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FINDING SUBJECT MATTER JURISDICTION OVER ANTITRUST CLAIMS OF EXTRATERRITORIAL ORIGIN: WHETHER THE SEVENTH CIRCUIT'S APPROACH PROPERLY BALANCES POLICIES OF INTERNATIONAL COMITY AND DETERRENCE

INTRODUCTION

Application of U.S. antitrust law to foreign conduct involves a battle between deterrence of wrongful conduct and respect for the sovereignty of foreign governments, generally described as international comity. Applying antitrust law to foreign conduct relies on a profound desire to excise unfair commercial practices that impact U.S. markets. Where U.S. markets are unaffected, application of U.S. law to conduct abroad destabilizes ties with foreign countries and undermines successful export commerce. Such concerns were manifested in federal legislation such as the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).¹ The FTAIA requires that for conduct abroad to be actionable in U.S. courts, it must (1) have “a direct, substantial, and reasonably foreseeable effect” on U.S. commerce; and (2) “give[] rise to a claim.”² Under the FTAIA’s second prong, three federal circuits apply conflicting meanings of “a claim.”³ Does “a claim” mean a domestic claim generally, the plaintiff’s actual claim, or a hypothetical claim? Recently, in *Hoffman-LaRoche, Ltd. v. Empagran, S.A.*,⁴ the Supreme Court resolved this circuit split, holding that “a claim” means the plaintiff’s claim, the most restrictive of the three interpretations.⁵ By requiring courts to find that the requisite effects on U.S. commerce exist before asserting jurisdiction over these claims, the United States Court of Appeals for the Seventh Circuit in *United*

1. 15 U.S.C. § 6a (2000).

2. *Id.*

3. See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), *vacated by* 124 S. Ct. 2359 (2004); *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384 (2d Cir. 2002); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001). According to one commentator, the Federal Trade Antitrust Improvements Act of 1982 (FTAIA), when considered “[a]n attempt to clarify the intended scope of the antitrust laws with regard to foreign trade . . . must be viewed as a failure.” Note, *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws*, 114 HARV. L. REV. 2122, 2136 (2001).

4. 124 S. Ct. 2359 (2004).

5. *Id.* at 2372.

*Phosphorus, Ltd. v. Angus Chemical Co.*⁶ created newfound ambiguity in interpreting the FTAIA's first prong.⁷

In interpreting the FTAIA, federal courts implicitly balance policies of international comity and deterrence. *Empagran* and earlier federal court opinions forms the backdrop for how this Note analyzes *United Phosphorus*—a decision that will alter the manner in which FTAIA claims are heard and ultimately will restrict the number of actions brought before U.S. courts. This Note argues that the Seventh Circuit's interpretation, while properly recognizing international comity, conflicts with Supreme Court precedent and ignores an integral anti-trust policy—deterrence.⁸

Part II of this Note discusses the Sherman Act of 1890 (Sherman Act) and judicial approaches to the “extraterritorial application of U.S. antitrust law”⁹ prior to passage of the FTAIA.¹⁰ Part II then details the FTAIA and Supreme Court decisional law.¹¹ Part III highlights the views expressed by the majority and dissenting opinions in *United Phosphorus*.¹² Part IV criticizes the *United Phosphorus* majority opinion and supports the dissenting opinion from textual, precedential, and legislative history perspectives.¹³ Part V discusses the various arguments from federal circuit dissenting opinions and other commentators that discuss deterrence, which is the policy *United Phosphorus* undervalues.¹⁴ Part VI concludes that *United Phosphorus* will undermine U.S. antitrust enforcement and weaken the deterrence of anticompetitive conduct.¹⁵

6. 322 F.3d 942 (7th Cir. 2003).

7. *Id.* (interpreting FTAIA, 15 U.S.C. § 6a (2000)).

8. *Id.* at 952.

9. See Note, *supra* note 3, at 2128; Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What Is A “Direct, Substantial, and Reasonably Foreseeable Effect” Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT'L L.J. 11, 11 (2003); David V. Dzara, Note, *Den Norske Stats Oljeselskap As v. Heeremac Vof: Interpreting the Foreign Trade Antitrust Improvements Act to Determine Whether “A Claim” Means “The Claim”*, 16 TEMP. INT'L & COMP. L.J. 411, 413 (2003); Ryan A. Haas, Comment, *Act Locally, Apply Globally: Protecting Consumers from International Cartels by Applying Domestic Antitrust Law Globally*, 15 LOY. CONSUMER L. REV. 99, 101 (2003); Kareen O'Brien, Comment, *Giving Rise to a Claim: Is FTAIA's Section 6A(2) an Antitrust Plaintiff's Key to the Courthouse Door?*, 9 SW. J. L. & TRADE AM. 421, 455 (2003); William J. Tuttle, *The Return of Timberlane?: The Fifth Circuit Signals a Return to Restrictive Notions of Extraterritorial Antitrust*, 36 VAND. J. TRANS-NAT'L L. 319, 321 (2003).

10. See *infra* notes 16–46 and accompanying text.

11. 15 U.S.C. § 6a (2000); see *infra* notes 47–124 and accompanying text.

12. See *infra* notes 125–214 and accompanying text.

13. See *infra* notes 215–308 and accompanying text.

14. See *infra* notes 309–356 and accompanying text. This section also discusses arguments that caution against overly broad application of U.S. jurisdiction abroad.

15. See *infra* notes 357–358 and accompanying text.

II. BACKGROUND: DEVELOPMENT OF EXTRATERRITORIAL
APPLICATION OF U.S. ANTITRUST LAW BEFORE AND
AFTER PASSAGE OF THE FTAIA

Before and after passage of the FTAIA, courts have struggled to harmonize the at-times conflicting policies of deterring wrongful conduct, encouraging U.S. export business,¹⁶ and granting comity to foreign sovereigns. Although not interpreting the FTAIA, the Supreme Court in *Hartford Fire Insurance Co. v. California* implicitly narrowed the scope and, consequently, the importance of international comity concerns in its discussion of whether to apply U.S. antitrust law to foreign conduct.¹⁷ By logical extension, *Hartford's* minimization of international comity gave the Sherman Act broad application over alleged foreign antitrust wrongdoing.¹⁸ Yet, in *F. Hoffman-La Roche v. Empagran S.A.*, the Supreme Court retreated from this position by finding that international comity tempered statutory construction in its consequent holding that the "effects on U.S. commerce"¹⁹ from foreign conduct must give rise to the plaintiff's claim.²⁰ *Empagran* arguably breathes life into the importance of international comity with this interpretation of the FTAIA. Accordingly, *Empagran*, decided after *United Phosphorus*, buttresses *United Phosphorus's* emphasis on international comity in its interpretation of the FTAIA. The notion that the FTAIA "restrict[s] the subject matter jurisdiction of the federal courts" and is not an "element of the plaintiff's claim" is also validated in *United Phosphorus*.²¹ The *United Phosphorus* dissent, however, raises searing points that question the rationale and workability of the majority's approach despite its timely, comity-stressed analysis.²²

16. This Note will focus on the policies of international comity and deterrence but will not discuss in detail encouraging U.S. export activity, "however anticompetitive." *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2364 (2004). Unlike the former two policies, this latter policy is uncontroversial and accepted as a major motivation for passage of the FTAIA. *See id.* (citing H.R. Rep. No. 97-686, at 1-3, 9-10 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2487-88, 2494-95).

17. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 769 (1993).

18. *Id.*

19. *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 946 (7th Cir. 2003).

20. *Empagran*, 124 S. Ct. at 2359.

21. *United Phosphorus*, 322 F.3d at 953.

22. *Id.* at 954 (Wood, J., dissenting).

A. *The Foundation of U.S. Statutory Antitrust Law
and Underlying Policies*

The U.S. Constitution empowers Congress “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²³ Pursuant to that authority, Congress enacted the Sherman Act, which largely codified “common law condemnation of monopolization and [other] restraints of trade.”²⁴ Pursuant to Section 1 of the Sherman Act, “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”²⁵ Section 2 criminalizes monopolization and “attempt[s] to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.”²⁶

The Sherman Act originally failed to provide a cause of action for individuals to sue alleged wrongdoers.²⁷ The Clayton Act of 1914 (Clayton Act) filled that gap, providing that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States.”²⁸ The Clayton Act also provides successful complainants “injunctive relief or treble damages plus costs and attorney’s fees.”²⁹

Although the Sherman Act seeks to maintain efficient market performance, courts and scholars interpret its underlying policies to be abstract economic goals of equilibrium market performance.³⁰ Ac-

23. U.S. CONST. art. I, § 8, cl. 3.

24. See Note, *supra* note 3, at 2124 n.18 (“The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations . . . that have been applied in the several States to protect local interests.” (quoting 21 Cong. Rec. 2456 (1890) (statement of Sen. Sherman))).

25. Sherman Act of 1890, 15 U.S.C. § 1 (2000); see also Note, *supra* note 3, at 2124.

26. 15 U.S.C. § 2. Describing the Attorney General’s power to prosecute violations under the Act, author William Tuttle writes:

The U.S. Attorney’s office may prosecute violations of the Sherman Act in either a civil or criminal proceeding. If the government directly purchased goods from the party accused of antitrust violations, it may obtain injunctive relief, damages, or both through a civil proceeding. Alternatively, the government may prosecute all antitrust violations and seek imprisonment and fines of up to ten million dollars.

Tuttle, *supra* note 9, at 328.

27. Tuttle, *supra* note 9, at 328; see 15 U.S.C. §§ 1–7.

28. 15 U.S.C. § 15(a) (2000); see also Tuttle, *supra* note 9, at 328.

29. Tuttle, *supra* note 9, at 328; see also 15 U.S.C. § 15(a) (2000).

30. One author argued that antitrust laws serve joint goals of compensating injured parties and deterring anticompetitive behavior. Haas, *supra* note 9, at 102–03. Another author described the egalitarian purpose underlying the Sherman Act: “In safeguarding rights of the ‘common man’ in business ‘equal’ to those of the evolving more ‘ruthless’ and impersonal forms of enterprise the Sherman Act embodies what is to be characterized as an eminently ‘social pur-

ording to case law, the Sherman Act is intended to accomplish more than the realization of economic principles.³¹ As one author stated, “Not only do the antitrust laws purportedly yield the most efficient allocation of economic resources, producing both the lowest possible prices and the highest quality for the greatest number, they simultaneously ‘provide an environment conducive to the preservation of our democratic[,] political[,] and social institutions.’”³²

B. Early Court “Tests” Applying U.S. Antitrust Law over Foreign Conduct: Movement from a Strict Territorial Approach to an “Effects on U.S. Commerce” Analysis

Courts were originally reticent to apply U.S. antitrust law to foreign conduct because the Sherman Act was understood as limited to conduct within the territorial borders of the United States.³³ The Supreme Court articulated the “strict territorial” approach in applying the Sherman Act to foreign conduct,³⁴ as typified by the analysis in *American Banana Co. v. United Fruit Co.*³⁵ American Banana Company (American Banana) sued United Fruit Company (United Fruit) alleging that United Fruit had convinced the Costa Rican government to appropriate land needed by American Banana, its competitor, to distribute fruit.³⁶ Finding that such alleged conduct occurred entirely in Central America, Justice Oliver Wendell Holmes wrote that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”³⁷ Justice Holmes also emphasized the im-

pose.” Note, *supra* note 3, at 2125 (quoting HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORGANIZATION OF AN AMERICAN TRADITION 227 (1954)). Even Senator Sherman, to whom Judge Hand turned for interpretive guidance, characterized the act as “a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.” Note, *supra* note 3, at 2125 n.21 (quoting HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORGANIZATION OF AN AMERICAN TRADITION 227 (1954)).

31. One commentator argued:

In one of the most famous opinions construing the Sherman Act, Judge Learned Hand gave voice to the popular sentiment many have viewed as the animating philosophy of the antitrust laws—that industrial consolidation and the concomitant accretions of power are “inherently undesirable, *regardless* of their economic results.”

Note, *supra* note 3, at 2125 (emphasis added) (quoting *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 428 (2d Cir. 1945)).

32. *See id.* at 2125 (alteration in original) (quoting *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958)).

33. *See Tuttle, supra* note 9, at 328.

34. Beckler & Kirtland, *supra* note 9, at 12 (quoting A.B.A. SEC. OF ANTITRUST LAW, 2 ANTITRUST LAW DEVELOPMENTS 1010–17 (4th ed. 1997)).

35. 213 U.S. 347 (1909).

36. *Id.* at 355–57.

37. *Id.* at 356; *see also* Beckler & Kirtland, *supra* note 9, at 13.

portance of international comity, "which precludes U.S. courts from imposing judgments on the decisions of foreign governments."³⁸

However, in *United States v. Aluminum Co. of America (Alcoa)*, the Second Circuit developed one of the first "effects tests," eliminating the strict territorial approach implicit in *American Banana*.³⁹ Although the Sherman Act imposed no liability where no effects from wrongful conduct occurred in the United States, the court held that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."⁴⁰ Thus, any wrongdoing was "intended to affect imports and did affect them."⁴¹ Thus, the location of the effects and not of the wrongdoing controlled whether U.S. antitrust laws applied.⁴² In retrospect, *Alcoa* was difficult to apply since such terms as "effect" and "intent" were unspecified.⁴³ *Alcoa* also failed to consider international comity.⁴⁴

Following *Alcoa* were court decisions that varied the "effects" theme. For instance, the Ninth Circuit employed an "interest-balancing" methodology in *Timberlane Lumber Co. v. Bank of America*,⁴⁵ which accounted for international comity. But not all circuits followed suit. The Second Circuit disagreed with the *Timberlane* approach and continued to apply an effects-oriented analysis.⁴⁶

38. See Haas, *supra* note 9, at 103 (discussing Justice Holmes's opinion); see also Tuttle, *supra* note 9, at 330-31. Black's Law Dictionary defines "comity" as "courtesy among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts." BLACK'S LAW DICTIONARY 213 (7th ed. 2000); see also Haas, *supra* note 9, at 103 n.31. One author suggests that Justice Holmes gave an interpretation of U.S. antitrust laws precluding application of U.S. antitrust authority abroad "regardless of the nature and degree of domestic effects." See Tuttle, *supra* note 9, at 330.

39. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443-45 (2d Cir. 1945); see also Beckler & Kirtland, *supra* note 9, at 13.

40. *Id.* at 443 (emphasis added).

41. *Id.* at 444.

42. See Haas, *supra* note 9, at 104 (citing Spencer Webber Waller, *The U.S. as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 LOY. CONSUMER L. REV. 523, 525 (2002)); see also sources cited *supra* note 9.

43. See Haas, *supra* note 9, at 104; see also Dzara, *supra* note 9, at 414-15.

44. See Tuttle, *supra* note 9, at 334.

45. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976). See generally Beckler & Kirtland, *supra* note 9.

46. *Nat'l Bank of Can. v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981).

