No. 10-1712

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MINN-CHEM, INCORPORATED, *et al.*,
Plaintiffs - Appellees

v.

AGRIUM INCORPORATED, *et al.*,
Defendants - Appellants

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

The Honorable Ruben Castillo

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This supplemental brief is submitted in response to the Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party ("Gov't Br.").

INTRODUCTION

The FTAIA places allegations of foreign anticompetitive conduct outside the scope of the Sherman Act unless, as relevant here, the complaint challenges (1) "conduct involving . . . import trade or import commerce" or (2) conduct that "has a direct, substantial, and reasonably foreseeable effect" on United States markets. 15 U.S.C. § 6a. Under any reasonable formulation of those standards, plaintiffs' complaints here fail. The government does not suggest otherwise, and its arguments do not offer support for plaintiffs' case.

Plaintiffs' complaints allege an anticompetitive agreement to fix the supply and price of potash in Brazil, China, and India. SA13 ¶52; SA21-22 ¶¶90, 94-95; SA25-26 ¶111; SA28-29 ¶¶120, 123-24, 127; SA33 ¶¶142, 144. Plaintiffs allege that defendants violated the Sherman Act because "the prices established in those markets directly influence[d] prices in other major markets." SA25 ¶111; *see also* SA26 ¶112; SA34 ¶145. In particular, plaintiffs allege that potash prices in the United States were adversely affected by defendants' foreign conduct because

"[t]he prices for cartelized [overseas] term contracts become benchmarks for [defendants'] spot market sales." SA26 ¶111.

Pursuant to the FTAIA, however, the Sherman Act does not provide a cause of action that reaches the conduct alleged here. Plaintiffs do not allege "conduct involving . . . import trade or import commerce" because that exception requires that the *anticompetitive conduct* itself have something to do with imports; on the face of the complaints, no such import conduct is at issue here. And plaintiffs do not allege conduct with a "direct . . . effect" on U.S. markets because their benchmark theory depends on the operation of nebulous and undefined market forces that are necessarily remote and *in*direct.

In addressing these exceptions, the government has proposed standards for interpreting the FTAIA that differ from those articulated by the panel in this case. But the differences have no bearing on the outcome here. Under either the government's approach or that of the panel, the district court erred in concluding that plaintiffs have adequately alleged a violation of the Sherman Act.

The government, it appears, is concerned about circumstances *not* presented by this case that might be affected by an incorrect statement

of the FTAIA standards. Because the particular factual circumstances that concern the government are not present here, it is not necessary for this Court to opine on the details of the government's theory. Nevertheless, should the Court be inclined to address those concerns in this case, the Court should reject the government's efforts to broaden the meaning of the FTAIA's direct-effects exception. The government's suggestion that Congress used the word "direct" to mean "reasonably proximate" is inconsistent with the plain meaning of the FTAIA, its historical context, the dictates of prescriptive comity, and the need for clarity as to this important legal guidepost.

ARGUMENT

I. UNDER EITHER THE PANEL'S OR THE GOVERNMENT'S APPROACH, PLAINTIFFS' COMPLAINT IS BARRED BY THE FTAIA.

Regardless of whether this Court employs the panel's standards or the government's, plaintiffs' complaints are insufficient. The FTAIA "lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach." *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004). "It then brings such conduct back within the Sherman Act's reach" (*id.*) if, as relevant here, the complaint challenges "conduct involving . . . import trade or import com-

merce" or conduct that "has a direct, substantial, and reasonably foreseeable effect" on United States markets, 15 U.S.C. § 6a. Neither exception permits plaintiffs' claims.

A. Plaintiffs' claims do not satisfy the FTAIA's import-commerce exception.

As we explained in our panel briefs, the FTAIA's import-commerce exception permits a claim to go forward when the *specific anticompetitive conduct* alleged in the complaint involves import commerce. Opening Br. 18-31; Reply Br. 3-11. Thus, the district court erred in concluding that plaintiffs' complaints satisfy the import-commerce exception on the ground that they "specifically allege that Defendants 'sold and distributed potash in the United States.'" A28 (quoting complaint). For the import commerce exception to be satisfied, there must be a nexus between the alleged anticompetitive *conduct* and importation.

