Minn-Chem and the New Normal: A Revitalized Foreign Trade Antitrust Improvements Act Comment

Cassandra Beckman Widay

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For over a century, the judiciary has faced delicate questions about the appropriateness of invoking U.S. antitrust law to potentially hold foreign actors accountable for anticompetitive conduct. The Foreign Trade Antitrust Improvements Act (FTAIA) passed in 1982 with the well-intentioned aim of establishing guidelines in this area. However, for many of the ensuing years, the statutory language was interpreted and applied in varying ways—evoking great uncertainty about the potential reach of U.S. antitrust law.

One of the most unassuming, quietly momentous FTAIA decisions of our time, Minn-Chem, Inc. v. Agrium Inc., signals that these interpretations may finally be converging in a way that favors antitrust plaintiffs seeking to bring claims against foreign defendants. This flows from two key holdings, namely: (1) that the FTAIA is a substantive, and not jurisdictional, statute; and (2) that the FTAIA is governed by a proximate causation standard rather than a strict directness standard. While the exact impact of the case remains to be seen, by shifting the pre-trial balance of power to plaintiffs, it stands to invite a new wave of litigation to the high-stakes U.S. antitrust realm.
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MINN-CHEM AND THE NEW NORMAL: A REVITALIZED FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

CASSANDRA BECKMAN WIDAY

I. INTRODUCTION

In its infancy, United States antitrust law was famously directed toward the well-caricatured domestic threats to free enterprise—such as railroad,1 oil,2 and steel3 conglomerates—with varying degrees of success. But in the transformative decades following these early, congressionally sanctioned campaigns, thorny questions arose in courts as to how this powerful body of law should apply to anticompetitive behaviors that originate abroad.4 The statutory answer was the Foreign Trade Antitrust Improvements Act (FTAIA).5

Though the FTAIA was designed to elucidate, it has suffered from widely varying treatments by the judiciary.6 Minn-Chem7 is a self-contained illustration of this point. In 2012, the Seventh Circuit issued the Minn-Chem decision—overruling its own relatively recent precedent8 and adopting a newly liberalized stance toward the potential reach of federal

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1 See generally N. Sec. Co. v. United States, 193 U.S. 197 (1904) (prohibiting the ongoing combination of the Great Northern and Northern Pacific Railway corporations).
2 See generally Standard Oil Co. v. United States, 221 U.S. 1 (1911) (effectively disbanding the Standard Oil Company).
3 See generally United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (finding that the U.S. Steel Corporation had not operated as a monopoly).
antitrust law. This stance involved two key components: (1) the view that the FTAIA is not a jurisdictional statute, but rather sets forth the substantive elements of a potential claim;⁹ and (2) the view that the FTAIA should be governed by a proximate causation standard, rather than a strict directness standard.¹⁰ Taken together, these dual forces considerably favor parties seeking to bring U.S. antitrust claims against foreign defendants.

But Minn-Chem was not the first federal case to embrace either one of the two views above.¹¹ Instead, this Comment suggests that Minn-Chem’s real significance stems from it being an early signal that FTAIA interpretations are finally converging—in an expansive direction for litigation. Such convergence is the likely result of an exogenous judicial movement,¹² as well as direct agency guidance.¹³ If true, under this new status quo, there is a greater likelihood that claims of extraterritorial antitrust violations will successfully cross the threshold of the U.S. court system. And within the high-stakes U.S. antitrust realm—where the worst overseas offenders may face government fines of $500 million, a rush of follow-on litigation from private parties, and treble damages—even marginally more hospitable rules could yield big behavioral swings by litigants.¹⁴

