No. 02-16472

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

LSL BIOTECHNOLOGIES, INC., SEMINIS VEGETABLE SEEDS, INC., AND LSL PLANTSCIENCE LLC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA'S PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING EN BANC

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RULE 35(b)(1) STATEMENT

This case raises an important issue of first impression: Whether the Foreign Trade Antitrust Improvements Act ("FTAIA") of 1982, 15 U.S.C. 6a(1), incorporates a test for application of the Sherman Act to foreign conduct that fundamentally differs from the established common law test. In a divided decision, the panel majority held that the common law understanding of the word "direct" as a reasonably proximate causal nexus was not controlling. The majority interpreted "direct" to mean immediacy and certainty, and applied the FTAIA to deny application of the Sherman Act to an agreement specifically designed to preclude the sale of new varieties of tomatoes and tomato seeds in the United States. This holding will perpetuate injury to U.S. consumers in a multibillion dollar market and undercut antitrust enforcement – potentially immunizing anticompetitive restraints precisely when they successfully deter the development of new products. The case merits panel and *en banc* rehearing for four reasons:

1. The FTAIA does not show a clearly expressed purpose to change the pre-existing common law. The panel majority's holding therefore conflicts with Supreme Court precedents holding that statutes must be read with a presumption favoring retention of common law principles unless there is a clear statutory purpose to the contrary. *E.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993); *United States v. Texas*, 507 U.S. 529, 534 (1993).

2. The panel decision also conflicts with *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997), in which the First Circuit applied the common law jurisdictional test to foreign conduct alleged to violate the antitrust laws.

3. The panel decision misreads the FTAIA and erroneously applies it to anticompetitive conduct that affects domestic or import commerce, both of which are excluded from the scope of the FTAIA by its terms.

4. Because an ever-increasing number of antitrust cases involve foreign conduct, and the FTAIA standard governs civil and criminal enforcement actions brought by the United States as well as private actions, the panel decision "substantially affects a rule of national application in which there is an overriding need for national uniformity." 9th Cir. R. 35-1.

INTRODUCTION

The United States filed this case on September 15, 2000 to protect the interests of millions of U.S. consumers and thousands of growers of tomatoes. There is substantial and undisputed demand in this country for long shelf-life tomatoes that, unlike most current varieties, can be picked when ripe in the southern United States or Mexico during the winter and still taste good on arrival at stores in the northern United States. That demand is frustrated by the horizontal

non-compete agreement that the United States sought to enjoin here as a violation of Section 1 of the Sherman Act.

That agreement perpetually excludes Hazera Quality Seeds, Inc., an Israeli company that is one of the world leaders in tomato seeds, from (1) selling currently existing or future long shelf-life seeds to U.S. growers, and (2) selling currently existing or future seeds to growers in Mexico who would export the bulk of the resulting tomatoes to the United States. The non-compete agreement thereby reserves all sales in North America to defendants LSL and Seminis, the combined market share for which the United States alleged "likely exceeds 70 percent." *United States v. LSL Biotechnologies, Inc. et al.*, No. 02-16472 (9th Cir. Aug. 11, 2004), slip op. 11014 (attached as Addendum).

This blatantly anticompetitive agreement is much like Boeing and Airbus, competitors now vying to develop the next generation jumbo passenger jet, agreeing to allocate all U.S. airlines to Boeing and all European airlines to Airbus. The agreement excludes a foreign competitor, but it is aimed directly at U.S. markets, and U.S. consumers and growers of tomatoes are its victims.

The United States' complaint alleged that, but for the non-compete agreement, Hazera would "likely be a significant competitor of defendants in North America" (¶ 3), and that Hazera is "one of the few firms with the

experience, track record and know-how likely to develop seeds that will allow United States and other North American farmers to grow better fresh-market tomatoes for United States consumers during the winter months" (¶ 39). *See* slip op. 11014.

The district court dismissed the United States' complaint. The court treated the United States' allegation of a restraint on Hazera selling seeds to growers *in the United States* as "domestic conduct" and held that subject matter jurisdiction existed over those allegations. But the court dismissed them under Fed. R. Civ. P. 12(b)(6) for what the court considered to be an overbroad market definition. The court then held that the United States' allegation of a restraint on Hazera selling seeds to growers *in Mexico* did not allege a "direct" effect on U.S. commerce under the "direct, substantial, and reasonably foreseeable" standard of the FTAIA, 15 U.S.C. 6a(1), which the court read as more demanding than the pre-FTAIA common law. The court drew a distinction between seeds and tomatoes, such that a restraint on selling seeds could not have a "direct" effect on the U.S. market for tomatoes. The court thus dismissed the complaint with respect to what it deemed "foreign conduct" for lack of subject matter jurisdiction, pursuant to Fed. R. Civ.

P. 12(b)(1).[1]

On appeal, the panel majority affirmed, holding: (1) that the FTAIA did not codify the pre-FTAIA common law test for jurisdiction, but rather established a new test, slip op. 11019-21; (2) that the United States did not allege any "direct" effects because the impact of the potential competition that Hazera provides is neither immediate nor certain, *id.* at 11023-24; and (3) that the district court did not clearly err in holding that the effect of the Restrictive Clause on prices paid by U.S. consumers is not "direct" because "[t]he government has presented no evidence that LSL has or will artificially inflate the prices it charges to Mexican farmers for LSL's long shelf-life seeds." *Id.* at 11025.[2]

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[1] The United States' complaint did not characterize any conduct as "foreign" because the critical conduct in this case is the non-compete agreement itself, and, contrary to the panel majority's assertion (slip op. 11016), the agreement apparently was executed in New York. *See* Excerpts of Record ("ER") 81 and Addendum to U.S. Reply Br. Defendants conceded, for present purposes, that the agreement's effect on U.S. commerce was "reasonably foreseeable." The district court did not address the term "substantial" except for three words, and did not say what would constitute a substantial effect.

[2] The majority's conclusion that no "direct" effect was alleged is based on the clearly mistaken premise that "Hazera has not yet developed its own long shelf-life tomato seeds capable of cultivation in North America." Slip op. 11024 n.7. The United States submitted sworn affidavit testimony that since 1996 Hazera has sold "greenhouse" tomato seed varieties in North America, some of which yield long shelf-life tomatoes, and growers in Mexico and California have planted them in open fields. "By my estimate, about ten percent of the non-summer fresh tomatoes consumed by United States consumers *now come from*

Senior Judge Aldisert, sitting by designation, wrote a lengthy and detailed dissent. He concluded that the FTAIA is best read as having codified the pre-existing common law, because that interpretation is consistent with more than 100 years of antitrust case law; the *Restatement (Second) of Foreign Relations Law of the United States* that was in effect at the time Congress enacted the FTAIA; leading antitrust treatises; Department of Justice guidelines; and the legislative history of the FTAIA. Slip op. 11032-44. He further concluded that the United States sufficiently alleged a "direct" effect on U.S. commerce in the sense of a proximate cause relationship between the restraint (the non-compete agreement) and the effect (no tomatoes from Hazera seeds). "The United States alleged a

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Hazera." Declaration of Amit Schwarz ¶ 20, ER 162-63 (emphasis added). Moreover, some Florida growers currently buy *existing* Hazera virus-resistant "extended shelf-life" seeds, even though they were developed for other regions. *Id*. ¶ 24, ER 165. Competition from Hazera therefore is not "speculative," as the majority says. The non-compete agreement and defendants' litigation to enforce it have, however, deterred Hazera from modifying some of its *other, currently existing* long shelf-life seeds, designed for other regions of the world, specifically to fit North American climate zones. *See id*. ¶¶ 7, 22, 23, 25, 26, ER 158-66. But as Judge Aldisert points out, "Hazera cannot be faulted for not producing seeds in Mexico or the United States, as it has done elsewhere, because the Restrictive Clause prohibits it from doing so." Slip op. 11050 n.6.

Whether current or future Hazera seeds infringe LSL's patent rights, slip op. 11023, 11024 n.7, is irrelevant to the issue of whether there is a "direct" effect and jurisdiction under the FTAIA. If the seeds are infringing, which Hazera denies, then LSL can sue for patent infringement.

restraint on the very tomato seeds that grow into tomatoes in Mexico expressly for shipment to the United States. The consequences to the commerce of tomatoes in the United States are immediate . . . . [I]t is difficult to imagine foreign conduct that would have a more direct effect on United States commerce." *Id.* at 11049.

Judge Aldisert also agreed with the United States that this case is factually analogous to *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), in which the Supreme Court treated an alleged foreign restraint on one product (reinsurance) as satisfying the common law test and the FTAIA (even assuming that the statute changed the prior law) by having an effect on a different, but closely related product in the U.S. (primary insurance). "If a restraint on reinsurance in the United Kingdom has a sufficiently 'direct' effect on primary insurance in the United States under the FTAIA, it is impossible to see how a restraint on tomato seeds in Mexico does not have an equally direct effect on the resulting tomatoes in the United States." *Id.*

Judge Aldisert then reached the Fed. R. Civ. P. 12(b)(6) issue, which the majority did not address, and concluded that the district court erred in that ruling as well. Slip op. at 11052-61.

ARGUMENT

The panel majority's decision makes four fundamental legal errors that merit panel rehearing and *en banc* review.

1. The panel majority held that the FTAIA's use of the word "direct" represents a change from the pre-FTAIA common law test for application of the Sherman Act to foreign antitrust conduct. Slip op. 11019-21. The Supreme Court, however, has long recognized a fundamental canon of construction requiring "statutes which invade the common law . . . to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen v. Johnson*, 343 U.S. 779, 783 (1952)).[3]

The FTAIA does not show any clearly expressed intention to change the common law. Judge Aldisert's opinion explains at length that the pre-FTAIA common law already included a requirement of directness, so that the FTAIA is consistent with the prior law. Slip op. 11032-36. Congress wrote the FTAIA

[3] *Accord, e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) ("we do not presume that the revision worked a change in the underlying substantive law unless an intent to make such a change is clearly expressed"); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.").

against that background, and the legislative history says that the purpose of the FTAIA was to "serve as a simple and straightforward clarification of *existing American law*," slip op. 11021 (emphasis added). And in *Hartford* the Supreme Court stated that it was "*unclear* " whether the FTAIA "amends existing law or merely codifies it." 509 U.S. at 797 n.23 (emphasis added). *See also F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) (15 U.S.C. 6a(2) is ambiguous).

"Direct" therefore cannot be construed to mean anything more than it meant in the pre-FTAIA common law. This meaning, as Judge Aldisert explains, is a reasonably proximate causal nexus, i.e., a causal connection that is not too remote. Slip op. 11045-48. The majority did not analyze the pre-FTAIA common law, and it departed from the "existing" law by giving "direct" an entirely different meaning not in terms of causal connection but rather immediacy and certainty.[4]

2. The panel majority's decision also conflicts with *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997). Like this case, *Nippon*

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[4] *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988), cited by the majority (slip op. 11021), does not support the majority's decision. That case did not even raise the question of whether to read the FTAIA as changing the common law. But to the extent that it could be read that way, it was overruled by the Supreme Court's differing view in *Hartford*, five years later, that the FTAIA is "unclear" on that point. The issue is not whether the FTAIA "provides the guiding standard" here, slip op. 11021 – it plainly does – but what the FTAIA *means*.

involved foreign conduct that allegedly was aimed at and affected U.S. markets. The First Circuit followed *Hartford* and applied the common law test. *See* 109 F.3d at 4 ("the case law now conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One's jurisdictional reach"). The panel majority here chose not to follow *Hartford,* distinguishing it on the ground that the defendants there "apparently concede[d]" jurisdiction. Slip op. 11026 (quoting 509 U.S. at 795). The First Circuit, however, expressly considered and rejected that argument. *See* 109 F.3d at 4 n.3.[5] The First Circuit is correct, for the Supreme Court made clear that jurisdiction was *not* conceded by all the defendants: "One of the London reinsurers, Sturge. . . argues that the Sherman Act does not apply to its conduct. . . ." 509 U.S. at 795 n.21. In any event, a party cannot concede subject matter jurisdiction when it does not exist. Fed. R. Civ. P. 12(h)(3); *Matheson v. Progressive Speciality Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003). If there truly had been no subject matter jurisdiction in *Hartford*, the Supreme Court would have dismissed the case.