The panel agreed. It concluded that "it is not enough that the defendants are engaged in the U.S. import market." Slip op. 20. Looking to plaintiffs' allegations of anticompetitive conduct, the nature of defendants' import activities, and the relationship between the two, the panel found no allegations of "an American price or production quota for potash," no allegations of "worldwide production quotas," and no allega-

tions of "a global cartel price." *Id.* at 21. As such, the panel concluded that "the complaint cannot survive dismissal based on the FTAIA's import-commerce exception." *Id.*

The government proposes a very similar approach. It agrees that the import-commerce exception "does not apply merely because the defendants engaged in import commerce." Gov't Br. 14. In the government's view, the import-commerce exception instead applies only "when the challenged contract, combination, or conspiracy is, at least in part, in restraint of import commerce." *Id.* at 15.

The only point of contention on the import-commerce exception raised by the government's submission involves the government's concern that the panel's standard might be construed too narrowly in future cases. In particular, the government expresses concern that the panel's favorable invocation of the Third Circuit's decision in *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011) (looking to "whether the defendants' alleged anticompetitive behavior 'was directed at an import market'" and whether the alleged anticompetitive behavior "target[s] [U.S.] import goods or services"), *petitions for cert. filed*, Nos. 11-846, 11-847 (U.S. Jan. 5, 2012), might lead future

courts to require a *subjective* intent to harm U.S. imports, which might be problematic in the case of a worldwide conspiracy. Gov't Br. 17-18.

Whatever its merits, that concern has no bearing on the outcome of this case. As the panel recognized, plaintiffs do not allege a conspiracy to constrain supply or to fix prices *in the United States*. And plaintiffs also do not allege—certainly, not with "enough factual matter," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)—a conspiracy that involves import commerce in part by constraining supply or fixing prices *world-wide*. Rather, plaintiffs allege a conspiracy to constrain supply and fix prices *in Brazil, China, and India*. *See* slip op. 23 ("As we have noted, the complaint does not allege that the defendants agreed to worldwide production quotas or a global cartel price, nor are there allegations that the defendants ever imposed a price or supply quota on the American potash market specifically."). Thus, as the government recognizes, "[t]he panel did not require a subjective intent to restrain U.S. imports or a specific focus on U.S. imports. Nor did it require a minimum proportion or dollar value of products sold in or for delivery to the United States." Gov't Br. 19. The concerns raised by the government accordingly are not implicated in this case, as the government itself acknowledges. *Id.* Whether

this Court accepts the standard stated by the panel and the Third Circuit, or ultimately agrees with the government, the conclusion here is the same: Plaintiffs have not satisfied the import-commerce exception because the anti-competitive conduct alleged in the complaint is not itself "in restraint of import commerce." *Id.* at 15.

B. Plaintiffs' claims do not satisfy the FTAIA's direct-effects exception.

The FTAIA's other relevant exception is for conduct that "has a direct, substantial, and reasonably foreseeable effect" on United States markets. Consistent with the holding of the Ninth Circuit in *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004), the panel concluded that, to be "direct," an "effect" must "'follow[] as an immediate consequence of the defendant's activity.'" Slip op. 22 (quoting *LSL Biotechs.*, 379 F.3d at 680 (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992))). Conversely, "'[a]n effect cannot be "direct" where it depends on . . . uncertain intervening developments.'" *Id.* (quoting *LSL Biotechs.*, 379 F.3d at 681).

The government proposes a somewhat different definition. In its view, "'direct' is best defined as 'reasonably proximate.'" Gov't Br. 21. Thus, the government would find a "direct" effect even when there is a

"'chain of causation between a defendant's action and a plaintiff's injury,'" although not when "'the connection is based instead only on "somewhat vaguely defined links."'" *Id.* at 22-23 (quoting *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 486-87 (7th Cir. 2002) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 540 (1983))).

