiction but only jurisdiction over acts that are effective within U.S. territory.”). In the *Lotus* case in 1927, the Permanent Court of International Justice upheld the objective territoriality principle as consistent with international law. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). See generally FUGATE, *supra* note 15, at 53-54 n.4.

2.3. *The expansion of the effects test*

American Banana and its progeny: An apparent territorial approach. The earliest Sherman Act cases to consider the application of the statute to foreign conduct appeared to resolve the tension in favor of strict territoriality. In *American Banana Co. v. United Fruit Co.*,¹⁸ Holmes rejected applying the Sherman Act to conduct that occurred entirely in Panama and Costa Rica. The plaintiff alleged that the defendant engaged the Costa Rican government to seize the plaintiff's property and otherwise prevent the plaintiff from competing in the banana trade. In rejecting the plaintiff's claim, the Court observed that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."¹⁹ Due regard for the territoriality principle, Holmes explained, implied that "[a]ll legislation is *prima facie* territorial."²⁰ That principle doomed applying the Sherman Act to foreign conduct. The Court found it "improbab[le]" that Congress intended through the Sherman Act to criminalize foreign acts.²¹

Despite *American Banana's* apparent territorial approach, U.S. courts and enforcers soon applied the Sherman Act to reach schemes involving foreign elements that caused anticompetitive effects in the United States. As was later observed, *American Banana* did not involve conduct alleged to have caused detrimental effects in the United States and thus presented no occasion for considering whether the Sherman Act should be construed to reach foreign conduct under the objective territoriality principle.²² Indeed, Holmes twice cited his *American Banana* opinion for the proposition that states permissibly *can* regulate foreign conduct when it causes the requisite in-jurisdiction effects.²³ Nonetheless, *American Banana's* territoriality analysis impelled later decisions not to rely on the effects principle but rather to find some substantial in-U.S. conduct to serve as a predicate for the Sherman Act's applicability.²⁴

The very year after the Court decided *American Banana*, the Court in *United States v. American Tobacco Co.*²⁵ condemned the tobacco trusts under the Sherman Act. Among the conduct held illegal was an agreement executed in England to divide world markets which kept an American firm out of the British market and a British firm out of the American market.²⁶ Shortly thereafter, in *United States v. Pacific & Arctic Railway & Navigation Co.*,²⁷ the Court reversed the dismissal of an indictment for violations of Section 1 and Section 2 of the Sherman Act against the defendant steamship and railroad companies concerning freight and passenger transportation between various ports in the

18. 213 U.S. 347 (1909).

19. *Id.* at 356 (citing *Slater v. Mexican Nat'l Ry. Co.*, 194 U.S. 120, 126 (1904)).

20. *Id.* at 357.

21. *Id.*

22. See *infra* note 43 and accompanying text.

23. *Hyde v. United States*, 225 U.S. 347, 386 (1912) (Holmes, J., dissenting); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

24. See cases cited *infra* notes 25-31.

25. 221 U.S. 106 (1911).

26. *Id.* at 171-73.

27. 228 U.S. 87 (1913).

United States and Canada.²⁸ The defendants argued that “as part of the transportation route was outside of the United States, the anti-trust law does not apply.”²⁹ The Court rejected this argument because it implied that Canada similarly could not condemn the conduct, thereby leaving “the indictment out of the control of either Canada or the United States,” a consequence that the Court could not accept.³⁰ Because the conduct occurred at least partially within the United States, the Court held that the Sherman Act applied.³¹

Antitrust enforcement based on the partial erosion of *American Banana* played an important role in and between the First and Second World Wars.³² The “Wilson Administration used criminal antitrust prosecutions to thwart clandestine efforts by German agents to disrupt the flow of war material from U.S. factories to countries fighting against Germany.”³³ The government successfully prosecuted German agents under Section 1 of the Sherman Act for acts against American interests, including instigating labor unrest among employees of arms makers and transportation companies,³⁴ as well as for planning to destroy arms and transportation facilities—both in America and abroad.³⁵

Leading up to Pearl Harbor, “the Antitrust Division was functioning at a record pace in the number of proceedings instituted under the [Sherman Act].”³⁶ As part of that “vigorous pre-war enforcement effort, the Roosevelt Administration obtained consent decrees and/or no contest pleas in several cases concerning agreements between American companies and German companies to divide world markets or otherwise eliminate competition for military optical instruments, magnesium, synthetic rubber and high octane aviation gasoline.”³⁷ Wendell Berge, head of the Antitrust Division in 1944, observed that “[t]hese cartel arrangements, although eventually discovered through antitrust investigation and dealt with by decrees . . . irretrievably deprived the Nation of reserves of capacity and skill for the war effort.”³⁸

Alcoa and the modern articulation of the effects doctrine. The government’s case against the aluminum industry, which culminated in *United States v. Aluminum Co. of America (Alcoa)*,³⁹ arose in this era of vigorous anticartel enforcement. In that 1945

28. *Id.* at 88.

29. *Id.* at 105.

30. *Id.* at 106.

31. *Id.*; see also *Thomsen v. Cayser*, 243 U.S. 66, 68 (1917) (holding illegal a combination of shipping common carriers as “in restraint of trade and commerce between New York and ports in South Africa”); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (holding illegal a conspiracy in Mexico which brought about forbidden results within the United States by acts done therein).

32. See Richard M. Steuer & Peter A. Barile III, *Antitrust in Wartime*, ANTITRUST, Spring 2002, at 71-73.

33. *Id.* at 71 (citing Thomas K. Fisher, *Antitrust During National Emergencies*, 40 MICH. L. REV. 969, 988-89 (1942) (discussing cases)).

34. *United States v. Rintelen*, 233 F. 793 (S.D.N.Y. 1916), *aff’d*, *Lamar v. United States*, 260 F. 561 (2d Cir. 1919). For a discussion of the case, see Fisher, *supra* note 33, at 988-89.

35. *United States v. Bopp*, 230 F. 723, 232 F. 177, 237 F. 283 (N.D. Cal. 1916).

36. Fisher, *supra* note 33, at 1186.

37. Steuer & Barile, *supra* note 32, at 72 (citing Wendell Berge, *Antitrust Enforcement in the War and Postwar Period*, 12 GEO. WASH. L. REV. 371, 372-73 (1944)).

38. *Id.*

39. 148 F.2d 416 (2d Cir. 1945).

decision, the Second Circuit, sitting as a court of last resort for a Supreme Court that lacked a quorum, and speaking through Judge Learned Hand, settled that the Sherman Act reaches foreign conduct that causes substantial intended effects in the United States.⁴⁰

Hand framed the question presented as “whether Congress chose to attach liability [under the Sherman Act] to the conduct outside the United States of persons not in allegiance to it.”⁴¹ Hand accepted Holmes’s axiom from *American Banana* 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.”⁴² Hand observed, however, that *American Banana* did not involve conduct alleged to have caused detrimental effects in the United States, and thus the case presented no occasion for considering whether the Sherman Act should be construed to reach foreign conduct when such effects were present.⁴³ Invoking objective territoriality, Hand recognized “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; and these liabilities other states will ordinarily recognize.”⁴⁴ The court accordingly held that, at least when conduct causes “some” intended effect on U.S. commerce, such conduct falls within the Sherman Act’s reach.⁴⁵

Alcoa settled that the Sherman Act reaches conduct that causes intended effects within the United States, as the Supreme Court later acknowledged in its 1993 decision in *Hartford Fire*.⁴⁶ Nonetheless, *Alcoa* left open a number of questions, and, in its subsequent applications, generated significant international controversy. For instance, *Alcoa* left unclear how much of an effect within the United States is required to support the Sherman Act’s application and the nature of the requisite effect. Although many courts (and the Supreme Court in *Hartford Fire*) eventually required a “substantial” in-U.S. effect,⁴⁷ courts differed in their articulations of the quantum required.⁴⁸ Moreover, courts

40. *Id.* at 443-44.

41. *Id.* at 443.

42. *Id.* (quoting *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909)).

43. *See id.* *But cf.* *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 407 (1990) (reading *American Banana* to decide in a holding “later substantially overruled” that “the antitrust laws had no extraterritorial application”). *See generally* FUGATE, *supra* note 15, at 61-62 (noting dispute over the proper reading of *American Banana*).

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

45. *Id.* at 443-44.

46. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96 n.21 (1993). A number of cases before *Hartford Fire* had endorsed aspects of *Alcoa*. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) (explaining that the “Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce”); *Cont’l Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (“A conspiracy to monopolize or restrain 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.” (citing *Alcoa*, 148 F.2d at 416)); *cf. Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952) (“Unlawful effects in this country, absent in the posture of the [*American Banana*] case before us, are often decisive . . .”).

47. *Hartford Fire*, 509 U.S. at 795-96 n.21.

