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**THE FTAIA IN ITS PROPER PLACE: MERITS,
JURISDICTION, AND STATUTORY
INTERPRETATION IN *MINN-CHEM, INC. V.
AGRIUM INC.***

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INTRODUCTION

For more than a century, extraterritorial application of United States antitrust laws has vexed federal courts. Although the Sherman Act—the statutory bedrock of antitrust law—outlaws restraints of trade or commerce with foreign nations, courts have traveled a circuitous route to determine the precise scope of foreign trade and commerce. In one of the earliest Supreme Court cases involving the intersection of foreign commerce and the Sherman Act, Justice Oliver Wendell Holmes applied the canon of statutory interpretation known as the “presumption against extraterritoriality” to the Sherman Act.¹ He concluded that an exclusive link between the laws passed by

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¹ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (“The foregoing considerations would lead, in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”).

Congress and the territory of the United States prevented the application of the Sherman Act to conduct occurring in foreign countries. Less than forty years later, Judge Learned Hand took a different approach, holding that the Sherman Act applies to foreign conduct that produces an “effect” on commerce in the United States.²

In 1982, after seventy years of courts wrestling with this issue, Congress passed the Foreign Trade Antitrust Improvements Act (“FTAIA”) with the hope of providing a stable guide to the extraterritorial reach of the Sherman Act.³ Despite the passage of the FTAIA, the controversy over applying U.S. law to individuals and entities in foreign countries did not subside. Indeed, the FTAIA’s cumbersome language posed new problems for the courts. One particular issue that arose was whether the law stripped federal courts of their subject-matter jurisdiction over certain antitrust claims; or, alternatively, whether the law merely added an element to a cause of action brought under the Sherman Act, with no effect on a court’s jurisdiction.

This Case Note examines this “jurisdiction/element” divide through the lens of *Minn-Chem, Inc. v. Agrium Inc.*, a recent case decided by the Seventh Circuit Court of Appeals sitting *en banc* during the summer of 2012.⁴ In *Minn-Chem*, the Seventh Circuit sided squarely with the interpretation that the FTAIA provides an element of an antitrust claim. The court’s holding has particular consequences on civil procedure, statutory interpretation, and the extraterritorial application of U.S. antitrust laws. The decision also is momentous, in part, because it overturns the Seventh Circuit’s 2003 holding in *United Phosphorus Ltd. v. Angus Chemical Company*, where the court held that the FTAIA proscribes subject-matter jurisdiction.⁵ The *Minn-Chem* decision also adopted a test to determine whether foreign

² *United States v. Aluminum Co. Of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

³ 15 U.S.C. § 6a (2006).

⁴ *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845 (7th Cir. 2012) (*en banc*).

⁵ *United Phosphorus Ltd. V. Angus Chemical Company*, 322 F.3d 942 (7th Cir. 2003) (*en banc*).

antitrust conduct has a “direct” effect on United States domestic or import commerce. Under the Seventh Circuit’s definition, conduct that has a “proximate causal nexus” with an effect on United States commerce is “direct.” That definition conflicts with the one adopted by the Ninth Circuit Court of Appeals that requires conduct to have an “immediate consequence” in order for it to have a “direct” effect.⁶

This Note argues that the Seventh Circuit made the right decision in *Minn-Chem*. The rationale provided in Judge Diane Wood’s opinion goes a long way toward justifying the categorization of the FTAIA as an “element-establishing” statute. Among those reasons is the desire to establish a bright-line distinction between statutes addressing subject-matter jurisdiction and statutes regulating conduct. This distinction makes the judicial process more efficient because it guides courts and litigators on the proper application of the Rules of Civil Procedure. This Note also adds to those reasons by focusing on the global context of the extraterritorial enforcement of antitrust law. In particular, it argues that the *Minn-Chem* decision’s “direct” effect test adopted by the Seventh Circuit effectively serves the purpose of United States antitrust laws.

Part I of this Note introduces the Sherman Antitrust Act and the FTAIA, the two statutes at issue in the *Minn-Chem* decision. Part II then traces the Supreme Court’s interpretation of the FTAIA along with the “jurisdiction/element” distinction in statutory interpretation beginning with Justice Scalia’s dissent in *Hartford Fire Insurance Co. v. California* through the Court’s decision in *Morrison v National Australia Bank*. Part III reviews the Seventh Circuit’s experience with the FTAIA in *United Phosphorus* and in *Minn-Chem*. Part IV analyzes the *Minn-Chem* decision’s impact on civil procedure, statutory interpretation, and extraterritorial antitrust enforcement. A brief conclusion follows.

⁶ U.S. v. LSL Biotechnologies, 379 F.3d 672, 681 (9th Cir. 2004).

I. THE STATUTORY FOUNDATION

A. *The Sherman Act*

The statutory basis for antitrust law in the United States begins with the Sherman Act of 1890.⁷ The text of §1 of the Sherman Act declares “restraints of trade” brought about through contracts, agreements, or conspiracies illegal.⁸ Similarly, § 2 of the Sherman Act applies to restraints of trade that arise from monopolistic abuses.⁹

The law explicitly prohibited acts restraining trade in the course of “commerce among the several States, or with foreign nations.”¹⁰ However, what Congress meant by “commerce with foreign nations” was not entirely clear, even within the first few decades after the law’s enactment.¹¹ Over the years courts wrestled with that phrase, and, in 1982, Congress eventually attempted to establish specific parameters on the extent of the Sherman Act’s extraterritorial reach with the FTAIA.

⁷ 15 U.S.C. §§ 1-7 (2006).

⁸ *See id.* § 1.

⁹ *See id.* § 2.

¹⁰ *See id.* § 1.

¹¹ *See e.g.*, *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (holding that the Sherman Act does not apply to conduct in Costa Rica and Panama); *but see*, *U.S. v. Pacific A & R & Nav. Co.*, 228 U.S. 87 (1913) (holding that the Sherman Act applied to a seafaring shipping company operating between the United States and Canada); *Thomsen v. Cayser*, 243 U.S. 66 (1917) (holding that the Sherman Act applied because antitrust violation occurred in United States territory despite the fact that company alleged to violate the Act was formed in a foreign country); *U.S. v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (distinguishing *American Banana* on the fact that the Sherman Act applies where a “contract, combination, and conspiracy” was entered into in the United States as opposed to acts only occurring in foreign countries).

B. The Foreign Trade Antitrust Improvements Act of 1982

1. History of the Act

For over ninety years after the passage of the Sherman Act, federal courts were left with the task of determining the scope of foreign commerce covered by the law. In the late 1970s and early 1980s, Congress debated and then adopted a statutory definition in the Foreign Trade Antitrust Improvements Act of 1982.¹² The House Judiciary Committee report on the FTAIA explained that the impetus for the legislation was a perception among U.S. business leaders that American antitrust laws hindered American export commerce.¹³ The Judiciary Committee also found concern among some commentators that the legal test used to determine whether American antitrust law applied to a foreign transaction was ambiguous, leading to inconsistent judicial decisions on what effects on the domestic economy warranted U.S. regulation over a foreign transaction.¹⁴ Although the Judiciary Committee heard conflicting testimony regarding these two concerns, it nonetheless chose to adopt a law intended to clarify the matter.¹⁵ According to the conference report, the standard articulated in the statute would remedy the perceived inconsistencies of the legal test formulated in the case law.¹⁶

2. Text of the Act

The text of the FTAIA is as follows:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

¹² 15 U.S.C. § 6a (2006).

¹³ H.R. Rep. No. 97-686, at 6 (1982).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph 1(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.¹⁷

A bit of translation is in order. The statute begins with a *chapeau* expressing the blanket limitation on the reach of the Sherman Act as embodied in the United States Code.¹⁸ The relevant code sections do not apply to conduct affecting trade or commerce with foreign nations, markets, consumers, or producers.¹⁹ The *chapeau* also includes a caveat in the parenthetical that the Sherman Act applies to import trade or commerce.²⁰ The statute then defines the category of conduct in foreign commerce that is subject to the Sherman Act.²¹ If there is conduct regulated by the Sherman Act that involves foreign commerce, and that conduct has a “direct, substantial, and reasonably foreseeable effect” on commerce within the United States, or on export commerce from the United States, then the antitrust laws are applicable.²² In the situations where that conduct causes an injury to

¹⁷ 15 U.S.C. § 6a (2006).

¹⁸ PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*, § 272i (3d ed. 2006); see, e.g., *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004).

¹⁹ AREEDA, *supra* note 18, § 272i.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

export commerce, then the antitrust laws are only applicable to those injuries that occur in the United States.²³

II. EXTRATERRITORIALITY AND JURISDICTION IN FEDERAL COURTS

At the heart of the legal dispute in *Minn-Chem, Inc. v. Agrium Inc.* is whether the FTAIA proscribes a federal court's jurisdiction over extraterritorial applications of antitrust law, or, alternatively, whether the statute defines the merits upon which a cause of action may succeed.²⁴ This section describes the lay-of-the-land regarding recent Supreme Court decisions aimed at refining precisely what is meant by the legal term "jurisdiction." The starting point is Justice Scalia's influential dissent in *Hartford Fire Insurance Co. v. California*,²⁵ the first Supreme Court case to discuss the FTAIA. The next case is *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*,²⁶ the only Supreme Court case where the FTAIA was directly at issue. Discussion then turns to *Arbaugh v. Y&H Corporation*,²⁷ a Title VII sex discrimination case²⁸ that turned on whether certain threshold requirements defining "employer" implicated federal subject-matter jurisdiction.²⁹ The section concludes with *Morrison v. National Australia Bank*,³⁰ which dealt with whether § 10(b) of the Securities Exchange Act of 1934³¹ could be applied extraterritorially.

²³ *Id.*

²⁴ *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 851 (7th Cir. 2012) (en banc).

²⁵ *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 800-21 (1993).

²⁶ *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 155 (2004).

²⁷ *Arbaugh v. Y&H Corporation*, 546 U.S. 500 (2006).

²⁸ *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended in 42 U.S.C. § 2000e-2).

²⁹ *Arbaugh*, 546 U.S. at 503.

³⁰ *Morrison v. National Australia Bank*, 130 S.Ct. 2869 (2010).

³¹ Pub. L. 106-554, 48 Stat. 891 (codified as amended in 15 U.S.C. § 78j).

A. Justice Scalia's Dissent in Hartford Fire Insurance Co. v. California

What does “jurisdiction” mean? Justice Thomas provides a simple definition: “‘Jurisdiction’ refers to ‘adjudicatory authority.’”³² This “authority” relates to the persons (personal jurisdiction) who are subject to a court’s authority, and the classes of cases (subject-matter jurisdiction) a court may decide.³³ Without adjudicatory authority a court lacks the power to decide a case.³⁴ Thus, when a federal court lacks subject-matter jurisdiction, Federal Rule of Civil Procedure 12(b)(1)³⁵ permits a motion to dismiss a claim for that reason at any point during litigation, even after a jury returns a verdict.³⁶ This description of jurisdiction may be self-evident to anyone familiar with Federal Rules of Civil Procedures. But what may be clear in theory has become murky in practice because courts have been less than precise when deciding whether an issue is properly characterized as jurisdictional.³⁷

³² *Reed Elsevier v. Muchnick*, 130 S.Ct. 1237, 1243 (2010) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (Ginsburg, J. dissenting)).