C. *The FTAIA's Attempt to "Clarify" the Extraterritorial Application of U.S. Antitrust Law*

In 1982, Congress strove to resolve differences among the federal circuits in applying U.S. antitrust law to matters abroad.⁴⁷ Thus, Congress amended the Sherman Act by passing the FTAIA.⁴⁸ The FTAIA provides:

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

- (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
 - (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
 - (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
- (2) such effect gives rise to a claim under the provisions of section 1 to 7 of this title, other than this section.⁴⁹

Congress intended the FTAIA to keep courts from invoking U.S. subject matter jurisdiction to protect foreign companies where the requisite "effects" on U.S. commerce were lacking.⁵⁰ Conversely, Congress also exempted certain exporters from the Act's scope in an effort to aid U.S. export markets.⁵¹ Additionally, noncitizens were not expressly denied the right to commence suit, implying that Congress intended that foreign plaintiffs could seek redress in U.S. courts even if the alleged conduct occurred overseas.⁵² Although the FTAIA's drafters aspired to create a clearer test for applying U.S. antitrust law abroad,⁵³ commentators conclude that due to poor phrasing,⁵⁴ the statute has created more confusion.⁵⁵

47. See Haas, *supra* note 9, at 105.

48. 15 U.S.C. § 6a (2000).

49. *Id.* § 402.

50. Tuttle, *supra* note 9, at 345.

51. See Beckler & Kirtland, *supra* note 9, at 13. The FTAIA states: "It is the purpose of this chapter to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers . . . by modifying the application of the antitrust laws to certain export trade." 15 U.S.C. § 4001(b) (2000). One commentator, however, argues that "Congress' ambiguous wording has led to the abandonment of the FTAIA's original goal of excluding some U.S. exporters from the restrictions of the Sherman Act. Tuttle, *supra* note 9, at 346–47. This deviation has led the FTAIA to be used as support for the *Timberlane* progeny and its considerations of international comity." *Id.* at 346.

52. See Beckler & Kirtland, *supra* note 9, at 29.

53. See *id.* at 345 (citing H.R. Rep. No. 97-686, 97th Cong. at 2, reprinted in 1989 U.S.C.C.A.N. 2487).

54. Attorneys Beckler and Kirtland provide a helpful, clarified rendition of the statute:

*D. Supreme Court Case Law in the FTAIA Era: The Increased
Emphasis on International Comity in Finding U.S.
Jurisdiction Over Foreign Conduct*

U.S. Supreme Court decisions dealing with the FTAIA illustrate a shifting policy towards giving greater weight to international comity concerns in deciding whether to apply U.S. jurisdiction to alleged anticompetitive conduct overseas. In *Hartford*, the Court held that international comity concerns are relevant in only a narrow subset of circumstances,⁵⁶ but the Court's opinion in *Empagran* suggests a significant change of course.⁵⁷

I. Hartford Minimizes the Role of International Comity in Applying U.S. Antitrust Law Abroad

In 1993, the Supreme Court gave what many considered a "near death blow"⁵⁸ to international comity in applying U.S. antitrust jurisdiction abroad.⁵⁹ The plaintiffs alleged that the defendant insurance companies conspired to restrict the availability and provisions of "commercial general liability insurance available in the United States" in violation of Section 1 of the Sherman Act.⁶⁰ Some of the defendants, London-based insurers, moved to dismiss on international com-

While the language of the FTAIA is somewhat clumsy, it boils down to the idea that the Sherman Act does not apply to conduct involving non-import foreign commerce unless the conduct has a "direct, substantial, and reasonably foreseeable effect" on either:

- (1) domestic commerce, such as extraterritorial conduct or foreign agreements having the effect of raising prices that U.S. consumers must pay for products in the United States;
- (2) non-direct import commerce, such as inflated prices for foreign products that reach the U.S. market through any mechanism other than direct sales; or
- (3) export trade or commerce of a U.S. company, such as foreign agreements that restrict or eliminate U.S. exports to a given market.

Beckler & Kirtland, *supra* note 9, at 14.

55. The framers of the FTAIA failed to define a "direct, substantial, and reasonably foreseeable" effect. See Tuttle, *supra* note 9, at 345-46 (citations omitted). Further, "what degree of effects on U.S. exporters is sufficient to trigger U.S. jurisdiction" was not provided for in the statute. *Id.* (citing Jeffrey N. Neuman, Comment, *Through a Glass Darkly: The Case Against Pilkington Plc. Under the New U.S. Department of Justice International Enforcement Policy*, 38 N.W. J. INT'L L. BUS. 284, 299 (1995)).

56. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797 (1993).

57. See generally *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004).

58. See Haas, *supra* note 9, at 106 (citing Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 564-69 (2000)).

59. See Haas, *supra* note 9, at 106 (discussing the impact of *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 769 (1993), on international comity concerns in determining whether to apply U.S. jurisdiction to alleged conduct occurring overseas).

60. *Hartford Fire Ins.*, 509 U.S. 764, 769 (1993).

ity grounds,⁶¹ based on express British Parliamentary approval of their activity.⁶² But Justice David Souter, writing for the majority, rejected the defendants' arguments.⁶³ First, the Court held that the Sherman Act applies to conduct intended to cause, that does cause, effects on U.S. trade.⁶⁴ The plaintiff's complaint met this standard.⁶⁵ Second, the Court explained that international comity plays a role in the Court's analysis only if there is a direct conflict of laws.⁶⁶ Merely because Parliament condoned, or even encouraged, the defendants' activities did not mean that the defendants need not comply with both laws.⁶⁷ Justice Souter reasoned, "Where a person who is subject to regulation by two states can comply with the laws of both," there is no conflict, and international comity is irrelevant.⁶⁸

In his dissenting opinion,⁶⁹ Justice Antonin Scalia treated the question as one of congressional intent, not as one of jurisdiction.⁷⁰ Without an indication from Congress to the contrary, federal legislation applies only over American soil.⁷¹ First, he argued that without contrary congressional intent, federal legislation applies only over U.S. territorial jurisdiction.⁷² Furthermore, "[laws] ought never to be construed to violate the law of nations if any other possible construction remains."⁷³ According to Justice Scalia, the majority's result created a "sharp and unnecessary conflict with the legitimate interests of other countries."⁷⁴

Hartford's "true conflict"⁷⁵ of laws approach vitiated the *Timberlane*⁷⁶ interest-balancing approach.⁷⁷ This result highlighted an

61. *Id.*

62. *Id.* at 798.

63. *Id.* at 799.

64. *Id.* at 796.

65. *Id.*

66. *Hartford Fire Ins.*, 509 U.S. at 798–99.

67. *Id.* at 799.

68. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987)).

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

70. *Id.* (Scalia, J., dissenting). Justice Scalia considered the issues of subject matter jurisdiction and the application of the FTAA as "two distinct questions." *Id.* at 812–13 (Scalia, J., dissenting).

71. *Hartford Fire Ins.*, 509 U.S. at 814 (Scalia, J., dissenting).

72. *Id.* (Scalia, J., dissenting).

73. *Id.* at 815 (Scalia, J., dissenting).

74. *Id.* at 820 (Scalia, J., dissenting).

75. *Id.* at 798–99.

76. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976).

77. See Tuttle, *supra* note 9, at 350–51 (citing Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 678 (2001)).

extremely narrow view of conflicts of laws and permitted expansive application of U.S. antitrust law.⁷⁸

2. *Empagran Retreats from Hartford by Increasing the Importance of International Comity in Its Statutory Construction of the FTAIA*

As discussed earlier, there were three conflicting interpretations among the federal circuits about what gives rise to “a claim” under the second prong of the FTAIA. Each circuit opinion is important in that each gives varying emphasis to international comity in deciding what “a claim” means. Eventually, the Supreme Court settled the matter, giving international comity an important role in its analysis by adopting the most restrictive of the three circuit approaches.

a. Preamble to *Empagran*: Three Federal Circuits Disagree over What “Gives Rise to ‘A’ Claim”

The United States Court of Appeals for the Fifth Circuit, the Second Circuit, and the United States Court of Appeals for the District of Columbia all disagreed over interpreting the meaning of “a claim.” Recall that the FTAIA provides that the Sherman Act will not apply to foreign conduct with foreign nations unless the following occurs: “(1) such conduct has a direct, substantial, and reasonably foreseeable effect” on U.S. commerce; and (2) “such effect gives rise to a claim under the” Sherman Act.⁷⁹ Although no conflict erupted over whether the effects test was satisfied, the Fifth, Second, and D.C. Circuits interpreted “a claim”⁸⁰ to mean either the plaintiff’s claim, a claim generally, or some hypothetical claim, respectively.⁸¹ Thus, the issue remained whether the second prong “close[d] the federal courthouse door on the plaintiffs.”⁸²

i. *Den Norske*: “A claim” means “the claim”

In *Den Norske Stats Oljeselskap As v. HeereMac Vof*,⁸³ the plaintiff, a Norwegian oil company, owned and operated oil drilling platforms in the North Sea.⁸⁴ The plaintiff alleged that the defendants formed a

78. *Id.* at 351.

79. 15 U.S.C. § 6a (2000) (emphasis added).

80. *See id.*

81. *See* *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003); *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384 (2d Cir. 2002); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001).

82. O’Brien, *supra* note 9, at 430.

83. 241 F.3d 420 (5th Cir. 2001).

84. *Den Norske*, 241 F.3d at 422.

cartel that conspired to “fix bids and allocate customers, territories, and projects between 1993 and 1997” over heavy lift barge services in the Gulf of Mexico, the North Sea, and the Far East.⁸⁵ The plaintiff claimed that the defendants’ cartel, which caused anticompetitive effects in the United States, was also at fault for its damages in paying for services for offshore oil drilling in the North Sea.⁸⁶ Two of the defendants had already pled guilty to a similar criminal complaint, filed by the Department of Justice (DOJ), and other injured parties had filed complaints based on the effects in American territory.⁸⁷ In deciding whether the “effect” on U.S. commerce (Gulf of Mexico “effects”) must support a Sherman Act claim or whether the “effect” on U.S. commerce must give rise to the plaintiff’s claim, the majority chose the latter view.⁸⁸ First, the Fifth Circuit majority panel felt that the plain meaning of the FTAIA compelled the result that the anticompetitive effects must give rise to the plaintiff’s claim.⁸⁹ Second, reasoning that Congress intended to exclude wholly foreign transactions from the FTAIA’s scope, the court referred to a United States House of Representatives report stating that the goal of the FTAIA was to clarify “when antitrust liability attaches to international business activities.”⁹⁰ Citing district court holdings, the majority panel found jurisdiction where effects on American commerce supported the plaintiff’s cause of action.⁹¹

In dissent, Judge Patrick E. Higginbotham argued that “‘a’ has a simple and universally understood meaning [as] the indefinite article.”⁹² Had the drafters of the FTAIA wished to use the word “the,” they would have done so.⁹³ Although the FTAIA requires the plaintiff to demonstrate harm to U.S. competition from the defendant’s activity, the text of the statute does not mandate showing that the effects give rise to the plaintiff’s claim.⁹⁴ Hence, Judge Higginbotham noted that “the majority cannot find support in a plain text argument.”⁹⁵ He

85. *Id.*

86. *Id.* at 422–23.

87. *Id.* at 423.

88. *See id.* at 422 n.6.

89. *Id.* at 427. Professor Mehra, in criticizing the result, writes: “the Fifth Circuit . . . came to the conclusion that the ‘plain language’ compelled the conclusion that ‘a’ must mean ‘the.’” Salil K. Mehra, “A” Is for Anachronism: The FTAIA Meets the World Trading System, 107 *DICK. L. REV.* 763, 766 (2003).

90. *Den Norske*, 241 F.3d at 428 (quoting H.R. Rep. No. 97-686, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490).

91. *Id.* at 430.

92. *Id.* at 432 (Higginbotham, J., dissenting).

93. *Id.* (Higginbotham, J., dissenting).

94. *Id.* at 433 (Higginbotham, J., dissenting).

95. *Id.* (Higginbotham, J., dissenting).

also pointed to legislative history supporting his interpretation of the FTAIA.⁹⁶ The Committee Report on the House bill, which eventually became the FTAIA, states:

[The FTAIA] does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States—e.g., price fixing not limited to the export market—would affect all purchasers of the target domestic products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects in the United States, even if some purchasers take title abroad or suffer economic injury abroad.⁹⁷

Judge Higginbotham therefore argued that the majority's interpretation of the FTAIA conflicted with this passage of legislative history.⁹⁸ Judge Higginbotham also raised an uncontested, deterrence-oriented policy argument: Private enforcement of U.S. antitrust policies aids the DOJ's pursuit of criminal and civil suits.⁹⁹ Not only does the Clayton Act recruit private law enforcement through providing a private cause of action, but "[the FTAIA also should] ensure[] that [foreign] parties injured by foreign aspects of the same conspiracy that harms American commerce are part of the phalanx of enforcers," or group of plaintiffs able to sue.¹⁰⁰

ii. *Kruman*: "A claim" means "any claim"

In *Kruman v. Christie's International PLC*, the defendants were the world's two largest auction houses of fine arts and collectibles.¹⁰¹ They controlled approximately ninety-seven percent of the world market.¹⁰² Their agreement to fix the sellers' prices and buyers' commissions and premiums caught the DOJ's attention.¹⁰³ The Second Circuit, in reversing the district court's dismissal of the claim under the Fifth Circuit's rationale, held that the second prong (the give rise to "a" claim prong) of the FTAIA "only requires that the domestic effect violate the substantive provisions of the Sherman Act."¹⁰⁴ The Second Circuit sided with Judge Higginbotham's dissent in *Den Norske*, holding that FTAIA's clear language employing "the indefinite

96. *Den Norske*, 241 F.3d at 433 (Higginbotham, J., dissenting).

97. *Id.* at 436 (Higginbotham, J., dissenting) (citation omitted).

98. *Id.* (Higginbotham, J., dissenting).

99. *Id.* at 439 (Higginbotham, J., dissenting).

100. *Id.* (Higginbotham, J., dissenting).

101. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 390 (2d Cir. 2002).

102. *Id.*

103. *Id.* at 390–91.

104. *Id.* at 400.

article” did not require that the domestic effect give rise to the plaintiff’s claim.¹⁰⁵

iii. *Empagran S.A.*: “A claim” means “a private claim, even if of another plaintiff”

The D.C. Circuit’s view represented a compromise solution between the Fifth and Second circuits’ approaches, “albeit somewhat closer to the latter than the former.”¹⁰⁶ The plaintiffs, foreign vitamin buyers, sued the defendants, who had purchased and distributed “vitamins, vitamin premixes, and bulk vitamin products and precursors” around the globe.¹⁰⁷ The plaintiffs alleged that the defendants engaged in a “worldwide conspiracy to raise, stabilize, and maintain the prices of vitamins.”¹⁰⁸ The plaintiffs contended that “[the] unlawful price-fixing conduct had adverse effects in the United States and in other nations that caused injury to [the plaintiffs] in connection with their foreign purchases of vitamin products.”¹⁰⁹ In reversing the district court’s dismissal of the plaintiffs’ complaint, the D.C. Circuit established its own approach to the FTAIA’s second prong: “[G]iving rise to a claim’ means giving rise to someone’s private claim for damages or equitable relief.”¹¹⁰ Where the defendants’ wrongful conduct has the requisite effect on U.S. commerce, the court has subject matter jurisdiction if the plaintiff alleges that it, or some private party, suffered “actual or threatened injury” arising from the “U.S. effect of the defendant’s violation of the Sherman Act.”¹¹¹

b. *Empagran* holds that “a claim” refers to the plaintiff’s claim

Holding that “a claim” means the plaintiff’s claim, the Supreme Court reversed the D.C. Circuit.¹¹² The Court began its analysis by asking first whether the claimed wrongful conduct is excluded from Sherman Act jurisdiction as “conduct involving trade or commerce . . .

