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

BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 15 U.S.C. 4 and 28 U.S.C. 1331. The district court's amended judgment dismissed this action with prejudice. This Court's jurisdiction rests on 15 U.S.C. 29(a) and 28 U.S.C. 1291. The district court entered its amended judgment on May 23, 2002. A timely notice of appeal was filed on July 22, 2002. Fed. R. App. P. 4(a)(4)(A)(iv).

RELEVANT STATUTES

Section 1 of the Sherman Act, 15 U.S.C. 1, provides in pertinent 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 hereby declared to be illegal.

The Foreign Trade Antitrust Improvements Act, 15 U.S.C. 6a ("FTAIA"), provides:

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

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

ISSUES PRESENTED

The district court's dismissal of the United States' complaint for failure to state a claim (Fed. R. Civ. P. 12(b)(6)) and for lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)) presents three principal issues:

1. Whether the district court erred by dismissing the complaint under Rule 12(b)(6) on the ground that its geographic and product market definitions are too broad, where the United States alleged both a *per se* theory of liability and the presence of substantial anticompetitive effect in every market identified by the district court.
2. Whether the district court erred by dismissing the complaint under Rule 12(b)(1) on the basis of its conclusion that the FTAIA's jurisdictional requirements could not be satisifed by meeting the long-standing case law standard for jurisdiction as explicated by the Supreme Court.
3. Whether, in the alternative, the district court erred because a "direct, substantial, and reasonably foreseeable" effect on United States commerce under the FTAIA is alleged by the exclusion of a foreign company from

selling tomato seeds to farmers in Mexico so that the seeds can grow into tomatoes for export to the United States.

STATEMENT OF THE CASE

This case arises from a non-compete agreement (the "Restrictive Clause") between former joint venturers that prevents United States consumers of fresh-market winter tomatoes[1] from getting the benefit of competition from one of the joint venturers, Hazera Quality Seeds, Inc. Hazera, an Israeli company, is a world leader in the development and marketing of innovative and long shelf-life tomato seeds. The Restrictive Clause perpetually excludes Hazera from (1) selling seeds for fresh-market tomatoes that have long shelf-life qualities to growers in the United States; and (2) selling seeds to farmers in Mexico who would grow long shelf-life tomatoes primarily for shipment to the United States.

The United States filed its complaint on September 15, 2000, challenging the Restrictive Clause as a horizontal non-compete agreement that 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, 15 U.S.C. 1, *see* Excerpts of Record

[1] "Fresh-market" tomatoes means tomatoes that are picked and sold for consumption as fresh whole tomatoes, as opposed to tomatoes that are cooked, canned, or processed for ketchup, salsa, and other tomato-based products. "Winter" tomatoes means tomatoes that are sold when locally grown summer tomatoes are not available — roughly from September/October through May/June.

("ER") 4 (complaint ¶ 6), and in the alternative as an unreasonable restraint of trade, *id.* (complaint ¶ 7). Defendants, without answering, moved to dismiss on December 5, 2000, for want of subject matter jurisdiction and failure to state a claim. In support of their motion to dismiss for lack of subject matter jurisdiction, defendants submitted two declarations and additional materials. In response, the United States submitted a sworn declaration from the President of Hazera Seeds, Inc., a United States affiliate of Hazera; factual and statistical information about tomatoes and tomato imports from government publications; and a letter from the Israel Antitrust Authority.[2]

The district court held oral argument on July 9, 2001. On March 28, 2002, it granted defendants' motion and dismissed. ER 380-92.[3]

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

[3] To avoid any ambiguity about the finality of the March 28, 2002 order, the United States timely moved to amend the judgment to change the dismissal of the action to "with prejudice." Fed. R. Civ. P. 59(e). The district court granted the motion and entered the amended judgment on May 23, 2002. ER 393-95.

STATEMENT OF FACTS

A. The United States' Complaint

United States consumers spend more than $4 billion annually on fresh-market tomatoes. ER 3 ¶ 1. During the summer months, tomatoes are grown all over the United States and sold locally. During the rest of the year, however, fresh-market tomatoes grown in open fields for consumption in the United States are produced only in southern portions of the United States and in Mexico, and trucked to grocery stores and other outlets throughout the United States. *Id.*

Spoilage and taste are critical issues for winter tomatoes, which must be trucked from southern California, Florida, or Mexico to consumers in the northern United States. To prevent the tomatoes from rotting before they reach consumers, farmers either (1) pick the fruit while green and ripen/redden it with ethylene gas (a method that produces less-flavorful tomatoes), or (2) grow special breeds of longer shelf-life tomatoes that can be picked after they ripen on the vine, and still be trucked to outlets throughout the United States before they spoil. ER 3, 5, 6 ¶¶ 1, 14, 15.

In 1983, defendant LSL Biotechnologies, Inc. ("LSL") and Hazera formed a joint venture, in coordination with Hebrew University in Israel, to develop longer shelf-life tomatoes suited to United States consumers' tastes (i.e., large, plump, and

firm). *Id.* ¶¶ 4, 20.[4] The venture succeeded in developing commercially salable bioengineered tomatoes containing a ripening-inhibitor gene ("RIN" gene), and LSL subsequently obtained a patent covering tomatoes and tomato seeds that use the RIN gene. *Id.* ¶ 21. For the duration of the venture, Hazera and LSL allocated territories in which each could sell exclusively both tomato seeds that they developed cooperatively and tomato seeds that either party developed independently. LSL's exclusive territory included North America. *Id.* ¶ 19.