48. *See generally* H.R. REP. NO. 97-686, at 2 (1982) (House Report for FTAIA), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487.

and enforcers differed on whether an effect on export commerce was sufficient absent an effect on U.S. consumers, when adverse consequences are merely to U.S. exporters.⁴⁹

Perceived aggressive applications of *Alcoa* by U.S. courts led to significant foreign backlash. A number of states objected that U.S. courts had stretched objective territoriality beyond its proper scope.⁵⁰ In particular, states objected that applying the Sherman Act overseas effectively required their companies operating in their own countries to comply with U.S. economic regulation, thereby ignoring the interests of those states. Some states went so far as to enact “blocking” statutes.⁵¹ These measures, which typically prohibited the enforcement of judgments that rested on the effects doctrine, were directly aimed at countering *Alcoa*. For example, the U.K. Trade Department stated that the U.K.’s blocking statute was “primarily a reaction to the accumulation of attempts by the United States since the 1950s to impose its own economic and other domestic policies . . . outside its territorial jurisdiction, without regard for the trading interests of other countries.”⁵²

As one noted antitrust jurist summarized: “The *Alcoa* decision was not warmly received in other countries, which as of the mid-1940s did not as a rule have antitrust laws and which resented the apparent effort of the United States to act as the world’s competition police officer.”⁵³

2.4. *The courts and Congress respond*

Criticisms of *Alcoa* and its progeny did not go unheeded. The courts, and ultimately Congress, took actions designed to mediate the tension between application of the effects principle to protect U.S. consumers and recognition that foreign states have an interest in regulating conduct that takes place on their own soil.

Judicial response: The rise of comity. The judicial response to the apparent expanding reach of the Sherman Act took the form of the jurisdictional “rule of reason,” which some referred to as declining jurisdiction on grounds of “comity.” Proposed by Kingman Brewster⁵⁴ and finding its first judicial expression in the Ninth Circuit’s *Timberlane* decision, the jurisdictional rule of reason permits courts to refuse to apply the Sherman Act unless “the interests of, and links to, the United States—including the

49. See generally WALLER, *supra* note 5, § 6:10 (describing the debate over the proper application of the Sherman Act to export transactions). Export transactions are both subject to the FTAIA and certain exemptions. See generally *id.* at § 6:5.

50. See Eleanor M. Fox, *Competition Law*, in INTERNATIONAL ECONOMIC LAW 345-46 (Andreas F. Lowenfeld ed., 2002) (describing how *Alcoa* offended U.S. trading partners); Fox, *supra* note 13, at 570.

51. See, e.g., Protection of Trading Interests Act, 1980, c. 11 (Eng.); Law No. 80-538 of July 16, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 16, 1980, p. 1799; The Foreign Extraterritorial Measures Act, 1984, R.S.C., ch. F-29, § 3 (1984) (Can.); Foreign Proceedings (Excess of Jurisdiction) Act, No. 3 (1984) (Austl.). See generally WALLER, *supra* note 5, § 5:16 (describing the U.K. Protection of Trading Interests Act “as a defensive measure to counteract perceived excesses in United States jurisdictional claims”).

52. Press Release, U.K. Dep’t of Trade and Indus., Protection of Interests Bill (Oct. 31, 1979).

53. *United Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 960 (7th Cir. 2003) (en banc) (Wood, J., dissenting).

54. See KINGMAN BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958).

magnitude of the effects on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”⁵⁵ *Timberlane* expressly responded to concerns that “[t]he effects test by itself is incomplete because it fails to consider other nations’ interests.”⁵⁶

In *Timberlane*, a domestic timber miller claimed that a rival, its Honduran affiliates, and other coconspirators prevented the plaintiff from milling timber in Honduras and exporting to the United States in order to maintain a timber export monopoly in Honduras.⁵⁷ Although the district court had disposed of the case on the ground that the conduct caused no substantial intended effects in the United States, the court of appeals reversed.⁵⁸ Recognizing that “[e]xtraterritorial application is understandably a matter of concern for the other countries involved,”⁵⁹ the court held that it could decline to adjudicate the dispute even if the alleged effects of the conspiracy met *Alcoa*.⁶⁰ Conversely, the existence of effects meeting *Alcoa* was just one factor in the analysis.⁶¹ Judging it “evident that at some point the interests of the United States are too weak and the foreign harmony incentive for [judicial] restraint too strong to justify an extraterritorial assertion of jurisdiction,”⁶² the court weighed the degree of the domestic anticompetitive effects (if any) against considerations of “international comity and fairness.”⁶³ The court looked to the following factors:

The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.⁶⁴

The Ninth Circuit affirmed the trial court’s subsequent dismissal on the grounds that the Honduran interests outweighed the U.S. interests and the exercise of jurisdiction might “create needless tensions” between the countries.⁶⁵

Other courts emulated *Timberlane* by crafting multifactor tests to determine whether the application of the Sherman Act to foreign conduct was, under all circumstances,

55. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976).

56. *Id.* at 611-12.

57. *Id.* at 603-05.

58. *Id.* at 615.

59. *Id.* at 609.

60. *Id.*

61. See generally Fox, *supra* note 13, at 571-72.

62. *Timberlane*, 549 F.2d at 609.

63. *Id.* at 614-15.

64. *Id.* at 614. In compiling these factors, the Ninth Circuit drew heavily from the factors set forth in § 40 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1962). See 549 F.2d at 614 n.31.

65. *Timberlane Lumber Co. v. Bank of Am.*, 574 F. Supp. 1453, 1471 (N.D. Cal. 1983), *aff’d*, 749 F.2d 1378 (9th Cir. 1984).

reasonable. For instance, the Third Circuit listed ten factors to be considered.⁶⁶ Other courts articulated similar tests.⁶⁷ This analysis ultimately found expression in the *Restatement (Third) of the Foreign Relations Law of the United States*, which requires assertions of prescriptive jurisdiction to be reasonable given the totality of the circumstances.⁶⁸

Reaction to *Timberlane* was mixed. Not all accepted that, as *Timberlane* and its progeny in principle permitted, a U.S. court could entertain a Sherman Act dispute absent a substantial intended effect in the United States.⁶⁹ Conversely, courts questioned whether comity provided a proper basis for declining to apply the Sherman Act when *Alcoa's* substantial intended effects test was met. Some doubted that the federal courts were equipped to balance relative national interests, concerns that are the province of the political branches of government.⁷⁰ The U.S. Department of Justice ultimately asserted, and some courts agreed, that judicial consideration of comity should not apply in suits brought by the government, which weighs comity concerns in bringing enforcement actions.⁷¹ As one scholar explained: “The need for comity” in this sense “arose

66. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) (articulating a list of factors similar to *Timberlane's*); see also *Montreal Trading v. Amax, Inc.*, 661 F.2d 864, 869 (10th Cir. 1981); *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983); cf. *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255-56 (7th Cir. 1980) (accepting that *Timberlane* and *Mannington Mills* “certainly provide an adequate framework” for determining whether jurisdiction should be exercised but holding that the trial court did not abuse its discretion in eschewing their analysis and instead concluding that the seriousness of the allegations and the recalcitrance of the defendants “all weighed heavily in favor of proceeding to judgment and damages”).

67. See generally FUGATE, *supra* note 15, at 86-93.

68. RESTATEMENT (THIRD), *supra* note 6, §§ 403, 415. See generally WALLER, *supra* note 5, § 5:6. The *Restatement* factors include: (1) the link between the conduct and the regulating jurisdiction (e.g., conduct or effects); (2) the connection, including nationality, residence, or economic activity, between the regulating jurisdiction and the person principally responsible for the conduct; (3) the character of the act being regulated, the importance of regulation to the regulating state, whether other states regulate the conduct, and the “degree to which the desirability of such regulation is generally accepted”; (4) the existence of justified expectations that might be protected or hurt by the regulation; (5) the importance of the regulation to the international political, legal, or economic system; (6) the extent to which the regulation is consistent with the traditions of the international system; (7) the extent to which another jurisdiction may have an interest in regulating the activity; and (8) the likelihood of conflict of regulation with another jurisdiction. RESTATEMENT (THIRD), *supra* note 6, § 403(2). Even if the assertion of jurisdiction is reasonable based on these factors, according to the *Restatement*, in the case of concurrent jurisdiction by multiple enforcers, “each state has an obligation to evaluate its own as well as the other state’s interest in exercising jurisdiction.” *Id.* § 403(3). See generally Fox, *supra* note 13, at 584-90 (discussing the *Restatement* factors).

69. As Professor Fox explains, both *Timberlane* and *Mannington Mills* “treat effect on U.S. commerce as a factor favoring the assertion of jurisdiction” but not as a prerequisite. Fox, *supra* note 13, at 573.

70. See *Laker Airways v. Sabena*, 731 F.2d 909, 948-52 (D.C. Cir. 1984).

71. Reply Brief for United States of America at 12, *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (No. 96-2001) (“[I]n a suit by the United States to enforce the antitrust laws, respect for the Executive Branch’s primacy in the foreign policy realm precludes ‘second-guess[ing] the executive branch’s judgment as to the proper role of comity concerns.’” (quoting *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C.), *aff’d*, 908 F.2d 981 (D.C. Cir. 1990))), available at <http://www.usdoj.gov/atr/cases/f1000/1002.htm>. The government’s international guidelines expressly require the

primarily because *private litigants* otherwise lacked the incentive to consider the broader national interest.⁷² Others maintained that, once a court concluded that Congress intended the Sherman Act to apply to conduct at issue (because it causes substantial intended effects in the United States), the court lacked discretion to decline jurisdiction on grounds of unreasonableness.⁷³

As explained below, the Supreme Court has not definitely resolved these debates. Despite this uncertainty, as one scholar has noted, “there is a pattern to the law.”⁷⁴ “If a defendant’s conduct has had a significant effect on U.S. domestic or foreign commerce, U.S. courts in antitrust cases virtually always find that the balance tips in favor of applying U.S. law.”⁷⁵ More generally, “[t]he only cases in which courts have granted dismissals for lack of subject matter jurisdiction are cases in which there was no viable antitrust claim because no U.S. competition interest was implicated.”⁷⁶ That observation, accurate as to the application of *Timberlane*, no longer holds true generally following Congress’s enactment of the Foreign Trade Antitrust Improvements Act (FTAIA).