105. *Id.*

106. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 350 (D.C. Cir. 2003).

107. *Id.* at 340.

108. *Id.*

109. *Id.*

110. *Id.* at 352.

111. *Id.* Professor Mehra summarizes: “In other words, even if the plaintiff’s claim need not arise from the domestic effect, there must be a potential Sherman Act claim that another private party *could* bring arising from that effect.” Mehra, *supra* note 89, at 769. Note that the United States Court of Appeals for the Seventh Circuit chose not to take a side in this debate in *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836, 840–41 (7th Cir. 2003).

112. *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2372 (2004). The court rejected this textual argument and held that the FTAIA framers intended “a” simply to mean “an adverse (as opposed to beneficial) effect.” *Id.* at 2371.

with foreign nations”;¹¹³ and second, if so, whether that conduct is nonetheless actionable since it has a “direct, substantial, and reasonably foreseeable effect” on domestic commerce, and “such effect gives rise to a [Sherman Act] claim.”¹¹⁴ The Court answered “yes” to the first question, and “no” to the second.¹¹⁵ With regard to question two, the Court noted that “the exception does not apply where the plaintiff’s claim rests solely on the independent foreign harm.”¹¹⁶

The Court’s rationale is two-fold: (1) Courts should construe “ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations”;¹¹⁷ and (2) Congress intended that the FTAIA limit the application of U.S. antitrust law to foreign conduct.¹¹⁸ As to the first point, the Court cited statutory construction provisions of the *Restatement (Third) of Foreign Relations Law of the United States* that limits the “unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State.”¹¹⁹ The Court also cited Justice Scalia’s dissent in *Hartford* for the proposition that this rule of construction is derived from the principle of “prescriptive comity.”¹²⁰ The Court also reasoned, however, that the application of U.S. antitrust law to foreign conduct is consistent with this principle, even if that interferes with a foreign nation’s ability to regulate its own commercial affairs. This remains true only so long as a “legislative effort [is promoted that] redress[es] domestic antitrust injury that foreign anticompetitive conduct has caused.”¹²¹ Applying these doctrines, in particular the *Restatement (Third) of Foreign Relations Law*, to the issue presented, the Court analyzed the degree of justification for applying U.S. law to foreign conduct.¹²² Under this framework, foreign claims based solely on

113. *Id.* at 2363 (quoting FTAIA, 15 U.S.C. § 6a (2000) (internal quotation marks omitted)).

114. *Id.* at 2371 (citing FTAIA, 15 U.S.C. § 6a (2000)).

115. *Id.* at 2366, 2372.

116. The Court held that had U.S. purchasers suffered the same injury from the domestic injury, those purchasers would have standing. *Id.* at 2363.

117. *Empagran*, 124 S. Ct. at 2366.

118. *Id.* at 2369.

119. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1986)).

120. *Id.* (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting)). “[Prescriptive comity] cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.” *Id.* This rule seeks to foster harmony in a world where nations’ laws often infringe on each other. *Id.*

121. *Empagran*, 124 S. Ct. at 2366–67 (citing *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443–44 (2d Cir. 1945)).

122. *Id.* at 2367.

the effects of foreign misconduct lack the necessary justification for interfering with the laws of other countries.¹²³

As to the second point, the Court cited portions of legislative history to support its argument that Congress intended to clarify and limit, but not expand the scope of the Sherman Act.¹²⁴ Beyond that, the Court's analysis here was very limited. Additionally, the Court declined to discuss the issue raised in *United Phosphorus*.

III. SUBJECT OPINION: *UNITED PHOSPHORUS, LTD.* v. *ANGUS CHEMICAL CO.*

Prior to the Supreme Court's decision in *Empagran*, the Seventh Circuit in *United Phosphorus* held that the FTAIA's two-prong test pertained to a court's subject matter jurisdiction and was not an element of the claim or the plaintiff's cause of action.¹²⁵ This holding was buttressed by appeals to international comity—an apt position in light of *Empagran*.¹²⁶ Notwithstanding that both the *Empagran* and *United Phosphorus* analyses shared an emphasis on international comity, the *United Phosphorus* dissent raised points that undermined the majority's logical framework despite its timely policy analysis.¹²⁷

A. *Facts and Procedural Background*

United Phosphorus “stemmed from a prior trade-secret litigation involving several of the parties.”¹²⁸ In the beginning of the 1990s, the plaintiffs, who were from India, decided to acquire the technology to make 2-Amino-1 Butanol (AB) and 1-Nitro-Propane (1-NP).¹²⁹ AB

123. *Id.* The Court supported this argument with the following rhetorical question: “Why should American laws supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?” *Id.*

124. *Id.* at 2369.

125. See generally *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003).

126. *Empagran*, 124 S. Ct. at 2363.

127. *United Phosphorus*, 322 F.3d at 953–54 (Wood, J., dissenting).

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

129. India had the “greatest incident of tuberculosis in the world . . . accounting for twenty-five percent of new cases.” *Id.* at 945 (internal quotation marks omitted). The Court summarized the chemicals and parties as follows:

2-Amino-1 Butanol (AB) is the key ingredient of Ethambutol, and 1-Nitro-Propane (1-NP) is the raw material from which AB is made. To make Ethambutol, defendant Lupin uses AB, which it buys from defendant Chemie, currently the world’s only manufacturer of AB. Chemie is a German subsidiary, wholly owned by defendant Angus. The AB is manufactured in Germany. Angus manufactures 1-NP at a plant in Louisiana and is the world’s only manufacturer of 1-NP.

Id.

is the primary ingredient of Ethambutol, which is a pharmaceutical that treats tuberculosis.¹³⁰ AB is made from 1-NP, the raw ingredient.¹³¹ The plaintiffs sought out Dr. John Miller, who worked at Angus.¹³² Upon discovering this, Angus sued Miller and the Indian entities in Illinois state court, “seeking to enjoin Miller from misappropriating its trade secrets.”¹³³ Angus “voluntarily dismissed the suit” when the state court ordered it to disclose its technology.¹³⁴ The defendants in state court claimed that “but for the Illinois [state court] action” the defendants “would have sold AB for profit.”¹³⁵ The plaintiffs alleged that Angus’s state claim was anticompetitive in violation of the Sherman Act.¹³⁶

The District Court for the Northern District of Illinois dismissed the plaintiffs’ claim for lack of subject matter jurisdiction under the FTAIA.¹³⁷ The Seventh Circuit, sitting en banc, decided by a five justice majority to affirm the district court’s order.¹³⁸

B. Majority Analysis

In recognizing the relevance of the second prong of the FTAIA,¹³⁹ the *United Phosphorus* majority framed its analysis in terms of whether the second prong “goes to the court’s subject matter jurisdiction” or whether the requirement is “an element of the claim.”¹⁴⁰ The court recognized that if the effects test related to the court’s subject matter jurisdiction, the court would discuss the case under Federal Rule of Civil Procedure 12(b)(1), “which provides for dismissal of an action for lack of subject matter jurisdiction.”¹⁴¹ If the court could not read subject matter jurisdiction from “the face of the complaint,” it must analyze the motion to dismiss under Rule 12(b)(1), by assuming “that the allegations in the complaint are true.”¹⁴²

130. *Id.*

131. *Id.*

132. *United Phosphorus*, 322 F.3d at 945.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 131 F. Supp. 2d 1003 (N.D. Ill. 2001).

138. *United Phosphorus*, 322 F.3d at 953.

139. The second prong of the FTAIA requires “that the conduct must have ‘a direct, substantial, and reasonably foreseeable effect’ on trade or commerce within the United States, rather than just on foreign commerce.” *Id.* at 945–46 (quoting 15 U.S.C. § 6a (2000)).

140. *Id.* at 946.

141. *Id.* The court reminded the reader that “[t]he burden of proof on a 12(b)(1) issue is on the party asserting jurisdiction.” *Id.*; see FED. R. CIV. P. 12(b)(1).

142. *United Phosphorus*, 322 F.3d at 946.

In contrast, “[i]f the requirement for a substantial effect on [U.S.] commerce were an element of the claim,” then the court would analyze the issue under summary judgment standards, construing all disputed facts against the movant.¹⁴³ The moving party in a summary judgment motion has a higher threshold to meet because it must show no effects on U.S. commerce while construing the facts against its case.¹⁴⁴ The moving party in a dismissal motion must only demonstrate through “affidavits and other material” that there are no effects on U.S. commerce.¹⁴⁵

Although the *United Phosphorus* majority recognized that the Sherman Act extends to trade with foreign nations, the court first articulated its position by emphasizing historical “concern about overreaching under our antitrust laws.”¹⁴⁶ The court acknowledged that in *Alcoa* the Second Circuit, then sitting as a court of last resort for certain antitrust cases, abandoned the strict territorial approach of *American Banana*.¹⁴⁷ Yet, the *United Phosphorus* majority emphasized that the *Alcoa* court chose “not [to] read the words of Congress without regard to the limitations customarily observed by nations upon the exercise of their powers.”¹⁴⁸

The *United Phosphorus* majority understood *Hartford* to interpret the FTAIA as referring to the court’s subject matter jurisdiction.¹⁴⁹ Nonetheless, the court mostly discussed Justice Scalia’s *Hartford* dissent, in which he argued that the FTAIA did not address subject matter jurisdiction.¹⁵⁰ The court understood Scalia’s argument that jurisdiction and the Sherman Act’s reach over extraterritorial conduct were two distinct questions.¹⁵¹ First, Congress clearly had the “legisla-

143. *Id.* The court added that the analysis changes if the issue is one of jurisdiction or merits, and “the procedure employed will dictate the outcome.” *Id.*

144. See FED. R. CIV. P. 56.

145. *Id.*

146. *United Phosphorus*, 322 F.3d at 946.

147. *Id.* at 947.

148. *Id.* (quoting *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945)) (internal quotation marks omitted). In interpreting *Alcoa*, the *United Phosphorus* majority wrote: “Rejected was the notion that Congress intended to punish all whom its courts can catch, for conduct which has no consequences within the United States.” *Id.* (citation omitted).

149. *Id.* at 948. The majority wrote: “[I]t seems reasonable to conclude, especially in light of the footnotes, that what the *Hartford* Court refers to is the court’s subject-matter jurisdiction for Sherman Act claims.” *Id.*

150. *United Phosphorus*, 322 F.3d at 947.

151. *Id.* The court continued:

[Scalia’s] conclusion was that the district court had subject-matter jurisdiction, simply because the Sherman Act claim was not frivolous and 28 U.S.C. § 1331 gives the district court jurisdiction over cases “arising under” federal statutes. The second question, he said, “has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on the regulatory power over the challenged conduct.”

tive jurisdiction” to pass the Sherman Act under the Commerce Clause.¹⁵² But the application of international comity principles is relevant to the district court’s analysis in interpreting the reach of the FTAIA in a given case. The *United Phosphorus* majority claimed that “the majority in *Hartford* carried out th[is] debate with Justice Scalia in the footnotes.”¹⁵³ The Sherman Act was a “prime example of the simultaneous exercise of prescriptive jurisdiction and the grant of subject matter jurisdiction.”¹⁵⁴ The *United Phosphorus* majority concluded, based on the footnotes in the *Hartford* opinion, that the *Hartford* majority referred to “the court’s subject matter jurisdiction” for Sherman Act claims.¹⁵⁵ Yet, the *United Phosphorus* majority recognized that the argument relying on *Hartford* was tenuous: “One could argue that in *Hartford* it is not entirely clear what the phrase ‘Sherman Act jurisdiction’ means . . . [for] ‘[j]urisdiction is a word of many, too many, meanings.’”¹⁵⁶

The *United Phosphorus* majority also made a number of side arguments.¹⁵⁷ The court supported its “subject matter jurisdiction approach” by referring to other Sherman Act, non-FTAIA claims.¹⁵⁸ Highlighting examples of how federal courts have split over the same issue in the context of other federal statutes, the court noted that “[t]he jurisdiction-versus-element-of-the-claim debate seems alive and well.”¹⁵⁹ The court also argued

Id. (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting)).

152. *Id.*

153. *Id.*

154. *Id.* (quoting *Hartford*, 509 U.S. at 796 n.22) (internal quotation marks omitted).

155. *United Phosphorus*, 322 F.3d at 947.

156. *Id.* at 948 (citation omitted).

157. *Id.* at 948–50.

158. *Id.* at 948 (internal quotation marks omitted). The court wrote: “[D]espite the breadth of the Sherman Act prohibitions, jurisdiction may not be invoked under the statute unless the relevant aspect of interstate commerce is identified.” *Id.* (quoting *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980) (internal quotation marks omitted)). In addressing “whether the interstate commerce requirement of antitrust jurisdiction is satisfied by allegations . . . the conspiracy at issue [had] a sufficient nexus with interstate commerce to support federal jurisdiction.” *Id.* (quoting *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991) (internal quotation marks omitted)).

159. *United Phosphorus*, 322 F.3d at 949. The court in *Gwaltney v. Chesapeake Bay Foundation* found that the plaintiff satisfied subject-matter jurisdiction by making a “good faith allegation.” *Id.* at 948 (citing *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49 (1987)). In that case, Scalia argued in dissent that “subject-matter jurisdiction can be called into question either by challenging the sufficiency of the allegation or by challenging the accuracy of the jurisdictional facts alleged.” *Id.* at 949 (citation omitted). Scalia in *Steel Co.* later dismissed *Gwaltney* as a “drive-by” jurisdictional ruling. *Id.* Moreover, in *Sharpe v. Jefferson Distributing Co.*, the Seventh Circuit found under Title VII that the “definition of employer ‘as a person . . . who has fifteen or more employees’ was an element of the claim, not a matter of the subject matter jurisdiction of the court . . . [because] a non-frivolous claim under federal law [is sufficient]; no

that commentators have discussed the “FTAIA in terms of jurisdiction.”¹⁶⁰

The *United Phosphorus* majority also discussed the Seventh Circuit’s reach into extraterritorial application of federal antitrust law prior to enactment of the FTAIA.¹⁶¹ The majority cited *in re Uranium Antitrust Litigation*, in which the Seventh Circuit, responding to comity concerns raised by various foreign governments, analyzed the jurisdictional issue as a two-pronged test: “(1) [D]oes subject matter jurisdiction exist; and (2) if so, should it be exercised?”¹⁶² Moreover, the court recognized that a bombing’s effect on interstate commerce is an element of the claim in a federal bombing statute.¹⁶³ The court noted that “sometimes a reference to ‘jurisdiction’ in statutes is merely . . . a shorthand way of referring to an element of the claim.”¹⁶⁴ But the court dismissed such “[c]riminal statutes . . . [as] far less than compelling analogies to FTAIA.”¹⁶⁵

The *United Phosphorus* majority also argued that despite the U.S. Supreme Court’s decision in *Steel Co. v. Citizens for a Better Environment*,¹⁶⁶ appellate courts “continue[d] to treat FTAIA as jurisdictional.”¹⁶⁷ For example, the court cited the D.C. Circuit opinion in *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*,¹⁶⁸ finding that once a

more is necessary for subject matter jurisdiction.” *Id.* (quoting *Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676, 677 (7th Cir. 1998)).