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⁹ Minn-Chem, 683 F.3d at 852.
¹⁰ Id. at 856–57.
¹¹ See Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 467–68 (3d Cir. 2011) (holding that the FTAIA “constitutes a substantive merits limitation rather than a jurisdictional limitation”), cert. denied, 132 S. Ct. 1744 (2012); In re Monosodium Glutamate Antitrust Litig., 477 F.3d 535, 538–39 (8th Cir. 2007) (adopting a proximate causation standard for FTAIA claims, yet declining to adopt an even more permissive “but-for” standard).
¹² See Sylvie K. Kern, *Is the FTAIA Jurisdictional? Subject Matter Jurisdiction After Arbaugh and Reed Elsevier*, COMPETITION, Fall 2010, at 108, 111 (remarking that recent Supreme Court cases on other subject matters “arguably compel the conclusion that the FTAIA is not a jurisdictional statute”). See generally Howard M. Wasserman, *The Demise of “Drive-By Jurisdictional Rulings,”* 105 NW. U. L. REV. 947 (2011) (discussing a recent push by the Supreme Court to distinguish statutes that genuinely impose jurisdictional bars from statutes that have been incorrectly interpreted as doing so due to overly broad readings by reviewing courts).
¹³ See Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party on Rehearing En Banc at 20–30, Minn-Chem, 683 F.3d 845 (No. 10-1712) (arguing that “directness” under the FTAIA should not require that the domestic effects follow as an immediate consequence of the allegedly anticompetitive conduct).
¹⁴ See Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficacy of Private Antitrust Enforcement: Follow-On and Independently Initiated Cases Compared*, 74 GEO. L.J. 1163, 1165 (1986) (“The filing of an antitrust complaint or return of an antitrust indictment sends a signal . . . .[that is likely to trigger] the filing of private suits and influence both the perceptions of the merits of the subsequent litigation and the conduct of the parties.”); Jeffrey M. Perloff et al., *Antitrust Settlements and Trial Outcomes*, 78 REV. ECON. & STAT. 401, 408 (1996) (summarizing an analysis of antitrust case data that revealed “changes in rules . . . . that affect the probability that a plaintiff will win at trial may substantially affect the share of cases that settle”); Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1020 (1986) (“By increasing the plaintiff’s recovery in the event he succeeds, a treble damages remedy increases the likelihood that a potential plaintiff will initiate a suit.”); Antitrust Div., U.S. Dep’t of Justice, *Sherman Act Violations*
In spite of the mounting indications that it will not stay unsettled forever, for now, the FTAIA landscape remains inconsistent across the circuit courts of appeals. While the contemporary Supreme Court’s aggressive stance toward so-called “drive-by jurisdictional rulings” may be motivating anticipatory reforms in some circuits, it has not yet provoked uniform rulings on the first issue of whether the FTAIA is a jurisdictional statute. Nor has the Supreme Court intervened on the matter, despite a recent solicitation to do so. And though a narrowly framed petition for a writ of certiorari did initially arise from Minn-Chem—asking the Court to weigh in on the second issue of which causation standard should govern the FTAIA—it was later dismissed because the parties entered a settlement agreement worth $110 million. While stability would be welcomed in this area of law, larger questions of whether the new FTAIA framework will adequately serve policy goals loom over the evolutionary process.

In Part II, this Comment will first examine the FTAIA and the circumstances that led to its codification. In Part III, it will survey the key cases that have directly addressed the question of whether the FTAIA is a jurisdictional statute—focusing largely on Minn-Chem—as well as some instructive cases beyond the antitrust arena. In Part IV, this Comment will survey the key cases that have addressed the question of which causation

Yielding a Corporate Fine of $10 Million or More, U.S. DEP’T OF JUST., http://www.justice.gov/atr/public/criminal/sherman10.html (last updated Nov. 12, 2013) (cataloguing two instances where half-billion dollar fines were levied against foreign companies).

15 Though some circuit courts of appeals that traditionally viewed the FTAIA as jurisdictional have not yet explicitly abandoned that position, certain district courts are taking on the initiative. See, e.g., In re Dynamic Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 985 n.3 (9th Cir. 2008) (acknowledging apparent conflict on the question of whether FTAIA is jurisdictional, but declining to resolve the question); United States v. LSL Biotechnologies Inc., 579 F.3d 672, 679 (9th Cir. 2004) (concluding that the FTAIA is jurisdictional); In re TFT-LCD (Flat Panel) Antitrust Litig., 822 F. Supp. 2d 953, 957–59 (N.D. Cal. 2011) (concluding that the FTAIA is not jurisdictional in light of contemporary attacks on drive-by jurisdictional rulings). But see In re Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819 CW, 2010 WL 5477313, at *3 (N.D. Cal. Dec. 31, 2010) (“Because Arbaugh did not clearly overrule the Ninth Circuit’s treatment of the FTAIA as a jurisdictional statute, and the Ninth Circuit has not found that it did, the Court is obliged to treat the FTAIA as jurisdictional.”).

