NOTES FROM THE ANTITRUST SUBCONSCIOUS: HOW ATTEMPTS TO SUPPRESS COMMON LAW PRECEDENT REPLACED BY THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT HAVE ONLY BROUGHT THE ACT CLOSER TO ITS ROOTS

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ABSTRACT

In 1982, Congress enacted the Foreign Trade Antitrust Improvements Act (FTAIA) to serve as a standard for determining when U.S. antitrust law should extend to foreign conduct. The FTAIA was designed to clarify the common law of antitrust extraterritoriality but has instead paralyzed the law's application. For years after its enactment, courts simply avoided the FTAIA. Into the late 1990s, many were still applying the common law test. More recent decisions have begun to construe the FTAIA's language, but their attempts have created more confusion than clarity. This Note argues that the dysfunction is a product of poor drafting and the resulting assumption that the FTAIA dispensed with the subjective elements of the common law test that preceded it. Understanding the FTAIA as a purely objective standard has proved unworkable. The evidence for this position comes from a close reading of FTAIA decisions, which shows that courts are implicitly relying on the subjective common law test in their analyses, even while asserting that the FTAIA test is objective. Rather than debate which circuit's interpretation of the FTAIA is better, courts should broaden their understanding of the Act to incorporate its common law roots.

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I. INTRODUCTION

Nineteen Eighty-Two was a year that seemed to want a break with the past. Michael Jackson released *Thriller* and Time Magazine gave its Person-of-the-Year Award to the computer. Possibly swept up in the tide, Congress also attempted to mark a transition from the past to the future in the realm of antitrust law, and enacted the Foreign Trade Antitrust Improvements Act (hereinafter "FTAIA" or "the Act").[1] Unlike other promising innovations of 1982, however, the FTAIA has contemporary courts and litigants yearning for the past. Although meant to clarify the common law standard used to decide when U.S. antitrust law should

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[1] The Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a (2000). The FTAIA amended the Sherman Act and the Federal Trade Commission Act, *see* 15 U.S.C. § 45(a)(3)(2014), by using identical language. *See* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 853 (7th Cir. 2012). However, for simplicity, I refer to it as though it is a stand-alone statute.

apply to foreign conduct (i.e. when it should apply "extraterritorially"), the FTAIA "did not quite achieve that result,"[2] "introduced confusion into a regime that, before its enactment, was a modestly successful common-law scheme,"[3] "is inelegantly phrased,"[4] "has failed at its essential purpose,"[5] and "keeps getting worse and worse."[6] In summary, the FTAIA is not well liked. This article sets out to determine why the Act has been dysfunctional since its enactment and, to propose a solution.

The FTAIA governs the extraterritorial application of the Sherman Act to anticompetitive conduct occurring in foreign commerce.[7] Prior to the FTAIA's enactment in 1982, courts applied a two part *effects test*, developed by Judge Learned Hand in *United States v.Aluminum Co. of America* (hereinafter, *Alcoa*),[8] to determine whether U.S. law applied extraterritorially. Under the *Alcoa* effects test,[9]foreign conduct that: (1) was intended to affect U.S. commerce; and (2) did in fact affect U.S. commerce and was subject to U.S. law.[10] This partially subjective, partially objective, standard represented the dominant common law approach before 1982.

With the FTAIA, Congress sought to clarify the common law[11] using a slightly different two-pronged test limiting extraterritorial application of U.S. law to conduct that (1)"has a direct, substantial, and reasonably foreseeable effect . . . on [U.S. domestic commerce]," which (2) gives rise to a domestic injury.[12] Few

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[2] Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. AM. L. 415, 420 (2005).

[3] Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 286 (2007).

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

[5] Huffman, *supra* note 3, at 286.

[6] Robert D. Sowell, *New Decisions Highlight Old Misgivings: A Reassessment of the Foreign Trade Antitrust Improvements Act Following Minn-Chem*, 66 FLA. L. REV. 511, 523 n. 84 (2014) (citing Joseph P. Bauer, *The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to American Banana?*, 65 ME. L. REV. 3, 4 (2012)).

[7] 15 U.S.C. § 6a(1)(A) (covering, specifically, "trade or commerce (other than import trade or import commerce) with foreign nations").

[8] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[9] *See* Part II. As discussed below, there were several alternative effects tests applied before the FTAIA. However, I often refer to a unified "common law effects test" for simplicity, because all of the tests shared fundamental characteristics distinguishing them from the FTAIA.

[10] *Alcoa*, 148 F.2d at 443-44.

[11] H.R. REP. NO. 97-686, at 2 (1982).

[12] 15 U.S.C. § 6a(1)(A).

courts have construed the FTAIA,[13] and many courts have declined to interpret the language of the first prong, particularly the word "direct."[14] Among those that have defined it, there is considerable disagreement.[15] However, courts and scholars generally agree on one thing: although the common law approach asked whether a defendant subjectively intended its conduct to affect U.S. domestic commerce, the FTAIA does not.[16]

This strictly objective understanding of the FTAIA's first prong is inhibiting its practical application. Believing that the Act prescribes an objective test, the circuits have formulated objective definitions of its terms, and two opposing definitions of *direct* have emerged. Despite differences in the abstract, these definitions are not practically distinguishable. Both have proven to be just as ambiguous as the phrase they sought to clarify. This article Note observes that courts struggling with the Act's first prong have exhibited certain tendencies. When forced to interpret or apply the "direct, substantial, and reasonably foreseeable" standard, courts consistently weigh elements of subjective intent, purpose, and design in their analyses. References to these elements are usually subtle or implicit and most likely unintended, because most judges accept that the FTAIA disposed of the common law's subjectivity. However, a close reading of major FTAIA decisions shows how the subjective test has survived between the lines.

This article argues that courts should recognize that subjective factors — such as a defendant's intent, purpose, or design— are not irrelevant to the FTAIA's first prong. There is historical precedent for such an interpretation, both

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[13] *See* United States v. LSL Biotechnologies, 379 F.3d 672, 698678 (2004) ("Federal courts did not shower the FTAIA with attention for the first decade after its enactment. But in the last ten years, and in particular the last five years, the case reporters have steadily filled with decisions this previously obscure statute.").

[14] Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293, 299 (3d Cir. 2002) ("Although passed two decades ago, few federal courts have had occasion to apply the [FTAIA].").

[15] *Id.* at 298 ("Federal courts have often disagreed about the extraterritorial scope of the Sherman Act.") (citing Den Norske Stats Oljeselskap v. HeereMac Vof et al., 241 F.3d 420, 423-24 (5th. Cir. 2011) "The history of this body of case law is confusing and unsettled.").

[16] *See, e.g.*, United States v. Hui Hsiung, 758 F.3d 1074, 1083 (9th Cir. 2014) ("[T]he FTATA . . . displaced the intentionality requirement . . . ."); Animal Science Products, Inc. v. China Minmetals Corp., 654 F.3d 462, 471 (3d. Cir. 2011) ("[T]he FTAIA's effects exception does not contain a 'subjective intent' requirement."); Rene H. DuBois, *Understanding the Limits of the Foreign Trade Antitrust Improvement Act Using Tort Law Principles as a Guide*, 58 N.Y.L. SCH. L. REV. 707, 717 (2013/2014) (asserting that the FTAIA "focuses on objective criteria"); Huffman, *supra* note 3, at 316 ("[T]he FTAIA enacted an objective version of the intent requirement from *Alcoa*."). *See also* Erica Siegmund, *Extraterritoriality and the Unique Analogy Between Multinational Antitrust and Securities Fraud Claims*, 51 VA. J. INT'L L. 1047, 1055 (2011) ("It is clear the test that courts used to determine whether U.S. antitrust laws applied extraterritorially prior to the FTAIA retains significance.").

in the common law effects test and in the Act's legislative history. More practically, a purely objective standard is simply not working. The FTAIA was enacted over three decades ago, and the courts are still struggling to grasp its basic operation. Rather than debate which circuit's interpretation of *direct*, *substantial*, *and reasonably foreseeable* is better, courts, should broaden their understanding of the FTAIA's domestic effects test to expressly include the subjective elements that they implicitly rely on.

