
WHAT’S IN A CLAIM? CHALLENGING CRIMINAL PROSECUTIONS UNDER THE FTAIA’S DOMESTIC EFFECTS EXCEPTION

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INTRODUCTION

O be some other name!

What's in a name? That which we call a rose

By any other word would smell as sweet . . .

— William Shakespeare, *Romeo and Juliet* act 2, sc. 2

Americans recently awoke to a startling revelation: “Our country is getting ripped off.”¹ Indeed, the purportedly deleterious effects of international trade on the United States domestic economy have claimed top billing in President Donald Trump’s nascent “America First” agenda.² As the White House publicly excoriates international free trade for the first

1. See Jason Margolis, *Trump’s Trade Policies Worry Economists*, USA TODAY (July 25, 2016, 10:57 AM), <https://www.usatoday.com/story/news/world/2016/07/25/donald-trump-trade-policies-china-mexico/87521852>. In one of many regrettable juxtapositions in American history since June 16, 2015—the day Donald Trump announced his presidential candidacy—Mr. Margolis’s article portended calamitous results relatively well. See also David J. Lynch et al., *U.S. Levies Tariffs on \$34 Billion Worth of Chinese Imports*, WASH. POST (July 6, 2018), https://wapo.st/2ITv5qz?tid=ss_tw-bottom&utm_term=.b5b9bb69b3be (“The conflict over U.S.-China trade has been brewing for years but has intensified rapidly in 2018. On April 3, the United States released a list of targets for proposed tariffs on \$50 billion worth of Chinese imports, taking aim at high-tech and industrial goods. On April 4, China fired back.”). Entering October 2018, the United States and China, two leading jurisdictions in terms of the international sale of goods, have engaged in a disturbing series of retributory tariffs. Anna Fifield, *China Thinks the Trade War Isn’t Really About Trade*, WASH. POST (Sept. 24, 2018), https://wapo.st/2OMNyC7?tid=ss_tw&utm_term=.35afb21f7722 (reporting, in wake of announcement that China will “retaliate with tariffs on \$60 billion of U.S. goods” in response to U.S. decision to “slap tariffs on an additional \$200 billion worth of Chinese goods,” that Chinese officials view combative trade policy as part of a larger geopolitical threat from the United States); see also Robyn Dixon, *China Accuses the U.S. of Holding a Knife to Its Neck and Rules Out New Talks to Resolve the Trade War*, L.A. TIMES (Sept. 25, 2018), <http://www.latimes.com/world/la-fg-china-trade-war-09-25-18-story.html> (reporting Chinese officials considered “U.S. tariffs on \$200 billion in Chinese goods . . . so massive that it made trade talks impossible”); Donald J. Trump (@realDonaldTrump), TWITTER (Jul. 24, 2018, 8:29 AM), <https://twitter.com/realdonaldtrump/status/1021719098265362432> (“Tariffs are the greatest! Either a country which has treated the United States unfairly on Trade negotiates a fair deal, or it gets hit with Tariffs. It’s as simple as that - and everybody’s talking! Remember, [the United States is] the ‘piggy bank’ that’s being robbed. All will be Great!”).

2. Margolis, *supra* note 1; see also Dixon, *supra* note 1. See generally *Issues: Foreign Policy*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/america-first-foreign-policy> (last visited Nov. 28, 2018) (“The promise of a better future will come in part from reasserting American sovereignty and the right of all nations to determine their own futures.”).

time in recent memory, global trade deals and domestic tariffs are cast in stark relief.³ China and Mexico, along these lines, are cast as chief culprits in a system of international exchange allegedly designed to subjugate American workers to nefarious foreign interests.⁴ Overall, recent politics underscore the practical importance of, and interdependence between, competition and cooperation in international economic regulation.⁵

In the arena of hard-nosed international competition, it's all fun and games—until somebody starts a trade war.⁶ But beyond the scope of trade deals and tariffs, sovereign states' *domestic antitrust laws* are also critical regulatory levers. Americans at the Antitrust Division of the Department of Justice and the Federal Trade Commission have the power to influence

3. *Remarks by President Trump to the World Economic Forum*, WHITEHOUSE.GOV (Jan. 26, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-world-economic-forum> (“We cannot have free and open trade if some countries exploit the system at the expense of others. We support free trade, but it needs to be fair and it needs to be reciprocal. Because, in the end, unfair trade undermines us all.”); *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 4, 2018, 4:10 PM), <https://twitter.com/realDonaldTrump/status/970451373681790978> (“We are on the losing side of almost all trade deals. Our friends and enemies have taken advantage of the U.S. for many years. Our . . . industries are dead. Sorry, it’s time for a change!”); Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 2, 2018, 2:50 AM), <https://twitter.com/realdonaldtrump/status/969525362580484098> (suggesting, in light of U.S. trade deficit of billions of dollars, “*trade wars are good, and easy to win*” (emphasis added)).

4. *See* Margolis, *supra* note 1 (“Trump’s major policy positions [on trade] are primarily focused on two countries: China and Mexico.”); *see also* Phil Levy, *Dumping, Cheating and Illegality: Trump Misleads the Public on Steel Tariffs*, FORBES (Mar. 12, 2018, 2:59 PM), <https://www.forbes.com/sites/phillevy/2018/03/12/dumping-cheating-and-illegality-trump-misleads-the-public-on-steel-tariffs>; *accord* Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 10, 2018, 6:17 PM), <https://twitter.com/realDonaldTrump/status/1005982266496094209> (“Why should [the United States] allow countries to continue to make Massive Trade Surpluses, as they have for decades, while our Farmers, Workers & Taxpayers have such a big and unfair price to pay? Not fair to the PEOPLE of America!”); Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 2, 2018, 2:23 PM), <https://twitter.com/realDonaldTrump/status/1003024268756733952> (“The U.S. has been ripped off by other countries for years on Trade, time to get smart!”); Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 5, 2018, 7:47 AM), <https://twitter.com/realdonaldtrump/status/970626966004162560> (“We have large trade deficits with Mexico and Canada.”).

5. Pankaj Ghemawat, *Globalization in the Age of Trump*, HARV. BUS. REV., July–Aug. 2017, <https://hbr.org/2017/07/globalization-in-the-age-of-trump> (“The myth of a borderless world has come crashing down. Traditional pillars of open markets—the United States and the UK—are wobbling, and China is positioning itself as globalization’s staunchest defender.”); *see also* Josh Zumbrun & Bob Davis, *Trade Tensions Intensify as Allies Rebuke U.S., Testing Trump Ahead of G-7*, WALL ST. J. (June 3, 2018, 8:02 PM), <https://www.wsj.com/articles/global-trade-tensions-intensify-1528070538>; *cf.* GAO SHANGQUAN, U.N. COMM. FOR DEV. POLICY, U.N. DOC. ST/ESA/2000/CDP/1, ECONOMIC GLOBALIZATION: TRENDS, RISKS, AND RISK PREVENTION 1–4 (2000), http://www.un.org/en/development/desa/policy/cdp/cdp_background_papers/bp2000_1.pdf (asserting economic globalization trends are “irreversible,” and forecasting developmental risks posed by economic globalization).

6. Lynch et al., *supra* note 1; *cf.* Donald J. Trump (@realDonaldTrump), TWITTER (June 2, 2018, 2:23 PM), <https://twitter.com/realDonaldTrump/status/1003024268756733952> (“When you’re almost 800 Billion Dollars a year down on Trade, you can’t lose a Trade War!”).

incentives in markets across the globe. For example, although domestic by nature, U.S. antitrust laws do not exclusively apply to conduct in domestic markets—the Sherman Act may extend far beyond American shores to activities conceived and executed abroad.⁷

Although it is understood that extraterritorial antitrust liability *may exist* with respect to *certain* foreign conduct, courts, businesses, and practitioners have struggled to concretely define the contours of this liability in practice.⁸ Judicial construction of the Sherman Act’s “charter of freedom”⁹ currently permits civil actions and criminal prosecutions against foreign anticompetitive conduct based solely on American domestic law. In the United States, liability may attach to foreign conduct even if the allegedly anticompetitive acts occur entirely beyond the territory over which the United States exerts sovereign control.¹⁰

Moreover, given its impact on the interests of market participants and sovereign states, extraterritorial application of the Sherman Act remains highly controversial in academic and professional legal circles.¹¹ In part due to the emergence of modern global supply chains, which often span

7. See Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2018); see also Ian Simmons et al., *Where to Draw the Line: Should the FTAIA’s Domestic Effects Test Apply in Criminal Prosecutions?*, 29 ANTITRUST 42, 42–46 (2015) (evaluating debate over extraterritorial contours of Sherman Act in criminal context).

8. See, e.g., Melinda F. Levitt & Howard W. Fogt, *International Trade and Antitrust: Clarity Put on Hold as FTAIA Conflict/Confusion Continues*, FOLEY (July 30, 2015), <https://www.foley.com/international-trade-and-antitrust--clarity-put-on-hold-as-ftaia-conflict-confusion-continues> (“Maybe the ball is back in Congress’s court. . . . However, given the present level of functionality with the United States Congress, I don’t think we are going to see that in the near future, unfortunately. And so, anybody who treads in these waters needs to continue to be very careful and monitor the situation as we go forward.”) (Melinda F. Levitt, at 1:01:12–1:01:48). But see Simmons et al., *supra* note 7, at 46 (suggesting plain language and clear legislative intent permit only civil liability for foreign actors under the FTAIA’s “domestic effects” exception).

9. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359–60 (1933) (“As a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.”); see also DIRECTORATE FOR FIN. & ENTER. AFFAIRS COMPETITION COM., *ROUNDTABLE ON THE EXTRATERRITORIAL REACH OF COMPETITION REMEDIES - NOTE BY THE UNITED STATES* 3–4 (Dec. 4–5, 2017), https://www.ftc.gov/system/files/attachments/us-submissions-oced-other-international-competition-fora/et_remedies_united_states.pdf (“[The Antitrust Division and DOJ] require relief sufficient to eliminate identified anticompetitive harm that has the requisite connection to U.S. commerce and consumers, even if this means reaching assets or conduct in a foreign jurisdiction.” (footnote omitted)).

10. See, e.g., *United States v. Hui Hsiung*, 778 F.3d 738, 758–59 (9th Cir. 2015), *cert. denied*, 135 S. Ct. 2837 (2015) (upholding criminal sentence under FTAIA for foreign price-fixing conspiracy with “effect” on United States).

11. Cf. Levitt & Fogt, *supra* note 8 (detailing ongoing debate over extraterritoriality in American antitrust jurisprudence after FTAIA).

several sovereign jurisdictions,¹² debate about extraterritoriality in U.S. competition policy has reached a fever pitch.¹³

Enter the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA” or “the Act”).¹⁴ In 1982, Congress passed the FTAIA, putatively in order to clarify the limits of the Sherman Act in reaching certain foreign and export activities.¹⁵ In early 2015, however, the United States Court of Appeals for the Ninth Circuit upheld the convictions of a Taiwanese electronics-manufacturing firm, AU Optronics, and its executives for criminal price fixing, in part based on the FTAIA’s so-called “domestic effects” exception.¹⁶ In a decision assessing several independent challenges to the defendants’ extraterritorial criminal convictions, the panel ruled that

12. Concerns surrounding extraterritoriality in U.S. competition policy are heightened in light of businesses’ widespread embrace of lean methodology and global supply-chain management strategies, which increasingly distribute goods and services throughout a single firm’s transnational network to maximize profit and minimize waste. *See generally* MICHAEL H. HUGOS, *ESSENTIALS OF SUPPLY CHAIN MANAGEMENT* (3d ed. 2011). Specifically, the emergence of global supply chain networks has unleashed a variety of associated complications with respect to commercial regulations. *Cf.* U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION* 16–25 (2017), <https://www.justice.gov/opa/press-release/file/926481/download> [hereinafter *INTERNATIONAL GUIDELINES*] (describing agencies’ extraterritorial prerogatives under the FTAIA); Joseph P. Bauer, *The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to American Banana?*, 65 *ME. L. REV.* 3, 5 (2012).

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. . . . [E]nhancement of consumer welfare, the promotion of competition, and compensation of the victims of antitrust violations. . . . [T]he FTAIA has significantly undermined the achievement of these goals.

Bauer, *supra*, at 5.

13. PHILLIP AREEDA ET AL., *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* ¶¶ 168–69 (7th ed. 2013) (“With ever-expanding globalization, instances of conflicting—as well of complementary—interests among jurisdictions involving multinational business activity will become increasingly frequent. . . . [I]n many individual cases an anticompetitive practice may well benefit some jurisdictions . . . [however,] the reciprocal nature of foreign trade suggests the existence of opportunities for mutual gain.”); *see also* JENNIFER B. PATTERSON & TERRI A. MAZUR, *KAYE SCHOLER, RECENT DEVELOPMENTS IN THE EXTRATERRITORIAL REACH OF THE U.S. ANTITRUST LAWS* (2014), https://www.arnoldporter.com/-/media/files/ks-imported/20140813_r_pattersonmazurinsidcounselarticleaugust132014pdf; Levitt & Fogt, *supra* note 8.

14. Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2018). The statute’s language is overly formalistic and consequently complicated. *Accord* *United States v. Nippon Paper Indus. (Nippon II)*, 109 F.3d 1, 4 (1st Cir. 1997) (describing the FTAIA as “inelegantly phrased”). In effect, its terms cabin the Sherman Act’s scope to activity beyond U.S. borders, providing that such conduct gives rise to domestic antitrust liability only if it: (1) involves “import commerce;” or (2) has a “direct, substantial, and reasonably foreseeable effect” on domestic trade or commerce, which “gives rise to a claim” under the Sherman Act. *See* 15 U.S.C. § 6a (emphasis added).

15. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (“[T]he FTAIA’s language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act’s scope as applied to foreign commerce.”).

16. *See United States v. Hui Hsiung*, 778 F.3d 738, 738, 756–60 (9th Cir. 2015).

an “effects” theory was independently sufficient to support criminal price-fixing charges under the FTAIA, absent an allegation that any acts in furtherance of the conspiracy occurred in the United States:

The defendants . . . urge that . . . the nexus to United States commerce was insufficient under the Sherman Act as amended by the Foreign Trade Antitrust Improvements Act of 1982 The defendants’ efforts to place their conduct beyond the reach of United States law and to escape culpability under the rubric of extraterritoriality are unavailing. . . . The verdict may . . . be sustained under the FTAIA’s domestic effects provision because the conduct had a “direct, substantial, and reasonably foreseeable effect on United States commerce.”¹⁷

From one perspective, the defendants’ foreign collusive activities were fairly traceable to U.S. markets, and thus fully within the purview of American antitrust laws, based on its direct connection to some qualifying “effect” on nonimport domestic commerce.¹⁸ This rationale rendered the defendants in *United States v. Hui Hsiung* subject to the weight of criminal antitrust penalties under the Sherman Act, although the entirety of the defendants’ underlying conduct occurred overseas. The court suggested that this criminal punishment was only fair, as the defendants’ wholly foreign anticompetitive activities entailed some “direct, substantial, and reasonably foreseeable effect on United States commerce,”¹⁹ which was legally cognizable through overcharges paid by Americans for electronic goods that had incorporated the defendants’ price-fixed LCD-panel component parts.²⁰

Regrettably, however, the final panel decision affirmed the defendants’ criminal convictions without substantively evaluating a critical merits inquiry²¹: whether the FTAIA’s “domestic effects” exception even authorizes the underlying extraterritorial criminal prosecution as a “claim”

17. *Id.* at 743 (quoting 15 U.S.C. § 6a).

18. *See id.*

19. *Id.* at 743, 748, 750–53, 756–60 (providing the required test under the first prong of the “domestic effects” exception, as articulated under the FTAIA).

20. *See, e.g., id.* at 743 (“Crystal Meeting participants stood to make enormous profits from TFT-LCD sales to United States technology retailers. . . . [T]he United States comprised approximately one-third of the global market for personal computers incorporating TFT-LCDs, and sales . . . generated over \$600 million in revenue.”). For example, the conspiracy targeted commercial electronics retailers, like Motorola and Apple, which incorporated the price-fixed panel technologies in overseas production processes earlier in the supply chain. *See id.*

21. *See id.* at 751–53 (“The FTAIA . . . provides *substantive elements* under the Sherman Act in cases involving nonimport trade with foreign nations.” (emphasis added)). *See generally* 15 U.S.C. § 6a(2) (“[S]uch effect gives rise to a *claim* under the provisions of [the Sherman Act]” (emphasis added)).

under the Sherman Act.²² This Note posits, contrary to the Ninth Circuit's amended decision in *Hui Hsiung*, that the FTAIA's domestic effects exception does not authorize American regulators to prosecute wholly foreign conduct under the Sherman Act. In the three years since *Hui Hsiung*, both the Supreme Court and Congress have failed to meaningfully address how to properly read the FTAIA.²³

This Note builds on published legal decisions, practitioner resources, and academic commentaries to paint a fuller picture of the FTAIA's domestic effects exception and, in particular, its proper scope in the context of extraterritorial criminal prosecutions.²⁴ Part I explores the historical development of extraterritorial antitrust jurisprudence in the United States, the FTAIA's substantive requirements, and recent cases evaluating extraterritorial enforcement under the Act. Part II evaluates the prevailing approach under *Hui Hsiung* and makes the case that the FTAIA does not independently authorize extraterritorial criminal antitrust prosecutions. Part III discusses criminal liability implications under *Hui Hsiung* and related antitrust jurisprudence for international businesses and their agents. In sum, through discussion of the FTAIA's history, text, and teleological aspects, this Note aims to clarify the proper scope of extraterritorial criminal antitrust actions under the Sherman Act, as amended by the Foreign Trade Antitrust Improvements Act of 1982.²⁵

22. The court's final analysis lacks any substantive discussion of whether a criminal indictment may give rise to a domestic antitrust "claim" within the meaning of the FTAIA's domestic effects prong, while concluding that the question of "what conduct [the FTAIA] prohibits is a merits question, not a jurisdictional one." *Hui Hsiung*, 778 F.3d at 752 (internal quotation marks omitted). Colorable arguments exist to support a broad interpretation of the FTAIA as authorizing both civil and criminal "claims" if wholly foreign conduct has a "direct, substantial, and reasonably foreseeable" effect on nonimport domestic commerce, see, for example, *infra* text accompanying notes 67–72, but the panel decision offers none. See, e.g., Simmons et al., *supra* note 7, at 42 ("[T]he amended opinion upheld the convictions . . . without any significant discussion of whether [the "domestic effects" prong] can independently support a criminal prosecution [under the Sherman Act]."). At the very least, the panel owed the public a legal justification for its implicit ruling that a criminal indictment constitutes a "claim" under the "domestic effects" exception. In reality, a more efficacious reading of the FTAIA's exception would limit the reach of the Sherman Act to *only civil claims*, at least where nonimport "domestic effects" form the basis of an extraterritorial competition "claim." See, e.g., *infra* Part II (arguing that the FTAIA facially prohibits extraterritorial criminal prosecutions on the independent "domestic effects" theory, in part because neither prosecutions nor indictments actually amount to "claims" within the plain meaning of the "domestic effects" exception).

23. Accord Levitt & Fogt, *supra* note 8.

24. See generally *supra* notes 7–23 (reviewing FTAIA's "domestic effects" exception and *Hui Hsiung*).

25. Moreover, in light of the proliferation of highly integrated global supply chain networks, see generally HUGOS, *supra* note 12, as well as the emergence of a tense global political economy surrounding free trade and international competition, see *supra* notes 1–5, this subject appears increasingly relevant to federal courts, legal practitioners, and the tens of thousands of firms doing

I. LEGAL BACKGROUND

A. HISTORICAL FOUNDATIONS OF EXTRATERRITORIALITY IN U.S. COMPETITION LAW

Before diving into the current state of criminal prosecutions under the FTAIA's domestic effects exception, it is first critical to trace the development of American criminal antitrust prosecutions beyond the territorial borders of the United States. Prior to passage of the FTAIA (and arguably even after its codification),²⁶ courts—rather than legislators—primarily defined the extraterritorial contours of the Sherman Act. The following sections trace a series of seminal decisions regarding the proper scope of the Sherman Act in international commerce prior to and following the passage of the FTAIA. This historical foundation informs a narrow interpretation of the FTAIA's domestic effects exception in criminal prosecutions.²⁷

1. Extraterritorial Criminal Liability Under the Sherman Act: Exploring the Shift from Territoriality to Effects²⁸

The Sherman Act prohibits monopolization and unlawful restraints on “commerce . . . with foreign nations.”²⁹ Thus, the statute unambiguously applies to conduct with foreign actors and opens the possibility of government prosecutions for “bad apples” in the high-stakes game of global competition. Historically, however, federal courts hesitated to apply the Sherman Act's provisions—along with related laws, such as the Clayton Act and the Federal Trade Commission Act—to conduct that occurred beyond the territorial boundaries of the United States.

Traditional notions of sovereignty largely informed the dominant,

business in America.

26. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 n.23 (1993) (noting disagreement regarding whether the FTAIA's “direct, substantial, and reasonably foreseeable effect” standard amends existing law or merely codifies it, but declining to take up the issue).

27. See *infra* Part II.

28. For rich academic discussion of foreign commerce and the complex relationships forged between foreign commerce and domestic antitrust laws, see generally WILBUR L. FUGATE & LEE H. SIMOWITZ, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* (5th ed. 1996 & Supp. 2018). Sections I.A.1–2 are designed to provide useful historical context for the FTAIA's substantive provisions and recent judicial decisions; they are not intended to provide exhaustive review of the Sherman Act in international commerce.

29. 15 U.S.C. §§ 1–2 (2018) (criminal antitrust violations). See also AREEDA ET AL., *supra* note 13, ¶ 168 n.101 (discussing definitions of “commerce” and the extraterritorial reach of various antitrust provisions, including sections 1, 2, and 7 of the Sherman Act, as well as the Clayton Act, and the Federal Trade Commission Act).

territorial conception of American courts' narrow jurisdiction over foreign anticompetitive conduct. The territorial location of the underlying conduct, rather than the site of its fairly traceable effects, served as the relevant standard for determining jurisdiction over foreign anticompetitive conduct. Justice Holmes' decision in *American Banana Co. v. United Fruit Co.*, for example, reflects the historic presumption against extraterritorial application of the Sherman Act:

Words having universal scope, such as 'every contract in restraint of trade,' 'every person who shall monopolize,' etc., will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute, the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it 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.³⁰

Although this prima facie territorial presumption applied seemingly to "all legislation" passed by Congress under Justice Holmes' view, the jurisprudential tide steadily shifted to embrace the imposition of antitrust liability for conduct conceived or executed beyond U.S. borders.³¹ Over time, the Supreme Court came to stray from a strict territoriality standard and adopted a much broader standard that granted courts antitrust jurisdiction over activities with certain "effects on competition in the United States."³²

Judge Learned Hand's approach in *United States v. Aluminum Co. of America* ("*Alcoa*") definitively established that foreign anticompetitive acts involving *import commerce* could be *criminally prosecuted* in American

30. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (Holmes, J.) (holding the Sherman Act does not apply to acts taken in Panama and Costa Rica, which fall beyond territorial borders of United States); see also Edward D. Cavanagh, *The FTAIA and Claims by Foreign Plaintiffs Under State Law*, 26 ANTITRUST L.J. 43, 43–44 (2011) [hereinafter Cavanagh, *The FTAIA*]; Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 SMU L. REV. 2151, 2153–56 (2003) [hereinafter Cavanagh, *The New Frontier*].

31. See *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 440–45 (2d Cir. 1945) (Hand, J.) ("[A]ny 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."); *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962) (approving of the Second Circuit decision in *Alcoa* and finding jurisdiction where foreign defendants' conduct abroad had an "impact within the United States and upon its foreign trade").

32. Bauer, *supra* note 12, at 8.

courts.³³ A unanimous panel of the United States Court of Appeals for the Second Circuit found a Canadian corporation to be in violation of Sherman Act section based on its agreement with European aluminum producers not to compete in the American market for virgin ingot.³⁴ The decision marked a notable shift in extraterritorial interpretation of the Sherman Act; Hand's majority opinion not only served as the final decision in lieu of Supreme Court review,³⁵ but also significantly expanded the global reach of American antitrust laws to include activities with effects on import commerce.³⁶

Rather than territoriality, the touchstone of extraterritorial antitrust liability shifted decidedly toward the tangible *effects* of foreign anticompetitive conduct on domestic markets. With respect to such effects, Judge Hand candidly noted, “[a]lmost any limitation of the supply of goods in Europe, . . . or in South America, may have repercussions in the United States if there is trade between the two.”³⁷ Shifting to an effects standard required reasonable limits; otherwise, American courts would adjudicate seemingly every global competition dispute.³⁸ Although the court in *Alcoa* embraced an effects test for extraterritorial Sherman Act violations, it also warned, “[w]e should not impute to Congress an intent to punish all whom its courts can *catch*, for conduct which has no consequences within the United States.”³⁹ Despite concerning only conduct directly involving import commerce, *Alcoa*'s non-territorial, effects-centered rationale has

33. *Alcoa*, 148 F.2d at 443–44. The panel noted, “[b]oth agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them.” *Id.* at 444. Although the case is famous for its domestic implications and market share analysis, the decision also marks a key moment in extraterritorial antitrust jurisprudence. Under the panel's view, *criminal* liability under the antitrust laws historically attached to wholly foreign conduct involving *imports*; foreign conduct that affected nonimport domestic commerce was historically only subject to civil liability, not criminal prosecution. *Alcoa* therefore provides only limited authority for extraterritorial criminal liability in nonimport contexts, as when foreign actors are prosecuted on the basis of downstream effects on domestic commerce.

34. *Id.* at 443–44.

35. An interesting aspect of the *Alcoa* case was simply its procedural posture. In 1944, the Supreme Court announced that it would not have a quorum to hear the case. Congress subsequently designated the case to the Second Circuit through a special act that stands to this day. *See generally* Act of June 9, 1944, 28 U.S.C. § 2109 (2018).

36. *See, e.g., AREEDA ET AL., supra* note 13, ¶ 168.

37. *Alcoa*, 148 F.2d at 443.

38. *Cf. id.* This inference appears reasonable given federal courts' position as legal custodians in the United States, one of the foremost consumer markets in the developed world. *Cf. United States v. Hui Hsiung*, 778 F.3d 738, 743 (9th Cir. 2015) (noting “Crystal Meetings” conspiracy targeted leading firms in American consumer electronics market); Shangquan, *supra* note 5.

39. *Alcoa*, 148 F.2d at 443 (emphasis added).

been generally incorporated into criminal antitrust precedents after passage of the FTAIA.⁴⁰

Thus, courts historically hesitated to apply domestic law to activity beyond U.S. territorial borders, which traditionally delineated the outer bounds of American sovereignty. After *Alcoa*, however, courts' antitrust jurisdiction would expand considerably to encompass criminal penalties for anticompetitive conduct involving direct import trade and commerce.⁴¹

2. Principles of International Comity and Fairness

Another judicial innovation concerns the doctrine of international comity.⁴² Despite finding sufficient anticompetitive effects targeting domestic commerce to support domestic jurisdiction, courts may nevertheless decline to apply U.S. law to foreign conduct under the judicial constructs of "international comity and fairness."⁴³ To determine the propriety of invoking comity to bar an antitrust action, courts widely consider several factors, including: (1) the parties' nationality, allegiance, or principal locations; (2) the relative importance of domestic and foreign conduct in the allegations; (3) the relative effects on all countries involved; (4) the clarity of foreseeability of a purpose to affect or harm domestic

40. See, e.g., *United States v. Nippon Paper Indus.*, 109 F.3d 1, 2, 4–5 (1st Cir. 1997). Indeed, this widely-adopted standard for extraterritorial antitrust analysis has been referred to as the "effects doctrine" or "effects test" in civil and criminal actions. See JOHN W. HEAD, *GLOBAL BUSINESS LAW: PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCE AND INVESTMENT* 643 (3d ed. 2012); *Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226, 1269–74 (2011).

41. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (adopting *Alcoa* effects test following passage of FTAIA where it could be shown that conduct "was meant to produce and did in fact produce some substantial effect in the United States"); accord *Filetech S.A. v. Fr. Telecom, S.A.*, 157 F.3d 922, 931 (2d Cir. 1998) (following *Hartford Fire's* construction of the prevailing *Alcoa* effects test).

42. See generally Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982) (describing role of the comity doctrine in extraterritorial application of domestic laws). The Supreme Court recently clarified the doctrine of "international comity" with respect to a foreign government's official statement concerning the meaning of its own domestic law. See generally *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018), *vacating and remanding In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016). The Court suggested American courts are "not bound to accord conclusive effect to the foreign government's statements," in such instances, but declined to undertake the analysis itself and instead remanded the case for further consideration consistent with its opinion. *Animal Science*, 138 S. Ct. at 1869, 1875 ("The correct interpretation of Chinese law is not before this Court, and we take no position on it.").

43. See, e.g., *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1977) (court may refrain from asserting "extraterritorial authority," despite finding of some actual or intended effect, upon presence of factors implicating international comity concerns in rendering judgment), *superseded by statute*, 15 U.S.C. § 6a (2018), as recognized in *McGlinchy v. Shell Chem. Co.*, 845 F. 2d 802, 813 n.8 (9th Cir. 1988).

commerce; (5) foreign law or policy and degree of conflict with American policy or law; and (6) compliance issues.⁴⁴

For example, in *Timberlane Lumber Co. v. Bank of America*, international comity factors suggested that the court “should refuse to exercise jurisdiction,” in part because “[t]he potential for conflict with Honduran economic policy and commercial law [was] great,” and “[t]he effect on the foreign commerce of the United States [was] minimal.”⁴⁵ The “jurisdictional rule of reason” embodied in the *Timberlane* opinion attempted to balance domestic concerns with the interests of foreign states in adjudicating legal disputes. Thus, in American antitrust law, the comity doctrine adds greater nuance to courts’ treatment of the domestic effects that stem from foreign anticompetitive conduct.⁴⁶

The comity doctrine reinforces a norm of reasonableness when applying domestic laws to foreign actors—agents who, in many cases, may not be fair targets for enforcement actions under the Sherman Act. In that vein, the third *Restatement on Foreign Relations Law of the United States* characterizes comity as a “principle of reasonableness” that applies to a court’s authority to adjudicate disputes and enforce remedies.⁴⁷ The comity doctrine has historically empowered federal courts with a measure of discretionary authority over how far domestic authorities can reach abroad to target foreign defendants, as well as how far private plaintiffs can project domestic claims across national borders. These considerations remain critical even after passage of the FTAIA.⁴⁸ Without considering fairness and foreign sovereignty in applying domestic laws, U.S. courts would risk dangerously overreaching into the affairs of international partners, as well as upsetting the constitutionally ingrained separation of powers between

44. AREEDA ET AL., *supra* note 13, ¶ 168(b) (citing *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985)). The *Timberlane* court ultimately dismissed the plaintiff’s claim based on the legitimacy of the defendant’s foreign acts under Honduran law, as well as the meager effects on competition within the United States. *Timberlane*, 749 F.2d at 1384–86.

45. *Timberlane*, 749 F.2d at 1386.

46. Cavanagh, *The New Frontier*, *supra* note 30, at 2154. *But see id.* (“While one cannot fault these courts for attempting to develop comprehensive jurisdictional standards, it is undeniable that infusing the issue of comity into the jurisdictional analysis has generated *more confusion than certainty* and has created significant unpredictability in the law.” (emphasis added)).

47. RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402–03, § 403 cmt. a (AM. LAW INST. 1987) [hereinafter RESTATEMENT].

48. *See, e.g.*, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165–69 (2004) (discussing prescriptive comity considerations in connection with FTAIA’s domestic effects exception and concluding that the Act did not apply given Congress’s adherence to principles of comity in international commercial relations).

judicial, legislative, and executive branches of government.⁴⁹

The *Timberlane* test has been widely embraced by courts in extraterritorial antitrust actions.⁵⁰ The Ninth Circuit's analysis built a compelling case for declining to extend domestic antitrust laws to a foreign transaction in which an American corporation, Bank of America, allegedly manipulated the Honduran national government to prevent its competitor, Timberlane, from exporting lumber into the United States.⁵¹ Beyond the facts of *Timberlane*, however, *Hartford Fire Insurance Co. v. California* suggests an alternative approach.⁵²

In *Hartford Fire*, the Supreme Court—without deciding whether federal courts may ever decline to exercise subject matter jurisdiction over Sherman Act claims concerning foreign conduct—determined that principles of international comity are not relevant in the absence of a “true conflict” between domestic and foreign law.⁵³ The petitioners in *Hartford Fire* claimed error based on the district court's failure to decline to exercise antitrust jurisdiction under the principle of international comity.⁵⁴ As the petitioners did not allege that British law mandated that they act in violation of the Sherman Act, however, the Court found no direct conflict of law and therefore quickly concluded that there was “no need . . . to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.”⁵⁵

The Court further ruled that the plaintiffs' civil antitrust action could proceed, despite concerns regarding the application of domestic laws to the defendants' foreign acts, so long as such foreign acts “[were] meant to

49. See Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19, 36, 38 (2008) (noting that courts' application of comity doctrine reflects concerns for separation of powers, historical experience, and respect for foreign sovereignty in context of extraterritorial antitrust disputes).

50. See *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 813 n.8 (9th Cir. 1988) (adopting *Timberlane* standard and noting that the FTAIA “did not change the ability of courts to exercise principles of international comity” in antitrust actions); see also *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979) (affirming *Timberlane* and listing ten comity factors relevant to “balancing process”); *Pillar Corp. v. Enercon Indus. Corp.*, 694 F. Supp. 1353, 1360–61 (E.D. Wis. 1988) (discussing “concerns raised” by *Mannington Mills* and *Timberlane* courts); *Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979) (following *Mannington Mills* analysis of ten factors relevant to comity analysis). But see *Hartford Fire, Ins. Co. v. California*, 509 U.S. 764, 796–99 (1993) (principles of international comity are only raised upon a “true conflict” between U.S. and foreign law).

51. *Timberlane v. Bank of Am. N.T.& S.A.*, 749 F.2d 1378, 1384–86 (9th Cir. 1984).

52. *Hartford Fire*, 509 U.S. at 796–99.

53. *Id.* at 798–99.

54. *Id.* at 797.

55. *Id.* at 799.

produce and did in fact produce some substantial effect in the United States.”⁵⁶ It remains unclear to what degree the rule in *Hartford Fire* governs comity decisions in extraterritorial criminal prosecutions under the Sherman Act. In the absence of clear guidance on this aspect of international comity in federal courts, principles of comity and fairness continue to play integral roles in extraterritorial antitrust analysis under either the *Hartford Fire* or *Timberlane* standards.

B. THE FTAIA’S DOMESTIC EFFECTS EXCEPTION

Although it remains unclear whether the FTAIA “amend[ed] existing law or merely codifie[d] it,”⁵⁷ courts have construed the statute to comport with the Sherman Act’s historical scope. The statute operates along with case law concerning how far plaintiffs may extend federal courts’ extraterritorial antitrust jurisdiction.⁵⁸ Prior to assessing the efficacy of the prevailing construction of the FTAIA’s “claim” language, however, it is helpful to discuss the language of the domestic effects exception, the intended purposes of the provision, and the early cases that largely ignored the statute in extraterritorial antitrust analysis.

The FTAIA facially excludes most foreign conduct from the scope of the Sherman Act. Two narrow exceptions bring wholly foreign activity back within the scope of domestic antitrust law.⁵⁹ Under the FTAIA’s “domestic effects” exception, 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” on domestic trade or commerce, *and* that effect (2) “gives rise to a *claim*” under the Sherman Act.⁶⁰ Courts have clarified that conduct involving direct “import trade or import commerce”

56. *Id.* at 796.

57. *See id.* at 796 n.23.

58. However, it is essential to note at the onset of this discussion that, despite judicial treatment of the Act’s thornier components, compelling commentary has called for repeal of the FTAIA altogether. *See generally* Robert E. Connolly, *Repeal the FTAIA! (Or at Least Consider It as Coextensive with Hartford Fire)*, CPI ANTITRUST CHRON. (Sept. 2014), <https://www.competitionpolicyinternational.com/assets/Uploads/ConnollySEP-141.pdf> [hereinafter Connolly, *Repeal the FTAIA!*] (noting “[a] primary motivation behind the FTAIA was to give immunity to American exporters to engage in anticompetitive conduct—as long as it negatively affected only foreign consumers,” and arguing the FTAIA should not govern the extraterritorial reach of the Sherman Act). Connolly reiterates and extends portions of his argument in a companion article. Robert E. Connolly, *Motorola Mobility and the FTAIA*, CARTELCAPERS (Sept. 30, 2014), <http://cartelcapers.com/blog/motorola-mobility-ftaia>.

59. *See* 15 U.S.C. § 6a (2018).

60. *Id.* (emphasis added).

unambiguously falls within the scope of the Sherman Act under the FTAIA.⁶¹

In practice, the FTAIA applies when anticompetitive conduct is foreign in nature.⁶² Courts have consistently noted since its passage, however, that lawmakers passed the Act primarily to “facilitat[e] the export of domestic goods by exempting export transactions that did not injure the United States economy from the Sherman Act and thereby reliev[e] exporters from a competitive disadvantage in foreign trade.”⁶³ Ironically, then, the FTAIA aimed to clarify when foreign anticompetitive conduct gives rise to domestic antitrust liability primarily in order to clarify that *American firms can behave anticompetitively—so long as they only target foreign markets*.⁶⁴ The notion that the FTAIA enables criminal prosecutions to remedy competitive harms in U.S. markets is notably absent in congressional findings related to the Act’s purpose, although the legislative history does broadly mention “Department of Justice enforcement.”⁶⁵

The Act was further designed to provide appropriate “legislative clarification” of the antitrust laws, which presented “an unnecessarily complicating factor in a fluid environment” of international exchange, and allegedly caused many “possible transaction[s] [to] die on the drawing board.”⁶⁶ Despite endorsing the “situs” of effects standard authoritatively articulated in *Alcoa*, the legislative history uncovers debate concerning the “precise legal standard to be employed” for assessing the requisite “effects” on domestic or import trade or commerce.⁶⁷ Lawmakers generally acknowledged, “it has been relatively clear that it is the situs of the *effects* as opposed to the *conduct*, that determines whether United States antitrust

61. See *id.*; accord *United States v. Hui Hsiung*, 778 F.3d 738, 750–51 (9th Cir. 2015); *Carpet Grp. Int’l v. Oriental Rug Imps. Ass’n*, 227 F.3d 62, 71 (3d Cir. 2000) (citing *Eskofot A/S v. E.I. Du Pont Nemours & Co.*, 872 F. Supp. 81, 85 (S.D.N.Y. 1995)) (noting the implication that the Sherman Act applies to “import trade and import commerce is unmistakable”). The import commerce prong likely applies where a defendant sells a finished product directly to American consumers in the United States. See *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 855 (7th Cir. 2012) (en banc), *cert. denied*, 570 U.S. 935 (2013).

62. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 163 (2004).

63. See *Carpet Grp. Int’l*, 227 F.3d at 71.

64. See Connolly, *Repeal the FTAIA!*, *supra* note 58.

65. H.R. REP. NO. 97–686, at 2–3 (1982), as reprinted in 1982 U.S.C.C.A.N. 2487, 2491; see also 15 U.S.C. § 4001 (2018) (“It is the purpose of this chapter to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular by . . . modifying the application of antitrust laws to certain export trade.”).

66. H.R. REP. NO. 97–686, at 6 (1982).

67. *Id.* at 5.

law applies.”⁶⁸ In line with judicial precedents, Congress intended to “enact[] . . . a single, objective test—the ‘direct, substantial, and reasonably foreseeable effect’ test” to clarify precisely *which* effects trigger extraterritorial antitrust liability for “businessmen, attorneys and judges as well as foreign trading partners.”⁶⁹

The legislative history suggests primary consideration of domestic commercial interests in export markets—interests that were increasingly complicated by the extraterritorial application of the Sherman Act.⁷⁰ Yet the statute has by no means proven simple and straightforward for antitrust practitioners. In that vein, prevailing academic commentary strongly suggests that the Act, falling just short of an outright failure worthy of repeal,⁷¹ has demanded *more* from the federal courts—tribunals that must now apply the complicated statute in tandem with an expansive terrain of Sherman Act precedents.⁷²

The Supreme Court first tackled the FTAIA in *Hartford Fire*. The majority declined to apply the statute in an analysis of civil claims under the Sherman Act.⁷³ The Court declined to rest its section 1 ruling on the FTAIA’s effects language, and instead relied entirely on Sherman Act precedents.⁷⁴ Nevertheless, the effects-centered rationale imbued in the FTAIA’s legislative history and prior precedents carried into decisions rendered after passage of the Act, as in *United States v. Nippon Paper Industries* and *F. Hoffman-La Roche, Limited v. Empagran S.A.* Although *Hartford Fire* only addressed the limited role of the FTAIA in *civil* antitrust proceedings, these later decisions grappled with the thornier issue of how to interpret the FTAIA and Sherman Act in the context of *criminal*

68. *Id.* (emphasis added) (citing *Cont’l Ore Co. v. Union Carbide*, 370 U.S. 690, 704–05 (1962) and *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952)).