Congressional response: The FTAIA. While the courts sought to temper objective territoriality through comity, Congress addressed the Sherman Act’s reach legislatively. In 1982, Congress enacted the FTAIA as Title IV of the Export Trading Company Act of 1982. Passage of the Act, according to its legislative history, was driven by two concerns. The first was to address the business community’s perception “that antitrust law prohibits efficiency-enhancing joint export activities.”⁷⁷ Many testified before Congress to the effect that “[i]t is an article of orthodoxy in the business community that the antitrust laws stand as an impediment to the international competitive performance of the United States” by “hinder[ing] our export performance.”⁷⁸

Congress’s second stated purpose was to rectify “possible ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied.”⁷⁹ Congress noted “disparity among judicial interpretations” of *Alcoa*’s effects test and believed that “at a time when international trade plays an immense and increasingly important role in the economy, it is appropriate . . . to formulate a standard to be applied uniformly throughout the federal judicial system.”⁸⁰

DOJ to consider comity considerations. See U.S. DEP’T OF JUSTICE & FEDERAL TRADE COMM’N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.2 (1995) [hereinafter 1995 ENFORCEMENT GUIDELINES], <http://www.usdoj.gov/atr/public/guidelines/internat.htm>.

72. Spencer W. Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT’L L. 563, 568 (1999) (emphasis added).

73. See generally FUGATE, *supra* note 15, § 2.13; WALLER, *supra* note 5, § 5:13 (citing critiques of the concept of balancing foreign interests). See also *Laker Airways*, 731 F.2d at 948-50.

74. Fox, *supra* note 13, at 577.

75. *Id.* at 574.

76. *Id.* at 576.

77. H.R. REP. NO. 97-686, at 4 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2489.

78. *Id.* at 4 (quoting statement of John H. Shenefield).

79. *Id.* at 5, reprinted in 1982 U.S.C.C.A.N. 2487, 2490.

80. *Id.* at 5-6, reprinted in 1982 U.S.C.C.A.N. 2487, 2490-91.

To address these concerns, Congress added Section 7 to the Sherman Act. That provision (and a parallel amendment to the FTC Act⁸¹) prescribes the Sherman Act's reach with respect to conduct "involving" nonimport commerce with foreign nations.⁸² Such conduct falls within the Sherman Act only if two requirements are met:

- first, the conduct must have "a direct, substantial, and reasonably foreseeable effect" on U.S. domestic, import, or export commerce (Subsection 1);
- second, "such effect" must "give[] rise to a claim" under the Sherman Act (Subsection 2); and
- additionally, in the case of conduct involving export commerce (only), the Sherman Act applies "only for injury to export business in the United States"⁸³ (export proviso).

These amendments, the legislative history predicted, would "promote certainty in assessing the applicability of the American antitrust law to international business transactions" by establishing an "objective" jurisdictional standard.⁸⁴ Congress believed that clarifying the antitrust laws' jurisdictional reach would promote comity by "encourag[ing] our trading partners to take more effective steps to protect competition in their markets."⁸⁵ Congress sought "to exempt from the antitrust laws conduct that does not have the requisite domestic effects," while making clear that the FTAIA "does not exclude all persons injured abroad from recovering under the antitrust laws of the United States."⁸⁶

Congress failed to achieve the clarity it sought. The statute's "inelegant[]"⁸⁷ language, as will be explained, spawned litigation over the extent to which the FTAIA limits claims by foreign purchasers allegedly harmed by international cartels. Moreover, Congress notably refused to promote clarity by resolving the debate over the jurisdictional rule of reason. According to the House Report, the FTAIA "address[es]

81. 15 U.S.C. § 45(a)(3).

82. The full text of the FTAIA provides:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

- (1) such conduct has a direct, substantial, and reasonably foreseeable effect
 - (A) on trade or commerce with is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
 - (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
- (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1) (B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a.

83. *Id.*

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

85. *Id.* at 14, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2499.

86. *Id.* at 10, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495.

87. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997).

only the subject matter jurisdiction of United States antitrust law.”⁸⁸ The Act “is intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions.”⁸⁹ Nor did Congress clarify the interaction between the FTAIA’s “jurisdictional” provisions and concepts of standing. Although Subsection 2 could be read to address, and the export proviso plainly addresses, which plaintiffs may assert Sherman Act claims, Congress disclaimed any “inten[t] to alter existing concepts of antitrust injury or antitrust standing.”⁹⁰

By leaving these issues and other issues unaddressed, Congress laid the foundation for further disputes over the Sherman Act’s extraterritorial reach.

3. Key current issues

Since the FTAIA’s enactment, courts have wrestled with its implications for a range of frequently recurring issues. This section explores several issues that remain unresolved: (1) Which set of jurisdictional principles (foreign or domestic) apply when “mixed” conduct (in part domestic, in part foreign) is challenged? (2) Which effects are “direct” or “indirect” under the FTAIA? (3) When can private plaintiffs challenge foreign conduct based on its *foreign* effects? (4) How does the FTAIA affect *Timberlane*’s comity analysis?

3.1. Which jurisdictional principles apply?

A threshold issue in any matter involving foreign commerce is which of the many tests that govern the Sherman Act’s reach applies. With the FTAIA’s passage, there are three possible “jurisdictional”⁹¹ standards:

- the test that applies to domestic commerce,
- the *Alcoa* substantial intended effects standard, and
- the FTAIA.

Which test applies can have significant practical consequences. The interstate commerce test is usually easily met. All that is required is that “defendant’s activity is itself in interstate commerce” *or* “has an effect on some other appreciable activity demonstrably in interstate commerce.”⁹² By contrast, under both *Alcoa* and the FTAIA, the effect on U.S. domestic commerce must be substantial, a requirement not met in

88. H.R. REP. NO. 97-686, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498.

89. *Id.*

90. *Id.* at 11, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2496.

91. As the Supreme Court has observed, “jurisdiction is a word of many, too many, meanings.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998) (citation omitted). The territorial reach of the Sherman Act, as explained, presents at least a question of “prescriptive” jurisdiction; that is, whether Congress has extended the Sherman Act to particular conduct. Some courts have held that the scope of the Sherman Act also delimits the subject matter jurisdiction of the federal courts in cases arising under the Sherman Act. *See United Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 951-52 (7th Cir. 2002) (en banc).

92. *McLain v. Real Estate Bd.*, 444 U.S. 232, 242 (1980). That standard is rarely not met. *But see United States v. ORS, Inc.*, 997 F.2d 628, 630-32 (9th Cir. 1993) (holding criminal indictment’s allegations not to meet the interstate commerce test).

several notable cases.⁹³ Moreover, when the interstate commerce test applies, no issue is presented as to whether the effects are intended (as required by *Alcoa*) or whether the link between cause and effect is too remote (an issue, as explained below, presented by the FTAIA).⁹⁴ Finally, if the case is governed by the interstate commerce test, then arguably judicial consideration of comity should play no role except in crafting relief.

Although the differences are less pronounced, whether a case is governed by *Alcoa* or the FTAIA can also matter. Under the FTAIA, a private plaintiff must show that its injury resulted from conduct that causes in-U.S. detrimental effects and did not occur, in the Supreme Court's words, independently from those effects.⁹⁵ By contrast, the usual standing and antitrust injury principles apply in a case governed by *Alcoa*. Moreover, the FTAIA imposes a directness requirement that may not apply (or may apply differently) under *Alcoa*.⁹⁶

The more important dispute is whether conduct is governed by the interstate commerce test or one of the two foreign commerce tests. The FTAIA appears to govern this issue by specifying the applicable test for "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations."⁹⁷ If conduct does not involve "trade or commerce . . . with foreign nations," the FTAIA does not apply and the interstate commerce test applies. By implication, if the "trade or commerce . . . with foreign nations" involves "import" trade or commerce, then *Alcoa* applies.

The problem is that the statutory text does not supply the meaning of the term "involving trade or commerce . . . with foreign nations." There are two opposing views as to when conduct is properly characterized as involving "foreign" trade or commerce, thereby possibly triggering the applicability of the FTAIA or, if import commerce, *Alcoa*. The first, championed among others by the U.S. Department of Justice (DOJ), is that characterizing conduct that has both foreign and domestic elements as *either* domestic or foreign is a false dichotomy. "The relative or absolute amount of foreign activity is immaterial if the aspects of the conspiracy giving rise to the plaintiff's injury

93. See, e.g., *United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173, 192-96 (D. Mass. 1999) (granting judgment of acquittal because government failed to show in-U.S. effects during the applicable limitations period); *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1106-07 (S.D.N.Y. 1984) (dismissing challenge to European distribution practice on grounds that plaintiff failed to allege causal connection between the conduct and any in-U.S. effects; mere allegations that U.S. prices rose following the challenged practice did not suffice); cf. *Sniado v. Bank Austria A.G.*, 378 F.3d 210, 213 (2d Cir. 2004) (dismissing complaint for failure sufficiently to allege causal connection between in-U.S. harm and foreign conduct; allegations "too conclusory" even when complaint was "liberally construed to the outer limits of reasonableness").

94. One court has also held that the requirement of a substantial in-U.S. effect implies that the per se rule against price fixing does not apply in a nondomestic commerce case involving a challenge to a competitor joint venture based overseas. See *Metro Indus. v. Sammi Corp.*, 82 F.3d 839, 844-45 (9th Cir. 1996). But see *Nippon Paper*, 62 F. Supp. 2d at 194 (disagreeing with the *Sammi* court's refusal to apply the per se rule).

