

January 2012

The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to American Banana?

Joseph P. Bauer

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

Joseph P. Bauer, *The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to American Banana?*, 65 Me. L. Rev. 3 (2012).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol65/iss1/2>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

THE FOREIGN TRADE ANTITRUST
IMPROVEMENTS ACT: DO WE REALLY WANT TO
RETURN TO *AMERICAN BANANA*?

Joseph P. Bauer

THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT: DO WE REALLY WANT TO RETURN TO *AMERICAN BANANA*?

*Joseph P. Bauer**

It keeps getting worse and worse. Over the past three and a half decades, the Supreme Court has made countless changes to substantive antitrust doctrine, making successful assertion of an antitrust claim more and more difficult.¹ We have known for at least a century—at least since the *Standard Oil* decision²—that the language in section 1 of the Sherman Act, providing that “every contract, combination . . . , or conspiracy, in restraint of trade . . . , is declared to be illegal”³ is not to be read literally. “Every” does not mean “every.” It means only “some”—generally, only those restraints of trade which are “unreasonable.”

The procedural obstacles facing a plaintiff even hoping for its day in court, to attempt to prove the harms it suffered from a defendant’s anti-competitive behavior, have also gotten much higher. Section 4 of the Clayton Act provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained”⁴ But we know that this language is also not to be taken literally. Once again, “any” only means “some.” There are numerous limitations with respect to the persons who may sue, including in particular requirements for showing standing and antitrust injury.⁵

In an article I wrote about a decade ago, I asserted that judicial hostility to the prosecution of antitrust claims was reflected in the erection of ever-steeper procedural barriers to satisfying the prerequisites for asserting a claim for antitrust

* Professor of Law, Notre Dame Law School. B.A. Univ. of Pa.; J.D. Harvard Law School. *Maine Law Review* granted the right to separately publish an abbreviated version of this article in *COMPETITION LAW AND THE STATE* (Thomas K. Cheng, Ioannis Lianos & D. Daniel Sokol, eds., 2012). I wish to thank Erin Orndorff, Notre Dame Law class of 2013, for her assistance with this article.

1. Among the “highlights” of this litany of cases are *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) and holding that vertical price restraints are unlawful only under a rule of reason analysis, and are not subject to a standard of per se unreasonableness); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006) (overruling portions of several prior cases, and rejecting the previously approved presumption regarding a tying arrangement that a patent confers the requisite power on the seller of the tying product); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (holding that only certain concerted refusals to deal are subject to a standard of per se unreasonableness, and that most such restraints will be tested under the rule of reason); *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977) (overruling *Arnold, Schwinn & Co. v. United States*, 388 U.S. 365 (1967), and holding that vertical non-price restraints are unlawful only under a rule of reason analysis, and are not subject to a standard of per se unreasonableness).

2. *Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1 (1911).

3. 15 U.S.C. § 1 (2006) (emphasis added).

4. 15 U.S.C. § 15 (2006) (emphasis added).

5. See generally JOSEPH P. BAUER, 11 FEDERAL ANTITRUST LAW ch. 78 (1998).

relief.⁶ Subsequently, four years ago, in the much-criticized *Twombly* decision,⁷ the Supreme Court imposed new, and substantially higher, pleading requirements on victims of alleged antitrust violations.⁸ These burdens have made it more difficult to get past the pleading stage and on to pre-trial discovery, where the plaintiffs would have access to the evidence demonstrating those violations.

The combination of these enhanced standing and pleading requirements is that it is far less likely that a court will ever reach the merits of the defendants' alleged anti-competitive conduct. These decisions are emblematic of an attempt by the judiciary both to limit the substantive reach of the antitrust laws and to restrict those persons who may challenge allegedly unlawful behavior.

But those cases are the subject of other articles. Here, I will focus on yet one more barrier to the successful assertion of an antitrust claim – the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”).⁹ While there is extensive disagreement about the specifics with respect to what behavior and structure the antitrust laws should seek to prohibit or permit, there is broad, general consensus on the goals of the antitrust laws. They are enhancement of consumer welfare, the promotion of competition, and compensation of the victims of antitrust violations. Regrettably, the FTAIA has significantly undermined the achievement of these goals.

The obstacles erected by FTAIA are the result both of that initial legislative act and subsequent restrictive judicial interpretation. As will be described below, the FTAIA precludes the maintenance of certain claims for behavior occurring in part or in whole outside the United States. The explicitly stated purpose of the Act was to benefit American businesses, and in particular the American export trade. The House Report¹⁰ indicates that the statute had two purposes. In the years leading up to its passage, understandably courts had given different interpretations to the reach of the antitrust laws. Thus, the FTAIA was designed to reduce this uncertainty.¹¹ But the stated primary purpose of the statute was to address 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.”¹² Withdrawing the application of the antitrust laws to certain export activities presumably would enhance domestic prosperity, without causing harm to

6. See Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L.REV. 437 (2001).

7. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

8. These pleading requirements were further explained in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (holding that a civil rights complaint challenging allegedly arbitrary arrest and harsh conditions of detention failed to plead sufficient facts to state a claim for unlawful discrimination).

9. Pub. L. No. 97-290, 96 Stat. 1246 (codified at 15 U.S.C. § 6a). FTAIA was in fact enacted as a part of a broader piece of legislation, the Export Trading Company Act, Pub. L. No. 97-290, 96 Stat. 1233 (1982).

10. H.R. REP. NO. 97-686 (1982).

11. “[C]ourts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists. H.R. 5235 addresses these problems of perception and definition by clarifying the Sherman Act . . .” *Id.* at 2.

12. *Id.*

American consumers.¹³

However, judicial interpretation of the FTAIA—by giving an increasingly expansive reading to those actions which can *not* be brought in American courts—has had a most unfortunate, and undoubtedly unintended effect. These cumulative decisions have contributed to significant reductions in the ability of the antitrust laws to achieve the goals just described.

A major step in that direction was the Supreme Court's *Empagran* decision, in which the Court denied relief to certain plaintiffs complaining of a worldwide price-fixing conspiracy.¹⁴ Subsequently, courts have interpreted the exclusions in the FTAIA even more broadly, thereby undermining the important role of American antitrust law.

Empagran itself probably had a neutral effect on American businesses and consumers. There, the Supreme Court sought to rein in the use by *non*-American plaintiffs of the Sherman and Clayton Acts, to activities which neither took place in the United States nor directly harmed Americans. But, remarkably, more recent case law under FTAIA affirmatively *harms American* plaintiffs. It denies them relief under the antitrust laws for foreign behavior which raises prices paid by American individuals and businesses. The result is a reduction in the consumer welfare that the antitrust laws are designed to promote and protect. This can hardly be consistent with the purposes of the FTAIA.

In Part I of this article, I review some of the principal pre-FTAIA decisions—two from the U.S. Supreme Court, two from courts of appeals—that sought to craft rules with respect to the extra-territorial reach of the antitrust laws. In Part II, I describe the specific standards set out by Congress in 1982 in the Foreign Trade Antitrust Improvements Act and describe the major interpretive questions. In Part III, I review a number of judicial decisions applying FTAIA. I argue that too many courts have given an overly expansive reach to the exclusions from the antitrust laws for certain behavior having a foreign or international component, and that these decisions are both inconsistent with the goals of the drafters of FTAIA and harmful to the interests of American competitors and American consumers.

I.

The state of the law with respect to the reach of the American antitrust laws to foreign activities has had a long and twisted history. I start with the seminal case, now over a century old: *American Banana Co. v. United Fruit Co.*¹⁵ The plaintiff and the defendant were both American corporations. The defendant owned numerous banana plantations in Central America, and exported bananas to the United States. The plaintiff purchased the interests of someone who had developed a rival plantation in Panama and was building a railway to deliver its bananas to a

13. See *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 299 (3d Cir. 2002) (“the Act demonstrated Congress’s intent to exempt from the Sherman Act export transactions *not injuring the United States economy*, thereby relieving exporters from a competitive disadvantage in foreign trade”) (emphasis added).

14. *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (discussed in detail *infra* notes 59-73 and accompanying text).

15. 213 U.S. 347 (1909).

port for export to the United States.

The plaintiff's lawsuit alleged that a number of acts undertaken by the defendant in Central America—including acquiring real property of and stock interests in competing corporations, entering into price fixing agreements, and inducing governmental authorities in Panama to seize the plaintiff's plantation¹⁶—gave rise to claims under the Sherman Act. Notwithstanding the fact that both parties were American—and, although not mentioned in the opinion, that the defendant's acts might have given rise to effects in the United States—the Supreme Court concluded that the Sherman Act did not reach this claim. Speaking for the Court, Justice Holmes proclaimed that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”¹⁷ A contrary result, the Court declared, “not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations.”¹⁸ Discerning congressional intent regarding the scope of the Sherman Act, the Court stated that

any statute [is] intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power [I]t is entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned.¹⁹

Over the following decades, the Supreme Court's interpretation of the Commerce Clause generally gave it an increasingly expansive reach.²⁰ That same expansion was reflected in decisions on the reach of the antitrust laws to certain intra-state activities.²¹ And there were a number of post-*American Banana* decisions by the Supreme Court, expanding the application of American antitrust laws to behavior that occurred in part in the United States but that also involved

16. This particular claim also asserted cooperation in that seizure by Costa Rican government authorities.

17. *Id.* at 356.