Again, this difference in standards has no practical effect on the outcome in this case. Although the expression "reasonably proximate" has no particular legal meaning, *see infra* p. 21, "proximate cause" has roots in the common law. "The *term* 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2637 (2011); *see also Palsgraf v. Long Island R.R.,* 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."). As commonly formulated, "[a] proximate cause is one that produces an injury through a natural and continuous sequence of events unbroken by any effective intervening cause." *Cleveland v. Rotman,* 297 F.3d 569, 573 (7th Cir. 2002) *see also Sosa v. Alva-*

rez-Machain, 542 U.S. 692, 704 (2004) ("[p]roximate cause is causation substantial enough and close enough to the harm to be recognized by law"). And when an intervening cause interrupts the causal chain, "[t]he general tendency of the law . . . is not to go beyond the first step" in awarding damages. *Holmes v. SIPC*, 503 U.S. 258, 271-72 (1992) (internal quotation marks omitted).

One "intervening cause" that defeats proximate causation is the operation of independent market forces. In settling on prices and quantities, a competitive marketplace will take into account any number of factors—especially, as here, where the market is dealing with a fungible commodity with multiple sellers. This phenomenon is reflected, at least in part, in the securities law concept of "loss causation," which is a component of proximate causation. It is not enough for a securities plaintiff to allege that there was misconduct and he or she suffered a loss in the market. The plaintiff must be able to explain *why* it was the defendant's misconduct, and not the forces of competition, that resulted in the loss. *See, e.g.*, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 344-45 (2005); *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 684-85 (7th Cir. 1990).

The fundamental flaw in plaintiffs' allegations is the logical disconnect separating the alleged Brazilian, Chinese, and Indian restraints from the supposed U.S. effects. Even under the government's "reasonably proximate" standard, plaintiffs must connect the dots. This they fail to do: They do not show how joint sales at foreign benchmark prices in Mumbai lead "through a natural and continuous sequence of events" to higher prices in Montana. The plaintiffs thus do not allege that defendants conspired to *use* Brazilian, Chinese, or Indian prices as an American benchmark. *Cf. In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) (holding that "[a]n agreement to fix list prices," which is not alleged here, would be "a per se violation of the Sherman Act"). Nor do they allege that defendants somehow *enforced* Brazilian, Chinese, or Indian prices in the United States. Those omissions are fatal to plaintiffs' case.

Absent affirmative restraints imposed on defendants' activities in the United States—or a description of the mechanism by which foreign activities led directly to an increase in U.S. prices—any responses by the U.S. market to overseas sales must be seen as a consequence of the competitive marketplace; there is nothing inevitable, direct, or "reasonably

proximate" in lawful joint export sales in one place leading to higher prices in other places where the defendants do *not* engage in joint sales activity. And particularly viewed through the lens of *Twombly*, plaintiffs' conclusory allegations that defendants' joint overseas activities led to higher U.S. prices are insufficient.[1]

Indeed, that conclusion must be a correct application of the government's approach. The Antitrust Enforcement Guidelines for International Operations, issued by the Department of Justice and the Federal Trade Commission, provide (consistent with the above analysis) that "sales in or into the United States" by a member of a foreign cartel do *not* provide the basis for a U.S. antitrust action "in the absence of an agreement with respect to the U.S. market," even if "the level of U.S. prices may ultimately be affected by the cartel agreement." U.S. Dep't of Justice

[1] Plaintiffs' causal reasoning bears similarities to that of the plaintiff in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). In that case, a civil RICO plaintiff alleged that it was injured because defendants, who were competitors, failed to pay sales tax and thereby were able to undersell plaintiff. The Supreme Court identified a disconnect between the defendants' misconduct—which directly affected the State—and the plaintiff's injury. *See id.* at 459 (noting the "attenuated connection between [defendant's] injury and the [plaintiff's] injurious conduct"). As the Court explained, "proximate causation" is designed to prevent the kind of "intricate, uncertain inquiries" involved in assessing the likelihood of the effect on the plaintiff. *Id.* at 460.

& Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.121 (ill. ex. C, var. 1) (Apr. 1995), *available at* http://tinyurl.com/22vjpp8 ("Guidelines").