160. *Id.* The court provided an example: “Regarding jurisdiction over conduct involving foreign commerce, the guidelines for the agencies state [that the] . . . ‘jurisdictional limits of the Sherman Act and the FTC Act are delineated in the FTAIA.’” *United Phosphorus*, 322 F.3d at 949 (quoting *Antitrust, Unfairness, Deception Policies and Guidelines*, reprinted in 4 TRADE REG. REP. (CCH) § 13.107).

161. *See id.* at 949–50.

162. *Id.* at 950 (citing *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980)). The court added that in that case, it had considered “issues raised by the governments of Australia, Canada, South Africa, and Great Britain as to whether the district court could proceed.” *Id.* at 949.

163. *Id.* at 949–50 (referring to *United States v. Martin*, 147 F.3d 529 (7th Cir. 1998), which involved 18 U.S.C. § 844(I)). The court continued: “We rejected that claim, saying that although the requirement is often referred to as jurisdictional, it is ‘simply one of the essential elements of § 844(I).’” *Id.* at 950 (citation omitted).

164. *United Phosphorus*, 322 F.3d at 950. The court even noted the “purity of an argument” that federal courts have jurisdiction to hear Sherman Act claims under 28 U.S.C. § 1331 for cases “arising under the Constitution, laws, or treaties of the United States.” *Id.* Any requirement of an effect on commerce would then be an element. *Id.* To such point, the court responded “that nothing is quite that simple.” *Id.*

165. *Id.*

166. 523 U.S. 83 (1998).

167. *United Phosphorus*, 322 F.3d at 950.

168. 315 F.3d 338 (D.C. Cir. 2003).

court finds the requisite wrongful conduct and accompanying effects on U.S. commerce, “subject matter jurisdiction is proper.”¹⁶⁹

The *United Phosphorus* majority argued that by passing the FTAIA, Congress intended to “jurisdiction[ally] strip[]” judicial oversight of antitrust matters arising abroad.¹⁷⁰ According to the court, fulfilling the requirements of the FTAIA would be “the predicate for antitrust jurisdiction.”¹⁷¹

The final argument of the *United Phosphorus* majority rested on policy grounds.¹⁷² It argued that to accord foreign governments comity, U.S. courts should “tread softly in this area.”¹⁷³ The *United Phosphorus* majority eventually concluded that the district court’s findings were not “clearly erroneous” and found subject matter jurisdiction absent.¹⁷⁴

In sum, *United Phosphorus* restricted application of the Sherman Act to claims of extraterritorial origin unless the plaintiff could show, beyond mere allegations, the following: (1) The defendant’s wrongful conduct had “a direct, substantial, and reasonably foreseeable effect” on U.S. commerce;¹⁷⁵ and (2) the plaintiff’s claim of injury was based on such effects.¹⁷⁶ Requiring these showings will reduce the number of claims heard in U.S. courts.

C. Dissenting Opinion

The dissent noted that although the various authorities cited by the majority referred to “jurisdiction,” the issue, as framed by the majority, “ha[d] also never been analyzed thoroughly by any other

169. *United Phosphorus*, 322 F.3d at 951 (quoting *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 340 (D.C. Cir. 2003)) (internal quotation marks omitted). The court added that it “cannot dismiss these cases as ‘drive-by’ jurisdictional rulings.” *Id.* at 951.

170. *Id.* at 951–52.

171. *Id.* at 952 (citation omitted). Furthermore, the court added that Congress stated: “This 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.” *Id.*

172. *Id.*

173. *United Phosphorus*, 322 F.3d at 952.

174. *Id.* The court wrote: “The [district] court found that there was virtually no evidence that the plaintiffs would have made any sales in the United States.” *Id.* While the plaintiffs may have had intentions to engage in commerce in the United States, the district court found that the plaintiffs “had no actual plans to sell AB in this country and that there would have been no significant AB sales opportunities for Plaintiffs in this country even if they had tried to sell AB here.” *Id.* at 953 (quoting *United Phosphorus, Ltd. v. Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1012 (N.D. Ill. 2001)).

175. *Id.* at 945–46.

176. *Id.* at 949.

court.”¹⁷⁷ The dissent made four other points in its argument: (1) The FTAIA’s language supports an element of the claim approach; (2) the court’s subject matter jurisdiction methodology conflicts with the U.S. Supreme Court’s analysis in *Steel Co.*; (3) “procedural consequences” of the majority’s characterization would offend the policies of the FTAIA and U.S. antitrust law in general; and (4) the subject matter jurisdiction approach ignores the history of applying U.S. antitrust law to foreign activity.¹⁷⁸

1. *The Language of the FTAIA Supports the Element of the Claim Approach*

According to the dissent, the plain language of the FTAIA supports a reading that satisfying its two prongs is a matter the plaintiff must ultimately prove at trial.¹⁷⁹ First, the dissent mentioned that nowhere does the statute reference an intent “to strip federal courts of their competence to hear and decide antitrust cases with a foreign element.”¹⁸⁰ Second, “jurisdiction-stripping rules must be expressed clearly.”¹⁸¹ The FTAIA’s provision limiting applicability does not mean that “courts do not have fundamental competence to consider defined categories of cases.”¹⁸²

2. *The Court’s Subject Matter Jurisdiction Methodology Conflicts with the U.S. Supreme Court’s Analysis in Steel Co.*

The U.S. Supreme Court held in *Steel Co.*¹⁸³ that the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), authorizing private suits if certain factors were met, “did not affect the district court’s subject matter jurisdiction.”¹⁸⁴ Although the statute used the word “jurisdiction,” that factor was not determinative of the Court’s holding.¹⁸⁵ Further, the Court “reaffirmed the long-standing rule that power to adjudicate a case does not depend on whether in the final analysis the plaintiff has a valid claim.”¹⁸⁶

177. *United Phosphorus*, 322 F.3d at 953 (Wood, J., dissenting). She continued: “But neither the majority nor those earlier opinions have distinguished carefully between judicial and legislative jurisdiction—or, to put it differently, between jurisdiction to decide a case and jurisdiction to prescribe a rule of law.” *Id.* (Wood, J., dissenting).

178. *Id.* at 953–54 (Wood, J., dissenting).

179. *Id.* at 954 (Wood, J., dissenting).

180. *Id.* (Wood, J., dissenting).

181. *Id.* (Wood, J., dissenting).

182. *United Phosphorus*, 322 F.3d at 955 (Wood, J., dissenting).

183. *Id.* (Wood, J., dissenting).

184. *Id.* (Wood, J., dissenting).

185. *Id.* (Wood, J., dissenting).

186. *Id.* (Wood, J., dissenting).

The *United Phosphorus* dissent observed that along the spectrum of “extraterritorial application of U.S. law,” from “no application”¹⁸⁷ to “virtually unlimited [application],”¹⁸⁸ the FTAIA falls in the middle with its “effects” test establishing an element of the claim in merit analysis.¹⁸⁹ While rejecting the *United Phosphorus* majority’s interpretation of the *Hartford* majority opinion,¹⁹⁰ the *United Phosphorus* dissent noted that Justice Scalia’s dissent in *Hartford* acquired majority authority in *Steel Co.*, and later in *United States v. Cotton*.¹⁹¹ Other case law, including those interpreting criminal statutes, held that effects-on-commerce statutes did not affect the court’s subject matter jurisdiction.¹⁹²

3. *Procedural Consequences of the Majority Characterization Would Lead to Perverse Results Regarding the Policies of U.S. Antitrust Law*

Although review of subject matter jurisdiction is usually straightforward,¹⁹³ inquiries into the “effects” on domestic commerce or U.S. import commerce “threaten to become a preliminary trial on the merits.”¹⁹⁴ Effects on commerce issues and the merits will often be

187. *Id.* (Wood, J., dissenting) (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (holding that Title VII of the Civil Rights Act of 1964 has no application beyond U.S. borders)).

188. *United Phosphorus*, 322 F.3d at 955 (Wood, J., dissenting) (citing 18 U.S.C. § 2333 (providing virtually unlimited application for a private right of action for civil damages by any U.S. national injured “by reason of an act of international terrorism,” regardless of the location of the act or the defendant’s country of origin)).

189. *Id.* at 955 (Wood, J., dissenting).

190. *Id.* at 956 (Wood, J., dissenting). Judge Wood argued that the *Hartford* majority thought it unnecessary to confront the FTAIA’s impact on the case and thus refused to respond to Justice Scalia’s element versus jurisdiction arguments. *Id.* (Wood, J., dissenting).

191. *United Phosphorus*, 322 F.3d at 956 (Wood, J., dissenting). In *Hartford*, Scalia, writing for the dissent, reasoned: “[a] cause of action under our law was asserted here, and the court had the power to determine whether it was or was not well founded in law and in fact.” *Id.* (Wood, J., dissenting) (emphasis added) (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812 (1993) (Scalia, J., dissenting)). Further, the *United Phosphorus* dissent noted that “[this] legal principle . . . [that assertions establish subject matter jurisdiction] was later adopted by a majority of the Court in *Steel Co.* and then later in *United States v. Cotton*.” *Id.* at 956 (Wood, J., dissenting); see *United States v. Cotton*, 535 U.S. 625 (2002).

192. See *United Phosphorus*, 322 F.3d at 956 (Wood, J., dissenting).

193. Courts can usually answer whether a cause of action arises pursuant to 28 U.S.C. § 1331 by reading the complaint. *Id.* at 957 (Wood, J., dissenting).

194. *Id.* (Wood, J., dissenting). For example, in *Timberlane*, the complaint was filed in 1973, but due to a series of appeals over whether the court had proper subject matter jurisdiction, an outcome did not ensue until 1985. *Id.* (Wood, J., dissenting) (citing *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (1976)). Thus, twelve years later the court resolved the “jurisdictional” issue. *Id.* (Wood, J., dissenting).

closely tied calls for a more complete analysis under the “element of the claim” approach.¹⁹⁵

Another negative procedural effect of the subject matter jurisdiction approach is that this statutory interpretation gives the defendant in a lawsuit the chance to raise the lack of subject matter jurisdiction argument at any time.¹⁹⁶ This would give the losing defendant an opportunity to “revisit the complex question” before the U.S. Supreme Court regardless of whether the defendant preserved his objection at the district court or appellate court stage.¹⁹⁷ Even if the parties were willing to stipulate the findings to further resolution of the case, the Court’s *sua sponte* duty to raise the issue might cause complications.¹⁹⁸

Another negative outcome¹⁹⁹ of the subject matter jurisdiction approach is its effect on appellate review.²⁰⁰ If district courts must resolve jurisdictional issues in advance, then courts of appeals will be required to give such findings deferential review.²⁰¹ This will tie the hands of appellate courts in considering the delicate subject of international comity better left to high courts than a solitary judge.²⁰²

4. *The Subject Matter Jurisdiction Approach Ignores the History of Applying U.S. Antitrust Law to Foreign Activity*

In reviewing case law from the beginning of the twentieth century, the court noted that in response to the *Alcoa* decision, scholars have addressed the question of how prescriptive jurisdictional lines should be drawn among nations with respect to international law.²⁰³ The present result of such efforts appears in the *Restatement (Third) of For-*

195. *Id.* (Wood, J., dissenting).

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

197. *Id.* at 958 (Wood, J., dissenting).

198. *Id.* (Wood, J., dissenting).

199. The court mentioned a separate concern of removal: “If Congress indeed meant to strip the federal courts of subject matter jurisdiction over foreign commerce antitrust cases, then those cases revert to state courts.” *Id.* (Wood, J., dissenting).

200. *Id.* (Wood, J., dissenting).

201. *Id.* at 958–59 (Wood, J., dissenting).

202. *United Phosphorus*, 322 F.3d at 958 (Wood, J., dissenting). The dissent lost its patience with the majority’s rationale:

The subject matter jurisdiction characterization makes no sense, either from the point of view of the policies being furthered by the FTAIA, or from the standpoint of judicial administration. We should not adopt a perverse decision just because parties have chosen to file motions under Rule 12(b)(1) instead of Rule 12(b)(6) or Rule 56, or because courts have unquestioningly adopted the diction of “subject matter jurisdiction” without careful examination.

Id. at 959 (Wood, J., dissenting).

203. *See id.* at 960 (Wood, J., dissenting).

eign Relations Law of the United States.²⁰⁴ The *Restatement* recognizes three types of jurisdiction: “[J]urisdiction to prescribe,” “jurisdiction to adjudicate,” and “jurisdiction to enforce.”²⁰⁵ With respect to subject matter jurisdiction, the *Restatement* provides that “[j]urisdiction to prescribe with respect to transnational activity depends not on a particular link . . . but on a concept of reasonableness based on a number of factors to be considered and evaluated.”²⁰⁶

While some appellate courts have granted dismissal motions under lack of subject matter jurisdiction,²⁰⁷ more often they have discussed the merits of the plaintiffs’ FTAIA claims “rather than dwelling on the precise procedural manner” of the plaintiff’s claim.²⁰⁸ Unlike the *United Phosphorus* majority, no other appellate court has focused on the “jurisdiction versus element” analysis.²⁰⁹

5. *Concluding Notes of the Dissent*

The majority holding might have a significant deterrent effect on the DOJ’s antitrust prosecutions in the Seventh Circuit.²¹⁰ Ninety percent of fines obtained in criminal antitrust matters come from international cartel cases.²¹¹ Moreover, allowing a criminal defendant to raise lack of subject matter jurisdiction continuously on appeal would further impede the DOJ’s efforts.²¹² The dissent also cautioned that the majority approach would require courts to find subject matter

204. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, PART IV (1987).

205. *United Phosphorus*, 322 F.3d at 960–61 (Wood, J., dissenting) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, PART IV, § 401 (1987)).

206. *Id.* at 961 (Wood, J., dissenting) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, PART IV, commentary to § 401 (1987)). Section 415, dealing with jurisdiction over anticompetitive activities, permits jurisdiction to prescribe over activities occurring outside the United States “if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.” *Id.* at 961 n.2 (Wood, J., dissenting).

207. *See* *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), *vacated* by *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004); *Kruman v. Christie’s Int’l PLC*, 284 F.2d 384 (2d Cir. 2002); *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001).

208. *United Phosphorus*, 322 F.3d at 962 (Wood, J., dissenting).

209. *Id.* at 962 (Wood, J., dissenting). The dissent added:

It is this court, sitting *en banc*, that will be the first one to give a fully considered answer to the question whether the FTAIA strips the federal courts of their competence to hear certain cases that lack sufficient connections to the United States, or if it affirmatively imposes on a plaintiff the burden of proving as an element of its case the existence of those connections.

Id. at 964 (Wood, J., dissenting).

210. *Id.* (Wood, J., dissenting).

211. *Id.* (Wood, J., dissenting) (citation omitted).

