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

REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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Introduction

This case challenges the legality under Section 1 of the Sherman Act of a territorial allocation created by a private agreement in 1987. ER 80.[1] The United States sued because that agreement ("Restrictive Clause") prevents Hazera, a major and innovative rival of LSL, from *ever* (1) selling currently existing or future long shelf-life tomato seeds to growers in the United States, 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 Restrictive Clause thereby prevents competition to provide millions of United States consumers with superior fresh-market winter tomatoes.

While defendants say that the case involves only "foreign" conduct in seeds (LSLBr. 4-5),[2] the only "conduct" at issue here is the Restrictive Clause, a restraint

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[1] Neither the fact that the agreement (which apparently was executed in New York and contains New York and Israel forum selection provisions, ER 81 and Addendum) was incorporated in an Israeli arbitration award in 1992, nor the fact that an Israeli court confirmed that award in 1996, matters. The only Sherman Act violation alleged by the United States is the Restrictive Clause. ER 12 ¶ 42. Moreover, as LSL recently told this Court, in Israel "converting the arbitration decision into a judgment is a virtually automatic process." LSL Reply to United States of America's Opposition to Stay Appeal at 3 (October 1, 2002). The Israel Competition Authority says that the Restrictive Clause "prima facie violate[s]" Israeli antitrust laws and is "illegal and void, notwithstanding . . . any judicial approval of that understanding or agreement." ER 195-96.

[2] The brief for appellees LSL Biotechnologies, Inc. and LSL Plantscience LLC (collectively "LSL") is cited as "LSLBr." Appellee Seminis Vegetable Seeds,

aimed at United States farmers and consumers of tomatoes. The purpose of LSL joining with Hazera to develop long shelf-life seeds was to satisfy United States consumers' tastes for tomatoes. ER 3 ¶ 4, ER 7 ¶ 20, ER 161 ¶ 16. Defendants' own documents confirm that United States consumer demand for fresh-market winter tomatoes drives the long shelf-life seed business. ER 130; *see also* ER 161 ¶ 16. Tomatoes and tomato seeds are different things, but demand for the seeds is entirely derivative of the United States consumer demand for the tomatoes, and the main reason for creating long shelf-life tomatoes is to enable them to reach distant markets in the United States without spoiling.[3]

The district court rejected defendants' exclusively "foreign" characterization of the case when it determined that the complaint alleged both domestic and

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Inc. joins LSL's brief. The United States' opening brief is cited as "USBr."

[3] Defendants' assertions that LSL does not grow tomatoes; that most (or even all) of defendants' conduct occurred outside the United States; and that most long shelf-life seeds presently are sold and planted in Mexico (LSLBr. 5, 13-14, 18), are relevant only to whether the FTAIA, 15 U.S.C. 6a, applies to this case in the first place. They are legally irrelevant to whether jurisdiction exists under the statute because the key inquiry (as it also is under the traditional federal common law test reiterated in *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 796 (1993) ("*Hartford*")) is whether the *restraint* at issue has a sufficient *effect* on United States commerce, regardless of the nature of defendants' business, regardless of where the restraint is imposed, and regardless of where defendants' conduct occurs. *See United States v. Nippon Paper Industries Co.*, 109 F.3d 1, 9 (1st Cir. 1997) (antitrust laws apply to "wholly foreign conduct which has an intended and substantial effect in the United States").

foreign conduct. ER 384. It dismissed allegations regarding the former under Rule 12(b)(6) and allegations regarding the latter under Rule 12(b)(1). The United States' opening brief showed that these rulings are unsound because they rest on significant legal errors. As shown below, defendants' defense of those rulings is also unsound. On behalf of United States consumers, the United States should have an opportunity to develop evidence to prove its claims.

ARGUMENT

I. The District Court's Dismissal Under Rule 12(b)(6) Was Error

The district court dismissed the domestic part of the complaint on the ground that it defined an overbroad market. ER 384-87. The United States showed in its opening brief (at 16-24) that this ruling is wrong for three reasons. First, the complaint alternatively alleged a "naked restraint" unlawful *per se* under Section 1 of the Sherman Act, for which no market at all need be pled. Second, the complaint satisfied Fed. R. Civ. P. 8(a)'s requirement of a "short and plain statement of the claim," and no more detail was required.[4] Third, the supposed overbreadth has no significance to the substantive antitrust inquiry in this case and

[4] In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002), the Supreme Court held unanimously that under Rule 8(a), a short and plain statement that gives the defendant fair notice of the plaintiff's claims will survive a motion to dismiss. "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions," but the Court did not identify antitrust as an exception. *Id.* at 513.

so is no basis for dismissing the complaint.[5]

Defendants now argue: (1) that the United States never alleged a *per se* offense, (2) that even if it did, such an offense is barred as a matter of law, and (3) that in any event the district court was right (LSLBr. 46-53). These arguments are all unsound.