Nor do the hypotheticals presented in the government's brief suggest that plaintiffs' allegations state a claim within the scope of the FTAIA under a proximate-cause analysis. *First*, the government suggests that its "reasonably proximate" standard would cover a circumstance in which foreign manufacturers conspired to "fix[] the price of inputs sold to other foreign manufacturers which incorporate the input into finished goods sold in the United States." Gov't Br. 23. Such a circumstance is anticipated by the Guidelines, which suggest that the FTAIA would not preclude Sherman Act enforcement where members of a foreign cartel that do not explicitly agree to restrain trade in the United States effectively do so by cartelizing sales to an "intermediary outside the United States [that] they know will resell the product in the United States." Guidelines § 3.121 (ill. ex. B).[2] That hypothetical differs materially from plaintiffs' allegations here because, in the situation described by the gov-

[2] The reasoning of the Guidelines applies with equal force whether the intermediary is used to ship finished goods to the United States or to incorporate a cartelized input into a finished good for sale in the United States.

ernment, there is no opportunity for market forces to break the causal link between the cartel's conduct and the effect on the U.S. market. But there was such an opportunity in this case, where there is no allegation at all that the goods sold at an inflated price overseas were resold in the United States.

Second, the government asserts that "a cartel making no sales into the United States would come within the direct effects exemption if it created 'a world-wide shortage . . . that had the effect of raising domestic prices.'" Gov't Br. 24 (quoting H.R. Rep. No. 97-686, at 13, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498). But such a situation also is not present in this case: Plaintiffs' complaints do not allege an agreement to create a worldwide potash shortage, and there is no allegation that defendants conspired to create a shortage in the United States—as the panel expressly explained. Slip op. 23.[3]

[3] The specific conduct alleged in the complaints all concerned conduct occurring in and directed at markets outside the United States. *See* SA21-22 ¶¶94-95 ("leading suppliers of potash around the world jointly limited supply of potash to Chinese consumers"); SA27 ¶117 (Brazil); SA28 ¶120 (Brazil and India); SA28-29 ¶¶123-24 (China); SA29 ¶127 (China and Brazil); SA33 ¶142 (China, India, and Brazil). Plaintiffs' claims rest entirely upon the alleged impact of "defendants' conduct in other countries" on potash prices in the United States as a consequence of a muddled, four-step "chain of events." SA33-34 ¶¶144-45. The effect of such a "chain

In sum, the government's discourse on its preferred standard for what constitutes a "direct" effect bears only on cases at the margins. But this is not a close case. Plaintiffs' complaints describe a situation in which purely foreign conduct is alleged to have had a ricochet effect on the domestic market through the operation of a vague "benchmarking" mechanism, the operation of which is not explained.[4] Stripping out the allegations that are too conclusory to satisfy the requirements of *Twombly*, this is not a case where "'the causal relation'" between the alleged conduct and the effect on U.S. prices "'is so close and intimate and obvious'" as to support liability. Gov't Br. 22 (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 328 (1936)). Under either the panel's or the govern-

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of events" is just the sort of "repercussion[]" of "agreements made beyond our borders" that has long been understood to be beyond the scope of the Sherman Act. *United States v. Alcoa*, 148 F.2d 416, 443 (2d Cir. 1945); *see also Blue Shield v. McCready*, 457 U.S. 465, 476-77 (1982) (antitrust laws do not cover "ripple[]" effect theories of causation). Moreover, as we explained in our panel reply brief, plaintiffs' conclusory allegations do not satisfy *Twombly* insofar as they suggest nothing more than sequential actions (involving different companies, at different times, making different decisions) in response to changing economic conditions and mining difficulties in particular locations. *See* Reply Br. 29-32.

[4] For example, Plaintiffs allege that regional potash prices "chart[ed]" by Green Markets "are considered benchmark prices in the industry" but never allege that those regional prices in any way followed from the alleged anticompetitive conduct directed at Brazil, India, and China. SA27 ¶¶114-15

ment's approach, plaintiffs have not alleged any conduct that has a "direct" effect on the U.S. market.

II. IF THIS COURT IS INCLINED TO CHOOSE BETWEEN THE PANEL'S AND THE GOVERNMENT'S CONSTRUCTION OF THE FTAIA'S DIRECT-EFFECTS EXCEPTION, IT SHOULD ADOPT THE PANEL'S CONSTRUCTION.