RIN-gene tomatoes have become popular in the United States, but the varieties developed by Hazera and LSL to date grow well only in Mexico. *Id.* ¶ 22. Therefore, most RIN-gene tomatoes are grown in Mexico and imported into the United States for winter consumption. Even RIN-gene tomatoes, however, do not taste the same as vine-ripened, summer-grown tomatoes. *Id.* ¶ 36.

LSL and Hazera later experienced a falling-out that led to litigation. The Restrictive Clause at issue here was part of an effort by LSL and Hazera to settle their disputes. The Restrictive Clause — in LSL's view — prohibits Hazera, after

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[4] The other defendants are Seminis Vegetable Seeds, Inc., which is the largest tomato seed company in the United States, and LSL PlantScience LLC. In 1998, LSL conveyed most of its tomato seed-related assets, including the Restrictive Clause, to LSL PlantScience. Seminis then purchased a 50 percent ownership stake in LSL PlantScience. The governance agreement for LSL PlantScience gives Seminis and LSL equal rights to require LSL PlantScience to enforce the Restrictive Clause against Hazera. ER 5, 9, 10 ¶¶ 10, 29, 30, 31.

the expiration of the LSL-Hazera contract, from *ever* competing against LSL on *any kind* of long shelf-life tomato:

> 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.[5]

Id. ¶¶ 23, 24. The LSL-Hazera contract expired on December 31, 1995. The Restrictive Clause therefore became effective years after the exchanges of information and joint development efforts by LSL and Hazera had concluded. *Id.* ¶¶ 4, 28.

Hazera is one of the world's leading tomato seed companies. It sells more seeds than any other company in many important tomato producing countries, including Spain, Italy, Israel, and Turkey. Hazera has developed improved varieties of tomatoes for different climates around the world and has been very successful in parts of Europe. *Id.* ¶¶ 3, 16. For the European and Mediterranean regions, Hazera has bred long shelf-life tomatoes by a traditional plant-breeding process. These tomatoes do not incorporate the RIN gene (and accordingly do not implicate LSL's patent rights) but instead have a thicker outer wall that slows

[5] Later still, LSL and Hazera had an arbitrator in Israel incorporate the Restrictive Clause into a stipulated arbitration order settling yet another lawsuit. An Israeli court judgment later confirmed that order. *Id.* ¶¶ 26, 27.

spoilage ("extended shelf-life" tomatoes). *Id.* ¶ 38.[6]

Hazera is one of the few firms with the experience and know-how to develop seeds that will allow United States and Mexican farmers to grow better fresh-market tomatoes for United States consumers during the winter months. *Id.* ¶¶ 37, 39. But for the Restrictive Clause, Hazera likely would be a significant competitor to defendants in North America. *Id.* ¶ 3. LSL has threatened to enforce the Restrictive Clause against Hazera, which has deterred Hazera from adapting its long shelf-life tomatoes designed for other countries to growing conditions in the United States and Mexico. *Id.* ¶¶ 5, 28.

B. Declarations and Supplemental Facts

1. The United States' declaration and other materials established the following pertinent facts:

The vast majority of the winter tomatoes that are grown in Mexico's export-oriented regions are shipped to the United States. ER 140.

"The purpose of both the LSL-Hebrew University agreement and the Hazera-LSL Seeds Production Agreement were [sic] to develop and market tomato

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[6] The term "long shelf-life" typically is used for both gassed green tomatoes and RIN-gene tomatoes. Hazera refers to its non-RIN-gene, thicker-walled tomato as "extended shelf-life," but the industry (as well as the district court) often uses "long shelf-life" to include both "long" and "extended" varieties.

varieties that would yield long shelf-life RIN gene tomatoes for United States consumers. . . . The concept of the cooperation was to develop a long shelf-life tomato variety to fulfill the strong demand in the United States for tomatoes outside the summer months." ER 161 (Schwarz Decl. ¶ 16). *See also* ER 130.

"Tomatoes having the RIN gene have certain drawbacks and limitations. RIN prevents a tomato from becoming fully red and may cause it to appear blotchy, with some spots green and others red. RIN also affects taste adversely. . . . Therefore, while there are excellent RIN gene tomato varieties, if the firmness issues can be resolved by other means, it is better to breed tomatoes without RIN." ER 159-160 (¶¶ 13-14).

Some Florida tomato growers have asked Hazera to develop new seed varieties designed to yield extended shelf-life tomatoes for Florida. Hazera has taken limited steps toward developing extended shelf-life seeds for Florida, *id.* ¶ 23, but LSL has taken the position that Hazera's efforts on behalf of Florida growers violate the Restrictive Clause. *Id.* ¶¶ 21-22. Hazera also has marketed "greenhouse" tomato seeds to distributors in the United States, and those seeds have been sold to growers in Mexico and California who have planted them in open fields. LSL has taken the position that Hazera's sales of "greenhouse" seeds violate the Restrictive Clause. *Id.* ¶ 20.

LSL sued Hazera in Florida federal court and threatened litigation on other occasions. *Id.* ¶ 19. Contract disputes between LSL and Hazera, including whether Hazera has violated the Restrictive Clause or other LSL-Hazera agreements, and the proper scope of the Clause, are the subject of ongoing "mediation" proceedings in Israel. ER 21-22 (Raviv-Berson Decl. ¶ 15).