69. H.R. REP. NO. 97–686, at 2–3 (1982).

70. Of critical importance to subsequent analysis in this Note—an unstated desire to protect U.S. commercial interests also pervades modern judicial interpretations of the FTAIA, at least with respect to civil actions. *See, e.g.*, Bauer, *supra* note 12, at 24 (“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.”).

71. *See, e.g.*, Connolly, *Repeal the FTAIA!*, *supra* note 58 (proposing outright repeal of the Act).

72. *See, e.g.*, Cavanagh, *The New Frontier*, *supra* note 30, at 2159 (“It has therefore fallen to the courts to determine the precise meaning and scope of the FTAIA.”). Indeed, given prolonged legislative inaction on the subject, federal courts arguably *must* define the scope of the FTAIA to yield some measure of clarity for litigants. *See* Levitt & Fogt, *supra* note 8 (suggesting legislative revision of FTAIA is unlikely but may be necessary).

73. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796–97, 796 n.23 (1993); *see also supra* Section I.A.2 (discussing comity concerns in *Hartford Fire*).

74. *Hartford Fire*, 509 U.S. at 796–97.

prosecutions.

The district court in *Nippon Paper (Nippon I)* reviewed the defendants' motions to dismiss a criminal antitrust indictment.⁷⁵ The indictment targeted a Japanese fax paper manufacturer for participating in meetings, agreements, and monitoring activities that took place entirely in Japan.⁷⁶ Notably, the court "disagree[d] with [the U.S. government's] suggested equating of the Sherman Act's civil and criminal application" with respect to wholly foreign conduct.⁷⁷ Given a "strong presumption against extraterritorial application of federal statutes" in criminal matters, the district court reasoned that "the line of cases permitting extraterritorial reach in *civil actions is not controlling*" in determining whether the Sherman Act's *criminal* provisions can reach wholly foreign conduct.⁷⁸

Citing prior judicial treatment of the language of the Sherman Act, academic commentary on its extraterritorial reach, policies underlying antitrust and criminal law, and relevant legislative history, the court concluded that the "criminal provisions of the Sherman Act do not apply to conspiratorial conduct in which none of the overt acts . . . take place in the United States."⁷⁹ Thus, on first impression, the court in *Nippon I* differentiated between the requirements of an extraterritorial civil claim and an extraterritorial criminal prosecution under the FTAIA.

The district court's holding remained intact for 165 days. The United States Court of Appeals for the First Circuit swiftly reversed the judgment, holding in *Nippon II* that, under *Hartford Fire*, the defendants could be criminally liable for agreeing to employ retail price maintenance strategies with various firms that distributed paper in the United States (notwithstanding the FTAIA's terms).⁸⁰ The court sidestepped *Hartford*

75. *United States v. Nippon Paper Indus. (Nippon I)*, 944 F. Supp. 55, 57–58 (D. Mass. 1996) (dismissing criminal antitrust indictment for lack of jurisdiction under Sherman Act).

76. *See id.* at 58. The thrilling basis for the government's prosecution stemmed from Nippon Paper Industries' corporate predecessor, "Jujo Paper," allegedly agreeing with unnamed Japanese firms to "fix prices of jumbo roll thermal facsimile paper ('fax paper') sold in the United States," in violation of section 1 of the Sherman Act. *Id.*

77. *Id.* at 64.

78. *Id.* at 65 (emphasis added) (construing *United States v. Bowman*, 260 U.S. 94, 97–98 (1922) as holding the presumption against extraterritorial application of federal law "carries even more weight when applied to criminal statutes").

79. *See id.* at 64–66.

80. *United States v. Nippon Paper Indus. (Nippon II)*, 109 F.3d 1, 2–3 (1st Cir. 1997) (detailing the essential "Fax" underlying the panel's decision); Raymond Krauze & John Mulcahy, *Antitrust Violations*, 40 AM. CRIM. L. REV. 241, 278–79 (2003) ("[T]he First Circuit reinstated the indictment of a foreign-based defendant for conduct occurring wholly outside of the United States, and the case looks to be a harbinger of the Antitrust Division's growing ability to combat international price-fixing."); *see*

Fire's civil posture by emphasizing that "in both criminal and civil cases, the claim that Section One applies extraterritorially is based on the *same language* in the *same section* of the *same statute*."⁸¹

Despite pausing to note the "inelegantly phrased" FTAIA, the panel's decision nevertheless declined to "place any weight on it," following *Hartford Fire*.⁸² The majority also reasoned that, without meaningful distinction in the Sherman Act's treatment of civil and criminal liability, "it would be disingenuous . . . to pretend that the words had lost their clarity simply because this is a criminal proceeding."⁸³ The decision explained how

Hartford Fire definitively establishe[d] that Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States. We are bound to accept that holding. Under settled principles of statutory construction, we also are bound to apply it by interpreting Section One *the same way in a criminal case*. The combined force of these commitments requires that we accept the government's . . . argument, reverse the order of the district court, reinstate the indictment, and remand for further proceedings.⁸⁴

In addition, despite ultimately arriving at the same conclusion regarding the applicability of the Sherman Act's criminal provisions to wholly foreign conduct, the detailed concurrence in *Nippon II* provided greater historical context for courts' broad "interpretive responsibility" in adjudicating Sherman Act claims:

The task of construing [the Sherman Act in a criminal context] is not the usual one of determining congressional intent by parsing the language or legislative history of the statute. The broad, general language of the federal antitrust laws and their unilluminating legislative history place a special interpretive responsibility upon the *judiciary*. The Supreme Court has called the Sherman Act a "charter of freedom" for the courts, with "a

also 15 U.S.C. §§ 1–2 (2018) (criminal antitrust violations for horizontal restraints of trade and monopolization practices).

81. *Nippon II*, 109 F.3d at 5 (emphasis added).

82. *Id.* at 4.

83. *Id.* at 6. The panel further noted that although *Nippon* and its expert witnesses argued that this was "the first criminal case in which the United States endeavor[ed] to extend Section One to wholly foreign conduct," an "absence of earlier criminal actions is probably more a demonstration of the increasingly global nature of our economy than proof that Section One cannot cover wholly foreign conduct in the criminal milieu." *Id.* In the court's view, the mere lack of precedent imposing criminal liability to wholly foreign conduct did not bar prosecutors from bringing charges under section 1. *Id.* Critically, in the view of the court, the *language of the FTAIA itself* also did not impact the ability of U.S. authorities to bring criminal prosecutions against solely extraterritorial conduct. *See id.* at 4–6.

84. *Id.* at 9 (emphasis added).

generality and adaptability comparable to that found . . . in constitutional provisions.”⁸⁵

Thus, by the turn of the century, the FTAIA’s substantive provisions were manifested as mere legislative gloss on prevailing judicial principles. Both the district court and the appellate court in *Nippon Paper* declined to find the FTAIA dispositive of extraterritorial criminal antitrust prosecutions, instead falling back to traditional conceptions of liability under the Sherman Act.

Nevertheless, the notable contrast in the district court’s and the appellate court’s treatments of the Sherman Act’s extraterritorial criminal provisions underscores a key development in extraterritorial antitrust jurisprudence. Although *Nippon II* stands for the proposition that wholly foreign conduct may give rise to criminal liability under the Sherman Act based on the plain language of the statute and its “common sense” application,⁸⁶ reasonable minds differ with respect to the proper extraterritorial limits on the antitrust jurisdiction of federal courts. For example, the district court’s reasoning in *Nippon I* stands against the dominant, casual assumption that indictments are interchangeable with civil “claims” when anticompetitive conduct occurs beyond U.S. borders, based on reasonable application of similar tools of statutory interpretation as the court in *Nippon II*. The fact that the appellate panel declined to endorse the district court’s handiwork, and instead crafted its own interpretive edifice with its preferred tools, is by no means dispositive of the merits of the district court’s reasoning.⁸⁷

In 2004, the Supreme Court finally weighed in on the FTAIA’s domestic effects exception in *F. Hoffman-La Roche, Ltd. v. Empagran*. Two decades after the passage of the Act, the Court reasoned that its “claim” language refers directly to the “plaintiff’s claim, or the claim at issue.”⁸⁸ In *Empagran*, the Court held that foreign purchasers of vitamins could not recover under the FTAIA based merely on allegations that their own foreign harms from international price-fixing activity coincided with some

85. *Id.* at 9 (Lynch, J., concurring) (emphasis added) (quoting *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359–60 (1933)).

86. *Id.* at 4–6.

87. Rather, along with the language and history of the FTAIA, *Nippon I* provides a helpful interpretive model for understanding the boundaries of U.S. law in the extraterritorial criminal context. In many ways, *Nippon I* challenges convention, as many courts have inferred substantially similar treatment of the Sherman Act’s criminal and civil provisions after *Hartford Fire*—a case in which only civil antitrust claims were at issue.

88. *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 174–75 (2004) (internal quotation marks omitted) (quoting 15 U.S.C. § 6a(2) (2018)).

domestic injury.⁸⁹ Thus, foreign purchaser plaintiffs in a civil antitrust action must now prove that the alleged anticompetitive effect on domestic trade or commerce *itself* gives rise directly and proximately to *their own* foreign injuries.⁹⁰ Foreign plaintiffs cannot “piggyback” on an indirect domestic effect to get into American courts on antitrust claims under the FTAIA. Following *Empagran*, the requisite domestic effect must proximately cause an antitrust plaintiff’s claimed injuries⁹¹—and it is the plaintiff’s burden of proof and persuasion to demonstrate proximate causation with respect to a domestic effect and his or her “claim.”

C. HUI HSIUNG, MOTOROLA MOBILITY, AND BEYOND

Recent circuit court judgments in *United States v. Hui Hsiung*⁹² and *Motorola Mobility, LLC v. AU Optronics Corp.*⁹³ endorse criminal prosecution of foreign anticompetitive conduct based on the FTAIA’s domestic effects prong. Further, in denying certiorari for these conspiracy cases,⁹⁴ the Supreme Court let the final circuit decisions lie undisturbed, even in light of potential analytical deficiencies.⁹⁵ Careful consideration of both decisions sets the stage for analysis of the FTAIA’s “claim” language.⁹⁶

Hui Hsiung and *Motorola Mobility* stem from the same conspiracy to

89. *Id.*

90. *Id.* at 173–75 (“Respondents concede that this claim is not their own claim; it is someone else’s claim. . . . “[T]hat is, the conduct’s domestic effects did not help to bring about that foreign injury.”); see also *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 417 F.3d 1267, 1270–71 (D.C. Cir. 2005) (noting on remand that the FTAIA codifies a proximate cause standard for Sherman Act claims involving foreign trade or commerce).

91. See *Empagran*, 417 F.3d at 1270–71.

92. *United States v. Hui Hsiung*, 778 F.3d 738, 750–51 (9th Cir. 2015).

93. *Motorola Mobility, LLC v. AU Optronics Corp.*, 775 F.3d 816, 824 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 2837 (2015).

94. *Motorola Mobility*, 135 S. Ct. at 2837 (denying petitions for certiorari in *Motorola Mobility* and *Hui Hsiung*). However, independent state-law actions have proceeded parallel to federal litigation surrounding the “Crystal Meeting” conspiracy. For example, consumer plaintiffs in the State of Washington will receive a total of \$41.1 million in “overcharge” damages stemming from the conspiracy’s agreement to manipulate the supply of LCD panels to artificially increase prices. See Press Release, Wash. State Office of the Attorney Gen., *More Than \$41M Headed to Consumers in AG Ferguson’s LCD Price-Fixing Case* (Sept. 14, 2017), <http://www.atg.wa.gov/news/news-releases/more-41m-headed-consumers-ag-ferguson-s-lcd-price-fixing-case>.

95. But see Robert E. Connolly, *Why the Supreme Court Refused to Hear the FTAIA Appeals*, LAW360 (June 16, 2015, 10:22 AM), <https://www.law360.com/articles/668031/why-the-supreme-court-refused-to-hear-the-ftaia-appeals> (arguing that *Hui Hsiung* and *Motorola Mobility* were correctly decided and that the cases were sufficiently factually dissimilar to avoid facial contradiction between the final Circuit opinions).

96. See *infra* Part II.

fix prices for liquid crystal display (“LCD”) panels,⁹⁷ component parts incorporated into electronics products sold in the United States and elsewhere.⁹⁸ Specifically, between 2001 and 2006, “representatives from six leading [LCD] manufacturers,” including defendant AU Optronics, met in Taiwan for a “series of meetings” that “came to be known as the ‘Crystal Meetings.’”⁹⁹ The Ninth Circuit explained that after these meetings,

participating companies produced “Crystal Meeting Reports.” These reports provided pricing targets for TFT–LCD sales, which, in turn, were used by retail branches of the companies as price benchmarks for selling panels to wholesale customers. More specifically, [AU Optronics Corporation of America] used the Crystal Meeting Reports that [AU Optronics] provided to negotiate prices for the sale of TFT–LCDs to United States customers including HP, Compaq, ViewSonic, Dell, and Apple.¹⁰⁰

The government alleged that the foreign conspiracy constituted a textbook example of a concerted agreement among direct competitors to restrain trade: “[s]pecifically, the indictment charged that ‘the substantial terms’ of the conspiracy were an agreement ‘to fix the prices of TFT–LCDs for use in notebook computers, desktop monitors, and televisions in the United States and elsewhere.’”¹⁰¹ From 2001 to 2006, the United States

97. LCD panels sold above competitive prices were incorporated in laptops, desktops, and television screens purchased by American consumers. See BRANDON GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 235–36 (2014) (describing “Crystal Meetings” conspiracy, harms to American consumers, and federal prosecution). One definition of “LCD” describes the technology as “an electronic display (as of the time in a digital watch) that consists of segments of a liquid crystal whose reflectivity varies according to the voltage applied to them.” *LCD*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2017). LCD panels are increasingly incorporated into handheld technologies, such as smartphones, watches, telephonic displays, as well as computer screens and televisions, among many other products. See generally JOSEPH A. CASTELLANO, *LIQUID GOLD: THE STORY OF LIQUID CRYSTAL DISPLAYS AND THE CREATION OF AN INDUSTRY* (2005) (tracing history of LCD panel technology and modern applications of technology).