³³ *Reed Elsevier*, 130 S.Ct. at 1243. For the purposes of brevity and simplicity, this discussion of adjudicative jurisdiction is necessarily limited to these forms of jurisdiction. Other forms of adjudicative jurisdiction, including, but not limited to, diversity and supplemental jurisdiction, although important in their own right, are neither necessary nor particularly pertinent to the analysis in this Case Note.

³⁴ *Id.*

³⁵ FED. R. CIV. P. 12(b)(1).

³⁶ FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”); *see also* 5B CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. CIV. § 1350 (3d ed. 2013).

³⁷ *See, e.g.*, Howard M. Wasserman, *The Demise of “Drive-By Jurisdictional Rulings,”* 105 NW. U. L. REV. 947 (2011) (“These [four] cases [decided in 2009 and 2010] continue an almost uninterrupted retreat from the Court’s admittedly ‘profligate’ and ‘less than meticulous’ use of the word ‘jurisdiction’ and a move towards ‘discipline’ in the use of the term.”) (referring to *Morrison*, 130 S.Ct. at 2877; *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367, 1377-78 (2010); *Reed Elsevier*, 130 S.Ct. at 1241; *Union Pacific R. Co. v. Locomotive Eng’rs*, 558 U.S. 67, 71-72 (2009)).

For this discussion on jurisdiction, the pertinent issue in *Hartford Fire* was whether a federal court could decline to hear a case dealing with the extraterritorial application of the Sherman Act based on the principle of “international comity.”³⁸ Under this principle, a United States court will abstain from adjudicating a cause of action because, among other reasons, foreign law may be better suited to address the matter, or an application of United States law might interfere with the application of the foreign country’s law.³⁹ The petitioners, which included London-based reinsurers, argued that British insurance laws sufficiently regulated them such that the adjudication of the Sherman Act claims in a United States court would create a conflict of laws that the principle of international comity was meant to prevent.⁴⁰ Writing for the majority, Justice Souter found no conflict between United States and British law in the matter before the Court.⁴¹ Thus, the majority held that the principle of international comity did not bar the district court from adjudicating the case.⁴² As to whether the FTAIA had any effect on the application of the principle of international comity, Justice Souter noted that the legislative history indicated that the FTAIA did not preclude such an inquiry.⁴³ However, this aside on the FTAIA was merely dicta.⁴⁴

The portion of Justice Scalia’s dissent that addresses the extraterritorial application of the Sherman Act begins by agreeing with the majority that the federal district court had subject-matter

³⁸ *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 794-99 (1993).

³⁹ See, e.g., 44B AM. JUR. 2D *International Law* § 8 (2007) (“The principle of international comity is an abstention doctrine, which at its base involves the recognition that there are circumstances in which the application of foreign law may be more appropriate than the application of United States law. Thus, under the doctrine of international comity, courts sometimes defer to laws or interests of a foreign country and decline to exercise the jurisdiction they otherwise have.”).

⁴⁰ *Hartford Fire*, 509 U.S. at 798-99.

⁴¹ *Id.* at 799.

⁴² *Id.*

⁴³ *Id.* at 798.

⁴⁴ *Id.*

jurisdiction over the Sherman Act claims in the case.⁴⁵ However, Justice Scalia parted company with the majority's analysis by finding instead that "28 U.S.C. § 1331 vests district courts with subject-matter jurisdiction over cases 'arising under' federal statutes."⁴⁶ Therefore, because the Sherman Act is a federal law, the district court could hear the Sherman Act claims made by the plaintiffs.⁴⁷

The bone of contention between the dissent and the majority was whether the Court's subject-matter jurisdiction had anything to do with the extraterritorial application of the Sherman Act.⁴⁸ For Justice Scalia, the proper investigation for the Court was not whether a court had the power to adjudicate, but rather to determine whether, and to what extent, Congress extended its power to regulate conduct occurring in foreign countries.⁴⁹ The practical implication of this distinction arises within the procedure litigants are to follow when addressing the FTAIA's effect on a case.⁵⁰ A defendant in a civil antitrust suit who disputes a federal court's subject-matter jurisdiction over a Sherman Act claim must move for dismissal under Federal Rule of Civil Procedure 12(b)(1).⁵¹ Under a Rule 12(b)(1) motion, the judge acts as a neutral fact finder with discretion to consider facts outside of the pleadings pertaining to jurisdiction.⁵² Instead, under Justice Scalia's interpretation, what was once thought to be a "jurisdictional" issue is actually an issue of substantive law, requiring a ruling on whether the plaintiff has stated a cause of action.⁵³ This interpretation requires a defendant to dismiss under Rule 12(b)(6).⁵⁴ For a 12(b)(6) analysis, the judge must confine her analysis to the facts contained in the

⁴⁵ *Id.* at 812 (Scalia, J., dissenting).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 813.

⁴⁹ *Id.*

⁵⁰ AREEDA, *supra* note 18, § 272.1a.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Hartford Fire*, 509 U.S. at 813; *see also*, AREEDA, *supra* note 18, § 272.1a.

⁵⁴ AREEDA, *supra* note 18, § 272.1a.

pleadings alone.⁵⁵ Furthermore, the judge must examine the pleadings in the light most favorable to the non-movant, the plaintiff.⁵⁶

Justice Scalia argued that for any federal statute, not just the Sherman Act, a court should use canons of statutory construction to determine whether Congress's legislative jurisdiction permits extraterritorial application of the law.⁵⁷ The first canon he suggested a court should consider is the "presumption against extraterritoriality."⁵⁸ Under this canon, a court assumes that legislation passed by Congress only applies within the territory of the United States, unless a contrary intent appears.⁵⁹ However, despite Justice Scalia's misgivings, this presumption does not apply to the Sherman Act because precedent has established that the Sherman Act does apply to conduct occurring in foreign countries.⁶⁰

Second, Justice Scalia suggested that the court interpret a law so that it does not conflict with international law.⁶¹ Within the specific area of antitrust law, courts have stated fealty to this principle while nonetheless holding that the Sherman Act applies to conduct in foreign countries.⁶² It is within this form of statutory analysis—not an analysis of the court's adjudicative authority—that the principle of "international comity" should enter into the picture.⁶³ To Scalia, the

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Hartford Fire*, 509 U.S. at 814.

⁵⁸ *Id.*; *see, e.g., American Banana v. United Fruit*, 213 U.S. 347, 357 (1909).

⁵⁹ *Hartford Fire*, 509 U.S. at 814.

⁶⁰ *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, fn. 6 (1986); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962); *see also United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945)).

⁶¹ *Hartford Fire*, 509 U.S. at 815-16 (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (quoting *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 264 (1991)).

⁶² *Hartford Fire*, 509 U.S. at 816-17 (citing *Alcoa*, 148 F.2d at 443).

⁶³ *Hartford Fire*, 509 U.S. at 817-18 ("Considering comity [as a matter of statutory construction] is just part of determining whether the Sherman Act prohibits the conduct at issue.").

first question in *Hartford Fire*, therefore, was not whether a court should decline to exercise jurisdiction because the matter may be more appropriately adjudicated in a foreign court. Rather, it was whether the law enacted by Congress regulated conduct occurring in a foreign country.⁶⁴ Once a court concludes that a law does reach extraterritorial conduct then an inquiry into international comity may begin. Justice Scalia then turned to the *Restatement (Third) of Foreign Relations Law of the United States* for guidance on whether international comity limits the Sherman Act's extraterritorial reach.⁶⁵ He concluded that it does,⁶⁶ but not without expressing his dismay with the majority's handling of the comity analysis:

It is evident from what I have said that the Court's comity analysis, which proceeds as though the issue is whether the courts should 'decline to exercise . . . jurisdiction,' . . . rather than whether the Sherman Act covers this conduct, is simply misdirected. . . . It is not realistic, and also not helpful, to pretend that the only really relevant issue in this litigation is not before us. In any event, if one erroneously chooses, as the Court does, to make adjudicative jurisdiction (or, more precisely, abstention) the vehicle for taking account of the needs of prescriptive comity, the Court still gets it wrong.⁶⁷

Justice Scalia's critique of the varieties of jurisdiction and extraterritoriality did not languish. In subsequent cases, the Supreme Court went on to use the basic analytical framework in Scalia's *Hartford Fire* dissent to reconsider how courts determine subject-

⁶⁴ *Id.* at 817-18.

⁶⁵ *Id.* at 818 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) [hereinafter *Restatement (Third)*]).

⁶⁶ *Hartford Fire*, 509 U.S. at 819.

⁶⁷ *Id.* at 820. The term "prescriptive comity" stands for the presumptive territorial limitation international law places on laws enacted by Congress. For Justice Scalia, the proper focus of the comity analysis is on this form of prescriptive comity, not adjudicative comity where a court declines to exercise jurisdiction.

matter jurisdiction and the extent of Congress's prescriptive jurisdiction to enact laws regulating extraterritorial conduct.

B. Taking the FTAIA Head On: F. Hoffman-LaRoche Ltd. v. Empagran S.A.

For this Note's narrative arc, Justice Scalia's dissent in *Hartford Fire* serves as the point of embarkation for the journey to the Seventh Circuit's *en banc* decision in *Minn-Chem v. Agrium*. However, the way there requires a few more stops at the Supreme Court.⁶⁸ In 2004 the Supreme Court directly addressed the relationship between prescriptive comity and the FTAIA in *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*⁶⁹ The case itself has a complicated history and requires a brief narrative. The original plaintiffs, both domestic and foreign purchasers of vitamin supplements, alleged that foreign and domestic manufacturers and distributors had violated the Sherman Act by entering into a price-fixing conspiracy that raised prices for consumers in the United States and in foreign countries.⁷⁰ The defendant companies argued that the FTAIA precluded the district court from hearing the case solely as it pertained to foreign plaintiffs because the alleged antitrust violation occurred in the course of foreign commerce.⁷¹ The district court agreed with the defendants and dismissed that part of the case for lack of subject-matter jurisdiction.⁷²

On appeal to the District of Columbia Circuit, the foreign plaintiffs, now severed from the domestic plaintiffs, argued that the

⁶⁸ See *Carlisle v. United States*, 517 U.S. 416 (1996) (Ginsburg, J. concurring); *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Bowles v. Russell*, 551 U.S. 205 (2007); *Union Pacific R. Co. v. Locomotive Eng'rs*, 558 U.S. 67; *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct. 1197 (2011).

⁶⁹ *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158-59 (2004) [hereinafter *Empagran II*].

⁷⁰ *Empagran S.A. v. Hoffman-LaRoche Ltd.*, 315 F.3d 338, 342 (D.C. Cir. 2003), *rev'd*, 542 U.S. 155 (2004) [hereinafter *Empagran I*].