1. Paragraph 6 of the complaint plainly alleges that the Restrictive Clause is "a naked restraint of trade in violation of Section 1 of the Sherman Act." ER 4 ¶ 6. To declare such a territorial restraint to be a "naked restraint" is equivalent to declaring it to be *per se* illegal. *E.g.*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990) (*per curiam*) ("This Court has reiterated time and time again that '[h]orizontal territorial limitations . . . are *naked restraints of trade* with no purpose except stifling of competition.' Such limitations are *per se* violations of the Sherman Act.") (emphasis added, citation omitted). And as the district court rightly said, ER 383, litigation of a *per se* offense does not require market definition at all. We do not understand defendants to dispute these principles. They do argue that the "naked restraint" language of ¶ 6 serves only to "refute numerous defenses available in a rule of reason case" (LSLBr. 47 n.22), but that

[5] The district court also committed procedural error by improperly relying on unsupported factual assertions outside the complaint. USBr. 22-23.

language addresses whether such defenses are available at all, i.e., whether the restraint is *per se* illegal. Moreover, ¶ 7 of the complaint clearly alleged a rule of reason offense in the alternative. Defendants' reading would make one of these paragraphs redundant. To the extent that defendants suggest that the United States will not be able to prove its *per se* allegation (LSLBr. 47), the suggestion is premature and cannot justify a Rule 12(b)(6) dismissal of a well-pled *per se* violation.

2. Defendants' fallback argument that "per se analysis is never appropriate when considering conduct that has occurred outside the United States" (LSLBr. 48, citing *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 845 (9th Cir. 1996) ("*Sammi*")) is also wrong. First, *Sammi* deals exclusively with foreign conduct, but the district court's Rule 12(b)(6) ruling expressly dealt with *domestic* conduct. Indeed, its entire discussion of the United States' supposed failure properly to define the market comes under the heading: "IV. DOMESTIC CONDUCT." ER 384. Thus, the district court did not accept defendants' position that "all the relevant conduct" occurred outside the United States (LSLBr. 48) but found instead that "the complaint concerns both foreign and domestic conduct by Defendants." ER 384.

Moreover, defendants misapprehend *Sammi*'s holding. The Supreme Court

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 Roller Bearing Co. v. United States,* 341 U.S. 593 (1951). The United States has long enforced this *per se* law — both civilly and criminally — against international cartels that injure United States consumers. *E.g.*, *Nippon Paper*, *supra*. *Sammi* neither challenged this well-established law nor hindered the United States' law enforcement efforts pursuant to it. Rather, *Sammi* stands for a more modest proposition: since a foreign restraint is within the jurisdictional reach of the Sherman Act only if it was meant to have, and did have, some substantial impact in the United States, courts should not assume that just because a foreign restraint is *per se* anticompetitive, the restraint necessarily has an intended and substantial effect on the United States. *See* 82 F.3d at 845; 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273b (2d ed. 2000). As we have already shown, however (USBr. 25-29), the restraint in this case meets those requirements.

3. The United States also alleged in the alternative (ER 4 ¶ 7) that the Restrictive Clause is unlawful under rule of reason analysis. That analysis requires the pleading of a relevant product and geographic market, and the complaint did so. ER 10 ¶ 33. The district court's rejection of this market as overbroad rests

largely on a failure to understand the possible significance of market definition in this case. Market definition is not an end in itself: it is a tool for use in analyzing the competitive effect of challenged conduct. The question in the case is whether the undisputed exclusion of a major competitor unreasonably restricts competition. Defendants make no serious attempt to explain why a determination of the precise contours of the market would help in answering that question.[6] In any event, the alternative market definitions mentioned by the district court would not materially affect the competitive analysis and adverse consequences of the exclusionary conduct.[7] USBr. 18-24.