98. See *Hui Hsiung*, 778 F.3d at 743 (outlining “Crystal Meetings” conspiracy). The final judgment notes that affected panels were purchased by market leaders, including “Dell, Hewlett Packard (‘HP’), Compaq, Apple, and Motorola for use in consumer electronics.” *Id.*

99. *Id.*

100. *Id.*; accord BRENT SNYDER, U.S. DEP’T OF JUSTICE, ANTITRUST DIV. INDIVIDUAL ACCOUNTABILITY FOR ANTITRUST CRIMES 6 (2016), <https://www.justice.gov/opa/file/826721/download> (“High-level executives were also prosecuted in the . . . LCD investigations, including two chairmen/CEOs, four presidents, more than 20 vice presidents, and a number of managers and directors. Among these were the president and executive vice president of the third largest LCD maker in the world. . . . [A] jury convicted these two, and they are currently serving 36-month jail terms—the longest sentences ever imposed on foreign-national defendants for antitrust offenses.”); DEP’T OF JUSTICE, ANTITRUST DIV., ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 4 (2018) [hereinafter ANTITRUST PRIMER], <https://www.justice.gov/atr/page/file/1091651/download> (discussing LCD-panel price-fixing conspiracy proceedings in U.S. federal courts).

101. *Hui Hsiung*, 778 F.3d at 757.

constituted “one-third of the global market for personal computers incorporating [LCD panels],” and sales by conspirators into the U.S. market generated “over \$600 million in revenue.”¹⁰²

After being indicted in the Northern District of California for price fixing under section 1 of the Sherman Act, the defendants twice unsuccessfully attempted to dismiss the charges before proceeding to trial.¹⁰³ The panel suggests that “the reach of the Sherman Act to conduct occurring outside of the United States” marked “a contentious subject” in pretrial proceedings.¹⁰⁴ The district court instructed the jury that it may uphold the charges upon finding that the government proved “beyond a reasonable doubt . . . that the conspiracy had a substantial and intended effect in the United States,” even without a single action taken by a single member of the conspiracy in furtherance of the conspiracy within the United States.¹⁰⁵ The district court also instructed that the jury could uphold the charge separately upon finding that the government proved beyond a reasonable doubt “that at least one member of the conspiracy took at least one action in furtherance of the conspiracy within the United States.”¹⁰⁶ Ultimately, the jury convicted the defendants and determined that combined gains derived from the conspiracy were in excess of \$500 million.¹⁰⁷ Individual and corporate defendants appealed their convictions, and AU Optronics appealed imposition of a \$500 million fine.¹⁰⁸

On appeal, the Ninth Circuit initially declined to determine whether the government had satisfied its burden to convict based on the domestic effects prong, instead concluding narrowly that “the FTAIA did not bar the prosecution because the government sufficiently proved that the defendants engaged in import trade.”¹⁰⁹ The panel subsequently amended their initial opinion (“amended opinion”) and noted that whenever a case involves nonimport trade with foreign nations, the Sherman Act presumptively does not apply—*unless* the FTAIA’s domestic effects prong applies.¹¹⁰

102. *Id.* at 743.

103. *Id.* at 744.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 745; *accord* SNYDER, *supra* note 100, at 6; ANTITRUST PRIMER, *supra* note 100, at 4 (noting final fines in the LCD antitrust investigation and prosecutions “led to criminal fines totaling more than \$1.39 billion and charges against 22 executives,” the majority of whom pleaded guilty or were convicted at trial before U.S. tribunals).

108. *Hui Hsiung*, 778 F.3d at 745.

109. *United States v. Hui Hsiung*, 758 F.3d 1074, 1095 (9th Cir. 2014), *amended by* *United States v. Hui Hsiung*, 778 F.3d 738 (2015).

110. *Hui Hsiung*, 778 F.3d at 743, 751, 756.

But the panel's amended analysis did not stop there. The decision independently sustained the defendants' convictions based on "domestic effects."¹¹¹ Despite a dearth of meaningful discourse regarding the FTAIA's "claim" language,¹¹² the panel independently authorized criminal penalties amounting to \$500 million against AU Optronics (matching "the largest fine imposed against a company for violating U.S. antitrust laws"), individual fines totaling \$400,000, and a total of six years in federal prison.¹¹³ In this sense, the amended opinion reasoned to the same conclusion as the initial opinion, but with considerably broader precedential scope.

The Ninth Circuit aimed to include within the scope of the Sherman Act *only* those acts that actually have a direct and proximate "effect" on domestic markets. The panel explains in great length that an effect must be "direct, substantial, and reasonably foreseeable" to trigger Sherman Act jurisdiction on the basis of alleged "domestic effects."¹¹⁴ Yet despite noting that the FTAIA presents *additional substantive elements for a Sherman Act prosecution* involving international commerce with domestic effects,¹¹⁵ the panel declined to warrant its conclusion that the government proved an essential element of its case beyond a reasonable doubt—that AU Optronics' conduct "[gave] rise" to the government's so-called "claim" under the antitrust laws.¹¹⁶

111. *Id.* at 743, 751, 760.

112. *See, e.g., supra* notes 21–22.

113. Press Release No. 12-1140, Dep't of Justice Office of Pub. Affairs, Antitrust Div., *Taiwan-Based AU Optronics Corp. Sentenced to Pay \$500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy* (Sept. 20, 2012), <https://www.justice.gov/opa/pr/taiwan-based-au-optronics-corporation-sentenced-pay-500-million-criminal-fine-role-lcd-price>. In total, the Department of Justice ("DOJ") reported that "eight companies have been convicted of charges arising out of the . . . ongoing investigation" into the LCD-panel price-fixing conspiracy, which "have been sentenced to pay criminal fines totaling \$1.39 billion." *Id.* (emphasis added). As of September 2012, the DOJ boasted that twenty-two executives had been charged in the foreign conspiracy; twelve had been convicted and "sentenced to serve a combined total of 4,871 days in prison" in the United States. *Id.* (emphasis added). These weighty penalties associated with criminal antitrust prosecutions particularly warrant heightened judicial scrutiny of the FTAIA's language, purpose, and scope in the criminal context. *Accord* ANTITRUST PRIMER, *supra* note 100, at 3–4 (summarizing total fines and penalties in LCD-panel cases).

114. *Hui Hsiung*, 778 F.3d at 758–60 (evaluating defendants' sufficiency of evidence challenges to government's alleged "direct, substantial, and reasonably foreseeable" effect on U.S. nonimport trade or commerce).

115. *Id.* at 752–53.

116. *See id.* at 756–60. The court notes that "even disregarding the domestic effects exception, the evidence that the defendants engaged in import trade was overwhelming" and demonstrated that the defendants participated in direct import commerce under 15 U.S.C. § 6a, and that this "import trade theory alone was sufficient to convict the defendants of price-fixing." *Id.* at 760. However, the court's discussion notably lacks *any* analysis of the second substantive element of the FTAIA's domestic effects prong. *See id.* at 756–60.

A subtle aspect of the Ninth Circuit's amended opinion underscores an important development in post-FTAIA extraterritorial antitrust jurisprudence: "[t]o allege a nonimport trade claim under the Sherman Act, the claim must encompass the domestic effects elements."¹¹⁷ Under the domestic effects exception, the government must now prove the existence of (1) a domestic effect that (2) "gives rise to" a "claim" as *substantive elements* of a criminal charge. *Hui Hsiung* reinforces the dominant interpretation of the FTAIA as providing additional substantive requirements of antitrust claims in the extraterritorial context, concomitantly placing additional burdens on *all* plaintiffs in such actions.¹¹⁸ Viewing the FTAIA's elements as substantive, rather than jurisdictional, requires that government plaintiffs' allegations and, ultimately, direct proof must satisfy each of the "domestic effects" elements in cases not involving direct import commerce.¹¹⁹

In *Motorola Mobility*, the Seventh Circuit reviewed a judgment entered in a suit brought by Motorola, along with "its ten foreign subsidiaries," which purchased liquid-crystal display panels and incorporated them into cellphones.¹²⁰ The panel first briefly explained the

117. *Id.* at 757.

118. See *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 851–52 (7th Cir. 2012); see also *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 466–69 (3d Cir. 2011). The dilemma of whether the FTAIA presents additional merits or jurisdictional elements for extraterritorial Sherman Act claims is contentious, with different lower courts adopting different rules since the 1990s. See *Hui Hsiung*, 778 F.3d at 751–52, 752 n.7, 753 (holding that the FTAIA is "not a subject-matter jurisdiction limitation on the power of the federal courts but a component of the merits of a Sherman Act claim involving nonimport trade or commerce with foreign nations," and reviewing cases adopting and rejecting this rule); see also Edward Valdespino, Note, *Shifting Viewpoints: The Foreign Trade Antitrust Improvements Act, a Substantive or Jurisdictional Approach*, 45 TEX. INT'L L.J. 457, 457 (2009) (noting a shift from jurisdictional to substantive view). The source of contention is the burden-shifting effect of viewing the FTAIA's terms as substantive elements: the "[e]xpense and shifting burdens of proof greatly increases settlement pressure." Levitt & Fogt, *supra* note 8. Rather than being challengeable on the pleadings through a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, see FED. R. CIV. P. 12(b)(1), a merits question requires courts to evaluate evidence and legal arguments, see Levitt & Fogt, *supra* note 8. Thus, viewing the FTAIA as a matter of "substantive liability" requires "resolution through motion[s] for summary judgment after . . . discovery or trial," which may be *extremely expensive* in the context of extraterritorial antitrust actions. Levitt & Fogt, *supra* note 8. With that in mind, the trend in recent years is decidedly in favor of viewing the FTAIA as additional *substantive* elements. See *id.*

119. See *Hui Hsiung*, 778 F.3d at 752.

120. *Motorola Mobility, LLC v. AU Optronics Corp.*, 775 F.3d 816, 817–18 (7th Cir. 2014) (describing procedural posture and factual basis of case). The panel decision, penned by economist and now-retired Judge Richard Posner, noted the criminal convictions entered in *Hui Hsiung* at the onset of its analysis. *Id.* ("We'll drop 'allegedly' and 'alleged,' for simplicity, and assume that the panels were indeed price-fixed—a plausible assumption since defendant AU Optronics has been convicted of participating in a criminal conspiracy to fix the price of panel components of the cellphones manufactured by Motorola's foreign subsidiaries.").

nature of the disputed panel sales in the civil action:

[a]bout 1 percent of the panels sold by the defendants to Motorola and its subsidiaries were bought by, and delivered to, Motorola in the United States for assembly here into cellphones; to the extent that the prices of the panels sold to Motorola had been elevated by collusive pricing by the manufacturers, Motorola has a solid claim under section 1 of the Sherman Act. The other 99 percent of the cartelized components, however, were bought and paid for by, and delivered to, foreign subsidiaries (mainly Chinese and Singaporean) of Motorola. Forty-two percent of the panels were bought by the subsidiaries and incorporated by them into cellphones that the subsidiaries then sold to and shipped to Motorola for resale in the United States. Motorola did none of the manufacturing or assembly of these phones. *The sale of the panels to these subsidiaries is the focus of this appeal.*¹²¹

Ultimately, the court concluded that Motorola's "derivative" competitive claims were barred under the indirect-purchaser doctrine.¹²² AU Optronics and related conspirators were therefore immunized from civil antitrust liability to indirect customers, like Motorola and its customers, although its subsidiaries could still pursue independent civil claims overseas.

The court stated that under the FTAIA's "domestic effects" exception "[t]he first requirement, if proved, establishes that there is an antitrust violation; the second determines *who may bring a suit* based on it."¹²³ Implicitly, the panel reasoned that Motorola—a party *directly affected* on its balance sheet by overcharges from the panel sales, despite integrating these technologies into final consumer products through foreign subsidiaries—was, unlike the United States government, not among the select few "who may bring a suit" involving foreign commerce under the Sherman Act.

The decision concluded by suggesting, "[i]f price fixing by the component manufacturers had the requisite statutory effect on cellphone prices in the United States, the Act would not block the Department of Justice from seeking *criminal . . . remedies.*"¹²⁴ Although this statement

121. *Id.* (emphasis added).

122. *Id.* at 821–25. Under the indirect-purchaser doctrine, only direct purchasers harmed by overcharging have cognizable antitrust claims under federal law. *See* *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 723–26 (1977). Thus, the panel noted, "Motorola's subsidiaries were the *direct* purchasers of the price-fixed LCD panels" whereas "Motorola and its customers [were the] *indirect* purchasers of the panels." *Motorola Mobility*, 775 F.3d at 821 (emphasis added).

123. *Id.* at 818 (emphasis added).