⁷¹ *Id.*

⁷² *Id.*

language of the FTAIA, specifically the phrase “gives rise to a claim” in § 6a(2) of the FTAIA, permitted a federal district court to exercise jurisdiction over their claims.⁷³ The court agreed with the foreign plaintiffs, holding that the act permitted a foreign plaintiff’s claim so long as the alleged injurious conduct has “requisite effect on United States commerce.”⁷⁴ The court’s holding may be stated in a slightly more formulaic way: when a) anticompetitive conduct violates the Sherman Act; and b) produces a harmful effect on United States commerce; and c) the effect gives rise to a claim; then d) the FTAIA does not bar a foreign plaintiff from bringing suit in federal district court based on the anticompetitive conduct’s independent effect on foreign commerce.⁷⁵ The court argued that this expansive interpretation of the FTAIA conformed to the structure of the Act itself,⁷⁶ the legislative intent behind the Act,⁷⁷ and the policy goal of deterring international price-fixing cartels.⁷⁸

The Supreme Court reversed.⁷⁹ At the Court, the plaintiffs argued that the FTAIA prevented the Sherman Act’s application to United States export commerce.⁸⁰ Under their interpretation, the Sherman Act still applied to antitrust conduct occurring in either import commerce or wholly foreign commerce.⁸¹ Therefore, because the plaintiffs’ claims arose from wholly foreign transactions, the FTAIA did not limit the application of the Sherman Act.⁸²

But the FTAIA restriction is not *that* narrow. Justice Breyer, writing for the Court, explained that the FTAIA barred antitrust claims

⁷³ *Id.* at 348-49.

⁷⁴ *Id.* at 350.

⁷⁵ *Id.*

⁷⁶ *Empagran I*, 315 F.3d at 350-52.

⁷⁷ *Id.* at 352-55.

⁷⁸ *Id.* at 355-57.

⁷⁹ *F. Hoffmann-LaRoche Ltd. v. Empagran S.A. (Empagran II)*, 542 U.S. 155, 175 (2004).

⁸⁰ *Id.* at 162.

⁸¹ *Id.*

⁸² *Id.*

arising from United States export commerce, as the plaintiffs had argued, as well as those claims arising from wholly foreign transactions.⁸³ This conclusion not only had clear support in the legislative history,⁸⁴ but it also conformed to the rule of statutory construction requiring the Court to interpret “ambiguous statutes to avoid an unreasonable interference with the sovereign authority of other nations.”⁸⁵ The Court found that the chief harm potentially resulting from the lower court’s interpretation would be an improper application of an American law in conflict with considerations required by the principle of international comity.⁸⁶

Whether the FTAIA limited a federal court’s subject-matter jurisdiction was not an issue before the Court in *Empagran*. However, the Court recognized that the foreign plaintiffs were attempting to expand the reach of American law beyond the limit of Congress’s

⁸³ *Id.* at 163. For example, consider an international price-fixing cartel of widget manufacturers. The manufacturers are located all over the world except the United States. They sell their widgets in every country. The price-fixing conspiracy causes an antitrust injury to a widget-purchaser in the United States because the conspiracy violates § 1 of the Sherman Act. The transaction occurs in the course of U.S. import commerce. The FTAIA, therefore, does not bar a U.S. widget-purchaser from bringing an antitrust lawsuit to a federal district court. Now, consider a resident of Chile who purchases a widget from a manufacturer participating in the cartel. The FTAIA, especially after *Empagran II*, bars the Chilean purchaser from pursuing an antitrust lawsuit in U.S. federal court, either alone or along with the U.S. purchaser, because the Chilean purchaser’s injury occurred in wholly-foreign commerce, independent of the effect the conspiracy had in the United States.

⁸⁴ *Id.*

⁸⁵ *Id.* at 164.

⁸⁶ *Id.* at 169 (“We conclude that principles of prescriptive comity counsel against the Court of Appeals’ interpretation of the FTAIA. Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America’s antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.”).

prescriptive jurisdiction.⁸⁷ Based on this analysis, the Court concluded that the FTAIA barred the foreign plaintiffs' cause of action.⁸⁸ This development is notable because Justice Breyer's form of analysis echoed Justice Scalia's position in his *Hartford Fire* dissent, which argued that statutory interpretation is the proper form of inquiry for an extraterritorial application of the Sherman Act.⁸⁹ The Court's method of reasoning in *Empagran* represented the most significant change in the Court's thinking about the FTAIA after *Hartford Fire*. In a sense, the seeds planted in Justice Scalia's *Hartford Fire* dissent had started to sprout.

C. Delineating Subject-Matter Jurisdiction and Merits: Arbaugh v. Y&H Corporation

In its 2006 decision, *Arbaugh v. Y&H Corporation*, the Court, in a unanimous opinion penned by Justice Ginsburg, adopted a bright line test for determining whether a statute grants a federal court subject-matter jurisdiction.⁹⁰ This decision arose from a sexual harassment suit brought under Title VII.⁹¹ The case went to a jury trial in district court, where Arbaugh won and was awarded \$40,000 in damages.⁹² Two weeks after the trial court entered judgment on the jury verdict, the defendant filed a motion to dismiss based on the premise that the court lacked subject-matter jurisdiction.⁹³ The defendant argued that the court's jurisdiction over the Title VII claim hinged on the statute's definition of "employer."⁹⁴ For the purpose of the statute, an employer is defined as a person engaged in commerce having fifteen or more

⁸⁷ *Id.* at 165-66.

⁸⁸ *Id.*

⁸⁹ *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 817-18; *see* discussion *supra* Part II. A.

⁹⁰ *Arbaugh v. Y&H Corporation*, 546 U.S. 500, 515 (2006).

⁹¹ *Id.* at 503-04.

⁹² *Id.* at 504.

⁹³ *Id.*

⁹⁴ *Id.*

employees.⁹⁵ Under this reading of the statute, Y&H claimed that because it had fewer than fifteen employees, the district court had no jurisdiction over the Title VII claim. The district court granted the defendant's motion to dismiss for lack of subject-matter jurisdiction.⁹⁶ The Fifth Circuit Court of Appeals affirmed.⁹⁷

At the Supreme Court, the issue in *Arbaugh* was "whether Title VII's employee-numerosity requirement . . . is jurisdictional or simply an element of a plaintiff's claim for relief."⁹⁸ The consequence of classifying the fifteen-employee requirement as jurisdictional would require setting aside the judgment entered on the jury verdict for the plaintiff.⁹⁹ Alternatively, if the lower courts should have found that the requirement concerned the merits of the plaintiff's case, then the defendant raised the issue too late to warrant setting aside the trial court's judgment.¹⁰⁰

The Court held that the fifteen-employee requirement should not be construed as jurisdictional.¹⁰¹ Under the Court's analysis, a district court's jurisdiction comes from either constitutional or statutory grants of subject-matter jurisdiction.¹⁰² However, the grant of subject-matter jurisdiction does not categorically preclude a "numerical" threshold requirement.¹⁰³ For example, the Court found that the "minimum amount in controversy" required as a prerequisite for diversity jurisdiction¹⁰⁴ is properly characterized as a jurisdictional matter.¹⁰⁵

⁹⁵ *Id.* at 504 (citing 42 U.S.C. § 2000(e)(b) (2006)).

⁹⁶ *Id.*

⁹⁷ *Id.* at 509.

⁹⁸ *Id.*

⁹⁹ *Id.* at 510.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 516.

¹⁰² *Id.* at 513. ("The basic statutory grants of federal-court subject-matter jurisdiction are contained in 28 U.S.C. §§ 1331 and 1332. Section 1331 provides for '[f]ederal-question' jurisdiction, § 1332 for '[d]iversity of citizenship' jurisdiction."); see also, U.S. CONST. art. III, § 2.

¹⁰³ *Arbaugh*, 546 U.S. at 515.

¹⁰⁴ 28 U.S.C. § 1332 (2006).

¹⁰⁵ *Arbaugh*, 546 U.S. at 514-15.

However, the difference between the minimum amount-in-controversy requirement and the fifteen-employee requirement under Title VII was their respective locations within the statutes.¹⁰⁶ On the one hand, the amount-in-controversy minimum is within a portion of the United States Code that explicitly vests jurisdiction in the federal courts over cases involving diversity of citizenship.¹⁰⁷ On the other hand, the fifteen-employee requirement lies in Title VII's definitions section,¹⁰⁸ which is completely separate from the jurisdictional grant in Title VII.¹⁰⁹ Congress could amend Title VII to attach the fifteen-employee requirement to the jurisdictional grant, but until that happens the Court would hold that the numerical requirement fell squarely within the merits of the case.¹¹⁰

After observing that, "this Court and others have been less than meticulous" when separating subject-matter jurisdiction from the elements of a claim for relief,¹¹¹ Justice Ginsburg went on to state the new legal rule:

If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.¹¹²

This rule is general, in that it does not concern Title VII alone, but rather it creates a signal for federal courts on how to interpret

¹⁰⁶ *Id.* at 515.

¹⁰⁷ *Id.*

¹⁰⁸ 42 U.S.C. § 2000e(b) (2006).

¹⁰⁹ *Arbaugh*, 546 U.S. at 515 (citing 42 U.S.C. § 2000e-5(f)(5) (2006) ("Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.")).

¹¹⁰ *Id.* at 515.

¹¹¹ *Id.* at 511.

¹¹² *Id.* at 515-16.

statutes.¹¹³ For the courts, the rule requires an inquiry into whether a jurisdictional grant is expressly stated in a statute's text. If the court finds such language, then the issue impacted by the statute is jurisdictional.¹¹⁴ Where no jurisdictional language is present, the statutory requirements automatically speak to the merits of a claim.¹¹⁵

Meanwhile, for Congress, the rule provides guidance on how to write statutes.¹¹⁶ When Congress intends for a threshold requirement to determine whether a court has subject-matter jurisdiction, then the text establishing that requirement should accompany the explicit grant of subject-matter jurisdiction.¹¹⁷ Otherwise, *Arbaugh* gives Congress notice that courts will construe a statutory requirement as an element necessary to establish a cause of action.¹¹⁸

*D. Subject-Matter Jurisdiction, Merits, and Extraterritoriality:
Morrison v. National Australia Bank Ltd.*

Justice Scalia's 2010 majority opinion in *Morrison v. National Australia Bank Ltd.* revisits the issues discussed in *Hartford Fire*, except that, instead of the FTAIA, the statutory provision at issue was § 10(b) of the Securities Exchange Act.¹¹⁹ The plaintiffs, all Australian residents, were shareholders of National Australia Bank

¹¹³ See, e.g., Wasserman, *supra* note 37, at 953.

¹¹⁴ *Id.*

¹¹⁵ *Id.*; compare *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998) (holding that a statute's explicit reference to "jurisdiction" did not affect the court's subject-matter jurisdiction, but rather remained an element of the cause of action).

¹¹⁶ See Wasserman, *supra* note 37, at 953.

¹¹⁷ *Id.* at 954.

¹¹⁸ *Id.*

¹¹⁹ Securities and Exchange Act of 1934, 15 U.S.C. § 78(j) (2006) (original version at ch. 404, Title I, § 10, 48 Stat. 891 (1934)) (amended 2000). The version of the statute codified in 2000 was at issue in *Morrison*. This section was amended again in the Dodd-Frank Act of 2010, but that amended version was not at issue in this case.

(“National”).¹²⁰ They alleged that management executives of the bank had made false public statements in reference to a Florida-based subsidiary wholly owned by the bank.¹²¹ National also had other contacts with the United States through American Depository Receipts (“ADRs”) traded on the New York Stock Exchange.¹²² The plaintiffs filed suit against National and its management alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act and S.E.C. Rule 10b-5.¹²³ The defendants moved to dismiss under Rules 12(b)(1) and 12(b)(6).¹²⁴ The district court dismissed the case on the grounds that it lacked jurisdiction “because the acts in this country ‘were, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad.’”¹²⁵ The Court of Appeals for the Second Circuit affirmed on similar grounds.¹²⁶

Justice Scalia, now writing for the majority, found the same error he identified in *Hartford Fire* in the district and appellate courts’ decisions.¹²⁷ Essentially, the lower courts treated a statute that regulates conduct as a statute that grants subject-matter jurisdiction to the courts.¹²⁸ Subject-matter jurisdiction did not spring from § 10(b). Rather, the specific statutory provision that grants subject-matter

¹²⁰ *Morrison v. National Australia Bank*, 130 S.Ct. 2869, 2876 (2010).