Rather than come to grips with the United States' argument, defendants offer only a collection of the district court's remarks without any effort to show why

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[6] Defendants' attempt to invoke the FTAIA on the subject of market definition (LSLBr. 53) is erroneous because the district court considered market definition only as it applied to "domestic conduct" for purposes of Rule 12(b)(6), not Rule 12(b)(1). The district court did not consider the "domestic" allegations of the complaint to have any jurisdictional problem.

[7] 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," ER 10 ¶ 33, 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, ER 10 ¶ 34, which must be taken as correct for Rule 12(b)(6) purposes. Rather, they appear to deny market power in a contrived market of their own definition — "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 (LSLBr. 15-17).

those remarks make economic/legal sense in this case (LSLBr. 51-52). This avoidance is not surprising, in light of the fact that defendants never argued below that the market alleged was overbroad and instead argued a very different point — recycled in slightly different form here (LSLBr. 29) — that it is always legal to agree to eliminate just one competitor.[8] Defendants' contention that courts "grant motions to dismiss based on inadequate market definitions" (LSLBr. 52) misses the point that they do so only when unsupportable market allegations are used to establish a necessary element of the offense. Defendants' five cited cases dismissed complaints that appeared to define markets too *narrowly*, thus attempting to create a false impression of market power. Neither the district court nor the defendants have contended that the market alleged in this case may create a false impression of market power. Defendants cite no case that dismissed a complaint because of an allegedly *overbroad* market definition.

II. The District Court's Dismissal Under Rule 12(b)(1) Was Error

[8] The district court did not accept this argument, for "the elimination of a single competitor may violate section 1 if it harms competition." *E.W. French & Sons, Inc. v. General Portland, Inc.*, 885 F.2d 1392, 1401 (9th Cir. 1989). *Accord Caribbean Broad. System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998); *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 978-79 (8th Cir. 1981). The complaint, which must be taken as true, amply explained how harm to competition results from the exclusion of Hazera. ER 3 ¶ 3, ER 11 ¶ 35, ER 12 ¶ 39.

The United States showed in its opening brief that its complaint and supplemental material satisfied the common law standard for subject matter jurisdiction as set forth in *Hartford*, which the FTAIA codified in slightly different words; and that even if the FTAIA is read as substantively changing the prior law, the United States sufficiently alleged that the Restrictive Clause has a "direct" effect on United States commerce. But the United States also explained (USBr. 15-16, 40-42) that regardless of how the FTAIA is interpreted, the complaint fully meets the FTAIA's "direct, substantial, and reasonably foreseeable" standard because it is properly analogous to the complaints in *Hartford* that the Supreme Court unanimously determined met FTAIA standards.

A. The Effects on United States Commerce In This Case Parallel Those That Met FTAIA Standards in *Hartford*

The Supreme Court said in *Hartford* that the alleged restraint imposed by the foreign reinsurers "plainly meets its [FTAIA's] requirements," 509 U.S. at 796 n.23. The Restrictive Clause therefore also plainly meets FTAIA requirements so long as it is properly analogous to the restraint in *Hartford*. It is, and this Court need go no further to reverse.

The foreign conduct of the London-based reinsurers that the Court found sufficient for jurisdiction under the FTAIA was that they conspired to refuse new

reinsurance, or otherwise to "withhold reinsurance," *id.* at 776-77, which had the effect of "eliminating" or making "almost entirely unavailable" (*id.* at 795) certain kinds of *primary* insurance in the United States. The Court therefore accepted that a restraint outside the United States satisfied the FTAIA's jurisdictional standard when (1) a restraint on one product outside the United States (London-based reinsurance) affected commerce in a related product in the United States (primary insurance),[9] and (2) the restraint made the affected product unavailable in the United States.

The foreign conduct in this case likewise involves a restraint outside the United States on one product — long shelf-life tomato seeds in Mexico — that affects commerce in a related product in the United States — tomatoes — and makes the affected product (tomatoes grown from Hazera seeds) unavailable in the United States. The victims of the restraint are United States purchasers of tomatoes, just as the victims in *Hartford* were United States purchasers of primary

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[9] *Den Norske Stats Oljeselskap AS v. Heeremac VOF*, 241 F.3d 420, 426 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002), likewise supports the proposition that a restraint on one product — heavy-lift barge services, or tomato seeds — can satisfy the FTAIA requirement of "direct" by affecting a different, but closely related product — oil, or tomatoes. Defendants' attempt to explain away the case as involving domestic conduct (LSLBr. 31-33) misses this point, but in any event the Fifth Circuit stated squarely that "[t]he conduct of these defendants is foreign conduct." *Id.*

insurance. In fact, the effect on United States commerce is even more direct than in *Hartford* because tomato seeds and tomatoes are so closely related as to share the same genes. *See* ER 158 ¶ 8 (tomato seed "is not just an input, but rather is the organic matter, the genetic material, that dictates what will grow"). Thus, the present case parallels *Hartford*; the FTAIA requirements similarly are met; and the district court order should be reversed.