212. *Id.* at 965 (Wood, J., dissenting).

jurisdiction in all cases interpreting federal statutes that contain effects on commerce elements.²¹³ This result “has the potential of upsetting far more than the small set of cases that present foreign trade antitrust issues.”²¹⁴

IV. ANALYSIS OF THE MAJORITY AND DISSENTS’ ARGUMENTS WITH RESPECT TO THE TEXT OF THE FTAIA, JUDICIAL PRECEDENT, AND LEGISLATIVE HISTORY

In debating whether the FTAIA created an element of the plaintiff’s claim or established a prerequisite to subject matter jurisdiction over actions arising under the Sherman Act, the *United Phosphorus* majority and dissent argue past each other.²¹⁵ This analysis attempts to shape their arguments into a logical framework and discusses the merits of both sides’ contentions. First, this section analyzes the text of the Sherman Act and the debate about whether the majority or dissent presents a stronger argument. Second, this section discusses the key Supreme Court cases cited by both opinions and pertaining to the issue of subject matter jurisdiction versus element of the claim. In particular, this section discusses whether the *United Phosphorus* majority properly applies the policy of international comity in light of *Empagran*. Third, this section discusses which of the opinions advances a stronger interpretation in light of the legislative history and the textual interpretation of the FTAIA, largely arguing against the majority’s interpretation of the FTAIA.

A. Textual Analysis of the FTAIA

In *Escondido Mutual Water Co. v. La Jolla Band of Missions Indians*, the Supreme Court held that “‘absent a clearly expressed legislative intention to the contrary, statutory language must ordinarily be regarded as conclusive.’”²¹⁶ Following this rationale, the *United Phosphorus* dissent persuasively argued, “One will search in vain [in the FTAIA] for any hint that Congress was attempting to strip federal courts of their competence to hear and decide antitrust cases with a

213. *United Phosphorus*, 322 F.3d at 965 (Wood, J., dissenting). “If effect-on-commerce rules are truly jurisdictional, then they are jurisdictional for every statute that contains commerce elements. . . . The majority’s approach therefore has the potential of upsetting far more than the small set of cases that present foreign trade antitrust issues.” *Id.* (Wood, J., dissenting).

214. *Id.* (Wood, J., dissenting).

215. The *United Phosphorus* majority opinion lacks a clear structure whereas the dissent is based on four points of law and policy. This analysis will discuss the merits of both sides’ contentions on three points of law and policy.

216. See *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984) (quoting *North Dakota v. United States*, 460 U.S. 308, 312 (1983)).

foreign element.”²¹⁷ In fact, the majority recognized the “purity of an argument that [the FTAIA] provides federal question jurisdiction for cases ‘arising under the Constitution, laws, or treaties of the United States’” which would thus make the FTAIA’s “effects” test an element of the claim.²¹⁸ But the majority responded “that nothing is quite that simple,” providing support only for the exception that frivolous suits do not give rise to jurisdiction.²¹⁹ Interestingly, a reading of Scalia’s opinion in *Steel Co.*²²⁰ suggests that this is the *only* exception where a claim arising under the Constitution, a statute, or a treaty would not give rise to subject matter jurisdiction (assuming the statute itself does not provide otherwise).²²¹

The dissent also noted that although there is precedent that treats statutes with jurisdictional language as nonjurisdictional, there are no examples of the converse—“treating something as jurisdictional that is phrased in terms of the scope of application of a statute.”²²² According to the dissent, the Seventh Circuit has held before that statutes that strip courts of their jurisdiction “must be expressed clearly.”²²³ Further, the FTAIA is anything but a paradigm of lucidity.²²⁴

217. *United Phosphorus*, 322 F.3d at 954 (Wood, J., dissenting).

218. *Id.* at 950 (Wood, J., dissenting) (quoting 28 U.S.C. § 1331 (2000)).

219. *Id.* (Wood, J., dissenting).

220. *See infra* Part IV.B.1.

221. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998).

222. *United Phosphorus*, 322 F.3d at 954 (Wood, J., dissenting).

223. *Id.* (Wood, J., dissenting). The dissent wrote:

In *Czerkies v. U.S. Department of Labor*, we held that the door-closing statute prohibiting judicial review of certain federal workers’ compensation claims should not be construed to bar review of constitutional claims in the absence of express language to that effect. The same approach is appropriate for other kinds of jurisdiction-stripping statutes.

Id. (Wood, J., dissenting) (citations omitted). The dissent added: “Naturally, when Congress does speak clearly, as it did in the statute that bars judicial review of certain immigration decisions, . . . the courts do and should recognize that their competence to act has been withdrawn.” *Id.* (Wood, J., dissenting). The Court referred to *McBrearty v. Perryman*, 212 F.3d 985 (7th Cir. 2000), where the Court dismissed the suit trying to avoid § 1252(a)(2)(B), providing that “notwithstanding any other provision of law, no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section 1255.” *Id.* at 954–55 (Wood, J., dissenting). The dissent noted that “[l]anguage 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.” *Id.* (Wood, J., dissenting).

224. One commentator argues that “[a]n attempt to clarify the intended scope of the anti-trust laws with regard to foreign trade, the FTAIA must be viewed as a failure.” *See Note, supra* note 3, at 2136.

B. Precedential Treatment: Whether Case Law Supports the Majority's Subject Matter Jurisdiction Approach or the Element of the Claim Approach

This subsection details arguments that undermine the *United Phosphorus* majority's approach. First and foremost, nonfrivolous allegations that wrongful conduct falls within the court's purview satisfies subject matter jurisdiction unless the controlling law states otherwise. Second, the *United Phosphorus* opinion incorrectly applies the Supreme Court's understanding of prescriptive comity and its effect on a court's decision to affirm or decline subject matter jurisdiction. Third, pre-FTAIA claims are irrelevant.

1. Supreme Court Precedent Asserts Jurisdiction Based on Nonfrivolous Allegations Unless the Applicable Statute Explicitly States Otherwise

Supreme Court precedent requires that absent explicitly controlling language to the contrary, nonfrivolous allegations arising under federal law will satisfy the plaintiff's burden in establishing the court's subject matter jurisdiction.²²⁵ For instance, in *Steel Co.*, the Court held that the EPCRA, which authorizes private suits depending on whether the plaintiffs satisfied certain elements, did not need to be satisfied before a court finds subject matter jurisdiction proper.²²⁶ Justice Scalia stated, "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case."²²⁷ Citing *Bell v. Hood*, the Court stated that "jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."²²⁸ A court has jurisdiction if "the Constitution and the laws of the United States are given one construction and [jurisdiction] will be defeated if they are given another," unless the plaintiff's claim appears "immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."²²⁹ Alternatively, a court should deny jurisdiction where the claim is "so insubstantial, implausible, [and] foreclosed by prior decisions of this

225. *Steel Co.*, 523 U.S. at 89.

226. *Id.* at 109–10.

227. *Id.* at 89.

228. *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

229. *Id.*

Court, or otherwise completely devoid of merit as not to involve a federal controversy.”²³⁰

Earlier in his *Hartford* dissent, Justice Scalia put forth the same principles in more detail.²³¹ Scalia’s analysis was two-pronged: (1) “[W]hether the district court had [subject matter] jurisdiction over the plaintiffs’ claims; and (2) “whether the Sherman Act reach[ed] the extraterritorial conduct alleged.”²³² Regarding the first prong, he found that the district court had subject matter jurisdiction under the FTAIA because the plaintiffs had asserted “nonfrivolous claims under the Sherman Act, and 28 U.S.C. § 1331 vest[ed] district courts with subject-matter jurisdiction over cases ‘arising under’ federal statutes.”²³³ Regarding the second prong, which pertained to the extraterritorial scope of the Sherman Act, he would have held that it did not affect a district court’s jurisdiction.²³⁴ Rather, this issue was one of “substantive law” regarding “whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct.”²³⁵ If a plaintiff fails to establish a prima facie case a court does not reject the claim for lack of subject matter jurisdiction or “want of power to adjudicate.”²³⁶ Instead, the court “decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute.”²³⁷

The *Hartford* majority opinion further supports the argument that nonfrivolous allegations arising under federal law are sufficient for proper subject matter jurisdiction despite the opposing arguments of the *United Phosphorus* majority. The Seventh Circuit clearly relied on *Hartford*.²³⁸ The majority argued that *Hartford* endorsed the

230. *Steel Co.*, 523 U.S. at 89 (quoting *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 667 (1974)) (internal quotation marks omitted). The Supreme Court’s decision in *United States v. Cotton* expanded on its decision in *Steel Co.* Citing Justice Holmes, the Court wrote that “a district court ‘has jurisdiction of all crimes cognizable under the authority of the United States . . . [and] [t]he objection that the indictment does not charge a crime against the United States goes only to the *merits of the case.*” *United States v. Cotton*, 535 U.S. 625, 631 (2002) (emphasis added) (citing *Lamar v. United States*, 240 U.S. 60, 65 (1916)).

231. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812 (1993) (Scalia, J., dissenting).

232. *Id.* (Scalia, J., dissenting).

233. *Id.* (Scalia, J., dissenting).

234. *Id.* at 813 (Scalia, J., dissenting).

235. *Id.* (Scalia, J., dissenting) (citations omitted).

236. *Id.* (Scalia, J., dissenting) (citations omitted).

237. *Hartford*, 509 U.S. at 813 (Scalia, J., dissenting) (citations omitted).

238. As previously discussed in Part II, the plaintiffs in *Hartford* alleged that the defendant insurance companies conspired to restrict the availability and provisions of commercial general liability insurance in the United States, a claim subject to Sherman Act section 1 review. *Id.* at 770. The Court in *Hartford* found no congressional intent to restrict courts from exercising subject matter jurisdiction on grounds of international comity. *Id.* at 798. Assuming that a court

FTAIA as a prerequisite to finding Sherman Act subject matter jurisdiction.²³⁹ Language in the *Hartford* opinions, however, undermines the *United Phosphorus* majority. First, the *Hartford* Court recited the “well established”²⁴⁰ rule that “[the] Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”²⁴¹ In discussing the FTAIA, which Congress intended to limit subject matter jurisdiction over export transactions not affecting the American economy, the Court observed that “it is unclear how it might apply to the conduct *alleged* here.”²⁴² However, the *Hartford* majority decided not to address this issue.²⁴³ Nonetheless, it concluded, “Assuming that the FTAIA’s standard affects this litigation . . . the *conduct alleged* plainly meets its requirements.”²⁴⁴ The *Hartford* majority did not address the point

could decline jurisdiction over foreign conduct, international comity would not be an appropriate justification for refusing jurisdiction under the *Hartford* facts. *Id.*

Justice Scalia’s dissent did not address whether the FTAIA limited a court’s subject matter jurisdiction versus whether it established the elements a plaintiff must show to recover under the Sherman Act. However, Justice Scalia discussed *when* the court should consider international comity concerns in finding jurisdiction and disagreed with the *Hartford* majority. *Id.* The *Hartford* majority reacted as follows: “Justice S[calia] says that we put the cart before the horse . . . for he argues that [a conflict of laws allowing the Court to consider international comity concerns] may be apposite only after a determination that jurisdiction over the foreign acts is reasonable,” in other words, a comity analysis should follow and not be part of the jurisdiction analysis. *Id.* at 799 n.25. The *Hartford* majority simply dismissed the argument on the ground that a direct conflict of laws, which would preclude jurisdiction, was the sole issue before the court. *Hartford*, 509 U.S. at 799 n.25.

239. The Seventh Circuit wrote:

One could argue that in *Hartford* it is not entirely clear what the phrase “Sherman Act jurisdiction” means. After all, “jurisdiction is a word of many, too many meanings.” But it seems reasonable to conclude, especially in light of the footnotes, that what the *Hartford* Court refers to is the court’s subject-matter jurisdiction for Sherman Act claims.

United Phosphorus, 332 F.3d at 948 (citations omitted).

In opposition, the *United Phosphorus* dissent criticized this interpretation, arguing that for the majority in *Hartford* it was “unnecessary to address the FTAIA’s effect on the case at all, and thus it had no need to engage the dissenters on the ‘element’ versus ‘jurisdiction’ point.” *Id.* at 956 (Wood, J., dissenting) (citations omitted). Immediately following this passage, Judge Diane Wood added that Justice Scalia’s dissenting opinion against a “subject matter jurisdiction” approach became controlling law in *Steel Co.* and *United States v. Cotton*, 535 U.S. 625 (2002). *Id.* (Wood, J., dissenting).

240. *Hartford*, 509 U.S. at 796.

241. *Id.*

242. *Id.* at 797 n.23 (emphasis added).

243. *Id.* at 795. Interestingly, in *Metallgesellschaft*, an opinion written by Judge Diane Wood, the Seventh Circuit held that *allegations* of injury from anticompetitive conduct in the U.S. satisfied a finding of subject matter jurisdiction even under the *Den Norske* approach. See *Metallgesellschaft*, AG v. Sumitono Corp. of Am., 325 F.3d 836, 841 (7th Cir. 2003).

244. *Hartford*, 508 U.S. at 797 n.23 (emphasis added). Furthermore, in addressing Justice Scalia’s argument that comity considerations come into play in determining whether to assert jurisdiction, the majority in *Hartford* found that comity considerations came into play “only after

that the *United Phosphorus* majority elicited—that is, whether the FTAIA circumscribes a court’s subject matter jurisdiction. On the contrary, it appears the *Hartford* majority accepted the plaintiff’s allegations as true for purposes of finding subject matter jurisdiction. By relying on allegations to find subject matter jurisdiction, the majority suggested that the “effects” test is not a matter the district court must address before asserting jurisdiction but rather it is an issue addressed on the merits.

Further, while not speaking directly to the issue in *United Phosphorus*, the Supreme Court’s opinion in *Empagran* appears to rely on the plaintiff’s allegations in analyzing whether legislative history suggested finding subject matter jurisdiction under the facts of that case:

We recognize principles of comity provide Congress greater leeway when it seeks to control through legislation the actions of American companies . . . and some of the anticompetitive price-fixing conduct alleged here took place in America. But the higher foreign prices of which the foreign plaintiffs here complain are not the consequence of any domestic anticompetitive conduct that Congress sought to forbid.²⁴⁵

In response to *Steel Co.*, the *United Phosphorus* majority argued that appellate courts nonetheless “continue[d] to treat [the] FTAIA as jurisdictional.”²⁴⁶ Yet, not one of the cases cited demonstrated whether those other circuits considered the FTAIA’s “effects” test a jurisdictional prerequisite.²⁴⁷ Further, these cases may simply have referred to subject matter jurisdiction as “a shorthand way of referring to an element of the claim”—an admittedly frequent occurrence.²⁴⁸

a court has determined that the *acts complained of* are subject to Sherman Act jurisdiction.” *Id.* at 797 n.24 (emphasis added).

245. *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2367 (2004).

246. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 950 (7th Cir. 2003).

247. *Id.* The court wrote:

Whatever their differences in interpretation of the Act or the effect it has on prior judge-made law [*i.e.*, referring to *Steel Co.*], all have treated the issue as one of subject matter jurisdiction. See *Kruman* (review of the district court’s dismissal for lack of subject matter jurisdiction under the FTAIA); *Den Norske* . . . (finding that the district court properly dismissed antitrust claim for lack of subject matter jurisdiction under FTAIA); *Carpet Group* (finding that FTAIA did not divest the court of subject matter jurisdiction on the claims presented); *Filetech S.A.* (finding that the district court should have looked to the factual matters presented to it regarding whether subject matter jurisdiction existed under FTAIA).

Id. (citations omitted).