Hazera "has specifically felt constrained to limit its activities because of the Non-Compete Amendment [Restrictive Clause]." ER 166 (Schwarz Decl. ¶ 26). But for the Restrictive Clause, Hazera "would have committed significant financial resources and its considerable experience and skill as a tomato breeder, to the development of non-RIN gene extended shelf-life tomato varieties for Florida growers that would have produced better-tasting winter tomatoes for consumers in the United States." *Id.* ¶¶ 21-22.

Despite the constraints imposed on it, Hazera has established offices in Mexico and California, each of which includes three agronomists, and is in the process of establishing operations in Florida. Hazera has rented farms and conducted field tests of tomatoes in southern California. *Id.* ¶ 25. "Hazera's extended shelf-life, non-RIN gene tomato varieties that have been successful in Greece are being crossed with other tomato varieties to develop seeds for California growers." *Id.* Similarly, "Hazera is now developing seeds for a winter

tomato variety for growers in Florida that we believe will yield tomatoes superior to both the gassed green tomatoes traditionally grown there and the RIN gene long shelf-life tomato varieties LSL sells in Mexico." *Id.* ¶ 23.

Other competitors "have been unwilling or unable to commit sufficient resources or talent to the development of either long shelf-life RIN gene tomatoes or extended shelf-life tomato varieties without ripening-inhibiting genes to meet the needs of growers in Mexico, California, and Florida." *Id.* ¶ 27.

Finally, the Israel Antitrust Authority has concluded that the non-compete provisions of the LSL-Hazera agreements "prima facie violate" Israeli antitrust laws and "under Israeli law the agreements are illegal and void, notwithstanding any other understanding or agreement between the parties or any judicial approval of that understanding or agreement. . . . We would therefore think that there is no conflict at all between the remedy sought by your agency [U.S. Department of Justice] and Israeli law." ER 195-96.[7]

2. LSL, joined by Seminis, submitted two declarations plus attachments. The first declaration, from an Israeli lawyer who has represented LSL in various matters, recites the background of LSL's involvement in research activities relating

[7] The Authority conducted only a preliminary investigation, deciding not to proceed further "until the results of your [the United States'] investigation are clarified." ER 195.

to long shelf-life tomatoes and the history, from LSL's perspective, of the legal disputes between LSL and Hazera. ER 15-22, Raviv-Berson Decl. The second declaration, from LSL's General Manager, describes how LSL's RIN-gene seeds are produced in Israel for LSL, shipped to LSL in Tucson, Arizona, and then re-shipped to growers in Mexico for planting in open fields. ER 23-26, Cocke Decl. The second declaration asserts, among other things, that LSL faces significant competition in Mexico from companies other than Hazera that offer long shelf-life tomato seeds, and that "[t]he cost of the seed used to grow the tomato is a very, very small fraction of the total cost incurred in growing and selling a tomato" so that "the cost of the tomato seed is less than 1% of the total retail price of the tomato in the United States." *Id.* ¶ 18.

C. District Court's Decision

The district court's March 28, 2002 opinion divides LSL and Seminis' alleged conduct into "domestic" and "foreign" parts, with the "domestic" part being the restraint on Hazera selling its seeds to growers in the United States and the "foreign" part being the restraint on Hazera selling seeds to growers in Mexico. ER 384. On domestic conduct, the court ruled that the complaint's market definition — "seeds designed to grow fresh market tomatoes in North America during the winter months" (ER 10 ¶ 33) — was overbroad, although LSL/Seminis

never made this claim. The court dismissed "as to the domestic conduct for failure to state a claim upon which relief can be granted." ER 387.

On "foreign conduct," the court dismissed for lack of jurisdiction under the FTAIA. It cited the Act's requirement that this conduct have a "direct, substantial, and reasonably foreseeable effect" on United States commerce. The district court did not, however, specifically address the phrase "reasonably foreseeable," which LSL/Seminis (for purposes of this motion) conceded was satisfied.[8] The court also did not address the term "substantial" except for three words. The court did not address what would constitute a substantial effect, and its finding of insubstantial effects refers only to effects on domestic tomato prices, ignoring the more significant effects on tomato quality. But the court held that the Restrictive Clause's effect on United States commerce was not "direct," as jurisdictionally required by the statute.

SUMMARY OF ARGUMENT

1. The district court erred under Rule 12(b)(6) in two respects. First, it simply ignored the complaint's unanswered allegation that the Restrictive Clause is a *per se* antitrust violation. A *per se* theory, as the district court said, does not

[8] Reply of Defendants LSL Biotechnologies, Inc. and LSL Plantscience LLC in Support of Their Motion to Dismiss at 5 n.4 (March 20, 2001).

require *any* market definition and so may not be dismissed on the basis of an improper market definition.

Second, the court demanded more detail concerning market definition than the Federal Rules require at the pleading stage: a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The complaint met that standard.

The district court's reasoning, based in part on its own assertions of fact without any basis in the record, does not support dismissal. The complaint's geographic and product market definitions are appropriate, or at worst harmlessly overbroad. The district court erred by treating market delineation as an end in itself without considering how the scope of the relevant market might matter. In this case, determining the precise meets and bounds of the market does not help analyze the competitive effect of the challenged conduct. The issue is whether the undisputed exclusion of a major competitor, by agreement, unreasonably restricts competition.