B. The United States Satisfied the Traditional Standard for Jurisdiction Over Foreign Conduct, Which the FTAIA Codified in Slightly Different Words

1. In *Hartford*, the Supreme Court unanimously held, several years *after* enactment of the FTAIA, 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. at 796. The United States submitted evidence, ER 162 ¶ 18, and defendants do not appear to deny, that the Restrictive Clause was intended to affect United States commerce by keeping Hazera seeds, and the tomatoes grown from Hazera seeds, out of the United States. The United States also alleged that the Restrictive Clause substantially affects United States commerce by making less likely the availability to United States consumers of better-tasting fresh-market tomatoes in the winter and by affecting the $250 million/year trade of winter tomatoes from Mexico. The United States

therefore established jurisdiction under the common law standard.

Defendants contend that the effect of the Restrictive Clause cannot be substantial here because the Hazera seeds subject to the restraint are "a mere input to another good ultimately intended for importation into the United States" (LSLBr. 26-28). This position is wrong in several respects. First, as explained previously, *Hartford* stands for the proposition that a jurisdictionally sufficient effect can be created by a restraint abroad on product "A" that affects closely related product "B" in the United States. It does not matter whether "A" can be characterized as an "input" into "B." Second, tomato seeds have no use other than growing tomatoes, so the connection between the "input" and "another good" could not be closer. Third, defendants' hypotheticals (LSLBr. 27) are inapposite because the Restrictive Clause does not merely affect the price of tomatoes in the United States; the Clause *totally prevents* the affected product — better quality tomatoes grown from currently existing or to be developed Hazera seeds — from entering the United States.[10]

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[10] Defendants also repeat the district court's aside that the restraint's effect on the United States price of winter tomatoes imported from Mexico is not substantial because the price of the seed is less than one percent of the price of such tomatoes (LSLBr. 25-26). This is unresponsive to the United States' argument that even a small increase in the price of tomatoes (or, conversely, a decrease in price that would result from increased competition), when applied to an annual market of $250 million, is substantial, and would be considered more than

Defendants' reliance on *Alcoa*, *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd*, 299 F.3d 281 (4th Cir. 2002), and the Areeda and Hovenkamp treatise (LSLBr. 26-28), is misplaced. The quoted passages from *Alcoa* and *Antitrust Law* refer to restraints made abroad that are "not intended" to affect United States commerce (and that have far more attenuated effects on United States commerce). But the Restrictive Clause *was* intended to affect United States commerce by keeping Hazera seeds and tomatoes out of the United States. ER 161-62 ¶ 18 ("LSL included [the Clause] to prevent Hazera from competing in or affecting in any way the markets for tomato seeds and tomatoes in North America"). The citation to *Dee-K* is misleading because the plaintiff there argued that the *domestic* standard for jurisdiction should apply as set forth in *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980), not the *Hartford* standard.

2. In *Hartford*, the Supreme Court found unanimously that it is "unclear . . . whether the [FTAIA]'s 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it." 509 U.S. 797 n.23. Given this controlling finding, under settled rules of statutory construction the FTAIA cannot be read as changing the pre-existing common law and instead should be

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"substantial" for establishing interstate commerce in cases of "domestic conduct." USBr. 29.

read as codifying it. USBr. 30-35.[11]

Defendants first argue that the pre-existing common law standard for jurisdiction was confused (LSLBr. 39-40 & n.19). But the Supreme Court did not see this supposed confusion when it pronounced the "well established" common law standard: "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford*, 509 U.S. at 796.