18. *Id.*

19. *Id.* at 357. Because the complaint alleged that the plaintiff's harm was the result of the acts of the governments of Panama and Costa Rica, but done pursuant to the defendant's intervention, the plaintiff's claims also implicated the “act of state” doctrine. The breadth of this defense to antitrust actions for conduct occurring outside the United States is beyond the scope of this article.

20. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding authority of Congress to regulate production of wheat used by a farmer for his own needs because those intrastate activities had an effect on interstate commerce). *But see Nat'l Fed'n of Indep. Bus. v. Sebelius*, ___ U.S. ___ 132 S.Ct. 2566 (2012) (concluding that the individual mandate component of the Patient Protection and Affordable Care Act was not a valid exercise of Congress' power under Commerce Clause).

21. *See, e.g., Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 328 n.7 (1991) (holding that the Sherman Act was intended to “go as far as the Constitution permits Congress to go,” and that it extended to a hospital's revocation of staff privileges of an individual physician); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980) (reiterating that the Commerce Clause also reaches conduct which *affects* interstate commerce, and holding that the Sherman Act extended to alleged conspiracy to fix real estate commission rates); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) (extending the Sherman Act to minimum fee schedules for title examinations performed by attorneys; although legal services were local, the funds to purchase real estate and the buyers of real estate often crossed state lines).

foreign conduct.²²

Gradually, courts exercised antitrust jurisdiction over certain forms of purely extra-territorial activities, which had effects on competition in the United States. Before considering the changes wrought by FTAIA, three cases addressing such behavior deserve particular attention. They include two courts of appeals decisions—the Second Circuit’s “intent/effects” approach in *Alcoa*²³ and the Ninth Circuit’s notably different approach in *Timberlane*²⁴—and the Supreme Court’s opinion in *Hartford Fire*.²⁵

Alcoa is the well-known decision authored by Judge Learned Hand. There, the Second Circuit concluded that the defendant’s intentional actions, to allow it to retain its decades-long position as the sole domestic manufacturer of aluminum ingot from bauxite ore,²⁶ supported a finding that the defendant was guilty of monopolization, in violation of section 2 of the Sherman Act. But *Alcoa* is also a landmark case on the extra-territorial application of the antitrust laws.

In addition to its action against the principal defendant, the government had also named Aluminum Limited, Alcoa’s Canadian subsidiary, as a defendant. One issue was whether the Sherman Act extended to Aluminum Limited’s acts outside the United States, which had effects on competition and the price of aluminum in the United States. Judge Hand distinguished *American Banana* and asserted that it was “settled law” that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.”²⁷ Then, suggesting a rule which has since been widely adopted by subsequent courts, the court of appeals concluded that the Sherman Act applied to extra-territorial activities if two conditions were satisfied: the activities were intended to have some effect on imports or exports, and the “performance [of the agreement] is shown actually to have had some effect upon them.”²⁸ Concluding that here, both of these two conditions were present, the court declined to decide the applicability of the Sherman Act if only one of them was shown.²⁹

In *Timberlane*, the plaintiffs alleged a complicated scheme involving an American bank, its subsidiary, which had an office in Honduras, and a number of

22. See, e.g., *U.S. v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (applying the Sherman Act to an alleged conspiracy carried out in part in the U.S. but implemented through actions of Mexican officials, which affected the prices of rope fiber in the United States); *Thomsen v. Cayser*, 243 U.S. 66 (1917) (applying the Sherman Act to claims against agents of foreign shipping lines based on agreements made in London to charge discriminatory rates on freight shipped between the United States and a foreign country); *U.S. v. Pac. & Arctic Ry.*, 228 U.S. 87 (1913) (applying the Sherman Act to conspiracy to set rates on shipments between the United States and Canada, which was effectuated in part by control of wharves located in the United States).

23. *U.S. v. Aluminum Co. of Am. (U.S. v. Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

24. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976).

25. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993).

26. *Alcoa*, 148 F.2d at 423-25. There were also numerous American suppliers of aluminum ingot from scrap metal or other sources, but the court of appeals held that “virgin aluminum ingot” constituted the relevant product market. *Id.*

27. *Id.* at 443.

28. *Id.* at 444. The court relied in part for its conclusion on the Supreme Court decisions cited *supra* note 20.

29. *Id.* at 443-44.

individuals and corporations—some American, some Honduran—to reduce the supply of lumber in Honduras, which the plaintiffs would have been able to purchase there and then to import to the United States. The bulk of the defendants’ activities took place in Honduras, and the principal effect was also felt in that country.³⁰ The district court, applying a version of *Alcoa’s* “effects” test, had dismissed the action, having concluded that the defendants’ conduct did not have the requisite “direct and substantial” effect on U.S. foreign commerce.

The Ninth Circuit rejected that conclusion, holding that a judicial focus solely on the substantiality of the domestic effect of a defendant’s extra-territorial conduct, with little or no attention to other considerations, including the degree of comity owed based on the interests of the parties and the countries involved, was “costly” and “risky.”³¹ Instead, the court suggested a three-step approach,³² which in turn would require weighing a long list of factors to determine the applicability of the Sherman Act to the challenged conduct.³³ While this far more nuanced approach had the potential virtue of increasing the likelihood of reaching a “correct” result, it was criticized by numerous courts and commentators for the increased burden it placed on courts and parties, as well as the uncertainty of result it presaged.³⁴

Hartford Fire involved an alleged conspiracy by American insurance and reinsurance companies, and reinsurers based in London, to change the terms of commercial general liability insurance policies for risks in the United States. Those non-American insurers did not engage in conduct in the United States, but

30. Some of the activities included resort to Honduran courts and involvement by Honduran government officials. The court of appeals rejected the argument that the plaintiffs’ claims were foreclosed by the “act of state” doctrine. *Timberlane*, 549 F.2d at 605-08.

31. *Id.* at 612.

32. *Id.* at 613.

A tripartite analysis seems to be indicated . . . [T]he antitrust laws require in the first instance that there be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil *violation* of the antitrust laws . . . Third, there is the additional question which is unique to the international setting of the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority. *Id.* (emphasis in original).

33. *Id.* at 614.

The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. (footnote omitted).

34. See, e.g., *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-49 (D.C. Cir. 1984) (concluding that *Timberlane* factors “are not useful in resolving the controversy”); *Nat’l Bank of Can. v. Interbank Card Ass’n*, 666 F.2d 6, 8 (2d Cir. 1981) (rejecting the *Timberlane* test); Lionel Kestenbaum, *Antitrust’s “Extraterritorial” Jurisdiction: A Progress Report on the Balancing of Interests Test*, 18 STAN. J. INT’L L. 311 (1982). But see *Hartford Fire*, 509 U.S. at 817-19 (Souter, J. dissenting) (citing with approval to *Timberlane* and its multi-factor approach).

the effects of their conduct were felt here. The case presented two separate questions: whether the defendants' conduct was immunized by the McCarran-Ferguson Act,³⁵ and "whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman Act to foreign conduct."³⁶

In a 5-4 decision, Justice Souter, writing for the Court,³⁷ concluded that the district court "undoubtedly had jurisdiction of these Sherman Act claims."³⁸ The Court noted that it had long ago rejected the limited approach of *American Banana*.³⁹ Citing to *Alcoa*, Justice Souter stated 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."⁴⁰

Justice Scalia dissented from the Court's conclusion that the Sherman Act applied to these defendants.⁴¹ He acknowledged that "it is now well established that the Sherman Act applies extraterritorially."⁴² He also agreed that federal courts had "jurisdiction" over these claims, given the fact that the antitrust laws fell within the power of Congress to legislate with respect to commerce with foreign nations. But, for the dissent, "the question . . . is whether, and to what extent, Congress *has* exercised that undoubted legislative jurisdiction in enacting the Sherman Act."⁴³ Justice Scalia found the answer in a canon of construction, that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains."⁴⁴ Drawing on principles of customary international law, and in particular the comity owed by one country to the interests of other countries, Justice Scalia concluded that the exercise of legislative

35. 59 Stat. 33 (codified at 15 U.S.C. § 1013 (2006)). The McCarran-Ferguson Act provides an immunity from the antitrust laws for "the business of insurance." However, that exemption is lost if the defendants' behavior constitutes a "boycott." *Id.* § 1013(b). The Court concluded that the Act did not foreclose scrutiny of this conduct, since at least some of the plaintiffs' allegations complained of "boycotts."