124. *Id.* at 825 (emphasis added). Interestingly, the Seventh Circuit's final opinion noted that the

stands as non-binding dicta with respect to the FTAIA's domestic effects prong, its implications are straightforward: federal criminal prosecutions are "claims" under the domestic effects exception and may support a conviction under the antitrust laws if the government can satisfy proof beyond a reasonable doubt. Obtusely, however, the court barred civil recovery for an American corporation harmed directly by the conspiracy, reasoning that Motorola could better pursue such claims through its subsidiaries' "direct" claims in foreign jurisdictions.¹²⁵

The final circuit opinions include analytical deficiencies, particularly with respect to the threshold requirements for invoking "domestic effects."¹²⁶ Neither decision identifies a clear reason for concluding that the "domestic effects" test supports criminal prosecutions under the Sherman Act, as both leave untouched the question of whether a criminal action may ever "give rise to" a "claim" under the antitrust laws. In that vein, Part II posits that the FTAIA's "claim" language should be narrowly interpreted in line with its original meaning, which did not authorize international criminal prosecutions.

II. THE FTAIA DOES NOT AUTHORIZE EXTRATERRITORIAL CRIMINAL PROSECUTIONS

Congress passed the FTAIA to limit the criminal justice authority of American antitrust authorities over nonimport foreign commerce—not to expand it. Part II argues the case for narrow construction of the FTAIA's "claim" language with respect to extraterritorial criminal prosecutions. After presenting a case for departure from the approach laid out in *Hui*

FTAIA has historically been interpreted to limit the extraterritorial application of domestic antitrust laws, in line with considerations of international comity, *id.* at 818, yet impliedly concluded that the Act's "claim" language should be broadly construed to encompass civil claims *and* criminal indictments, see *id.* at 825.

125. *Id.* at 824–25 ("The foreign subsidiaries can sue under foreign law—are we to *presume* the inadequacy of the antitrust laws of our foreign allies? Would such a presumption be consistent with international comity, or more concretely with good relations with allied nations in a world in turmoil?"). In response to Judge Posner—it seems readily discernible that American antitrust law *does in fact* presume the inadequacy of the competition laws of foreign collaborators, at least insofar as American prosecutors increasingly pursue criminal enforcement prosecutions involving foreign commerce. Moreover, in the wider array of international transactional regulation, the United States frequently dispatches with consideration of "good relations with allied nations" in pursuit of national economic objectives. See generally HEAD, *supra* note 40 (broadly surveying the role of U.S. law in regulation of international trade and investment).

126. Notably, here, no petitioner raised this "claim" of error in *Hui Hsiung* or *Motorola Mobility*. Nevertheless, particularly if the FTAIA is to be construed as a series of additional substantive, non-jurisdictional requirements for Sherman Act claims, a full analysis of *both* parts of the *two-part conjunctive domestic effects test* is certainly warranted.

Hsiung, Part III considers various implications of the current state of the law on international businesses, multinational corporate executives, and their agents.

A. TEXTUALISM FOUNDATIONALLY SUPPORTS A NARROW
CONSTRUCTION OF THE DOMESTIC EFFECTS EXCEPTION'S "CLAIM"
LANGUAGE

Courts frequently begin an assessment of apparent ambiguities in statutory meaning based on "pure textual reliance."¹²⁷ In some cases, American courts divine the "meaning of a statute . . . entirely from the words used in the law under consideration."¹²⁸ The plain statutory language, authoritative definitions of terms in secondary source materials, and the ordinary or common usage of terms or phrases in the statute, as well as related sections of the law, may illuminate statutory meaning in the absence of clear legislative intent.¹²⁹ These engrained methods suggest that the FTAIA's domestic effects prong does not support criminal prosecutions.

The Act ought to be interpreted in line with its unambiguous terms. Fortunately, the words "claim" and "prosecution" are terms with distinct meanings in the legal lexicon. At the outset, it is useful to note that the more general term "action" may encompass civil and criminal redress under the Sherman Act. By contrast, at least in the American legal system, plaintiffs asserting a "claim" under a given statute ordinarily would do so only with respect to the civil aspects of the statute—as where a civil plaintiff alleges "claims" against a civil defendant in adversary legal proceeding. This textual distinction is not accidental; it is reflective of

127. Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1971 (2013) (citing Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 339 (2005)). For authoritative discussions of the interaction between textualism and other recognized statutory interpretive methodologies in American judicial opinions, see generally Cross, *supra* and Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). Part II begins from a textualist foundation and in subsequent sections, see *infra* Sections II.B–D, also considers alternative rationales for strictly interpreting the domestic effects exception to not authorize extraterritorial criminal prosecutions. Cross briefly notes that "[d]escriptive statistics reveal that textualism and legislative intent are [the] most common [interpretive methodologies], but all the approaches find material use in Court opinions." See Cross, *supra*, at 1972; *cf. id.* at 1973–74 ("Textualism is broadly accepted as an interpretive methodology, the controversy is over its exclusivism. . . . Critics argue that there are many cases in which the plain meaning of the text does not offer a clear resolution and these difficult cases are . . . most likely to be taken by the . . . Supreme Court." (citing Breyer, *supra*, at 862)).

128. Cross, *supra* note 127, at 1972 (citing John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434 (2005)).

129. See *id.* at 1972–74.

fundamental underlying differences between civil and criminal actions under the FTAIA. The courts should treat it as such.

The Act does not expressly define the term “claim,” however. Thus, legal practitioners and jurists should typically import the plain or ordinary meaning of the term, as defined in secondary source materials. One source commonly relied upon is an authoritative definition in a legal dictionary. According to Black’s Law Dictionary, a “claim” may entail the “assertion of an existing right,” a “right to payment or to an equitable remedy,” or a “demand for money, property, or a legal remedy to which one asserts a right, esp[ecially] the part of a complaint in a civil action specifying what relief the plaintiff asks for.”¹³⁰ By contrast, criminal “prosecutions” ordinarily entail “criminal proceeding[s] in which an accused person is tried.”¹³¹ From a textual standpoint, then, these terms entail distinct proceedings in statutory parlance. This observation strongly suggests that it would be erroneous to casually equate the term “claim” with any “criminal proceeding.”

Moreover, the sharp contrast between authoritative legal definitions of the terms “claim” and “prosecution” is accentuated by ingrained uses for the terms in distinct legal proceedings. In ordinary use, surely, the word “claim” would not be used to describe highly specialized terms in criminal procedure, such as “prosecution,” and “indictment,” and “plea.” Broad usage of “claim” would, in fact, more likely lead to greater confusion than clarity in the course of criminal proceedings. In other words, loosely speaking, the government may allege “claims” against alleged perpetrators in criminal proceedings. However, stretching the term “claim” so far as to encompass the government’s entire “prosecution” against the defendant would appear facially obtuse in most contexts—in large part based on the ordinary usage of the terms in distinct legal settings.

Such judgments about “plain meaning” and “ordinary usage” are naturally disputed. Yet the foregoing discussion rapidly approaches an alternative conclusion from that rendered by the panel in *Hui Hsiung*: the plain terms of the FTAIA’s domestic effects exception are unambiguous, but they authorize only *civil* “claims” under the Sherman Act. And, turning beyond the black letter of the statute, ordinary usage of the words “claim” and “prosecution” lends further credence to this view. Thus, claims and prosecutions can and should be understood to entail distinct legal meanings; criminal “prosecutions” do not fall within “claims” based on a

130. *Claim*, BLACK’S LAW DICTIONARY (10th ed. 2014).

131. *Prosecution*, BLACK’S LAW DICTIONARY (10th ed. 2014).

textualist analysis of the FTAIA's domestic effects prong.

To the extent that the Act's terms are subject to multiple reasonable meanings, however, other interpretive canons suggest that its domestic effects prong does not extend to criminal actions under the Sherman Act where wholly foreign acts are concerned. The remainder of this Part evaluates arguments for and against extending the FTAIA to authorize extraterritorial criminal prosecutions based in non-textual interpretive canons, including: (1) extraterritoriality principles of comity and fairness; (2) applicable canons of statutory construction; and (3) consideration of the varied remedy schemes for criminal and civil Sherman Act violations.

B. NARROW INTERPRETATION OF THE FTAIA COMPORTS WITH
INTERNATIONAL COMITY PRINCIPLES AND APPLICABLE CANONS OF
CONSTRUCTION

Extraterritoriality principles further counsel departure from the prevailing interpretation of the FTAIA's domestic effects prong. Notions of comity and fairness undergird extraterritorial antitrust jurisprudence. These adjudicatory principles also clarify U.S. competition policy for foreign governments and firms, as courts share legal authority with the executive and legislative branches where extraterritorial liability is involved. This discussion reflects that adherence to these principles would be best advanced by interpreting the FTAIA to presumptively prohibit domestic criminal prosecutions of wholly foreign conduct under the domestic effects prong.

The international comity doctrine historically served a central role in limiting the extraterritorial jurisdiction of federal courts. And today, even under the far narrower "direct conflict" standard set forth in *Hartford Fire*,¹³² American courts regularly invoke "reasons of international comity" while describing the FTAIA as limiting "the extraterritorial application of U.S. antitrust law."¹³³ Judge Posner's statement is characteristic:

[A]re we to *presume* the inadequacy of the antitrust laws of our foreign allies? Would such a presumption be consistent with international comity, or more concretely with good relations with allied nations in a world in turmoil? . . . "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from

132. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993).

133. *See, e.g., Motorola Mobility, LLC v. AU Optronics Corp.*, 775 F.3d 816, 818 (7th Cir. 2014) (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 273(c)(2) (3d ed. 2006)).

anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?”¹³⁴

Comity similarly counsels courts in criminal matters under the FTAIA. American laws should not presumptively supplant foreign governments’ judgments concerning criminal liability, particularly in an interconnected global marketplace. Application of criminal punishment thus warrants hesitation upon consideration of “good relations with *allied nations in a world in turmoil*.”¹³⁵ The principles of fairness and reasonableness help to outline a doctrinally consistent conception of the FTAIA’s domestic effects prong, as these principles have historically aided federal courts in crafting remedies and resolving international conflicts.¹³⁶

Alternatively, however, comity may counsel in favor of enabling criminal remedies for extraterritorial antitrust violations. For example, leading antitrust commentator Robert Connolly notes, “there is a difference between actions brought by the DOJ and private class action damages,” particularly with respect to the extent to which government and private plaintiffs consider “comity considerations.”¹³⁷ Arguing that “[n]o nation has objected to the DOJ’s successful prosecution of foreign companies and even citizens of that country in the LCD panel investigation,” and that “the DOJ seriously considers the views of foreign nations before bringing cases,” Connolly, an experienced practitioner with decades of experience at the Antitrust Division of the Department of Justice, projects confidence that past practice makes perfect.¹³⁸ This conception of the comity doctrine clearly influenced the court’s decision in *Motorola Mobility*:

[T]he . . . court should reach a decision that preserves the ability of the DOJ to protect American consumers and continue to lead the way in prosecuting international cartels—including appropriate component cartels. The court could also acknowledge the comity concerns of foreign

134. *Id.* at 825 (quoting *F. Hoffman-La Roche, Ltd. v. Empagran, S.A.*, 542 U.S. 155, 165 (2004)). Of course, the court in *Motorola Mobility* dealt with civil claims. Comity holds the same, if not greater, weight in criminal prosecutions, where judgments of community condemnation and moral culpability are implicated to far greater degrees than in civil actions. *Accord* INTERNATIONAL GUIDELINES, *supra* note 12, at 49–51 (highlighting “Special Considerations” in connection with criminal investigations and prosecutions undertaken against international price-fixing cartels).

135. *Motorola Mobility*, 775 F.3d at 825 (emphasis added).

136. *See* RESTATEMENT, *supra* note 47 §§ 402–03, § 403 cmt. a.

137. Connolly, *Repeal the FTAIA!*, *supra* note 58, at 3. Connolly seems to suggest that American federal prosecutors will always have a greater concern for international relations, foreign sovereignty concerns, and other attendant comity considerations, than will civil plaintiffs. *See id.*

138. *See id.* at 4.

nations and find application of [the indirect purchaser doctrine] a bar to foreign component civil damage cases.¹³⁹

This view of comity appears highly limited, however, when cast against the principles underlying the doctrine and the weighty penalties associated with criminal antitrust actions under the Sherman Act. Neither the opinion in *Motorola Mobility* nor Connolly's commentary acknowledge the limited nature of justifying the extension of American criminal penalties abroad based upon foreign states' as-of-yet unstated approval of a single case arising from a single foreign conspiracy involving only several nations.

Under this view, to defend extraterritorial prosecutions beyond the Crystal Meetings conspiracy, something affirmative or principled is needed—something more than silence from foreign governments in the face of American action. Although coordination with foreign governments provides prima facie evidence that prosecutors can avoid chafing foreign sovereigns while applying the Sherman Act to wholly foreign conduct, the mere acquiescence of foreign states to such conduct should not temper characterization of American prosecutions as potential overreaching.¹⁴⁰ A more reasonable standard would presumptively limit the criminal domain of American prosecutors to domestic markets. This would encourage enhanced criminal enforcement activity by foreign governments, whose interests and authority are often more directly implicated in cases involving disputed extraterritorial conduct.

Fortunately, this is not a new concept. International comity already reflects an ingrained presumption against extraterritorial prosecutions under the Sherman Act. Generally, criminal law reflects social judgments regarding the proper magnitude of punishment acceptable for given violations in market competition and to consumer welfare. Different sovereign jurisdictions may make different judgments regarding whether to

139. *Id.* at 7. Notably, Judge Posner cited Connolly's article at length in the final opinion, including the relevant portion cited herein. See *Motorola Mobility*, 775 F.3d at 826–27 (citing Connolly, *Repeal the FTAIA!*, *supra* note 58). This suggests that Connolly's colorable conception of comity had at least a persuasive impact on the panel's reasoning with respect to the domestic effects prong.

