No. 10-1712

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MINN-CHEM, INC., et al.,
Plaintiffs-Appellees,

v.

AGRIUM INC., et al.,
Defendants-Appellants.

On Interlocutory Appeal from an Order of the
United States District Court for the Northern District of Illinois
MDL Docket No. 1996, Case No. 08-cv-6910
(The Honorable Ruben Castillo)

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY ON REHEARING *EN BANC*

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STATEMENT OF INTEREST

The United States and the Federal Trade Commission enforce the federal antitrust laws and have a strong interest in the correct interpretation of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which added Section 6a to the Sherman Act, 15 U.S.C. § 6a. The FTAIA also added Section 5(a)(3) to the FTC Act, 15 U.S.C. § 45(a)(3), which closely parallels Section 6a and limits the antitrust enforcement authority of the FTC. This amicus brief addresses the meaning of the "import commerce" and "direct effects" exceptions in the FTAIA but does not express a view on the proper disposition of this case. It is filed pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF ISSUES

1. Whether the FTAIA's import commerce exception is limited to conduct that specifically targets U.S. import commerce.

2. Whether the FTAIA's direct effects exception is limited to effects that follow as an immediate consequence of the challenged conduct.

STATEMENT

This case involves an alleged foreign conspiracy to fix the price of potash in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. It raises important questions regarding the proper interpretation of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a.

1. Section 1 of the Sherman Act prohibits agreements "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. The FTAIA, however, provides that:

> Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a.

The FTAIA initially places all conduct involving foreign commerce, with the exception of conduct involving import commerce, outside the Sherman Act's reach. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004). Thus, the FTAIA leaves the Sherman Act applicable to conduct involving import commerce; courts sometimes refer to this as the "import commerce exception." Slip Op. 17, 19. The FTAIA also brings conduct involving non-import foreign commerce "back within the Sherman Act's reach" if that conduct "sufficiently affects American commerce, *i.e.*, it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce." *Empagran*, 542 U.S. at 162. Courts sometimes call this the "direct effects exception." Slip Op. 19.

2. Purchasers of potash in the United States (plaintiffs) filed class actions alleging that certain foreign potash producers (defendants) violated Section 1 of the Sherman Act by agreeing to "restrict output and fix prices of potash at artificially high levels." Slip. Op. 2, 5. Plaintiffs alleged that the defendants "coordinated price hikes in Brazil, China, and India," which in turn increased the price of potash imported

into the United States, because the price of potash in these foreign markets served as a "benchmark" for U.S. sales. *Id.* at 9-10.

Defendants moved to dismiss the Sherman Act claims for lack of subject-matter jurisdiction under the FTAIA and alternatively for failure to state a claim upon which relief can be granted. Slip Op. 10. The district court denied the motion. *Id.* It ruled that the import commerce exception to the FTAIA was satisfied because the defendants imported potash into the United States and there was a sufficiently "tight nexus between the alleged [global conspiracy] and [d]efendants' import activities . . . to conclude that the former 'involved' the latter." *Id.* at 19. The court also concluded that plaintiffs sufficiently alleged a price-fixing conspiracy to state a claim under Section 1. *Id.* at 10.

3. On a certified interlocutory appeal, a two-judge panel of this Court vacated the district court's decision. Slip. Op. 1-27.[1] The panel explained that the district court "essentially conflate[d] the 'import commerce' exception and the 'direct effects' exception" by assuming that "foreign anticompetitive conduct can 'involve' U.S. import commerce even if it is directed entirely at markets overseas." *Id.* at 19. The panel

[1] Judge Evans, the third member of the panel, died before the case was decided.

further noted that the district court had erred in reasoning that "a foreign company that does *any* import business in the United States would violate the Sherman Act whenever it entered into a joint-selling arrangement overseas *regardless* of its impact on the American market." *Id.* at 19-20.