248. *Id.* While recognizing that such courts have referred to their “jurisdiction” as shorthand for referring to an element of the claim—undermining much of the Court’s precedential arguments—it nevertheless characterized interpretations of such “[c]riminal statutes . . . [as] far less than compelling analogies to [the] FTAIA.” *Id.* at 950 (referring to its decision in *United States v. Martin*, 147 F.3d 529 (7th Cir. 1998), which involved a federal bombing statute). Are federalism issues less important than international comity concerns? Both policies address whether

For instance, the court cited *Caribbean Broad Systems, Ltd. v. Cable & Wireless, PLC*, in which the court found “subject matter jurisdiction only to the extent that the complaint *alleges* that the challenged conduct has a ‘direct, substantial, and reasonably foreseeable effect’ on domestic commerce under the FTAIA.”²⁴⁹ These court holdings that allegations are sufficient to establish a court’s subject matter jurisdiction suggest that plaintiffs under the FTAIA need not establish subject matter jurisdiction apart from their prima facie case elements.²⁵⁰

The *United Phosphorus* majority later argued that “commentators” refer to the FTAIA as “jurisdictional.”²⁵¹ The court provided no basis to determine whether the commentators referred to the determination of jurisdiction through a prescreening, jurisdictional finding, or an analysis on the merits.²⁵² Even law review commentators have overlooked this point or failed to clarify it.²⁵³ For example, David Dzara argues that

Statoil [the plaintiff in *Den Norske*] was therefore obligated to satisfy the two-prong test in order for a U.S. federal court to have subject matter jurisdiction over its claim. The majority was correct in deciding that Statoil satisfied the first prong [effects test] because

courts should exercise jurisdiction where another sovereign’s jurisdiction may be offended. The court simply failed to explain itself. Moreover, U.S. antitrust laws carry *criminal* penalties. In fact, as the dissent poignantly noted, ninety percent of fines that the Department of Justice (DOJ) collects in antitrust matters are derived from international cartel cases. *See id.* at 964 (Wood, J., dissenting).

249. *United Phosphorus*, 322 F.3d at 951 (emphasis added) (quoting *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998)).

250. In discussing the “paramount importance of the statute’s effects requirement . . . [a]bsent allegations of domestic effects, courts have shown a staunch unwillingness to grant antitrust jurisdiction. The negative implication of this point is equally crucial—when foreign plaintiffs can show that anticompetitive conduct has domestic effects, U.S. courts must accept subject matter jurisdiction.” Note, *supra* note 3, at 2138. The author’s own language neither helps nor hurts our analysis. The author first writes that “allegations” are sufficient for jurisdiction, and then writes that the plaintiff must show such harm. *Id.* The author also cites *Caribbean Broadcasting System Ltd.*, which supports the latter interpretation. *Id.*

251. *United Phosphorus*, 322 F.3d at 949. The majority supports its position by referencing ABA articles, stating that “to establish subject matter jurisdiction under the FTAIA, a plaintiff must also show that ‘such effect’—*i.e.*, the direct, substantial, and reasonably foreseeable anticompetitive domestic effect—‘gives rise to’ a Sherman Act Claim.” *Id.* (citations omitted). Further, “the [DOJ] and the Federal Trade Commission [(FTC)] both consider the statute jurisdictional,” and the agencies’ guidelines provide, “[T]he jurisdictional limits of the Sherman Act and the FTC Act are delineated in the FTAIA.” *Id.* (citations omitted). In addition, the ABA International Antitrust Guidelines provide that “anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.” *Id.* (citations omitted).

252. *Id.* at 949.

253. *See Dzara, supra* note 9, at 438.

the defendants' conduct did have a direct, substantial, and reasonably foreseeable effect on domestic commerce.²⁵⁴

But the majority in *Den Norske* did not specifically make a finding as to the substance of the effects before ruling that the plaintiff satisfied the first prong. The court ruled instead on the complaint's allegations.²⁵⁵ The *Den Norske* court wrote,

We accept the contention that Statoil has *sufficiently alleged* that the defendants' conduct—that is, the agreement among heavy-lift service providers to divide territory, rig bids, and fix prices—had a direct, substantial, and reasonably foreseeable effect on the United States market. Statoil *alleges* that the conspiracy not only forced purchasers of heavy-lift services in the Gulf of Mexico to pay inflated prices, but also that the agreement compelled Americans to pay supra-competitive prices for oil. *These allegations are sufficient to satisfy the first requirement of the FTAIA.*²⁵⁶

Despite the United Phosphorus majority's insistence that "courts of appeals continue to treat [the] FTAIA as jurisdictional,"²⁵⁷ strong language indicates otherwise. In sum, there is clear language throughout Supreme Court and appellate court decisions that suggest that a plaintiff's nonfrivolous allegations arising under federal law properly invoke the court's subject matter jurisdiction.

2. *Empagran Suggests that Justice Scalia's Prescriptive Comity Approach in Hartford Should Control When Comity Is at Issue*

This section argues that the *United Phosphorus* majority misapplied how international comity should affect the court's decision regarding whether to find subject matter jurisdiction under Supreme Court principles of prescriptive comity. The doctrine of prescriptive comity, as it pertains to restricting the FTAIA's scope, has been discussed by two Court opinions: Recently in *Empagran* and a decade ago in Justice Scalia's *Hartford* dissent.²⁵⁸ *Empagran's* analysis is instructive, yet limited. Albeit not controlling, Scalia's dissent is more detailed and relevant to the issue of when comity concerns affect the assertion of a

254. *Id.*

255. *See Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 426–27 (5th Cir. 2001).

256. *Id.* (emphasis added).

257. *United Phosphorus*, 322 F.3d at 950.

258. As discussed in Part II, the *Hartford* majority required the plaintiff to allege a direct conflict of laws before the court would consider international comity considerations. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993). This approach, in light of *Empagran*, which considers comity concerns absent any allegation of any conflict, has arguably been overruled. *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2369 (2004).

court's subject matter jurisdiction.²⁵⁹ This approach first finds subject matter jurisdiction based on nonfrivolous allegations arising under federal law. Subsequently, the court should determine if it is proper to assert jurisdiction based on a number of factors—an analysis best left to expedient resolution prior to hearing the substance of the case.

a. *United Phosphorus* Emphasizes International Comity in Deciding that the FTAIA Limits a Court's Subject Matter Jurisdiction

Although phrased in terms of policy, the most forceful point of the *United Phosphorus* majority opinion was that U.S. antitrust law must consider the interests of the relevant foreign jurisdiction before exercising authority.²⁶⁰ In fact, the majority began and ended its analysis by appealing to international comity.²⁶¹ First, the court announced the rule from *American Banana* that “[d]espite the fact that, using language borrowed from the Foreign Commerce Clause of the Constitution, the Sherman Act itself prohibits agreements restraining ‘trade or commerce . . . with foreign nations,’ there has long been concern about overreaching under our antitrust laws.”²⁶² Subsequently, although many recognized the *Alcoa* “effects” test as abandoning international comity concerns inherent in the *American Banana* “strict territorial approach,”²⁶³ the majority nonetheless selectively quoted that case, providing for an interpretation that cut against previously held views.²⁶⁴

The court concluded that its subject matter jurisdiction rule better accorded with the policy of international comity. The court emphasized that “[t]he extraterritorial scope of our antitrust laws touches our relations with foreign governments, and so, it seems, it is prudent to tread softly in this area.”²⁶⁵ The *United Phosphorus* majority argued that if the “effects” test were resolved on the merits, the lawsuit

259. *Hartford*, 509 U.S. at 812 (Scalia, J., dissenting).

260. See *United Phosphorus*, 322 F.3d at 946, 952.

261. *Id.* at 947, 952.

262. *Id.* at 946 (quoting *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909)).

263. See *supra* Part II.B.

264. According to the *United Phosphorus* majority, the *Alcoa* Court “recognized that it should not read the words of Congress without regard to the limitations customarily observed by nations upon the exercise of their powers.” *United Phosphorus*, 322 F.3d at 947 (citation omitted). *Alcoa* created an “effects” test limiting Sherman Act jurisdiction to conduct that intended to affect and did affect U.S. commerce. *Id.* The *United Phosphorus* majority felt that “[r]ejected was the notion that Congress intended ‘to punish all whom its courts can catch, for conduct which has no consequences within the United States.’” *Id.* (quoting *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945)).

265. *Id.* at 952.

could potentially affect foreign markets in which “resolution of the issue could be delayed until late in the case.”²⁶⁶ The court failed to explain how the element of the claim approach might adversely impact foreign markets. If the “effects” prong is a matter of subject matter jurisdiction, the *United Phosphorus* majority argued that it would be disposed of sooner or settled upon a determination that the alleged anticompetitive conduct did not substantially affect U.S. markets.²⁶⁷ This argument is not necessarily accurate because subject matter jurisdiction could be raised at every stage of litigation.²⁶⁸ Thus, although the *United Phosphorus* majority supported the district court’s treatment of the “effects” prong as determining one of subject matter jurisdiction by explaining that its approach decreased the possibility of offending other nations’ economic policies, the majority failed to explain how the element of the claim approach might adversely impact foreign markets.²⁶⁹

b. *Empagran*’s Prescriptive Comity Analysis Incorporates International Comity Concerns into the Court’s Statutory Construction of the FTAIA

Empagran’s comity analysis incorporates elements from the *Restatement (Third) of Foreign Relations Law* and references Justice Scalia’s *Hartford* dissent.²⁷⁰ As discussed in Part II, *Empagran* now requires the plaintiff to allege a nexus between his claim and the negative effects on U.S. commerce from foreign anticompetitive activity.²⁷¹ The Court’s two-part reasoning relied on principles of statutory construction and “the FTAIA’s language and history.”²⁷² In regard to the first part, the Court recited the rule that ambiguous statutes be construed to avoid “unreasonable interference with the sovereign authority of other nations.”²⁷³ Reasonableness depends on a variety of factors, such as the relationship to the domestic country, harm to the domestic country’s interests, extent to which foreign nations regulate, and “the potential for conflict.”²⁷⁴ The Court’s desire “to avoid unreasonable interference with the sovereign authority of other nations” reflects in-

266. *Id.*

267. *Id.* Moreover, the judge must raise the issue *sua sponte* if the parties fail to do so. *United Phosphorus*, 322 F.3d at 952.

268. FED. R. CIV. P. 12(b). *United Phosphorus*, 322 F.3d at 946.

269. *United Phosphorus*, 322 F.3d at 946.

270. *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004).

271. *Id.* at 2365.

272. *Id.* at 2366, 2370.

273. *Id.*

274. *Id.* at 2367.

ternational law principles that the Court assumes Congress follows.²⁷⁵ The Court cited the *Restatement (Third) of Foreign Relations Law of the United States*,²⁷⁶ and Scalia's *Hartford* dissent as "identifying [a] rule of construction . . . derived from the principle of 'prescriptive comity.'"²⁷⁷ The doctrine of prescriptive comity cautions courts to assume that the legislature has accounted for foreign interests, while it condones interference with other nations' laws "[if those laws] reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused."²⁷⁸ The Court then held that the application of U.S. antitrust laws to foreign conduct that gave rise to the plaintiff's claim does not redress domestic injury and, therefore, does not provide reasonable grounds on which to interfere with foreign jurisdictions.²⁷⁹

c. Scalia's *Hartford* Dissent Discusses When and How Prescriptive Comity Affects the Court's Subject Matter Jurisdiction

While *Empagran*'s prescriptive comity analysis addressed a separate question, Scalia's *Hartford* dissent applied this approach to a dispositive subissue in *United Phosphorus*.²⁸⁰ Namely, does prescriptive comity preclude the application of U.S. antitrust law to foreign conduct *before* or *after* the court finds subject matter jurisdiction over the plaintiff's claims? Justice Scalia would first find jurisdiction based on a plaintiff's nonfrivolous claims.²⁸¹ Then Scalia would decide if international comity prevents the application of U.S. law by looking at congressional intent as to whether the application of U.S. law would be unreasonable.²⁸² Either way, international comity was irrelevant to whether subject matter jurisdiction was proper.²⁸³ Additionally, such a factor-by-factor analysis is an inappropriate method for determining subject matter jurisdiction.

Justice Scalia's analysis has been coined "not as one of the jurisdiction of the courts, but rather as the pre-*Timberlane* interpretation

275. *Id.* at 2366.

276. *Empagran*, 124 S. Ct. at 2366 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 403(1)-403(2) (1986)). The Court viewed these sections as "limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State." *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Hartford Fire Ins. Co. v. California*, 509 U.S. at 812 (Scalia, J., dissenting).

281. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998).

282. See *Hartford*, 509 U.S. at 813 (Scalia, J., dissenting); *supra* Part IV.B.1.

283. *Steel Co.*, 523 U.S. at 90; *Hartford*, 509 U.S. at 813 (Scalia, J., dissenting).

question of congressional intent.”²⁸⁴ First, Scalia discussed prescriptive jurisdiction as pertaining to the sovereign’s authority to apply its laws to people or activities, a question separate from “jurisdiction to adjudicate.”²⁸⁵ Under the former doctrine, once a statute is understood to apply extraterritorially, courts define the statute’s outer reach pursuant to the cannon²⁸⁶ of statutory interpretation announced in *Alcoa*: “[Courts] are not to read general words . . . [of the Sherman] Act[] without regard to the limitations customarily observed by nations upon the exercise of their powers, limitations which generally correspond to those fixed by the ‘Conflict of Laws.’”²⁸⁷ In other words, under prescriptive comity principles courts first presume that the legislature has exercised jurisdiction. Comity incorporates “choice-of-law principles,” which, “‘in the absence of contrary congressional direction,’ are assumed to be incorporated into our substantive laws having extraterritorial reach.”²⁸⁸ Viewing comity in this light informs the Court’s decision as to whether the Sherman Act prohibits particular conduct. Justice Scalia argued that appellate courts have confused the issue with one of “comity of courts,” leading courts to mischaracterize the issue as one of “abstention,” in other words, whether the court should “exercise or decline jurisdiction.”²⁸⁹

284. See Tuttle, *supra* note 9, at 350.

285. See *Hartford*, 509 U.S. at 813 (Scalia, J., dissenting).

286. *Id.* at 815 (Scalia, J., dissenting) (citation omitted). Moreover, Justice Scalia found that this rule was “independent of the presumption against extraterritoriality.” *Id.* at 814–15 (Scalia, J., dissenting) (internal quotation marks omitted). Justice Scalia argued that courts should presume that Congress did not exceed “those customary international-law limits” with respect to prescriptive jurisdiction even though he thought that “statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.” *Id.* at 815 (Scalia, J., dissenting). In *Romero v. International Terminal Operating Company*, in which a Spanish plaintiff sued a Spanish defendant for a tort injury, the Court found “the presumption against extraterritorial application of U.S. law” inapplicable because the tort occurred in U.S. waters. *Id.* (Scalia, J., dissenting) (citing *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354 (1959)). Nonetheless, the Court applied “principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community.” *Id.* at 815 (Scalia, J., dissenting) (citations omitted). Thus, the principal considerations in this choice of law analysis were “the interacting interests of the United States and of foreign countries.” *Hartford*, 509 U.S. at 815 (Scalia, J., dissenting) (citation omitted).

287. *Id.* at 816–17 (Scalia, J., dissenting) (citing *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945)).