¹²¹ *Id.*

¹²² *Id.* at 2875.

¹²³ *Id.* at 2876 (citing 15 U.S.C. §§ 78j(b) and 78t(a), and 17 CFR § 240.10b-5 (2009)).

¹²⁴ *Morrison*, 130 S.Ct. at 2876.

¹²⁵ *Id.* (quoting *In re National Australia Bank Securities Litigation*, 2006 WL 3844465, *8 (S.D.N.Y. Oct. 25, 2006)).

¹²⁶ *Id.*

¹²⁷ *Id.* at 2876-77.

¹²⁸ *Id.* at 2877 (“But to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, ‘refers to a tribunal’s “ ‘power to hear a case.’” (quoting *Union Pacific R. Co. v. Locomotive Eng’rs*, 558 U.S. 67, 130 (2009), in turn quoting *Arbaugh v. Y&H Corporation*, 546 U.S. 500, 514 (2006), in turn quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)).

jurisdiction over a § 10(b) claim is 15 U.S.C. § 78aa.¹²⁹ After concluding that § 10(b) was not jurisdictional, Scalia then considered whether the statute applies to extraterritorial conduct.¹³⁰

The opinion then follows with a discourse on the presumption against extraterritoriality in causes of action arising under § 10(b).¹³¹ Justice Scalia noted that, until 1967, the presumption consistently led the Second Circuit Court of Appeals to conclude that § 10(b) did not apply to stock transactions occurring in a foreign country.¹³²

However, in two decisions - *Schoenbaum v. Firstbrook*¹³³ and *Leasco Data Processing Equip. Corp. v. Maxwell*¹³⁴ - the Second Circuit formulated a two-prong test that, if satisfied, permitted

¹²⁹ *Id.* As part of the Dodd-Frank Act, Congress amended § 78aa in response to the Court's decision in *Morrison*. As it reads, the amendment granted subject-matter jurisdiction to United States courts over cases, including those filed by foreign plaintiffs, involving extraterritorial conduct that has a foreseeable substantial effect in the United States. See Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), Pub. L. 111-203, 124 Stat. 1376, 1865 (amending 15 U.S.C. § 78aa (1934)). Although, Congress passed the amendment intending to have § 10(b) apply extraterritorially, a literal reading of the statute might not change the subject-matter jurisdiction holding in *Morrison*, which states that the court already had jurisdiction over § 10(b) causes of action. Thus the amendment, in what may be a drafting error, reiterates the subject-matter jurisdiction holding in *Morrison*, leaving open the possibility that the presumption against extraterritoriality may still apply to § 10(b). In short, the possibility remains that courts still have jurisdiction – i.e., power to adjudicate – a § 10(b) case, but that does not necessarily imply that the law applies to conduct occurring in foreign countries. For a more thorough discussion of this peculiar situation, see Richard Painter, Douglas Dunham, & Ellen Quackenbos, *When Courts and Congress Don't Say What They Mean: Initial Reactions to Morrison v. National Australia National Bank and the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L. 1, 14-25 (2011).

¹³⁰ *Id.* at 2877-78.

¹³¹ *Id.* at 2877

¹³² *Id.* (citing *Schoenbaum v. Firstbrook*, 268 F.Supp. 385, 392 (1967), in turn citing *Ferraoli v. Cantor*, CCH Fed. Sec. L. Rep. ¶ 91615 (SDNY 1965) and *Kook v Crang*, 182 F.Supp. 388, 390 (S.D.N.Y. 1960)).

¹³³ *Schoenbaum*, 268 F.Supp. at 206-09.

¹³⁴ *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334-37 (1972).

extraterritorial application of § 10(b).¹³⁵ Under the *Schoenbaum* test, a court first had to ask whether the alleged violative conduct had a “substantial effect” in the United States or upon United States citizens.¹³⁶ *Leasco* solidified the second prong, whether the alleged conduct occurred within the United States.¹³⁷ After cataloging a series of circuit splits and commentaries critical of this test,¹³⁸ Justice Scalia concluded that this test was invalid because courts should interpret congressional silence on extraterritoriality as automatically prohibiting extraterritorial application.¹³⁹ “Rather than guess anew in each case,” wrote Justice Scalia, “we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.”¹⁴⁰ Thus ended the inquiry into whether § 10(b) applied extraterritorially.

The petitioners nonetheless argued that the presumption against extraterritoriality did not bar their claim because the deceptive conduct at issue occurred in Florida.¹⁴¹ This fact was of little consequence to the Court, however. Under Justice Scalia’s interpretation of the statute, a violation of § 10(b) requires deceptive conduct “in connection” with a purchase or sale of securities within the United States.¹⁴² He grounded this “transactional” test on two premises. First, transactions within the United States involving either domestic securities or exchanges fall under § 10(b)’s regulatory purview.¹⁴³ Second, §§ 30(a) and (b) of the Securities Exchange Act regulate transactions occurring within the United States involving securities registered on foreign exchanges.¹⁴⁴ These premises fall in line with the

¹³⁵ *Morrison*, 130 S.Ct. at 2879.

¹³⁶ *Id.*

¹³⁷ *Id.* (citing *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003)).

¹³⁸ *Id.* at 2879-81.

¹³⁹ *Id.* at 2881.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2883-84.

¹⁴² *Id.* at 2884.

¹⁴³ *Id.* at 2884-85.

¹⁴⁴ *Id.* at 2885.

presumption against extraterritoriality because “the foreign location of the *transaction* . . . establishes (or reflects the presumption of) the Act’s inapplicability, absent regulations by the [Securities Exchange] Commission.”¹⁴⁵ The final virtue of this test, and the presumption against extraterritoriality, is that it prevents conflicts and interference with foreign laws and securities regulators.¹⁴⁶

III. JURISDICTION, EXTRATERRITORIALITY, AND ANTITRUST AT THE SEVENTH CIRCUIT COURT OF APPEALS

Having established the backdrop, the stage is now set for *Minn-Chem v. Agrium*. Like the Supreme Court’s march from *Hartford Fire* to *Morrison*, the Seventh Circuit’s journey began in the muddled milieu of what did or did not define a federal court’s subject-matter jurisdiction. In *United Phosphorus Ltd. v. Angus Chemical Company*, its first decision interpreting the FTAIA, a divided Seventh Circuit sitting *en banc* held that the FTAIA proscribed a district court’s subject matter jurisdiction.¹⁴⁷ However, Judge Wood’s dissent¹⁴⁸ in that case eventually served as the template for the unanimous decision that reversed the *United Phosphorus* holding, *Minn-Chem, Inc. v. Agrium Inc.*¹⁴⁹ This section tells the story of these two cases.

A. *Enter, United Phosphorus, Ltd. v. Angus Chemical Company*

The U.S. Court of Appeals for the Seventh Circuit first encountered the FTAIA in *United Phosphorus, Ltd. v. Angus Chemical Company*.¹⁵⁰ The plaintiffs were an American firm and two chemical manufacturers based in India, all three of whom participated in a joint

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2885-86.

¹⁴⁷ *United Phosphorus, Ltd. v. Angus Chem. Co. (United Phosphorus II)*, 322 F.3d 942 (7th Cir. 2003) (en banc), cert. denied, 540 U.S. 1003 (2003).

¹⁴⁸ *Id.* at 953-65.

¹⁴⁹ *Minn-Chem v. Agrium*, 683 F.3d 845 (7th Cir. 2012) (en banc).

¹⁵⁰ *United Phosphorus II*, 322 F.3d at 944.

venture to manufacture certain chemicals used in making pharmaceuticals for the treatment of tuberculosis.¹⁵¹ The defendants included: Angus Chemical Company (“Angus”), a Delaware Corporation; its wholly-owned German subsidiary, Angus Chemie GmbH; and Lupin Laboratories, Ltd., an Indian chemical company.¹⁵² The plaintiffs’ complaint alleged that the “[d]efendants attempted to monopolize, monopolized, and conspired to monopolize the market for those chemicals in violation of § 2 of the Sherman Act.”¹⁵³

The plaintiffs argued that the § 2 violations occurred in the mid-1990s as a consequence of prior litigation Angus had initiated in the Circuit Court of Cook County, Illinois, to enjoin the American member of the joint venture from misappropriating its trade secrets.¹⁵⁴ Two years into the litigation, when the Circuit Court issued a discovery ruling that required Angus to disclose the very trade secrets it had sued to protect, Angus voluntarily withdrew its complaint.¹⁵⁵ According to the plaintiffs’ complaint, “but for Angus’s initiation of the Cook County Action,” the Indian co-plaintiffs would have sold the pharmaceutical chemicals for a profit.¹⁵⁶ Also, but for Angus’s complaint, the American co-plaintiff would have sold the manufacturing technology.¹⁵⁷ In a second amended complaint, the Indian plaintiffs argued that the defendants used anti-competitive means to restrain them from manufacturing the chemicals.¹⁵⁸

The defendants moved to dismiss under Rule 12(b)(1) for lack of subject-matter jurisdiction.¹⁵⁹ The district court held that the FTAIA barred the plaintiffs’ complaint largely because any anticompetitive

¹⁵¹ *United Phosphorus v. Angus Chem. (United Phosphorus I)*, 131 F.Supp.2d 1003, 1006-08 (N.D. Ill. 2001).

¹⁵² *Id.* at 1006.

¹⁵³ *Id.* (citing 15 U.S.C. § 2).

¹⁵⁴ *Id.* at 1007.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1008.

conduct would not have had a “demonstrable effect” on United States domestic commerce.¹⁶⁰ The plaintiffs appealed to the Seventh Circuit, echoing the arguments Justice Scalia made in his *Hartford Fire* dissent.¹⁶¹ On appeal, the plaintiffs argued that the district court erred in granting the motion to dismiss for lack of subject-matter jurisdiction because the FTAIA does not affect jurisdiction, but rather it only adds an element to the Sherman Act claim.¹⁶²

1. The Majority Opinion

Despite an evenly divided court, the Seventh Circuit sitting *en banc* affirmed the lower court’s ruling.¹⁶³ The rationale adopted by the majority took direct aim at Justice Scalia’s dissent in *Hartford Fire*.¹⁶⁴ Judge Evans, writing for the majority, drew the inference that the FTAIA confers subject-matter jurisdiction from the footnotes in Justice Souter’s majority opinion in *Hartford Fire*.¹⁶⁵ Because the tendency of other circuits had been to classify the FTAIA as “jurisdictional,” the majority argued that its interpretation followed the prevailing view.¹⁶⁶

¹⁶⁰ *Id.* at 1012 (“It is clear that Plaintiffs cannot carry their burden of showing a ‘direct, substantial, and reasonably foreseeable effect’ on domestic commerce under the FTAIA. A Plaintiffs’ own liability expert agreed, ‘any effect upon United States commerce, based on what [he has] seen with respect to AB sales’ would be ‘less than substantial.’”).