Defendants fare no better arguing that construing the FTAIA as a codification of the pre-existing law would read the word "direct" out of the statute (LSLBr. 40). The concept of remoteness always was present in the common law test for jurisdiction. USBr. 31-32. Indeed, defendants themselves acknowledge this reality when they discuss Judge Hand's opinion in *Alcoa* (LSLBr. 26-27). No separate *test* for directness was necessary because a restraint that is intended to affect United States commerce and in fact does have a substantial effect would never be considered too remote. By adding the word "direct," the FTAIA merely made explicit what had been implicit, but did not change the substance. The

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[11] Therefore, even if *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988) could be read to say that the FTAIA significantly changed the common law (LSLBr. 38 n.17), it is trumped on this point by the Supreme Court's unanimous, differing view in *Hartford* five years later.

common law standard thus incorporates the concept of directness, and when the United States met this standard it necessarily met the directness requirement of the FTAIA. Similarly, when the district court treated the FTAIA as changing the common law standard and imposed a more stringent jurisdictional test than is required by the common law as stated in *Hartford*, it erred and must be reversed.

3. Defendants argue that the Restrictive Clause's effect on United States commerce is speculative because neither Hazera nor anyone else has created a long shelf-life seed suitable for large scale winter tomato cultivation *in the United States* (LSLBr. 17-18, 30-31). This argument is misplaced and legally wrong.

Defendants' argument is misplaced because the district court treated the bar on Hazera selling seeds *in the United States* as "domestic conduct" not subject to *Hartford* or the FTAIA. The "foreign conduct" alleged, for which an effect on United States commerce must be shown, is the bar on Hazera selling long shelf-life seeds to Mexican growers who would export the bulk of the resulting tomatoes to the United States. There is nothing speculative about the effect of that bar on United States commerce, because it is undisputed that Hazera already has "extended shelf-life" seeds suitable for winter cultivation in Mexico. ER 159-167

¶¶ 10, 15, 19, 27.[12]

If defendants' speculativeness argument were directed at the "domestic conduct" part of the case, it would fail because the domestic anticompetitive effects of the Restrictive Clause are sufficient to establish a Sherman Act violation. In *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001), the *en banc* court affirmed Sherman Act liability for efforts to "squash nascent, albeit unproven, competitors" offering "merely *potential* substitutes" for an entrenched monopoly product. *Id.* at 79 (emphasis added). Moreover, restraints eliminating only potential competition have been held to violate the antitrust laws, *see Yamaha Motor Co., supra*, 657 F.2d at 978-79, as have mergers eliminating competition to develop new technologies, *FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1504-06 (D.C. Cir. 1986). The United States alleged that Hazera is a potential seller of long shelf-life seeds in the United States, ER 3 ¶ 3, ER 12 ¶¶ 39, 40, ER 162-167 ¶¶ 20-27, and the very existence of the Restrictive Clause confirms it. *See United States v. Sargent Elec. Co.*, 785 F.2d 1123, 1127 (3d Cir. 1986) ("very existence" of a horizontal agreement "tends to show that the parties to it are

[12] Defendants further assert that Hazera has no "non-infringing" long shelf-life tomato seeds (LSLBr. 17), but Hazera takes the position that its "extended shelf-life" seeds are not infringing, ER 11 ¶ 38, ER 164 ¶ 23, ER 165 ¶ 25, and the scope of LSL's intellectual property rights is in dispute in Israel.

at least potential competitors. If they were not, there would be no point to such an agreement.").

C. The United States' Allegations In Any Event Showed A "Direct" Effect

Even if the FTAIA is read as substantively changing the pre-existing jurisdictional standard, 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, which is proximate cause.[13] The Restrictive Clause's bar against Hazera selling long shelf-life seeds to growers in Mexico is a proximate cause of the effect in the United States: no better-tasting winter tomatoes to be imported, and perhaps higher prices on those that are imported. *See* USBr. 35-42.

Defendants argue that the word "direct" in the FTAIA unambiguously (LSLBr. 38-39) means proceeding from one point to another "without deviation or interruption" (LSLBr. 21); that under this interpretation the United States did not allege a direct effect on United States commerce; and that proximate cause is not a proper interpretation. They are wrong on all counts.

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[13] Defendants conceded, for present purposes, that the effect on United States commerce was "reasonably foreseeable." USBr. 13 & n.8. As explained at pp. 12-14 above and at USBr. 27-29, the effect was also "substantial."