36. *Hartford Fire*, 509 U.S. at 794-95.

37. Justice Souter was joined in this part of the opinion by Chief Justice Rehnquist and Justices White, Blackmun and Stevens.

38. *Id.* at 795.

39. *Id.* at 795-96. In addition to several earlier cases in which the Supreme Court had distinguished *American Banana*, *see supra* note 22, more recent case law had also indicated that that decision was of limited precedential value. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce.") (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 (1962)).

40. 509 U.S. at 796. The Court asserted that the plaintiffs' allegations satisfied this standard. *Id.* "Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect." *Id.* (footnote omitted); *see also Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438-40 (6th Cir. 2012) (concluding that the court has jurisdiction under Sherman Act for claims involving foreign conduct which has domestic effects; relying on *Hartford Fire* and *Alcoa*).

41. He was joined in this dissent by Justices O'Connor, Kennedy, and Thomas.

42. 509 U.S. at 814 (Scalia, J., dissenting).

43. *Id.* (emphasis in original).

44. *Id.* at 814-15 (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)).

jurisdiction here was unwarranted.⁴⁵

II.

In addition to these three cases, over the years, numerous other courts have also struggled to create a framework for analyzing the international reach of the antitrust laws. As the legislative history of the FTAIA reflects,⁴⁶ prior to its enactment, there was considerable uncertainty regarding that question.⁴⁷ The FTAIA was a congressional attempt to state clear rules for identifying the applicability of the antitrust laws to certain foreign activities.

Yet, despite the passage of the FTAIA, the uncertainty persists today, and the controversy about the appropriate scope of the antitrust laws has not ended. The primary difficulty in discerning the scope of these limitations is the “rather convoluted language” of the statute.⁴⁸ It provides as follows:

[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

- (1) such conduct has a direct, substantial and reasonably foreseeable effect—
 - (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
 - (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
- (2) such effect gives rise to a claim under the provisions of the [Sherman Act], other than this section.⁴⁹

Now, to try to parse this statutory monstrosity. What is the effect of the enactment of the FTAIA on the application of the Sherman Act to extra-territorial behavior?

First, what is clear. The FTAIA seeks to identify situations to which the American antitrust laws are inapplicable. The “other than import trade or import commerce” language, inserted parenthetically in the initial portion of the Act, sets forth the one straightforward situation involving international trade that is outside of the FTAIA. This phrase makes clear that the FTAIA simply does not apply to, and thus the Sherman Act is fully applicable to, importation activities.⁵⁰

45. “I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable” 509 U.S. at 819 (Scalia, J., dissenting).

46. See *supra* notes 10-12 and accompanying text.

47. See *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 610 (9th Cir. 1976) (“Even among American courts and commentators, however, there is no consensus on how far the jurisdiction should extend.”) (discussing conflicting case law and commentary).

48. *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 300 (3d Cir. 2002) (describing the statute as “inelegantly phrased”).

49. 15 U.S.C. § 6a (2006).

50. See, e.g., *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 n.3 (6th Cir. 2012) (noting that FTAIA clearly permits antitrust actions for claims challenging foreign price-fixing conspiracy on goods exported to the United States); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp.2d 1011, 1022-23 (N.D. Cal. 2010) (upholding jurisdiction over claims for products sold or distributed in the United States, either directly or through subsidiaries or affiliated companies). See also *Fond du Lac Bumper Exch. v. Jui Li Enter. Co.*, 795 F. Supp.2d 847 (E.D. Wis. 2011) (holding that FTAIA does not bar a class action complaining of conspiracy to fix prices and limit output of auto parts; although passage of title to goods occurred in Taiwan, defendants knew they would be imported into the United

What about other “foreign commerce”?⁵¹ Does the FTAIA limit the application of the Sherman Act to exports from the United States? Does it bar antitrust claims for activities which neither originate in, nor terminate in, the United States? What different treatment is there for activities involving goods or commodities, as compared to services, financial transactions and the like? The balance of this article seeks to answer these questions, and more importantly, to criticize some of the answers that some courts have given.

III.

The Supreme Court has not been particularly helpful in resolving interpretive questions. *Hartford Fire*⁵² was the first post-FTAIA case to address the extra-territorial reach of the antitrust laws.⁵³ But, although that case was decided more than a decade after the enactment of the FTAIA, Justice Souter’s opinion there only made passing reference to that statute.⁵⁴ Indeed, the Court expressed doubt, without any further explanation, whether FTAIA even applied to the case.⁵⁵ The *Hartford Fire* Court also expressed uncertainty, without feeling a need to resolve the question, “whether the Act’s ‘direct, substantial, and reasonably foreseeable effect’ standard amends existing law or merely codifies it.”⁵⁶ And, on a key issue that divided the majority and the dissent that was authored by Justice Scalia—the extent to which the doctrine of *comity* would counsel an American court to decline to exercise jurisdiction over the foreign defendants⁵⁷—Justice Souter once again found no guidance from the FTAIA.⁵⁸

By contrast, *Empagran* addressed one of the important interpretive issues

States either by plaintiffs or by third parties); *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-42, 2011 WL 7053807, at *35-36 (E.D.N.Y. Jan. 4, 2011) (holding that “import commerce” included price-fixing by freight-forwarders, on cost for shipping goods from foreign locations into the United States).

51. The second, and more convoluted, exception applies where the commerce in question has a “direct, substantial, and reasonably foreseeable effect” on domestic commerce and where that effect gives rise to a Sherman Act claim. See *Empagran*, *infra*, note 59 and accompanying text.

52. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993) (discussed *supra* notes 36-45 and accompanying text).

53. *Empagran*, which by contrast dealt in depth with the FTAIA, is discussed below. See *infra* notes 59-73 and accompanying text.

54. Justice Scalia’s dissent did not even take note of FTAIA or its implications for the case.

55. “[I]t is unclear how [FTAIA] might apply to the conduct alleged here Assuming that FTAIA’s standard affects this litigation . . . the conduct alleged plainly meets its requirements.” 509 U.S. at 796 n.23. Why? How? The Court was silent.

56. *Id.* Compare *U.S. v. LSL Biotech.*, 379 F.3d 672, 679 (9th Cir. 2004) (concluding that FTAIA’s requirement of “direct” effect in the U.S. cut back on the *Alcoa* test for reach of the Sherman Act), with *id.* at 684 (Aldisert, J., dissenting) (“I believe that the new statute merely codified existing antitrust law in the use of the word ‘direct.’”) and *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 389-90, 399-401 (2d Cir. 2002) (FTAIA “does not alter” pre-existing standards for extra-territorial reach of antitrust laws).

57. See *supra* notes 67-69 and accompanying text.

58. “When it enacted the FTAIA, . . . Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity We need not decide that question here, however . . . [because] international comity would not counsel against exercising jurisdiction in the circumstances alleged here.” *Hartford Fire*, 509 U.S. at 798.

under the FTAIA: Does the Sherman Act continue to apply when the defendant's activity under attack involves "(1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim[?]"⁵⁹ The Court in *Empagran* began by restating the second "exception" to the FTAIA, in addition to the "import trade or import commerce" exception. The Sherman Act continues to apply where the commerce in question has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce and where that effect gives rise to a Sherman Act claim.⁶⁰

Empagran's restatement of this statutory language does provide a few clear rules. The antitrust laws do not apply to anticompetitive activities where the harm is felt solely outside the United States.⁶¹ Thus, they do not apply either to "export activities" or to "other commercial activities taking place abroad, *unless* those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States."⁶² But the imprecision of the extent of the second exception—the "unless" clause—still leaves numerous unanswered questions.

Empagran involved an alleged worldwide conspiracy to fix the prices of vitamins. Some of the manufacturers and distributors were American, and some were foreign. Some of the purchasers affected by the price-fixing cartel were American, and some were foreign. But the focus of this appeal was on foreign purchasers who did not purchase any vitamins in the United States.⁶³ Critically, the Court accepted the lower court's assumption⁶⁴ that the "foreign effect"—i.e., the higher prices paid by the foreign plaintiffs—was *independent of* any domestic effect—i.e., the higher prices paid by American purchasers.⁶⁵

The Court identified two reasons for finding the Sherman Act inapplicable to the foreign purchasers' claims: history and comity. The FTAIA sought to clarify and limit the extraterritorial scope of the antitrust laws. But it certainly did not

59. *Empagran*, 542 U.S. at 159.

60. *Id.*

61. "[T]he Sherman Act does not prevent [American exporters] from entering into business arrangements (say, joint selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets." *Id.* at 161. This conclusion is consistent with the primary purpose given for the enactment of FTAIA—the removal of "barrier[s] to join export activities." See *supra* note 10 and accompanying text.