2. The district court erred under Rule 12(b)(1) by misinterpreting the FTAIA's phrase "direct, substantial and reasonably foreseeable" as a diminution of the reach of the Sherman Act, which already was well-established by case law. Rather, the FTAIA simply codified the pre-existing common law test for

jurisdiction, which is "that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993). The United States' complaint and supplemental evidence readily satisfied the *Hartford Fire* standard by alleging both that the purpose of the Restrictive Clause — indeed, the purpose of the entire LSL-Hazera relationship — was to affect United States commerce and that the Restrictive Clause deprives United States consumers of better tasting winter tomatoes and adversely affects the roughly $250 million annual trade in winter tomatoes imported from Mexico.

Even if the FTAIA is read as changing the pre-existing jurisdictional standard, the United States sufficiently alleged a "direct" effect on United States commerce under the most useful and sensible interpretation of that term. The allegation was that the Restrictive Clause blocks the sale of seeds that are expressly designed to grow directly into tomatoes for United States consumption. "Direct," in this context, invokes the concept of proximate causation. The United States sufficiently alleged a proximate cause relationship between the Restrictive Clause and its effect on United States commerce.

Regardless of the precise defintion of "direct," however, the district court's formalistic distinction between tomato seeds and tomatoes is fundamentally

inconsistent with *Hartford Fire*. The Supreme Court stated unambiguously that the FTAIA would be satisfied by a restraint on a product in the United Kingdom (reinsurance) that adversely affected a related product in the United States (primary insurance). Since the district court itself acknowledged the obvious — that tomato seeds and tomatoes are closely related — a restraint on tomato seeds in Mexico equally can have a "direct" effect on tomatoes in the United States.

ARGUMENT

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

1. This Court "review[s] *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). This Court therefore applies the same standard as the district court: "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).

2. The district court wrongly ignored the complaint's unanswered allegation that the Restrictive Clause is a horizontal non-compete agreement that

amounts to a "naked restraint of trade," ER 4 ¶ 6.[9] The complaint thus alleged a *per se* antitrust violation. *See, e.g.*, *NYNEX Corp v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (horizontal market division is "unlawful per se"); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (*per curiam*); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) ("One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.").

The district court's order correctly stated that a plaintiff must allege a relevant market only if "the restraint is *not* alleged to be a per se violation," ER 383 (emphasis added). *See generally Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (*per se* practices "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use," and no "economic investigation" into the industry is required). But the court then failed to apply this rule to paragraph 6 of the complaint, which alleged just such a *per se* violation. ER 4. Because the

[9] Moreover, the defendants in their briefs on the motion to dismiss did not discuss — let alone dispute — the claim of *per se* illegality. Rather, they advanced a theory of *per se* legality for any agreement that eliminates only one competitor. Memorandum of Points and Authorities in Support of Defendants LSL Biotechnologies, Inc. and LSL Plantscience LLC's Motion to Dismiss at 12-14 (December 5, 2000). The district court rightly did not accept their argument.

United States did not have to describe the contours of the relevant market for this theory, the district court could not dismiss on the basis of an overbroad or unclear market definition.

3. In any event, the district court demanded a level of detail, at the pleading stage, that the Federal Rules do not require even in cases involving conduct subject to the rule of reason. As this Court has explained, "[t]he 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.'" *Knevelbaard Dairies*, 232 F.3d at 984 (quoting Fed. R. Civ. P. 8(a)). "[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 America, S.A. v. Latin American 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.").

The United States' complaint easily met this liberal standard. It alleged that the Restrictive Clause, which "bars Hazera from ever competing to develop tomato seeds specifically adapted for North American climates" (ER 12 ¶ 39), violates the

Sherman Act (ER 12 ¶ 42), and it 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." ER 10 ¶ 33. This allegation gave the defendants notice that the government's case 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 North America (thus including both the United States and Mexico), and (3) tomatoes that are grown in the winter months. These allegations were more than sufficient to put the defendants on fair notice 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" sufficient).

The critical point missed by the district court is that market definition is not an end in itself; it is a tool for use in analyzing the competitive effect of challenged conduct. Market power is an essential element of many antitrust offenses, and it generally is inferred from the defendant's market share, which turns on the

definition of the relevant market.[10] Although a plaintiff's failure to plead or prove a relevant market often is decisive, this is not such a case.

Here the issue is whether the undisputed exclusion of Hazera, by agreement, unreasonably restricts competition. What matters is not whether the defendants have market power in some relevant market or markets, but rather whether Hazera's entry would make those markets appreciably more competitive.[11] The

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[10] *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986); *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("Without a definition of the relevant market, it is impossible to determine market share."); *Oltz v. St. Peter's Comty. Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988) ("Defining the market is not the aim of antitrust law . . . . market definition and market power are merely tools designed to uncover competitive harm"); Lawrence A. Sullivan, *Handbook of the Law of Antitrust* 41 (1977) ("Market definition is not a jurisdictional prerequisite, or an issue having its own significance under the statute; it is merely an aid for determining whether power exists.").

[11] *Tanaka v. University of Southern California*, 252 F.3d 1059 (9th Cir. 2001), ER 385-86, 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.

district court erred by treating market definition almost as an element of the offense without considering how the scope of the relevant market might matter.