The panel then held that "the relevant inquiry under the import-commerce exception is 'whether the defendants' alleged anticompetitive behavior was directed at an import market,'" which "'requires that the defendants' [foreign anticompetitive] conduct target [U.S.] import goods or services.'" Slip Op. 20-21 (quoting *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011)). Plaintiffs failed to satisfy that requirement, the panel concluded, because they did not sufficiently allege either "that the offshore defendants agreed to an American price or production quota for potash" or "that the defendants agreed to worldwide production quotas for all members of the conspiracy or that a global cartel price was ever set." *Id.* at 21. Rather, plaintiffs "describe[d] anticompetitive conduct aimed at the potash markets in Brazil, China, and India—not the U.S. import market." *Id.*

The panel also concluded that plaintiffs' claims did not come within the "direct effects" exception (an issue the district court had not reached). Slip Op. 21-27. The panel found "compelling" the definition of "direct" adopted in *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004): that an effect is "direct" if "it follows as an immediate consequence of the defendant's activity," and hence, "[a]n effect cannot be 'direct' where it depends on . . . uncertain intervening developments." Slip Op. 22 (quoting *LSL Biotechs.*, 379 F.3d at 680-81). The alleged effects failed to satisfy this requirement, the panel held, because the complaints lacked "specific factual content to support the asserted proposition that prices in China, India, and Brazil serve as a 'benchmark' for prices in the United States and that this benchmark, if it exists, has a strong enough relationship with the domestic potash market to raise a plausible inference that the defendants' foreign anticompetitive conduct has a 'direct, substantial, and reasonably foreseeable effect' on domestic or import commerce." *Id.* at 24. Thus, dismissal of the Sherman Act claims was required. *Id.* at 27.

4. On December 2, 2011, the Court granted plaintiffs' petition for rehearing *en banc* and vacated the panel's decision. Dkt. 58.

SUMMARY OF ARGUMENT

1. Congress enacted the FTAIA to make clear to U.S. exporters and U.S. firms doing business abroad that the Sherman Act does not apply to their business arrangements "as long as those arrangements adversely affect only foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004). But Congress also sought to ensure that purchasers in the United States remained fully protected by the federal antitrust laws. Thus, the FTAIA leaves the Sherman Act applicable to conduct "involving" import trade or commerce (the import commerce exception) and to conduct that has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States, U.S. import commerce, or the export trade of a U.S. exporter (the direct effects exception). 15 U.S.C. § 6a.

2. The import commerce exception guarantees the continuing applicability of the Sherman Act to import restraints that harm purchasers in the United States. The exception does not apply merely because the defendants engaged in import commerce; rather, the conduct being challenged must itself "involv[e]" import trade or commerce. 15 U.S.C. § 6a. In a Section 1 case, the conduct involves

import commerce when the challenged agreement is, at least in part, in restraint of import commerce.

Courts have described the FTAIA's import commerce exception as applying when the challenged conduct is "directed at an import market," *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 303 (3d Cir. 2002), or "target[s] import goods or services," *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011). Although the panel apparently did not intend this result, "directed at" and "targeting" could be understood to narrow substantially the statutory language. These terms wrongly suggest that the import commerce exception applies only if the defendants specifically or uniquely focused on U.S. imports.

3. The direct effects exception leaves the Sherman Act applicable to conduct involving non-import foreign commerce that has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States, U.S. import commerce, or export commerce of a U.S. exporter. "Direct" has many meanings, but in light of the statutory context, the FTAIA's history and purpose, and antitrust precedent, it is best defined here as "reasonably proximate."

The panel borrowed the definition of "direct" adopted by the panel majority in *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004): that an effect is "direct" if "it follows as an immediate consequence of the defendant's activity," and hence, "[a]n effect cannot be 'direct' where it depends on . . . uncertain intervening developments." Slip Op. 22 (quoting *LSL Biotechs.*, 379 F.3d at 680-81). Defining directness in this way, however, would render multiple provisions in the FTAIA superfluous and undermine Congress's objective of ensuring that the Sherman Act protects purchasers in the United States from anticompetitive harm.