16 See Minn-Chem., 683 F.3d at 852 (holding that the FTAIA is substantive); Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 438 n.3 (6th Cir. 2012) (declining to decide whether the FTAIA is substantive or jurisdictional); Animal Sci. Prods., 654 F.3d at 469 (holding that the FTAIA is substantive); In re DRAM, 546 F.3d at 985 n.3 (declining to decide whether the FTAIA is substantive or jurisdictional).


standard should apply to FTAIA matters. In Part V, this Comment will conclude with a summary of the practical and policy implications that may flow from an expansion of the FTAIA’s reach.

II. BACKGROUND: THE FTAIA

A. Early Treatment of the Extraterritorial Reach of U.S. Antitrust Law

Though the genesis of antitrust law may be most well known as a period when the giants of domestic industry were targeted, it did witness a failed initial attempt to battle anticompetitive practices that transpired abroad.20 In American Banana Co. v. United Fruit Co.,21 Justice Holmes affirmed the dismissal of a complaint that alleged federal antitrust violations occurred on foreign soil.22 The complaint was brought by a U.S.-based plaintiff against a U.S.-based defendant, with the latter having allegedly used its relationships with the governments of Panama and Costa Rica to drive the former out of its banana trade operations in those countries.23 Justice Holmes remarked that since “the acts causing damage were done, so far as appears, outside the jurisdiction of the United States,” it was “surprising to hear it argued that they were governed by the act of Congress.”24 Ultimately, dismissal was deemed proper because the Supreme Court reasoned that the Sherman Act should be “confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”25 American Banana thus became emblematic of a “strict territoriality” approach that prohibited any extraterritorial applications of antitrust law.26

As World War II came to a close, a modified approach to the extraterritorial application of U.S. antitrust laws solidified—one that was perhaps indicative of a new geopolitical mindset.27 In the landmark case

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20 See Susan E. Burnett, Comment, U.S. Judicial Imperialism Post Empagran v. F. Hoffman-LaRoche? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust, 18 EMORY INT’L L. REV. 555, 567 (2004) (“At the turn of the twentieth century, in the infancy of antitrust litigation, the Supreme Court was unwilling to apply the Sherman Act to conduct occurring beyond the physical boundaries of the United States.”).
22 Id. at 353, 359.
23 Id. at 354–55.
24 Id. at 355.
25 Id. at 357.
26 See, e.g., Burnett, supra note 20, at 568 (“American Banana firmly embraced the established territorial model of State jurisdiction.”).
United States v. Aluminum Co. of America (Alcoa), Judge Learned Hand articulated the “effects test.” Scrutinizing a quota agreement entered into by corporate members of a Swiss-based cartel, Judge Hand wrote that federal antitrust statutes could ensnare “conduct outside [U.S.] borders that has consequences within its borders.” That is, anticompetitive conduct abroad could come into the crosshairs of the Sherman Act if it “intended to affect imports and did affect them.” Judge Hand took care to recognize and distinguish American Banana’s principles, stating that the courts should not punish similar conduct that did not ultimately have domestic consequences.

B. Post-Alcoa Turmoil and the Development of the FTAIA

Alcoa’s effects test proliferated quickly throughout the judiciary, thereby lessening the taboo of applying U.S. antitrust law extraterritorially. Perhaps, in the views of other nations and historical critics, this move was distasteful. And though the effects test may have seemed straightforward enough, courts struggled with drawing boundaries, for—to borrow a famous quote from the antitrust realm—“everything affects everything.”

In response, some wary courts layered multifaceted interest-balancing requirements on top of the effects test. Among some of the factors that might be weighed before exercising antitrust authority extraterritorially were the following: the potential degree of conflict with foreign law or

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28 148 F.2d 416 (2d Cir. 1945). The Second Circuit served as the highest possible appeals court for this case because the Supreme Court could not obtain a quorum of six justices to hear it. Id. at 421.

29 Id. at 442–43.

30 Id. at 444.

31 Id. at 443.

32 See Parrish, supra note 27, at 1472 (reflecting that the effects test “gained widespread currency among U.S. courts” and launched a new era that broke from the tradition of territoriality).