With respect to the geographic scope of the relevant market, the crux of the court's objection to the complaint was that "open field winter tomatoes can only potentially be grown in Mexico and some Southern U.S. States" rather than throughout North America. ER 386. The district court's objection makes no difference, however, for purposes of this case. 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, since they would include precisely the same tomatoes.

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." *Id.* n.3. 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. Since 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's reasoning that every microclimate for different tomato seeds is a separate market is wrong because it assumes, without apparent support,[12] that any substitution had to occur at the level of the farmer 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. That grocery store-level competition limits the potential for the exercise of market power with respect to seeds designed for a single microclimate. If market power cannot be exercised in a microclimate, then that microclimate is not a separate economic market.

The court's basis for finding fault with the product dimensions of the relevant market also rested on its supposed 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." ER 387. By asserting that these seeds are

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[12] As noted previously, LSL and Seminis did not challenge the complaint's market definition. LSL and Seminis therefore did not submit a declaration from an economist, or anyone else, addressing market definition. To the contrary, one of LSL's declarations describes how LSL faces competition for selling tomato seeds "in Mexico," without ever identifying any separate growing regions or sub-markets in Mexico. ER 25 (Cocke Decl. ¶¶ 11, 12).

not interchangeable, an assertion not made by LSL or Seminis, the court in effect alleged its own fact and made a finding without giving the United States an opportunity to respond. But Rule 12(b)(6) does not allow courts to reach "matters outside the pleading" without following the summary judgment procedures of Rule 56. The district court here did not invoke Rule 56 procedures, and so it was obliged not to rely on material outside the complaint.[13]

Even if the court's unsupported supposition as to product market definition was correct, however, the competitive analysis of the case would not change because 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 be the same in the

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[13] Moreover, the district court's unsupported finding is wrong. Contrary to its assertion, the Schwarz Declaration submitted by the United States showed that different seeds relevant to this case *are* interchangeable. For example, "certain Hazera seeds not developed for Florida are nevertheless being purchased by Florida growers" and "[s]ome growers in Florida with substantial concerns about the TY virus that is currently threatening Florida's winter tomato crops are already purchasing some Hazera TY-resistant non-RIN gene extended shelf-life tomato varieties that were originally developed for other geographic regions." ER 164 ¶ 24. Mr. Schwarz further testified that some Hazera "greenhouse" tomato seeds "have been sold to growers in Mexico and California who have planted them in open fields." ER 162 ¶ 20. Most importantly, Mr. Schwarz testified that extended shelf-life seeds that do not incorporate the RIN gene would compete against RIN-gene seeds for the United States winter tomato market. *Id.* ¶¶ 19-28.

smaller markets that the district court suggested would be preferable, so aggregating them was a reasonable convenience.

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

This Court "review[s] 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) (citation omitted). *Accord Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 390 (2d Cir. 2002).

The district court's opinion appears to treat as "domestic conduct" the Restrictive Clause's exclusion of Hazera from selling seeds to growers in the United States. The order cites the legal test applicable to this part of the case — a not insubstantial effect from a restraint "in or affecting" interstate commerce, *see McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241-42 (1980) and ER 387 — without ever indicating that the government failed to satisfy it. As to subject matter jurisdiction, this is correct.

The district court seriously erred, however, in ruling that, because of the FTAIA, it lacked subject matter jurisdiction over the alleged "foreign conduct." The FTAIA says that Section 1 of the Sherman Act does not apply to conduct

involving commerce (other than import commerce) with foreign nations unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on United States domestic or import commerce. In enacting this language Congress did not intend to change the pre-existing federal common law test for jurisdiction — a test the United States plainly met here. In any event, the United States fulfilled the jurisdictional requirements of the FTAIA: LSL and Seminis conceded the issue of reasonable foreseeability; the United States amply showed substantiality; and it fully met the requirement of directness under any sensible definition of that term.

A. The United States Satisfied the Traditional Standard for Jurisdiction Over Foreign Conduct

Section 1 of the Sherman Act prohibits "[e]very contract . . . in restraint of trade or commerce among the several States, or with foreign nations . . . ." This test is not obviously self-explanatory. *See* Robert H. Bork, *The Antitrust Paradox* 19-20 (1993). As a result, for more than a century the federal courts have created a kind of federal common law in interpreting the statute. *State Oil Co. v. Khan*, 522 U.S. 3, 20-21 (1997).

This course of interpretation has applied to the statute's jurisdictional reach over restraints of "commerce . . . with foreign nations." In *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993), the Supreme Court unanimously held 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."[14]

The "foreign conduct" alleged here by the United States — the exclusion of Hazera from selling seeds to farmers in Mexico who would grow long shelf-life tomatoes primarily for export to the United States — readily satisfies the jurisdictional standard as set forth in *Hartford Fire*. First, it was intended to produce a substantial effect in the United States. The LSL-Hazera joint venture was formed to develop a new tomato *to satisfy United States consumer tastes*. As LSL and Hazera wrote, "[t]he purpose of the project is to develop tomatoes with better taste. This will satisfy a strong need in the American market." ER 130. And:

> It is no secret that American tomatoes are harvested prematurely today and suffer from qualities of mealiness, lack of taste, poor color and aroma and a high percentage of spoilage. If a longer-shelf-life tomato is perfected, it will be preferred by most consumers and push the current commercial tomato right off the market.