II. BRIEF BACKGROUND ON ANTITRUST STATUTES

American antitrust laws are designed to protect free and fair competition and "safeguard the competitive community against methods of trade and business that are destructive of equal opportunity in honest competition."[17] The Sherman Act[18] is broadly phrased and operates as a "comprehensive charter of economic liberty"[19] and "a blanket norm against any activity that unduly restrict competition."[20] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . ." is illegal under § 1 of the Sherman Act.[21] Presently, the Federal Trade Commission and the Department of Justice can bring enforcement actions pursuant to federal antitrust statutes.[22]

III. THE COMMON LAW OF ANTITRUST EXTRATERRITORIALITY BEFORE THE FTAIA

The question of whether U.S. antitrust laws apply extraterritorially arises when courts hear disputes involving anticompetitive activity that takes place outside the United States. The first case to define the boundaries of antitrust extraterritoriality was *American Banana Co. v. United Fruit Co.*[23] Both parties in that case were American corporations, but the complaint alleged anticompetitive conduct occurring in Costa Rica (modern-day Panama) and called for the

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[17] 1 CALLMANN ON UNFAIR COMP., TR. & MONO. § 4:1 (Louis Altman & Malla Pollack eds., 4th ed. 2014).
[18] 15 U.S.C. §§ 1–7 (2014).
[19] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).
[20] 1 CALLMANN, *supra* note 17.
[21] 15 U.S.C. § 1 (2014).
[22] 1 CALLMANN ON UNFAIR COMP., TR. & MONO. § 4:51 (Louis Altman & Malla Pollack eds., 4th ed. 2014).2014).
[23] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

extension of the Sherman Act to foreign conduct.[24] The plaintiff had purchased plantations in Costa Rica and alleged the defendant had induced the Costa Rican military to seize the plots and railroads linking the plantations to trade ports.[25] The defendant's conduct, if accurately alleged, was clearly anticompetitive, but it had occurred entirely in foreign commerce. The Supreme Court declined to extend U.S. antitrust law to the defendant's activities.[26] Justice Holmes thought that applying U.S. law to wholly foreign conduct was a "startling proposition"[27] and "not within the scope of the [Sherman Act] so far as the present suit is concerned."[28] The holding appeared to create a bright-line rule exempting all conduct occurring in sovereign nations from U.S. law.[29] However, subsequent cases carefully massaged flexibility into the Court's stance, as conduct occurring outside the United States was brought within reach of the Sherman Act.[30]

A. The Predominant Common Law Approach Is Known as the *Alcoa* Effects Test

American Banana's restrictive approach was officially retired by Judge Learned Hand in *Alcoa*, when the Second Circuit sat as court of last resort.[31] In *Alcoa*, six foreign corporations had expressly agreed to restrict the supply of aluminum to the United States.[32] Considering whether § 1 of the Sherman Act applied to the agreement, the Court established what is now known as the *Alcoa*

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[24] *Id.* at 354.
[25] *Id.* at 354–55.
[26] *Id.* at 357.
[27] *Id.* at 355–56.
[28] *Id.* at 357.
[29] *See Id.* at 355–56; Sowell, *supra* note 6, at 523 n. 33 ("An important factor in the [*American Banana*] Court's limited application was that . . . a nation's laws may govern its citizens in territories lacking sovereign authority . . . ."); Huffman, *supra* note 3, at 292 ("*American Banana* generally is understood to have expressed a broad 'no extraterritorial[ity]' principle applicable to antitrust claims.").
[30] *See, e.g.*, United States v. Am. Tobacco Co., 221 U.S. 106, 182–83 (1911); United States v. Pac. & Arctic Ry. & Navigation Co., 228 U.S. 87, 90–92 (1913); Thomsen v. Cayser, 243 U.S. 66, 68–69 (1917); United States v. Sisal Sales Corp., 274 U.S. 268, 275–76 (1927) (reversing a district court holding that relied on *American Banana* to dismiss a complaint alleging anticompetitive conduct in Mexico).
[31] United States v. Aluminium Co., 322 U.S. 716, 716 (1944) (transferring the case). Several Supreme Court Justices recused from the case, and the remaining five justices fell sort of a quorum. As a result, the appeal was certified and transferred to the Second Circuit, which operated as the court of last resort.
[32] *Alcoa*, 148 F.2d 416, 424, 442 (2d Cir. 1945).

effects test: "[the agreements] were unlawful, though made abroad, if they intended to affect imports and did affect them."[33] Additionally, it specified that "[a]fter the intent to affect imports was proved, the burden of proof shifted to [the defendant]" as to whether its conduct did in fact affect U.S. domestic commerce.[34] Because the agreement openly declared the defendant corporations' intention to affect the U.S. market by restricting supply, the first element of the effects test was met.[35] On the second element, the defendants were unable to overcome the presumption that the supply restrictions drove up U.S. prices.[36] Therefore, for the first time, wholly foreign conduct was found to violate the Sherman Act and the view that "Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it" was approved.[37]

Alcoa not only negated *American Banana* in the type of conduct it declared unlawful; it moved the focus of antitrust extraterritoriality away from where conduct occurs to where its effect is felt. *American Banana* declined to consider whether there had been an effect on U.S. commerce, because the defendant's conduct occurred entirely overseas.[38] In contrast, *Alcoa* found an intended effect on U.S. commerce constituted a violation of the Sherman Act, notwithstanding the fact that it occurred entirely outside the United States.

The *Alcoa* effects test was the dominant approach to extraterritorial application in the thirty-seven years between *Alcoa* and the enactment of the FTAIA.[39] However, a plethora of modifications took hold in different circuits, most of which retained the basic *Alcoa* test but added other factors.[40] In *Timberlane Lumber Co v. Bank of America*,[41] the Ninth Circuit declared the effects test "incomplete"[42] and adopted a "tripartite analysis."[43] This expanded version of the

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[33] *Id.* at 444.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 443.
[38] *See* 1 CALLMANN, *supra* note 22, at 354.
[39] Delrahim, *supra* note 2, at 417 ("This 'effects test' has prevailed consistently since *Alcoa*."); Sowell, *supra* note 6, at 518 ("[*Alcoa*] established the 'intended-effects test,' which became the standard in determining the extraterritorial reach of the Sherman Act for years to come."); Siegmund, *supra* note 16, at 1054 ("Judge Learned Hand famously articulated the prevailing version of the effects test in [*Alcoa*].").
[40] *E.g.*, Mannington Mills Corp. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979).
[41] Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 612 (9th Cir. 1976).
[42] *Id.* at 611–12.
[43] *Id.* at 613.

Alcoa test considered the degree of conflict between U.S. and foreign law, whether other nations were likely to enforce their laws, the significance of the effect on U.S. commerce relative to the effect on other nations, the foreseeability of the domestic effects, and whether conduct integral to a defendant's scheme occurred within the United States.[44] In 1982, the Fifth Circuit also added international comity factors to its effects test, but it expressly rejected the Ninth Circuit's contention that these factors should be used to determine subject-matter jurisdiction.[45] Despite these modifications, most courts firmly retained the intent element of the *Alcoa* test.[46]

Too much uncommon ground developed between the circuits, however, and the multiplication of effects tests following *Alcoa* created disparities in expectations about the extraterritorial application of antitrust law. Congress enacted the FTAIA in response to this confusion.[47]

IV. CONGRESS PASSES THE FTAIA, CREATING A NEW TEST

In 1982, Congress enacted the FTAIA, and the law amended both the Sherman Act and the Federal Trade Commission Act.[48] It reads:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless-
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> (1) such conduct has a direct, substantial, and reasonably foreseeable effect-
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and;

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[44] *Id.*

[45] Indus. Investment Development Corp. v. Mitsui and Co., 671 F.2d 876, 884 n. 7 (5th Cir. 1982), *vacated*, 460 U.S. 1007 (1983).

[46] *Timberlane*, 549 F.2d at 612 ([The] "intent requirement suggested by *Alcoa* . . . is one example of an attempt to broaden the court's perspective."); Mannington Mills Corp. v. Congoleum Corp., 595 F.2d 1287, 1292 (3d Cir. 1979); *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1253 (7th Cir. 1980).

[47] H.R. REP. NO. 97-686, *supra* note 11, at 2 (recognizing the differences among lower courts' application of the Sherman Act to foreign conduct "in their expression[s] of the proper test for determining whether U.S. antitrust jurisdiction over international transactions exists.").

[48] FTAIA, Pub. L. No. 97-290, §§ 401–403, 96 Stat. 1233 (codified as 15 U.S.C. § 6a).

> (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.

A. An Overview of How Each Part of the FTAIA Functions

Many years after its enactment, Justice Breyer articulated the operation of the FTAIA: "[the statute] lays down a general rule placing all (non import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach provided that the conduct . . . (1) sufficiently affects American commerce, . . . and (2) has an effect of a kind that antitrust law considers harmful."[49] In other words, the FTAIA is an exclusionary rule. Import commerce is subject to the Sherman Act, but purely foreign commerce is not, unless it qualifies for the domestic effects exception of the FTAIA. If a court determines a defendant's conduct is import commerce, it will not conduct an FTAIA inquiry.

1. The FTAIA Is a Substantive Limitation

The circuits have recently agreed that the FTAIA places a substantive, not jurisdictional, limitation on the extraterritorial reach of U.S. antitrust law. In 2003, the Seventh Circuit decided, en banc, that the FTAIA was jurisdictional.[50] In 2011, it reaffirmed this position in *Minn-Chem, Inc. v. Agrium, Inc.*[51] However, after the Third Circuit[52] held that the Supreme Court's decisions in *Morrison v. Nat'l Australian Bank*[53]and *Arbaugh v. Y & H Corp.*[54] had added new legal context that linked the FTAIA to the merits of an antitrust claim,[55] the Seventh Circuit reconsidered. Rehearing *Minn-Chem*, en banc,[56] the court followed the Third

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[49] F. Hoffman-LaRoche, Ltd., v. Empagran S.A., 542 U.S. 155, 162 (2004) [hereinafter, *Empagran I*], *remanded*, 417 F.3d 1267 (D.C. Cir. 2005) [hereinafter, *Empagran II*].
[50] United Phosphorus v. Angus Chem., 322 F.3d 942, 952 (7th Cir. 2003) (en banc).
[51] Minn-Chem, Inc. v. Agrium, Inc. 657 F.3d 650, 657–59 (7th Cir. 2011).
[52] Animal Science Products, Inc. v. China Minmetals Corp, 654 F.3d 462 (3d Cir. 2011).
[53] Morrison v. Nat'l Australian Bank, 561 U.S. 247 (2010).
[54] Arbaugh v. Y & H Corp, 546 U.S. 500 (2006).
[55] *Animal Science*, 654 F.3d at 467–68.
[56] Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845 (7th Cir. 2012) (en banc).