33 See, e.g., id. at 1478–79 (criticizing the effects test because it lacks a meaningful constraint on the exercise of jurisdiction); Burnett, supra note 20, at 571–72 (“Foreign reaction to such U.S. extraterritorial . . . was initially critical and suggested that U.S. laws should be more explicitly limited to reflect considerations of international comity.”). It is worth noting here that some negative sentiment would openly linger even after the effects test was formally codified in the FTAIA. In 1991, Janet Steiger, then the head of the Federal Trade Commission, wrote: “The views of the United States, as a proponent of the so-called ‘effects doctrine’, and of some of our largest trading partners opposing its application are well known.” Janet D. Steiger, Means of Competition Law Enforcement, in ORG. FOR ECON. CO-OPERATION & DEV., COMPETITION AND ECONOMIC DEVELOPMENT 145, 148 (1991).

34 See Parrish, supra note 27, at 1479 (quoting PHILLIP AREEDA & DONALD F. TURNER, 1 ANTITRUST LAW 255 (1978)).

policy, the nationality of the parties, the locations of the businesses involved, the extent to which enforcement might achieve compliance, and the significance of the effects on the United States as compared with elsewhere.36

The resulting lack of predictability in the extraterritorial application of antitrust laws was not the legislature’s only call to arms. Beyond clarification purposes, Congress developed the FTAIA with an eye toward limiting the antitrust exposure of the nation’s exporters.37 The statute was partially a response to allay concerns among businesspeople that the ominous threat of antitrust liability was constricting joint export ventures.38 This is underscored by the fact that the FTAIA was passed alongside the Export Trading Company Act of 1982 and the Bank Export Services Act.39

C. The Text of the FTAIA

In 1982, these historical and political forces culminated in the codification of the FTAIA,40 which is embedded in the Sherman Antitrust Act.41 The relevant text reads:

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

(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 this Act, other than this section.

36 Timberlane Lumber, 549 F.2d at 614–15.
38 Id.
If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.\(^42\)

Recall that one of the primary reasons for this statute’s existence was to lend clarity to extraterritoriality matters. Its language has been sharply criticized for not only failing to attain that goal but, worse still, actually obfuscating the subject further. One detractor went so far as to say: “The FTAIA is perhaps described as a drafting disaster, the worst nightmare of every legislation professor.”\(^43\)

In any event, this language can be synthesized into a two-prong test for determining when anticompetitive extraterritorial conduct might be actionable in the United States. A court may consider the following: (1) whether the conduct has a direct, substantial, and reasonably foreseeable effect on domestic commerce or U.S. export business; and (2) whether the conduct also gives rise to a claim under the Sherman Antitrust Act. Congress intended that the second prong of this test would operate so that—even if the first prong has been satisfied—a plaintiff would still need to meet the normal antitrust requirements of “standing, injury, causality, violation, damages, and so forth,” to advance an extraterritorial claim.\(^44\)

The FTAIA seems to leave unanswered many of the questions that traditionally surrounded the process of applying antitrust laws extraterritorially. First, the statute is facially neutral regarding the geographic locus of the triggering conduct.\(^45\) Second, it is also facially neutral between United States citizens and non-citizens.\(^46\) This point is a subject of much practical debate, as there are strong feelings about whether U.S. courts should be open forums to private foreign plaintiffs seeking antitrust remedies.\(^47\) Third, the statute does not mention international

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\(^{42}\) Id. § 6a.

\(^{43}\) Cavanagh, supra note 37, at 2157.


\(^{46}\) Id.