Id. *See also* ER 161 (Schwarz Decl. ¶ 16) (purpose was to develop and market

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[14] Justice Scalia's dissenting opinion did not disagree with the majority's analysis on this point. *See* 509 U.S. at 814 ("it is now well established that the Sherman Act applies extraterritorially") (citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), the same case on which the majority chiefly relied for the "effects" test).

"long shelf-life RIN gene tomatoes for United States consumers").

Moreover, once the joint venture fell apart, LSL indisputably intended the Restrictive Clause to affect United States commerce by keeping tomatoes grown from Hazera seeds out of the United States. ER 162 ¶ 18 (LSL added the Restrictive Clause "to prevent Hazera from competing in or affecting in any significant way the markets for tomato seeds and tomatoes in North America").[15]

Second, the United States alleged a substantial effect. United States consumers want better-tasting fresh-market tomatoes in the winter. ER 11 ¶ 36. The Restrictive Clause delays or makes less likely innovations that will allow consumers to enjoy them. ER 12 ¶ 41. A diminution in product quality adversely affects consumer welfare. "Congress designed the Sherman Act as a consumer welfare prescription." *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984) (internal quotation and citation omitted).

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[15] The district court wrongly ignored the United States' Schwarz Declaration. The court should have considered the testimony or, at a minimum, actively exercised its discretion whether to consider it. *See Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 70-71 (3d Cir. 2000) ("We believe that in the context of a challenge to subject matter jurisdiction . . . the District Court should have considered the [plaintiff's] additional evidence."); *cf. Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 728 (9th Cir. 1997) ("The district court should consider all evidence before it in resolving the [subject matter jurisdiction] immunity issue"; district court properly considered plaintiff's declaration in opposition to motion to dismiss).

> Consumer welfare is maximized when economic resources are allocated to their best use, and when consumers are assured competitive price and quality. Accordingly, an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality.

Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995) (emphasis and citations omitted).

Conversely, a major improvement in the quality of tomatoes would by itself substantially affect the United States, even if at this time it is not possible (or necessary[16]) to quantify that effect. The district court acknowledged "the large volume of winter tomatoes imported into the United States from Mexico each year," with an annual value of "approximately $250 million." ER 390 & n.4. LSL/Seminis' exclusion of Hazera, a world-class competitor ready and eager to expand the market with new kinds of tomatoes (*see* ER 157-58, 162-67, ¶¶ 6, 20-26), plainly produces a substantial effect.

The district court did not consider whether the effect of the Restrictive

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[16] A quantitative effect need not be definite at the pleading stage. *See Caribbean Broadcasting*, 148 F.3d at 1086 ("it is quite plausible that the plaintiff's alleged conduct would have a significant effect upon U.S. commerce," even though the court did not quantify that effect); *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F. Supp. 81, 86 (S.D.N.Y. 1995) (at the pleading stage, jurisdictional allegations need not be "quantitatively definite"). *Cf. Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1293 (9th Cir. 1981) ("Jurisdiction under the Sherman Act does not fail simply because the plaintiff has failed to quantify the adverse impact of the defendant's conduct.").

Clause on tomato quality constitutes a substantial effect on United States domestic commerce. To the extent that the court addressed substantiality at all, it took LSL's assertion that the cost of tomato seed is a tiny fraction of the ultimate price of the tomato and stated, as an aside, that any passed-through increase in tomato seed prices would not have a substantial effect on United States domestic commerce. ER 390-91. But the court never indicated what would constitute a substantial effect, and even a small increase in the price of tomatoes, applied to an annual market of $250 million, would be substantial for establishing interstate commerce in cases of "domestic conduct." *See Palmer v. Roosevelt Lake Log Owners Ass'n,* 651 F.2d 1289, 1294 (9th Cir. 1981) (substantial effect on interstate commerce where plaintiff's business was capable of recovering logs worth about $35,000 per year); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 35, 45 n.17 (5th Cir. 1972) (annual total interstate sales of under $50,000 sufficient to affect interstate commerce).[17]

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[17] The district court's opinion also asserts that "[d]efendants' involvement is limited to the development and sale of the plant seeds in Mexico. They have no impact on the decisions made regarding the downstream pricing of a related product." ER 391. This is irrelevant: under the common law standard or the FTAIA, the test is whether there is an "effect" on United States commerce, not the nature of the defendants' business or the degree to which the defendants may control pricing decisions. *See Hartford*, 509 U.S. at 796 ("some substantial effect in the United States"); 15 U.S.C. 6a ("direct, substantial, and reasonably foreseeable effect").

B. The FTAIA Did Not Change the Traditional Jurisdictional Standard

Congress enacted the FTAIA as part of the Export Trading Company Act of 1982. Driven by "the apparent perception among businessmen that American antitrust laws are a barrier to joint export activities that promote efficiencies in the export of American goods and services," H.R. Rep. No. 97-686, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487,[18] 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. *Accord Carpet Group*, 227 F.3d at 71.

The House Report also says that the FTAIA was intended to clarify the "proper test for determining whether United States antitrust jurisdiction over international transactions exists." 1982 U.S.C.C.A.N at 2487. "[E]nactment 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 and the Department of Justice enforcement standards." *Id.* at 2487-88.