3. The panel majority's holding is that an effect that is neither immediate

[5] The United States alerted the panel to *Nippon* in a Fed. R. App. P. 28(j) letter dated August 12, 2003.

nor certain cannot be "direct." Slip op. 11023-24. This holding is wrong because it contradicts the plain sense in which "direct" is used in the FTAIA; will have perverse effects; renders the statutory term "reasonably foreseeable" largely meaningless; and is completely unsupported by legal authority or antitrust principles.

A. As used in the FTAIA, "direct" is a term of *causation*: the causal connection between the anticompetitive conduct and the effect must be "direct." Indeed, this Court previously has said that "'[d]irectness' in the antitrust context means close in the chain of causation.'" *In re Ins. Antitrust Litig.*, 938 F.2d 919, 926 (9th Cir. 1991) (quoting *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 147 (9th Cir. 1989)), *aff'd in part, rev'd in part* by *Hartford*. But the panel majority's actual holding here has nothing to do with directness as a matter of causal nexus, but rather relates to the timing and certainty of the alleged effect.

The majority's holding focused on timing, emphasizing that the restraint produces no palpable effect on innovation or price today. But there is always some time between any cause and effect, and the length of that time is irrelevant to causality: the causal link between the firing of a gun and the impact of the bullet is equally direct no matter how far the marksman stands from the target. The

majority also focused on certainty, emphasizing that Hazera might never market the relevant seeds. But certainty is not a proxy for directness: the further the marksman stands from the target, the less certain he is of hitting the target, but the causal link between firing the gun and hitting the target is equally direct whatever the distance.

B. The majority's interpretation of "direct" attempts to draw a distinction between effects on actual competition and effects on potential competition, which is its second way of attempting to distinguish *Hartford*. *See* slip op. 11026. To be sure, there are significant differences between restraints on actual and potential competition, as a matter of substantive antitrust law. But the United States appeals from a Fed. R. Civ. P. 12(b)(1) jurisdictional dismissal. There is nothing in the text or legislative history of the FTAIA, or in the case law, that supports the majority's *jurisdictional* distinction in directness between actual and potential competition cases.

Worse, the majority's unsupported distinction will have the perverse effect of immunizing anticompetitive restraints from legal challenge when the restraints are imposed early enough to deter the development of competing products. "[S]uffice it to say that it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at

will." *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir.) (en banc), *cert. denied*, 534 U.S. 952 (2001). *See also FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1504-06 (D.C. Cir. 1986) (merger that eliminates competition to develop new technologies violates antitrust laws); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 241 (2d Cir. 2003) (exclusionary rules restrained competition that would have yielded "new and better products and services").

C. By taking "direct" to mean certainty, the panel majority robs another term of the FTAIA – "reasonably foreseeable"– of much of its meaning. "Reasonably foreseeable" encompasses a broad range of possibilities, from effects that are very likely to effects that are not particularly likely but still plainly possible. But if an effect must be reasonably certain, it cannot be merely possible or somewhat likely. Requiring effects to be reasonably certain – i.e., very foreseeable – thereby shrinks the scope of "reasonably foreseeable" to the point of rendering that term largely meaningless, a result that Congress cannot be presumed to have intended. The term "direct" therefore must have a different meaning than was assumed by the majority.[6]

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[6] By contrast, the correct understanding of "direct" as a requirement of causation does not make it redundant of "reasonably foreseeable." Defendants conceded reasonable foreseeability for purposes of their motion to dismiss but do not concede a proximate cause relationship, thereby confirming that the two concepts are not identical. Under a proximate cause interpretation of "direct," the

D. The majority's interpretation of "direct" also violates norms of statutory construction and reaches the strange result that the effect of defendants' restraint on U.S. commerce, though proximately caused, was nonetheless not direct.

The panel's first means of statutory construction was the dictionary.[7] It said: "A dictionary published contemporaneously with the enactment of the FTAIA defined 'direct' as 'proceeding from one point to another in time or space without deviation or interruption.'" Slip op. 11022-23. But, as Judge Aldisert explained in dissent, the "same dictionary source contains seven main meanings in the adjective form, encompassing 31 more specific subsidiary meanings. . . . All of those meanings are contemporary with the FTAIA, enacted in 1982, and many

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FTAIA would screen out cases in which foreign conduct has a reasonably foreseeable effect in the United States, but the effect is too remote from the conduct.

[7] The majority's only other source for interpretation of "direct" was the phrase "direct effect" in the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. 1605(a)(2), as interpreted by the Supreme Court to mean "follows as an immediate consequence of the defendant's activity." Slip op. 11023 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)). The FSIA, however, deals with a different subject from the FTAIA: the scope of the immunity of foreign nations from suit under any statute in U.S. courts. There is nothing in the legislative history of the FTAIA indicating that Congress was influenced by the FSIA. Moreover, the *Weltover* language on its face is different from the panel majority's dictionary definition, and, as Judge Aldisert explained, is wholly consistent with upholding the United States' complaint. Slip op. 11046.

are both ordinary and common." *Id.* at 11045. "The existence of alternative dictionary definitions . . . each making some sense under the statute, itself indicates that the statute is open to interpretation." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.,* 503 U.S. 407, 418 (1992). *See also Hartford,* 509 U.S. at 797 n.23 (unclear how FTAIA might apply). The majority simply never mentioned the other pertinent dictionary definitions, and the dissent was right to say: "It would be arbitrary simply to pick one definition and declare it the 'plain meaning' in the abstract." Slip op. 11045.

Critically, another dictionary definition of "direct" is both pertinent and sensible: "characterized by or giving evidence of a close specially logical, causal, or consequential relationship." *Webster's Third New International Dictionary* 640 at 3a (1981). *See* Slip op. 11045 (dissent). This definition is "informed by the FTAIA's context and history." *Id.* The FTAIA had "the goal of achieving clarity" about the antitrust laws' reach over international business transactions. *Id.* at 11021 (majority). And this definition gives clarity by essentially expressing what the law has long called "proximate cause." This is particularly important in FTAIA interpretation because at the time the FTAIA was enacted, a major area of antitrust law – private plaintiffs' antitrust standing – treated the terms "directness" and "proximate cause" as comparable. In *Blue Shield of Virginia v. McCready,*

457 U.S. 465 (1982), the Supreme Court faced the issue of which persons have sustained injuries too remote from an antitrust violation to give them standing to sue for damages under Section 4 of the Clayton Act. In answering this question, the Court observed that, historically, some antitrust cases formulated a test for remoteness that equates it with "directness" (*id.* at n.12), and it suggested that both terms are analogous to the common law concept of "proximate cause." *Id.* nn.12, 13. *See also In re Ins. Antitrust Litig.*, 938 F.2d at 926 ("Directness in the antitrust context means close in the chain of causation") (citation omitted).

The panel majority's failure to use the correct proximate cause definition of "direct" was not only a serious legal error, but it demonstrably led to the wrong result. The defendants never argued that the United States failed to show proximate causation, and Judge Aldisert's dissent explains convincingly why the facts establish proximate causation. Slip op. 11048-49. The majority never even used the term "proximate cause."

Furthermore, to define "direct" as "proximately caused" is a reminder that public policy undergirds concepts such as "proximate cause" and "direct." See *id.* The "policy unequivocally laid down by the [Sherman] Act is competition," *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4-5 (1958), and the FTAIA, which is part of the Sherman Act, should be interpreted in light of its fundamental purpose

to protect U.S. consumers. The majority's interpretation, however, frustrates that fundamental purpose. Under its logic, the Sherman Act applies in the case of a restraint that does not entirely exclude the potential competitor from the United States. But the Sherman Act does not apply because of the FTAIA in the case of a restraint that does entirely exclude the potential competitor from the United States. This reading turns both the Sherman Act and the FTAIA on their heads.

4. The panel majority's approach misreads the FTAIA to apply to conduct that it was not intended to address. The majority never explains why the FTAIA even applies to the conduct described by the district court as "domestic conduct," i.e., the restraint on Hazera's ability to develop and sell seeds to growers *in the United States*, as opposed to Mexico. That conduct is either domestic or potential import commerce, to which the FTAIA, by its terms, does not apply. The majority's reasoning that subject matter jurisdiction must be evaluated in terms of the case as a whole (slip op. 11016-17) does not answer this question. Nor does the majority explain why jurisdiction cannot exist as to some allegations of a complaint even if it is lacking with respect to other allegations, when a single restraint has several independent effects.

CONCLUSION

The petition should be granted, the panel's decision vacated, and the district court's order reversed.

Respectfully submitted.

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Certificate of Compliance Pursuant to Circuit Rule 40-1
for Case Number 02-16472

I certify that pursuant to Circuit Rule 40-1, the attached Petition for Panel Rehearing and Suggestion for Rehearing En Banc is:

Proportionately spaced, has a typeface of 14 points or more and contains 4,190 words.

Dated: September 23, 2004

_____
Steven J. Mintz

CERTIFICATE OF SERVICE

I, Steven J. Mintz, hereby certify that today, September 23, 2004, I caused copies of the accompanying United States of America's Petition for Panel Rehearing and Suggestion for Rehearing En Banc to be served on the following by Federal Express:

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. LSL BIOTECHNOLOGIES; SEMINIS VEGETABLE SEEDS, INC.; LSL PLANTSCIENCE LCC, *Defendants-Appellees.*	No. 02-16472 D.C. No. CV-00-00529-RCC OPINION

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted
August 5, 2003—Pasadena, California
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Filed August 11, 2004

Before: Ruggero J. Aldisert,* Richard C. Tallman, and
Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Tallman;
Dissent by Judge Aldisert

*Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

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OPINION

TALLMAN, Circuit Judge:

We must decide whether the district court erred by determining that it lacked subject matter jurisdiction over this antitrust action. The United States alleged that an agreement between the defendants (collectively, "LSL") and an Israeli company, Hazera Quality Seeds, Inc., violates the Sherman Act. Because the challenged agreement does not have a direct, substantial, and reasonably foreseeable effect on United States commerce, we affirm the district court's dismissal.

I

This dispute grows out of a joint business venture—always a fertile ground for litigation—that sought to solve the dilemma of how to bring fresher, tastier tomatoes to Americans who live in the northern part of the nation and therefore suffer from a lack of fresh tomatoes in the winter months.

In the early 1980s, LSL Biotechnologies, Inc., an American corporation that develops and markets seeds, entered into a relationship with Hazera. LSL began working with Hazera in the hope of developing a genetically-altered tomato seed that would produce tomatoes with a longer shelf-life. LSL and Hazera wanted to create such a tomato because, until recently, tomatoes had a very short shelf-life if they were picked from

the vine already ripened. This means that tomato growers can only sell their product in a limited geographic area. Because most of the American climate cannot produce tomatoes during the winter months, consumers are unable to access vine-ripened tomatoes for much of the year. Instead, most United States consumers are relegated to eating foreign tomatoes that are picked before they are ripe, so they will still be fresh after shipping. Tomatoes picked in this fashion have a poor flavor compared to vine-ripened tomatoes.

To solve this dilemma, LSL and Hazera sought to develop a tomato with enough shelf-life after reddening on the vine to travel from growing locations primarily in Mexico to the rest of the American market before spoiling. On January 1, 1983, LSL and Hazera signed a contract that regulated their relationship in this joint endeavor. The contract allocated to each party exclusive territories in which they could sell the seeds they developed together and seeds that each party developed on its own. The contract provided that LSL would have the exclusive rights to the North American market.

LSL and Hazera eventually bred a ripening-inhibitor ("RIN") gene into tomato seeds to be grown in open fields. The RIN gene caused tomatoes to remain fresh longer after being picked. LSL obtained a patent for tomatoes and seeds containing the RIN gene; Hazera obtained no rights to the patent. The RIN gene tomatoes proved to be exceptionally successful when grown in Mexican climates, but failed to take in cooler American climates. As a result, Mexican growers now dominate the fresh winter-tomato market. To date, Hazera has not developed a long shelf-life tomato seed.