62. *Empagran*, 542 U.S. at 161 (emphasis in original). The "other commercial activities" would encompass transactions solely within, between, or among foreign countries.

63. The court of appeals had concluded that these purchases, as part of a global price-fixing conspiracy, were within the "exception" to the FTAIA. *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 315 F.3d 338 (D.C. Cir. 2003). In addition to overruling that decision, the Court also abrogated a Second Circuit decision that had reached a similar result. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395-96 (2d Cir. 2002). After *Empagran*, *Transnor (Bermuda) Limited v. BP North America Petroleum*, 666 F. Supp. 581 (S.D.N.Y. 1987)—which held that a foreign corporation which allegedly suffered injury on a contract made for, and calling for delivery of, petroleum outside of the United States could maintain an antitrust action because two of the three principal trading centers for that oil were in the United States—is probably of little precedential value.

64. *Empagran*, 542 U.S. at 160.

65. "[W]e base our decision upon the following: The price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect." *Id.* at 164.

seek to expand their reach. And the prevailing state of the law in 1982 would have foreclosed the assertion of that kind of antitrust claim.⁶⁶

Considerations of comity were even more important. There is a strong presumption that federal statutes are to be construed to avoid interference with the sovereign interests of other nations.⁶⁷ That presumption may be overcome when the foreign activity impacts American consumers and other domestic interests. But, in light of the assumption that here the foreign harm was independent of any domestic impact, recognition of the superior interests of other countries⁶⁸ and the extent to which imposition of liability and remedies would be inconsistent with their legal norms, dictated a refusal to extend the Sherman Act to those claims.⁶⁹

All well and good, if there truly was no domestic harm from the defendant's behavior.⁷⁰ There must be some "domestic effect" of the antitrust violation⁷¹ to avoid the bar of FTAIA.⁷² The United States might view the defendants' conduct

66. "[W]e have found no significant indication that at the time Congress wrote this statute courts would have thought the Sherman Act applicable in these circumstances." *Id.* at 169.

67. *Id.* at 164. This approach echoes the canon of construction invoked by Justice Scalia in dissent in *Hartford Fire*. See *supra* notes 44 and accompanying text.

68. The strength of those interests, and the American sensitivity to those interests, was demonstrated in part by appearances as amici curiae by the Federal Republic of Germany and the government of Canada, and by the U.S. Department of Justice and Federal Trade Commission, all arguing for inapplicability of the American antitrust laws.

69. *Id.* at 165 (finding that justification for "interference with a foreign nation's ability independently to regulate its own commercial affairs" was "insubstantial").

70. See *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F. Supp. 1102, 1106 (S.D.N.Y. 1984) (dismissing a challenge to alleged worldwide price-fixing and market division agreements, entered into by an American defendant-manufacturer on products manufactured and sold in Europe, where the plaintiff alleged "spillover effect on domestic commerce"); see also *United Phosphorus Ltd. v. Angus Chem. Co.*, 131 F. Supp.2d 1003, 1014 (N.D. Ill. 2001) ("The FTAIA explicitly bars antitrust actions alleging restraints in foreign markets for inputs . . . that are used abroad to manufacture downstream products . . . that may later be imported into the United States."), *aff'd on other grounds*, 322 F.3d 942 (7th Cir. 2002)(en banc).

71. See *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395 (2d Cir. 2002) ("it is the effect and not the location of the conduct that determines whether the antitrust laws apply; *United Phosphorus*, 131 F. Supp.2d at 1009 ("conduct on American soil is not always sufficient to prove effect on domestic commerce because it is the situs of the effect, not the conduct, which is crucial"), *aff'd on other grounds*, 322 F.3d 942 (7th Cir. 2002) (en banc); *Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F. Supp. 920, 924 (E.D.N.Y. 1985) (concluding that FTAIA barred claim for harm suffered by plaintiff outside the United States; "[i]t matters not if there was anti-competitive conduct in the United States or by domestic corporations.").

72. For example, in *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001), a Norwegian oil corporation that conducted business solely in Europe complained that the defendants' worldwide bid-rigging and market division agreements for barge services had inflated its operating costs in the North Sea. Although those agreements also affected the prices that other oil companies paid for similar services in the Gulf of Mexico, the court of appeals found that FTAIA barred the plaintiff's claim. The existence of an alleged single, unified global conspiracy, and of a "close relationship" between the domestic injury and the plaintiff's claim, was insufficient when, as here, the domestic harm to others which flowed from the antitrust violations did not "give rise to" the foreign injuries allegedly suffered by the plaintiff.

Similarly, in *In re Copper Antitrust Litigation*, 117 F. Supp.2d 875 (W.D. Wis. 2000), the plaintiffs, who were German purchasers of copper, asserted that the defendants had engaged in a worldwide price fixing conspiracy. They alleged that the defendants had tampered with prices on the London Metal Exchange; as a result, copper prices throughout the world were artificially inflated.

as highly problematic, but America has at most only an altruistic interest in having its antitrust statutes apply to all anticompetitive behavior everywhere in the world, while other countries have real interests at stake.⁷³

However, in the Supreme Court, the plaintiffs also challenged the assumption that the behavior truly was “independent.” Rather, they asserted that even the portion of the price-fixing conspiracy addressed at foreign purchasers did harm American interests. The Court remanded on this point, to allow a determination of the relationship between those harms and, if so, whether this would fall within the second exception to FTAIA.

Since *Empagran*, lower courts have considered a variety of interpretative questions under the FTAIA. One is the question that was left for consideration on remand: whether there is the requisite domestic harm if the sellers could not have maintained their international price-fixing arrangement “but for” some adverse domestic effect.

Regrettably, several courts have rejected that assertion. Application of the American antitrust laws is withheld, even where the foreign conduct results in a spillover effect in the United States, or when U.S. consumers are harmed by extra-territorial behavior. The result has been to deny fuller protection to *American consumers* from antitrust violations that take place on a worldwide basis.

The most notable decision to reject the “but for” argument was the D.C. Circuit’s opinion on remand in *Empagran*.⁷⁴ The plaintiffs contended that in the challenged worldwide price-fixing conspiracy, involving products which were fungible, the defendants were only able to maintain their super-competitive prices outside the United States by inflating prices within the United States as well. Otherwise, domestic purchasers would have been able to act as arbitrageur-exporters, underselling the cartel’s elevated foreign prices.⁷⁵

The court of appeals recognized that the plaintiffs had painted a “plausible scenario under which maintaining super-competitive prices in the United States

Although the effect of this conduct may indeed have been felt in the United States by American consumers, the plaintiffs’ particular harm—distortion of the prices on copper and copper futures they had purchased and resold in Europe—was not the result of the illegal behavior. Thus, the court concluded that the action was barred by FTAIA, holding that “the Sherman Act claim that a plaintiff alleges and the Sherman Act claim that arises out of the effect on an American market must be the same.” *Id.* at 883; *see also* *Sniado v. Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004) (concluding that FTAIA bars an American consumer’s claim challenging the alleged conspiracy by European banks to inflate fees to exchange Euro-zone currencies in Europe; dismissing action, after Supreme Court’s remand to reconsider earlier decision in light of *Empagran*); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 813-15 (9th Cir. 1988) (concluding that FTAIA barred action arising out of the termination of an agreement appointing American plaintiff as exclusive distributor of defendant’s products in Asia and Africa).

73. *See generally* Eric Taffet, *The Foreign Trade Antitrust Improvements Act’s Domestic Injury Exception: A Nullity for Private Foreign Plaintiffs Seeking Access to American Courts*, 50 COLUM. J. TRANSNAT’L L. 216, 218 (2011) (arguing that the consequence of the *Empagran* decision “that no foreign private antitrust plaintiff can establish jurisdiction of an American court based on the domestic injury exception . . . is supported by sound policy justifications”).

74. *Empagran S.A. v. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005) [hereinafter *Empagran II*].

75. *Id.* at 1270.

might well have been a ‘but-for’ cause of the [plaintiffs’] foreign injury.”⁷⁶ But the court held that this was not enough. The court insisted on a showing of a “direct causal relationship” to the domestic injury, i.e., a showing of “proximate causation.” Echoing the Supreme Court’s concerns for so-called “prescriptive comity,”⁷⁷ the D.C. Circuit insisted that “a more flexible, less direct standard than proximate causation would open the door to just such interference with other nations’ prerogative to safeguard their own citizens from anti-competitive activity within their own borders.”⁷⁸

Subsequently, a number of other courts have likewise held that this “but-for” relationship is insufficient to bring the conduct within the exception to the FTAIA for foreign activities which have a domestic effect. Like the D.C. Circuit in *Empagran II*, they have insisted that the FTAIA bars an antitrust claim unless the domestic harm is the “direct” result of the foreign behavior.