¹⁶¹ *United Phosphorus, Ltd. v. Angus Chem. Co. (United Phosphorus II)*, 322 F.3d 942, 946 (7th Cir. 2003) (en banc).

¹⁶² *Id.* at 944.

¹⁶³ *Id.* at 952; *see also, e.g.*, U.S. Court of Appeals for the Seventh Cir. Practitioner’s Handbook for Appeals 141 (2012), <http://www.ca7.uscourts.gov/rules/handbook.pdf> (“Thus, if the court en banc should be equally divided, the judgment of the district court and not the judgment of the panel will be affirmed.”).

¹⁶⁴ *United Phosphorus II*, 322 F.3d at 947-48. For discussion on Justice Scalia’s dissent in *Hartford Fire*, *see* discussion *supra* Part II.A.

¹⁶⁵ *Id.* (citing *Hartford Fire*, 509 U.S. at 796 n. 22, 797 n. 24).

¹⁶⁶ *Id.* at 950-51. Referring to decisions made by the District of Columbia and Fifth Circuit Courts ruling on subject-matter jurisdiction and the FTAIA, Judge Evans states, “We simply cannot dismiss these cases as ‘drive-by’ jurisdictional rulings.”

Furthermore, legal commentators, the American Bar Association, and the government's enforcement agencies also supported this classification.¹⁶⁷ The court also found that the FTAIA's legislative history lends itself to the court's holding that the FTAIA is jurisdictional.¹⁶⁸ Finally, as a matter of policy, because an extraterritorial application of United States antitrust law could have consequences on the conduct of United States foreign affairs and on foreign markets, classifying the FTAIA as jurisdictional permits a judge to dismiss a cause of action at an earlier stage than would be available were the FTAIA's statutory requirements treated solely as an element of the cause of action.¹⁶⁹

2. The Dissent

In her dissent, Judge Wood couched the issue of whether the FTAIA is jurisdictional or instead lays out an element of the cause of action as a question pertaining to whether the FTAIA strips federal district courts of their subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1337.¹⁷⁰ If the FTAIA's requirement for "substantial, direct, and reasonably foreseeable effect" on United States commerce strips the applicability of those statutory sections to the Sherman Act, then the FTAIA limits a federal court's subject-matter jurisdiction.¹⁷¹ If, however, the FTAIA states an element of a Sherman Act cause of action, then subject-matter jurisdiction should not have entered into the district court's analysis of whether there is a required effect on United States commerce.¹⁷²

¹⁶⁷ *Id.* at 949.

¹⁶⁸ *Id.* at 951-52. ("The House Report says that satisfying FTAIA would be 'the predicate for antitrust jurisdiction.' It also says, '[t]his bill only establishes the standards necessary for assertion of United States Antitrust jurisdiction. The substantive antitrust issues on the merits of the plaintiffs' claim would remain unchanged.'") (citing H.R. REP. NO. 97-686 at 11).

¹⁶⁹ *Id.* at 952.

¹⁷⁰ *Id.* at 953 (Wood, J., dissenting).

¹⁷¹ *Id.*

¹⁷² *Id.*

In an argument that foreshadows her *en banc* opinion in *Minn-Chem*, Judge Wood gave four reasons for adopting an “element approach” instead of the majority’s interpretation that the FTAIA goes to a court’s subject-matter jurisdiction.¹⁷³ First, the text of the FTAIA itself does not contain language suggesting that Congress altered the jurisdiction of federal courts over antitrust cases.¹⁷⁴ Although the Supreme Court had treated some statutes containing jurisdictional language as “non-jurisdictional,”¹⁷⁵ the Court had never treated a statute “phrased in terms of the scope of application of a statute” as jurisdictional.¹⁷⁶ By way of comparison, Judge Wood argued that Congress has enacted statutes that explicitly restrict federal court jurisdiction.¹⁷⁷ The FTAIA simply does not bear any textual resemblance to those jurisdiction-stripping statutes.¹⁷⁸ It does not even contain the word “jurisdiction.”¹⁷⁹

Judge Wood considered this first textual argument enough to justify holding that the FTAIA presents an element of a cause of action; however, she continued by disputing the majority’s claim that *Hartford Fire* controlled the outcome in *United Phosphorus*.¹⁸⁰ Judge Wood argued instead that the majority in *Hartford Fire* in fact found it unnecessary to address whether the FTAIA had any effect on the

¹⁷³ *Id.* at 953-54.

¹⁷⁴ *Id.* at 954-955.

¹⁷⁵ *Id.* at 954; *see also, e.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90-2 (1998).

¹⁷⁶ *United Phosphorus II*, 322 F.3d at 954.

¹⁷⁷ *Id.* Judge Wood refers to 8 U.S.C. §§ 1252(a)(2)(B) and 1255, which bar judicial review of certain immigration decisions. Section 1252(a)(2)(B), in relevant part, states that “notwithstanding any other provision of law, no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under” section 1255.

¹⁷⁸ *Id.* at 955. (“Language like that of the FTAIA, stating that a law does not ‘apply’ in certain circumstances, cannot be equated to language stating that the courts do not have fundamental competence to consider defined categories of cases.”).

¹⁷⁹ *See* discussion *supra* Part I. B. 2.

¹⁸⁰ *United Phosphorus II*, 322 F.3d at 956.

outcome of that case.¹⁸¹ In other words, the majority's reliance on *Hartford Fire* was misplaced because there was no holding on point from that case.¹⁸² Instead, holding that the FTAIA presents an element of a cause of action better aligns the FTAIA with the Supreme Court's more recent decision in *Steel Co. v. Citizens for a Better Environment*.¹⁸³

In *Steel Co.* the Court underscored the distinction between statutes establishing subject-matter jurisdiction and those laying out the elements of a cause of action: "the power to adjudicate does not depend whether in the final analysis the plaintiff has a valid claim."¹⁸⁴ Without a reference to "jurisdiction" in the FTAIA, the court should have concluded, based on the holding in *Steel Co.*, that Congress intended to define an element to a cause of action.¹⁸⁵ Thus the FTAIA permits recovery only if the plaintiffs can show the requisite effect in their case.¹⁸⁶ Without showing the effect, the plaintiffs lose the cause of action; the "required effect" simply has no effect on jurisdiction.¹⁸⁷

The third reason countered the majority's claim that, for policy reasons, it is better to characterize the FTAIA as conferring subject-matter jurisdiction.¹⁸⁸ Judge Wood contended that jurisdictional inquiries under §§ 1331 and 1332 at the outset of a case normally follow a routine review based on the facts alleged in the complaint;¹⁸⁹ however, whether there is a "direct, substantial, and reasonably foreseeable effect" on United States commerce always requires a more thorough inquiry.¹⁹⁰ An inquiry into subject-matter jurisdiction could

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 955.

¹⁸⁴ *Id.* (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89-90 (1998)).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 956.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 956.

¹⁸⁹ *Id.* at 957.

¹⁹⁰ *Id.*

turn into a “preliminary trial” just to determine whether the required effect is present.¹⁹¹ Instead, treating the FTAIA effect test as an element of the case permits resolving the issue on the pleadings, on summary judgment, or at the appellate level *de novo*.¹⁹² Keeping the FTAIA within the realm of subject-matter jurisdiction, however, would invite abuse from losing parties who would continue to have the ability to move for dismissal under 12(b)(1) before, during, and after the completion of the case, thus leaving the possibility that the court could re-initiate at any time an inquiry into whether the effect test had been met.¹⁹³

Finally, Judge Wood argued that the history of the application of the antitrust laws to persons and conduct outside of the United States supports the conclusion that the FTAIA does not affect a district court’s subject-matter jurisdiction.¹⁹⁴ Referring to both *American Banana Company v. United Fruit Co.* and *United States v. Aluminum Corporation of America (Alcoa)*, Judge Wood observed that the Supreme Court in the former, and the Second Circuit in the latter, spoke about extraterritorial application of the Sherman Act in terms of whether the law itself extended to parties and conduct abroad.¹⁹⁵ Neither court questioned whether it, or the courts below, had adjudicatory power over the Sherman Act claims.¹⁹⁶ Furthermore, the *Restatement (Third) of Foreign Relations Law of the United States* addressed the jurisdictional dilemma presented to the Seventh

¹⁹¹ *Id.* Judge Wood provides the twelve-year litigation in *Timberlane Lumber Co. v. Bank of America N.T.*, 549 F.2d 597 (9th Cir. 1976) (reversing district court dismissal for lack of subject-matter jurisdiction), 574 F.Supp. 1453 (N.D. Cal. 1983) (dismissing for lack of subject-matter jurisdiction), *aff’d on other grounds*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985), as an example of this jurisdictional inquiry run amok.

¹⁹² *Id.* at 957.

¹⁹³ *Id.* at 958.

¹⁹⁴ *Id.* at 959.

¹⁹⁵ *Id.* at 959-61 (citing *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *United States v. Aluminum Co. Of America (Alcoa)*, 148 F.2d 416 (1945)).

¹⁹⁶ *Id.*

Circuit.¹⁹⁷ The *Restatement* rejects the use of the phrase “subject-matter jurisdiction” to describe the forms of jurisdiction recognized under international law.¹⁹⁸ Instead, it recognized the concept of “prescriptive” jurisdiction as describing the power of the legislature to enact laws that regulate conduct beyond a country’s borders.¹⁹⁹

B. Exit United Phosphorus, Chased by Minn-Chem, Inc. v. Agrium Inc.

And so an idea that began in a dissent in *Hartford Fire*, and then returned only to face rejection in *United Phosphorus*, returned triumphant in *Minn-Chem*. This section concludes the story of the litigation that led to the Seventh Circuit’s *en banc* decision in *Minn-Chem*.

1. The Antitrust Case

Potash is a potassium-rich mineral and chemical salt, chiefly extracted for use in fertilizer, but also used as an ingredient in industrial manufacturing for glass, ceramics, soaps, and animal feed.²⁰⁰ The product is homogenous, meaning that potash supplied by one producer is indistinguishable from another producer’s supply.²⁰¹ Thus, buyers base purchasing decisions almost entirely on price alone.²⁰² Direct and indirect purchasers of potash in the United States brought class action lawsuits in the federal district courts of Minnesota and the Northern District of Illinois against domestic and foreign potash producers.²⁰³ At the end of 2008, the lawsuits were combined and

¹⁹⁷ *Id.* at 961-62.

¹⁹⁸ *Id.* at 961 (citing *Restatement (Third)*, *supra* note 65, § 401, cmt. c).

¹⁹⁹ *Id.* (citing *Restatement (Third)*, *supra* note 65, § 401 cmt. c).