The relationship between LSL and Hazera soon withered. Litigation ensued. In 1987, Hazera sued LSL in an Israeli court. This foreign litigation led to mediation in Israel that produced the renegotiation of and addendum to the contract. The addendum included a Restrictive Clause, which is the

device the United States now claims violates the Sherman Act. The Restrictive Clause originally stated:

> Subsequent to the termination of the Agreement hereunder, Hazera shall not engage, directly or indirectly, alone, with others and/or through third parties, in the development, production, marketing or other activities involving tomatoes having any long shelf life qualities. However, in the event that Hazera shall be requested by any third party to produce seeds of tomatoes having long shelf life qualities, Hazera may engage in such activities only if all of the following conditions are met: (A) the subject tomatoes do not have or involve long shelf life qualities which are included in LSL's proprietary rights; (B) Hazera shall not engage in such production prior to the year 2000 or prior to the expiration of 5 years following the termination of the Agreement, whichever occurs later, and (C) Hazera has obtained LSL's advanced written consent, which shall not be unreasonably withheld . . . . LSL shall determine whether or not the proposed cooperation may involve any of its proprietary rights and shall not unreasonably withhold its consents to such production.

LSL and Hazera continued working together after adopting the Restrictive Clause, despite frequent returns to the legal system. In 1992, the parties modified the contract a final time and requested that an Israeli arbitrator "incorporate their final contract modifications into a stipulated arbitration order." The arbitration settlement affirmed the Restrictive Clause's ban on Hazera selling long shelf-life tomato seeds in North America. But the Restrictive Clause was amended to allow Hazera to sell other seeds (*e.g.*, tomato seeds for growing in greenhouses) to North American consumers, provided that Hazera disclose the details of such sales to LSL.

The contract between Hazera and LSL expired on January 1, 1996, and the Restrictive Clause became effective.

On September 15, 2000, the United States filed its antitrust complaint. The government alleged that the Restrictive Clause is "so overbroad as to scope and unlimited as to time as to constitute a naked restraint of trade in violation of Section 1 of the Sherman Act." The government also alleged that the Restrictive Clause is illegal because "it has harmed and will continue to harm American consumers by unreasonably reducing competition to develop better seeds for fresh-market, long shelf-life tomatoes for sale in the United States."

The government alleged that "[b]ut for the [Restrictive Clause], Hazera would likely be a significant competitor of [LSL] in North America." The Complaint stated that the defendants[1] collectively held more than 70 percent of the market for "fresh market tomato seeds." Nonetheless, LSL's competitors control a significant percentage of the market for "fresh market tomato seeds": Novartis and Monsanto together possess around twenty percent of the market, while several other companies together account for the remaining ten percent.

The portion of the Complaint titled "Anticompetitive Effects" alleged that the exclusion of Hazera from the North American market eliminated "one of the few firms with the experience, track record and know-how likely to develop seeds that will allow United States and other North American farmers to grow better fresh-market tomatoes for United States consumers during winter months." The government also alleged that the "Restrictive Clause may also allow defendants to charge more for their seeds (or more for a license to use seeds with the RIN gene) than they otherwise would."

LSL filed a motion to dismiss the Complaint, arguing that

[1]The Complaint names as defendants LSL, Seminis Vegetable Seeds, Inc., and LSL Plantscience LLC. At the time of the Complaint, Seminis and LSL each owned half of Plantscience; Plantscience was the repository for all of LSL's tomato seed assets, including the Restrictive Clause.

the government failed to state a cause of action and that the district court lacked subject matter jurisdiction. In support of their positions regarding subject matter jurisdiction, the parties submitted declarations and other evidence. After hearing oral argument, the district court granted LSL's motion.

The district court's approach was to divide the Complaint into separate domestic and foreign components, because the area of restraint (North America) covered both domestic and foreign markets.

The district court first concluded that the Complaint failed to state a cause of action regarding conduct in the United States and dismissed that aspect of the action without prejudice under Federal Rule of Civil Procedure 12(b)(6). The court concluded that the Complaint's market definition was so poor that the Complaint failed to establish anti-competitive effects. The United States chose not to amend its defective complaint.

The district court then held that it lacked jurisdiction over the claim that the restriction on the sale of seeds to Mexico violated the Sherman Act and dismissed that aspect of the Complaint *with* prejudice under Rule 12(b)(1). In order to seek immediate appellate review, the government, rather than replead the domestic conduct aspect of the Complaint, requested that the district court dismiss the entire action with prejudice. The request was granted and the government perfected its appeal to this court under 28 U.S.C. § 1291.

II

As an initial structural matter we must decide whether it was proper for the district court to divide the consideration of the Complaint into domestic and foreign components.

LSL moved to dismiss the Complaint, arguing primarily that the district court lacked subject matter jurisdiction. The

motion very briefly urged that the whole Complaint—not just the domestic aspect—also failed to state a cause of action. LSL's attack on the Complaint is not split into distinct "domestic" and "foreign" aspects. Likewise, the government's opposition to LSL's motion does not defend the Complaint in this fashion. The government concentrated the bulk of its response on the district court's subject matter jurisdiction, while briefly answering LSL's assertion that the entire Complaint failed to state a cause of action.

The district court evaluated different parts of the Complaint under different standards. On the one hand, the court considered whether the allegations in the Complaint concerning the restriction on selling seeds to the United States stated a cause of action under Rule 12(b)(6). The district court was satisfied that it had subject matter jurisdiction over this component of the Complaint. On the other hand, the district court analyzed whether the court had subject matter jurisdiction over the portion of the Complaint alleging a restraint on the sale of seeds to Mexico under Rule 12(b)(1) and the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a ("FTAIA").

Of course, the parties' arguments did not prevent the district court from separately considering the Complaint's domestic and foreign allegations. Nonetheless, we think this two-pronged approach was not the most appropriate way to analyze the motion to dismiss. The threshold question in this case is whether the district court had subject matter jurisdiction. That inquiry pervades the entire Complaint; the government alleged only one cause of action, which lumped together the Restrictive Clause's ban on distributing certain modified tomato seeds to Mexico and the resulting fruit in the United States.

[1] Where, as here, a Complaint alleges a restraint of trade on a foreign corporation, that restraint was executed in a foreign nation as the result of litigation in that foreign nation, and the defendants file a Rule 12(b)(1) motion to dismiss the

entire Complaint for lack of subject matter jurisdiction, a court should determine its subject matter jurisdiction to entertain the entire Complaint. Accordingly, we consider whether the district court had subject matter jurisdiction over the entire Complaint, including the "domestic" allegations.

III

We review de novo the district court's dismissal for lack of subject matter jurisdiction. *La Reunion Francaise SA v. Barnes*, 247 F.3d 1022, 1024 (9th Cir. 2001). Factual findings made in support of the dismissal are reviewed for clear error. *Id.*

IV

[2] The Sherman Act prohibits "[e]very 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 . . . ." 15 U.S.C. § 1. Federal courts have struggled for decades to determine when United States courts have jurisdiction over allegations of foreign restraints of trade. *See* Areeda & Hovenkamp, ANTITRUST LAW, ¶ 272 (2d ed. 2000); *see also Den Norske Stats Oljeselskap As v. Heere-Mac v.o.f., et al.*, 241 F.3d 420, 423-24 (5th Cir. 2001) ("The history of this body of case law is confusing and unsettled.").

[3] Prior to the passage of the FTAIA, courts applied varying tests to determine when foreign conduct fell within the purview of the Sherman Act. The most widely used standard was the "effects test," which was developed by Judge Learned Hand in *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) ("*Alcoa*").[2] The *Alcoa* court considered whether Congress intended the Sherman Act to impose liabil-

[2]The *Alcoa* court sat as a court of last resort pursuant to 15 U.S.C. § 29, which at the time authorized the designation of a court of appeal as the final stop in certain antitrust actions. *Alcoa*, 148 F.2d at 421.

ity for conduct outside of the United States and whether the Constitution allowed Congress to do so. Judge Hand rejected the idea that Congress meant "to punish all whom [United States] courts can catch, for conduct which has no consequences within the United States." *Id.* at 443. Instead, the court held that the Sherman Act was meant to reach foreign conduct only if it was intended to and did affect United States commerce. *Id.* In *Hartford Fire Ins. Co. v. California*, the Supreme Court summarized the effects test, stating that "it 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." 509 U.S. 764, 796 (1993) (citing *Alcoa*).

[4] Application of the effects test, however, has proved difficult and the precise extraterritorial reach of the Sherman Act remains less than crystal clear. In an effort to address this uncertainty, Congress enacted the FTAIA in 1982. The FTAIA "was intended to exempt from the Sherman Act export transactions that did not injure the United States economy." *Hartford Fire*, 509 U.S. at 796-97 n.23. According to the House Report, another significant purpose of the FTAIA was to fix the problem that arose because "courts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists." H.R. Rep. No. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487 ("House Report") at 2487. The FTAIA tackled this issue by "clarifying the Sherman Act . . . to make explicit [its] application only to conduct having a 'direct, substantial and reasonably foreseeable effect' on domestic commerce." *Id.* Specifically, the FTAIA states:

> Sections 1 to 7 of this title [including 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.

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 interpreting this previously obscure statute. As a threshold matter, many courts have debated whether the FTAIA established a new jurisdictional standard or merely codified the standard applied in *Alcoa* and its progeny.

Several courts have raised this question without answering it. The Supreme Court did as much in *Hartford Fire*. The *Hartford Fire* Court considered the jurisdictional status of an alleged conspiracy among London-based re-insurers to manipulate the American insurance market by not offering certain types of re-insurance. The Court introduced its jurisdictional analysis by noting that the effects test is well established. *Hartford Fire*, 509 U.S. at 796. In a footnote, the Court stated that it is not clear "whether the [FTAIA's] 'direct, substantial, and reasonably foreseeable effect' stan-

dard amends existing law or merely codifies it. We need not address these questions here." *Id.* at 796 n.23.[3]

[5] It is manifest that our role is to apply the laws that Congress passes and the executive branch enforces unless those laws violate the Constitution. There is no suggestion that the FTAIA is unconstitutional. Thus, we must adhere to the FTAIA in determining whether a district court has subject matter jurisdiction over an alleged foreign restraint of trade. The government contends that the FTAIA merely codified the existing common law regarding when the Sherman Act applies to foreign conduct and that we should continue to employ the *Alcoa* effects test. We reject this contention.

[6] Our task when interpreting legislation is to give meaning to the words used by Congress; we strive to avoid constructions that render words meaningless. *See United States v. Fiorillo*, 186 F.3d 1136, 1153 (9th Cir. 1999). The FTAIA states that the Sherman Act shall not apply to foreign conduct unless it has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. § 6a(1). The Supreme Court reads the *Alcoa* test as conferring jurisdiction so long as the conduct creates "some substantial effect in the United States." *Hartford Fire*, 509 U.S. at 796. Unlike the FTAIA, the *Alcoa* test does not require the effect to be "direct." Adopting the government's argument and applying the *Alcoa* test would render meaningless the word "direct" in the FTAIA.[4] We are not willing to rewrite a statute under the pretense of interpreting it.

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[3]The Court devoted very little attention to whether jurisdiction existed. After concluding that the bare minimums were met, the Court quickly turned to a more robust discussion of whether principles of international comity should have prevented the exercise of jurisdiction. *Id.* at 797.

[4]Applying *Alcoa* might also ignore the words "reasonably foreseeable," although we recognize that foreseeability might be a concept inherent in any scheme that seeks to impose liability.

[7] Moreover, applying *Alcoa* instead of the FTAIA would contravene the FTAIA's purpose. The FTAIA created its jurisdictional test because the "enactment of a single, objective test—the 'direct, substantial, and reasonably foreseeable effect' test—will serve as a simple and straightforward clarification of existing American law." House Report at 2487-88. The House Report goes on to state: "The specific purpose of the Sherman Act modification is: to more clearly establish when antitrust liability attaches to international business activities." *Id.* at 2492.