95. See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). For a discussion of *Empagran*, see *infra* Section 3.3.

96. See *United States v. LSL Biotech., Inc.*, 379 F.3d 672 (9th Cir. 2004). For a discussion of *LSL Biotech.*, see *infra* Section 3.2.

97. 15 U.S.C. § 6a.

sufficiently affect domestic commerce,” thereby establishing the requisite effect on interstate commerce.⁹⁸ In other words, in the DOJ’s view, if the interstate commerce test is satisfied (for instance, there are sales in interstate commerce), whether some *other* basis for jurisdiction exists is beside the point.⁹⁹ The policy considerations that explain the DOJ’s position are straightforward. Conspirators who, for example, fix the prices of goods in U.S. commerce should not potentially escape the Sherman Act “by broadening the conspiracy to include foreign markets.”¹⁰⁰

This position, however, suggests the opposite problem: Whether it leaves too little scope for the FTAIA and *Alcoa* to apply the interstate commerce test to a conspiracy that operates virtually entirely abroad merely because the scheme includes some trivial U.S. component. Indeed, because it is relatively easy to satisfy the interstate commerce test, the practical consequence of the DOJ’s position may be to restrict the FTAIA and *Alcoa* to export commerce, import commerce involving no in-U.S. sales, and wholly foreign conduct.¹⁰¹ Supporting this critique is that the FTAIA by its terms supplies the sole test applicable to “conduct *involving* . . . trade or commerce with foreign nations” but is not restricted to “trade or commerce *exclusively within* foreign nations.” In other words, the Act’s text suggests that, if the conduct involves enough foreign element such that it comprises “trade or commerce with foreign nations,” then the interstate commerce test is ousted and not an alternative basis for the Sherman Act’s applicability.

In *Dee-K Enterprises v. Heveafil Sdn. Bhd.*,¹⁰² the Fourth Circuit accepted this critique and rejected the view that the interstate commerce test automatically applies to an international conspiracy merely because it involves some in-U.S. sales. Rather, “in determining which jurisdictional test . . . applies, a court should consider whether the participants, acts, targets, and effects involved in an asserted antitrust violation *are primarily foreign or primarily domestic.*”¹⁰³ On the facts before it, the court found the case to involve “primarily ‘foreign conduct.’”¹⁰⁴ The conspiracy was formed in Southeast Asia, targeted a global market, and involved few U.S. participants or sales. The “links to the United States,” the court held, were “mere drops in the sea of conduct that occurred in Southeast Asia (and around the world).”¹⁰⁵

98. Brief for the United States and the Federal Trade Commission as Amici Curiae at 8-9, *Dee-K Enters. v. Heveafil Sdn. Bhd.*, 299 F.3d 281 (4th Cir. 2002) (No. 02-649), available at <http://www.usdoj.gov/atr/cases/f201000/201042.htm>.

99. Another way to rationalize this result with the statutory text is that an activity does not “involv[e] trade or commerce . . . with foreign nations” within the meaning of the FTAIA if the domestic test is satisfied.

100. Brief for the United States, *supra* note 98, at 9.

101. This view—that the FTAIA and *Alcoa* apply only to “wholly foreign transactions” and export commerce—finds some support in legislative history that the Supreme Court quoted approvingly in *Empagran*. See H.R. REP. NO. 97-686, at 9-10 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2494-95 (“It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment, but that import transactions are not.”) (quoted in *Empagran*, 542 U.S. 155, 163 (2004)).

102. 299 F.3d 281 (4th Cir. 2002).

103. *Id.* at 294 (emphasis added).

104. *Id.* at 296.

105. *Id.* at 295.

Although the DOJ took issue with the court of appeals analysis, it urged the Supreme Court to deny certiorari,¹⁰⁶ which the Court did. Whether other courts embrace the position of the DOJ or the court of appeals remains to be seen. The statute's text and legislative history appear to point in different directions and there are policy arguments in favor of both positions.

3.2. *What type of effect is too indirect?*

Another debate the FTAIA has generated is the meaning of its requirement that the effect on U.S. commerce must be "direct." This is an important issue because, in today's global economy, conduct that is undertaken overseas may harm U.S. consumers even if many steps intervene between cause and effect. Consider a scheme, undertaken only in Europe, to fix the price of a consumer product exported to the United States and elsewhere. If "direct" denoted a specific, per se rule of (for example) no intervening steps between cause and effect, it might be quite easy for this hypothetical cartel to insulate its activities from the Sherman Act by using in-Europe intermediaries (such as trading houses), even if the cartel's activities had obvious adverse effects on U.S. domestic commerce. To borrow the First Circuit's analysis from a different context, such a rule "would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect."¹⁰⁷

On the other hand, direct must be given some independent meaning consistent with the FTAIA's structure and purpose. The FTAIA requires an in-U.S. effect that is "direct, substantial, and reasonably foreseeable," and elemental canons of statutory interpretation counsel against interpreting any of these three terms so as to render the others mere surplusage.¹⁰⁸ If direct merely provided a shorthand for ordinary principles of proximate cause, that arguably would flout this interpretive principle by depriving the foreseeability requirement of independent meaning.¹⁰⁹

In *United States v. LSL Biotechnologies, Inc.*,¹¹⁰ the Ninth Circuit accepted the latter argument and construed FTAIA Section 1's direct requirement strictly. The case involved a noncompete agreement that prohibited an Israeli firm, Hazera, from selling

106. See Brief for United States, *supra* note 98, at 15.

107. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997) (comity analysis). Whether the Sherman Act reaches input restraints undertaken entirely outside the United States raises similar (unresolved) issues, although some courts have suggested that such restraints are not reached by the FTAIA. See, e.g., *United Phosphorus, Ltd. v. Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1014 (N.D. Ill. 2001), *aff'd on other grounds*, 322 F.3d 942 (7th Cir. 2003); cf. *Papst Motoren GmbH v. Kanematsu-Goshu, Inc.*, 629 F. Supp. 864, 869 (S.D.N.Y. 1986) ("Papst's alleged restraint on STC in Japan cannot be said to have an anticompetitive effect upon United States commerce based upon [the] later sale of STC manufactured motors in the United States, since jurisdiction over Sherman Act claims is not supported by every conceivable repercussion of the action objected to on United States commerce.").

108. See, e.g., *Beck v. Prupis*, 529 U.S. 494, 506 (2000) (explaining "the longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous").

109. See, e.g., *United States v. Genes*, 405 U.S. 93, 105 (1972) (explaining that proximate cause includes considerations of foreseeability).

110. 379 F.3d 672 (9th Cir. 2004).

genetically altered long-shelf-life-tomato seeds in North America (where they likely would be cultivated in Mexico and the resulting tomatoes sold into the United States). The court found it speculative that, absent the noncompete, Hazera would successfully develop such seeds and, for this reason, held any anticompetitive effect from the noncompete to be indirect. “An effect cannot be ‘direct,’” the court held, “where it depends on such uncertain intervening developments”; rather, an effect is direct under the FTAIA only if it proceeds “without deviation or interruption” from its cause.¹¹¹ Supplying this independent meaning to direct was necessary, the court held, because the statutory term “direct” could not be read to render the separate foreseeable requirement meaningless, and because the Supreme Court had interpreted a similar statutory phrase requiring an effect to be direct to have that meaning in a related setting.¹¹²

Dissenting, Judge Ruggero Aldisert asserted that the majority erred by not looking to pre-FTAIA applications of *Alcoa* that both articulated a direct requirement and, according to Aldisert, Congress intended to codify in the FTAIA.¹¹³ In Aldisert’s view, “directness” was merely “a synonym for proximate cause.”¹¹⁴ Aldisert found that requirement satisfied because the government alleged that, but for the agreement, Hazera would be a significant competitor and that the noncompete posed an obstacle to that competition.¹¹⁵ Aldisert feared that, under the majority’s reading of direct, anticompetitive conduct directed to inputs may escape the Sherman Act’s reach.¹¹⁶

Both the majority’s and the dissent’s analyses exhibit shortcomings. The majority surely is correct that, as a matter of statutory interpretation, direct and reasonably foreseeable must each have a different meaning. For this reason, the majority was correct that direct likely does not denote proximate cause, for proximate cause includes foreseeability.¹¹⁷ Moreover, Aldisert’s fears appear overblown because his fundamental disagreement with the majority concerned whether Hazera’s entry into the United States was, in fact, speculative.¹¹⁸

Nonetheless, the majority’s articulation of the direct requirement—one that proceeds “without deviation or interruption”—does not provide clear guidance. And to the extent the court’s language might be read to permit foreign cartels to use overseas

111. *Id.* at 680-81 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 640 (3d ed. 1982)).

112. *Id.* at 680 (citing *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (interpreting the Foreign Sovereign Immunities Act)).

113. *Id.* at 691 (Aldisert, J., dissenting).

114. *Id.* at 693.

115. *Id.* at 695 n.6.

116. *Id.* at 694.

117. *See, e.g.*, *United States v. Genes*, 405 U.S. 93, 105 (1972) (explaining that proximate cause includes considerations of foreseeability).