\(^{47}\) See, e.g., Schmidt, supra note 4, at 258–59 (“Congress should amend section 12 of the Clayton Act to bar jurisdiction in cases involving international cartels in which (1) neither the plaintiff nor the defendant is a national of the United States, and (2) the plaintiff or defendant is a national of a country that the DOJ currently lists as one that provides plaintiffs with an adequate private remedy in the antitrust claim, except (3) when that country permits United States jurisdiction for reasons of judicial economy. Such a law would promote international judicial economy in a transparent and predictable manner that prevents forum shopping without greatly reducing the deterrent effect of United States law.” (footnotes omitted)). See generally Eric Taffet, Note, The Foreign Trade Antitrust Improvements Act’s Domestic Injury Exception: A Nullity for Private Foreign Plaintiffs Seeking Access to American Courts, 50 COLUM. J. TRANSNAT’L L. 216 (2011) (positing that the judiciary’s FTAIA interpretations
comity and whether—and to what extent—it should play a role in judicial decision-making.\footnote{Burnett, supra note 20, at 591. During Congressional debates, it was argued that the FTAIA would not foreclose judges from using discretion in declining to hear cases—rather, comity considerations could still be weighed after the FTAIA’s application. Id. at 590. The statute’s complete silence on this front only resulted in confusion. Id. at 591. In Hartford Fire Insurance Co. v. California, the Supreme Court recognized that the capacity for courts to consider comity in FTAIA cases was unclear, but nonetheless declined to answer the question because “international comity would not counsel against exercising jurisdiction in the circumstances alleged here.” 509 U.S. 764, 798 (1993).}

Though the aforementioned concerns of interpretation are important parts of the general FTAIA discourse, this Comment turns its focus toward the at-large queries of whether the statute is jurisdictional and what causation standard should control it. In theory, the causation standard is delineated by the language targeting conduct that has “direct, substantial, and reasonably foreseeable” effects on U.S. commerce.\footnote{15 U.S.C. § 6a(1) (2012).} But while the FTAIA overtly speaks to a causation standard, it has not been saved from disparate treatments in practice.\footnote{See infra Part IV (discussing judicial treatments of the FTAIA’s causation standard).} In contrast, the text of the FTAIA nowhere mentions jurisdiction. This silence persists despite legislative history indicating that the FTAIA was intended be jurisdictional in nature.\footnote{See H.R. REP. NO. 97-686, at 11 (1982), reprinted in 1982 U.S.C.C.A.N. 2487 (“This bill only establishes the standards necessary for assertion of United States antitrust jurisdiction. The substantive antitrust issues on the merits of the plaintiff’s claim would be unchanged.”).}

III. THE QUESTION OF JURISDICTION

A. Precepts

Subject matter jurisdiction empowers a court to hear and resolve a dispute; substantive causes of action grant parties permission to bring those cases before a court.\footnote{Howard M. Wasserman, Jurisdiction and Merits, 80 WASH. L. REV. 643, 676 (2005).} Both are necessary for a case to be litigated.\footnote{Id.} Whether a statute is treated as jurisdictional or substantive may have important consequences affecting the pre-trial balance of power. All other things being equal, a court’s choice of one of these labels over the other could substantially increase the likelihood of settlement for the antitrust cases falling within its jurisdiction.\footnote{Perloff et al., supra note 14, at 408. Of course, in any given individual antitrust case there may be other defenses or strategic advantages weighing against settlement.}

Motions to dismiss for lack of subject matter jurisdiction are brought pursuant to Federal Rule of Civil Procedure 12(b)(1). In these scenarios,
the plaintiffs bear the burden of proof in demonstrating that subject matter jurisdiction exists. Further, in evaluating 12(b)(1) motions, courts do not need to presume that the factual allegations in the complaint are true. Courts can also consider extrinsic evidence while deliberating on the motion. Dismissals for lack of subject matter jurisdiction can occur at any time in the lifespan of a suit—from its inception to appeal—and may be granted sua sponte.

By contrast, motions to dismiss for substantive maladies are brought pursuant to Federal Rule of Civil Procedure 12(b)(6). In these situations, the pleadings are now reviewed pursuant to the ubiquitous Twiqlal standard to see if they contain sufficient factual matter that, if true, plausibly states a claim for which relief might be granted. At this stage, since the truth of the factual matters pleaded is presumed, the tilt may favor prospective plaintiffs. Further, the court may only look to the complaint in making a determination, and not to extrinsic documents.

Taken in combination, these distinctions between jurisdictional and substantive treatments play significant roles in the viability of an FTAIA claim. Where the FTAIA is interpreted as a jurisdictional statute, a plaintiff must shoulder the responsibility of demonstrating—as a preliminary matter—that it meets all of the Sherman Antitrust Act’s requirements. Thus, migrating away from the jurisdictional framework may ultimately make the FTAIA a much more plaintiff-friendly tool.