It would be a serious departure from the goal of achieving clarity for us to conclude that Congress meant only "some substantial effect," *Hartford Fire*, 509 U.S. at 796, when it said "direct, substantial, and reasonably foreseeable effect." Clarity is not achieved by employing three modifiers ("direct," "substantial," and "reasonably foreseeable") as the standard for the required effect of the challenged conduct and then telling businesses that only one modifier ("substantial") is relevant to Sherman Act liability.

Our precedent supports the conclusion that the FTAIA provides the guiding standard for jurisdiction over foreign restraints of trade. Most notably, in *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988), we considered an antitrust claim that the defendants' refusal to deal in pipe-manufacturing products "in various foreign markets" violated the Sherman Act. *Id.* at 813. The district court dismissed the claim because it failed to satisfy the FTAIA's test for subject matter jurisdiction. We determined without difficulty that "we are bound to apply [the FTAIA]," *id.* at 813 n.8, and affirmed the district court, concluding that "appellants have failed to allege that the defendants' conduct has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce or import trade." *Id.* at 815.[5]

[5]Other circuits have also treated the FTAIA as the binding test for determining jurisdiction over foreign restraints of trade. For example, in *United*

[8] As in *McGlinchy*, we conclude that the FTAIA controls in this case. Therefore, we must affirm the district court's dismissal for lack of subject matter jurisdiction unless we determine that the Restrictive Clause operates to have a direct, substantial, and reasonably foreseeable effect on domestic commerce.[6]

V

[9] Before discussing whether there is a direct effect here, we must consider what Congress meant by "direct." A dictionary published contemporaneously with the enactment of the FTAIA defined "direct" as "proceeding from one point to

Phosphorous, Ltd. v. Angus Chem. Co., the Seventh Circuit thoroughly analyzed the FTAIA and concluded that "the legislative history shows that jurisdiction stripping is what Congress had in mind in enacting FTAIA." 322 F.3d 942, 951 (7th Cir. 2003) (en banc). The court then applied the FTAIA jurisdictional standards and affirmed the district court's dismissal for lack of subject matter jurisdiction. *Id.* at 952-53; *see also Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 304-05 (3d Cir. 2002) (affirming dismissal because the FTAIA's test was not satisfied); *Den Norske*, 241 F.3d at 425-29 (applying the FTAIA to determine whether subject matter jurisdiction existed); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1085 (D.C. Cir. 1998) ("It does seem clear, however, that we should use the standard set forth in the FTAIA to analyze whether conduct related to international trade has had an effect of the nature and magnitude necessary to provide us with subject matter jurisdiction.").

[6]Unlike the government, the dissent does not argue that the effects need not be direct, but rather that the directness requirement has *always* been part of the "effects test." Thus, the panel agrees on the standard; we merely disagree about its source. We say it is the FTAIA, while the dissent says the common law. We all recognize that conduct related to international trade is exempt from the Sherman Act unless it has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. Under either approach, the dispositive question is whether the Restrictive Clause operates to have a direct effect on U.S. commerce. We think the allegations in the government's complaint, even if taken to be true on a motion to dismiss, are insufficient to establish the effect required under the FTAIA. As currently pleaded, it is sheer speculation as to whether Hazera will ever be able to develop its own version of long shelf-life tomatoes suitable for growing in North America during the winter.

another in time or space without deviation or interruption." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1982).

[10] Further, our efforts at understanding the meaning of "direct" are aided by the Supreme Court's interpretation of a nearly identical term in the Foreign Sovereign Immunities Act ("FSIA"). The FSIA states that immunity does not extend to commercial conduct "outside the territory of the United States . . . that [ ] causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). After the lower federal courts struggled for years to define "direct effect," the Supreme Court unanimously declared that an effect is "direct" if it follows as an immediate consequence of the defendant's activity. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). Settling on this definition, the Court "reject[ed] the suggestion that ['direct'] contains any unexpressed requirement of 'substantiality' or 'foreseeability.' " *Id.*

Having defined "direct," we next consider what effects the government asserts. As the district court recognized, the Complaint alleges that the Restrictive Clause causes two effects: (1) the agreement makes less likely possible innovations from Hazera in the creation of heartier tomato seeds "that will allow consumers to enjoy higher quality, better tasting winter tomatoes and that will allow United States farmers to grow long shelf-life tomatoes," and (2) the Restrictive Clause "may also allow defendants to profitably charge more for their seeds (or more for a license to use seeds with the RIN gene) than they otherwise could."

[11] Neither of these effects is "direct." The delay of possible "innovations" does not have a direct effect on American commerce. Even if Hazera were free to distribute new types of long shelf-life seeds in North America, there is no indication that Hazera has yet figured out a different way to produce such a seed without violating LSL's intellectual property rights to the RIN gene. Moreover, there is no indication that Hazera is in a stronger (or as strong a) position to develop

such a new seed as Monsanto and Novartis, which the Complaint alleges already account for 20 percent of the tomato seed market. Thus, any innovation that Hazera would bring to American consumers is speculative at best and doubtful at worst. An effect cannot be "direct" where it depends on such uncertain intervening developments. In this case, Hazera's delivery of long shelf-life seeds to North American growers depends on Hazera first creating such seeds, a development that is certainly not guaranteed.[7]

We can imagine a situation where the exclusion of a potential foreign competitor would satisfy the "direct" requirement.

[7]The dissent consistently refers to Hazera's seeds as though they actually exist; it fails to appreciate that Hazera has not yet developed its own long shelf-life tomato seeds capable of cultivation in North America. *See* Dissent at 11048 ("First, the Complaint squarely alleged causation in fact: but for the restraint, United States consumers would have the important potential of better winter tomatoes grown from Hazera seeds."); *id.* at 11048 ("Consumers in the United States are the persons injured by the Restrictive Clause, as they are the ones deprived of the superior tomatoes that competition from Hazera could bring."); *id.* at 11050 (". . . ignoring the effect of that conduct, which is to deprive the United States consumers of winter tomatoes from Hazera seeds."). We do not read the allegations of ¶¶ 38-39 of the government's Complaint as generously as our colleague in dissent. *See* Dissent at 11049-50 n.6.

Likewise, the government maintains that it demonstrated that Hazera can produce a long shelf-life seed that does not infringe on LSL's patents. But the document to which the government cites—a declaration from Hazera's president—speaks in purely forward-looking terms: "Hazera is now *developing* seeds for a winter tomato variety . . . . Hazera *intends* to develop a seed that produces a tomato that tastes better while staying firm without gassing or the RIN gene . . . . Hazera *will also launch* a program to develop improved extended shelf-life tomatoes for growers in California." (emphasis added). We find no express allegation that Hazera has actually produced a modified seed that can be successfully grown in North America for long shelf-life winter tomatoes. In sum, the record reveals that such seeds do not yet exist and the prospect of Hazera developing seeds that do not infringe LSL's patent is at best speculative. As a matter of common sense, regardless which of the many definitions of "direct" one adopts, this fact is crucial to the "direct effect" calculus.

One such scenario might be where the foreign competitor already has the good in hand. It might also be possible for a "direct" effect to exist where the potential foreign competitor does not yet have the product in hand. A potential foreign competitor might be able to demonstrate that its exclusion already has an effect on the American market. For example, the competitor might be able to demonstrate that its exclusion is causing existing market players to invest less in the research and development of new products. Although it might be possible in such situations for a "direct" effect to exist, the United States has not presented us with sufficient evidence to conclude that the district court clearly erred in ruling on the existing pleadings that Hazera's exclusion does not yet have a direct effect on domestic commerce.

[12] The district court also held that the effect of the Restrictive Clause on prices paid by American consumers is not "direct." This ruling was not clearly erroneous. The government has presented no evidence that LSL has or will artificially inflate the prices it charges to Mexican farmers for LSL's long shelf-life seeds.

Perhaps more importantly, the government's argument about the directness of the effect of seed prices on tomato prices is undermined by the United States' recent agreement with Mexican farmers to set a floor on the price of tomatoes shipped from Mexico to the United States. SUSPENSION OF ANTIDUMPING INVESTIGATION: FRESH TOMATOES FROM MEXICO, 67 Fed. Reg. 77044 (Dec. 16, 2002). The agreement covers all "fresh or chilled tomatoes (fresh tomatoes) which have Mexico as their origin." *Id.* at 77046. The agreement fixes minimum prices that Mexican tomato growers must charge for their product. *Id.* at 77045-50. The agreement was necessary to "eliminate completely the injurious effect of exports to the United States of the subject merchandise and prevent the suppression or undercutting of price levels of domestic fresh tomatoes by imports of that merchandise from Mexico." *Id.* at 77045. The government initiated the investigation that led to

the agreement because it was determined that Mexican tomato growers were selling their product "in the United States at less than fair value." *Id.* This agreement, and the concerns that gave rise to it, belie the United States' argument that LSL could raise the prices ultimately paid by American tomato consumers.

The government cites two cases in support of its argument that the Restrictive Clause has a "direct" effect on American commerce. First, the government points to *Hartford Fire*. However, the defendants in *Hartford Fire* "apparently concede[d]" that the district court had jurisdiction; rather than challenge the existence of jurisdiction, the defendants argued that the district court should decline to exercise jurisdiction because of comity concerns. 509 U.S. at 795. Also, the *Hartford Fire* defendants' foreign conduct—not offering re-insurance—had a demonstrated impact on the American insurance market: certain types of primary insurance were made unavailable because primary insurers could not obtain necessary re-insurance. Here, the product "loss" suggested by the government is entirely speculative: but for the Restrictive Clause, Hazera might someday create a long shelf-life tomato seed suitable for growing by North American farmers that does not violate LSL's existing patents. While the Restrictive Clause in this case removes nothing from American consumers except the vague possibility that Hazera might create a new type of seed before Novartis or Monsanto or one of the other smaller competitors, conduct by the defendants in *Hartford Fire* actually deprived American consumers of a wider array of an existing product, primary insurance.

The government also relies on the Fifth Circuit's decision in *Den Norske*. Like *Hartford Fire*, *Den Norske* differs in at least one critical way from this case. In *Den Norske*, the plaintiff alleged that the defendants caused Americans to pay $165 million in higher oil prices because the defendants' conspiracy raised the prices paid by off-shore oil producers for heavy-lift services in the Gulf of Mexico and the producers

passed on the higher prices to American oil consumers. 241 F.3d. at 426 & n.21. By contrast, here the government cannot demonstrate an existing effect on American tomato consumers. At most, the government can demonstrate that the Restrictive Clause removes the *possibility* of future innovation from Hazera and "*may* also allow defendants to profitably charge more for their seeds."

[13] In assailing the district court's jurisdictional ruling, the dissent invokes the general notice pleading standard. *See, e.g.*, Dissent at 11046 n.5 ("Here, the government sufficiently averred that the adverse effect on the United States' domestic commerce of tomatoes has been an immediate consequence of the Restrictive Clause governing tomato seeds . . . ."); *id.* at 11048 ("First, the Complaint squarely alleged causation in fact: but for the restraint, United States consumers would have the important potential of better winter tomatoes grown from Hazera seeds."). However, while federal complaints are generally construed liberally, in this case the district court correctly scrutinized the government's Complaint more closely in order to make the necessary threshold determination of whether it had subject matter jurisdiction. This scrutiny involved taking preliminary evidence, weighing that evidence, and deciding as a matter of law whether the facts alleged supported jurisdiction. Here, the district court properly found that the operation of the Clause does not have the required direct effect on U.S. commerce. We agree and hold that as a matter of law the FTAIA does not confer jurisdiction.[8]

[8]In other words, the question of fact is whether, accepting the allegations of the Complaint as true, there is a "direct, substantial, and reasonably foreseeable effect," while the question of law is whether the FTAIA provides a basis for jurisdiction. The legal question here is relatively straightforward; because the district court's finding of no direct effect survives clearly erroneous appellate review, affirmance of its jurisdictional finding necessarily follows.