118. As the majority pointed out, this disagreement stemmed from the dissent’s unwillingness to look beyond the complaint to the evidence before the court. *LSL Biotech.*, 379 F.3d at 672. The majority looked to extracomplaint facts because it treated the question of whether the complaint met the FTAIA as one of subject matter jurisdiction, to be resolved under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998); *United Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 951-52 (7th Cir. 2003) (discussing whether the FTAIA affects the subject matter jurisdiction of the federal courts or only delimits the Sherman Act’s substantive reach).

intermediaries to avoid the Sherman Act, such a reading would appear to undermine both Congress's intent, in enacting the FTAIA, to reach "wholly foreign conduct" and Congress's recognition that international cartels, even when they operate entirely overseas, can harm U.S. consumers.¹¹⁹

Critics of the *LSL* court's analysis might instead turn to the body of law that applies the objective territoriality principle—a corpus that, the *LSL* dissent properly noted, Congress intended to clarify and not entirely supplant. At the time of the Sherman Act's enactment, John Bassett Moore explained, objective territoriality comported with international law if the "acts done abroad" were brought "by an immediate effect *or* by direct and continuous causal relationship, within the territorial jurisdiction of the court."¹²⁰ By only focusing on whether the effects of the noncompete were "immediate," the argument would run, the *LSL* majority ignored the second, independent part of this test. Effects resulting from foreign restraints, depending on the facts, can be brought "by direct and continuous causal relationship" within the United States.

In *In re Intel Corp. Microprocessor Antitrust Litigation*,¹²¹ the court appeared to adopt this middle ground. Plaintiff AMD asserted that certain foreign conduct by Intel facilitated anticompetitive conduct within the United States because that foreign conduct ultimately weakened AMD domestically, thereby helping Intel's asserted anticompetitive in-U.S. scheme to succeed.¹²² The court judged such a connection between foreign conduct and in-U.S. harm too indirect and speculative to support jurisdiction under the FTAIA.¹²³

3.3. *What is the Sherman Act's scope in private litigation?*

The FTAIA has also spawned a significant and, despite the Supreme Court's foray into the matter, unresolved dispute over whether certain claims brought by private parties are excluded from the Sherman Act's coverage.

FTAIA subsection 2 and the Empagran case. The FTAIA requires not only that an effect on U.S. commerce must be "direct, substantial, and reasonably foreseeable" but *also* that "such effect gives rise to a claim" under the Sherman Act.¹²⁴ It is this second requirement that, potentially, makes the Sherman Act's applicability turn on the relationship between in-U.S. effects and the injury suffered by the party seeking to enforce the Sherman Act. If "such effect gives rise to a claim" means the claim of the particular plaintiff before the court (the narrow reading), then the plaintiff must demonstrate some nexus between its injury and the domestic effects. By contrast, if "such effect gives rise to a claim" simply means that the effects that justify the Sherman Act's assertion must be anticompetitive (a term that otherwise nowhere appears in the FTAIA), then ordinary antitrust standing principles, and not the FTAIA, govern whether a particular plaintiff can assert a claim (the broad reading).

119. H.R. REP. NO. 97-686, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495.

120. MOORE, *supra* note 15, at 34 (emphasis added).

121. *In re Intel Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555 (D. Del. 2006).

122. *Id.* at 559.

123. *Id.*

124. 15 U.S.C. § 6a. See *supra* note 82 for the full text of the FTAIA.

Although the FTAIA dates from 1982, whether it requires a particular relationship between effects and a plaintiff's injury remained largely unaddressed until the late 1990s. Two key developments brought the issue to the fore. The first was the successful exportation of American antitrust values.¹²⁵ Although many states objected to *Alcoa*, by the 1990s dozens of jurisdictions—including the European Union—had enacted competition laws largely (but in some important respects not completely) modeled on those of the United States.¹²⁶ Today, nearly 100 jurisdictions have competition laws.¹²⁷ The proliferation of competition laws has engendered further cooperation between enforcers, including information sharing and other agreements primarily aimed at international cartels.¹²⁸

The widespread adoption of competition laws led to the second development: in the mid-1990s, guilty pleas in U.S. international cartel cases sharply increased.¹²⁹ This development was spurred both by better cooperation between American and foreign enforcers, many of which had adopted U.S.-style antitrust laws and entered into cooperation agreements with the United States, and by significant revisions to the DOJ's amnesty program. The revised amnesty program, by giving the first conspirator to cooperate with the DOJ immunity from criminal prosecution, in particular is credited with exploding numerous international cartels from the inside.¹³⁰ The DOJ judged that

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125. Justice William Brennan famously noted that, according to some commentators, “our country’s three largest exports are now ‘rock music, blue jeans, and United States law.’” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 281 (1990) (Brennan, J., dissenting) (citation omitted).
126. See generally Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 L. & POL’Y INT’L BUS. 1, 68 nn.344-46 (1992) (listing, among others, Denmark, France, Germany, and Switzerland); 1995 ENFORCEMENT GUIDELINES, *supra* note 71, at 12 n.51 (adding to this list the European Court of Justice and “the merger laws of the European Union, Canada . . . Australia, and the Czech and Slovak Republics, among others”); 1 BARRY E. HAWK, UNITED STATES, COMMON MARKET, AND INTERNATIONAL ANTITRUST 87-88 (2d ed. Supp. 1996) (listing still other nations). For a discussion of the differences between the U.S. and EU models of competition law, see Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1791-93 (2000).
127. For an overview of competition laws worldwide, see the DOJ’s compilation of antitrust sites, U.S. Dep’t of Justice, Antitrust Division, Other Antitrust Sites Worldwide, <http://www.usdoj.gov/atr/contact/otheratr.htm> (last visited Sept. 9, 2007). See generally Diane P. Wood, *Harmonizing Antitrust Law: The Tortoise or the Hare?*, 3 CHI. J. INT’L L. 391 (2002).
128. See generally James M. Griffin, Deputy Ass’t Att’y Gen., U.S. Dep’t of Justice, *The Modern Leniency Program After Ten Years*, Address Before the American Bar Association Section of Antitrust Law Annual Meeting (Aug. 13, 2003) (explaining that the government’s “ability to detect and prosecute international cartel activity has been enhanced by the increased cooperation and assistance that we have received from foreign governments, and from their own enforcement efforts”), available at <http://www.usdoj.gov/atr/public/speeches/201477.htm>.
129. See generally Scott D. Hammond, Dir. of Criminal Enforcement, U.S. Dep’t of Justice, *A Summary Overview of the Antitrust Division’s Criminal Enforcement Program*, Address before the New York State Bar Association Annual Meeting (Jan. 23, 2003), available at <http://www.usdoj.gov/atr/public/speeches/200686.htm>.
130. See generally Scott D. Hammond, Acting Dep. Ass’t Att’y Gen., U.S. Dep’t of Justice, *An Overview of Recent Developments in the Antitrust Division’s Criminal Enforcement Program*, Address Before the American Bar Association Midwinter Leadership Meeting, at 4-9 (Jan. 10, 2005), available at <http://www.usdoj.gov/atr/public/speeches/207226.htm>; Griffin, *supra* note 128, at 7-8; Gary R. Spratling, Dep. Ass’t Att’y Gen., U.S. Dep’t of Justice, *Making Companies an Offer They Shouldn’t*

the encouragement of the detection of international cartels (by inducing members to turn on their coconspirators) would contribute more to total deterrence than would a more severe sanction once cartels were uncovered.¹³¹

Increased guilty pleas in international cartel cases, in turn, attracted private litigation. These cases typically involved similar fact patterns: the international cartel caused in-U.S. anticompetitive effects, but at least some of the plaintiffs suffered injury from the cartel's conduct outside the United States. These cases thus raised sharply whether, under the FTAIA, plaintiffs who suffer injury overseas from the same conduct that cause in-U.S. effects must demonstrate that their injury derived from those in-U.S. effects or whether it is sufficient that the same conduct that harms American consumers also harms the plaintiff. In other words, what nexus, if any, is required between in-U.S. injury and a plaintiff's injury, when both flow from the same conduct?

Courts considering this scenario split on the meaning of FTAIA Subsection 2 and its application. Some, agreeing with the narrower reading, held that Subsection 2 requires that the plaintiff before the court demonstrate that the in-U.S. effects "give rise" to its injury.¹³² Other courts, some emphasizing that the FTAIA subjects "conduct" to the Sherman Act, which counsels against construing the subsection to create a standing requirement, read Subsection 2 to require that the in-U.S. effect of the challenged conduct be anticompetitive but not to require a particular link between detrimental in-U.S. effects and the plaintiff's injury.¹³³ This interpretation was buttressed by legislative history suggesting that Congress added "gives rise to a claim" in Subsection 2 (1) to clarify that the FTAIA created no claims, and (2) to ensure the effect on U.S. commerce plaintiffs identifies is *anticompetitive* (rather than, for example, beneficial), a requirement that nowhere appears in Subsection 1.¹³⁴

In *F. Hoffman-La Roche, Ltd. v. Empagran*,¹³⁵ the Supreme Court adopted the narrower reading of Subsection 2 but largely left open what type of nexus between in-U.S. detrimental effects and plaintiffs' injury is required. *Empagran* involved class actions seeking recovery for a worldwide conspiracy to fix the price of vitamins. One class involved foreign purchasers: those who bought price-fixed vitamins for delivery in Ecuador, Ukraine, Australia, and Panama. The defendants argued that FTAIA

Refuse: The Antitrust Division's Corporate Leniency Policy—An Update, Address Before the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999), available at <http://www.usdoj.gov/atr/public/speeches/2247.htm>.

131. Congress reinforced this policy choice by enacting the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which reduces damages liability for firms that qualify for leniency to actual rather than treble damages. See Pub. L. No. 108-237, 118 Stat. 665 (codified as amended at 1 U.S.C. §§ 2, 3, 16).