As demonstrated above, this Court need not identify the outer bounds of the direct-effects exception to conclude that plaintiffs have failed to state a claim under the Sherman Act. Under both the definition of "direct" employed by the panel and that proposed by the government, plaintiffs' allegations are inadequate.

But if the Court is inclined to choose between the two standards, the usual tools of statutory construction all favor the panel's approach. The plain language of the exception, its context, principles of prescriptive comity, and the need for clarity all counsel in favor of the straightforward definition of "direct" adopted by the panel. This Court accordingly should reject the government's invitation to create a circuit split on the meaning of the FTAIA's direct-effects exception. *See Czerkies v. U.S. Dep't of Labor*, 73 F.3d 1435, 1438 (7th Cir. 1996) ("We ought not go out of our way to create intercircuit conflicts.").

1. *Statutory language*. The first step of any textual analysis is to look to "the word's ordinary meaning." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011); *see Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (internal quotation marks omitted). As the panel correctly recognized, in common parlance an effect is "direct" if "it follows as an immediate consequence of the defendant's activity" and does not "depend[] on . . . uncertain intervening developments." Slip op. 22 (quoting *LSL Biotechs.*, 379 F.3d at 680-81). That usage is consistent with the ordinary meaning of "direct." *See LSL Biotechs.*, 379 F.3d at 680 (adopting the definition after consulting Webster's New International Dictionary 640 (3d ed. 1982)).

The government objects that there are seven "primary" and 31 "specific, subsidiary meanings" of "direct" in the adjectival form. Gov't Br. 20 n.6. That is true. But none of these 31 definitions uses the words

"reasonably" or "proximate."[5] Rather, Webster's Third New International Dictionary (at 640) offers definitions such as "proceeding . . . without deviation," "operating . . . without digression or obstruction," "stemming immediately from a source," "blunt and unqualified," and "marked by absence of an intervening agency, instrumentality, or influence," all of which are consistent with the panel's approach.

The government suggests that one of the 31 meanings is different—"characterized by or giving evidence of a close especially logical, causal, or consequential relationship." Gov't Br. 26 (internal quotation marks omitted). But that definition does not mean that "direct" sometimes means "circuitous." Rather, the "primary" definition to which that definition corresponds also references the words "inevitable," "unequivocal," and "straightforward." This definition thus comports with the panel's conclusion that "'[a]n effect cannot be "direct" where it depends on . . .

[5] If Congress had intended to require a "reasonably proximate" effect, it could at least have used the term "proximate," as Congress has done in numerous other statutes. *See, e.g.*, 15 U.S.C. § 7903(5)(A)(v); 18 U.S.C. § 38(b)(2); 21 U.S.C. § 1606(a)(1)(A); 42 U.S.C. § 3796(a); *see also Vainisi v. Comm'r*, 599 F.3d 567, 572 (7th Cir. 2010) (cautioning courts not to "rewrite statutes . . . merely because [the courts] think they imperfectly express congressional intent").

uncertain intervening developments.'" Slip op. 22 (quoting *LSL Biotechs.*, 379 F.3d at 681).[6]

2. *Context*. Even if the dictionary definitions were truly inconsistent, that would only invite an inquiry into the historical and statutory context of "direct." In *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011), the Supreme Court resolved dueling dictionary definitions by looking to how courts had defined the disputed term contemporaneously with the adoption of the statute and how those definitions comported with the historical purposes of the legislation.

In this case, both of those factors favor the panel's interpretation of "direct." In *Weltover*, the Supreme Court interpreted the same phrase

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[6] The government contends that if the panel's interpretation of "direct" means that "there can be no subsequent sales or other steps before the product is sold or delivered into the United States," the direct-effects exception would be duplicative of the import-commerce exception. Gov't Br. 27. But that is not so. The panel's definition emphasized the immediacy and inevitability of the effect but did not impose a one-step requirement. Consistent with that interpretation, the Guidelines demonstrate that the two exceptions have independent force. *Compare* § 3.11 (ill. ex. A) (shipment by cartel participants into United States constitutes "import commerce"), *with* § 3.121 (ill. ex. B) (shipment by cartel participants to an intermediary outside the United States that "they know will resell the product in the United States" is subject to the direct-effects test if the intermediary is not a member of the cartel). The distinction reflected by the Guidelines is entirely consistent with the panel's conclusion that the term "direct" excludes effects—like those alleged here—that are merely contingent or speculative.