ARGUMENT

I. Congress Crafted the FTAIA's Exceptions To Protect Purchasers in the United States from Antitrust Injury.

The FTAIA should be construed in light of its history and purpose. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004). The statute "seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets." *Id.* at 161. By making clear to

U.S. firms when the federal antitrust laws apply to conduct involving export commerce or other commerce outside the United States, Congress intended to "increase United States exports of products and services." Pub. L. No. 97-290, § 102(b), 96 Stat. 1233, 1234; *see also* H.R. Rep. No. 97-686, at 7-8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494.

To this end, Congress limited the application of the Sherman Act when the challenged conduct involves export commerce or wholly foreign commerce—that is, commerce within, between, or among foreign nations. Clear limits were necessary because the Sherman Act goes "to the utmost extent of [Congress's] Constitutional power." *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 558 (1944). As a result, U.S. firms—and Congress—were concerned that courts would apply the Sherman Act to some anticompetitive conduct involving only export or wholly foreign commerce with no impact on the United States. This undesirable outcome, the FTAIA's drafters explained, was exemplified by *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), which applied the Sherman Act to an alleged conspiracy among U.S. shipping companies to destroy plaintiffs'

business of carrying cement and fertilizer between Taiwan and South Vietnam. H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494. Yet, such anticompetitive conduct "should not, merely by virtue of the American ownership, come within the reach of our antitrust laws." *Id.*

Congress's solution was the FTAIA. It provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect" on commerce within the United States, U.S. import commerce, or export trade of a U.S. exporter. 15 U.S.C. § 6a.

Because the FTAIA addresses whether the Sherman Act applies, the term "conduct" in the FTAIA refers to the activity that might violate the Sherman Act. But, as the statutory language makes clear, the application of the FTAIA turns on the type of commerce involved and not on the location of the conduct or on the nationality of the defendants. Potentially anticompetitive activity by U.S. exporters in the United States is precisely the sort of conduct Congress sought to exclude from the Sherman Act so long as it affects only non-import

foreign commerce. Conversely, the FTAIA leaves the Sherman Act fully applicable to conduct involving U.S. import commerce, even if the conduct takes place entirely outside the United States.[2]

Congress also sought to ensure that purchasers in the United States remained fully protected by the federal antitrust laws. For this reason, the FTAIA leaves the Sherman Act applicable to anticompetitive conduct involving commerce within the United States, even though the conduct also involves foreign commerce. If U.S. manufacturers fixed the price of products sold in the United States and also exported to Canada, the FTAIA would be irrelevant to a suit under the Sherman Act brought by purchasers in the United States or by the U.S. government. *See Empagran*, 542 U.S. at 161; *cf. Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314 (1978) ("Congress' foremost concern in passing the antitrust laws was the protection of Americans.").

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[2] "[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993). Thus, the Sherman Act authorizes antitrust actions "predicated on wholly foreign conduct which has an intended and substantial effect on the United States." *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997). While *Hartford Fire* and *Nippon Paper* focus on the where the conduct took place, the FTAIA considers what commerce the conduct involves or affects.

For conduct that does not involve commerce within the United States, the FTAIA makes the Sherman Act inapplicable unless the conduct comes within a statutory exception. The first exception applies to conduct involving import commerce. By providing that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations," the FTAIA leaves the Sherman Act fully applicable to conduct involving import commerce. 15 U.S.C. § 6a; *see Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 466 (3d Cir. 2011) ("[T]he FTAIA provides that it does not apply (and thus that the Sherman Act *does* apply) if the defendants were involved in 'import trade or import commerce' (the 'import trade or commerce' exception)."). This exception was included so there would be "no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law." H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494.