132. See, e.g., *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420, 421 (5th Cir. 2001) ("[E]ven though the [p]laintiff alleges that the antitrust conspiracy raised prices in the United States, it fails to assert jurisdiction under the antitrust laws because the plaintiff's injury did not arise from that domestic anticompetitive effect.").

133. See *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003), vacated by 542 U.S. 155 (2004); *Kruman v. Christie's Int'l*, 284 F.3d 384, 395-96 (2d Cir. 2002); *Den Norske*, 241 F.3d at 431 (Higginbotham, J., dissenting).

134. See H.R. REP. NO. 97-686, at 11 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2496.

135. 542 U.S. 155 (2004).

Subsection 2 barred these claims, because, having purchased abroad, the in-U.S. anticompetitive effects of the scheme did not “give rise” to plaintiffs’ injuries.¹³⁶ The plaintiffs, by contrast, advanced the broader reading of Subsection 2 and argued, *inter alia*, that the FTAIA imposed no such nexus requirement.¹³⁷

The Supreme Court agreed with defendants that the FTAIA imposes a nexus requirement. The Court decided the case on the assumption that “the adverse foreign effect [the plaintiffs alleged] is independent of any adverse domestic effect.”¹³⁸ In other words, the *only* link alleged between the in-U.S. effects that meet FTAIA Subsection 1 and the plaintiffs’ injury was that both flowed from the same conduct. The FTAIA, the Court held, could not be construed to extend the Sherman Act to redress such foreign injuries for two reasons.

First, permitting such treble damages actions defied international norms on the reasonable scope of the objective territorial principle.¹³⁹ Finding Subsection 2 of the FTAIA ambiguous, the Court invoked the principle that the Sherman Act not be construed to violate customary principles of international law.¹⁴⁰ The Court explained that, although applying the Sherman Act to condemn foreign conduct is “consistent with principles of prescriptive comity,” permitting treble damages actions to proceed where the only link between the foreign harm asserted and the requisite in-U.S. harm is that both flow from the same conduct is not.¹⁴¹ Such private enforcement in U.S. courts would “interfer[e] with a foreign nation’s ability independently to regulate its own commercial affairs.”¹⁴² The Court agreed with commentators observing that reading the FTAIA to impose no nexus requirement would effectively “provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign’s provision for private antitrust enforcement.”¹⁴³ “Congress,” the Court explained, cannot lightly be assumed to have engaged “in an act of legal imperialism.”¹⁴⁴

The Court rejected the plaintiffs’ arguments that international comity concerns were better addressed on a case-by-case basis and that a contrary rule would threaten to undermine the Sherman Act’s goals of compensation and deterrence. The Court accepted the arguments of amici—the United States, the business community, and foreign enforcers—that permitting private damages actions for foreign injuries could “undermine foreign nations’ own antitrust enforcement policies by diminishing foreign firms’ incentive to cooperate with antitrust authorities in return for prosecutorial amnesty.”¹⁴⁵

136. *See id.* at 158-60.

137. *See id.* at 173-74.

138. *Id.* at 164.

139. *Id.* at 164-66.

140. *Id.* at 165.

141. *Id.* at 164-65.

142. *Id.* at 165.

143. *Id.* at 166.

144. *Id.* at 169.

145. *Id.* at 168.

Second, the Court concluded that applying “the Sherman Act to redress foreign injuries” that are independent of in-U.S. effects would be unprecedented.¹⁴⁶ This doomed the plaintiffs’ reading of the FTAIA because, according to the court, the FTAIA was designed to *limit*, not *expand*, the Sherman Act’s scope.¹⁴⁷

The Court, however, did not order plaintiffs’ complaint dismissed. The Court explained that the plaintiffs “argue, in the alternative, that the foreign injury was not independent” of the harm inflicted on U.S. domestic commerce.¹⁴⁸ Rather, the plaintiffs “contend that, because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the United States), the sellers could not have maintained” price fixing elsewhere.¹⁴⁹ In other words, the plaintiffs asserted, the in-U.S. effects *did* “give rise” to their claims because, absent those effects, the plaintiffs would not have suffered injury. The Court remanded the case for further consideration of the plaintiffs’ alternative theory. How the D.C. Circuit ruled on remand is discussed below.¹⁵⁰

Foreign Injuries that are not independent of in-U.S. effects. By leaving unaddressed whether the plaintiffs’ allegations of a nexus between their foreign injury and in-U.S. effects meet the requirements of the FTAIA, *Empagran* may pose more questions than it answers. Plainly, some sort of causal relationship is necessary between in-U.S. effects and the foreign injury. The issue is what, if anything, must link the plaintiff’s injury and in-U.S. effects beyond proximate and but-for causation.

This question must be answered in light of the Supreme Court’s admonition that FTAIA Section 2 must be read with due regard for principles of comity and, therefore, the customary limitation that international law places on the assertion of jurisdiction based on objective territoriality. That limitation, as explained, historically has required a close connection between cause and effect.¹⁵¹ And there are at least four distinct types of fact patterns that courts, as they wrestle with this issue, may treat differently.

First are cases in which the foreign aspects of a conspiracy would collapse absent maintaining fixed prices in the United States. This is sometimes termed the “arbitrage” theory because, with a fungible good, arbitrage opportunities should eliminate price differences between nations absent a worldwide conspiracy. This arbitrage theory is, in fact, the theory advanced by the plaintiffs in *Empagran*.¹⁵² Because the in-U.S. effects are necessary to produce the foreign injury, those effects arguably give rise to that injury. The potential problem with this argument is twofold: First, depending on the facts, the link between the in-U.S. effects and the foreign injury may be very attenuated, involving many links. If, as the *LSL Biotechnologies* court held, FTAIA Section 1’s direct requirement is to be construed strictly, so too, it can be argued, should the gives rise requirement of FTAIA Section 2.¹⁵³ Second, as a practical matter, it may be very

146. *Id.* at 170-72.

147. *Id.*

148. *Id.* at 175.

149. *Id.*

150. *See infra* notes 162-72 and accompanying text.

151. *See supra* Section 3.3.

152. *F. Hoffman-La Roche*, 542 U.S. 155.

153. *See United States v. LSL Biotech., Inc.*, 379 F.3d 672, 683 (9th Cir. 2004).

easy for plaintiffs to plead *some* interrelationship between U.S. and foreign prices, particularly when a market is worldwide. To permit claims to proceed based on allegations of some relationship arguably would implicate the very comity concerns that led the Court to rule out claims of independent injury.

Second, and closely related to the arbitrage cases, are cases in which one conspirator allegedly would have entered the U.S. market but for another conspirator's agreement to stay out of the foreign market in which the plaintiff suffers injury.¹⁵⁴ In these cases, the argument runs, the foreign injury is not independent of in-U.S. effects because, without the in-U.S. effects (the agreement not to enter) there would be no foreign effects (i.e., the lack of entry). The arguments for and against finding that in-U.S. effects gave rise to plaintiffs injuries in such cases are essentially the same as in the arbitrage cases.

Third are cases where markets are "worldwide" not only because prices are economically interrelated but also because the market *exists* worldwide, or in several locations around the world. An example of such a market is the Brent Oil market at issue in the *Transnor* case.¹⁵⁵ In that case, future contracts could be traded in one of three locations around the world, one of which was in the United States. The court held that a plaintiff who purchased in London could bring a Sherman Act claim because the "market" existed both in London and in the United States.¹⁵⁶ There is a strong argument that the same result should obtain under the FTAIA. For, in such circumstances, the plaintiffs' injury arguably occurs *in* U.S. commerce and, therefore, it is plain that in-U.S. effects give rise to the plaintiffs' claim.¹⁵⁷ The argument on the other side is that the Sherman Act, by this reasoning, could apply to all purchasers, wherever located.

Fourth are cases in which a direct restraint on U.S. prices or output ripples overseas. For example, *Metallgesellschaft AG v. Sumitomo Corp.*¹⁵⁸ involved a conspiracy to corner the market for copper deliverable to satisfy London Metal Exchange (LME) contracts. The defendants allegedly cornered the market by buying up the available supply of copper in the United States and then proceeded to squeeze short sellers of LME-deliverable contracts who purchased such contracts at the market's three locations: London, Tokyo, and New York.¹⁵⁹ The injuries to such purchasers all flowed, it can be argued, directly from an in-US. reduction of output and thus an output restraint gave rise to their claim.¹⁶⁰ As with cases such as *Transnor*, this analysis arguably leads to the Sherman Act's possible application to many injuries arising from the conspiracy—although other doctrines, such as standing, forum non conveniens, and, as we will turn to

154. These cases can differ from arbitrage cases when prices in one nation do not affect those in another. In such circumstances, reciprocal agreements not to enter coconspirators' territories prevent prices from falling.

155. *Transnor* (Berm.) Ltd. v. BP N. Am. Petroleum, 738 F. Supp. 1472, 1476 (S.D.N.Y. 1990).

156. *Id.*

157. *Id.* at 1477-78; *see also* *Metallgesellschaft AG v. Sumitomo Corp.*, 325 F.3d 836 (7th Cir. 2003).

158. *Metallgesellschaft*, 325 F.3d 836.

159. *Id.* at 836-37.

160. The Seventh Circuit Court of Appeals in the *Metallgesellschaft* case did not reach this issue because it reasoned that the trading of LME instruments in New York gave rise to an injury in U.S. domestic commerce, thus easily satisfying FTAIA Subsection 2. *See id.* at 840-42.

next, comity, may help filter out claims that lack a substantial relationship to the United States.