288. *Id.* at 817 (Scalia, J., dissenting) (citing *Romero*, 358 U.S. at 382–83).

289. *Id.* at 818 n.9 (Scalia, J., dissenting). Justice Scalia argued that the majority in *Hartford* made this same mistake. Justice Scalia added: “[b]ecause courts are generally reluctant to refuse the exercise of conferred jurisdiction, confusion on this seemingly theoretical point can have the very practical consequence of greatly expanding the extraterritorial reach of the Sherman Act.” *Id.* (Scalia, J., dissenting).

Whether comity concerns prevent application of U.S. law depends on a reasonableness inquiry,²⁹⁰ an analysis that *follows* a finding of subject matter jurisdiction.²⁹¹

Justice Scalia's judgment of the proper application of international comity to a given case undermines the *United Phosphorus* approach.²⁹² As previously mentioned above, international comity is not relevant to a court's decision in finding subject matter jurisdiction.²⁹³ As writer of the *Steel Co.* majority opinion, Scalia held that a plaintiff's nonfrivolous allegations establish a district court's prescriptive jurisdiction.²⁹⁴ International comity may limit a court's power to decide a case only if such exercise would be unreasonable in light of the defendant's connections to a foreign jurisdiction.²⁹⁵ But this part of Justice Scalia's *Hartford* dissent surfaced nowhere in the *United Phosphorus* majority.²⁹⁶ Even if this analysis were to apply to the facts in *United Phosphorus*, international comity would not prevent exercise of jurisdiction because the defendants never alleged that their legal and commercial connections to another sovereign made exercise of U.S. subject matter jurisdiction unreasonable.²⁹⁷ Reasonableness should ultimately take into account U.S. interests in balancing deterrence, robust U.S. export commerce, and international comity. This

290. *Id.* at 818 (Scalia, J., dissenting) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987)). Justice Scalia expanded upon what "unreasonable" means:

The "reasonableness" inquiry turns on a number of factors including, but not limited to: "the extent to which the activity takes place within the territory [of the regulating state]," "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated," "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," "the extent to which another state may have an interest in regulating the activity," and "the likelihood of conflict with regulation by another state."

Hartford, 509 U.S. at 818–19 (Scalia, J., dissenting) (citations omitted).

291. *Id.* at 819 (Scalia, J., dissenting). According to Justice Scalia, the *Hartford* majority should have deferred to the interests of the United Kingdom. *Id.* (Scalia, J., dissenting).

292. *Id.* at 814–15 (Scalia, J., dissenting).

293. *Id.* (Scalia, J., dissenting).

294. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

295. *Hartford*, 509 U.S. at 819–20 (Scalia, J., dissenting).

296. *United Phosphorus*, 322 F.3d at 942–53. Interestingly, the *United Phosphorus* dissent stated that, based on passages from the *Restatement (Third) of Foreign Relations Law*, prescriptive jurisdiction would be satisfied if the FTAIA effects test were met and application of jurisdiction would be unreasonable. *Id.* at 961 (Wood, J., dissenting) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 415(3) and comment b thereto). Wood argued that prescriptive jurisdiction was the issue before Congress in passing the FTAIA. *Id.* at 961–62 (Wood, J., dissenting). However, courts of appeals, until now, had never held that courts were stripped of their jurisdiction to hear the case. *Id.* at 962 (Wood, J., dissenting).

297. *Id.* at 942–53.

weighing of factors, however, would best be addressed in a trial on the merits and not on a preliminary motion to establish jurisdiction. Therefore, the *United Phosphorus* approach to limiting subject matter jurisdiction based on comity concerns ignores the Supreme Court's more detailed, prescriptive comity analysis, which is better left to plaintiff's burden in a trial on the merits.

3. *The United Phosphorus Majority's Reliance on Case Law Prior to Passage of the FTAIA Is Misguided*

The Seventh Circuit addressed the issue of the "extraterritorial application of U.S. antitrust law" before Congress enacted the FTAIA.²⁹⁸ But the relevance of pre-FTAIA rulings to the interpretation of subsequent statutory law is suspect because Congress passed the Act with the intent to clarify the standards by which courts would find subject matter jurisdiction over conduct arising outside of the territorial borders of the United States.²⁹⁹ Therefore, Seventh Circuit decisions prior to passage of the FTAIA are irrelevant because the determination of the proper "extraterritorial application of U.S. antitrust law" rests solely on interpreting the FTAIA.³⁰⁰

C. *Whether Congress Meant to Jurisdictionally Strip Federal Courts of Their Authority to Hear Such Matters*

As the *Den Norske* court noted, "Legislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; even in its secondary role legislative history must be used cautiously."³⁰¹ The FTAIA's legislative history is inconclusive as to whether it limits the court's ability to hear a plaintiff's claim.

The legislative history of the FTAIA illustrates how Congress tried "to resolve ambiguity regarding the extraterritorial application of American antitrust law."³⁰² The FTAIA's purpose was to "more

298. *Id.* at 949; see also sources cited *supra* note 9.

299. In *In re Uranium Antitrust Litigation*, the Seventh Circuit approached the "extraterritorial application of U.S. antitrust law" in a two-pronged manner: First, it asked whether subject matter jurisdiction existed, and second, it asked whether it "should . . . be exercised." *Id.* at 949 (citing *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980)); see also sources cited *supra* note 9. The Seventh Circuit's broad approach in the second prong of this old test in deciding whether to exert jurisdiction highlights a predisposed policy bias in favor of international comity in interpreting the FTAIA.

300. See sources cited *supra* note 9. The Court in *Empagran* held that pre-FTAIA cases were insignificant for purposes of interpreting the extraterritorial limitations provided by the Sherman Act and the FTAIA. *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2371 (2004).

301. *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 428 (5th Cir. 2001) (citing *Boureslan v. Aramco*, 857 F.2d 1014 (5th Cir. 1988)).

302. See Note, *supra* note 3, at 2136 (citing H.R. Rep. No. 97-686, at 5).

clearly establish when antitrust liability attaches to international business activities . . . [and to establish] the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction.”³⁰³ The drafters of the FTAIA also sought to encourage export trade, thus exempting purely foreign transactions from the scope of U.S. antitrust laws.³⁰⁴

Of principal importance is the statute’s “effects” test.³⁰⁵ The FTAIA’s legislative history provides that “[t]he intent of the Sherman and [Federal Tort Claims] Act amendments in H.R. 5235 is to exempt from the antitrust laws conduct that does not have the requisite domestic effects.”³⁰⁶ Although the statute refers to “conduct” generally, without emphasizing the geographical origin of the conduct, the statute focuses on the location of the effects.³⁰⁷ This result “circumscribe[s] narrowly the subset of foreign purchasers who could be understood to have the necessary standing to maintain such claims” while extending “subject matter jurisdiction broadly.”³⁰⁸

Although legislators intended to clarify the circumstances by which plaintiffs could sue under the Sherman Act, no language from the legislative history suggests that the drafters intended that the FTAIA’s

303. See *Den Norske*, 241 F.3d at 428 (citing H.R. Rep. No. 97-686, at 5–8).

304. See Dzara, *supra* note 9, at 432. In discussing the Court’s analysis in *Den Norske*, Dzara wrote that Judge Higginbotham emphasized the importance of the FTAIA, in conjunction with the Export Trading Company Act, in easing restrictions on export commerce to increase American competitiveness overseas. *Id.* at 431. The latter act states that its purpose is to make “more efficient provision of export trade services to United States producers and suppliers . . . by . . . modifying the application of the antitrust laws to certain export trade.” *Id.* Moreover, the District Court in *In re Microsoft Corp. Antitrust Litigation* aptly reviewed legislative history by identifying how the two goals of the FTAIA relate. *In re Microsoft Corp. Antitrust Litigation*, 127 F. Supp. 2d 702, 715 (D. Md. 2001). The court noted that the Act endeavored to loosen restrictions on exporters and clarify the standard by which U.S. courts would assert jurisdiction over foreign conduct. *Id.* The court argued that Congress foresaw such a dual intention, and it meant to open the dockets to foreign plaintiffs. *Id.* The court cited House Report No. 97-686:

The intent of the Sherman and FTCA Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States—*e.g.*, price fixing not limited to the export market—would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do. Indeed, to deny them this protection could violate the Friendship, Commerce, and Navigation Treaties this country has entered into with a number of foreign nations.

Id. (citations omitted).

305. See generally Dzara, *supra* note 9.

306. Note, *supra* note 3, at 2140 (citing H.R. Rep. No. 97-686, at 10).

307. *Id.*

308. *Id.*

“effects” test acts as a jurisdictional prerequisite to allowing a district court to hear the case on the merits.

V. IMPACT: *UNITED PHOSPHORUS* UNDERMINES THE ROLE AND IMPORTANCE OF DETERRENCE IN ANTITRUST LAW

By requiring district courts to make factual findings of the requisite “effects on U.S. commerce”³⁰⁹ before finding U.S. subject matter jurisdiction, the *United Phosphorus* majority’s approach threatens to decrease the number of international antitrust claims heard in U.S. courts.³¹⁰ It may also discourage claimants from bringing potentially successful suits that would not only compensate plaintiffs, but would also benefit U.S. consumers by preventing future abuses. This outcome, coupled with the misapplied premium that the *United Phosphorus* majority placed on international comity, deemphasizes, or even ignores, the role deterrence should play in courts’ decisions. This section calls on courts to value deterrence as the fundamental policy in interpreting the FTAIA.

A. *Federal Circuit Dissenting Opinions Emphasize Various Aspects of Deterrence Policies*

In its concluding remarks, the *United Phosphorus* dissent noted that the majority’s subject matter jurisdiction approach, which required factual findings of “effects” on U.S. commerce before proceeding to the merits, stood to impede the DOJ’s efforts to halt illegal interna-

309. *United Phosphorus*, 322 F.3d at 952.

310. The decision also remains stable in light of the U.S. Supreme Court’s denial of certiorari. See *United Phosphorus, Ltd. v. Angus Chem. Co.*, 124 S. Ct. 533 (2003).

Courts following the Seventh Circuit *United Phosphorus* decision hold it to mean that district courts *may*, under Federal Rule of Civil Procedure 12(b)(1), look beyond the face of the complaint to examine the substance of the allegations. See *Palay v. United States*, 349 F.3d 418, 424–25 (7th Cir. 2003); see also *Blevins-Moore v. B. Barnhart*, No. 1:03-CV-13, 2003 WL 21919180, at *2 (N.D. Ind. Mar. 5, 2003). District courts have held *United Phosphorus* to articulate two types of 12(b)(1) motions: “those that attack the sufficiency of the jurisdictional allegations and those that attack the factual basis for jurisdiction.” See *Franklin Lunding v. Biocatalyst Res., Inc.*, No. 03 C 696, 2003 WL 21310280, at *1 (N.D. Ill. June 5, 2003). Motions that attack the sufficiency of an allegation “are subject to the same standard” as motions under Federal Rule of Civil Procedure 12(b)(6). *Id.* In factual challenges, “the [c]ourt may consider affidavits and other evidence in deciding the motion.” *Id.* In both situations the plaintiff bears the burden of proof. *Id.* A court “is free to weigh the evidence” in deciding whether subject matter jurisdiction is proper. See *Qualitech Steel Corp. v. GE Supply Co.*, 1102-0040-CMS, 2003 WL 21314073, at *11 (S.D. Ind. May 9, 2003). “Factual findings rendered during this process are reviewed for clear error.” *Id.* (citing *United Phosphorus*, 322 F.3d at 946); see also *Purmal v. Supreme Court of Illinois*, No. 03 C 458, 2004 WL 542528, at *2 (N.D. Ill. Feb. 26, 2004); *Bogacz v. Bd. of Educ.*, No. 03 C 4548, 2003 WL 22057026 (N.D. Ill. Aug. 29, 2003); *Maton v. Comm’r of Internal Revenue*, No. 02 C 6689, 2003 WL 1860514, at *2 (N.D. Ill. Apr. 10, 2003); *El-Khader v. Perryman*, 264 F. Supp. 2d 645, 648–49 (N.D. Ill. 2003).

tional cartels.³¹¹ Unsurprisingly, the *United Phosphorus* dissent is not the only dissent in a major federal appellate court opinion to invoke a deterrence policy argument in interpreting the scope of the FTAIA. Judge Higginbotham's dissent in *Den Norske*, which involved the circuit split eventually resolved in *Empagran*, argued that private suits aid the DOJ's efforts to curtail international cartels.³¹² Judge Higginbotham mentioned the role of the Clayton Act in conjunction with the Sherman Act in "enlist[ing] private enforcement in supplementation of governmental enforcement of the Sherman Act."³¹³ Emphasizing the role of deterrence in protecting market efficiency, Judge Higginbotham argued that the majority's interpretation would impede the purposes of the FTAIA and reduce the efficacy of U.S. antitrust laws.³¹⁴ He wrote, "Nothing in the text of the FTAIA, or the Export Trading Company Act of 1982 as a whole, or its legislative history, casts doubt on the importance of deterring restraints of trade that affect United States commerce."³¹⁵ He noted that the Supreme Court has often recognized that "the accent of the Sherman and the Clayton Acts is deterrence, requiring violators to pay full, treble damages, even if some plaintiffs gain a windfall or are foreigners."³¹⁶ Admitting the inelegance of the FTAIA, Judge Higginbotham wrote that the

311. The holding would at a minimum impede the Justice Department's efforts in the Seventh Circuit because it might lead to forum shopping as the dissent forewarned. See *United Phosphorus*, 322 F.3d at 964.

312. See *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 431 (5th Cir. 2001) (Higginbotham, J., dissenting).

313. *Id.* at 433 (Higginbotham, J., dissenting). Judge Higginbotham wrote in full "[t]hat an injury that 'gives rise to' an antitrust claim must be an injury caused by harm to competition is no light notion." *Id.* at 432-33 (Higginbotham, J., dissenting). Continuing, he argued that "[t]he requisite injury to competition] is a well established and fundamental tenet of antitrust law [Antitrust injury] is frequently encountered in enforcement action under the Clayton Act, by which Congress enlisted private enforcement in supplementation of governmental enforcement of the Sherman Act." *Id.* at 433 (Higginbotham, J., dissenting) (internal quotation marks omitted). Judge Higginbotham poignantly described the complementary nature of the two acts. *Id.* (Higginbotham, J., dissenting). While the Clayton Act requires that the plaintiff suffer an injury, the FTAIA demands only that the U.S. suffer an injury. *Id.* at 453 n.7 (Higginbotham, J., dissenting). Judge Higginbotham wrote: "When a private plaintiff wishes to sue under the Clayton Act, the Clayton Act and FTAIA erect complementary requirements: the plaintiff must suffer antitrust injury, and persons in United States commerce must suffer antitrust injury. The majority opinion, on the other hand, appears to conflate these two concepts." *Den Norske*, 241 F.3d at 433 n.7 (Higginbotham, J., dissenting).

314. *Id.* at 434 (Higginbotham, J., dissenting).

315. *Id.* (Higginbotham, J., dissenting).