The second exception applies to conduct involving only non-import foreign commerce that, nevertheless, affects the United States. The FTAIA leaves the Sherman Act applicable to such conduct if it has a

"direct, substantial, and reasonably foreseeable effect" on commerce within the United States, U.S import commerce, or the export trade of a U.S. exporter. 15 U.S.C. § 6a(1). This exception also requires that "such effect gives rise to a claim under [the Sherman Act]." 15 U.S.C. § 6a(2).[3]

II. The Import Commerce Exception Is Not Limited to Conduct that Specifically Targets U.S. Import Commerce.

The import commerce exception provides that conduct "involving" import trade or commerce is not exempted from the Sherman Act. 15 U.S.C. § 6a. As the panel correctly observed, this exception does not apply merely because the defendants engaged in import commerce. Slip Op. 20. Rather, the *conduct being challenged* must itself "involv[e]" import trade or commerce. *Id.* at 20-21; *Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62, 71 (3d Cir. 2000) (the relevant inquiry is

[3] In *Empagran*, the Supreme Court concluded that this requirement was not met by foreign plaintiffs' damages claim to recover for "foreign injury" caused by "foreign anticompetitive conduct" producing "an adverse domestic effect" and "an independent foreign effect giving rise to the claim." 542 U.S. at 158-59. No case prior to the FTAIA had "applied the Sherman Act to redress foreign injury in such circumstances," and the FTAIA did not expand the Sherman Act's reach. *Id.* at 169-73. Consistent with the pre-FTAIA understanding that the antitrust laws "redress *domestic* antitrust injury that foreign anticompetitive conduct has caused" and "principles of prescriptive comity," the term "gives rise to a claim" must mean "gives rise to the plaintiff's claim." *Id.* at 165, 173-74. Thus, "the exception does not apply where the plaintiff's claim rests solely on the independent foreign harm." *Id.* at 159.

whether the "alleged *conduct by the defendants* 'involved' import trade or commerce").

Section 1 of the Sherman Act applies when the challenged contract, combination, or conspiracy is, at least in part, in restraint of import commerce. For instance, a price-fixing conspiracy among foreign manufacturers "involv[es]" import commerce if the conspirators fix the price of goods sold in or for delivery to the United States—i.e., goods in import commerce. *See Animal Sci.*, 654 F.3d at 471 n.11 (emphasizing the importance of defendants' "sales of magnesite for delivery in the United States"). Likewise, import commerce is involved if conspirators fix the price of services necessary to the importation of goods, for example, freight transportation into the United States. A group boycott or market allocation in which foreign participants agree not to sell into the United States also involves import commerce because the conspirators restrain import commerce by agreeing not to engage in it. And while joint export activities—the promotion of which was the impetus for the FTAIA—normally are outside the reach of the Sherman Act, joint ventures that involve products or services for sale in or for

delivery to the United States may restrain import commerce and thus come within the import commerce exception.

The import commerce exception, however, is not limited to conduct that restrains import commerce. The Sherman Act prohibits more than just agreements in restraint of trade. *See* 15 U.S.C. § 2 (prohibiting monopolizing and attempts or conspiracies to monopolize "commerce among the several States, or with foreign nations"). The statutory term "involving" accommodates the full range of conduct that might violate the Sherman Act.

Courts have explained that the exception applies when the challenged conduct "target[s] import goods or services," *Animal Sci.*, 654 F.3d at 470, or "was directed at an import market," *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 313 (3d Cir. 2002). These formulations can be useful in explaining why the import commerce exception applies in particular cases. For example, in *Animal Science*, magnesite purchasers in the United States alleged that Chinese producers and exporters conspired to fix the price of magnesite exported from China to the United States. 654 F.3d at 464. The district court held the exception inapplicable because the defendants were not importers. *Id.*

at 470. The Third Circuit disagreed. *Id.* "[T]he relevant inquiry is whether the defendants' alleged anticompetitive behavior 'was directed at an import market,'" or, "to phrase it slightly differently, the import trade or commerce exception requires that the defendants' conduct target import goods or services." *Id.* (quoting *Turicentro*, 303 F.3d at 303).