Circuit and decided that *Morrison* had left little doubt that the FTAIA was a merit-based limitation.[57] The issue has remained settled since *Minn-Chem*.[58]

2. Overview of the FTAIA's First Prong

The first prong of the FTAIA is Congress's version of a domestic effects test.[59] Congress did not view its test as reinventing extraterritorial jurisdiction, but as offering "a simple and straightforward clarification of existing American law and the Department of Justice enforcement standards" and creating a "clear benchmark . . . for businessmen, attorneys, and judges as well as our trading partners." The Judiciary Committee recognized that the *Alcoa* effects test was the prevailing standard at the time of enactment.[60] However, it did not say whether the FTAIA codified *Alcoa* or amended it.[61] The general consensus, now, is that pre-FTAIA precedent is not binding post-enactment.[62]

Moreover, courts and scholars have since come to understand Congress's *clarification* of existing law as having removed a major element of the existing common law effects test: a defendant's subjective intent.[63] This belief is grounded in the Act's legislative history, in which it is clear Congress wanted to extend jurisdiction to cover "domestic effect[s] [that] would have been evident to a reasonable person making practical business judgments," even if not intended.[64]

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[57] *Id.* at 852.

[58] *See, e.g.*, Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 398 (9th Cir. 2014); *In re* TFT-LCD Antitrust Litig., 822 F. Supp. 2d 953, 959 (N.D. Cal. 2011) (expressly following *Animal Science*'s interpretation of the FTAIA post-Morrison).

[59] The FTAIA's test was technically "[d]eemed the 'domestic injury exception" but that language seems to create unnecessary confusion. *See* Sowell, *supra* note 7, at 515, 540.

[60] H.R. REP. NO. 97-686, *supra* note 11, at 5.

[61] *Id.*; Hartford Fire Ins. Co. v. California, 509 U.S. 764, n.23 (1993); *see also* United States v. LSL Biotechnologies, 379 F.3d 672, 698 (2004) ("[M]any courts have debated whether the FTAIA established a new . . . standard or merely codified the standard applied in *Alcoa* and its progeny. Several courts have raised this question without answering."); Delrahim, *supra* note 2, at 418 ("The common law standard for the reach of the Sherman Act to foreign conduct may or may not have changed with the enactment of the FTAIA in 1982.").

[62] DuBois, *supra* note 16, at 717 ("Pre-FTAIA cases . . . provide limited guidance on the limitations imposed by the conjunctive requirements of the [FTAIA] . . . ."); Huffman, *supra* note 3, at 313 ("The FTAIA codified a version of the Alcoa effects test."). *But see* Siegmund, *supra* note 16, at 1055–56 ("*Hartford Fire* thus illustrates that the effects test continues to play an important role in the Court's determination of extraterritoriality.").

[63] *See supra* note 5.

[64] H.R. REP. NO. 97-686, *supra* note 11, at 9.

However, the assumption that, if Congress wanted to add objective foreseeability to the domestic effects analysis, then it necessarily wanted to remove subjective intent from the analysis, is challenged by this article.[65]

3. Overview of the FTAIA's Second Prong

Unlike the first prong, the second prong of the FTAIA was not formally part of the *Alcoa* effects test, but its underlying principle was embodied in the common law comity analysis.[66] Section 6a(2) requires that the "direct, substantial, and reasonably foreseeable" effect described in prong one "gives rise to a claim" under the Sherman Act.[67] In a case now referred to as *Empagran I*, the Supreme Court clarified some ambiguous aspects of the second prong.[68] For example, it held that, although the effects of a defendant's conduct must be felt domestically, a foreign injury can be the basis of a Sherman Act claim and satisfy prong two of the FTAIA.

However, the Court also made two qualifications: (1) the domestic effects alleged must have been detrimental, not beneficial, to the U.S. economy; and (2) a foreign plaintiff's injury cannot be "independent" of the domestic effect proved under prong one.[69] Additionally, the Court clarified that the word "claim" in the second prong refers to the plaintiff's claim against the defendant, rejecting a broader reading that required plaintiffs to show domestic effects gave rise to a Sherman Act claim but not necessarily to theirs.[70] Importantly, the Court did not decide what causation standard should be used for the second prong.[71] It remanded this question to the D.C. Circuit (*Empagran II*), which held that a proximate cause test was appropriate.[72] The court reasoned that this standard was more respecting of international comity concerns than causation.[73] Since *Empagran II*, other circuits have also adopted proximate causation for the "gives

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[65] The legislative history is discussed in greater detail in Part VII of this article.

[66] *See* Lotes Co, Ltd. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 414 (2d Cir. 2014) ("In *Empagran*, the Supreme Court [decided the meaning of] the statutory phrase 'gives rise to a claim under' . . . . [a]fter considering the legislative history and principles of international comity . . . .").

[67] 15 U.S.C. § 6a(2).

[68] *Empagran I*, 542 U.S. 155 (2004).

[69] *Id.* at 173.

[70] *Id.* ("Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach."). The Court's holding resolved a circuit split on these issues. *See* Sowell, *supra* note 6 at 545-46.

[71] *Empagran I*, 542 U.S. at 175.

[72] *Empagran II*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

[73] *Id.*

rise to" element of the FTAIA.[74] Although there remains controversy[75] about this approach and about prong two generally, however, that is not the focus of this article.

B. Background of Congressional Intent

In addition to furthering the overarching aims of the Sherman Act[76] by "encourage[ing] the business community to engage in efficiency-producing joint conduct in the export of American goods and services,"[77] the FTAIA was intended to clarify the scattered common law of antitrust extraterritoriality.[78] The Judiciary Committee recognized that at least six distinct common law tests were being used by different courts,[79] and other sources note that even substantively similar tests often used different phraseology,[80] adding to the confusion.

Furthermore, Congress chose to cast the law as an exception to the general rule of non-liability for anticompetitive activity in foreign commerce. This may suggest an intent to limit the scope of the Sherman Act.[81] Alternatively, some scholars see this feature of the Act as a protectionist measure, "because the FTAIA permits only U.S. exporters to sue to remedy harm to competition that occurred in U.S. export commerce—giving license for U.S. exporters to engage in conduct causing harm felt only in foreign commerce."[82] Another potential reason for wanting to limit the extraterritorial application of U.S. law is international comity.[83] Surprisingly, though, Congress did not create a separate prong in the Act for comity analysis.[84]

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[74] *E.g.*, Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 414 (2nd Cir. 2014); *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 987 (9th Cir. 2008); *In re* Monosodium Glutamate Antitrust Litig., 477 F.3d 535, 538 (8th Cir. 2007).

[75] *See, e.g.*, Sowell, *supra* note 6, at 546-47.

[76] *See supra* Part I.

[77] H.R. REP. NO. 97-686, *supra* note 12, at 2-3.

[78] *Id.* at 5 (referring to the discrepancies in "quantum and nature of effects required to create jurisdiction" developed after *Alcoa*.)

[79] *Id.*

[80] *See, e.g.*, Huffman, *supra* note 3, at 310 n. 138.

[81] 4A CALLMANN ON UNFAIR COMP., TR. & MONO. § 27:30 (Louis Altman & Malla Pollack eds., 4th ed. 2014); *see Empagran I*, 542 U.S. 155, 169 (2004) ("Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce.").

[82] Huffman, *supra* note 3, at 306.

[83] *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 958 (D.C. Cir. 1984) (Starr, J., dissenting) (noting that the United Kingdom had enacted a law, the Protection of Trading Interests Act, in 1980 that prevented enforcement of judgments obtained under U.S. antitrust law; Judge Starr

V. HOW THE ACT AND THE FIRST PRONG HAVE BEEN AWKWARDLY APPLIED SINCE THE FTAIA REPLACED THE COMMON LAW TEST

Whether in spite of, or as a result of Congress's effort, the FTAIA has been applied awkwardly and inconsistently, particularly with regard to its first prong. Although the statute is over thirty years old, judicial interpretations of its "direct, substantial, and reasonably foreseeable" requirements are rudimentary and unstable. In part, this is because not many cases have dealt with the FTAIA since its enactment. In larger part, it is because courts have avoided construing or applying the Act's first prong. Judges have accomplished this in a variety of ways, but the overall trend of avoiding the statute is evidence that the FTAIA standard, as it stands now, is problematic.