140. Connolly relies in part on the fact that, as DOJ prosecutors noted in their *Motorola Mobility* briefs, before commencing with a case, the DOJ contemplates the views of foreign nations, whereas, in his view, "the comity considerations with private plaintiffs are quite different." Connolly, *Repeal the FTAIA!*, *supra* note 58, at 4. For example, Connolly contends that private individuals seeking civil damage remedies may fail to exercise the "degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." *Id.* at 4–5 (emphasis added) (citing *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004)). In defense of Connolly and the Court in *Empagran*, this praise of "self-restraint" and "consideration of foreign government sensibilities" in the American executive branch came prior to January 2017.

criminalize the same putatively anticompetitive conduct.¹⁴¹ Moreover, different states punish offenders in different ways for the same crimes.¹⁴² Variation in criminal punishment among developed nations reflects concomitant variation in social judgments regarding individual moral culpability and foundational precepts to systems of criminal justice. In this vein, from one dominant theoretical perspective, criminal liability confers a judgment of community condemnation of moral culpability.¹⁴³

Amidst political uncertainty regarding norms of free trade and global economic cooperation,¹⁴⁴ American competition law should privilege the principles of reason and fairness imbued in the comity doctrine. Fairness lies at the heart of American criminal law—particularly when applied in the extraterritorial and criminal contexts.¹⁴⁵ Historical weighing of domestic and foreign sovereignty, which generally informs courts' extraterritorial jurisdiction, should be imported into analysis of the FTAIA's "claim" language in the context of criminal penalties. Certainly, the antitrust laws should not apply extraterritorially in criminal contexts when: (1) the parties are wholly foreign and foreign conduct constitutes the basis for the allegations; (2) direct effects are principally centered abroad; (3) there is a

141. In fact, "substantial differences . . . exist among various countries in respect of competition laws." HEAD, *supra* note 40, at 643–45; *see also id.* at 634–54 (outlining American, Japanese, and EU competition regimes, multilateral competition policy efforts, and bilateral and regional competition policy efforts). In sharp contrast to imposition of criminal penalties for violations of competition policy, most countries of the world do agree on near-universal condemnation of "core international crimes," such as "war crimes, crimes against the peace or aggression, crimes against humanity, and genocide." BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 205 (3rd ed. 2015). *See id.* at 205–581 (describing internationally recognized mechanisms for condemnation of war crimes, crimes against the peace, crimes against humanity, genocide).

142. For instance, recent research suggests that criminal punishment in the United States is increasingly "harsh," relative to peer nations. *See generally* JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

143. *See* Paul H. Robinson, *The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 693–95, 698–710 (1993) (discussing interdependence between civil and criminal law, contrasting reasons for civil and criminal commitment, and arguing that "the distinctiveness of criminal law is its focus on moral blameworthiness"); ROBERT COOTER & THOMAS ULEN, *An Economic Theory of Crime and Punishment*, in *LAW AND ECONOMICS* 454–84 (6th ed. 2016) (contrasting "traditional," retributivist justifications for criminal punishment with utility-based "economic" approaches). Robinson traces first principles surrounding civil and criminal commitment to provide a robust take on the association between community values and the type of culpability associated with criminal condemnation. *See* Robinson, *supra*, at 693–95. Ultimately Robinson arrives at the conclusion that "it would be better to expand civil commitment to include seriously dangerous offenders who are excluded from criminal liability as blameless for any reason," in part because American laws frequently set *high standards for criminal commitment* based upon offenders' mental states and associated blameworthiness, as opposed to dangerousness. *Id.* at 716–17.

144. *See supra* notes 1–6 and accompanying text (discussing the currently fractious political economy of international trade and international economic cooperation).

145. *See, e.g.,* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

lack of foreseeable purpose to affect or harm domestic commerce; (4) foreign laws and policies conflict with American laws and policies to a high degree; and (5) simultaneous compliance with U.S. and foreign law is impossible.¹⁴⁶ The FTAIA's "claim" language therefore naturally compliments the historically entrenched comity doctrine by barring criminal enforcement of the Sherman Act against foreign acts with effects on nonimport domestic commerce.¹⁴⁷

Moreover, the strong presumption against extraterritorial application of federal law clearly applies in the case of criminal actions under the FTAIA. Courts presume that federal statutes do not apply extraterritorially in the absence of express legislative intent to the contrary.¹⁴⁸ To avoid this presumption against extraterritorial application of U.S. law, a plaintiff typically must bring a significant showing before the court of some "clear" expression of legislative intent to invoke the law beyond U.S. sovereign control.¹⁴⁹

Relatedly, *Morrison v. National Australia Bank Ltd.* provides that the

146. *Cf. Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 749 F.2d 1378, 1384–86 (9th Cir. 1984) (noting international comity factors traditionally applied by federal courts to assess propriety of exercising jurisdiction). *But see Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–99 (1993) (suggesting comity factors only relevant in assessing jurisdiction upon finding of "direct" conflict between American law and foreign law).

147. *See Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (noting comity reflects "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation").

148. *See Arabian Am. Oil Co.*, 499 U.S. at 248, 252 ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. . . . [U]nless there is 'the affirmative intention of the Congress clearly expressed,' we must presume it 'is primarily concerned with domestic conditions.'" (citations omitted)); *see also Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247, 255 (2010) (quoting *Arabian Am. Oil Co.*, 499 U.S. at 248) ("It is a 'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (citations omitted)); *Small v. United States*, 544 U.S. 385, 388–89 (2005) (noting the "legal presumption that Congress ordinarily intends its statutes to have domestic, *not extraterritorial*, application" (emphasis added)); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993); *Smith v. United States*, 507 U.S. 197, 203 (1993); *cf. The Antelope*, 23 U.S. 66, 123 (1825) ("The Courts of no country execute the penal laws of another."); *United States v. Ballestas*, 795 F.3d 138, 143–44 (D.C. Cir. 2015) (quoting *Morrison*, 561 U.S. at 255).

149. *See Labor Union of Pico Korea, Ltd. v. Pico Prods., Inc.*, 968 F.2d 191, 194 (2d Cir. 1992), *cert. denied*, 506 U.S. 985 (1992) (suggesting burden of overcoming presumption against extraterritorial application of U.S. law lies with the party asserting application of U.S. law to events that occurred abroad); *United States v. Gatlin*, 216 F.3d 207, 211–12 (2d Cir. 2000) (discussing burden on party seeking extraterritorial application vis-à-vis legislative intent). *But see United States v. Bowman*, 260 U.S. 94, 101–03 (1922) (suggesting there is no presumption against extraterritoriality when dealing with statutes prohibiting crimes against the U.S. government); *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 71 (2d Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995) (holding *Bowman* should be read narrowly to only apply to "criminal statutes . . . and . . . only those relating to the government's power to prosecute wrongs committed against it" and exempt such actions "from the presumption [against extraterritoriality]").

test of territoriality must look to the “focus” of a federal statute in determining the scope of a law.¹⁵⁰ In *Morrison*, for example, the Court held the territorial connections related to a statute’s “focus” may overcome the statutory presumption against territoriality.¹⁵¹ Here, similarly, the focus of the FTAIA should guide federal courts in divining the extraterritorial scope of the statute’s criminal dimensions. Moreover, *United States v. Bowman* held that ambiguous criminal statutes generally should not apply extraterritorially, at least absent an extraterritorial intent clearly inferred from the nature of the offense itself.¹⁵² Overall, these canons of construction reinforce comity considerations and counsel against interpreting the FTAIA to independently authorize criminal actions.

C. DISTINCT REMEDIES REFLECT DISTINCT TREATMENT OF CIVIL AND CRIMINAL ACTIONS UNDER THE FTAIA

A final consideration concerns the distinct remedies that the overall statutory scheme envisions for civil and criminal antitrust violations. According to regulators’ conception of the Sherman Act and its penalties, violations “may be prosecuted as civil or criminal offenses,” and punishments for civil and criminal offenses vary.¹⁵³ For example, available relief under the law encompasses penalties and custodial sentences for criminal offenses, whereas civil plaintiffs may “obtain injunctive and treble damage relief for violations of the Sherman Act.”¹⁵⁴ Regulators also recognize that the law envisions distinct means of enforcing criminal and civil offenses under the Sherman Act. For example, the DOJ retains the “sole responsibility for the criminal enforcement” of criminal offenses and

150. See *Morrison*, 561 U.S. at 266–67 (citing *Arabian Am. Oil Co.*, 499 U.S. at 255 and *Foley Bros. v. Filardo*, 336 U.S. 281, 283, 285–86 (1949)) (suggesting the mode of analysis the Court applied concerned the “‘focus’ of congressional concern”).

151. *Id.* at 266–67 (holding that the “focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States,” so section 10(b) of the Exchange Act only regulates “domestic transactions in other securities”); cf. Zachary D. Clopton, *Bowman Lives: The Extraterritorial Application of U.S. Criminal Law After Morrison v. National Australia Bank*, 67 N.Y.U. ANN. SURV. OF AM. L. 137, 159–60 (2011) (noting, in the civil context, “cases like [*Arabian Am. Oil Co.*] have made it harder to overcome the presumption,” and “*Morrison* seems to have made it harder to avoid the presumption with claims of territoriality”).

152. *Bowman*, 260 U.S. at 97–98; see also Clopton, *supra* note 151, at 161 (“*Bowman* and its progeny do not question the power of Congress to enact extraterritorial criminal laws. Instead, these cases ask whether a court *should apply an ambiguous criminal statute extraterritorially*. For centuries, the answer . . . was flatly ‘no.’” (emphasis added)). But see Clopton, *supra* note 151, at 166 (suggesting lower courts have interpreted *Bowman* as “merely restat[ing] the *American Banana* rule that statutes are presumed to apply territorially unless Congress has indicated otherwise,” while other courts have “suggested that *Bowman* created a limited exception to the presumption” (footnotes omitted)).

153. INTERNATIONAL GUIDELINES, *supra* note 12, at 5.

154. *Id.*

“criminally prosecutes traditional per se offenses of the law.”¹⁵⁵ In civil proceedings, private plaintiffs and the federal government may seek equitable relief and treble damage relief for Sherman Act violations.¹⁵⁶

These recognized remedial distinctions matter when assessing the FTAIA’s meaning. Along with the interpretive argument that the Sherman Act’s various provisions ought to be enforced in a way that is internally consistent, practical assessment of the varied remedies and parties that may pursue such remedies reinforces a narrow conception of the FTAIA’s language. The weighty power to seek imprisonment of offenders critically distinguishes criminal and civil remedies under the Sherman Act. The federal government alone retains such authority, predicated on principles of legality and sovereignty. For many reasons, it remains reasonable to permit civil redress—encompassing the full range of injunctive and damage relief—in extraterritorial proceedings under the Sherman Act. Aggrieved consumers and competitors targeted in American markets by foreign activities can sue for injunctive and treble damage relief under the Sherman Act’s civil provisions. Notably, the FTAIA permits as much by its own terms, at least where substantive elements under the Act are satisfied with respect to the requisite effect on domestic or direct import commerce.

In this sense, American law maintains a strong deterrent to foreign actors through a robust system of civil, as opposed to criminal, redress. Extraterritorial competitive injuries are left to the civil sphere under the FTAIA. Such civil remedies are more than sufficient to advance the objectives of the American competition regime abroad—namely, to prevent through legal means artificial distortions on the price and output of goods and services. American courts play a major role in the adjudication of disputes spanning distinct sovereign jurisdictions; that role is best maintained through established civil remedies. But criminal remedies—being reserved to the sovereign alone—should not extend extraterritorially. The remedial distinctions under the Sherman Act reflect the aims of criminal and civil competition law—criminally, to vindicate public wrongs, and civilly, to remedy private injuries.

Criminal antitrust remedies are logically limited in the context of foreign sovereign jurisdiction. By contrast, the Sherman Act’s civil remedies provide injunctive and damage relief that may compensate victims despite traditional notions of foreign sovereign authority. Far from one sovereign intervening in the backyard of another, a civil action enables

155. *Id.*

156. *Id.*

individually aggrieved parties to receive compensation from an antitrust offender. This is an intuitive remedial extension of basic principles of legality and sovereignty. Thus, far from the government's current position—that the FTAIA's "claim" prong empowers prosecutors to independently seek criminal remedies for extraterritorial antitrust offenses—the overall remedy scheme for antitrust offenses reinforces a limited conception of criminal redress, particularly where the FTAIA provides the basis for government action.

The preceding discussion substantiates a narrow interpretation of the FTAIA as cabining the extraterritorial criminal antitrust jurisdiction of federal courts. Based on the factors cited—along with substantial historical evaluation of the Sherman Act and FTAIA—this interpretation is consistent with the plain letter of the Act, engrained legal norms, and applicable canons of construction. The current state of U.S. antitrust law tacitly endorses potential executive overreach into criminal judgments of co-equal sovereigns, which is questionable even under consensual arrangements with such governments.¹⁵⁷ Such sovereigns' domestic political and legal processes properly decide criminal judgments, absent American influence or legal process. In light of growing economic globalization, Part III briefly considers various implications of the prevailing construction of the FTAIA as independently supporting criminal prosecutions of foreign anticompetitive conduct.

III. IMPLICATIONS FOR AN INTERCONNECTED GLOBAL POLITICAL ECONOMY

The foregoing analysis makes clear that the FTAIA was never intended to apply to criminal activity. Its drafters did not design the Act to reinforce American hegemony in the political economy of global competition policy. Rather, the statute provides express legislative guidance regarding the extraterritorial *limits* on criminal liability under the Sherman Act.