While conduct "directed at" or "targeting" import commerce satisfies the import commerce exception, those terms do not convey the full breadth of the statutory term "involving." Adopting those terms as a standard risks rewriting, and thereby narrowing, the FTAIA's import commerce exception. *Cf. Vainisi v. CIR*, 599 F.3d 567, 572 (7th Cir. 2010) (cautioning courts not to "rewrite statutes . . . merely because [the courts] think they imperfectly express congressional intent").

Terms like "directed at" and "targeting" suggest that the import commerce exception applies only if the defendants specifically or uniquely focused on U.S. imports. But the FTAIA's import commerce exception does not impose a requirement that defendants subjectively intend to restrain U.S. imports. Nor does it require that U.S. imports

be singled out for anticompetitive conduct.[4] *Cf. Kruman v. Christie's Int'l PLC,* 284 F.3d 384, 393 (2d Cir. 2002) ("Our markets benefit when antitrust suits stop or deter any conduct that reduces competition in our markets regardless of where it occurs and whether it is also directed at foreign markets."), *abrogated on other grounds by Empagran*, 542 U.S. 155.

"Directed at" and "targeting" also might be misunderstood to suggest that the import commerce exception turns on the proportion or dollar value of products sold in or for delivery to the United States. A price-fixing conspiracy "involv[es]" U.S. import commerce even if the conspirators set prices for products sold around the world (so long as the agreement includes products sold into the United States) and even if only a relatively small proportion or dollar amount of the price-fixed goods were sold into the United States.

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[4] Applying the import commerce exception to conduct that restrains U.S. import commerce as well as commerce in foreign countries will not benefit *Empagran*-like plaintiffs whose damages claims rest solely on independent foreign harm. While the import commerce exception has no "gives rise to" requirement similar to the direct effects exception, *see supra* note 3, courts nevertheless should dismiss damages claims to recover for "foreign injury" caused by "foreign anticompetitive conduct" when the conduct causing the injury involves import commerce but the injury does not relate to import commerce. As the *Empagran* Court recognized, the federal antitrust laws do not "redress foreign injury in such circumstances" regardless of the FTAIA, but rather "reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." 542 U.S. at 165, 169-73.

While borrowing the "directed at" and "targeting" formulations from the Third Circuit, the panel appears to have correctly understood the exception. Slip Op. 20-21. The panel did not require a subjective intent to restrain U.S. imports or a specific focus on U.S. imports. Nor did it require a minimum proportion or dollar value of products sold in or for delivery to the United States. Rather, the panel held that the import commerce exception did not apply because the complaint failed to allege adequately that defendants had agreed either "to an American price or production quota" or "to worldwide production quotas . . . or that a global cartel price was ever set." Slip Op. 21. Thus, the panel apparently understood that allegations of a global cartel price or production limits would be within the import commerce exception.

Nevertheless, litigants elsewhere have already seized upon the panel's use of "directed at" and "targeting" to assert that the import commerce exception applies only if the challenged conduct "is particularly directed at the American import market."[5] Thus, this

[5] Defendants' Proposed Preliminary Jury Instructions on the Elements of the Offense, and Memorandum in Support of Proposed Instructions at 5, *United States v. AU Optronics Corp.*, Case No. Cr-09-0110 (SI) (N.D. Cal. Nov. 2, 2011).

Court should make clear that the import commerce exception is not limited to conduct specifically targeting U.S. import commerce.

III. The Direct Effects Exception Is Not Limited to Effects that Follow as an Immediate Consequence of the Challenged Conduct.

The direct effects exception to the FTAIA provides that conduct involving (non-import) trade or commerce with foreign nations is nonetheless subject to the Sherman Act if it has a "direct, substantial, and reasonably foreseeable effect" on (1) "trade or commerce which is not trade or commerce with foreign nations" (that is, trade or commerce within the United States), (2) import trade or commerce, or (3) export trade or commerce of a person engaged in such trade or commerce in the United States. 15 U.S.C. § 6a(1).