1. Few statutes of which we are aware are more ambiguous and less susceptible to a "plain meaning" analysis than the FTAIA. In *Hartford*, the Supreme Court found it "unclear" how the FTAIA might apply outside the context of an export transaction. 509 U.S. at 797 n.23. The Court therefore did not know how to apply the FTAIA to the vast majority of foreign conduct that might affect United States commerce. Courts of appeals, with obvious understatement, have called the statute "inelegantly phrased" and avoided reliance on it in whole or in part. *Nippon Paper*, *supra*, 109 F.3d at 4; *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000).

2. Defendants' definition of "direct" as "without deviation or interruption" is arbitrary and has no basis in the FTAIA. It is so narrow as to render "direct" largely meaningless, because the core of foreign conduct affecting the United States "without deviation or interruption" is conduct involving import commerce. But the FTAIA expressly exempts import commerce from its jurisdictional limitation. 15 U.S.C. 6a (excluding from Sherman Act conduct involving trade or commerce "other than import trade or import commerce"). And so defendants' definition of "direct" may preclude *any* jurisdiction over foreign commerce.

Moreover, to the extent that conduct involving foreign commerce other than import commerce meets defendants' "direct" definition, it still would not promote

certainty or uniformity (LSLBr. 24). Instead, it would require courts to engage in hairsplitting over precisely how much time or geographic distance must come between a restraint and an effect in the United States for there to be a "deviation or interruption." This will particularly burden government criminal prosecutions of international cartels, for the defendants' proposed definition is a virtual invitation to international cartels to structure their activities to create such complexities and so to discourage prosecution. Defendants' attempt to justify their definition by reliance on the Foreign Sovereign Immunities Act (LSLBr. 21-23) is groundless. Nothing in the legislative history of the FTAIA attempted to draw from the FSIA. Rather, the FTAIA legislative history looked to Sherman Act cases that did or did not use the word "direct." USBr. 34-35 & nn. 21, 22.

3. By contrast to defendants' arbitrary definition, an interpretation of "direct" as invoking proximate cause relates to the surrounding words in the FTAIA, particularly "reasonably foreseeable." That definition gives "direct" a grounding in a long tradition of tort law that courts know how to apply, and it allows courts to consider public policy considerations where Congress intended that courts make determinations of jurisdiction on a case-by-case basis.

While defendants claim that interpreting "direct" as proximate cause would be redundant of other statutory terms (LSLBr. 23), they are mistaken. Proximate

cause obviously is not redundant of the term "substantial"; they are distinct concepts, because "substantial" deals with impact or quantity, not causation. Nor is proximate cause redundant of "reasonably foreseeable": an effect can be reasonably foreseeable without having been proximately caused by an event. Thus, it might be reasonably foreseeable that driving too fast would cause an automobile accident, but speed might not be the proximate cause of the accident if the negligence of other drivers or weather/road conditions are involved. Defendants themselves 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 FTAIA therefore 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. Interpreting "direct" as meaning proximate cause therefore does not make "direct" meaningless or surplusage.

Finally, there is also no merit to defendants' argument (LSLBr. 34), based on *Den Norske*, that the complaint does not comply with the FTAIA's additional requirement that the restraint's "effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2). This argument is irrelevant because that holding of *Den Norske* turned on the particular injury alleged by a private plaintiff. But a case

brought by the United States never is based on a particular plaintiff's injury. When "foreign conduct" violates the Sherman Act, the United States can sue if there is a jurisdictionally sufficient effect on United States commerce.

In any event, the main effect of the "foreign conduct" here is not on "tomato prices in the United States" (LSLBr. 34). Instead, the Restrictive Clause bars Hazera, a major competitor and seed innovator, from selling long shelf-life seeds to Mexican farmers, so that no resulting tomatoes are shipped to United States consumers. Unlike *Den Norske*, the injury to *consumers in the United States* arises directly from the anticompetitive effect *in the United States*.

III. The International Comity and *Noerr-Pennington* Doctrines Are Inapplicable

The district court's opinion does not mention comity or *Noerr-Pennington* (LSLBr. 41-47). Defendants' attempt to invoke them is unsound for several reasons.

A. Comity

While an appellee is entitled to defend the judgment on any ground supported by the record, comity principles cannot save this judgment. Comity applies only in the international arena, and therefore does not apply to the district court's ruling on "domestic conduct." Since the district court's errors on the

domestic side of this case require reversal of the judgment by themselves, international comity cannot defend the judgment.