Initially, it was unclear whether the FTAIA had changed the *Alcoa* effects test at all. The first case to address the Act reached its conclusion by relying on Alcoa's requirements of intent and actual effect and relegating the words "direct, substantial, and reasonably foreseeable" to a footnote.[85] Gradually, courts become more comfortable with the new statutory standard, and a belief solidified that, unlike *Alcoa*, the FTAIA was a purely objective standard. Despite this growing understanding, very little has been said about what the first prong meant or which facts met its objective threshold. Very recently, a flurry of cases has offered new interpretations. However, the majority of the courts have declined to rest their holdings on the first prong of the FTAIA, preferring instead to decide the domestic effects issue on the second prong or by circumventing the Act altogether.

In each of the opinions discussed below, there are clues as to what is wrong with the present understanding of the first prong and what might improve it. This article focuses on the ways in which judicial analysis has implicitly relied on subjective elements of a defendant's conduct -such as the intent, purpose or design of a conspiracy without acknowledging that these elements are part of the statutory standard.

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described that "[a] tempest has been brewing for some time among the nations as to the reach of this country's antitrust laws").

[84] The judiciary has introduced some measure of comity analysis into the existing language. *See, e.g.*, *Empagran I*, 542 U.S. 155 (2004) at 164–65 (stating generally that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations" and conducting a comity analysis).

[85] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 n. 23 (1993).

A. Courts Are Avoiding Applying the FTAIA or Holding Under the First Prong

Less subtle than the ways in which courts have interpreted the FTAIA are the ways in which they have avoided interpreting it. The FTAIA was enacted in 1982, but the first case to mention was decided in 1993.[86] That case did not attempt to interpret the language of the Act, and neither did any other case until 2004. Since then, courts have been more willing to construe the language of the FTAIA and its first prong, but most have found that the statute's second prong offers surer footing. This article reviews a selection of major rulings and presents them as evidence that the "direct, substantial, and reasonably foreseeable" standard is unworkable as a purely objective test.[87]

B. Early FTAIA Cases Ignored the Act Altogether

After over a decade of silence on the FTAIA,[88] in 1993, the Supreme Court took a case that called for the law's application.[89] In *Hartford Fire Ins. Co. v. California*, nineteen states and several private parties brought suit against British insurance companies that had conspired to "restrict the terms of coverage of commercial general liability available in the United States."[90] Both the Northern District of California[91]and the Ninth Circuit[92]applied pre-FTAIA common law precedent. However, they came to different conclusions.[93]The Court granted certiorari ostensibly to resolve the ambiguity surrounding the application of the FTAIA, but it avoided construing the new law.[94] Rather, the Court also leaned on pre-FTAIA cases, particularly *Alcoa*.[95] Without making direct reference to the language of the FTAIA, the Court stated "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in

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[86] *Id.*

[87] *See* Delrahim, *supra* note 2, at 427 ("[The first prong] has attracted less attention than the [second prong] . . . .").

[88] *Id.* at 419 ("For several years, courts seemed to avoid the FTAIA, and it attracted little attention well into the 1990s.").

[89] *Hartford Fire*, 509 U.S. 764 (1993).

[90] *Id.* at 770 (footnote omitted).

[91] *In re* Ins. Antitrust Litig., 723 F. Supp. 464, 490–91 (N.D. Cal. 1989).

[92] *In re* Ins. Antitrust Litig., 938 F.2d 919, 934 (9th Cir. 1991).

[93] *Id.*

[94] *Hartford Fire*, 509 U.S. at 796.

[95] *See* DuBois, *supra* note 17, at 713 ("*Hartford Fire* . . . returned to the broader school of thought articulated in the *Alcoa* decision.").

fact produce some substantial effect in the United States" and cited to *Alcoa* to support this rule.[96]

Recent cases have developed an alternative interpretation of *Hartford Fire*. In *Minn-Chem*, the Seventh Circuit reviewed a complaint that alleged both conduct involving import commerce and conduct occurring only in foreign commerce.[97] The court correctly recognized that conduct involving import commerce is not the type of conduct excluded from the Sherman Act by the FTAIA; the FTAIA applies only to foreign commerce.[98] Then, more controversially, it recast *Alcoa* and *Hartford Fire*, not as FTAIA cases, but as providing a jurisdictional test for conduct involving import commerce: "[*Alcoa*] held that the Sherman Act covers imports when actual and intended effects on U.S. commerce have been shown. In *Hartford Fire*, the Supreme Court confirmed this rule . . . ."[99] The Seventh Circuit thus posed *Hartford Fire* as an entirely separate, import-only test, distinct from the FTAIA's "direct, substantial, and reasonably foreseeable" domestic effects test for foreign, non-import commerce.

This view represents a perplexing inference from *Alcoa* and *Hartford Fire*. *Hartford Fire* displays a reluctance to construe the FTAIA, but the Court never claimed the statute was inapplicable because the case was about import commerce. Furthermore, in a footnote to the *Alcoa* effects test, the Court expressed uncertainty as to whether the "direct, substantial, and reasonably foreseeable" language of the FTAIA "amends existing law or merely codifies it."[100] If, as *Minn-Chem* proposed, *Alcoa* applied exclusively to import commerce, and the FTAIA does not apply to import commerce at all, then the FTAIA could not be a codification of *Alcoa*. Additionally, *Alcoa* governed both import and non-import commerce before 1982. There is no indication that the FTAIA's enactment replaced *Alcoa* with regard to non-import commerce but retained the common law test for import commerce.

As previously discussed, the Act's legislative history acknowledges *Alcoa* as the leading common law standard and described Congress's intent to "clarify" that

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[96] *Hartford Fire*, 509 U.S. at 796.

[97] Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 855 (7th Cir. 2012).

[98] 15 U.S.C. § 6a ("Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or commerce) with foreign nations . . . ."); *Minn-Chem*, 683 F.3d at 855 ("The FTAIA does not require any special showing in order to bring these [import] transactions back into the Sherman Act . . . because they were never removed from the statute.").

[99] *Minn-Chem*, 683 F.3d at 855.

[100] *Hartford Fire*, 509 U.S. at 796 n.23.

standard with the FTAIA.[101] If *Alcoa* applied only to import commerce, then Congress would not have used it formulate a law that does not apply to import commerce. Therefore, *Minn-Chem*'s contention that *Hartford Fire* and *Alcoa* represent a test for import commerce is not supported by the language of either case or the legislative history. *Hartford Fire* applied *Alcoa*'s subjective effects test because the Court considered the FTAIA standard puzzling, not because the FTAIA did not apply.[102]

Returning to the early application of the FTAIA, in 1997, the First Circuit decided *United States v. Nippon Paper Co.*,[103] a case that relied heavily on *Hartford Fire*. In *Nippon Paper*, the Justice Department brought a criminal action against a Japanese corporation that had allegedly conspired to fix the price of paper sold in the United States.[104] The district court held that, because the defendant's activities took place entirely in Japan, a criminal antitrust prosecution was precluded.[105] The First Circuit reversed, holding that the defendant's foreign conduct had affected domestic commerce enough to warrant the extraterritorial application of U.S. antitrust law.[106] However, the court bluntly refused to use the FTAIA to make this determination, saying "[t]he FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it . . . . [w]e emulate this example and do not rest our ultimate conclusion about Section One's scope upon the FTAIA."[107] Like *Hartford Fire*, the court instead applied the common law Alcoa effects test and declared, "the case law now conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an

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[101] *See* Siegmund, *supra* note 16, at 1055 ("[T]he legislative history of the FTAIA suggests that Congress contemplated the effects test when enacting the statute.").

[102] It is also difficult to trace where *Minn-Chem*'s characterization of *Aloca* and *Hartford Fire* originated. The case cites to Animal Science Products, Inc. v. China Minmetals Corp., 654 F.3d 462, 470 (3d. Cir. 2011). *Animal Science* indeed supports *Minn-Chem*'s proposition and cites to Turicentro, S.A. v. Am. Airlines Inc., 303 F.3d 293, 303 (3d Cir. 2002) for support. *Turicentro*, however, does not cite *Hartford Fire* or *Alcoa* in its analysis of whether defendant's conduct constituted import commerce. *Id.* at 303-04. In fact, it cites both cases as seminal interpretations of the FTAIA. *Id.* at 304-05. This undermines the contention, in *Animal Science* and *Minn-Chem*, that *Alcoa* and *Hartford Fire* represent a different effects test for import commerce, separate from the FTAIA. *See also* Sowell, *supra* note 6, at 533 (criticizing this aspect of the *Minn-Chem* decision, because "it would seem contrary to congressional intent . . . to apply the [(*Alcoa*)] intended-effects test to import commerce that Congress specifically excluded from the FTAIA").

[103] United States v. Nippon Paper Co., 109 F.3d 1 (1st Cir. 1997).

[104] *Id.* at 2.

[105] *Id.*

[106] *Id.* at 4.