Despite the legislative history's reference to "existing American law," the

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[18] The earlier Senate report does not bear on this issue, and there was no pertinent floor debate after the filing of the House Report.

question arose in *Hartford Fire* whether the FTAIA's form of words — "direct, substantial, and reasonably foreseeable effect" — meant something different from the pre-FTAIA common law standard, which did not expressly use the words "direct" or "reasonably foreseeable," or whether the FTAIA merely codified the substance of the pre-existing law using slightly different words.

The Supreme Court addressed this issue, saying that it is "unclear . . . whether the Act's 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it." 509 U.S. 797 n.23. The Court did not decide the issue, however, since, "[a]ssuming that the FTAIA's standard affects this litigation, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements." *Id.*

In this case, the district court, without any analysis, treated the FTAIA as amending the common law standard. The court's decision is apparent from the fact that it applied a test very different from the common law standard identified in *Hartford Fire*. First, the court required the government to satisfy a separate test for "direct" effect on U.S. commerce. ER 389-91. The common law standard, although it implies some limitation on remoteness from U.S. commerce, *see United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) ("*Alcoa*"), did not require a separate test for directness because the concern about remoteness was

satisfied when the alleged conduct is intended to have and does in fact have a substantial effect in the United States. Second, the district court applied a far narrower conception of directness than under the common law standard. The court reasoned that a restraint on seeds could not have a direct effect on an admittedly related product, tomatoes. ER 389-90.

The district court's application of the FTAIA as substantively changing federal common law was mistaken as a matter of law. Well-established canons of statutory construction require "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 Co. v. Johnson*, 343 U.S. 779, 783 (1952)). The same presumption and requirement of clarity apply when a statute amends a pre-existing statute: "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." *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (internal quotation and citation omitted). *Accord 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.").

It is manifest that the FTAIA does *not* show a clear purpose or intention to change the common law, because the Supreme Court in *Hartford Fire* stated squarely that the statute is "unclear" as to whether it changes the common law jurisdictional test. 509 U.S. at 797 n.23.[19] Since the Supreme Court unanimously found the statute unclear on the relevant issue, the FTAIA should not be read as having changed the common law.

Moreover, the legislative history of the FTAIA does not show an intention to make the significant change in the pre-existing law that the district court made here. As noted previously, the House Report states that the FTAIA was meant to be a "clarification of *existing* American law." 1982 U.S.C.C.A.N. at 2487-88 (emphasis added).[20] The Report cites two cases that used the words "direct" or

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[19] Courts of appeals similarly have noted the FTAIA's ambiguity. In *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997), the First Circuit stated: "The FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it. . . . We emulate this example and do not rest our ultimate conclusion about Section One's scope upon the FTAIA." *See also Carpet Group*, 227 F.3d at 69 (FTAIA is "inelegantly phrased") (quoting *Nippon Paper*, 109 F.3d at 4). Commentators regularly express dismay over the FTAIA's "cumbersome and inelegant language," 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272h2 (2d ed. 2000).

[20] The House Report suggests that the drafting subcommittee chose the words "reasonably foreseeable" for the FTAIA instead of "intended" because it believed the former phrase to indicate a more objective test. But there is no indication that the pre-FTAIA case law use of "intended" was materially different or subjective. In fact, the Report quotes testimony citing *Alcoa* for the proposition

"directly," but did so without meaning anything more restrictive than what was implicit in the "effects" test of *Alcoa*, i.e., not too remote. *Id.* at 2490.[21] The Report cites three cases that follow the *Alcoa* formulation and do not use "direct." *Id.*[22] The Report does not purport to explain any of this. It notes the differing opinions among witnesses who testified on whether this case law use or non-use of "direct" made any difference. It does not try to resolve the issue and adopts

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that only "foreseeable" effects on United States commerce should result in jurisdiction, even though *Alcoa* was the source of the term "intended." 1982 U.S.C.C.A.N. at 2493.

[21] *Dominicus Americana Bohio v. Gulf & Western Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979), stated only that under the *Alcoa* test, "it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not *de minimus,*" thereby indicating that "direct" is not a requirement. *Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1974), used "direct" only to describe the facts of that case: the "restraints imposed on the Miami and New Orleans distributors directly affected the flow of commerce out of this country." The opinion discusses *Alcoa* as a supporting authority and does not given any indication of disagreement with the standard as phrased in *Alcoa*, which did not use "direct."

[22] *See Nat'l Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1291-92 (3d Cir. 1979). *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 615 (9th Cir. 1976), *rejected* a district court's use of a "direct and substantial effect" test and ruled that the plaintiff established jurisdiction by alleging "that the complained of activities were intended to, and did, affect the export of lumber from Honduras to the United States."

"direct" for "clarity."[23]

Thus, the district court should have applied the traditional standard, which the United States plainly met and which the FTAIA merely codified: whether the restraint on Hazera selling seeds in Mexico was intended to, and had, a substantial effect on United States trade or commerce.

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.[24] 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." ER 389-90.[25] This ruling was wrong.

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[23] The leading antitrust treatise similarly says that there is no clear indication that the FTAIA is meant significantly to change, rather than merely codify, the common law jurisdictional standard. *See* 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272h2 (2d ed. 2000).

[24] As pointed out at page 13, *supra*, LSL/Seminis conceded for present purposes that the effect of their restraint was "reasonably foreseeable." And, as shown on pp. 27-28, *supra*, the effect was "substantial."