Second, comity cannot bar enforcement actions by the United States. "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the Southern Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987). But "courts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own." *Id.* at 552 (Blackmun, J., concurring in part and dissenting in part). Therefore, when the Executive Branch, which manages foreign relations, determines that the interests of United States law enforcement outweigh any possible detriment to our foreign relations, and accordingly decides to file a case, separation of powers principles, as well as the Judiciary's own recognition of its limitations in matters of foreign affairs, point to the conclusion that an "American court cannot refuse to enforce a law its political branches have already determined is desirable and necessary." *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 949 (D.C. Cir. 1984) (emphasis omitted). In *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C.), *aff'd on other grounds*, 908 F.2d 981 (D.C. Cir. 1990), the court held squarely that comity concerns "are not a factor here. . . . [where] the

United States has decided to go ahead with the case." *See also Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) (higher concern about the foreign implications of litigation in private suits, where "there is no opportunity for the executive branch to weigh the foreign relations impact").[14]

Third, nothing in the record (as opposed to defendants' speculation, LSLBr. 44) suggests that adjudicating this case would interfere with any interests or actions of the government of Israel. To the contrary, the Israel Antitrust Authority deferred its own investigation into the LSL-Hazera agreements "until the results of your [United States'] investigation are clarified." ER 195. The Authority also thinks that this case would neither undermine any ongoing judicial proceeding in Israel nor "impede any enforcement activity on our behalf against those agreements should we decide to pursue it." ER 196. Since the outset of this case more than two years ago, the government of Israel never has complained that its interests somehow might be adversely affected.

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[14] For these reasons, this Court has held the analogous act of state doctrine to be inapplicable in government enforcement actions. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 409 (9th Cir. 1983). And in *United States v. Alvarez-Machain*, 504 U.S. 655, 669 & n.16 (1992), the Supreme Court rejected a criminal defendant's claim that the federal district court lacked jurisdiction over him because he had been forcibly abducted in Mexico and brought to the United States for trial in violation of international law. The Court concluded that international law principles or diplomatic concerns are "a matter for the Executive Branch" and do not negate jurisdiction.

Finally, even if comity analysis were appropriate, the *Timberlane* factors, 549 F.2d at 614, weigh heavily in favor of exercising jurisdiction:

- *The Degree of Conflict with Foreign Law or Policy*

According to this Court's most recent pronouncement, comity "is limited to cases in which 'there is in fact a true conflict between domestic and foreign law.'" *In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998) (quoting *Hartford*, 509 U.S. at 798).[15] But there is no conflict between United States and Israeli law. Defendants never have contended that Israeli law somehow *required* them to act in a way that violates the Sherman Act, and the Israel Antitrust Authority says that the Restrictive Clause may violate Israeli law. ER 196. And even if the Restrictive Clause ultimately is determined to be valid as a matter of Israeli contract or antitrust law, there would be no conflict because defendants could comply with both Israeli law and United States law by simply not attempting to enforce the Restrictive Clause in the United States.

- *The Nationality or Allegiance of the Parties and the Locations or Principal*

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[15] *Accord Nippon Paper, supra,* 109 F.3d at 8 (comity applies only "in those few cases in which the law of the foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible"); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998).

Places of Business of the Corporations

All the defendants have their principal places of business in the United States, and LSL receives its RIN-gene tomato seeds at its Arizona facility. ER 24. *Cf. In re Insurance Antitrust Litig.*, 938 F.2d 919, 933 (9th Cir. 1991) ("*Insurance Antitrust*") ("the interest of an American court in being able to judge claims against an American company is high"), *aff'd in part, rev'd in part* by *Hartford*.

- *The Extent to Which Enforcement by Either State Can Be Expected to Achieve Compliance*

The ongoing arbitration between LSL and Hazera in Israel is based on contract law and is not an antitrust enforcement action by Israel, whose Antitrust Authority has deferred to the United States' enforcement efforts. ER 195. This case therefore is necessary to ensure antitrust enforcement, and an order from the district court that enjoins the Restrictive Clause would allow Hazera to compete.

- *The Relative Significance of Effects on the United States as Compared With Those Elsewhere*

The Restrictive Clause keeps Hazera long shelf-life seeds, and the tomatoes that would be grown from those seeds, out of the United States, and therefore delays or makes less likely innovations that will allow United States consumers to enjoy better fresh-market winter tomatoes. USBr. 8, 10, 27-29; ER 162-63, 166. Nothing in the record shows any adverse effect in any foreign country.