VI

The FTAIA provides the standard for establishing when subject matter jurisdiction exists over a foreign restraint of trade. This standard was not met here because the government cannot demonstrate that the district court clearly erred by determining that the alleged effects of the Restrictive Clause are not direct.

Because we conclude that the district court lacked subject matter jurisdiction over the entire Complaint, we do not consider the district court's Rule 12(b)(6) dismissal of the domestic aspect of the Complaint.

AFFIRMED.

ALDISERT, Circuit Judge, Dissenting:

This is a case of first impression. The panel is unanimous in agreeing that this appeal requires us to interpret critical language in the Foreign Trade Antitrust Improvements Act (FTAIA or "Act"), 15 U.S.C. § 6a (1994). We must express a judicial interpretation to a single word, "direct," in the FTAIA's provision of "direct, substantial, and reasonably foreseeable effect" on United States trade or commerce when foreign activity is involved. The flash point of controversy, however, is whether the word "direct" in the FTAIA is a new dimension added to traditional antitrust law that involves trade or commerce with foreign nations, as the majority concludes, as did the district court, or, as urged by the government in this appeal, is merely a codification of antitrust law in place prior to the enactment of FTAIA. I agree with the government's interpretation, and accordingly, respectfully dissent. I would reverse the judgment of the district court.[1]

[1]The district court also entered judgment against the United States for failure to state a claim for which relief could be granted. Rule 12(b)(6),

I.

Our analysis, perforce, must begin with the statutory language of FTAIA:

> Section 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a *direct*, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce 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 (emphasis added).

Although other appellate courts have dodged the critical issue on which this appeal turns,[2] this panel has decided to

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Federal Rules of Civil Procedure. Because the majority affirms the dismissal under Rule 12(b)(1) it does not meet this issue. In light of the view I take, it will be necessary for me to discuss this question, *infra.*

[2]*See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 789 n.23 ("Also unclear is whether the Act's 'direct, substantial, and reasonably

face the dragon in his teeth and stop tap dancing around the meaning of the word "direct." As did the district court in this case, the majority adopts the view that something new has been added by Congress in 1994 in enacting FTAIA — something that restricts the operation of the Sherman Act when foreign conduct is involved, a new ingredient requiring proof of a "direct" effect on American commerce.

I take a contrary view. I believe that the new statute merely codified existing antitrust law in the use of the word "direct." And so interpreted, under the facts in this case, which I adopt as laid down by the majority, a result contrary to that of the district court is mandated for the reasons that follow in detail.

II.

The district court erred in dismissing the Complaint for lack of jurisdiction under the FTAIA by determining that the government failed to allege a "direct, substantial, and reasonably foreseeable effect" on United States commerce.

"We review de novo a district court's dismissal for lack of subject matter jurisdiction. . . . The district court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error." *La Reunion Francaise SA v. Barnes*, 247 F.3d 1022, 1024 (9th Cir. 2001) (citations omitted).

The leading Supreme Court case discussing the FTAIA is *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). Although jurisdiction was conceded by both parties in

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foreseeable effect' standard amends existing law or merely codifies it . . . . We need not address these questions here.") (citation omitted); *see also Dee-K Enter., Inc. v. Heveafil Sdn. Bhd*, 299 F.3d 281, 287 (4th Cir. 2002); *Kruman v. Christie's Int'l P.L.C.*, 284 F.3d 384, 399 n.5 (2d Cir. 2002); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 428 (5th Cir. 2001).

that case and the Court was only interested in issues of comity,[3] it engaged in a significant discussion of the FTAIA's import:

> Under § 402 of the Federal Trade Antitrust Improvements Act of 1982 (FTAIA), 96 Stat. 1246, 15 U.S.C. § 6a, the Sherman Act does not apply to conduct involving foreign trade or commerce, other than import trade or import commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. § 6a(1)(A).

Hartford Fire, 509 U.S. at 796 n.23.

In so stating the Court resolved any tension between the teachings of *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) and *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (*Alcoa*). In *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), the court explained:

> Any perceived tension between *American Banana* and *Alcoa* was eased by the Supreme Court's most recent exploration of the Sherman Act's extraterritorial reach. In *Hartford Fire* . . . the Justices endorsed *Alcoa*'s core holding, permitting civil antitrust

[3]The opposite situation is presented here. The contested issue is subject matter jurisdiction, not comity. "[T]he general understanding [is] that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction." *Hartford Fire*, 509 U.S. at 797 n.24. Thus, the list of factors relating to moderating enforcement powers of the United States in the interest of comity set forth in *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597, 614 (9th Cir. 1976), do not necessarily speak to the issue before us. Nor do my personal observations set forth in Ruggero J. Aldisert, "Federal Courts and Extraterritorial Antitrust Law: Enlightened Self Interest or Yankee Imperialism?," 5 *J.L. & Com.* 415 (1985).

> claims under Section One to go forward despite the fact that the actions which allegedly violated Section One occurred entirely on British soil. While noting *American Banana*'s initial disagreement with this proposition, the *Hartford Fire* Court deemed it "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." *Id.* at 796. The conduct alleged, a London-based conspiracy to alter the American insurance market, met that benchmark. *See id.*

109 F.3d at 3-4 (footnote omitted).

I now turn to the issue that divides this panel. Does "direct" in the phrase "direct, substantial, and reasonably foreseeable effect" reflect a statutory restriction of the operation of the Sherman Act, or does it merely codify existing case law?

A.

For over a century, at least since 1898, the jurisprudence of antitrust law has required that for Section 1 of the 1890 Sherman Act to apply there must be a "direct effect" on interstate commerce. Congress' enactment of the FTAIA in 1982 — promulgating the statutory language "direct, substantial, and reasonably foreseeable effect" on United States trade or commerce when foreign activity is involved — merely codified the direct effects requirement that has been set forth in teachings of (1) antitrust case law for over 100 years, (2) the *Restatement (Second) of Foreign Relations Law of the United States* (1965), (3) leading treatises of distinguished academics, (4) the *Antitrust Guide for International Operations* of the United States Department of Justice, Antitrust Division, January 26, 1977 and (5) the *Report to Accompany Resolutions Concerning Legislative Proposals to Promote Export Trading* of the American Bar Association, Section of Antitrust Law, October 26, 1981.

We thus learn from the legislative history of the FTAIA:

> Following the lead of *Alcoa* and its subsequent judicial interpretations, the Department of Justice announced its view in 1977 that the United States antitrust laws should be applicable to an international transaction "when there is a substantial and foreseeable effect on the United States commerce," and that it would be a miscarriage of Congressional intent to apply the Sherman Act to "foreign activities which have no direct or intended effect on United States consumers or export opportunities. . . ." United States Department of Justice, Antitrust Division, *Antitrust Guide to International Operations* 6-7 (1977) . . . .
>
> An ABA Antitrust Section analysis has concluded that, despite the variations in wording, "there is, with rare exception, no *significant* inconsistency between judicial precedents and the Justice Department's view of the effects test." Antitrust Section Report at 10 (emphasis in original).

H.R. Rep. No. 97-686 at 5-6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490-2491 (House Report).

The use of "direct effect" is historically an integral part of antitrust law. "As Professors Areeda and Turner have said, the federal courts have been invested 'with a jurisdiction to create and develop an "antitrust law" in the manner of the common law courts.' I Areeda & Turner, *Antitrust Law* ¶ 106, at 15 (1978)." *Nippon Paper*, 109 F.3d at 9 (Lynch, J. concurring). I first turn to the antitrust cases of the Supreme Court announcing or explicitly endorsing the "direct effects" test.

B.

My starting point is the seminal cases in 1898. After some very broad language in *United States v. Trans-Missouri*

Freight Ass'n, 166 U.S. 290 (1897), that would seem "to reach every minor restraint . . . [t]he Court cut back the § 1 dragnet in *Hopkins [v. United States*, 171 U.S. 578, (1898)]. . . ." 4 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1501, at 339 (2d ed. 2000). The Court in *Hopkins* declared that the Sherman Act

> must have a reasonable construction, or else there would scarcely be an agreement or contract among business [persons] that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.

171 U.S. at 600.

Earlier the same year the Court had held:

> An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does *not directly* restrain s[u]ch commerce, is not . . . covered by the act, although the agreement may indirectly and remotely affect that commerce.

United States v. Joint-Traffic Ass'n, 171 U.S. 505, 568 (1898) (emphasis added).

These clear statements by the Court enunciated the direct effects test in actions brought under Section 1 of the Sherman Act. In the words of the prominent commentators Areeda and Hovenkamp: "The Court then excepted from the statute indirect or remote restraints." Areeda & Hovenkamp, *supra*, ¶ 1501, at 339.

Then in 1945 came Learned Hand's formulation in *Alcoa*: "the ingot fabricated by 'Alcoa,' *necessarily had a direct effect* upon the ingot market." 148 F.2d at 424 (emphasis

added). To say, as does the majority, that "[u]nlike the FTAIA, the *Alcoa* test does not require the effect to be "direct[,]" (Maj. Op. at 11020), runs counter to the explicit teachings of *Alcoa*. My view is endorsed by the authoritative commentators, Areeda and Hovenkamp:

> As Judge Hand made clear in his *Alcoa* opinion, the Sherman Act would govern the world unless significant/*direct*/intended effects were required, for American commerce is affected in some degree by every force affecting the world's markets in which we buy or sell . . . .

4 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 277 at 363 (2d ed. 2000) (emphasis added).

The "direct effects" test has thus been part and parcel of antitrust law before and after the passage of FTAIA in 1982. Indeed it was an integral part of antitrust jurisprudence for at least 84 years before Congress used the word "direct" in its formula on what constitutes foreign conduct affecting United States commerce in the FTAIA. After over 100 years of antitrust cases, the Supreme Court has not diluted the "direct effects" requirement. On the contrary, in 1951 the Court approved the district court's use of this explicit test in a case, similar to the one at bar, in which there was a foreign restraint on commerce in the United States.

In *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio 1949), the district court had before it evidence that the defendant and two foreign manufacturers had made and sold for over 20 years a substantial portion of the world's production of anti-friction bearings by engaging in market allocation, price fixing and other illegal restraints of trade. As part of its defense, Timken argued that the cartel agreements had been made in foreign countries and that the Sherman Act could not be applied extraterritorially. In rejecting the argument the court held:

> Nor does the fact that the cartel agreements were made on foreign soil relieve defendant from responsibility. . . . They had a *direct* and influencing effect on trade in tapered bearings between the United States and foreign countries.

Timken, 83 F. Supp. at 309 (emphasis added, citation omitted). When the defendant repeated the same argument on appeal, the Court rejected its contention, stating: "[T]he trial judge after a patient hearing carefully analyzed the evidence in an opinion prepared with obvious care. Appellant's lengthy brief has failed to establish that there was error in making any crucial, or even important, ultimate or subsidiary finding." *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597 (1951) (footnote omitted).

That there is not a host of cases emphasizing this very point attests to the requirement that showing a direct effect on interstate commerce is a *sine qua non* of antitrust liability. Otherwise, as the Court stated, "there would scarcely be an agreement or contract among business [persons] that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." *Hopkins*, 171 U.S. at 600.

C.

In any event, the American Law Institute, composed of the leading judges, academics and lawyers, included the "direct effects" requirement in the relevant *Restatement (Second) of Foreign Relations Law of the United States* (1965) that was in effect at the time the Congress enacted the FTAIA in 1982.

Section 18, of the *Restatement (Second) of Foreign Relations Law of the United States* (1965) provided in relevant part:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs

> outside its territory and causes an effect within its territory, if . . .
>
> > (b) (I) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is *substantial*: (iii) it occurs as a *direct* and *foreseeable* result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

§ 18 (emphasis added).