²⁰⁰ *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907, 915 (2009).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 919. The six producers were Potash Corporation of Saskatchewan (Canada) Inc. and its U.S. subsidiary Potash Sales (USA), Inc.; Mosaic Company and Mosaic Crop Nutrition, a Delaware company headquartered in Minnesota; Agrium Inc. and Agrium U.S. Inc., a Canadian corporation and its wholly-owned

assigned to the Northern District of Illinois.²⁰⁴ The plaintiffs' chief allegation was that the producers had engaged in a horizontal price-fixing conspiracy in violation of the Sherman Act.²⁰⁵

To meet the pleading threshold set by the Supreme Court's decision in *Bell Atlantic Corporation v. Twombly*,²⁰⁶ the plaintiffs' complaint alleged that these producers formed a price-fixing cartel, which, since 2003, had been responsible for a 600% increase in the price of potash.²⁰⁷ The six firms accused of participating in the international cartel were located in Canada, Russia, and Belarus.²⁰⁸ Each firm had affiliates (either wholly-owned subsidiaries or joint-ventures) operating in the United States.²⁰⁹ In 2008, these firms were

U.S. subsidiary; Uralkali, a Russian joint venture headquartered in Moscow; Belaruskali, a Belarusian company, which together with Uralkali owned JSC Belarusian Potash Company, which acts as the distributor for Uralkali and Belaruskali; Silvinit, a Russian company that sells potash globally and in the United States; and IPC, a Russian company that is Silvinit's exclusive distributor.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 919. The plaintiffs classified as "indirect purchasers" included in their complaint four other counts alleging that the defendants violated twenty-one state antitrust laws, twenty-three state consumer protection laws, fifty state law claims of unjust enrichment, and a restraint of trade claim under New York law. The state law claims were not at issue in the Seventh Circuit's en banc proceedings. Furthermore, as a matter of federal antitrust law, the indirect purchasers were not entitled to seek damages. See *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 848 (7th Cir. 2012) (en banc) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 792 (1977)).

²⁰⁶ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). *Twombly* requires the pleadings in a civil antitrust complaint to allege enough facts to state plausible grounds for a cause of action. Mere conclusory statements, without more, are not enough to survive a motion to dismiss under Rule 12(b)(6). In *Ashcroft v. Iqbal* (556 U.S. 662, 678 (2009)) the Supreme Court expanded the *Twombly* pleading requirements to all civil actions in federal law. In this Note, *Twombly* is used as shorthand for the pleading requirements established by both cases. See also, e.g., 5 CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. CIV. § 1216 (3d ed. 2013).

²⁰⁷ *Potash*, 667 F.Supp.2d at 915.

²⁰⁸ *Minn-Chem*, 683 F.3d at 648-49.

²⁰⁹ *Id.*

responsible for over 71% of the world's potash production.²¹⁰ By 2008, when demand for potash started to decline, prices remained high and continued to increase while other fertilizer prices declined.²¹¹ Meanwhile, potash supply is relatively easy to manipulate, in part because there are no ready, cost-effective substitutes;²¹² purchasers tend to buy at the higher price rather than curtail the volume of their orders;²¹³ production companies have variable costs and have little incentive to operate facilities at full capacity;²¹⁴ and entry-barriers into the market are high, with new mines requiring an up-front expense of approximately \$2.5 billion.²¹⁵ In 2008, imports accounted for over 85% of U.S. potash consumption.²¹⁶ The United States is one of the two largest consumers of potash.²¹⁷

The alleged cartel arose in the early 2000s, after a period of significant price depression during the 1990s, when post-Soviet producers released a glut of potash onto global markets.²¹⁸ Beginning in mid-2003, potash prices began to rise.²¹⁹ According to the plaintiffs' complaint, the conspiracy worked through a series of coordinated supply restrictions that the producers blamed for price increases.²²⁰ Rather than fix specific prices for the American market, the producers raised prices on potash sales to China, India, and Brazil.²²¹ The prices charged to purchasers in those three countries served as the benchmark

²¹⁰ *Potash*, 667 F.Supp.2d at 915

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 858 (7th Cir. 2012).

²¹⁷ *Id.* at 849.

²¹⁸ *Potash*, 667 F.Supp.2d at 915.

²¹⁹ *Id.*

²²⁰ *Id.* at 916-17.

²²¹ *Id.* at 915.

for potash prices charged elsewhere in the world, including the United States.²²²

The plaintiffs also pointed to connections between the potash producers.²²³ Three of the producers in the western hemisphere were co-venturers and equal shareowners of Canpotex, Ltd., a Canadian corporation that sold potash throughout the world, except in the United States and Canada.²²⁴ Two potash producers located in the former Soviet Union also formed a joint-venture company to consolidate their sales and marketing for global sales.²²⁵ Further coordination among the defendants occurred through business meetings and conferences where representatives of the producers could meet and discuss future price movements.²²⁶ Under these alleged facts, the plaintiffs accused the defendants of violating the Sherman Act, violating various States' antitrust and consumer protection laws, and unjust enrichment.²²⁷

2. The District Court Decision and Interlocutory Appeal to the Seventh Circuit

In district court, the Defendants moved to dismiss the plaintiffs' complaint based on a variety of facial and procedural challenges.²²⁸ The focus in this discussion, however, is on the defendants' motion to dismiss for lack of subject-matter jurisdiction. The defendants based

²²² *Id.*

²²³ *Id.* at 917-19.

²²⁴ *Id.* at 917.

²²⁵ *Id.*

²²⁶ *Id.* at 919.

²²⁷ *Id.*

²²⁸ See *Id.* at 920-24 (class certification and Article III standing), 928-32 (Insufficient Service), 941-46 (State antitrust), 946-48 (State consumer protection), 948-49 (State unjust enrichment). The defendants filed motions to dismiss arguing, *inter alia*, that class certification, under Fed.R.Civ.P. 23, was improper; the Indirect Purchasers lacked Article III standing for claims brought under the laws of States where no named plaintiff resided; the Russian defendants had insufficient service of process (under Rules 12(b)(4) and 12(b)(5)); the plaintiffs failed to adequately plead State antitrust, consumer protection, and unjust enrichment claims.

their motion to dismiss on the premise that the FTAIA excluded the foreign price-fixing conspiracy from the court's subject-matter jurisdiction. According to the motion, the plaintiffs' complaint failed to allege that the foreign antitrust conduct had a "direct, substantial, and foreseeable effect" ("direct effect test") on United States commerce.²²⁹ More specifically, whatever effect the alleged conduct had on American commerce was "too attenuated" to be deemed "direct."²³⁰ The defendants argued that, without this "direct" effect, the district court lacked subject-matter jurisdiction.²³¹

The district court reviewed the motion under the rubric established in *United Phosphorus*, and held that the FTAIA stripped federal courts of subject-matter jurisdiction over foreign antitrust conduct.²³² For the court, the issue turned not on whether there was a direct effect, but rather whether the plaintiffs had sufficiently alleged facts that showed the antitrust conduct fell under the FTAIA's import commerce exception.²³³ The court concluded that a sufficient "nexus" existed between the alleged foreign conspiracy and the fact that the defendants "sold and distributed potash throughout the United States" so that the plaintiffs' complaint fell under the import commerce exception.²³⁴ Because the complaint met the import exception, the court did not need to take up the direct effect test. Therefore, under the "jurisdictional" analysis (as opposed to one on the "merits"), the plaintiffs met the minimum threshold requirements to survive the motion to dismiss.²³⁵

²²⁹ *Potash*, 667 F.Supp.2d at 926.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 925.

²³³ *Id.* at 926. Recall that the FTAIA exception for import commerce means that the Sherman Act continues to regulate conduct occurring in import commerce.

²³⁴ *Id.* at 927.

²³⁵ *Id.*

The district court certified its order for immediate review in an interlocutory appeal to the Seventh Circuit.²³⁶ The three-judge panel (“Panel”) reversed the lower court’s order, holding that the FTAIA barred the complaint because the court lacked subject-matter jurisdiction. At this stage of the litigation, the plaintiffs argued that the Panel should call *United Phosphorus* into question and instead subject the FTAIA to the rule expressed by the Supreme Court in *Arbaugh*.²³⁷ In response, the defendants gave two arguments as grounds for reversal. First, the FTAIA is distinguishable from *Arbaugh* because the FTAIA’s primary concern is international comity.²³⁸ The Panel found that following this interpretation would put the court’s decision in tension with the holding in *Morrison*.²³⁹

Second, the defendants stated that there was no need for the Panel to reconcile the holding in *United Phosphorus* with *Arbaugh* because dismissal was required under both cases.²⁴⁰ The Panel agreed.²⁴¹ In its analysis, the Panel gave a twofold critique of the lower court’s interpretation of the FTAIA.²⁴² First, the Panel found that, under the district court’s interpretation, the direct effect test becomes superfluous.²⁴³ Under the lower court’s reasoning, any importer of a product into the United States who happens also to engage in a price-fixing conspiracy aimed at a foreign country would be subject to antitrust suits in the United States.²⁴⁴ The Panel claimed that this

²³⁶ *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650, 652 (7th Cir. 2011), *vacated*, 683 F.3d. 845 (2012) (en banc) [hereinafter *Minn-Chem I*]. See 28 U.S.C. § 1292(b) (2006). A district court judge has the authority to grant a right to immediately appeal an order when the judge is of the opinion that the order concerns a controlling question of law that is likely to engender a substantial difference of opinion.

²³⁷ *Minn-Chem I*. at 659. See discussion *supra* Part II.C.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 660-63.

²⁴³ *Id.* at 660.

²⁴⁴ *Id.* at 660-61.

interpretation went beyond Congress's intent to limit extraterritorial applications of antitrust law through the FTAIA.²⁴⁵ According to the Panel, the better interpretation would not conflate the import exception with the direct effect test, but instead it would require the direct effect test to apply specifically to the conduct aimed at foreign countries.²⁴⁶ If the foreign-directed conduct created a "direct, substantial, and reasonably foreseeable effect" on United States import or interstate commerce, then the court would have subject-matter jurisdiction.²⁴⁷

Next the Panel applied a *Twombly* analysis to the facts alleged by the plaintiffs to determine whether the litigation could continue into pre-trial discovery.²⁴⁸ Although the Panel found that the plaintiffs explained the price-fixing conspiracy aimed at China, India, and Brazil with sufficient facts, the complaint provided only a conclusory statement to connect that conspiracy to any effect in the United States.²⁴⁹ Furthermore, any connection between the conspiracy aimed at foreign countries and import or domestic commerce in the United States had to be "direct."²⁵⁰ For this analysis, the Panel referred to *United States v. LSL Biotechnologies*, a Ninth Circuit decision that defined an effect as "direct" under the FTAIA if "it follows as an immediate consequence of the defendant's activity."²⁵¹ If the conduct occurs in a foreign country, but there are "uncertain intervening

²⁴⁵ *Id.* at 661.

²⁴⁶ *Id.* at 660.

²⁴⁷ *Id.* at 661.

²⁴⁸ *Id.* at 661-63. *See supra* text accompanying note 206.

²⁴⁹ *Id.* at 662 ("The problem with these generalized allegations is the absence of specific factual content to support the asserted proposition that prices in China, India, and Brazil serve as a 'benchmark' for prices in the United States and that this benchmark, if it exists, has a strong relationship with the domestic potash market to raise a plausible inference that the defendants' foreign anticompetitive conduct has a 'direct, substantial, and reasonably foreseeable effect' on domestic or import commerce.").

²⁵⁰ *Id.* at 661.

²⁵¹ *Id.* at 662 (quoting *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004; citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)). The Ninth Circuit case derives the definition of "direct" from the *Weltover* decision, where the Foreign Sovereign Immunities Act was at issue.

developments” before there is an effect on import or domestic commerce, then the effect is not direct.²⁵² “Ultimately,” the Panel concluded, “the connection asserted in the complaint between the alleged cartelized prices of potash overseas and the domestic price of potash is too speculative and indirect to state an actionable claim under the FTAIA’s direct-effects exception.”²⁵³

The Panel vacated the lower court’s ruling based on its *Twombly* analysis.²⁵⁴ However, it refused to upset the precedent in *United Phosphorus*, and remained silent on whether the FTAIA affected a court’s jurisdiction or established an element of an antitrust claim.²⁵⁵ This decision occurred despite the court’s acknowledgement that the Third Circuit Court of Appeals in *Animal Science Products, Inc. v. China Minmetals Corp.* had applied the *Arbaugh* bright-line test and held that the FTAIA only establishes an element of an antitrust claim.²⁵⁶ The decision to revisit *United Phosphorus* was left to the plaintiffs’ subsequent appeal to the Seventh Circuit sitting *en banc*.