For example, in a challenge to a global price-fixing conspiracy involving the food additive monosodium glutamate (MSG),⁷⁹ the plaintiffs had argued that but for the higher prices set by the defendants in the United States, they would have been able to purchase MSG either directly from the United States or from arbitrageurs selling MSG imported from the United States. The Eighth Circuit upheld the dismissal of the complaint, concluding that “the statutory ‘gives rise to’ language requires a direct and proximate causal relationship.”⁸⁰ The Ninth Circuit also rejected a claim premised on a similar “but for” theory by a foreign purchaser who complained of the elevated prices it paid as a result of a global price-fixing conspiracy involving computer components.⁸¹ And a district court rejected a claim that the defendant’s manipulation of sales of wheat in Iraq were part of a global conspiracy which eventually led to lower prices that American farmers received from their wheat.⁸²

Another interpretive question is whether FTAIA bars an action for foreign injury, if the same conduct—an alleged worldwide antitrust conspiracy—gives rise to both domestic harm and the foreign injury, but where the domestic effects of the violation—paying inflated prices—do not “give rise to” that latter injury. Although

76. *Id.*

77. *Empagran*, 542 U.S. at 164-69 (discussed *supra* notes 59-73 and accompanying text).

78. *Empagran II*, 417 F.3d at 1271.

79. *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 537-40 (8th Cir. 2007) (following *Empagran II*).

80. *Id.* at 538. See also *Latino Quimica-Amtex S.A. v. Akzo Nobel Chems. B.V.*, No. 03 Civ. 10312(HBDF), 2005 WL 2207017, at *6-9 (S.D.N.Y. Sept. 8, 2005) (rejecting assertion that domestic effects of global price-fixing conspiracy for various chemicals “gave rise to” foreign plaintiffs’ antitrust injuries; “but-for” causation is insufficient).

81. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 985-90 (9th Cir. 2008) (following *Empagran II* and *Monosodium Glutamate*); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F. Supp.2d 437, 442-47 (D.N.J. 2007) (following *Empagran II*). Cf. *In re Urethane Antitrust Litig.*, 261 F.R.D. 570, 575 (D. Kan. 2009) (“[N]othing in the FTAIA or *Empagran* precludes discovery of documents or information related to foreign commerce that are relevant to antitrust claims alleging a domestic injury.”) (footnote omitted).

82. *Boyd v. AWB Ltd.*, 544 F. Supp.2d 236, 246 (S.D.N.Y. 2008) (“although plaintiffs may have alleged a plausible theory of causation based on the global interrelatedness of the wheat markets in Iraq and the United States, [defendant’s] extraterritorial conduct in Iraq was, at most, only a ‘but for’ cause of the alleged drop in wheat prices in the United States”).

the text of FTAIA merely speaks in terms of limitations on claims for foreign “conduct,” courts have concluded that the existence of domestic harm will not serve as a hook to permit assertion of claims for the foreign injury.⁸³

Some courts have properly rejected defendants’ contentions that the plaintiff’s foreign injury, in particular paying higher prices abroad, was not the proximate result of the domestic effect of the price-fixing conspiracy. For example, in *In re TFT-LCD (Flat Panel) Antitrust Litigation*,⁸⁴ an American company, purchasing components for its own use both in the United States and abroad, had engaged in negotiations with the defendants in the United States to set a single, world-wide price for the products in question. Because of this direct linkage between the artificially inflated price schedule and the prices actually paid by the plaintiff’s foreign affiliates, the district court distinguished the arbitrage theory asserted, but rejected, in the *Empagran II* line of cases and concluded that the “domestic effects” exception to FTAIA was satisfied by plaintiffs’ allegations.⁸⁵ In a subsequent opinion in the same case,⁸⁶ the court rejected the defendants’ argument that the domestic effect was not “direct,” even with respect to transactions involving several steps between the foreign manufacture and sale of the products and their subsequent importation into and sale in the United States.⁸⁷

The narrow approach taken by *Empagran II* and cases relying on its analysis to the FTAIA’s exception for behavior causing adverse domestic effects is unreasonably constrained and short-sighted. These decisions effectively ignore the very real injury—the spillover effect—that Americans incur from this behavior. And this result is hardly dictated by the language of the Act. The Supreme Court in *Empagran* had indeed relied on comity to support its result. But it emphasized that this comity—which is analogous to the balancing of interests undertaken in a conflicts of law analysis—was particularly appropriate when there was no domestic harm from the behavior in question.⁸⁸ However, where the D.C. Circuit and other courts have acknowledged that the defendants’ behavior necessarily had a domestic impact, even if one that was arguably only “indirect,” the comity analysis differs substantially. Under those circumstances, an American court should be far less reluctant to apply American law to protect American interests.

A different interpretative aspect of the “domestic effects” exception has given

83. *In re Rubber Chems. Antitrust Litig.*, 504 F. Supp.2d 777, 781-86 (N.D. Cal. 2007); *Emerson Elec. Co.*, 500 F. Supp.2d at 446-47; *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp.2d 555, 562 (D. Del. 2006). *See also* *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166, 1182-90 (N.D. Cal. 2009) (dismissing claims on behalf of plaintiff’s foreign subsidiaries, for foreign purchases made as part of alleged global price-fixing conspiracy; rejecting plaintiff’s arguments based on single entity and agency theories).

84. . 781 F. Supp.2d 955 (N.D. Cal. 2011).

85. *Id.* at 959-64. That district court reached similar conclusions in a parallel action brought by another plaintiff. *See in re TFT-LCD (Flat Panel) Antitrust Litig.*, 785 F. Supp.2d 835, 840-44 (N.D. Cal. 2011).

86. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp.2d 953, 959-68 (N.D. Cal. 2011).

87. “The increased price of the components caused the prices of the finished products in the United States to increase. If this effect is not ‘direct,’ it is difficult to imagine what would be.” *Id.* at 966.

88. “[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.” *Empagran*, 542 U.S. at 165 (emphasis in original).

rise to yet another unfortunate expansion of the FTAIA. Recall that the Sherman Act continues to apply when the commerce in question has a “direct, substantial, and reasonably foreseeable effect” on domestic commerce and where that effect gives rise to a Sherman Act claim.⁸⁹ Does the exception apply when, because there is an alleged conspiracy to fix prices both in the United States and abroad, the defendant’s conduct caused a domestic effect, and *at the same time* that effect proximately caused antitrust injury outside the United States? Or must there first be a domestic effect, and then a *subsequent* non-domestic injury? In a recent case,⁹⁰ a district court concluded “that FTAIA imposes a two-step dance.”⁹¹ The existence of a *simultaneous* domestic effect and a foreign injury was insufficient to state a Sherman Act claim.⁹²

Another group of decisions is even more problematic. In these cases, although the alleged anti-competitive behavior occurred outside the United States, the harm undoubtedly was inflicted on American consumers. Indeed, in several of those cases, at least some portions of the transaction itself occurred in the United States. Nonetheless, in these cases, courts have concluded that FTAIA still bars an antitrust action.

The *Minn-Chem* decision by a panel of the Seventh Circuit—which was properly overturned by that court in an en banc decision—is the most recent and most prominent illustration of the serious judicial misreadings given to FTAIA.⁹³ However, had that original decision not been set aside, it would have been yet one more instance of the serious erosion of protection that can, and should, be afforded to American consumers by the antitrust laws.

The plaintiffs complained of a broad price-fixing conspiracy in the potash market. The defendants were non-American companies engaged in mining potash, which is a mineral primarily used as an agricultural fertilizer, in Canada, Russia and Belarus. Together, the defendants accounted for over two-thirds of the world’s

89. See *supra* note 60 and accompanying text.

90. *In re Hydrogen Peroxide Antitrust Litig.*, 702 F. Supp.2d 548 (E.D. Pa. 2010).

91. *Id.* at 551. “We hold that under FTAIA the domestic effects must occur first and then proximately cause the foreign antitrust claim.” *Id.*

92. The plaintiffs had made purchases both in the United States and abroad of products sold pursuant to an alleged price-fixing conspiracy. *Id.* at 550. The portion of the action under scrutiny sought damages for their purchases outside the United States. *Id.* For the purposes of resolving the scope of this exception to FTAIA, the court accepted the plaintiffs’ assertions that the defendants had agreed, in part by meetings that took place in the United States, to elevated prices for the products in question; and that the agreement resulted in a single unified price for the sales in both the United States and Europe. *Id.* at 554. Thus, there was no question that there was the requisite “domestic effect.” *Id.* At issue, however, was whether that effect satisfied the “gives rise” portion of the exception. *Id.* In insisting that the domestic effect and the foreign injury be sequential rather than simultaneous, the court relied on *Empagran II*’s rejection of a “but for” scenario and its imposition of a “proximate cause” requirement. *Id.* at 555-61. The court rejected the plaintiffs’ argument that this standard should not apply when, as here, the domestic and foreign prices, and the injuries they caused, were interdependent rather than independent. *Id.* Instead, the court concluded that a simultaneous foreign injury could not be the “proximate” result of the domestic effect, maintaining that even “a direct correlation between prices does not establish a sufficient causal relationship.” *Id.* at 560 (quoting *In re DRAM Antitrust Litig.*, 546 F.3d 981, 989 (9th Cir. 2008)).