In light of the foregoing, it cannot be said that in its 1982 enactment the Congress intended to promulgate a new standard for restricting the operation of the Sherman Act by using the language "direct, substantial, and reasonably foreseeable effect," when in fact the existing case law had been using the identical formulation, to wit, "(ii) the effect within its territory is *substantial*: (iii) it occurs as a *direct* and *foreseeable* result of the conduct outside the territory." *Id.* Indeed, the Court of Appeals for the Third Circuit cited Section 18 of the *Restatement* as reflecting the components of the "intended effects" test in extraterritorial Sherman Act cases. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979).

In 1986, when the bench, bar and professoriat promulgated the *Restatement (Third) of Foreign Relations Law of the United States*, the same formulation was retained, albeit in succinct form:

> Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes

> place within the territory, or has *substantial, direct, and foreseeable effect* upon or in the territory.

§ 403(2) (emphasis added).

D.

The treatises on antitrust law also reiterate that the "direct effects" test was integral to antitrust law when Congress enacted the FTAIA.

In Volume 1 of James Atwood, Kingman Brewster & Spencer W. Waller, *Antitrust and American Business Abroad* (3d ed. 2002), the commentators analyze leading antitrust cases preceding the 1982 Congressional action that discussed "direct and substantial effect upon trade" and " 'direct' effect on United States commerce." § 6, at 18 (quoting *United States v. Gen. Elec. Co.*, 82 F. Supp. 753, 884 (D.N.J. 1949) and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 103 (C.D. Cal 1971)).

In *General Electric Co.*, District Judge Forman explained that "the second requirement for the finding of a violation on the part of Philips [is] that its activities must have had a direct and substantial effect upon trade. . . ." 82 F. Supp. at 891.

In *Occidental Petroleum*, the court set forth views of two leading commentators:

> See Beausang, The Extraterritorial Jurisdiction of the Sherman Act, 70 Dick.L.Rev. 187, 191 (1966): "An '[e]ffect' is a necessary element of *jurisdiction* ***; a direct and substantial '[e]ffect' is necessary for Sherman Act *violations*. The problem arises when the standards of illegality (which might be modified to promote foreign trade) are confused with the jurisdictional feature of the '[e]ffect on foreign commerce' " (emphasis in original).

> In reviewing the cases, Von Kalinowski notes the confusion evident therein: "The cases that used the word "[e]ffect" have said that a restraint must (1) "directly affect," or (2) "substantially affect," or (3) "directly and substantially affect," or (4) simply "affect" the flow of foreign commerce. 1 J. Von Kalinowski, [Antitrust Laws and Trade Regulation] § 5.502[2], at 5-120 (footnotes omitted). He concludes that "[t]he better view would seem to be that any effect that is not both insubstantial and indirect will support federal jurisdiction under Section 1." *Id.* at 5-121-22.

331 F. Supp. at 102-103 (emphasis in original); *see also Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1974) ("Restraints which directly affect the flow of foreign commerce into or out of this country are subject to the provisions of Section 1 of the Sherman Act. Von Kalinowski, *Antitrust Laws and Trade Regulations,* Vol. 1. § 5.02(2) (1971).").

Again turning to Areeda and Hovenkamp, the distinguished commentators jump into the new-law-versus-codification-of-the-old fray and persuasively argue that codification is the "better view":

> The most interesting question about the new statute is whether its standard for appraising export restraints differs from that for appraising import restraints or whether it merely "codifies" a general understanding of when American antitrust law should be concerned about restraints abroad that might affect United States interests only indirectly, insubstantially, or in ways that could not be foreseen. Although the "codification" reading would make the statute's distinction between import and export trade unnecessary, that distinction might simply reflect the new legislation's sole focus on export trade. In favor

> of the "codification" reading is *Alcoa* itself, which emphasized "significant" and "direct" effects on the United States, with intended effects as a possible alternative.
>
> Also supporting that reading is the policy that conduct abroad whose primary effects are also abroad is not a fit subject for regulation by American domestic law. As Judge Hand made clear in his *Alcoa* opinion, the Sherman Act would govern the world unless significant/direct/intended effects were required, for American commerce is affected in some degree by every force affecting the world's markets in which we buy or sell . . . .
>
> If the new statute is not seen as a "codification" of the "better view" of the existing standard for jurisdiction, it might fail to have its intended effect even on export trade. It amends only the Sherman Act and the Federal Trade Commission Act, not the Clayton Act. Because some joint ventures can be reached under the latter statute, such a venture might be subjected to American antitrust law even though its effects would not satisfy the new statute.

Areeda & Hovenkamp, *supra*, ¶ 272, at 362-363 (footnotes omitted).

E.

I now turn to the legislative history of the FTAIA for two distinct purposes. First, I emphasize that in formulating the expression specifically set forth in Section 18 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965), "such conduct has a direct, substantial, and reasonably foreseeable effect," Congress intended to voice its disagreement with some lower court decisions that did not require a "substantial" effect. My second purpose is to emphasize the

conclusions sent to Congress by the United States Department of Justice and the American Bar Association, Section of Antitrust Law that "direct," "substantial" and "foreseeable" constituted a correct formulation of existing law.

What concerned Congress was twofold: first, that in some private actions a few *lower* courts seemed to discuss a *de minimus* effect, a much lesser standard than that of the "substantial effects" test;[4] and, second, to make explicit the requirement that the effect be "reasonably foreseeable" rather than based on "intent." House Report, *supra*, at 2494.

In this regard, what the House Report may have suggested as "new" law is what the Department of Justice reported to Congress as *existing* law:

> . . . U.S. law in general, and the U.S. antitrust laws in particular, are not limited to transactions which take place within our borders. When foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place.

Antitrust Division, *Antitrust Guide for International Operations* 6 (1977) (footnotes omitted).

The House Report acknowledged this view: "The Justice Department in its *Antitrust Guide* takes the position that only 'foreseeable' effects on U.S. commerce should result in U.S. antitrust jurisdiction." House Report, *supra*, at 2493.

Moreover, the American Bar Association Section of Antitrust Law submitted a report to Congress in October of 1981 commenting on the purpose and effect of the various pending legislative proposals on extraterritorial antitrust law. The ABA Antitrust Section concluded that "any business uncer-

[4]*See* cases cited in House Report, *supra*, at 2490.

tainty as to the applicability of the antitrust laws to foreign trade would seem to be an overreaction, for there is, with rare exception, no *significant* inconsistency between judicial precedents and the Justice Department's view of the 'effects' test." American Bar Ass'n, Sec. of Antitrust Law, *Report to Accompany Resolutions Concerning Legislative Proposals to Promote Export Trading* 10 (1981) (emphasis in original). The *Antitrust Section Report* explained further:

> [I]t is clear . . . that a showing of something more than any effect on United States interstate, export, or import commerce would be required to establish subject matter jurisdiction. In this fundamental respect, the recent court decisions seem essentially consistent with the Justice Department's enforcement policy and with the state of the law generally, although courts and commentators may not always see eye to eye on what constitutes "substantiality" or "foreseeability."

Id. at 13 (footnotes omitted). The ABA Antitrust Section, in a footnote, quoted another 1981 report it authored that states:

> The cases decided since *Alcoa* likewise recognize a need for limiting antitrust subject matter jurisdiction to something less than all conduct having any impact on American commerce. The approach generally taken . . . has been to make jurisdiction dependent upon whether the effect on U.S. commerce in each case is *direct, substantial and reasonably foreseeable*.

Id. (quoting American Bar Ass'n, Sec. of Antitrust Law, *U.S. Antitrust Law in International Patent and Know-How Licensing* 4-5 & nn.16-18 (1981)) (emphasis added). It is from this conclusion that the *Antitrust Section Report* recommended to Congress the language "direct, substantial, and foreseeable

effect" — to succinctly codify, for the purpose of clarification, existing antitrust case law.

When originally introduced in Congress, the FTAIA included only the words: "direct and substantial effect." H.R. 2326, 97th Cong. (1981). This indicates that the debate centered on the concept of foreseeability, not direct effects. But even then, the legislation as proposed did not reflect a change in existing case law, as the *Antitrust Section Report* explained: "H.R. 2326 [and its companion bill S. 795] is intended, *without changing the law substantively*, to use the 1977 Justice Department [Antitrust] Guide's wording to clarify the 'effects' test to be applied in foreign commerce cases." *Antitrust Section Report*, *supra*, at 29-30 (emphasis added) (citing Hearing on S. 795, 97th Cong. 4 (1981) (Statement of William F. Baxter, Esq.) ("We understand that this bill is not intended to work any significant changes in the law, but rather to restate current enforcement policy and judicial interpretations governing the applicability of the antitrust laws to joint export activity.")).

In commenting on the *Antitrust Section Report*, the House Report noted: "An ABA Antitrust Section analysis has concluded that, despite the variations in wording, 'there is, with rare exception, no *significant* inconsistency between judicial precedents and the Justice Department's view of the effects test.' Antitrust Section Report at 10 (emphasis in the original)." House Report, *supra*, at 2490-2491.

F.

In sum, the promulgation of the statutory language "direct, substantial, and reasonably foreseeable effect" on United States trade or commerce when foreign activity is involved was merely a codification of the direct effects requirement that had been set forth in teachings of ruling case law, the Restatements of Foreign Relations Law, leading treatises of distinguished academics, the Department of Justice's 1977

Antitrust Guide and the American Bar Association's 1981 *Antitrust Section Report*. Although the panel agrees on the standard to be applied, the "direct effects test," I respectfully disagree with the contrary view expressed by my colleagues of the majority that the word "direct" in the FTAIA is a new dimension of antitrust law. Whereas the majority interprets the term "direct" from scratch, I am guided by contemporary definitions of the term as well as relevant precedent, including that which preexisted the FTAIA, and therefore I diverge from my colleagues' interpretation of the "direct effects test" as applied to this case.

III.

The United States sufficiently alleged that the Restrictive Clause has a "direct" effect on United States commerce under the most useful and sensible interpretation of that term. The district court did not attempt to define direct, but instead simply accepted LSL's argument that the effect of the Restrictive Clause was not direct because the clause "involves the development of seeds, not tomatoes." This ruling was simply wrong.

It was as if to say that restricting vanadium ore, which was processed into vanadium oxide in Canada and then into ferrovanadium, had no direct effect in the United States markets, whereas here it was purchased by American steel companies for use as an alloy in hardening steels. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Likewise, we could not say that restricting sisal, the fiber of the henequen plant that is native to Mexico, had no effect on American commerce, because here the fabricated Mexican hemp amounted to more than 80 percent of the binder twine used for harvesting grain in the United States. *See United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927). Neither could we say that restricting competition for the purchase of cattle was insufficient to support an intention to monopolize

commerce in fresh meat. *See Swift Co. v. United States*, 196 U.S. 375 (1905).

"Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.' " *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). "Direct" has many meanings, in fact, only one of which is drawing direct lines on paper or geographically "from point to point without deviation" — the definition used by the district court and accepted by the Majority. The same dictionary source contains seven main meanings in the adjective form, encompassing 31 more specific subsidiary meanings. *Webster's Third New International Dictionary* 640 (1981). All of those meanings are contemporary with the FTAIA, enacted in 1982, and many are both ordinary and common.

It would be arbitrary simply to pick one definition and declare it the "plain meaning" in the abstract. Determining the meaning of "direct" requires the consideration of definitions as informed by the FTAIA's context and history. In this light, I believe that the most pertinent and sensible definition of "direct" for current purposes is: "3a. characterized by or giving evidence of a close especially logical, causal, or consequential relationship." *Id*.

And, if we go to the granddaddy of all English dictionaries, *The Oxford Dictionary of the English Language*, the straight line definition is described as an adjective arising in LME (Late Middle English, 1350-1460). But the definition which I perceive to be most relevant here is "c. LOGIC. Proceeding immediately from consequent to antecedent, from cause to effect. Etc. 'E19' " (1800-1829). This comports with the dictionary definition urged by the United States before us, in its neat comparison with the law of torts' familiar phrase "proximate cause."