[107] *Id.*

intended and substantial effect in the United States come within Section One's jurisdictional reach."[108]

Few courts have been so explicit about their desire to avoid the FTAIA. Rather, most have taken the *Hartford Fire* route: recognizing that the FTAIA is governing law, but using the more familiar common law test as a way of understanding the Act's meaning. For example, in *United States v. Anderson*,[109] the Eleventh Circuit began its analysis by reciting the requirements of the FTAIA, including the "direct, substantial, and reasonably foreseeable" language of the first prong.[110] Additionally, the court acknowledged that the Act was meant "to limit American courts' jurisdiction over international commerce."[111] The FTAIA notwithstanding, however, the court restated the standard in common law terms: "The Sherman Act reaches conduct outside the borders of the United States, but only when the conduct is intended to and does in fact produce a substantial effect on commerce in the United States."[112]

C. Recent Cases Apply the FTAIA but Are Reluctant to Place Too Much Weight on the First Prong

The following cases, all of which were decided in the last two years, illustrate courts' increasing willingness to apply and construe the language of the FTAIA, but also their continued reluctance to hold under the first prong.

In *Lotes Co. v. Hon Hai Precision Indus. Co.*,[113] the Second Circuit elaborated, explicitly and in great detail, on its theoretical disagreement with the Ninth Circuit's interpretation of the domestic effects exception.[114] Nevertheless, the court withheld final judgment and was clearly relieved that "we need not decide the rather difficult question of whether the defendants' foreign anticompetitive conduct [satisfied the directness test] . . . . because . . . [any] effect does not 'give rise to' Lotes' claim."[115]

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[108] *Id.*
[109] United States v. Anderson, 326 F.3d 1319 (11th Cir. 2003).
[110] *Id.* at 1329–30.
[111] *Id.* at 1329.
[112] *Id.* (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993)).
[113] Lotes Co. v. Hon Hai Precision Indus. Co, 753 F.3d 395 (2d Cir. 2014).
[114] *Id.* at 409–412.
[115] *Id.* at 413.

In *Motorola Mobility LLC v. AU Optronics Corp.*,[116] the Seventh Circuit twice eluded the FTAIA's first prong. In his first, now vacated, opinion, Judge Posner said little about whether alleged effects on the U.S. economy were reasonably foreseeable and wondered out loud, "who knows what 'substantial' means in this context?"[117] Although he made a greater effort to elucidate the meaning of the word "direct," Judge Posner ultimately grounded the court's decision in the Act's second prong: "Motorola's claim is upended by another—and independent—requirement that must be satisfied . . . the effect . . . must 'give rise to' [the plaintiff's injury]."[118] Rehearing the case en banc, Judge Posner went into greater detail explaining the foreseeability element and was, this time, willing to say that "[w]e'll assume that the requirement of a direct, substantial, and reasonably foreseeable effect on domestic commerce has been satisfied."[119] However, the resolution of the appeal again turned on the second prong, and the difficulty of applying the first prong was neutralized: "Whether or not Motorola was harmed indirectly, the immediate victims of the price fixing were its foreign subsidiaries . . . "[120]

In *United States v. Hui Hsiung*,[121] the Ninth Circuit paid acknowledgement to the first prong of the FTAIA and Ninth Circuit precedent.[122] However, it did not base its ruling on the Act. Instead, the court reasoned that it "need not resolve whether the evidence of the defendants' conduct was sufficiently 'direct,'"[123] because all the alleged conduct could be characterized as import commerce, which automatically placed it outside the scope of the FTAIA.[124]

Minn-Chem, Inc. v. Agrium, Inc.[125] is a Seventh Circuit case seen as a bellwether decision in FTAIA interpretation.[126] One of its principle contributions was generating a proximate cause standard for measuring directness.[127] The *Minn-*

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[116] Motorola Mobility LLC v. AU Optronics Corp., 773 F.3d 826 (7th Cir. 2014) *amended and superseded by* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015) [hereinafter, *Motorola II*], *aff'g en banc* Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842 (7th Cir. 2014) [hereinafter, *Motorola I*].
[117] *Motorola I*, 746 F.3d at 844.
[118] *Id.* at 845.
[119] *Motorola II*, 773 F.3d at 829.
[120] *Id.* at 830.
[121] United States v. Hui Hsiung, 758 F.3d 1074 (9th Cir. 2014).
[122] *Id.* at 1094.
[123] *Id.*
[124] *Id.*
[125] Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845 (7th Cir. 2012).)
[126] *See* Sowell, *supra* note 6, at 528 (applauding "Clarity from the Seventh Circuit" in *Minn-Chem*).
[127] DuBois, *supra* note 16, at 720.

Chem opinion described the standard in detail, assessed the facts of the complaint, and found the plaintiffs had made allegations under both prongs of the FTAIA sufficient to withstand a motion to dismiss.[128] However, the court displayed hesitance about drawing broad conclusions. It advised, "[w]e stress, however, that our evaluation throughout has proceeded exclusively on the face of the Complaint," and then carefully outlined a list of legal and factual issues upon which it was not commenting.[129] Although the Seventh Circuit cannot be accused of avoiding the FTAIA's first prong in *Minn-Chem*, its especially cautious holding is nevertheless revealing.

VI. NOW, THE FEDERAL CIRCUITS ARE DIVIDED BETWEEN DIFFERENT DEFINITIONS OF THE WORD "DIRECT" IN THE FIRST PRONG

Although these recent cases mostly avoided reaching a decision under the first prong, they did express opinions about its meaning. There is now a clear split between the circuits, with most of the conflict centered on the word "direct." One set of cases, led by the Ninth Circuit, defines a direct effect as "an immediate consequence" of an activity. Another faction, led by the Seventh Circuit, defines directness in terms of "proximate cause." This debate has subsumed the rest of the first prong, even though no meaningful explanation "substantial" and "reasonably foreseeable" has been attempted by any court.

The Ninth Circuit was the first to issue an interpretation, in *United States v. LSL Biotechnologies*, in which it defined a direct effect as one that "follows as an immediate consequence of the defendant's activity."[130] The court referred to a dictionary that defined 'direct' as 'proceeding from one point to another . . . without deviation or interruption.'"[131] Finding that an "uncertain intervening event" separated defendant's conduct from any domestic effects, the court held the standard had not been met.[132]

The Seventh Circuit later offered an alternative definition. In *Minn-Chem*, the court stated that directness was evidenced by "a reasonably proximate causal nexus" between conduct and effect.[133] Later referring to its standard simply as

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[128] *Minn-Chem*, 683 F.3d at 859.
[129] *Id.* at 860.
[130] United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004).
[131] *Id.*
[132] *Id.* at 681.
[133] *Minn-Chem*, 683 F.3d at 857.

"proximate cause,"[134] the court reached its definition by analogy: "[j]ust as tort law cuts off recovery for those whose injuries are too remote from the cause of injury"[135] the FTAIA's directness test cuts off liability when domestic effects are too remote from foreign anticompetitive conduct.[136] The Second Circuit has since fallen in line with the Seventh Circuit,[137] but other circuits have not entered the fray.

A. The Seventh Circuit Created an Objective Definition of "Direct" but Prominent Cases Resort to Elements of the Common Law Test to Explain the Definition

This article asserts that both circuit's proposed definitions are inadequate, because neither considers the subjective factors -such as intent, purpose, and design- that were integral to the *Alcoa* effects test and other common law tests. In addition to court's tendency to avoid the FTAIA's first prong, or avoid the Act altogether, the primary evidence supporting this claim is that judicial analysis implicitly considers these subjective factors, even while disclaiming them from the statutory effects test. The first example is that of the Seventh Circuit.

Minn-Chem, Inc. v. Agrium, Inc. set the tone for the Seventh Circuit's position on the FTAIA and its disagreement with the Ninth Circuit. In *Minn-Chem*, "U.S. companies that [were] direct and indirect purchases of potash [a component of agricultural fertilizers], accuse[d] several global producers of price-fixing."[138] Potash "is a homogenous commodity . . . . As a result, buyers choose among suppliers based largely on price."[139] The defendant potash supplier was a Canadian conglomerate of U.S. and foreign companies[140] that conspired abroad to manipulate the U.S. market. Specifically, "[t]he cartel members used a rolling strategy: [t]hey would first negotiate prices in Brazil, India, and China, and then use those prices as benchmarks for sales to U.S. consumers."[141] Shortly after the cartel agreed to a price on foreign soil, "prices in the United States went up by precisely the same amount."[142] The court acknowledged that is strategy first

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[134] *Id.* at 859.
[135] *Id.* at 857.
[136] *Id.*
[137] *See infra*, note 214.
[138] *Minn-Chem*, 683 F.3d at 858.
[139] *Id.* at 848.
[140] *Id.* at 848–49.
[141] *Id.* at 849.
[142] *Id.*

affected countries like China and "[s]hortly thereafter, a similar price increase was implemented throughout the world."[143]

Judge Wood framed the first prong of the FTAIA as the case's central issue: "[t]he question before us is thus whether the . . . conduct . . . had a direct, substantial and reasonably foreseeable effect on domestic or import commerce."[144] The court began its interpretation of this language by finding that "the requirements of substantiality and foreseeability are easily met."[145] Interestingly, however, the court did not attempt to ascertain the meaning of these words. It was satisfied that "[w]herever the floor may be, it is so far below these numbers that we do not worry about it here."[146] It returned to the directness element, however, by rejecting the Ninth Circuit's "immediate consequence" standard as failing to understand the first prong of the FTAIA as an "integrated phrase."[147]; "[t]o demand a foreseeable, substantial, and 'immediate' consequence on import or domestic commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage."[148] The Seventh Circuit settled on the view that "direct means only 'a reasonably proximate causal nexus.'"[149]