93. *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650 (7th Cir. 2011), *set aside after reh’g en banc*, 683 F.3d 845 (2012).

potash supply. The plaintiffs represented classes of American purchasers of potash who imported it, both directly and indirectly, into the United States.

The complaint alleged that the defendants had conspired to set the sales prices and output levels of potash in China, Brazil and India; that those prices served as “benchmarks” for American potash prices; and that this behavior resulted in the higher prices they paid for potash in the United States. Yet remarkably, the original Seventh Circuit panel held that these claims were barred by the FTAIA. First, it concluded that “it is not enough that the defendants are engaged in the U.S. import market.”⁹⁴ Rather, it held that FTAIA’s “import commerce” provision⁹⁵ applies only “if the overseas anticompetitive conduct actually ‘involves’ the U.S. import market.”⁹⁶ In the panel’s view, this in turn required that the specific conduct, here the agreement to fix prices, must “target” U.S. import goods.⁹⁷

Then, in the panel’s view, it was not enough that the plaintiffs alleged that the prices they paid were elevated, and that this was the known and intended result of their behavior.⁹⁸ Rather, the plaintiffs had to plead facts, showing that the effect on the domestic potash industry was the “direct, substantial and reasonably foreseeable” result of the foreign anticompetitive activity. The various allegations in the complaint about the relationship between the price increases and output restrictions in China, Brazil and India, and the sharply elevated prices the plaintiffs paid in the United States, were dismissed as conclusory or inadequate.

In part, the defendant-oriented tilt reflected in that decision is yet another illustration of the serious mischief wrought by *Twombly* and its progeny.⁹⁹ The insistence on detailed allegations of fact makes it far more difficult for plaintiffs, who have not yet had the benefit of any pre-trial discovery, to state a claim which will satisfy these elevated standards of Federal Rule of Civil Procedure 8.¹⁰⁰

However, that decision was also reflective of the substantive shift away from vigorous enforcement of the antitrust laws and towards greater permissiveness of defendants’ anticompetitive behavior, which was described at the outset of this article.¹⁰¹ But the expansion of FTAIA in a situation like the one presented by *Minn-Chem* would have had a particularly invidious result. Nonsensically, the court exempted Canadian, Russian and Belarus producers from antitrust scrutiny, even when their conduct harmed American importers, American farmers and American consumers.

In notable contrast, the en banc panel refused to permit the defendants to

94. *Id.* at 661.

95. Recall that this “exception” to FTAIA—more accurately, a provision dictating that the FTAIA never reaches “import commerce”—permits the assertion of an antitrust claim.

96. *Minn-Chem*, 657 F.3d at 661 (emphasis in original).

97. *Id.*

98. As the court noted, “[f]rom 2003 to 2008, potash prices in the United States increased by a staggering amount—roughly 600%.” *Id.* at 654.

99. See *supra* notes 7-8 and accompanying text.

100. FED. R. CIV. P. 8(a)(2). See generally Max Huffman, *New Lessons for Pleading the FTAIA*, CPI ANTITRUST CHRONICLE (Nov. 2011) (stating that the court in *Minn-Chem* “may have been overly skeptical in its review of the complaint,” and concluding that “[c]ombining [FTAIA] with a pleading standard created to protect against false positive errors from private antitrust enforcement substantially increases the challenge to private plaintiffs.”).

101. See *supra* note 1 and accompanying text.

invoke FTAIA as a shield from potential antitrust liability. As to some of the charged conduct, the result was straightforward. Some of the allegedly inflated prices were for large quantities of potash shipped directly to the United States. These transactions were part of “import trade,” and thus were clearly outside of the FTAIA’s coverage.¹⁰² Rejecting any suggestions of “targeting,”¹⁰³ the court succinctly concluded that “transactions that are directly between the plaintiff purchasers and the defendant cartel members *are* the import commerce of the United States in this sector.”¹⁰⁴

Closer examination was required of some of the allegations regarding the defendants’ global price-fixing conspiracy, and the plaintiffs’ contention that the elevated prices charged in the United States were the result of the defendants’ use of prices set on foreign sales as a “benchmark.” Since arguably some of those transactions involved potash that was not imported directly into the United States, they were not part of “import trade” or “import commerce.” Therefore, it became necessary to consider the requirement for an exception to FTAIA—that the foreign conduct have a “direct, substantial, and reasonably foreseeable effect” on domestic commerce. The latter two requirements were easily met: The trade involved ran into the billions of dollars, the price of potash rose 600%, and the defendants certainly could have foreseen that their price strategy would affect the prices paid by American consumers.¹⁰⁵

But was the effect of this conduct “direct”? Here, the court rejected the more demanding standard suggested by the Ninth Circuit in *United States v. LSL Biotechnologies*, which required that the domestic effect be the “immediate consequence” of the defendants’ illegal conduct.¹⁰⁶ Instead, the Seventh Circuit correctly held that the element only required proof that the prohibited effect on domestic competition was the “proximate result” of the unlawful behavior.¹⁰⁷ And here, since the plaintiffs’ complaint plausibly alleged the requisite domestic effect, it was error to dismiss the action.

This decision marks a healthy re-direction of FTAIA’s exclusion of actions challenging foreign behavior, even when it does not directly involve import commerce. The antitrust laws still apply when that behavior impacts domestic commerce and harms domestic consumers. Despite fears of potential over-

102. As the court explained, “the applicability of U.S. law to transactions in which a good or service is being sent directly into the United States, with no intermediate stops, is both fully predictable to foreign entities and necessary for the protection of U.S. consumers.” *Minn-Chem*, 683 F.3d at 854.

103. Regrettably, other cases have also insisted on proof that the defendants’ conduct “targeted” the United States or U.S. imports. *See, e.g.,* *McLafferty v. Deutsche Lufthansa A.G.*, No. 08-1706, 2009 WL 3365881 (E.D. Pa. Oct. 16, 2009) (discussed *infra* notes 109, 118 and accompanying text). However, as the Seventh Circuit correctly concluded, the proper reading of FTAIA only requires that the defendants’ conduct have the requisite “effect” on either U.S. domestic commerce or U.S. import commerce—irrespective of the defendants’ intent. Thus, the test is “objective,” looking at the actual effect, rather than adding some “subjective” requirement.

104. *Minn-Chem*, 683 F.3d at 855 (emphasis in original).

105. *Id.* at 856.

106. 379 F.3d 672, 680 (9th Cir. 2004).

107. “The word ‘direct’ addresses the classic concern about remoteness [T]he FTAIA exclude[s] from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce.” *Minn-Chem*, 683 F.3d at 857.

application of the Sherman Act, as the Seventh Circuit noted, plaintiffs still have to meet the *Alcoa/Hartford Fire* standard for the extra-territorial application of the antitrust laws—“that the conduct of the foreign cartel members (1) was meant to produce and (2) did in fact produce some substantial effect in the United States.”¹⁰⁸

Although the expansive misinterpretation of the FTAIA’s exclusions was properly corrected by the full Seventh Circuit, a slightly older pair of decisions involving international air travel by Americans, affords other instances of the overbroad judicial interpretation of FTAIA. In *McLafferty*,¹⁰⁹ the plaintiff sought to represent a class of Americans who purchased tickets in the United States from several foreign airlines. She alleged that the defendants had engaged in a price-fixing conspiracy to elevate the fares for travel between Europe and Japan, including flights taken by the plaintiff. Yet, the court found that the alleged conspiracy did not have the requisite effect on domestic “commerce” to fall within the exception in the FTAIA. The court stated that its focus was on the “geographic target” of the conspiracy. Then, with little explanation for its conclusion, it asserted that “it is apparent that the conspiracy’s target was Europe and Japan and passenger travel between the two.”¹¹⁰ In the court’s view, the fact that the claim was by American plaintiffs, for purchases made in the United States, was insufficient to overcome the FTAIA.

It should be obvious that this result seriously diminishes the protection that the antitrust laws are designed to extend to American consumers. Furthermore, this reading of FTAIA was not necessary to accomplish its goals, including whatever comity concerns are suggested by *Empagran*. It should hardly be offensive to foreign countries for the Sherman Act to extend to sales taking place in the United States, even for foreign air travel. The opportunity afforded to the defendants to make sales in the United States and to profit from travel by American consumers should carry with it the obligation to adhere to the rules imposed by U.S. antitrust law.