Just as well, this is how the Supreme Court interpreted the term "direct" in the Foreign Sovereign Immunities Act (FSIA), as the majority concedes: "an effect is 'direct' 'if it follows as an *immediate consequence* of the defendant's activity." Maj. Op. at 11023 (emphasis added) (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (holding that Argentina's bond payment rescheduling had a "direct effect" in the United States, where Argentina was to perform its ultimate contractual obligations, even though the bond holders were foreign corporations)).[5]

A definition of "direct" that focuses on consequential relationships draws support from another area of antitrust law — private plaintiffs' antitrust standing. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the Court faced the issue of which persons sustained injuries too remote from an antitrust violation to give them standing to sue for damages under Section 4 of the Clayton Act. In answering this question, the Court observed that, historically, some antitrust cases formulated a test that equated "remoteness" with "directness" and suggested that both terms are analogous to the common law concept of "proximate cause." *Id.* at 478 nn.12-13.

To be sure, proximate cause itself is not easily defined. *Id.* at 478 n.13. But it is still useful and important here for two reasons. First, it rightly focuses the inquiry about the meaning

[5]The majority points out that the Court in *Weltover* "reject[ed] the suggestion that ['direct'] contains any unexpressed requirement of 'substantiality' or 'foreseeability.' " 504 U.S. at 618. This simply indicates, however, that "direct" requires something less than substantial and foreseeable. *Id.* Indeed, a "direct" effect, or immediate consequence, on domestic commerce is the baseline — the *sine qua non* — of extraterritorial jurisdiction. Althoughthe FSIA requires this baseline, the FTAIA requires that the immediate consequence be substantial and foreseeable. Here, the government sufficiently averred that the adverse effect on the United States' domestic commerce of tomatoes has been an immediate consequence of the Restrictive Clause governing tomato seeds, and given Defendants' "market power," this "direct effect" has been, as well, "reasonably foreseeable" and "substantial." *See* discussion *infra*.

of "direct" into a relationship of logical causation rather than of something else such as time or geography. Second, it is a reminder that public policy undergirds concepts such as "proximate cause" and "direct effects." The "policy unequivocally laid down by the [Sherman] Act is competition[,]" *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4-5 (1958), and the FTAIA, which is part of the Sherman Act, should therefore be interpreted in light of its fundamental purpose to protect United States consumers from the consequences of anticompetitive conduct.

Indeed, even the master wordsmith Benjamin N. Cardozo had his fling with attempting to define "direct" in deciding what was required in the context of Congress' Commerce Clause power. He warned of confining a constitutional principle — namely the power of one sovereign to regulate the commerce of another — to a strict construction of a pair of opposing adjectives, for:

> 'the law is not indifferent to considerations of degree'. . . . Perhaps, if one group of adjectives is to be chosen in preference to another, 'intimate' and 'remote' will be found as good as any. At all events, 'direct' and 'indirect,' even if accepted as sufficient, must not be read too narrowly. . . . A survey of the [Commerce Clause] cases shows that the words have been interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it.

Carter v. Carter Coal Co., 298 U.S. 238, 327-328 (1936) (Cardozo, J., dissenting) (citations omitted). After reviewing relevant Commerce Clause cases Cardozo concluded:

> What the cases really mean is that the causal relation in such circumstances is so close and intimate and obvious as to permit it to be called direct without subjecting the word to an unfair or excessive strain.

Id. at 328.

When directness is seen as a synonym for proximate cause, it is relevant that there are two types of causation: causation in fact, otherwise known as "but for" causation; and legal causation, the public policy imperative of cutting off liability when a causal chain of events becomes excessively complex or attenuated. *See, e.g.*, *Prosser and Keeton on Torts* § 42, at 272-73 (5th ed. 1984). It is evident here that the United States sufficiently alleged that the Restrictive Clause had a "direct," or proximate cause, effect on United States commerce in both senses.

First, the Complaint squarely alleged causation in fact: but for the restraint, United States consumers would have the important potential of better winter tomatoes grown from Hazera seeds. The Restrictive Clause, and indeed the entire LSL-Hazera relationship, was aimed at United States consumers. The United States tomato market drives the long shelf-life seed business. LSL sells its tomato seeds to farmers in Mexico and those farmers raise the seeds into tomatoes for the purpose of supplying grocery stores in the United States. Consumers in the United States are the persons injured by the Restrictive Clause, as they are the ones deprived of the superior tomatoes that competition from Hazera could bring.

Second, the causal link between seeds and tomatoes is very close and intimate. If seeds are allowed to grow (and otherwise they would be worthless), they quickly and inevitably become tomatoes. Because the principal use of tomato seeds is to grow tomatoes, tomatoes are more properly described as a different stage of the *same* product rather than as a related but downstream product. The seed, when planted, becomes the plant and the fruit that is yielded. Accordingly, LSL's contention, adopted by the district court, that the seed is only an input into the finished tomato, does not preclude a "direct" effect on United States consumers.

Moreover, the causal connection between the Restrictive Clause and its effect on United States consumers is extremely close and intimate. The United States alleged a restraint on the very tomato seeds that grow into tomatoes in Mexico expressly for shipment to the United States. The consequences to the commerce of tomatoes in the United States are immediate, as there are no diversions or other intermediate stops for either the seeds or the resulting tomatoes. Short of a restraint on import commerce (to which the FTAIA does not apply), it is difficult to imagine foreign conduct that would have a more direct effect on United States commerce.

Most obviously, in *Hartford Fire* the Supreme Court treated the plaintiffs' allegations as satisfying *both* the common law and the FTAIA's tests for subject matter jurisdiction as to a conspiracy involving the market for *reinsurance*, particularly in London, but ultimately targeting the United States domestic market for *primary* insurance. 509 U.S. at 795-796. The two products, the London-based reinsurance and the United States primary insurance, were closely related — in a proximate cause sense — because primary insurers depend on reinsurance for their own protection and "the London reinsurance market [is] an important provider of reinsurance for North American risks." *Id.* at 775.

The district court's distinction between seeds and tomatoes, endorsed by the majority, is fundamentally inconsistent with *Hartford Fire*. If a restraint on reinsurance in the United Kingdom has a sufficiently "direct" effect on primary insurance in the United States under the FTAIA, it is impossible to see how a restraint on tomato seeds in Mexico does not have an equally direct effect on the resulting tomatoes in the United States — particularly when the district court's order concedes that seeds and tomatoes are related and it is undisputed that Mexico is a significant provider of winter tomatoes for the United States.[6]

[6]The majority emphasizes that Hazera has not yet developed its own long term shelf-life tomato seeds and suggests that the Restrictive Clause

The United States alleged here that a contractual bar against Hazera selling seeds in Mexico adversely affected the domestic commerce of tomatoes, the inevitable outgrowth of the seeds, in the United States. *Hartford Fire* shows that the FTAIA is satisfied by these facts, and the district court's treatment of the distinction between seeds and tomatoes as dispositive was therefore error. Fundamentally, the district court confused *conduct* with *effect* under the FTAIA by focusing on what the Restrictive Clause bars — Hazera selling seeds in Mexico — and ignoring the effect of that conduct, which is to deprive United States consumers of winter tomatoes from Hazera seeds. But "it is the effect and not the location of the conduct that determines whether the antitrust laws apply," even under the FTAIA. *Kruman v. Christie's Intern. PLC*, 284 F.3d 384, 395 (2d Cir. 2002).

Inasmuch as the Congress did not define the term "direct" by statute, this court should give the term its ordinary mean-

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cannot have a direct effect on United States commerce because the prospect of Hazera developing such a seed without infringing on LSL's patent is speculative. (*See* Maj. Op. at 11024 n.7). All of this flies in the face of the government's declarations in its Complaint that: (1) Hazera is one of the world's leading tomato seed producing companies, (2) Hazera sells more seeds than any other company in many important tomato producing countries, including Spain, Italy, Israel and Turkey, (3) For the European and Mediterranean regions, Hazera has bred long shelf-life tomatoes by traditional plant-breeding processes that do not incorporate the RIN gene (and accordingly do not implicate LSL's patent rights), (4) Hazera is one of the few firms with experience and know-how to develop seeds that will allow farmers from the United States and Mexico to grow better fresh-market tomatoes for United States consumers during winter months, (E.R. at 11-12, ¶¶ 37, 39), and but for the Restrictive Clause, Hazera would be a significant competitor to Appellees in North America. Indeed, LSL would have had little reason to impose the Restrictive Clause on Hazera if it believed that Hazera's prospect in developing its own long term shelf-life tomato seed was "speculative at best," as the majority suggests. Hazera cannot be faulted for not producing seeds in Mexico or the United States, as it has done elsewhere, because the Restrictive Clause prohibits it from doing so.

ing within the context of Congress' Commerce Clause power. In the words of Cardozo, the "causal relation" between the restraints on the development and production of tomato seeds in Mexico and the marketing, price and consumption of the resulting tomatoes in the United States "is so close and intimate and obvious as to permit it to be called direct without subjecting the word to an unfair or excessive strain." *Carter*, 298 U.S. at 328.

Accordingly, I am convinced that there is no persuasive reason why a restraint on selling seeds in Mexico cannot have a "direct" effect on United States domestic commerce in tomatoes.[7]

[7]The majority argues that an agreement with farmers in Mexico to set a floor on prices of tomatoes shipped from Mexico to the United States supports its position. *Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico*, 67 Fed. Reg. 77044-02 (Dec. 16, 2002). The agreement covers all "fresh or chilled tomatoes (fresh tomatoes) which have Mexico as their origin . . . ." *Id.* at 77046. The agreement fixes minimum prices that tomato growers in Mexico must charge for their product. *Id.* at 77045-77050. The majority argues that this agreement, and the concerns that gave rise to it, belie the United States' argument that LSL could raise the prices ultimately paid by American tomato consumers. I disagree, and endorse completely the United States' reply to this argument:

> First, as the United States argued in its briefs, the primary effect of the Restrictive Clause on U.S. commerce is to limit innovation that improves tomato quality. The Restrictive Clause excludes Hazera's current and future long shelf-life seeds from North America and thereby ensures that no tomatoes grown from those seeds can reach U.S. grocery stores. The official anti-dumping agreement cited by LSL has nothing to do with this effect.
>
> Second, the very existence of the anti-dumping agreements confirms that the importation of fresh tomatoes from Mexico, and the pricing of those tomatoes, have a substantial effect on U.S. domestic commerce. But it is impossible to determine, at least at this stage of the proceedings, whether the agreement prevents the Restrictive Clause from affecting prices in the United States.

Although the district court determined there was no subject matter jurisdiction, it went further in its analysis and decided that the United States' Complaint failed to state a claim for which relief can be granted. Rule 12(b)6, Federal Rules of Civil Procedure. In so doing the court participated in an exercise of determining the relevant market definition for antitrust law, and accordingly stepped beyond its bounds, "[f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998).

Moreover, the court erred in its treatment of the two components of defining a market in antitrust law: first, identifying the relevant product for the service market, and, second, identifying the relevant geographic area. It is to this issue that I will now turn. The majority held that there was no subject matter jurisdiction and, following the teachings of *Steel Company*, it properly declined to address the Rule 12(b)(6) issue: "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." 523 U.S. at 94 (quoting *Ex Parte McCardle*, 7 Wall. 506, 514 (1868)). Because I conclude that there is subject matter jurisdiction, and the district court elected to decide the merits, so must I.

IV.

First, it is of import to provide a brief overview of market power, an underlying principle of antitrust law. Section 1 of the Sherman Act reads in part:

> 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 declared to be illegal.

15 U.S.C. § 1 (1994).

Antitrust is concerned with the power of market participants to distort the competitive process. This distortion can misallocate resources, transfer wealth from consumers and other protected groups or, as in this case, by means of the non-compete agreement, stifle new entry or innovation and commercialization.