157. There is a wide divergence in the "substance and enforcement" of competition law among leading jurisdictions—including the United States, Japan, and the European Union ("EU"). See HEAD, *supra* note 40, at 648–49. Leading commentary suggests that the *values* undergirding competition policy in the EU and United States "differ significantly," in that the EU does not follow the United States' unilateral "focus on ensuring competitive markets through limitations on abusive business practices." JEROLD A. FRIEDLAND, UNDERSTANDING INTERNATIONAL BUSINESS AND FINANCIAL TRANSACTIONS 295–96 (4th ed. 2014). Moreover, Japanese law "does not begin with the premise of U.S. law that private agreements to regulate trade are injurious," and, for many decades "cartels of the largest Japanese businesses were encouraged to stabilize the economy through practices that prevented unemployment and focused private economic activity on public goals." *Id.* at 296.

To date, the Supreme Court remains notably silent on the issue. In the meantime, *Hui Hsiung* and *Motorola Mobility* suggest that international businesses that participate in certain anticompetitive acts *anywhere in the world* should beware potential criminal redress in American courts. The chief implication of the “Crystal Meetings” cases is that anticompetitive conduct presents a massive criminal liability risk that may attach to commercial transactions that in many ways appear removed from American sovereignty. In particular, firms with foreign headquarters that deal significantly in American domestic commerce while operating abroad should consider the wide range of criminal remedies available to American prosecutors under the FTAIA.

In that vein, contractual agreements among segments of global supply chain networks should be drafted to avoid traditional areas of American criminal antitrust enforcement, such as price-fixing and bid rigging, territorial allocation mechanisms, and other “naked” collusive activities. Given that—at least in recent times—U.S. criminal enforcement actions are far more likely to stem from agreements *between* firms, rather than agreements enacted *within* a single entity, international businesses should factor antitrust enforcement concerns into assessing the relative risk of commercial dealings with partners. Owning subsidiaries, rather than dealing with others, may be a preferable alternative.¹⁵⁸

Although vertical integration may shield firms from horizontal liabilities under section 1 of the Sherman Act, section 2 proscribes certain single-firm activities. Section 2 prohibitions include bans on attempted monopolization and the illegal maintenance or acquisition of monopoly power.¹⁵⁹ There are tensions inherent between self-dealing and dealing with others under U.S. antitrust law. Ironically, foreign firms may feel paralyzed by the vast scope of American antitrust law under courts’ expansive reading of the FTAIA in the criminal context—thus the Act may in fact fuel the type of commercial chilling effect bemoaned by legislators before its passage.¹⁶⁰

Whereas the petitioners in *Hui Hsiung* failed to raise challenges to the criminal application of the domestic effects prong based on the FTAIA’s plain language and related arguments, future businesses and individuals

158. Nevertheless, the DOJ may maintain a focus on “individual accountability” in criminal antitrust enforcement, even in extraterritorial cases. SNYDER, *supra* note 100, at 3–5.

159. See 15 U.S.C. § 2 (2018).

160. See, e.g., H.R. REP. NO. 97–686, at 6 (1982) (noting how extraterritorial application of the Sherman Act prior to the FTAIA caused many international business transactions to “die on the drawing board”).

targeted by criminal indictments should put the government to the test.¹⁶¹ Multinational businesses play a major role in addressing the current conception of the FTAIA's criminal dimensions—most notably by challenging the U.S. government to prove the Act *should* apply to extraterritorial criminal acts. The plain text of the statute should give new life to extraterritoriality jurisprudence by reasonably limiting the domain of American authorities. This development is only possible, however, if foreign defendants raise facial challenges to the Act's extraterritorial criminal application.

In the meantime, beyond reflecting the risk of criminal antitrust liability in international business transactions, multinational businesses should consider the panoply of behavioral and structural remedies available to federal prosecutors. In particular, behavioral remedies encompass fines, penalties, and potential prison time, as well as long-term monitoring and compliance regimes.¹⁶² Foreign firms like AU Optronics, if caught in the crosshairs of a criminal prosecution, could lose control of certain areas of corporate governance *altogether*, in order to ensure such firms continuing compliance with American law.¹⁶³

The range of behavioral remedies available to American competition authorities underscores the importance of avoiding criminal liability *altogether* by embracing a culture of prospective caution regarding potentially collusive conduct.¹⁶⁴ Foreign executives intending to maintain full control of corporate affairs and eschew long-term compliance monitors should craft deals as though American competition law operates globally, or otherwise entirely avoid collusive activities that could reasonably wash

161. The government's emphasis on "individual accountability" is underscored in the LCD investigation and eventual prosecutions. See SNYDER, *supra* note 100, at 3–5; ANTITRUST PRIMER, *supra* note 100, at 4.

162. SNYDER, *supra* note 100, at 6 ("AU Optronics . . . pa[id] a then-record fine of \$500 million and accept[ed] a compliance monitor, after the same jury convicted it."). The former Deputy Assistant Attorney General's remarks reinforce the importance of compliance monitors to maintain a long-term culture of antitrust enforcement—even cases involving foreign companies and extraterritorial application of criminal antitrust law. *Id.*

Corporate accountability is important as well because it incentivizes compliance with our laws. The Antitrust Division emphasizes that compliance with antitrust laws must be ingrained in a corporation's culture—one that is established from the top down. And we insist on probation and corporate monitors in criminal resolutions, where corporate offenders fail to demonstrate serious compliance efforts.

Id. at 1–2.

163. *Id.* at 6.

164. See generally *id.* The fact that leaders among the DOJ antitrust enforcement community view compliance monitors and cultures of corporate compliance as essential to the U.S. criminal antitrust regime generally reinforces this point.

up on American shores.¹⁶⁵ Given the depth of consumer demand in American markets, caution appears to be the best policy at present for the vast majority of major global businesses.

CONCLUSION

The foregoing discussion indicates that domestic antitrust laws play a major role in modern global trade regulation. Arguably more than any time since the passage of the FTAIA, today the international dimensions of competition policy warrant careful consideration by lawmakers, businesses, and legal practitioners. Markets are increasingly global, and the application of domestic competition law to international business has necessarily become more complex.

Although global trade can unlock market efficiencies and enhance consumer welfare, it must be managed diligently among co-equal sovereign collaborators.¹⁶⁶ The FTAIA clarifies that U.S. antitrust law plays a *limited* role in managing foreign anticompetitive activities. Moving forward, the FTAIA's "effects exception" should therefore not be permitted to independently support extraterritorial criminal prosecutions under the Sherman Act. The plain language of the FTAIA, in tandem with other traditional tools of statutory interpretation, suggests a limited range of legal redress for competitive harms stemming from wholly foreign acts. Such activities are cabined to the domain of civil redress and should not be subject to criminal prosecution under the FTAIA.

An interpretation of the FTAIA that would reduce reliance on American criminal law enforcement in favor of civil redress and enhanced criminal action by foreign governments in the competition sphere would be preferable, as this approach would reduce the risk of impolitic prosecutorial overreach. Spirited arguments can be made for rigorous domestic criminal enforcement where Americans face competitive injuries, but these arguments become less clear-cut in the global marketplace. Yet one thing is clear: The FTAIA—a pronouncement designed by Congress to *clarify* the

165. Regrettably, this response arguably both reflects and reinforces American hegemony in competition policy.

166. At least at present, the prospects for a truly *global* competition regime appear scant. See HEAD, *supra* note 40, at 641–54 (discussing regimes regulating anticompetitive conduct beyond domestic laws). Since the 1990s, nearly 150 sovereign states have enacted competition regimes; these are predominately molded from American common law principles. See Levitt & Fogt, *supra* note 8. States, rather than intergovernmental organizations or non-governmental actors, simply retain principal authority over this aspect of international trade policy. Thus, efforts toward effective transnational regulatory frameworks should proceed from principles of collaborative management between coequal sovereigns. *Accord id.*

limited range of extraterritorial claims under the Sherman Act—did not speak clearly enough for federal courts. Absent judicial action, Congress should *enunciate* that criminal penalties are in fact authorized by the FTAIA's plain terms.

In the meantime, American competition authorities are prepared to exercise every ounce of extraterritorial authority meted out by the federal judiciary.¹⁶⁷ This portends potential conflict where rigorous international competition is involved. Although the litigants in *Hui Hsiung* failed to fully raise arguments challenging a Sherman Act criminal prosecution under the FTAIA, the decision remains instructive. Criminal penalties under the Sherman Act are currently available to American prosecutors under a domestic effects theory.¹⁶⁸ Sherman Act remedies are structural *and* behavioral. Thus, international businesses and their agents may face U.S. competition remedies that directly interfere with corporate governance structures, including, but not limited to, compliance monitors, deferred-prosecution agreements, and non-prosecution agreements.¹⁶⁹

This portends trouble in a world already plagued by political uncertainty surrounding global trade.¹⁷⁰ Businesses and individuals facing the current legal regime should challenge criminal enforcement of the Sherman Act under the FTAIA's domestic effects exception. Given a lack of a clear controlling precedent, a domestic effects theory should not permit U.S. authorities to pursue criminal sanctions against wholly foreign activities, which fall more reasonably within the domain of *foreign governments'* competition authorities.¹⁷¹ By challenging the law in

167. See, e.g., INTERNATIONAL GUIDELINES, *supra* note 12, at 16–19 (broadly interpreting domestic effects standard based on cited precedents).

168. Although in both cases the courts applied the direct import commerce prong as an independent basis for their respective decisions, each also noted that the domestic effects prong—if independently relied upon—would support the same outcome. These results are just as analytically problematic, albeit in a more attenuated sense, as a decision rendered solely upon application of the domestic effects prong.

169. For example, in the case of AU Optronics, a criminal remedy included a long-term compliance monitor, on site at the company, to tackle a perceived culture of criminal corruption at the firm. See *Antitrust Sanctions 2.0 – Evolving Views on Behavioral Remedies*, ALLEN & OVERY LLP, <http://www.allenoverly.com/publications/en-gb/lrfs/us/Pages/Antitrust-sanctions-2.0-%E2%80%93-evolving-views-on-behavioral-remedies.aspx> (last visited Dec. 4, 2018). Behavioral obligations for foreign *individuals* may be the next phase of the Antitrust Division's shift toward behavioral remedies, as at least one major international law firm currently advises. *Id.* Given remedies available to prosecutors, foreign individual defendants may be more inclined to settle with U.S. authorities directly, in order to craft personally tailored monitoring remedies in lieu of more punitive mechanisms, such as a custodial sentence in the federal prison system. *Id.*

170. See, e.g., *supra* notes 1–8, 12.

171. Notably, Judge Posner substantively agreed with this observation in *Motorola Mobility*, drawing upon the seminal *Empagran* decision to suggest that it would be highly improper for courts to

this way, businesses might topple the edifice of judicial inference that has resulted in uniform treatment of civil claims and criminal actions under the Sherman Act's extraterritorial dimensions.

Given the proliferation of domestic competition laws worldwide in recent decades,¹⁷² in particular, the Sherman Act should not be elevated to the status of global doctrine.¹⁷³ Nor should American jurists desire it to be treated as such.¹⁷⁴ The application of domestic criminal law to foreign activities demands propriety, which, in the immediate context, is best achieved by presumptively tempering domestic executive authority. To the extent short-term underdeterrence follows from respecting foreign governments' criminal antitrust regimes, American law offers a robust range of civil redress.¹⁷⁵

Trade talk has shifted from an overall cooperative tenor to a chorus of conflict.¹⁷⁶ The amended "panel" decisions will stand as good law for the time being. However, presumptive equivocal treatment of the civil and criminal provisions of the Sherman Act after the FTAIA demands meaningful justification from U.S. courts in the immediate future. For although American antitrust laws play a significant role in the

"presume the inadequacy of the antitrust laws of our foreign allies" and that doing so may constitute "unjustified interference with the right of foreign nations to regulate their own economies." *Motorola Mobility, LLC v. AU Optronics Corp.*, 775 F.3d 816, 824–25 (7th Cir. 2014) (citing *F. Hoffmann-La Roche, Ltd. v. Empagran, S.A.*, 542 U.S. 155, 165 (2004)). Certainly, this logic should be imported into the criminal antitrust analysis to prevent interference with the rights of foreign sovereigns.

172. INTERNATIONAL GUIDELINES, *supra* note 12, at 28 ("[M]ore jurisdictions have adopted and enforce antitrust laws that are compatible with those of the United States . . .").

173. *But see Developments in the Law: Extraterritoriality*, *supra* note 40, at 1279. In the alternative, extensive criminal enforcement under the Sherman Act may be viewed as a positive, given [t]he decrease in civil jurisdiction and the increase in criminal prosecution do more than cancel out each other's downsides: the beneficial synergies between them can further the purposes of antitrust law. When viewed as a single trend instead of two, this shift involves the courts' deferring to institutional competence and disengaging from foreign relations, more optimal deterrence attained by encouraging the preferred types of enforcement, and more international cooperation achieved without damaging reciprocity-based trade and foreign relations interests. . . . [I]t may represent a more coherent development in the law.

Id. Yet this proposed interpretation ignores the facial incongruence in "cutting back on protections afforded by the antitrust laws" in the civil context, see, for example, Bauer, *supra* note 12, at 26, while casually endorsing enhanced extraterritorial criminal enforcement under the FTAIA, see *Developments in the Law: Extraterritoriality*, *supra* note 40, at 1274–78 (describing increased criminal prosecutions of extraterritorial conduct under the Sherman Act in recent years).

174. INTERNATIONAL GUIDELINES, *supra* note 12, at 16–19 (broadly interpreting domestic effects standard based on cited precedents) (citations omitted).

175. As previously outlined, criminal laws and remedies canonically apply to delinquency that, within a given community, is adjudged morally deserving of condemnation. *Cf.* Robinson, *supra* note 143 (discussing justifications for punishment). This is not the case with respect to competition violations, at least in most instances.

176. *See, e.g., supra* notes 1–7.

contemporaneous global political economy, words matter: “A *rose by any other name may smell as sweet*,”¹⁷⁷ *but an indictment does not a claim make*.

177. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.