Even more regrettable is another decision also involving alleged price-fixing by airlines—both American and foreign—flying international routes. Unlike *McLafferty*, where the flights neither originated in nor terminated in the United States, in *In re Transpacific Passenger Air Transportation Antitrust Litigation*,¹¹¹ the plaintiffs complained of overcharges on flights from Asia to the United States.¹¹² Nonetheless, the court here too held that the claims were barred by FTAIA. It first gave a cramped interpretation to the “import trade” or “import commerce” limitation in FTAIA, finding that unlike cargo,¹¹³ international air

108. *Id.* at 858. Here, the court concluded that “[t]he inference from [the plaintiffs’] allegations is not just plausible but compelling that the cartel meant to, and did in fact, keep prices artificially high in the United States.” *Id.* at 858-59.

109. *McLafferty v. Deutsche Lufthansa A.G.*, No. 08-1706, 2009 WL 3365881 (E.D. Pa. Oct. 16, 2009).

110. *Id.* at *4.

111. No. C 07-05634 CRB, 2011 WL 1753738 (N.D. Cal. May 9, 2011).

112. The class of plaintiffs was all passengers purchasing overpriced tickets on these flights. While these passengers were not all Americans, undoubtedly a large fraction of them were.

113. Thus, the court distinguished *In re Air Cargo Shipping Services Antitrust Litigation*, No. MD 06-1775(JG)(VVP), 2008 WL 5958061, at *13-15 (E.D.N.Y. Sept. 26, 2008) (concluding that a conspiracy to fix prices of international air cargo transportation “involved” import commerce; “conduct

passengers were not the subject of “importation.” Putting aside the fact that the airlines presumably also transported the passengers’ luggage,¹¹⁴ this narrow definition of “import” is inconsistent with the evolving nature of international trade, which is increasingly characterized by the sale of services, intellectual property, or other intangibles across national borders, and less by sales of traditional “goods.”

The court also dismissed the second “exception” to FTAIA—for foreign conduct having an adverse domestic effect, where “such effect gives rise to the [antitrust] claim.”¹¹⁵ The court conceded that the defendants’ overcharges resulted in the requisite effect on American consumers. Yet, it strangely found that the excessive fares paid by those Americans, to fly to the United States, constituted a *foreign injury*—because the flights did not originate in the United States.¹¹⁶ In doing so, the court rejected the obvious facts that the same planes that flew to the United States were returning to the Asian destinations; that the fares to and from the United States were similar and linked; and, perhaps most importantly, that the U.S.-based resources of these passengers was diminished by the price-fixing conspiracy.¹¹⁷

These instances of limiting protection under the antitrust laws for American consumers—and, ironically, expanding the range of immunity for foreign defendants for their behavior that harms those American consumers—can hardly have been the goal of FTAIA. To the contrary, they undermine the goals of the antitrust regime.¹¹⁸

directed at fixing the cost of airfreight necessarily affects the commerce in the goods transported by airfreight”).

114. Today, of course, that carriage would probably be subject to various limitations, surcharges, penalties, and so forth.

115. FTAIA, 15 U.S.C. §6a (2006) (quoted in full *supra* in Section II).

116. *Transpacific Passenger Air Transp.*, 2011 WL 1753738, at *5-8.

117. *Id.* See also *In re Korean Air Lines Co. Antitrust Litig.*, No. CV 07-01891, 2010 WL 3184372 (C.D. Cal. Aug. 2, 2010) (reaching similar conclusions regarding purchases of air tickets for flights from Korea to the United States).

118. The case law under the FTAIA also reflects a significantly reduced solicitude for invoking the American antitrust laws with respect to injury to *non-Americans*, even if that harm is the result of anti-competitive behavior taking place in the United States. A leading example is *Turicentro, S.A. v. American Airlines*, 303 F.3d 293 (3d Cir. 2002). The plaintiffs were travel agents located in Central America. *Id.* at 297. They alleged that the defendants—American air carriers and a U.S. airline trade association—had conspired to reduce the commissions paid to them for air travel both in the United States and between the United States and Latin America. *Id.* The court of appeals concluded that these claims were barred by the FTAIA, because they did not have the requisite “effect” on U.S. commerce. *Id.* at 305. Here, the harm was to competition among non-American travel agents, and the “United States antitrust laws only apply when a price-fixing conspiracy affects the domestic economy.” *Id.* Although some might argue that this result is “unfortunate,” it presents the obverse situation from the *McLafferty* and *Transpacific Passenger Air Transportation* decisions. As a matter of policy, *Empagran* can be read for the sound proposition that the American antitrust laws are not designed to protect the world from all types of anti-competitive behavior. Thus, these non-American plaintiffs were outside the pale of protection, and it was irrelevant that some of their customers were Americans or that the offending behavior took place in the United States. But in the two cases discussed in the text, the plaintiffs were American. *Empagran* should not be read to extend the FTAIA as a shield for defendants, whether they be American or foreign, from anti-competitive behavior which harms American consumers.

Unfortunately, numerous courts have given the “import” provision an unduly narrow reading. For example, some cases hold that it applied only if the defendants were the physical importers of the goods.¹¹⁹ However, the better reading, found in other decisions, is that FTAIA is inapplicable so long as the defendants’ conduct was directed at an American import market, or “to phrase it slightly differently, the import trade or commerce exception [merely] requires that the defendants’ conduct target import goods or services.”¹²⁰ “Import trade” has been given a narrow interpretation by another line of cases, whereby courts have insisted that the focus should be solely on whether the defendant’s conduct “involved” import trade or commerce, while ignoring the fact that the plaintiff may have been involved in the importation of goods (or perhaps services).¹²¹

There are other decisions which have likewise given the FTAIA an overly expansive reading on other questions. For example, some cases have unduly elevated the requirement that the defendant’s conduct have a “direct . . . effect” on non-import commerce.¹²² As a result, courts have dismissed claims although the defendants’ alleged antitrust violations resulted in artificially higher prices for components of products purchased abroad that were in turn incorporated in goods sold to retailers and consumers in the United States at elevated prices—clearly producing a domestic harm.¹²³ The justification given for these dismissals is that the chain of distribution was assertedly too long or too difficult to follow.¹²⁴ The bottom line, however, is that in these and other cases, the FTAIA is being applied in ways which are not required to meet its goal of promoting American business, and in particular export business. At the same time, the courts are further undermining the vitality of the antitrust laws as an important means of promoting consumer welfare for American individuals and corporations.¹²⁵

119. See, e.g., *Animal Science Prods., Inc. v. China Nat’l Metals & Minerals Imp. & Exp. Corp.*, 702 F. Supp.2d 320, 369 (D. N.J. 2010).

120. See *Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011), *cert. denied*, 132 S.Ct. 1744 (2012).

121. See, e.g., *Turicentro, S.A. v. Am. Airlines*, 303 F.3d 293, 302-03 (3d Cir. 2002); *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 395-96 (2d Cir. 2002). See also *Carpet Group Int’l v. Oriental Rug Importers Ass’n*, 227 F.3d 62, 71-73 (3d Cir. 2000) (finding that defendants’ conduct sufficiently involved import trade, to bring plaintiff’s complaint within exception to FTAIA).

122. See, e.g., *U.S. v. LSL Biotechs.*, 379 F.3d 672, 680 (9th Cir. 2004) (“‘direct effect’ means that there must be an ‘immediate consequence’ of the alleged anticompetitive conduct with no ‘intervening developments’”); *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp.2d 555, 560 (D. Del. 2006) (quoting *LSL Biotechs.*).

123. See *In re Intel*, 452 F. Supp.2d at 561 (describing plaintiff’s claim as “full of twists and turns,” and rejecting “allegations of foreign conduct [that] result in nothing more than what courts have termed a ‘ripple effect’ on the United States domestic market”).

124. See *In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F. Supp.2d 452, 456 (D. Del. 2007) (asserting that a “speculative chain of events is insufficient to create the direct, substantial and foreseeable effects on commerce required by the FTAIA”).

125. In *The ‘In’ Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 497-501 (M.D.N.C. 1987), the plaintiff, a French distributor of the defendant’s products in Europe, had entered into an exclusive distributorship agreement with the defendant, pursuant to which the plaintiff had terminated its distributorship arrangements with a number of other American manufacturers. After the defendant subsequently terminated the agreement, plaintiff asserted various antitrust claims. *Id.* at 496-97. To attempt to overcome the FTAIA requirement that there be a “domestic effect” of the defendant’s conduct, the plaintiff pointed to the business assertedly lost by the other American exporters. *Id.* at 499-

Unfortunately, but not surprisingly, the opinions engage merely in an elementary level of statutory interpretation. They leave unexamined the competing values that underlie the possible alternate interpretations. Arguably, the courts are seeking to protect the interests of American companies doing business abroad and of foreign companies doing business in the United States, with the unstated assumption that somehow this will result in a net benefit to the American economy. The unwillingness to allow American consumers harmed by that behavior to sue for antitrust redress may implicitly be the necessary evil to protect those business entities.