The power relevant to antitrust is market power, or as some economists put it "monopoly power."[8] This power is, at its core, linked to elasticity of demand. Although a participant can exercise market power either as a seller or as a buyer, it is usually defined from the point of view of the seller: Market power is the seller's ability to raise and sustain a price increase without losing so many sales that it must rescind the increase. William M. Landes & Richard A. Posner, "Market Power in Antitrust Cases," 94 *Harv. L. Rev.* 937, 939 (1981).[9]

Elasticity of demand is a concept used to signify the relationship between changes in price and responsive changes in demand. In monopolization cases, the Court has said that the existence of market power can be determined by examining elasticities. *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 400 (1956) ("[t]he responsiveness of the sales of one product to price changes of the other").

[8]Frederic M. Sherer and David Ross, *Industrial Market Structure and Economic Performance* 17 (3d ed. 1990).

[9]Judge Posner has restated this definition in various opinions. *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 603 (7th Cir. 1997) (market power or monopoly power is "the power to raise price above cost without losing so many sales as to make the price rise unsustainable") *cert. denied*, 522 U.S. 1153 (1998); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 373 (7th Cir. 1986) (market power is "the power to raise prices without losing so much business that the price increase is unprofitable"), *cert. denied*, 480 U.S. 934 (1987); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 743, 745 (7th Cir. 1982) (market power is the "power to raise prices significantly above the competitive level without losing all of one's business").

V.

Under the rule of reason, or a market analysis of the circumstances presented in this case, the United States satisfied pleading requirements to withstand a motion to dismiss for failure to state an antitrust claim.

"Ordinarily, whether particular concerted activity violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason — that is, 'the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.' " *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (quoting *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977)). "Certain categories of agreements, however, have been held to be *per se* illegal, dispensing with the need for case-by-case evaluation." *Id.* "Such agreements are those that always or almost always tend to restrict competition and decrease output." *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (internal quotations and citations omitted). In general, "[a] market allocation agreement between competitors at the same market level is a classic *per se* antitrust violation." *Id.*

Given the binding precedent of this court, however, the United States may not rely on a *per se* theory of a Sherman Act violation in this case. *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 844-845 (9th Cir. 1996) ("application of the per se rule is not appropriate where the conduct in question occurred in another country").[10] Instead, we must examine

[10]This is not to say that I personally agree with this holding, but it nevertheless binds this panel in this judicial circuit. Like the United States, I am concerned that it runs counter to teachings of the Supreme Court that long ago held that international conduct such as price fixing and territorial allocations among horizontal competitors is *per se* unreasonable and hence *per se* unlawful under Section 1 of the Sherman Act. *Timken*, 341 U.S. at

whether there are intended and substantial effects in the United States — an inquiry that must be conducted through a market analysis and the rule of reason.[11]

A.

"We review *de novo* the district court's order of dismissal for failure to state a claim." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000). "A motion to dismiss for failure to state a claim may not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Both the district court and this Court are required to "presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party." *Id.* (citation omitted).

Here the district court ignored the Complaint's unanswered allegation that the Restrictive Clause is a horizontal non-compete agreement that amounts to a "naked restraint of trade." This was reversible error.

599, *aff'g Timken*, 83 F. Supp. 284, 310 (N.D. Ohio. 1949) ("In view of settled law and the facts, defendants' contention that the restraints were reasonable must be rejected as untenable. The restraints on commerce, here proved by abundant evidence, have been denounced as unreasonable per se."); *see also Nippon*, 109 F.3d at 7 ("[t]he instant case falls within [the per se illegal] rubric") and Areeda & Hovenkamp, *supra*, ¶ 273, at 379 (1997).

[11]The district court treated the domestic affairs of LSL as the backdrop of facts upon which to assess the 12(b)(6) motion and used the foreign affairs as the backdrop for the 12(b)(1) motion. I agree with the majority that this analysis improperly divided a course of conduct that is interrelated and comprised of an impetus in a foreign location and an alleged direct effects in a domestic one. The entire course of conduct must be analyzed to determine its effects and this can only be done with the rule of reason. A division of activities into domestic and foreign categories was improper.

The district court demanded a level of detail at the pleading stage that the Federal Rules do not require in antitrust cases involving conduct subject to the rule of reason. "The complaint need not set out the facts in detail; what is required is a 'short and plain statement of the claim showing that the pleader is entitled to relief.' " *Id.* at 984 (quoting Rule 8(a), Federal Rules of Civil Procedure). "[N]otice pleading is all that is required for a valid antitrust complaint[,]" and thus "the complaint need only 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983) (quoting *Conley*, 355 U.S. at 47), *accord Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980) ("There is no special rule requiring more factual specificity in antitrust pleadings.").

Moreover, in recent decisions the Supreme Court has been extremely emphatic on this issue. In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court made clear that "Rule 8(a)'s simplified pleading standard applies to *all civil actions*, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake." *Id.* at 513 (emphasis added).

In so proclaiming, the Court reaffirmed the teachings of *Leatherman v. Tarrant County Narcotics Intelligence and Coordinatioon Unit*, 507 U.S. 163 (1993):

> Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Conley* . . . we said in effect that the Rule meant what it said:
>
> > [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short

> and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.
>
> [355 U.S.] at 47 . . . (footnote omitted).

Id. at 168.

What the United States averred in its Complaint was all that is necessary under the teachings of *Swierkiewicz* and *Leatherman*. "Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " *Swierwiekicz*, 534 U.S. at 512 (quoting *Conley*, 355 U.S. at 47). The United States alleged that the Restrictive Clause, which "bars Hazera from ever competing to develop tomato seeds specifically adapted for North American climates," violates the Sherman Act because it was so "overbroad as to scope and unlimited as to time as to constitute a naked restraint of trade . . . ." The Complaint specified, in a short and plain statement, that "[t]he relevant market consists of seeds designed to grow fresh-market tomatoes in North America during the winter months."[12]

These averments gave the defendants notice that the government's Sherman Act claim would focus on the Restrictive Clause's effect on competition with respect to (1) seeds designed to grow fresh-market tomatoes (thus excluding tomatoes destined for processing), (2) tomatoes grown in

[12]Defendants do not deny that they have market power in the market for "seeds designed to grow fresh-market tomatoes in North America during the winter months," or in any part thereof. In particular, they do not deny the Complaint's allegation that they control a 70+% share of the relevant market, which must be taken as correct for Rule 12(b)(6) purposes. Rather, they appear to deny market power in a market of their own definition, not alleged by the United States — "the sale of long-shelf life tomato seeds for open-field cultivation in winter in the United States" — a market in which they insist there is no commerce. (LSL Br. at 15-17).

North America (thus including both the United States and Mexico), and (3) tomatoes that are grown in the winter months. The United States' Complaint was more than sufficient to put the defendants on fair notice of the claim and relevant market and enable them to frame responsive pleadings. *See, e.g., Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1086 (D.C. Cir. 1998) (alleged "market for English-language radio broadcast advertising in the Eastern Caribbean" was sufficient); *Quality Foods*, 711 F.2d at 996 ("United States market for frozen vegetables" was sufficient). The district court erred in finding fault with the product and geographical dimensions of the relevant market as set forth in the government's complaint.

B.

The court based its finding of fault with the product component of the relevant market on a premise of overbreadth: "by including seeds designed to grow in greenhouses, cherry tomato seeds, open-field seeds and seeds with long-shelf-life qualities," the Complaint's market included "different types of seeds [that] are not interchangeable."

By asserting that these seeds are not interchangeable, an assertion not made by LSL or Seminis, the court in effect participated in its own fact finding. The nature of Rule 12(b)(6) does not allow courts to reach "matters outside the pleading" without following the summary judgment procedures of Rule 56. *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998). ("[i]f matters outside the pleadings are considered, the motion to dismiss is to be treated as one for summary judgment").[13] The district court here did not invoke Rule 56 procedures, and was thus precluded from relying on matters outside the four corners of the United States'

[13]When a district court rules on a Rule 12(b)(1) motion, unlike a 12(b)(6) motion, it may consider affidavits or other extra-pleading evidence. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

Complaint. Moreover, the court may not make fact findings of a controverted matter when ruling on a Rule 12(b)(6) motion. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

Even if the court's unsupported supposition of overbreadth as to the product market definition was correct, the competitive analysis of the case would not change.[14] The Restrictive Clause, as interpreted by LSL, excludes Hazera from developing, marketing, or selling *any* kind of tomato seed that has *any* long shelf-life qualities, whether referred to as greenhouse, open-field, long shelf-life, extended shelf-life, or something else. The analysis would thus be the same in the smaller markets that the district court suggested as preferable. Aggregating these various tomato seed products was a reasonable convenience, and it certainly does not foreclose the United States' case.

But the court's error did not stop there. It committed reversible error also in finding fault with the geographical metes and bounds of the relevant market.

[14]*Tanaka v. University of Southern California*, 252 F.3d 1059 (9th Cir. 2001), on which the district court relied, differs from this case with respect to the sufficiency of the plaintiff's market, and anticompetitive effects allegations. In that case a former collegiate soccer player challenged an intercollegiate athletic association rule that discouraged her from an intraconference transfer to a single athletic program, but she apparently did not even attempt to allege geographic or product markets on the basis of any economic facts. Instead, she based her allegations simply on her own subjective personal preferences: she alleged that "the relevant [geographic] market is Los Angeles because she wanted to be close to her family," *id.* at 1063 (internal quotations and brackets omitted), and that the relevant product market was UCLA because of her "strictly personal preference" that she wanted to play for UCLA's soccer team. *Id.* These market allegations were obviously defective, and Tanaka "failed to allege that the transfer rule has had significant anticompetitive effects within a relevant market, however defined." *Id.* at 1064.

C.

As to the geographic scope of the relevant market, the crux of the district court's objection to the Complaint was also premised on overbreadth, as it reasoned: "open field winter tomatoes can only potentially be grown in Mexico and some Southern U.S. States" rather than throughout North America. The district court's approach misapprehends antitrust law dealing with the geographic market definition.

If Hazera was excluded with respect to all of North America, it necessarily was excluded with respect to Mexico and the southern U.S. States. And if all the relevant tomatoes were grown in those areas, then a market consisting of those areas would be equivalent, for purposes of this case, to a market encompassing all of North America, because it would include precisely the same tomatoes.

In any event, neither the district court nor the Appellees have cited any case that dismissed a complaint because of an allegedly *overbroad* market definition. The cases cited were dismissals in which the market was defined too narrowly. My own research has not unearthed any authority supporting the district court's decision in this respect.[15]

[15]Rather, this case resembles one Justice Holmes described concerning the product and geographic scope of a domestic meat packing monopoly in 1905: "The scheme alleged is so vast that it presents a new problem in pleading . . . . Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place." *Swift & Co. v. United States*, 196 U.S. 375, 395 (1905). Like Justice Holmes, I conclude here that

> the scheme as a whole seems to . . . be within the reach of the law. The constituent elements . . . are enough to give the scheme a body and, for all that we can say, to accomplish it. . . . Although the combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote, or merely probable . . . .

Id. at 396-397.

In a footnote, the court went further, reasoning that because tomato seeds are designed for microclimates, "[i]t seems to the Court that separate relevant markets exist for each growing region that requires a distinct seed variety." But Hazera was excluded from each of the court's suggested microclimate markets, and its exclusion from each eliminated a potent force for enhanced competition. Because the likely anticompetitive effect of the Restrictive Clause was basically the same for all the relevant microclimate markets, treating them as a single aggregate market cannot be a valid basis for dismissing the United States' Complaint.

In addition, the district court erred in holding that every microclimate for different tomato seeds is a separate market. This approach assumes, without logical underpinning or case law support, that any substitution had to occur at the level of the farmer when selecting seeds. The Complaint placed seeds for different microclimates in the same market because the tomatoes grown in the different microclimates compete at the level of grocery store shelves. It is the grocery store-level competition of tomatoes, not the farmers' selection of seeds with which to grow them, that goes to the heart of the United States' Complaint and constitutes the geographic contours of the market.

* * * * *

For all the foregoing reasons I would reverse the judgment of the district court that determined that there was no subject matter jurisdiction under Rule 12(b)(1) and that the Complaint failed to state a claim for which relief could be granted under Rule 12(b)(6).

With respect, I dissent.