"Direct" is not defined in the statute, and it is a word of many meanings.[6] Thus, the meaning of "direct" in the FTAIA must be informed by history, context, and statutory purpose. *See, e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) (history and context "help courts determine a statute's objectives and thereby

[6] The 1981 edition of *Webster's Third New International Dictionary*, published one year prior to the enactment of the FTAIA, contained seven primary meanings for "direct" in the adjectival form, encompassing 31 more specific, subsidiary meanings. *Webster's Third New International Dictionary* 640 (1981).

illuminate its text"); *A.M.I. Diamonds Co. v. Hanover Ins. Co.*, 397 F.3d 528, 530 (7th Cir. 2005) (where contractual or statutory text is not written in terms of its purposes, "the task for the court is to interpret the text in light of its purposes"). So viewed, "direct" is best defined as "reasonably proximate."

Antitrust courts historically limited Section 1 liability to conduct with a "direct effect in restraint of trade or commerce among the several states, or with foreign nations." *Hopkins v. United States*, 171 U.S. 578, 586-87 (1898); *see Anderson v. United States*, 171 U.S. 604, 616 (1898); *LSL Biotechs.*, 379 F.3d at 685-86 (Aldisert, J., dissenting).[7] The reasoning in these cases suggested that the existence of such a direct effect is "a question of proximity and de[g]ree." *N. Sec. Co. v. United States*, 193 U.S. 197, 409-10 (1904) (Holmes, J., dissenting); *see also Anderson*, 171 U.S. at 616 (an agreement "only indirectly and unintentionally" affecting interstate trade or commerce is not within the scope of the Sherman Act); *Hopkins*, 171 U.S. at 596 ("charges of the

[7] Antitrust courts stopped requiring proof of a "direct effect" on interstate commerce after the Supreme Court abandoned the direct/indirect distinction in Commerce Clause cases. *See Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 231 (1948); *Wickard v. Filburn*, 317 U.S. 111, 122-23 (1942). Nevertheless, this history informs the interpretation of "direct" in the FTAIA.

nature described do not amount to a regulation of interstate trade or commerce because they touch it only in an indirect and remote way"); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898) ("An agreement . . . with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."); *cf. Carter v. Carter Coal Co.*, 298 U.S. 238, 327-28 (1936) (Cardozo, J., dissenting) (surveying cases and observing that "direct" means "the causal relation . . . is so close and intimate and obvious").

Antitrust courts also have long relied on the concept of "directness" in determining whether a private plaintiff's injury gives rise to standing under the antitrust laws. *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 476-77 & n.12 (1982) (citing cases).[8] The courts contrasted the "directness" of some injuries with the "remoteness" of others, and have applied the common-law concept of proximate cause. *Id.* at 476-77 nn.12-13. As this Court has explained, "directness relates to the question whether there exists a chain of

[8] The FTAIA was enacted a few months after *McCready* was decided.

causation between a defendant's action and a plaintiff's injury or (in contrast) if the connection is based instead only on 'somewhat vaguely defined links.'" *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 486-87 (7th Cir. 2002) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 540 (1983)).

The proper understanding of "direct" leaves conduct involving non-import foreign commerce subject to the Sherman Act if it has a reasonably proximate (as well as substantial and reasonably foreseeable) effect on commerce within the United States, U.S. import commerce, or export commerce of a U.S. exporter.[9] Suppose, for example, that a conspiracy of foreign manufactures fixed the price of inputs sold to other foreign manufacturers which incorporate the input into finished goods sold in the United States. If successful, the

[9] Proximate cause is the correct standard for the FTAIA's requirement, discussed above in note 3, that the "direct, substantial, and reasonably foreseeable" effect "gives rise to" the plaintiff's damages claim, 15 U.S.C. § 6a(2). *See Empagran S.A. v. F. Hoffmann-LaRoche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) (holding, on remand from the Supreme Court, that the direct effect must proximately cause the claimed injuries); *accord In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 988 (9th Cir. 2008); *In re Monosodium Glutamate (MSG) Antitrust Litig.*, 477 F.3d 535, 539 (8th Cir. 2007). Because "the proximate cause standard is consistent with general antitrust principles, which typically require a direct causal link between the anticompetitive practice and plaintiff's damages," a proximate cause, rather than but for, standard is proper. *DRAM*, 546 F.3d at 988; *see MSG*, 477 F.3d 538-39 (Proximate cause is "consistent with general antitrust principles, which typically require a more direct causation standard.").