Thankfully, the landscape is not totally bleak. In addition to the recent Seventh Circuit decision in *Minn-Chem* described above,¹²⁶ there are other important decisions that have recognized the broader reach of American antitrust laws, notwithstanding some of the limitations erected by the FTAIA. Thus, some courts have properly taken a more expansive view of the “domestic effects” exception to FTAIA. For example, a district court recently held that direct purchasers of products which were billed to parties in the United States could complain of a price-fixing conspiracy, even if those products were shipped to purchasers outside the United States.¹²⁷ Because the plaintiffs had alleged that the defendants had broadly targeted the American market, the court correctly concluded that the conspiracy had a direct effect on domestic commerce and that the overcharge for purchases made in the United States gave “rise to” their antitrust claims.¹²⁸

In another case, a district court concluded that FTAIA did not preclude a challenge by an American brewer to the acquisition by one of its American competitors of a major Canadian brewer with which the plaintiff had had a licensing agreement.¹²⁹ The court agreed that the acquisition would have effects not only on the plaintiff’s export trade to Canada—which presumably would not be subject to an antitrust challenge because of FTAIA—“but also, albeit less directly, on the United States beer market and the consumers in that market.”¹³⁰

The Third Circuit has also made it clear that the plaintiffs do not need to prove that the defendant *subjectively* intended to impact commerce in the United States.¹³¹ Rather, FTAIA adopts an objective standard: It is sufficient for the

500. Rejecting this theory, the court concluded that “an antitrust plaintiff . . . must prove . . . (1) the defendant’s conduct must have a direct, substantial, and reasonably foreseeable effect on (2) *plaintiff’s* continuing ability to export products (3) *from the United States.*” *Id.* (emphasis in original).

126. *See supra* notes 93-108 and accompanying text.

127. *In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07–md–01819 CW, 2010 WL 5477313 (N.D. Cal. Dec. 31, 2010).

128. *Id.* at *5-7. *See also* Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd., No. 07–md–01819 CW, 2011 WL 7053807, at *36-37 (E.D.N.Y. Jan 4, 2011) (holding that conspiracy by freight-forwarders elevating prices for shipment of goods exported from foreign locations into the U.S. had a direct effect on the prices of goods themselves and thus were within an exception to FTAIA).

129. Coors Brewing Co. v. Miller Brewing Co., 889 F. Supp. 1394 (D. Col. 1995).

130. *Id.* at 1398. *Cf. In re* TFT-LCD (Flat Panel) Antitrust Litig., Nos. M 07–1827 SI, CR 09–0110 SI, 2011 WL 1464858, at *5 (N.D. Cal. Apr. 18, 2011) (concluding that FTAIA did not bar a criminal indictment charging criminal behavior that occurred both outside of and within the United States, including an “overt act in furtherance of conspiracy” in the United States).

131. *See* Animal Science Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011), *cert. denied*, 132 S.Ct. 1744 (2012).

plaintiff to show that the adverse effects on domestic commerce were foreseeable to an “objectively reasonable person.”¹³²

There is one set of decisions which may have a positive effect on the protective reach of the antitrust laws. An interpretive question is whether the provisions in FTAIA are jurisdictional or substantive—i.e., whether they bar the court from hearing the case at all, or are instead limitations on the substantive scope of the Sherman Act.

A large number of earlier cases had concluded that the statute was jurisdictional.¹³³ However, in a non-antitrust case,¹³⁴ the Supreme Court recently held that statutes should be viewed as *non*-jurisdictional unless Congress “clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional.”¹³⁵ As a result, several recent decisions have extended that presumption to FTAIA.¹³⁶ Other cases have continued to view FTAIA as jurisdictional.¹³⁷ Still other courts have declined to resolve the question.¹³⁸

The difference is significant both from a procedural and a practical perspective.¹³⁹ A substantive challenge would be raised by a motion to dismiss for failure to state a claim¹⁴⁰ (in which case all of the plaintiff’s factual allegations must be taken as true) or pursuant to a motion for summary judgment (if there are disputed facts).¹⁴¹ Under both of these latter motions, the burden of proof would be on the defendant.¹⁴² To the extent that there are disputed facts, the plaintiff would be entitled to some pre-trial discovery, raising the likelihood that the defendant might settle.

By contrast, if the bar is jurisdictional, an action complaining of foreign

132. *Id.* at 471.

133. *See, e.g.*, U.S. v. LSL Biotechnologies, 379 F.3d 672, 677-83 (9th Cir. 2004); United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942 (7th Cir. 2003) (en banc); Turicentro, S.A. v. Am. Airlines, 303 F.3d 293, 300 (3d Cir. 2002); Carpet Group Int’l v. Oriental Rug Importers Ass’n, 227 F.3d 62, 69-73 (3d Cir. 2000); Filetech S.A. v. France Telecom, S.A., 212 F. Supp.2d 183, 188-89, 198-99 (S.D.N.Y. 2001).

134. *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006).

135. *Id.* at 515. *See also* *Morrison v. Nat’l Austl. Bank*, 130 S.Ct. 2869 (2010).

136. *See, e.g.*, *Minn-Chem, Inc. v. Agrium*, 683 F.3d 845, 851 (2012) (en banc) (overruling *United Phosphorus*); *Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 465-69 (3d Cir. 2011) (suggesting that *United Phosphorus* may be “ripe for reconsideration”), *cert. denied*, 132 S.Ct. 1744 (2012); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp.2d 953, 957-59 (N.D. Cal. 2011).

137. *See, e.g.*, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-md-01819 CW, 2010 WL 5477313, at *2-3 (N.D. Cal. Dec. 31, 2010) (feeling bound by Circuit precedent); *McLafferty v. Deutsche Lufthansa A.G.*, No. 08-1706, 2009 WL 3365881 (E.D. Pa. Oct. 16, 2009) (treating question as one involving subject matter jurisdiction); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp.2d 1166, 1184-85 (N.D. Cal. 2009) (same).

138. *See, e.g.*, *In re DRAM Antitrust Litig.*, 546 F.3d 981, 985 n.3 (9th Cir. 2008); *Boyd v. AWB Ltd.*, 544 F. Supp.2d 236, 243 n.6 (S.D.N.Y. 2008). *See also* *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 439 n.4 (6th Cir. 2012) (declining to resolve whether *Alcoa*’s “effects” requirement for application of the Sherman Act is jurisdictional).

139. *See* *Minn-Chem, Inc. v. Agrium*, 683 F.3d 845, 852-53 (2012) (en banc) (“This is not a picky point that is of interest only to procedure buffs. Rather, this distinction affects how disputed facts are handled, and it determines when a party may raise the point.”).

140. FED. R. CIV. P. 12(b)(6).

141. FED. R. CIV. P. 56.

142. *See, e.g.*, *Animal Science Prods.*, 654 F.3d at 469 n.9.

activity would be subject to challenge under Rule 12(b)(1),¹⁴³ and the burden of proof would be on the plaintiff. And, on jurisdictional challenges, the court need not confine its analysis to the pleadings and other materials submitted by the parties, and it need not make all inferences on behalf of the non-moving party.¹⁴⁴

CONCLUSION

The Foreign Trade Antitrust Improvements Act of 1982 was intended to promote exports from the United States by shielding exporters from antitrust liability for harm to non-American consumers. But, under FTAIA, the Sherman Act remains fully applicable to foreign behavior having an adverse effect on domestic commerce and import commerce. The Seventh Circuit's recent *Minn-Chem* decision recognizes the importance of continued application of the antitrust laws to this behavior. Regrettably, too many other courts have given an unduly expansive reading to the carve-out from the reach of the antitrust to certain foreign behavior. Not only are these decisions inconsistent with the legislative purpose of FTAIA—they also deny the competitive benefits which the antitrust laws are designed to confer on American consumers.

These cases are part of a larger trend in the last 35 years of cutting back on the protections afforded by the antitrust laws. As incorrect as those decisions may be, they may in part be explained by the countervailing concerns of undue burdens imposed on American companies supplying goods and services. But that explanation cannot be extended to conduct undertaken principally by *non-American* suppliers that adversely affects commerce in or to the United States and harms *American* consumers.

So, enough already! It is past time either for the courts—including the Supreme Court—to right this misdirection in the interpretation of FTAIA, or for Congress to make the necessary statutory revisions. Congress or the Court needs to make clear that the antitrust laws reach *all* conduct, domestic and foreign, that harms competition in the United States.

143. FED. R. CIV. P. 12(b)(1).

144. See generally Alicia Batts & Keith Butler, *Recovery in the United States for Price-Fixing Abroad: The Future of FTAIA Litigation*, CPI ANTITRUST CHRONICLE (2011) (noting circuit split, and urging Supreme Court review); Edward Valdespino, *Shifting Viewpoints: The Foreign Trade Antitrust Improvements Act, A Substantive or Jurisdictional Approach*, 45 TEX. INT'L L. J. 457 (2009).