However, the court also made several statements that suggest subjective intent played a role in its analysis. Most notably, Judge Wood characterized the first prong as a question of "whether the allegations in the plaintiff's Complaint describe conduct that had a direct, substantial, and reasonably foreseeable effect on domestic or import commerce by, for example, setting a benchmark price *intended to govern later U.S. sales*."[150] Assuming such an intent was present and noting that there had been an effect on U.S. commerce "almost immediately," the court found it "is not a stretch to say" that the defendants' alleged conspiracy was covered by the first prong of the FTAIA.[151] Additionally, the court found the defendants' observation that several cartel members did not sell potash directly to the United States or to U.S. purchasers abroad "[does] not provide a reason to throw out the case" on FTAIA grounds.[152] In other words, a foreign supplier who

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[143] *Id.* at 850.
[144] *Id.* at 859.
[145] *Id.* at 856.
[146] *Id.*
[147] *Id.* at 857.
[148] *Id.*
[149] *Id.*
[150] *Id.* at 859 (emphasis added).
[151] *Id.*
[152] *Id.* at 860.

sold only to Chinese buyers but was involved in a conspiracy designed to raise U.S. prices is subject to the Sherman Act, because that supplier was part of a broader plan designed to affect U.S. commerce.[153] This, together with the court's framing of the legal question in terms of intentionality, suggests that the design and purpose of the defendants' plan were relevant to *Minn-Chem*'s holding.

The Seventh Circuit considered the first prong of the FTAIA again in *Motorola II*.[154] The plaintiffs in that case, Motorola and its foreign subsidiaries, alleged that the defendants, AU Optronics and other electronics manufacturers, had agreed to a price-fixing scheme that regulated the sale of liquid-crystal display (LCD) panels.[155] The defendants sold their products to Motorola and its foreign subsidiaries,[156] which incorporated them into cell phones for retail sale.[157] One percent of the price-fixed panels was sold directly to Motorola and incorporated into cellphones in the United States.[158] These transactions clearly fell within the Sherman Act and were not considered on appeal, because they constituted import commerce, which is not excluded by the FTAIA.[159] The other ninety-nine percent of the purchased panels were sold to Motorola's foreign subsidiaries.[160] Fifty-seven percent were incorporated into cellphones and sold abroad.[161] "As neither those cellphones nor their panel components entered the United States, they never became part of domestic U.S. commerce . . . [and therefore] can't possibly support a Sherman Act claim."[162] The remaining forty-two percent of the price-fixed LCD panels were incorporated into cellphones abroad by Motorola subsidiaries, then sent to Motorola and sold in the United States.[163] The court considered whether the sale of these panels satisfied the FTAIA's domestic effects test.[164]

A three-judge panel heard the case in March 2014, but their opinion was vacated and a rehearing was granted. Sitting en banc, the Seventh Circuit affirmed the district court's ruling that the defendants' sale of LCD panels to

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[153] *See Id.* at 859 (noting that one foreign defendant, Canpotex, dealt only with Chinese buyers).
[154] *Motorola II*, 773 F.3d 826.
[155] *Id.* at 827.
[156] Mainly Chinese and Singaporean. *See Motorola I*, 746 F.3d at 843.
[157] *Motorola II*, 773 F.3d at 828.
[158] *Id.*
[159] *Id.* at 827.
[160] *Id.*
[161] *Id.* at 828.
[162] *Id.*
[163] *Id.* at 828. Fifty-seven percent were sold abroad. The remaining one percent represents the (unfinished) LCD panels sold to Motorola directly by foreign manufacturers, which bypassed its subsidiaries. That one percent was not involved in the appeal.
[164] *Id.*

Motorola's subsidiaries was insulated from Sherman Act liability by the FTAIA,[165] as the three-judge panel had also found months earlier.[166] In both opinions, the court rested its holding on the Act's second prong, finding that any effects of the price-fixing scheme had not given rise to Motorola's claim.[167]

However, Judge Posner briefly analyzed the first prong in each opinion.[168] In its en banc decision, the court reasoned that "[i]f prices of the components were indeed fixed, there would be an effect on domestic U.S. commerce,"[169] which is something it had not been willing to do in its vacated opinion.[170] Additionally, the original opinion had glanced over the terms "reasonably foreseeable" and "substantial," instead opting to focus on "direct."[171] Its directness analysis was brief and centered on the fact that "[t]he alleged price-fixers are not selling the panels in the United States."[172] In its en banc decision, the court justifiably retreated from this assertion, which had inaccurately distinguished the facts of *Minn-Chem*[173] and came too close to describing import commerce. In fact, the en banc opinion reversed course entirely in its treatment of the first prong. This time emphasizing the similarities of *Minn-Chem*, the court found that AU Optronics and the other manufacturers' price-fixing scheme could have had direct effects on the United States.[174]

Furthermore, the Seventh Circuit's en banc opinion made a more definitive conclusion as to foreseeability, when it notably made reference to the defendants' subjective state of mind: "[The] effect would be foreseeable (because

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[165] *Id.* at 829.

[166] *Motorola I*, 746 F.3d at 845.

[167] *Motorola II*, 773 F.3d at 829; *Motorola I*, 746 F.3d at 845–46.

[168] The court's assumption "that the requirement of a direct, substantial, and reasonably foreseeable effect on domestic commerce has been satisfied" did not affect the outcome of the case, because, as Judge Posner emphasized, "[i]t is essential to understand that these are two requirements," and that failing to satisfy one prong of the FTAIA bars a plaintiff's claim, "[w]hether or not Motorola was harmed indirectly." *Motorola II*, 773 F.3d at 830.

[169] *Id.* at 829.

[170] *Motorola I*, 746 F.3d at 845.

[171] *Id.* at 844–45; *Motorola II*, 773 F.3d 826.

[172] *Motorola I*, 746 F.3d at 844.

[173] In *Motorola I*, the majority claimed that, in *Minn-Chem*, the defendants "sold [their] product to U.S. consumers." *Motorola I*, 746 F.3d at 844. However, this selectively ignored another part of the *Minn-Chem* opinion, which found "a Canadian entity that does not sell directly into the United States [but] restricted supply during a period of especially difficult price negotiations with China" could be liable for being "a direct —that is, proximate— cause of the subsequent price increases in the United States." *Minn-Chem*, 683 F.3d at 859.

[174] *Motorola II*, 773 F.3d at 829. ("But at the same time the facts of this case are not equivalent to what we said in *Minn-Chem* would *definitely* block liability under the Sherman Act . . . .").

defendants knew that Motorola's foreign subsidiaries intended to incorporate some of the panels into products Motorola would resell in the United States) . . . ."[175] Although brief and seemingly ad-lib, this statement reveals the organic association between a subjective factual element (a defendant's knowledge) and the calculation of domestic effects under the FTAIA's first prong. Although *Motorola* is unique in that it introduced this element in context of foreseeability, rather than directness, it fits appropriately into the pattern of courts' discreetly supplementing a reputedly objective test with subjective factors.

B. The Ninth Circuit Created an Objective Definition of "Direct" That Is Unworkable Without Considering Subjective Factors

The Ninth Circuit's decision in *United States v. LSL Biotechnologies* was the first FTAIA case to define a "direct" effect, which it characterized as "an immediate consequence of the defendant's activity."[176] This definition appears to conflict with the Seventh and Second Circuits' interpretation, but the *LSL* court's analysis raises questions about whether its definition is a workable standard of directness at all.

The government's complaint in *LSL* alleged that two agricultural companies, LSL Biotechnologies and Hazera, had reached an agreement under which Hazera was prohibited from selling long-shelf life tomato seeds in the United States.[177] The Justice Department argued the agreement eliminated a "significant competitor" from the U.S. market,[178] prevented the technological development of "better fresh-market tomatoes for United States consumers," and "may also allow defendants to charge more for their seeds."[179] The Ninth Circuit panel found these allegations insufficient to satisfy the FTAIA's first prong, because "[t]he delay of possible innovations" was too speculative to be considered a direct effect,[180] and "[t]he government has presented no evidence that LSL has or will artificially inflate the prices it charges."[181] The court

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[175] *Id.*
[176] *LSL Biotechnologies*, 379 F.3d at 680–81. (borrowing its standard from Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992), which construed "a nearly identical term in the Foreign Sovereign Immunities Act.").
[177] *LSL Biotechnologies*, 379 F.3d at 674–75.
[178] *Id.* at 675.
[179] *Id.* at 676.
[180] *Id.* at 681.
[181] *Id.* at 682.

concluded that U.S. antitrust law could not be applied to the defendants' agreement, because "[n]either of these effects is 'direct.'"[182]

Arguably, though, *LSL*'s holding was less about what constitutes directness and more about what constitutes an "effect." In the other cases discussed in this section, there was no dispute that some adverse domestic effect had occurred. In *Minn-Chem*, the price of potash in the United States rose;[183] in *Motorola*, U.S. consumers paid more for cellphones.[184] The question in those cases went to the quantum and nature of effects on the U.S. market. The *LSL* court, in contrast, was not convinced there had been any effects on the U.S. market at all. This discrepancy makes the Ninth Circuit's *LSL* holding difficult to compare with Seventh Circuit cases like *Minn-Chem* and *Motorola*, because the court did not specify how it would proceed if there had been clear domestic effects.