conspirators' restraint of trade in the inputs (which is non-import foreign commerce) would proximately cause effects on import commerce in the finished goods, notably by increasing the price. This effect should be viewed as direct, and therefore, the direct effects exception would apply (assuming the effect was also reasonably foreseeable and substantial). *Cf. Mandeville Island Farms*, 334 U.S. at 235-38 (an unlawful restraint of local commerce in sugar beets had the requisite effect on interstate commerce in sugar). In addition, a cartel making no sales into the United States would come within the direct effects exemption if it created "a world-wide shortage . . . that had the effect of raising domestic prices." H.R. Rep. No. 97-686, at 13, *reprinted in* 1982 U.S.C.C.A.N. at 2498.

Principles of prescriptive comity fully support defining "direct" as reasonably proximate. By leaving the Sherman Act applicable to conduct that has a reasonably proximate (and substantial and reasonably foreseeable) effect on commerce within the United States, import commerce, or export commerce of a U.S. exporter, Congress sought to redress domestic antitrust injuries in this commerce. American "courts have long held that application of our antitrust laws

to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Empagran*, 542 U.S. at 165.[10]

The panel here found "compelling" the definition of "direct" adopted by the panel majority in *LSL Biotechnologies*: that an effect is "direct" if "it follows as an immediate consequence of the defendant's activity," and hence, "[a]n effect cannot be 'direct' where it depends on . . . uncertain intervening developments." Slip Op. 22. (quoting 379 F.3d at 680-81). But the *LSL* majority's reasoning was seriously flawed, and its definition threatens effective antitrust enforcement.

When the FTAIA was enacted in 1982, there were many "ordinary and common" usages of the term "direct." *LSL Biotechs.*, 379 F.3d at 692 (Aldisert, J., dissenting); *see also supra* note 6. The definition of "direct" adopted by the *LSL* majority corresponds to one such usage—"proceeding from one point to another in time or space without deviation or interruption"—while the definition adopted by the *LSL*

[10] Similarly, by leaving the Sherman Act applicable to conduct that restrains import commerce, Congress sought to redress the domestic injury caused by that restraint on U.S. imports.

dissent corresponds to another—"characterized by or giving evidence of a close especially logical, causal, or consequential relationship." *Webster's Third New International Dictionary* 640 (1981). The *LSL* majority never adverted to any definitions of "direct" other than its own, much less explained why such constructions would be inferior. The majority may have adopted the first dictionary definition because it was the first, but "the relative order of the common dictionary definitions of a single term does little to clarify that term's meaning within a particular context. When a word has multiple definitions, usage determines its meaning." *Trs. of the Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 828 n.4 (7th Cir. 1996).

The *LSL* majority also relied on the fact that the Supreme Court had defined a "nearly identical term" in the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2), in the same way. 379 F.3d at 680 (citing *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607 (1992)). But *Weltover* was decided ten years after the FTAIA's enactment and concerned a different statute with a significantly different purpose and history. While the FTAIA deals only with the

limits of the reach of the antitrust laws, the FSIA deals with the general immunity of foreign nations from suit in U.S. courts and applies to numerous federal statutes. Moreover, while both statutes have a "direct effects" exception, the language of the exceptions differs. As the *Weltover* Court emphasized, the FSIA's "direct effects" exception does not include an expressed or "unexpressed requirement of 'substantiality' or 'foreseeability,'" 504 U.S. at 618, while the FTAIA requires a "direct, substantial, and reasonably foreseeable effect," 15 U.S.C. § 6a. *Weltover*'s construction of the FSIA's direct effects exception thus sheds no light on the meaning of "direct" in the FTAIA.