3. The *en banc* Decision

The Seventh Circuit’s *en banc* panel found that the “nascent idea” expressed in Judge Wood’s dissent in *United Phosphorus* had “now become a firmly established principle of statutory construction.”²⁵⁷ The series of decisions that led to the bright-line test in *Arbaugh* convinced the *en banc* panel that the time had come to reconsider its holding in *United Phosphorus*.²⁵⁸ The Supreme Court’s decision in

²⁵² *Id.*

²⁵³ *Id.* at 663.

²⁵⁴ *Id.* at 663-64.

²⁵⁵ *Id.* at 659.

²⁵⁶ *Id.* 659 n.3 (citing *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011)). In its footnote, the Panel acknowledges that the Third Circuit based its decision, in part, on the dissent in *United Phosphorus*.

²⁵⁷ *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (*en banc*) [hereinafter *Minn-Chem II*].

²⁵⁸ *Id.* (citing *Union Pacific R. Co. v. Locomotive Eng’rs*, 558 U.S. 67 (2009); *Arbaugh v. Y&H Corporation*, 546 U.S. 500; *United States v. Cotton*, 535 U.S. 625;

Morrison presented a compelling factor.²⁵⁹ Judge Wood, this time writing for the unanimous *en banc* panel, referred to the Court's finding that "limitations on the extraterritorial reach of a statute describe what conduct the law purports to regulate and what lies outside its reach."²⁶⁰ By way of analogy, the FTAIA, like § 10(b) of the Securities Exchange Act, lacks language in the text of the statute that explicitly references a federal court's jurisdiction.²⁶¹ Therefore, under the *Arbaugh* test, the court should infer that that the statute's provisions regulate the conduct the statute purports to regulate, not the ability of the court to adjudicate the matter before it.²⁶² Henceforth, in the district and appellate courts of the Seventh Circuit, the FTAIA establishes an element of an antitrust cause of action.²⁶³

With that matter behind it, the *en banc* panel was left with the task of determining whether the plaintiffs' complaint could survive a motion to dismiss.²⁶⁴ The first issue for the court was to determine precisely what forms of commerce the FTAIA excluded from the reach of the Sherman Act. The district court and the three-judge panel presented interpretations that did not completely satisfy the *en banc* panel.²⁶⁵ However, between the two courts, the interpretation offered

Reed Elsevier v. Muchnick, 130 S.Ct. 1237, 1243 (2010); Kontrick v. Ryan, 540 U.S. 443, 455 (2004) (Ginsburg, J. dissenting); Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 89 (1998); Henderson *ex rel.* Henderson v. Shinseki 131 S.Ct. 1197, 1202-03 (2011).

²⁵⁹ *Id.* at 852 ("We can see no way to distinguish this case from *Morrison*.").

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* ("When Congress decides to strip the courts of subject-matter jurisdiction in a particular area, it speaks clearly. The FTAIA, however, never comes close to using the word 'jurisdiction' or any commonly accepted synonym. Instead, it speaks to the 'conduct' to which the Sherman Act (or the Federal Trade Commission Act) applies. This is the language of elements, not jurisdiction.").

²⁶³ *Id.*

²⁶⁴ *Id.* at 853.

²⁶⁵ See discussion *supra* Part III.B.2.

by the three-judge panel proved, for the most part, to be more attractive.²⁶⁶

Under the *en banc* panel's interpretation, the FTAIA categorizes two forms of commerce: foreign and import. If antitrust conduct occurs within "import trade or import commerce," then the Sherman Act applies. As a general matter, the Sherman Act does not cover antitrust conduct "involving trade or commerce with foreign nations." However, if the antitrust conduct occurring in foreign commerce has a "direct, substantial, and reasonably foreseeable effect" on import trade or commerce, then the Sherman Act does apply to that conduct. All of this is in line with *Empagran*.²⁶⁷

Having established the proper interpretive framework, the *en banc* panel then narrowed its analysis and defined certain terms within the FTAIA with more specificity.²⁶⁸ First, the court defined a test for the kinds of transactions that constitute "pure import commerce."²⁶⁹ Under the situation in *Minn-Chem*, "[t]hose transactions that are directly between the plaintiff purchasers and defendant cartel members *are* the import commerce of the United States in this sector."²⁷⁰ This conclusion follows logically from the fact that the plaintiff purchasers were U.S. entities, and all of the defendant producers were located outside of the United States.²⁷¹

Because the facts in the plaintiffs' complaint alleged that part of the price-fixing conspiracy occurred through transactions specifically not occurring with the United States or Canada, the court next questioned what constituted "trade or commerce with foreign nations."²⁷² The court found this to be self-evident based on the facts

²⁶⁶ *Minn-Chem II*, 683 F.3d 853-54.

²⁶⁷ *Id.* at 854; *see* discussion *supra* Part II.B.

²⁶⁸ *Minn-Chem II*, 683 F.3d. at 855.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 655-56. The court refers to Canpotex, the Canadian marketing and sales agent for Agrium, Mosaic, and Potash Corp. of Saskatchewan, and the fact that it specifically did not sell to purchasers in the United States and Canada. The court presumes that Canpotex was included in the complaint because it was "jointly and

that alleged the existence of an international cartel that raised prices for potash sold directly to U.S. purchasers.²⁷³ Those sales were “plainly” foreign commerce.²⁷⁴ The next step was to determine whether that foreign commerce had a “direct, substantial, and reasonably foreseeable effect” on United States import or interstate commerce.²⁷⁵

As to whether the cartel’s foreign conduct had a substantial and reasonably foreseeable effect on domestic or import commerce, the court quickly concluded that the facts alleged by the plaintiffs, if true, satisfied those requirements.²⁷⁶ What was in dispute, and where the *en banc* panel disagreed with the three-judge panel, was what showing must be made to show “direct” effects.²⁷⁷ The *en banc* panel thought that the lower court’s reliance on the Ninth Circuit’s “immediate consequence” definition, itself derived from an interpretation of the Foreign Sovereign Immunities Act, was “misplaced.”²⁷⁸ The Antitrust Division of the Department of Justice advocated an alternative definition for “direct,” meaning instead, “a reasonably proximate causal nexus” (“nexus test”).²⁷⁹ The court found this definition comported with the language of the FTAIA better than “immediate consequence” because an immediate effect from foreign commerce would likely, if not necessarily, impact import commerce.²⁸⁰ Such a

severally liable” for participating in the conspiracy raising the prices charged by the direct sellers to the United States market.

²⁷³ *Id.* at 656.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 657.

²⁷⁹ *Id.* (citing Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. AM. L. 415, 430 (2005) (remarks of the Deputy Assistant Attorney General)).

²⁸⁰ *Id.*

reading is either redundant or ignores the fact that the FTAIA already excludes import commerce from its coverage.²⁸¹

The nexus test also avoids the concern expressed by the three-judge panel that any foreign company that has import business in the United States would be at risk of violating the Sherman Act simply by participating in a foreign joint-selling arrangement, which may or may not affect United States import or domestic commerce.²⁸² First, as a direct participant in United States import commerce, this hypothetical foreign company would already have to comply with U.S. law.²⁸³ Second, the company's foreign sales would still need to meet the threshold for "effects" on interstate commerce established in the case law;²⁸⁴ if that threshold is not met, then the foreign company's conduct will not face scrutiny under the Sherman Act.²⁸⁵ Finally, if the foreign company's conduct is foreign commerce usually excluded by the FTAIA, then that conduct must cause a "direct, substantial, and reasonably foreseeable effect" before the Sherman Act applies.²⁸⁶

The court next turned to whether the plaintiffs' complaint plausibly alleged that the defendants' conduct fell either into the category of import commerce, or the category of foreign commerce, thus meeting the direct effect test.²⁸⁷ On the facts before the court, the *en banc* panel concluded that much of the complaint alleged import transactions.²⁸⁸ Under *Hartford Fire*, the Sherman Act applies to those transactions if the conduct was meant to produce, and did in fact produce, a "substantial" effect on United States domestic

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* (citing *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991)).

²⁸⁵ *Id.* at 857-58.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 858.

²⁸⁸ *Id.*

commerce.²⁸⁹ The import transactions, according to the court, met these requirements, and therefore were subject to the Sherman Act.²⁹⁰

As for the defendants' conduct alleged to have occurred in foreign commerce, the court repeated its finding that the facts presented by the plaintiffs sufficiently alleged a substantial and reasonably foreseeable effect on domestic or import commerce.²⁹¹ The specific allegations that the defendants negotiated production levels among themselves; set prices for the Chinese, Indian, and Brazilian markets; and then used those cartel-determined prices to serve as a benchmark for prices charged to purchasers in the United States were sufficient to meet the "direct" effect test.²⁹² Judge Wood compared the "benchmark" practice allegedly employed by the defendants to the common uses of benchmarks like, among other examples, the London Interbank Offer Rate (LIBOR) for interest rates in the credit market.²⁹³ The court concluded that the plaintiffs' complaint plausibly pleaded facts that supported the inference that the defendants' cartel activity was a proximate cause of the price increases in the United States.²⁹⁴

IV. ANALYSIS

A. *Ramifications for the Courts and Attorneys*

What perhaps appeared, at the time of the *Hartford Fire* decision, to be a marginal squabble over subject-matter jurisdiction eventually inspired a careful reconsideration of how the entire federal judiciary evaluates adjudicatory authority. As articulated in *Arbaugh*, the test

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 858-59. ("The inference from these allegations is not just plausible but compelling that the cartel meant to, and did in fact, keep prices artificially high in the United States.").

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* ("It is no stretch to say that the foreign supply restrictions, and the concomitant price increases forced upon Chinese purchasers, were a direct – that is, proximate – cause of the subsequent price increases in the United States.").

that determines whether a federal statute grants a court subject-matter jurisdiction is formal: does the statute's text explicitly refer to a court's jurisdiction? After examining the text of the statute at issue, a simple "yes" or "no" will suffice. Answer "yes," and challenges to that particular statute will require a motion to dismiss under Rule 12(b)(1). Answer "no," and challenges will require a motion to dismiss under Rule 12(b)(6), or later a call for summary judgment under Rule 56.²⁹⁵

A federal court contemplating an antitrust claim has an elegant method for determining subject-matter jurisdiction through 28 U.S.C. § 1331.²⁹⁶ This method provides litigators with a clear delineation between what defines jurisdiction and what constitutes the elements of an antitrust cause of action. Attorneys can work more efficiently because this delineation reduces confusion and uncertainty over which motions and procedures to follow in a lawsuit. Furthermore, as Judge Wood noted in her dissent in *United Phosphorus*, it reduces the potential that a jurisdictional inquiry will result in the consumption of "enormous judicial resources."²⁹⁷

As a matter of fairness, the *Minn-Chem* decision strikes the proper balance between plaintiffs and defendants. A district court's determination of whether an antitrust plaintiff's complaint meets the FTIA's requirements now requires an inquiry under a 12(b)(6) motion. This requirement gives an advantage to plaintiffs because the inquiry is limited to the pleadings, and the facts are read in the light most favorable to the non-moving party. However, balance occurs at

²⁹⁵ *United Phosphorus Ltd. V. Angus Chemical Company (United Phosphorus II)*, 322 F.3d 942, 959 (7th Cir. 2003) (en banc) (Wood, J. dissenting) ("We should not adopt a perverse decision just because parties have chosen to file motions under Rule 12(b)(1) instead of 12(b)(6) or Rule 56, or because courts have unquestioningly adopted the diction of 'subject-matter jurisdiction' without careful examination.").