Judge Aldisert dissented[185] from the *LSL* majority, saying that he would use a proximate cause standard for directness —the standard later adopted by the Seventh and Second Circuits.[186] His dissent is notable, first, because it thoroughly examined how the *LSL* majority failed to consider the meaning of the FTAIA's first prong in the context of the common law, the Act's legislative history, and the federal 's interpretations. Judge Aldisert criticized the majority for selectively pulling a definition of "direct" from a dictionary when "[t]he same dictionary source contains seven main meanings . . . encompassing 31 more specific subsidiary meanings."[187] The majority's uncritical selection of the "immediate consequence" definition was arbitrary, because "[a]ll of [the dictionary's] meanings are contemporary with the FTAIA."[188] A more thoughtful approach would have acknowledged that "[d]etermining the meaning of 'direct' requires the consideration of definitions as informed by the FTAIA's context and history."[189] Judge Aldisert supported his criticism by tracing the Act's history to show that directness was always a part of the extraterritorial application of the Sherman Act and, therefore, that "the new statute merely codified existing antitrust law in the use of the word 'direct.'"[190]

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[182] *Id.* at 681.
[183] *See Minn-Chem*, 683 F.3d at 856.
[184] *Motorola II*, 773 F.3d at 833.
[185] *LSL Biotechnologies*, 379 F.3d at 683 (Aldisert, J., dissenting).
[186] *See* Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., Ltd., 753 F.3d 395, 398 (9th Cir. 2014).
[187] *Id.* at 692.
[188] *Id.*
[189] *Id.*
[190] *Id.* at 684.

Paradoxically, in spite of the weight it assigns to the common law, Judge Aldisert's dissent has a complicated relationship with the subjective intent element of the *Alcoa* effects test. His dissent observed that, in enacting the FTAIA, "[w]hat concerned Congress was . . . to make explicit the requirement that the effect be 'reasonably foreseeable' rather than based on 'intent.'"[191] This statement appears to imply that Congress created a purely objective test. However, that implication would arguably undercut Judge Aldisert's central contention -that the FTAIA codified the common law- because the common law did not employ a purely objective test. In other words, if the dissent acknowledged that a major element of the common law test was obliterated by the FTAIA, then it would have difficulty arguing the Act does not represent a modification of the common law.

Additionally, Judge Aldisert's opinion argued that the Justice Department sufficiently alleged direct effects on U.S. commerce by analogy with *Hartford Fire*, in which "the Supreme Court treated the plaintiffs' allegations as satisfying both the common law and the FTAIA's tests . . . as to a conspiracy involving the market for reinsurance, particularly in London, but ultimately targeting the United States domestic market for primary insurance."[192] The dissent further points out that *Hartford Fire* highlighted effects that were "closely related—in a proximate cause sense" to a foreign conspiracy. However, he did not address how *Hartford Fire* had weighed the subjective elements of *Alcoa*.[193] Judge Aldisert may have used *Hartford Fire* as an analogy because he thought incorporating subjective elements (specifically, the defendant's "targeting" the United States) strengthened his directness analysis; or, he may have chosen it simply because the facts were similar to those of *LSL*. In either case, his dissent illustrates the difficulty of expressing any definition of *direct* that does not retain some link to the subjective elements of the common law effects test.

Seven years after *LSL*, the Northern District of California applied the Ninth Circuit's interpretation of the FTAIA and carefully analyzed the circumstances that contribute to a direct effect.[194] In *In re TFT-LCD (Flat Panel) Antitrust Litigation*, a class of retail consumers who purchased products containing LCD panels brought a Sherman Act suit against global producers of the panels, the six largest of which controlled more than eighty percent of the world market.[195] The plaintiffs alleged the manufacturers had conspired to fix the prices

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[191] *Id.* at 690.
[192] *Id.* at 694 (emphasis omitted).
[193] *Id.*
[194] *In re* TFT-LCD Antitrust Litigation, 822 F. Supp. 2d 953 (N.D. Cal. 2011).
[195] *Id.* at 955.

of the panels, which resulted in a higher cost to consumers.[196] The defendants manufactured all of their panels outside of the United States, and the majority of these panels were sold to foreign companies that incorporated them into finished products in foreign manufacturing facilities.[197] Thus, U.S. retailers rarely purchased the price-fixed panels directly from the defendants.[198]

Apparently conceding the substantiality and foreseeability components of the FTAIA's domestic effects test, the defendants asserted that "the only 'direct' effects of the conspiracy occurred overseas and that the effects on the U.S. economy are at most 'ripple effects.'"[199] The plaintiffs responded by arguing "that defendants' conduct had a direct effect on the United States economy because the conspiracy was deliberately targeted at the United States."[200] To substantiate this argument, they presented a wealth of evidence that the "primary purpose" of the conspiracy was to affect U.S. prices, such as admissions by corporate executives that their agreement specifically targeted the U.S., evidence that products were tailored for U.S. consumers, and records showing the defendants' monitored U.S. prices.[201] Fundamentally, the plaintiffs grounded their theory of "direct effects" in the design of the conspiracy, "regardless of how the LCD panels ultimately found their way into the United States."[202]

The Northern District of California held for the plaintiffs,[203] saying "[t]he Court agrees with plaintiffs' construction of the 'domestic injury' exception."[204] Fully acknowledging Ninth Circuit precedent (namely, *LSL*), the court held "the effect is an 'immediate consequence'. . . . because the effect of defendants' anticompetitive conduct did not change significantly between the beginning of the process . . . and the end."[205] It reasoned that, unlike in *LSL*, where a chain of events separated conduct and effect, "[n]o intervening events interrupted [the effect's] journey."[206] Of course, there were, literally speaking, several events separating the illegal pricing of LCD panels and consumer purchases in the United States; most notably, price-fixed panels were sold to foreign

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[196] *Id.*
[197] *Id.* at 959–60.
[198] *Id.* at 960.
[199] *Id.* at 962.
[200] *Id.*
[201] *Id.* at 962–63.
[202] *Id.* at 963.
[203] *Id.* at 967.
[204] *Id.* at 963.
[205] *Id.* at 964.
[206] *Id.*

intermediaries before being sold to U.S. retailers.[207] However, the intended effect of the defendants' anticompetitive agreement —that prices for products containing their panels in the United States would rise, proceeded uninterrupted. Put simply, everything went according to plan.

TFT-LCD stands as an example of courts' recognition that the intent or purpose of a foreign conspiracy is a relevant factor in determining the directness of domestic effects. Importantly, the court never explicitly said that intent is an element of directness, and it did not consider whether the plaintiff's design-oriented theory comported with the apparently objective nature of the FTAIA's domestic effects test. It simply recited the evidence presented, noting how clearly it demonstrated the defendant's intent to affect U.S. commerce, and then held that the plaintiff's arguments were persuasive on the directness element.[208] Therefore, like the other cases discussed thus far, *TFT-LCD* did not openly challenge the objectivity of the FTAIA, but it nevertheless relied on theories and evidence which undermined that objectivity.

A limited number of other cases have been more explicit. For example, another Northern District of California judge, in *In re Static Random Access Memory (SRAM)*,[209] agreed with a plaintiff's theory that "transactions have a domestic effect because Defendants targeted purchasers in the United States." As authority, the *SRAM* court cited a Third Circuit case, *Turicentro v. American Airlines*,[210] in which the court declared "[t]he geographic target of the alleged anticompetitive conduct matters greatly."[211] However, neither *SRAM* nor *Turicentro* offers much help in dissecting the application of the FTAIA's first prong, because both opinions rested their holdings on other grounds before reaching the directness of the defendants' conduct.[212] Still, these cases are

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[207] *See Minn-Chem*, 683 F.3d at 856, 859.

[208] "In this case, of course, there are no similar 'twists and turns' in plaintiffs' theory of domestic effect. Plaintiffs argue that defendants colluded to increase the prices of LCD panels, a major component in electronic products that are imported into the United States. The increased price of the components caused the prices of the finished products in the United States to increase. If this effect is not 'direct,' it is difficult to imagine what would be." *TFT-LCD*, 822 F. Supp. 2d at 966.

[209] *In re* Static Random Access Memory (SRAM) Antitrust Litigation, 2010 WL 5477313 at *7 (N.D. Cal. 2010).

[210] Turicentro, S.A. v. AmericanAm Airlines, Inc., 303 F.3d 293 (3d Cir. 2002).

[211] *Id.* at 305.