- *The Extent to Which There is Explicit Purpose to Harm or Affect United States Commerce*

The purpose of the Restrictive Clause is to keep Hazera seeds, and the resulting tomatoes, out of the United States. USBr. 26-27; ER 162 ¶ 18. *Cf. Insurance Antitrust*, 938 F.2d at 934 (this factor "strongly weighs in favor of the exercise of jurisdiction").

- *The Foreseeability of the Effects on American Commerce*

Defendants conceded, for purposes of their motion to dismiss, that the effects of the Restrictive Clause on American commerce were reasonably foreseeable. USBr. 13 & n.8.

- *The Relative Importance to the Violations Charged of Conduct Within the United States Compared With Conduct Abroad*

The violation charged is the Restrictive Clause. The record does not indicate where the 1987 agreement that created the Clause was negotiated or executed. Although defendants assert, without citation, that the agreement was executed in Israel (LSLBr. 8 n.4), a participant in the negotiations testified in deposition that it was negotiated and executed in New York. *See* Addendum hereto. LSL also has threatened and attempted to enforce the Clause in the United States. ER 162 ¶ 19. By comparison, defendants' other conduct abroad is not the violation charged.

B. *Noerr-Pennington*

The undisputed facts — chiefly that the Restrictive Clause was created in a private contract and only years later was incorporated into a court judgment — make that doctrine inapplicable.

First, the United States does not challenge any LSL petitioning of the Israeli government, or any action of that government. Rather, the subject of this case is the Restrictive Clause of the LSL-Hazera agreement. It is analogous to *Columbia*

Steel Casting Co. v. Portland General Electric Co., 111 F.3d 1427 (9th Cir. 1996), a territorial allocation case where this Court rejected a *Noerr-Pennington* defense based on the public utility commission's after-the-fact approval of the allocation:

> Applying to an administrative agency for approval of an anticompetitive contract is not lobbying activity within the meaning of the Noerr-Pennington doctrine. In any case, PGE is not being held liable for filing the application that resulted in the 1972 Order. PGE is being held liable for agreeing with PP&L to replace competition with area monopolies in the Portland market.

Id. at 1446. Similarly, LSL's applications to Israeli arbitrators and courts for approval of the Restrictive Clause are not *Noerr-Pennington* protected activity, and LSL is not being held liable for the result of any litigation in Israel.[16]

Second, as Judge Posner has explained,

> [*Noerr-Pennington*] does not authorize anticompetitive *action* in advance of government's adopting the industry's anticompetitive proposal. The doctrine applies when such action is the consequence of legislation or other governmental action, not when it is the means for obtaining such action . . . . Otherwise every cartel could immunize itself from antitrust liability by the simple expedient of seeking governmental sanction for the cartel after it was up and going.

In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 789 (7th Cir.

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[16] Beyond this, passive government approval of a private restraint is insufficient to confer *Noerr-Pennington* immunity. *See A.D. Bedell Wholesale Co. v. Phillip Morris Inc.*, 263 F.3d 239, 251 (3d Cir. 2001). The Israeli court's 1996 confirmation of the 1992 arbitration award was passive, because according to LSL, in Israel "converting the arbitration decision into a judgment is a virtually automatic process." *See* Note 1, *supra*.

1999) (emphasis in original). LSL persuaded and/or coerced Hazera into an anticompetitive contract and only later sought to make the Restrictive Clause subject to judicial enforcement in Israel. And so *Noerr-Pennington* does not apply, or else any territorial allocation agreement could be immunized after-the-fact. *See also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (*Noerr-Pennington* inapplicable to standard-setting process of private association, although association's code routinely was adopted into state and local law); *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 882 n.6 (5th Cir. 1982) (*Noerr-Pennington* does not apply "simply because [defendants' lobbying] later resulted in [Indonesian] government action"), *vacated on other grounds*, 460 U.S. 1007 (1983).

CONCLUSION

For the foregoing reasons, and those set forth in the United States' opening brief, the district court's amended judgment should be reversed.

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Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 02-16472

I certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is

Proportionately spaced, has a typeface of 14 points or more and contains 6,867 words.

Dated: November 20, 2002

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STEVEN J. MINTZ

CERTIFICATE OF SERVICE

I, Steven J. Mintz, hereby certify that today, November 20, 2002, I caused two copies of the accompanying REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA to be served on the following by Federal Express:

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