²⁹⁶ See, e.g., JEAN FORD BRENNAN, *THE ELEGANT SOLUTION*. xi (1967) ("In the world of mathematics, when the solution to a problem exhibits precision, neatness and simplicity, it is said to be 'elegant.'"). Thanks to Kevin McClure, Research Librarian, Chicago-Kent College of Law Library, for tracking down the preceding definition. In *United Phosphorus*, Judge Evans recognized a level of "purity" to the rationale behind finding jurisdiction through § 1331; see *United Phosphorus II*, 322 F.3d at 950. "Elegant," as defined here, is perhaps a better description.

²⁹⁷ *United Phosphorus II*. 322 F.3d at 957 (Wood, J. dissenting).

the appellate level, because review of a trial court's disposition of a motion to dismiss under 12(b)(6), or for summary judgment, is *de novo*.²⁹⁸ This procedural distinction is important because an appellate court would not have to defer to the district court's findings of fact.²⁹⁹ Furthermore, the appellate court would be able to raise its own inquiry into whether the principle of international comity would have any bearing on the case.³⁰⁰ Review under Rule 12(b)(1), however, would require deference on the part of the appellate court toward the district court's findings of fact, and it would limit the appellate court's ability to examine the effect of the principle of international comity on the case.³⁰¹

B. Ramifications on the Principle of International Comity and the Presumption Against Extraterritoriality

Filed under the category of "unfinished business" left over from Justice Scalia's dissent in *Hartford Fire*,³⁰² the Seventh Circuit did not rule on whether the principle of international comity counseled against an extraterritorial application of the Sherman Act in *Minn-Chem*.³⁰³ This avoidance was due, in part, because the defendants did not raise the issue on appeal.³⁰⁴ However, now that challenges to subject-matter jurisdiction are off the table, *vis-à-vis* the FTAIA, foreign defendants would be well advised to argue in their pleadings that a comity analysis³⁰⁵ limits the Sherman Act's applicability.

²⁹⁸ *Id.* at 963.

²⁹⁹ *Id.* at 958.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 817-18 (1993).

³⁰³ *Minn-Chem II*, 683 F.3d at 860.

³⁰⁴ *Id.*

³⁰⁵ *See, e.g., Hartford Fire*, 509 U.S. at 818-19 (citing *Restatement (Third)*, *supra* note 65, §§ 403(1), 403(2)(a)-(c), 403(2)(g)-(h) (describing the inquiry a court should make to determine whether the principle of international comity bars an extraterritorial application of the Sherman Act)).

The presumption against extraterritoriality also received no attention from the Seventh Circuit, again because the defendants did not raise the issue on appeal.³⁰⁶ This omission might signal that, so far as the FTAIA and the Sherman Act are concerned, the presumption has been thoroughly rebutted by nearly seventy years of extraterritorial application of the Sherman Act in federal courts. However, the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum*³⁰⁷ may give pause to those ready to consider the matter settled. The issue in *Kiobel* was whether the 224-year-old Alien Tort Statute³⁰⁸ ("ATS") granted federal courts subject-matter jurisdiction over tort claims arising from violations of international law committed in a foreign country.³⁰⁹ This case was novel because the ATS is "strictly jurisdictional."³¹⁰

To determine whether the ATS granted jurisdiction over the conduct that had occurred in a foreign country, the Court invoked the presumption against extraterritoriality.³¹¹ This was the first application of the presumption to a jurisdictional statute since the Court's decision

³⁰⁶ *Minn-Chem II*, 683 F.3d. at 860.

³⁰⁷ *Kiobel v. Royal Dutch Petroleum*, 569 U.S. __ at (slip op., at 1) (2013), 2013 WL 1628935 *1.

³⁰⁸ 28 U.S.C. § 1350 (2006). The text of the statute: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." N.B.: This Case Note substitutes "international law" for the phrase "law of nations"; for the purposes of this Note, the terms are interchangeable.

³⁰⁹ *Kiobel*, 569 U.S. __ at (slip op., at 3), 2013 WL 1628935, at *4. The plaintiffs, Nigerian-born residents of the United States, alleged that oil companies operating in the Niger River delta had aided and abetted the Nigerian Government in committing crimes in violation of international law. The plaintiffs alleged that the Nigerian government committed these violations of international law: extrajudicial killings; crimes against humanity; torture and cruel treatment; arbitrary arrest and detention; violations of the rights of life, liberty, security, and association; forced exile; and property destruction. *Id.* at (slip op., at 1), at *3.

³¹⁰ *Id.* at 569 U.S. __ at (slip op., at 5), at *5 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004)).

³¹¹ *Id.* at 569 U.S. __ at (slip op., at 4-6), at *5-*6.

in *Morrison*.³¹² The Court reasoned that the policy concerns justifying the application of the canon to a “merits question”³¹³ also applied to a jurisdictional statute like the ATS.³¹⁴ Armed with the presumption, Chief Justice Roberts found that nothing in the text or the historical background of the ATS rebutted the presumption.³¹⁵ Because all of the relevant conduct took place outside of the United States, the plaintiffs’ case could not proceed in federal court.³¹⁶

The Court nevertheless adopted a legal test that left open the possibility that the presumption against extraterritoriality may be overcome. Chief Justice Roberts wrote that:

... even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.³¹⁷

This test suggests that the prerequisite facts upon which a federal court may exercise ATS jurisdiction must show that the torts resulting from a violation of international law have some discernible effect upon the territory of the United States. The minimum size of that effect is more than one arising from corporate presence. Presumably, without

³¹² See discussion *supra* Part II.D.

³¹³ *Kiobel*, 569 U.S. __ at (slip op., at 4-5), 2013 WL 1628935, at *5 (citing *Morrison v. National Australia Bank*, 130 S.Ct. 2869, 2877 (2010)) (“... [to] ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”).

³¹⁴ *Id.* at 569 U.S. __ at (slip op., at 6), at *6.

³¹⁵ *Id.* at 569 U.S. __ at (slip op., at 7-12), at *6-*9.

³¹⁶ *Id.* at 569 U.S. __ at (slip op., at 13-4), at *10.

³¹⁷ *Id.* at 569 U.S. __ at (slip op., at 14), at *10 (citing *Morrison*, 130 S.Ct. 2883-8).

Congressional action to revise the ATS, future cases will determine the sufficient quantum of effect to trigger ATS jurisdiction.³¹⁸

Another way of looking at the *Kiobel* test is as an echo of the FTAIA. Like the FTAIA, the *Kiobel* test divides claims into two categories. Federal courts have subject-matter jurisdiction over only one category: those tort claims arising from a violation of international law occurring solely in the United States. The court justifies jurisdiction over this first category of claims by citing the history of the passage and early application of the ATS.³¹⁹ The second category consists of those tort claims arising from a violation of international law occurring in a foreign country. For these claims, the ATS does not grant subject-matter jurisdiction to federal courts. However, claims may be moved from the second category and placed in the first, so long as they “touch and concern” the territory of the United States with “sufficient force” to justify the assertion of a federal court’s jurisdiction.

The FTAIA and *Minn-Chem* reenter the discussion here because what may be “sufficient force” to knock out the presumption against extraterritoriality in the context of the ATS may have consequences on whether the presumption still applies to antitrust laws. Although a reasonable interpretation of the FTAIA’s direct effect test suggests that the test implies “sufficient force,” a Supreme Court wanting to reassert the presumption to the FTAIA could make a “sufficient force” requirement a separate inquiry, as it did for the ATS in *Kiobel*. If the bar for achieving sufficient force is set high enough, the Supreme Court could curtail extraterritorial applications of U.S. antitrust laws so that they occur only in the most extraordinary circumstances.

³¹⁸ See, e.g., *Kiobel*, 569 U.S. __ at (slip op., at 1), 2013 WL 1628935, at *11 (Kennedy, J., concurring).

³¹⁹ *Id.*, 569 U.S. __ at (at slip op., at 8-10), 2013 WL 1628935 at *7. Chief Justice Roberts recounts two cases occurring shortly before Congress passed the ATS as giving impetus for the passage of the law. Each involved a foreign diplomat and violations of “the rights of ambassadors,” one of three areas of “international law” recognized in that era. The violations of international law occurred within the territory of the United States. Two cases invoked the ATS shortly after it was passed and also concerned conduct within United States territory.

This possibility may not be completely farfetched, especially in light of Justice Scalia's *Hartford Fire* dissent. There, he referred to *EEOC v. Arabian American Oil Co.* ("Aramco"), where the Court found that "boilerplate language" indicating Title VII's scope over a variety of forms of commerce did not overcome the presumption against extraterritoriality.³²⁰ By way of comparison, Scalia wrote: "The Sherman Act contains similar 'boilerplate language,' [to that contained in Title VII of the Civil Rights Act of 1964] and if the question [of whether the Sherman Act applied extraterritorially] were not governed by precedent, it would be worth considering whether that presumption controls the outcome here."³²¹

CONCLUSION

The *Minn-Chem* decision provides the counter-argument to reapplying the presumption to the Sherman Act. This is, in part, a consequence of the Seventh Circuit's endorsement of the nexus test to show direct effect. If the court had adopted the "immediate consequence" test, it would have given foreign companies a blueprint on how to construct a price-fixing cartel that the Sherman Act could not reach. Foreign companies would simply agree to control production and fix prices for sales to any country that has no, or at most a weak, antitrust enforcement regime; then they could use those prices to set the benchmark for prices charged to American customers. The nexus test ensures that this method of conspiracy will be subject to U.S. antitrust laws.

Judge Wood also argued, at the close of the *Minn-Chem* decision, that reliance on the countries where the foreign potash producers were located to put a stop to the cartel would be misplaced.³²² Canada,

³²⁰ *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 814 (1993) (citing *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 251 (1991)). The specific language in Title VII is "any activity, business, or industry in commerce." Scalia compares that language to the Sherman Act's phrase, "commerce among the several States, or with foreign nations."

³²¹ *Id.*

³²² *Minn-Chem II*, 683 F.3d 845, 860 (7th Cir. 2012) (en banc).

Russia, and Belarus have no incentive to stop the cartel so long as the benefit of extracting monopoly rents from customers outside of their countries outweighed any potential losses.³²³ “It is the U.S. authorities or private plaintiffs,” she wrote, “who have the incentive—and the right—to complain about overcharges paid as a result of the potash cartel, and whose interests will be sacrificed if the law is interpreted not to permit this kind of case.”³²⁴ After *Minn-Chem*, the Sherman Act can continue what it was meant to do: protect United States consumers, deter anticompetitive conduct, and maintain a free and fair market.

³²³ *Id.*

³²⁴ *Id.*