It is still unclear which, if any, of these scenarios satisfy the FTAIA after *Empagran*, although most post-*Empagran* decisions largely have concerned the so-called arbitration cases.¹⁶¹ In its decision on remand in *Empagran* itself, the D.C. Circuit rejected the arbitration theory when the chain of causation was indirect and dismissed the complaint for lack of subject matter jurisdiction under the FTAIA.¹⁶² The *Empagran* court read FTAIA Subsection 2 to require more than “but for” causation between the plaintiff’s injury and in-U.S. anticompetitive effects. Rather, the in-U.S. anticompetitive effects must *proximately* cause plaintiff’s injury.¹⁶³ Importantly, the D.C. Circuit held that consideration of prescriptive comity required a direct connection between cause and effect; mere foreseeability was not enough.¹⁶⁴ The D.C. Circuit cited as meeting this direct causation standard its prior decision in *Caribbean Broadcasting*,¹⁶⁵ which involved the exclusion of a competitor from making in-U.S. sales, and *Industria Siciliana*,¹⁶⁶ which involved a reciprocal dealing arrangement where, according to the court, the foreign injury was “inextricably bound up with . . . domestic restraints of trade.”¹⁶⁷

Applying this standard, the D.C. Circuit found the plaintiffs’ allegations wanting. “While maintaining super-competitive prices in the United States may have facilitated [the defendants’] scheme to charge comparable prices abroad, this fact,” the court reasoned, “demonstrated at most but for causation.”¹⁶⁸ “That the [defendants] knew or could foresee the effect of their allegedly anticompetitive activities in the United States on the appellants’ injuries . . . does not establish that ‘U.S. effects’ proximately caused appellant’s harm.”¹⁶⁹ Because “[t]he foreign injury caused by [the defendants’] conduct, then, was not ‘inextricably bound up with . . . domestic restraints of trade,’” it “was the foreign effects of price-fixing outside of the United States that directly caused or ‘g[a]ve rise to’ the appellants’ losses.”¹⁷⁰ At least one other federal court of appeals and number of district court decisions have rejected similar allegations that overseas conduct was

161. Some such post-*Empagran* decisions dismissed complaints on the ground that the plaintiff’s alleged linkage between in-U.S. effects and foreign injury was too sparse. See *Sniado v. Bank Austria A.G.*, 378 F.3d 210, 213 (2d Cir. 2004) (dismissing allegations that U.S. component of anticompetitive scheme was essential to its overall success as “too conclusory” even when complaint was “liberally construed to the outer limits of reasonableness”).

162. *Empagran S.A. v. F. Hoffmann-La Roche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005).

163. *See id.* at 1271.

164. *See id.*

165. *Caribbean Broad. Sys. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998).

166. *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng’r Co.*, No. 75-CV-5828-CSH, 1977 WL 1353 (S.D.N.Y. 1977).

167. *Empagran*, 417 F.3d at 1270.

168. *Id.* at 1271.

169. *Id.*

170. *Id.* (citations omitted). Notably, the D.C. Circuit in *Empagran* read “gives rise” in FTAIA § 2 similarly to the *LSL Biotechnology* court’s reading of “direct” in FTAIA § 1. *See also supra* text accompanying note 150.

within the FTAIA because, absent U.S.-based price fixing, there would have been no foreign injury,¹⁷¹ although the precise fact patterns differ.¹⁷²

In some tension with *Empagran* is *MM Global*.¹⁷³ There, the plaintiff alleged that defendants compelled its participation in a scheme to set minimum resale prices in India as part of a scheme to keep prices high in the United States. Had the plaintiff reduced prices in India, U.S. prices assertedly would have declined. In denying the defendant's motion to dismiss, the court relied on allegations that the defendant's conduct improperly diminished competition "in the sale and resale of [p]roducts in and from the United States" and that "as a result of such effect on competition, [the] plaintiffs were injured by being precluded from effectively and fully competing and maximizing their sales of products."¹⁷⁴ *MM Global* is best read as holding that the foreign injury was, as in *Industria Siciliana*, "inextricably bound up with . . . domestic restraints of trade."¹⁷⁵ Although the complaint recited that in-U.S. effects caused the plaintiff's foreign injury, the causal mechanism identified by the complaint's factual averments was exactly the opposite: the foreign injury (resale price maintenance in India) was necessary to achieve in-U.S. effects (high U.S. prices).

Antitrust standing after Empagran. Separate and apart from Sherman Act jurisdiction is whether a plaintiff that meets *Empagran* has antitrust standing to recover damages for an injury suffered abroad. Pre-*Empagran* courts often, but not always, required that the plaintiff suffer an injury in a "United States market."¹⁷⁶ Some courts defined a U.S. market broadly to include U.S. commerce. For example, in *Transnor*, the court effectively deemed the worldwide Brent Oil market a U.S. market for standing purposes.¹⁷⁷ In *Caribbean Broadcasting*, the court permitted a claim challenging the

171. See, e.g., *In re Monosodium Gultamate Antitrust Litig.*, 477 F.3d 535, 538-39 (8th Cir. 2007); *In re DRAM Antitrust Litig.*, No. M:02-cv-01486, 2006 WL 515629 (N.D. Cal. 2006), *appeal docketed*, No. 06-15636 (9th Cir. Mar. 30, 2006); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chems. B.V.*, No. 03-CV-10312, 2005 WL 2207017, at *12-13 (S.D.N.Y. 2005).

172. Compare *Latino Quimica*, 2005 WL 2207017, at *10 (allegations that foreign price fixing would have been impossible with U.S. component barred as mere arbitrage theory), and *In re Monosodium Gultamate*, 2007 U.S. App. LEXIS 2772, at *10 (same), with *In re DRAM Antitrust Litig.*, No. M:02-cv-01486, slip op. at 6 (averments that prices were in U.S. dollars and that U.S. price fixing was essential to foreign harm barred as mere arbitrage theory).

173. *MM Global Servs. v. Dow Chem. Co.*, 329 F. Supp. 2d 337 (D. Conn. 2004).

174. *Id.* at 342 (emphasis added).

175. *In re Monosodium Glutamate Antitrust Litig.*, 2005 WL 1080790, at *3 (quoting *Industria Siciliana*, 1977 WL 1353).

176. See, e.g., *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001) ("[F]oreign consumers who have not participated in any way in the U.S. market have no right to institute a Sherman Act claim."); *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, No. C 97-3259, 1997 WL 732498, at *4 (N.D. Cal. 1997) (no standing because plaintiff was neither a competitor nor a consumer in the U.S. "domestic market"); *deAtucha v. Commodity Exch.*, 608 F. Supp. 510, 515-18 (S.D.N.Y. 1985) (no standing to challenge manipulation of U.S.-based Comex exchange that allegedly harmed plaintiff as a London Metal Exchange trader, among other reasons because plaintiff's injury was remote and because plaintiff did not trade in American commerce); cf. *Metallgesellschaft AG v. Sumitomo Corp.*, 325 F.3d 836, 841-42 (7th Cir. 2003) (holding that trades made on the London Metal Exchange in New York occurred in U.S. commerce and remanding on standing issue).

177. *Transnor (Berm.) Ltd. v. BP N. Am. Petroleum*, 738 F. Supp. 1472, 1476 (S.D.N.Y. 1990).

plaintiff's exclusion from broadcasting overseas into U.S. territory to proceed on the ground that the plaintiff sought to operate in U.S. commerce.¹⁷⁸ Other courts viewed the jurisdictional and standing issues as virtually indistinguishable. For example, the D.C. Circuit in *Empagran*, in the opinion vacated by the Supreme Court, ruled that a plaintiff satisfying the FTAIA's jurisdictional requirements ordinarily suffers the type of injury that confers standing to bring suit.¹⁷⁹

Antitrust standing under *Associated General Contractors*¹⁸⁰ is a broad inquiry that takes into account, among other factors, the availability of alternative plaintiffs motivated to challenge the practice involved, the remoteness of the injury, and the risk of duplicative recovery.¹⁸¹ *Empagran* holds that the FTAIA requires a private plaintiff to show a particular connection between its harm and in-U.S. effects before it may bring a Sherman Act claim. But the decision does not answer whether reading the FTAIA to impose this "standing like" nexus requirement dispenses with some or all of the usual antitrust standing inquiry under *Associated General Contractors*.

It is likely that courts will still require plaintiffs after *Empagran* to establish antitrust standing under the usual *Associated General Contractors* factors. For one thing, the FTAIA's legislative history states that Congress had no intention of altering standing principles.¹⁸² For another, the antitrust standing doctrine (including its threshold requirement of antitrust injury) permits the weeding out of claims that are antithetical to the purposes of private antitrust enforcement.¹⁸³

But the pre-*Empagran* requirement imposed by some courts of injury in a U.S. market, if construed strictly, might be in tension with the *Empagran* Court's preservation of some theory under which plaintiffs who suffer an injury abroad in a collusion case can sue. If by U.S. market the courts simply mean an antitrust market that includes the United States, then arguably the requirement threatens little mischief. Whatever theories of harm suffered abroad the lower courts permit after *Empagran* most likely will involve a worldwide market.¹⁸⁴ If, however, U.S. market means an injury suffered *within the United States*, then the cases in which plaintiffs suffering injury abroad may sue in U.S. courts likely would be limited to exclusion cases, such as *Caribbean Broadcasting*.¹⁸⁵

Under this narrow reading of U.S. market, the plaintiff in *Transnor*, whose transaction occurred overseas in a worldwide market, could not sue under the Sherman Act, but its rival, who happened to purchase in Houston (perhaps merely because the time of day was different), could. Such distinctions may ill serve the purposes of the

178. *Caribbean Broad. Sys. v. Cable & Wireless PLC*, 148 F.3d 1080, 1086 (D.C. Cir. 1998).

179. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 358-59 (D.C. Cir. 2003).

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

181. *See id.* at 536 n.33.

182. *See supra* note 90 and accompanying text.

183. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 114-15 (1986).

184. *But cf. MM Global Servs. v. Dow Chem. Co.*, 329 F. Supp. 2d 337, 342 (D. Conn. 2004) (upholding complaint alleging harm in India pursuant to scheme to raise prices in the United States).

185. *Caribbean Broad. Sys. v. Cable & Wireless PLC*, 148 F.3d 1080, 1086 (D.C. Cir. 1998); *see also Eskofot A/S v. E.I. du Pont de Nemours & Co.*, 872 F. Supp. 81, 84-86 (S.D.N.Y. 1995) (permitting claim challenging exclusion from U.S. market).

antitrust standing doctrine, among which is to ensure that private Sherman Act enforcement properly serves the goals of compensation and deterrence. In *In re Intel Corp. Microprocessor Antitrust Litigation*,¹⁸⁶ the court, having found the plaintiff to allege no direct in-U.S. effect from foreign conduct, also dismissed the pertinent allegations on standing grounds, reasoning that “foreign injuries are not the type of injury Congress intended to prevent through the [FTAIA] or the Sherman Act.”¹⁸⁷ However, because the court first concluded that the plaintiff’s allegations were not within the FTAIA at all, the *Intel* court did not reach the issue of whether claims otherwise within the FTAIA may be defeated by the argument that a plaintiff lacks standing to recover for foreign injuries.

3.4. *What is left of comity?*

Just as jurisdiction is a word of “many, too many meanings,”¹⁸⁸ so too is comity. There is the comity of nations, by which states voluntarily enforce one another’s judgments.¹⁸⁹ There is comity in the sense of prosecutorial discretion, by which governmental enforcers take into account the interests of other states in their enforcement decisions.¹⁹⁰ Finally, there is comity in the sense of the jurisdictional rule of reason, adopted, as explained, by some courts as a device for declining to adjudicate antitrust matters with significant foreign elements that otherwise meet the applicable jurisdictional test. It is the proper scope of comity in this last sense—of “voluntary forbearance” when “a second sovereign also has a legitimate claim to jurisdiction under principles of international law”¹⁹¹—that remains unresolved.

Comity analysis as articulated by many courts and the *Restatement (Third) of the Foreign Relations Laws of the United States* appeared to call for an open-ended balancing of numerous factors. But in *Hartford Fire*, the Supreme Court (by a 5-4 vote) appeared to require that a “true conflict,” in the sense that foreign law *requires* conduct the Sherman Act forbids, be demonstrated before a court may undertake any comity analysis.¹⁹² In other words, a *Timberlane*-style balancing of numerous factors can be undertaken *only* when foreign law requires what U.S. law forbids.

It is possible to read *Hartford* to require a true conflict only when a party asks a court to dismiss the action based on a conflict with the policy of a foreign enforcer. However, most (but not all) subsequent decisions have read the decision to require a true conflict

186. *In re Intel Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555 (D. Del. 2006).

187. *Id.* at 563 (internal quotations omitted).

188. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998).

189. *See Hilton v. Guyot*, 159 U.S. 113, 164-65 (1895). *See generally* *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 937-38 (D.C. Cir. 1984). *Laker Airways* involved a refusal by U.S. courts to enforce a British injunction designed to block a U.S. civil antitrust suit.

190. *See, e.g.*, 1995 ENFORCEMENT GUIDELINES, *supra* note 71, § 3.2. *See generally* Waller, *supra* note 72.

191. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997).

192. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993). For a discussion of the Court’s opinion in *Hartford Fire*, see Eleanor M. Fox, *Antitrust at the Millennium (Part I): National Law, Global Markets, and Hartford: Eyes Wide Shut*, 68 ANTITRUST L.J. 73 (2000).

as a predicate for engaging in any *Timberlane*-style comity analysis.¹⁹³ As one commentator has observed, *Hartford Fire* thereby “virtually eliminated” comity “as a meaningful restraint on the extraterritorial application of the Sherman Act.”¹⁹⁴

There is another sense, however, in which comity has been revived: the extent to which comity (or international law norms) informs the scope of the Sherman Act itself (as opposed to whether courts should decline to enforce the Act when it otherwise applies). *Hartford Fire* cast doubt on whether international law affects the Sherman Act’s reach. Holding that the Sherman Act applies when conduct produces “some substantial effect” in the United States, *Hartford Fire* stated, in considered dicta, that comity considerations come into play, if at all, in declining to exercise such jurisdiction, rather than in ascertaining the scope of the Act.¹⁹⁵ Justice Antonin Scalia, writing in dissent for four justices, disagreed. He asserted that the Sherman Act must be read consistently with the law of nations, even when the effects test is satisfied.¹⁹⁶ “Prescriptive comity,” Scalia explained, is “exercised by legislatures when they enact laws, and courts assume it has been exercised.”¹⁹⁷ Principles of prescriptive comity, Scalia asserted, required the effects test to be applied reasonably even absent a conflict as defined by the majority, and Scalia would have held the assertion of jurisdiction unreasonable on the facts of the case.¹⁹⁸

In *Empagran*, the Court embraced the very analysis that it denigrated in *Hartford Fire*. Without dissent, the Court readily accepted that the Sherman Act’s language (in the case before it, the FTAIA’s) must be read “to avoid unreasonable interference with the sovereign authority of other nations.”¹⁹⁹ Applying the very “principles of prescriptive comity” that the *Hartford Fire* majority eschewed (but Scalia’s defense proposed), the Court held that they required rejecting application of the Sherman Act when foreign injury was independent of in-U.S. effects.

Empagran is noteworthy not simply because it clarifies that, as Justice Holmes explained in *American Banana* and Judge Hand held in *Alcoa*, the Sherman Act ought to be interpreted consistent with international law. *Empagran* also casts further doubt on whether case-by-case analysis of comity is appropriate, declaring that “abstaining where

193. See, e.g., *Filetech S.A. v. Fr. Telecom S.A.*, 157 F.3d 922, 928-30 (2d Cir. 1998); *Nippon Paper*, 109 F.3d at 8 (explaining that comity’s “growth in the antitrust sphere has been stunted by *Hartford Fire*” because the Court “suggested” the predicate of a true conflict but finding other comity concerns to support the United States’ prosecution of a Japan-based conspiracy assertedly designed to “rig[] prices in the United States”). But see *Metro Indus. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996) (finding no conflict as defined by *Hartford Fire* but nonetheless engaging in a balancing analysis). See generally WALLER, *supra* note 5, § 5:9.

194. Waller, *supra* note 72, at 569.

195. *Hartford Fire*, 509 U.S. at 796-99, 799 nn.24-25.

196. *Id.* at 813-16 (Scalia, J., dissenting) (citing *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch 64) (1804)).

197. *Id.* at 817.

198. *Id.* at 818-20.

199. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (citing *Romero*, 358 U.S. at 354; *Lauritzen*, 345 U.S. at 571).

comity considerations so dictate” is “too complex to prove workable.”²⁰⁰ The Court observed that applying that sort of analysis in the case before it—worldwide price fixing that causes independent injury in the U.S. and elsewhere—would require assessing, as an empirical matter, (1) the extent to which providing a U.S. remedy would deter anticompetitive conduct that harms U.S. consumers as compared to (2) the extent to which U.S. consumers might be harmed by reducing incentives to enter amnesty programs. “How,” the Court asked, “could a court seriously interested in resolving so empirical a matter—a matter potentially related to impact on foreign interests—do so simply and expeditiously?”²⁰¹

One can read *Empagran* as rejecting a case-by-case comity analysis only when the issue (there, the net impact on deterrence) is not susceptible to judicial analysis. But the Court’s citation to cases that employed a *Timberlane* approach to comity, and the Court’s blanket statement that a case-by-case “approach is too complex to prove workable,” strongly suggests that the Court restricted comity’s role in policing the Sherman Act’s reach to the role ascribed by the *Hartford Fire* dissenters: to determining the limits of Sherman Act enforcement that Congress intended.²⁰²

Whether comity in the *Timberlane* sense survives, however, is far less important than it once was. “Comity was a cause célèbre when the United States stood alone as the sole extraterritorial enforcer of competition law and enforcement was at its most aggressive.”²⁰³ Now, by contrast, some variation of objective territoriality is accepted by many antitrust enforcers worldwide.²⁰⁴ U.S. enforcers rely more heavily on cooperation with foreign enforcers to make its cases, which necessarily requires U.S. enforcers to take into account foreign concerns.²⁰⁵ “Discussions today” thus “tend to focus on better ways of coordinating these many national-level regimes” rather than on the limitations respect for principles of international law impose on the adjudicative power of the courts.²⁰⁶

200. *Id.* at 168.

201. *Id.* at 169.

202. *Id.* at 168.

203. Waller, *supra* note 72, at 574, 575-76.

204. *Id.* at 574-76.

205. *Id.* at 573.

206. *United Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 960 n. 1 (7th Cir. 2003).