[25] Contrary to the district court's assertion, the Restrictive Clause bars Hazera from any "activities involving *tomatoes* having any long-shelf-life

1. "Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.' *Perrin v. United States,* 444 U.S. 37, 42 (1979)." *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993). "Direct" has many meanings — in fact, 7 main meanings in the adjective form encompassing 31 more specific subsidiary meanings, according to *Webster's Third New International Dictionary* 640 (1981). All 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. Accordingly, determining the meaning of "direct" must consider definitions as informed by the statute's context and history. Considered in this light, 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.*

A definition of "direct" that focuses on causal/logical relationships draws support from another area of antitrust law: private plaintiffs' antitrust standing. In *Blue Shield of Va. v. McCready,* 457 U.S. 465 (1982), the Court faced the issue of

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qualities" (emphasis added), not just from developing or selling seeds. ER 8 ¶ 24. This language shows that the restraint was intended to affect the product that consumers buy — the grown tomato — as much as seeds.

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 suggested that both terms are analogous to the common law concept of "proximate cause." *Id.* nn.12, 13.

Interpreting "direct" in light of causality also is bolstered by the word's location in the FTAIA's larger phrase: "direct, substantial and reasonably foreseeable." *See Guttierez v. Ada,* 528 U.S. 250, 255 (2000) ("[A] word is known by the company it keeps") (alteration in original, citation omitted). The company that "direct" keeps in this context — especially the words "reasonably foreseeable" — is language of proximate cause. To be sure, proximate cause itself is not easily defined. *McCready,* 457 U.S. at 477 n.13. But it is still useful and important in the current case for two reasons. First, it rightly focuses the inquiry about the meaning 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." *See id.*

The "policy unequivocally laid down by the [Sherman] Act is competition," *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4-5 (1958), and the FTAIA,

which is part of the Sherman Act, therefore should be interpreted in light of its fundamental purpose to protect United States consumers.

When directness is seen as a synonym for proximate cause, it is evident 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 also evident 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. ER 3 ¶ 3; ER 11 ¶ 35; ER 12 ¶¶ 39, 41. As shown previously, the restraint — 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: it is why LSL sells these seeds to Mexican farmers and why those farmers raise them into tomatoes that are shipped to grocery stores in the United States. Consumers in the United States are the persons injured by the Restrictive Clause because they are deprived of the superior tomatoes that competition from Hazera could bring.

Second, the causal link between seeds and tomatoes is very short. If seeds are allowed to grow (and otherwise they would be worthless), they quickly and inevitably become tomatoes. In fact, because the dominant 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.[26] 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.

The causal connection between the Restrictive Clause and its effect on United States consumers is also extremely short. The United States alleged a restraint on seeds to be grown into tomatoes in Mexico expressly for shipment to the United States. 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.

2. In any event, even if the district court's formalistic distinction

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[26] The Schwarz Declaration also responded to LSL's argument: "[t]he seed is not just an input, but rather is the organic matter, the genetic material, that dictates what will grow. The seed, when planted, becomes the plant and the fruit that is yielded." ER 158 ¶ 8.

between seeds and tomatoes is accepted, the court's reasoning on directness still is erroneous as a matter of law. The court recognized that in "domestic commerce cases" the Sherman Act's jurisdictional requirements are met when "restraints on one product affect the downstream interstate movement of related products." ER 389. The court failed to recognize, however, that the case law supports the parallel proposition that the FTAIA can be satisfied where a restraint on product "A" affects related product "B."

Most obviously, in *Hartford Fire* the Supreme Court treated the plaintiff's allegations as satisfying *both* the common law test for subject matter jurisdiction and the FTAIA as to a conspiracy involving the market for *reinsurance,* particularly in London, but ultimately targeting the United States domestic market for *primary* insurance. The two products — London-based reinsurance and United States primary insurance — were closely related 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." 509 U.S. at 775.

The district court's distinction between seeds and tomatoes 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 where the district court's order concedes that seeds and tomatoes are related and it is undisputed that Mexico is an important provider of winter tomatoes for the United States.

Also analogous is *Den Norske Stats Oljeselskap AS v. Heeremac VOF*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 1059 (2002). There, the plaintiff alleged a conspiracy to fix bids and allocate customers, territories, and projects for heavy-lift barge services. Although the court of appeals ultimately held that the plaintiff failed to establish jurisdiction, it reasoned that the challenged conduct had a direct, substantial, and reasonably foreseeable effect on United States domestic commerce because, among other things, "the agreement [allegedly] compelled Americans to pay supra-competitive prices for oil." *Id.* at 426. A restraint directed at one product, heavy-lift barge services, thus had a "direct" effect on an indisputably distinct but economically related product, oil.

The United States similarly alleged here that a contractual bar against Hazera selling seeds in Mexico adversely affected the inevitable byproduct of the seeds, tomatoes, 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 therefore was error. The 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*, 284 F.3d at 395. Accordingly, 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.

CONCLUSION

For the foregoing reasons, the district court's amended judgment entered May 23, 2002, should be reversed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is not aware of any related cases pending in this Court.

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 opening brief is

Proportionately spaced, has a typeface of 14 points or more and contains 10,067 words.

Dated: September 23, 2002

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STEVEN J. MINTZ

CERTIFICATE OF SERVICE

I, Steven J. Mintz, hereby certify that today, September 23, 2002, I caused two copies of the accompanying BRIEF FOR APPELLANT UNITED STATES OF AMERICA, plus one copy of the Excerpts of Record, in two volumes, to be served on the following by Federal Express:

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