("direct effect") in a statute of similar vintage (the Foreign Sovereign Immunities Act of 1976) in a similar context (the power of federal courts to resolve disputes touching on foreign affairs). The Court concluded—as did the panel here—that "an effect is 'direct' if it follows as an immediate consequence of the defendant's . . . activity." *Weltover*, 504 U.S. at 618 (internal quotation marks omitted).[7]

Likewise, the historical backdrop of antitrust law supports the panel's approach. Congress intended the FTAIA to be a "straightforward clarification of existing American law." H.R. Rep. No. 97-686, at 1. The "direct effects" test traces back to the seminal decision in *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945). And in *Alcoa*, Judge Learned Hand rejected the sort of ripple effect basis for liability suggested by the government's brief, recognizing that, although "[a]lmost any limitation of the supply of goods in Europe, for example, or in South America, may

[7] The government discounts the analysis of *Weltover* because, unlike the FTAIA, "the FSIA's 'direct effects' exception does not include an expressed or 'unexpressed requirement of "substantiality" or "foreseeability."'" Gov't Br. 27 (quoting *Weltover*, 504 U.S. at 618). That observation is correct, but cuts strongly *against* the government's reading: The difference between the statutes confirms both that the FTAIA requires a uniquely close connection between the wrongful conduct and the injury, and that as used in the FTAIA "direct" must mean something *other* than foreseeable or substantial.

have repercussions in the United States if there is trade between the two[,] . . . Congress certainly did not intend the [Sherman] Act to cover them." *Id.* at 443. Similarly, in *Blue Shield v. McCready*, 457 U.S. 465 (1982), the Supreme Court rejected the premise that the antitrust laws might cover "ripple[]" effect theories of causation under which "every person tangentially affected by an antitrust violation" would be able "to maintain an action to recover threefold damages." *Id.* at 476-77. These decisions are consistent with the approach adopted by the panel.

The government cites a number of other decisions in support of its "reasonably proximate" standard. *See* Gov't Br. 21-24. But none of them uses that term. To the contrary, a decision that, as the government puts it, "survey[ed] [the] cases . . . observ[ed] that 'direct' means 'the causal relation . . . is . . . close and intimate and obvious'"; that formulation hardly suggests recourse to a vague "reasonably proximate" standard. *Id.* at 22 (quoting *Carter*, 298 U.S. at 328). Rather, the decisions cited by the government distinguish between injuries that are direct and injuries that are remote and speculative—a distinction entirely consistent with the panel's test.

Indeed, the "reasonably proximate" standard proposed by the government has no historical pedigree in the antitrust context. The Supreme Court has used the phrase "reasonably proximate" only once—forty years ago, in an immigration case. *See Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 57 (1971) (noting that an administrative law judge had examined whether an asylee's physical presence in the United States was "reasonably proximate" to that asylee's flight to avoid persecution). So far as we have been able to determine, this Court has never used the term.

3. *International comity*. International comity concerns also weigh strongly in favor of the panel's approach to the direct-effects exception. There are two reasons for this. As a general matter, "ambiguous statutes" should be construed "to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164. As this Court recognized when it last sat *en banc* to address the FTAIA, "there has long been concern about overreaching under our antitrust laws." *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) (en banc). It is "prudent to tread softly in this area" because "[t]he extraterritorial scope of our antitrust laws touches our relations with foreign governments." *Id.* at 952. And this is so whether or not the

FTAIA states a jurisdictional rule, the point debated by the majority and dissent in *United Phosphorus*. *See id.* at 962 (Wood, J., dissenting) (noting that Congress in the FTAIA sought to "assure foreign countries and their citizens that they would not be swept into a U.S. court to answer under U.S. law for actions that were of no legitimate concern to the United States").