[212] The court in *SRAM* decided to allow the plaintiffs more time to present evidence of the defendants' intent to increase prices in the U.S., finding the existing evidence insufficient. *SRAM*, 2010 WL 5477313 at *7-8. In *Turicentro*, the plaintiffs' claim did not properly allege any domestic effect had resulted from the defendants' conduct, so their complaint was facially insufficient. *Turicentro*, 303 F.3d at 305.

valuable, because they show some courts' willingness to introduce subjective elements into analysis under the FTAIA.

C. The Second Circuit Adopted the Seventh Circuit's Definition but Has Only Hinted at How It Might Be Applied

In *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., Ltd.*,[213] the Second Circuit adopted the Seventh Circuit's proximate cause standard for the first prong of the FTAIA.[214] However, because it held under the second prong,[215] it said very little about how it would apply that standard. The court only opined that the modern economy, with its many and fragmented layers, should not

> [R]ender[] any and all domestic effects impermissibly remote and indirect. Indeed, given the important role American firms and consumers play in the global economy, we expect that some perpetrators will design foreign anticompetitive schemes for the very purpose of causing harmful downstream effects in the United States.[216]

This statement suggests that otherwise remote or indirect effects could be deemed "direct" if a defendant intended its conduct to impact the United States. It is uncertain, however, whether the Second Circuit would reach this conclusion if it was presented with, and had to rule on, a conspiratorial design like the one it hypothesized.

VII. THE LEGISLATIVE HISTORY AND THE FEDERAL AGENCIES' POSITION DO NOT RULE OUT THE POSSIBILITY THAT CONGRESS INTENDED TO RETAIN SOME ELEMENTS OF THE SUBJECTIVE COMMON LAW TEST

The legislative history of the FTAIA is important, because the notion that the Act's standard is purely objective originated in scholarly and judicial interpretations of the history. In a subsection entitled "Addition of the Requirement That Effects 'Reasonably Foreseeable,'" the Judiciary Committee

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[213] Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., Ltd., 753 F.3d 395 (9th Cir. 2014).
[214] *Id.* at 398.
[215] *Id.*
[216] *Id.* at 413.

explained: "The subcommittee chose a formulation based on foreseeability rather than intent to make the standard an objective one . . . ."[217] This approach was favored, because "[a]n intent test might encourage ignorance of the consequences of one's actions, which in this context would be an undesirable result."[218] Admittedly, this suggests that Congress wanted to remove the intent element of the *Alcoa* effects test and replace it with foreseeability to a "reasonable person making practical business judgments."[219]

However, other parts of the legislative history complicate the issue. For example, one subsection quotes a policy statement from the Department of Justice that articulated the agency's version of an appropriate effects test:

> United States antitrust laws should be applicable to an international transaction 'when there is a substantial and foreseeable effect on the United States commerce,' and that it . . . would be a miscarriage of congressional intent to apply the Sherman Act to 'foreign activities which have no direct *or intended effect* on United States consumers . . . .[220]

The legislative history does not explicitly say that Congress adopted Justice Department's position, but the final language of the Act is very close to the above-quoted phrase, as well as similar formulations found in the agency's guidelines.[221] Additionally, the Department's 1977 antitrust enforcement guidelines continue to be regarded as the Act's prototype,[222] and the legislative history cites them approvingly in several other instances.[223] Still, it is difficult to ascertain which parts of the agency interpretation were retained by the FTAIA and which were excluded.

The federal agencies' understanding of the FTAIA post-enactment has evolved with the law itself and is likewise mired in complexity and contradiction.

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[217] H.R. REP. NO. 97-686, *supra* note 11, at 9.
[218] *Id.*
[219] *Id.*
[220] *Id.* at 5 (emphasis added).
[221] Huffman, *supra* note 3, 62at 315.
[222] Foreign Trade Antitrust Improvements Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary, 97th Cong. 69 (1981), (statement of former Assistant Attorney General for Antitrust, John Shenefield) (recommending that Congress "bring the bill . . . into line with *Alcoa* and the Antitrust Guide for International Operations, published by the Justice Department"); Am. Bar Ass'n, Sec. of Antitrust Law, Report to Accompany Resolutions Concerning Legislative Proposal to Promote Export Trading 29-30 (1981) ("[The Act] is intended, without changing the law substantively, to use the 1977 Justice Department Guide's wording to clarify the 'effects' test . . . ."); Huffman, *supra* note 3, at 315 ("Congress's formulation most closely approximates that of the Department of Justice . . . .").
[223] *See supra* note 119.

The most recent policy statement is embodied in the 1995 enforcement guidelines that the Department of Justice and the Federal Trade Commission[224] (collectively, "the agencies") issued jointly.[225] Although the agencies' litigation strategy may sometimes suggest otherwise,[226] their guidelines strongly imply a connection between the directness element of the FTAIA and a defendant's subjective intent, purpose, or design.

This view is not stated outright, because the substance of the guidelines is contained in a series of illustrative examples. For instance, Example C presents two hypothetical situations.[227] In one situation, a group of manufacturers form an agreement that "clearly indicates that sales in or into the United States are not within the scope of the agreement."[228] In the other situation, the "agreement specifically provides that cartel members will set agreed prices for the U.S. market."[229] According to the guidelines, only the latter situation falls within the domestic effects exception of the FTAIA, because it contains "[t]he critical element of a foreign price-fixing agreement with direct, intended effects in the United States."[230] Similarly, in Example D, an agreement between two companies "would clearly have a direct and reasonably foreseeable effect on U.S. export commerce, since it is aimed at a U.S. exporter."[231] In Example E, an agreement is declared both direct and foreseeable, because "[the] arrangement appears to have been created with particular reference to competition from the United States."[232]

The guidelines' repeated reference to the intent, design, and purpose of anticompetitive schemes is not semantic or accidental, but represents a considered policy position. The foundation of this policy is that

> [T]he essence of any [Sherman Act] violation . . . is the illegal agreement itself—rather than the overt acts performed in furtherance of it,' [therefore,] the Agencies . . . focus on the potential harm that would

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[224] *See supra* note 1.
[225] U.S. DEP'T OF JUSTICE & THE FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1995) [hereinafter, "1995 Guidelines"].
[226] Delrahim, *supra* note 3,, at 429-30 ("In the Division's view, the correct interpretation of 'direct' in the FTAIA is a reasonably proximate causal nexus.") (citing *In re* Linerboard Antitrust Litig., 305 F.3d 145 (3d Cir. 2002)).
[227] *Id.* § 3.121.
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.* § 3.122.
[232] *Id.*

> ensue if the conspiracy were successful, not on whether the actual conduct . . . had in fact the prohibited effect.[233]

The agencies may have taken this position to avoid the messy factual questions that arise from trying to trace imported goods through the complicated avenues of global trade.[234] Alternatively, they may have simply assumed that the elements of the *Alcoa* test and the 1977 Department of Justice guidelines[235] were not altered by the FTAIA. Regardless of the agencies' motivations, their interpretation of the Act clearly considers a defendant's subjective intent relevant, if not critical, to analysis under the first prong of the FTAIA.[236]

VIII. CONCLUSION

This final observation of the agencies' stated position exemplifies the aim of this Note, which focuses less on how courts, legislators, and scholars express their interpretations of the FTAIA, and more on what their analyses of particular facts reveal. It is entirely possibly, maybe even likely, that Congress intended to make the first prong of the FTAIA a purely objective test. It is equally possible, or likely, that none of the judges writing the opinions surveyed in this Note intended to incorporate any subjective elements in their analysis. The same can be said, and has been said, for the agency position. However, the fact remains that references to intent, purpose, design, and other subjective factors consistently appear in all of these sources. Even if their influence is not invited, it is undeniably present.

Therefore, although the objective "immediate consequence" and "proximate cause" definitions of "direct" both have strengths and weaknesses, Judge Aldisert observed correctly that "[i]t would be arbitrary simply to pick one definition and declare it the 'plain meaning' in the abstract."[237] For thirty-seven

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[233] *Id.* § 3.121 (footnote omitted).

[234] For example, avoiding the analysis the *LSL* court performed in order to determine whether an effect had actually been felt in the United States. *See Minn-Chem*, 683 F.3d at 856; *Motorola II*, 773 F.3d at 833; *LSL Biotechnologies*, 379 F.3d at 683 (Aldisert, J., dissenting).

[235] I refer to these as "DOJ guidelines" rather than "the Agencies' guidelines," because FTC was not given enforcement authority under the Sherman Act until the FTAIA was enacted. *See supra* note 1.

[236] *See also* Am. Bar Ass'n, Sec. of Antitrust Law, *Report to Accompany Resolutions Concerning Legislative Proposal to Promote Export Trading* 29-30 (1981) ("[T]here is, with rare exception, no *significant* inconsistency between judicial precedents and the Justice Department's view of the 'effects' test.").

[237] United States v. LSL Biotechnologies, 379 F.3d 672, 692 (2004) (Aldisert, J., dissenting).

years, *Alcoa* governed antitrust extraterritoriality with a test that was one half subjective. Without analyzing the merits of that test, this Note suggests that such a long-standing precedent may not have been completely extinguished from antitrust jurisprudence by a new statute and new interpretations. Furthermore, it argues that incorporating subjective elements that continue to be relevant to the FTAIA would be more productive than attempting, unsuccessfully, to suppress them.