Placing the term "direct" in the context of the FTAIA demonstrates the flaws in the *LSL* majority's definition. Following "as an immediate consequence" could be understood to mean that there can be no subsequent sales or other steps before the product is sold or delivered into the United States.[11] If so, the direct effects exception would reach only conduct that qualifies for the import commerce exception. Moreover, any antitrust injury that is an "immediate consequence" of anticompetitive conduct would be "reasonably

[11] One district court has rejected such a construction. *In Re: TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, 2011 WL 4634031, at *9 (N.D. Cal. Oct. 5, 2011).

foreseeable," so the *LSL* majority's definition of "direct" robs the "reasonable foreseeab[ility]" requirement of any function. Thus, the *LSL* majority's definition of "direct" violates the "cardinal principle" that a statute should be interpreted so that, if possible, "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

In contrast, if direct is defined as "reasonably proximate," the import commerce and direct effects exceptions fit comfortably together: the former applies when the challenged conduct itself involves import commerce, while the latter applies when the challenged conduct proximately causes an effect on import commerce (or on commerce within the United States or certain export commerce). While proximate cause includes notions of foreseeability, proximate cause and reasonable foreseeability are distinct concepts. And defining "direct" as reasonably proximate gives each of the three parts of the direct effects exception its own function: "direct" goes to the effect's cause, "substantial" goes to its amount, and "reasonably foreseeable" goes to its objective predictability.

Finally, adopting the *LSL* majority's definition of "direct" could undermine Congress's objective of protecting purchasers in the United

States from anticompetitive conduct. Many finished goods sold in the United States are manufactured or assembled abroad and incorporate component parts sold, manufactured, or assembled in other countries.[12] Courts applying the *LSL* majority's definition of "direct" could erroneously find that the foreign assembly of these finished goods constitutes an "interruption" that places a restraint of trade in the component parts outside the reach of the Sherman Act, even though that restraint proximately causes substantial and reasonably foreseeable effects on U.S. import commerce in those finished goods. *See* 1B Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272i1, at 295 (3d ed. 2009) ("Many, perhaps most, restraints are on 'intermediate' goods," but effects "that occur in upstream markets quickly filter into consumer markets as well.").

The application of the direct effects exception should not turn on the particular manufacturing process used, but rather on the challenged conduct's likely and significant harm to purchasers in the

[12] *See, e.g.*, *TFT-LCD Flat Panel*, *supra* note 11, at *5 ("Once a defendant manufactures a panel, the panel may enter the United States in a number of ways. Defendants may import it as part of a finished product. Defendants may sell it directly to a U.S. company, which incorporates the panel into a finished product. Or defendants may sell the panel to a foreign company that assembles it into a final product before it is sold to a U.S. company and imported into the United States.").

United States. *Cf. Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836, 842 (7th Cir. 2003) ("In a global economy, where domestic and foreign markets are interrelated and influence each other, it is sometimes difficult to put strict economic boundaries around any particular country. . . . A global conspiracy to inflate prices could have anticompetitive effects on the U.S. economy whether the conspiracy occurred within the United States or abroad."). Defining "direct effects" as reasonably proximate effects ensures an inquiry tailored to the conduct alleged. And it accomplishes Congress's primary goal of protecting purchasers in the United States, while allowing U.S. firms to engage in export or wholly foreign commerce that has no U.S. effects without fear of treble damages lawsuits under the Sherman Act based on sales outside the United States.

CONCLUSION

The Court should hold that the FTAIA's import commerce exception is not limited to conduct specifically targeting U.S. imports. The Court should also hold that the direct effects exception is not limited to effects that follow as an immediate consequence but includes those proximately caused by the challenged conduct.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,222 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font in the body and 12-point New Century Schoolbook font in the footnotes.

January 12, 2012

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CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on January 12, 2012, I electronically filed the foregoing Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party on Rehearing *En Banc* with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. Once the brief is accepted for filing by the Clerk's Office, I will send 30 copies to the Clerk of the Court by FedEx.

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