316. *Id.* (Higginbotham, J., dissenting) (citations omitted). He noted that the Court in *Illinois Brick Co. v. Illinois*, recognized the importance of "vigorous private enforcement of the antitrust laws" and "deterring violators." *Id.* (Higginbotham, J., dissenting) (citing *Illinois Brick Co.*, 431 U.S. 720 (1977)). The court observed that "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as [someone] redresses the violation." *Id.* at 434 (Higginbotham, J., dissenting) (citations omitted).

amending statute stands to enforce “selfish” U.S. interests by excluding wrongful conduct that has no effect on U.S. commerce.³¹⁷ However, the FTAIA “enlists all injured parties—foreign or domestic—to assist the Department of Justice in deterring conduct” that injures U.S. competition.³¹⁸ Judge Higginbotham discusses the deterrent force private parties bring to bear in applying U.S. antitrust law:

When a conspiracy causes a direct and substantial injury to competition in the United States, the Clayton Act recruits private parties to supplement the efforts of the Department of Justice in ending the conspiracy. The FTAIA ensures that parties injured by foreign aspects of the same conspiracy that harms American commerce are part of the phalanx of enforcers brought to bear by the Clayton Act. Thus, treble damages suits by parties who suffer antitrust injury from a conspiracy that has a direct and substantial harmful impact on United States commerce serve a single function: the protection of United States commerce. The FTAIA threatens no parade of horrors—it does nothing more than zealously protect competition in the United States while sparing from the docket of American courts suits involving conspiracies that affect only foreign economies.³¹⁹

Ironically, the U.S. amicus brief in *Empagran*³²⁰ challenged the argument that narrow interpretations of the FTAIA undermine the DOJ’s efforts to prosecute international cartels.³²¹ The United States argued that allowing private-party standing for injuries that occurred abroad threatens the vibrancy of the DOJ’s amnesty program.³²² This amnesty program allows corporate entities to seek full amnesty before an investigation of the cartel commences.³²³ Allowing private parties to sue these cooperating entities for treble damages for wrongful conduct that occurred anywhere on the globe would discourage cooperating entities or individuals from seeking the protection that the amnesty program provides.³²⁴ The DOJ argued that a weakened amnesty program would cripple its abilities to identify and prosecute international cartels.³²⁵ The Supreme Court found that the evidence

317. *Den Norske*, 241 F.3d at 438–39 (Higginbotham, J., dissenting).

318. *Id.* at 439 (Higginbotham, J., dissenting).

319. *Id.* (Higginbotham, J., dissenting).

320. *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2372 (2004).

321. *See United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 963–64 (7th Cir. 2003) (Wood, J., dissenting).

322. Brief of Amicus Curiae of the United States at *20, *Empagran*, 124 S. Ct. 2359 (No. 03-724), 2004 WL 234125.

323. *Id.* at *19–20.

324. *Id.* at *20–21.

325. *Id.* at *21. William E. Kovacic also discusses the same issue raised by the United States’s amicus brief in *Empagran*. *See* William E. Kovacic, *Sauce for the Gander: Foreign Extraterritorial Regulation of U.S. Parties, Extraterritoriality, Institutions, and Convergence in International*

was unclear and of empirical insignificance in light of its analysis.³²⁶ But the Court did not reject deterrence generally.³²⁷ Nor did the court hold that international comity trumps deterrence.³²⁸

B. Legal Commentators Emphasize the Importance of Deterrence as a Preeminent U.S. Antitrust Policy

In addition to these dissenting opinions, other commentators have provided persuasive arguments for extending latitude to private lawsuits in helping the DOJ deter wrongdoers. Professor Salil Mehra cites statistical evidence that the private lawsuit has aided antitrust enforcement because private access to treble damages “creates the incentive for that assistance.”³²⁹ Mehra highlights that “private parties . . . have . . . unique access to information crucial to public enforcement.”³³⁰ Moreover, she argues that the DOJ owes a debt of gratitude to the convincing deterrent that the prospect of treble damages brings to bear.³³¹ She concludes that it is reasonable to allow parties to sue in U.S. courts, even if it causes tensions with other countries, as

Competition Policy, 97 AM. SOC'Y INT'L PROC. 309, 311 (2003). When a cartel member debates cooperating with antitrust authorities, he assesses potential damages to private claimants. *Id.* at 311 n.9. Such forecasting to foreign parties using U.S. courts is uncertain and exacerbated by broad applications of subject matter jurisdiction. *Id.* This effect deters wrongdoers from seeking leniency, thus delaying the detection of illegal practices. *Id.* For a discussion of leniency programs, see Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 GEO. WASH. L. REV. 798 (2001).

326. *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2372 (2004).

327. *Id.*

328. *Id.*

329. Mehra, *supra* note 89, at 320. In support of this proposition, Professor Mehra summarized statistical evidence of Harry First, who studied the effects on state enforcement of antitrust law in Japan where no private remedy existed. *Id.* His study found that the Japanese absence of a private remedy in practice and the greater resources of private plaintiffs “marks the most significant difference between the level of antitrust enforcement” between the United States and Japan. *Id.* at 320 n.164 (citation omitted). He predicted that “[c]ritical to the viability of antitrust in Japan [in the future] will be the private cause of action.” *Id.* (citation omitted). Referring to the statistical findings of Stephen Caulkins, Professor Mehra concluded that antitrust class actions will continue to play a vital role in deterring conduct that falls short of triggering criminal liability but that merit condemnation nonetheless. *Id.*

330. *Id.*

331. Mehra, *supra* note 89, at 321.

long as it deters wrongful conduct.³³² This perspective emphasizes deterrence over international comity concerns.³³³

Mehra, in another article supporting deterrence-based antitrust polices, specifically suggests that courts should “look to policy in a more in-depth fashion” where statutory text and legislative history wander.³³⁴ She argues that the private-plaintiff-deterrent adds potential costs to violators and aids government agencies, “thus providing a force-multiplier to those agencies’ own resources.”³³⁵ Mehra also discusses steps the European Union (EU) has taken to find “private allies.”³³⁶ Not only has the EU adopted a regulation providing that private parties may enforce EU competition law in national courts, but it has also created an amnesty program that provides conspirators with incentives to reveal information about co-conspirators, similar to a DOJ program adopted in 1993.³³⁷ *United Phosphorus* threatens to undermine the deterrent potency of the Sherman Act under which “private citizens will have the treble damage incentive under United States law to reach out and help United States enforcement agencies.”³³⁸

Mehra also argues that statutory “effects-based” versus territorial approaches make “jurisdictional overlap” in the antitrust arena work-

332. *Id.* She also concludes that while rejection of international comity concerns in Hartford might anger our trading partners, the consequence of such a broader reading of the FTAIA might help these foreigners. *Id.* She surmised: “a broader reading of the FTAIA may benefit our trading partners’ plaintiffs to the extent that they complain of conduct with U.S. effects, and to the extent that U.S. remedies are more generous . . . [this] might be seen as a logical extension of Hartford.” *Id.*

333. But Professor Mehra also quoted other authors who present opposing views. Kenneth Dam found that while Hartford permits “private attorney generals” to facilitate U.S. economic policy decisionmaking replete of judicial oversight and safeguards, calling the courts to “impose standards” to prevent abuse and assure beneficial consideration of the public interest. *Id.* at 320 n.163 (quoting Kenneth Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 328). She also quoted Hannah L. Buxbaum: “[Buxbaum observed] that ‘[a]fter Hartford . . . , actions by a federal agency are subject to interest-balancing [by the agency internally under its guidelines] while actions brought by private attorneys general—in service of the same public interests—are not.’” *Id.* (quoting Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT’L L. 219, 234 (2001)).

334. *See* Mehra, *supra* note 89, at 774.

335. *Id.* at 770.

336. *Id.* According to findings of Harry First, Professor Mehra concludes that private plaintiffs “piggyback” off DOJ prosecutions and often gather evidence for their suits before government agencies enter the scene. For example, one private plaintiff’s counsel gathered evidence on an international vitamin cartel before the government impaneled a grand jury. *Id.* (citing Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 712–13 (2001)).

337. *Id.* at 771 (citations omitted).

338. *Id.*

able.³³⁹ She further contends, “When conduct occurs in one nation with effects in another—or when effects occur in multiple nations—the widespread acceptance of the effects test means that several nations’ antitrust regimes may apply concurrently.”³⁴⁰ Acceptance of a multiple jurisdictional landscape should vitiate many international comity concerns.³⁴¹

But overlapping jurisdiction may have negative consequences. Andrew Stanger comments that overly broad U.S. antitrust jurisdiction causes other countries to widen their jurisdiction in retaliation.³⁴² This resulting “myriad of contradictory laws”³⁴³ injures U.S. economic interests by stifling business transactions and increasing the costs of regulating anticompetitive conduct.³⁴⁴ The failed General Electric/Honeywell merger in 2001 provides a good example.³⁴⁵ Some countries have adopted “blocking statutes” and other laws that invalidate U.S. judgments or hinder litigation in U.S. courts.³⁴⁶

339. Mehra, *supra* note 89, at 772.

340. *Id.* Professor Mehra notes division among scholars over whether concurrent jurisdiction is more efficient than allocating exclusive jurisdiction to one country. *Id.* The prevailing interpretation of the three-way circuit split will control the degree to which private antitrust suits will remain possible in overlapping jurisdictions. *Id.* Professor Mehra discusses two reasons for this result: (1) If the restrictive interpretation prevails, then government agencies might have wider jurisdiction under the effects approach than private plaintiffs because they will only have to show an effect on U.S. commerce and will not have to demonstrate an injury; (2) if other jurisdictions permitting private suits adopt a similar effects test, then jurisdiction would be apportioned to the country where such effects occurred. *Id.* With respect to the second, “[a]s a result, reciprocal adoption of this test could eliminate overlap, and eliminate competition of antitrust law regimes, with respect to private rights of action.” *Id.* at 773.

341. Mehra, *supra* note 89, at 772.

342. See Andrew Stanger, *Analyzing U.S. Antitrust Jurisdiction Over Foreign Parties After Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2003 B.Y.U. L. REV. 1453, 1454.

343. *Id.* at 1454.

344. See Kovacic, *supra* note 325, at 311.

345. *Id.* at 310. While the DOJ approved the merger, the EU asserted jurisdiction and found the merger illegal. Stanger, *supra* note 342, at 1454–55 n.7 (citation omitted).

346. “Blocking statutes” curtail the discovery process by criminalizing the production of documents for U.S. trials. See Stanger, *supra* note 342, at 1455 n.8 (citing RALPH H. FOLSOM ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS* § 20.14 (2d ed. 2002)). For example, the United Kingdom Protection of Trading Interests Act of 1980 inhibits the deposition of witnesses, the obtaining of documents, and the enforcement of punitive awards. *Id.*

While Stanger notes concerns of overlapping jurisdictional problems, he later endorses the *Empagran* interpretation over the narrow *Den Norske* approach because the former “maximizes the deterrent effect of the FTAIA by allowing plaintiffs injured outside of the United States to bring suit.” *Id.* at 1487.

Related to this issue of overlapping jurisdiction is the debate over whether international or national institutions ought to govern antitrust disputes. For an interesting exploration of the dichotomy between “horizontalism” (where antitrust law is enforced by many nations) and internationalism (where one supranational institution governs antitrust disputes), see Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT’L L. 911 (2003).

Writing on the circuit split over the meaning of “a claim,” Ryan Haas argued in favor of deterrence reminiscent of Senator Sherman, who, by authoring the Sherman Act, sought to protect the more vulnerable from “great aggregations of capital.”³⁴⁷ Haas advocated that amidst rising poverty rates and decreasing median income levels “the need to protect consumers from conspiracies is even more pressing.”³⁴⁸ Ideally, Haas would prefer that an international organization such as the World Trade Organization or the United Nations harmonize international antitrust policy and create enforcement mechanisms.³⁴⁹ In the meantime, he supports a broader reading of the FTAIA that “better serves the deterrence purpose[s] of antitrust law without violating international law . . . better deters anticompetitive conduct across the board . . . [and] better protects American consumers from the harmful effects of international cartels.”³⁵⁰ Although difficulties arise in enforcing U.S. judgments abroad, and vice-versa, Haas surmises that these judgments should be enforceable because “there is little justification for price-fixing or output-limiting private cartels.”³⁵¹ He adds that “[i]f U.S. law cannot protect American consumers from foreign conduct that raises the prices of oil and gasoline, or perhaps even necessities, such as food or clothing, then consumers may be at the mercy of the monopolistic whim of international corporate cartels.”³⁵²

But one author argues that the FTAIA endeavored to deter wrongful conduct *and* stimulate American export activities.³⁵³ According to this author, U.S. policy should not protect international competition for its own sake in international trade.³⁵⁴ U.S. policies should reflect that times have changed: “Nineteenth-century populist concern for

347. Note, *supra* note 3, at 2125 n.21 (quoting HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORGANIZATION OF AN AMERICAN TRADITION 227 (1954)); see Haas, *supra* note 9, at 123.

348. Haas, *supra* note 9, at 123.

349. *Id.* at 122.

350. *Id.*

351. *Id.* at 123.

352. *Id.* Haas argues that until the world is ready to harmonize international competition policy, “consumers must be protected from the effects of such harmful and unfair activity as the formation of anticompetitive cartels.” *Id.* at 124. He concludes that the Second Circuit approach, requiring that “a” claim of the plaintiff not be tied to the “effects” on U.S. commerce, provides U.S. consumers with the most efficacious form of antitrust protection. Haas, *supra* note 9, at 124.

353. Note, *supra* note 3, at 2145.

354. *Id.* at 2143. This viewpoint potentially conflicts with a reading of Haas’ argument that antitrust wrongdoing is inherently undesirable. See Haas, *supra* note 9, at 123. One could read the commentator’s note to argue that the FTAIA implicitly encourages anticompetitive activity that does not have the requisite effects on U.S. commerce. See Note, *supra* note 3, at 2144.

the vulnerability of the individual American before the concentrated power of U.S. firms arguably has been tempered by recognition of potential vulnerability in the face of concentrated foreign economic power.”³⁵⁵ Encouraging competitive U.S. businesses, and not competition for its own sake, should inform application of U.S. antitrust laws to foreign trade.³⁵⁶

Deterrence should be the paramount maxim in interpreting antitrust laws. Tempering our laws with concern for competitiveness and international comity serve to check, but not override antitrust law’s predominant interest in preventing wrongful commercial practices.

VI. CONCLUSION

From an analytical standpoint, the *United Phosphorus* decision has tenuous textual, precedential, and legislative history support. Yet, the decision’s salient policy preference of international comity appears timely in light of the Supreme Court’s about-face in *Empagran*, which gave international comity a major role in its FTAIA interpretation.³⁵⁷ Although deterrence is perhaps outweighed by other considerations, including international comity, in addressing the issues raised in *Empagran*, deterrence should remain the foremost antitrust policy.

Before deciding *Empagran*, the Supreme Court waited until three circuits disagreed over the proper interpretation of “a claim.” Only when other circuits reject the Seventh Circuit approach, perhaps on deterrence grounds, will the Supreme Court use prescriptive comity principles to decide whether the FTAIA “strip[s] federal district courts of their competence to hear and decide antitrust cases with a foreign element.”³⁵⁸

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355. Note, *supra* note 3, at 2145.

356. *Id.*

357. *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2539, 2372 (2004).

358. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 953 (7th Cir. 2003) (Wood, J., dissenting).

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