Moreover, avoiding conflict with America's trading partners was a principal purpose underlying the FTAIA's enactment. *See, e.g.*, Foreign Trade Antitrust Improvements Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary, 97th Cong., at 2 (1981) (statement of Rep. Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary) (the FTAIA was intended to allay "foreign animosity toward U.S. antitrust enforcement" and to mollify "our closest allies and trading partners[,] [who] resent the extraterritorial reach of our antitrust laws."); *id.* (domestic-effects standard was intended to "limit the reach of our antitrust laws in a manner consistent with our major trading partners"). This, too, counsels against imposing U.S. antitrust liability for conduct, the direct effect of which is felt overseas, particularly where, as here, the challenged foreign conduct involves

joint export marketing arrangements that are encouraged by foreign governments.

The panel's approach is appropriately modest, predictable, and straightforward. The government's approach is not.

4. *Clarity*. A final—and particularly problematic—concern with the government's approach is that it would replace an easily understood bright-line rule (that of the immediate effect) with a muddled definition sure to sow confusion. Just last Term, the Supreme Court acknowledged that formulations of "proximate cause" are "difficult to comprehend" and reflect not verifiable fact but "a concept." *CSX Transp.*, 131 S. Ct. at 2637; *see also Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996) ("commentators have often lamented the degree of disagreement regarding the principles of proximate causation and confusion in the doctrine's application"). Indeed, the concept is so confusing and muddled that the most recent Restatement of Torts abandoned use of the term "proximate cause" altogether. *See* Restatement (Third) of Torts, ch. 6, Special Note on Proximate Cause (2011). Against this background, what it means to be *reasonably* proximate, a term never before used in this context, is entirely unclear. Adding an additional layer of vagueness to an already

hazy and much-criticized notion leaves great uncertainty about what the FTAIA excludes and what it permits.

Such an outcome would be unacceptable. Even if the FTAIA speaks only to the threshold substantive requirements for Sherman Act claims respecting foreign conduct and not the jurisdiction of federal courts, clarity in the scope of the statute is essential, both for businesses that operate overseas and for the foreign nations (including the United States' principal trading partners) that regulate them.[8] Recognizing that, Congress intended the FTAIA to be a "straightforward clarification of existing American law" (H.R. Rep. No. 97-686, at 1) that would resolve "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction." *Id.* at 4. Interpreting "direct" to mean "reasonably proximate" would do

[8] Of course, under the existing precedent of this Court, the FTAIA speaks to federal jurisdiction to entertain a Sherman Act claim. *United Phosphorus*, 322 F.3d at 945-52. And as the Supreme Court has recognized time and again, "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010); *see also, e.g.*, *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 582 (2004) ("Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful."); *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002) ("jurisdictional rules should be clear"); *Missouri v. Jenkins*, 495 U.S. 33, 50 (1990) (preferring "stability and clarity of jurisdictional rules").

just the opposite. "[P]roximate cause is generally not amenable to bright-line rules." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 659 (2008). And "[t]he farther we depart from bright line rules, the more common error becomes." *Walsh v. Ward*, 991 F.2d 1344, 1346 (7th Cir. 1993). Businesses ought to be able to predict when they will be subject to U.S. antitrust liability.

The rule adopted by the panel is consistent with the plain text of the FTAIA, the preexisting standards of antitrust law, and the need for comity. Consistent with Congress's rationale for enacting the FTAIA—codifying a standard that would displace piecemeal judicial development—it states an easily understood standard that can be applied consistently by courts and anticipated by businesses. The government's "reasonably proximate" standard lacks any of these virtues. Adopting such a novel and opaque standard, grounded in subjective hair-splitting rather than objective fact, would invite a rash of litigation and extensive judicial supervision in a way not envisioned by Congress.

For all these reasons, this Court should not adopt the direct effect test proposed by the government.

CONCLUSION

The district court's order denying the motion to dismiss should be vacated, and the matter should be remanded with instructions to dismiss the complaints with prejudice.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on January 26, 2012, he filed electronically the foregoing Supplemental Brief of Appellants using the Court's CM/ECF system, which will serve the same upon all counsel of record via electronic mail. Pursuant to the parties' agreement, he furthermore certifies that he caused one hard copy of the foregoing Supplemental Brief of Appellants to be placed with a third-party commercial carrier for overnight delivery to the following:

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