B. The End of Drive-By Jurisdictional Rulings

Following its enactment, the FTAIA was viewed predominantly as a
jurisdictional limitation to the Sherman Antitrust Act.\textsuperscript{63} For many years, this approach was embraced without much controversy at the circuit level.\textsuperscript{64}

By the mid-2000s, however, the Supreme Court began taking a harsh look toward so-called “drive-by jurisdictional rulings.”\textsuperscript{65} In the Court’s view, many statutes were improperly being treated as jurisdictional despite their being silent about jurisdiction. The problem was that legal matters were being disposed of for lack of subject matter jurisdiction without a thorough consideration of whether Congress explicitly intended for the statute to operate with such effect. Thus began the Court’s mission to create very distinct lines between jurisdictional and substantive statutes.\textsuperscript{66} At least one scholar views this endeavor as a sign of the Court’s renewed enthusiasm for engaging civil procedure topics under Chief Justice Roberts.\textsuperscript{67}

Though it has not yet ruled on the FTAIA, the Court has struck down attempts to label silent statutes as jurisdictional in many other subject areas. In 2006, the Supreme Court ruled in \textit{Arbaugh v. Y & H Corp.}\textsuperscript{68} that statutory requirements are jurisdictional only if the pertinent statute clearly states that they are.\textsuperscript{69} Otherwise, the requirements simply define substantive elements of a claim.\textsuperscript{70} At issue in this sexual harassment case was the Civil Rights Act’s statutory limitation on covered employers—i.e., those with fifteen or more employees\textsuperscript{71}—which a unanimous Court held was not jurisdictional in nature.\textsuperscript{72} The Court reasoned that the employee threshold appeared in a separate section from the statutes conferring jurisdiction, and that the limitation did not “speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.”\textsuperscript{73} Thus, \textit{Arbaugh} seemed to articulate a bright line rule: Congress must expressly include the magic language of “jurisdiction” within the same discrete portion of a statute before it can be deemed jurisdictional in nature.\textsuperscript{74}


\textsuperscript{64} See id. at 459 (observing that, as of 2009, the circuits uniformly interpreted the FTAIA as a jurisdictional statute—yet astutely predicting that “the prevailing winds may be changing”).

\textsuperscript{65} Wasserman, supra note 12, at 947.

\textsuperscript{66} Id. at 948.

\textsuperscript{67} See Howard M. Wasserman, \textit{The Roberts Court and the Civil Procedure Revival}, 31 Rev. LITIG. 313, 317–18 (2012) (citing the elimination of “drive-by jurisdictional rulings” as one example of a type of civil procedure project undertaken by the Roberts Court).

\textsuperscript{68} 546 U.S. 500 (2006).

\textsuperscript{69} Id. at 515–16.

\textsuperscript{70} Id. at 516.

\textsuperscript{71} Id. at 503.

\textsuperscript{72} Id. at 516.

\textsuperscript{73} Id. at 515 (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982)).

\textsuperscript{74} See id. at 515–16 (“If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left
The march against drive-by jurisdictional rulings went onward. In 2010, the Court held in *Reed Elsevier, Inc. v. Muchnick*\(^{75}\) that the Copyright Act’s registration requirement was not a jurisdictional bar.\(^{76}\) The registration requirement dictates that a party must have registered their copyright before filing a copyright infringement claim.\(^{77}\) Writing for the Court, Justice Thomas opined that this portion of the Copyright Act “is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized exceptions. . . . [T]hus [it] imposes a type of precondition to suit that supports nonjurisdictional treatment under our precedents.”\(^{78}\)

That same year, the attack on drive-by jurisdictional rulings made the jump to securities law. In *Morrison v. National Australia Bank Ltd.*,\(^{79}\) Justice Scalia addressed the issue of whether section 10(b) of the Securities and Exchange Act could be applied extraterritorially to misconduct by foreign defendants that harmed foreign plaintiffs in securities transactions on foreign exchanges.\(^{80}\) Justice Scalia insisted that extraterritoriality was a merits question rather than a jurisdictional question.\(^{81}\) As he put it, “to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question.”\(^{82}\) Compartmentalizing the issues, Scalia posited that extraterritoriality has nothing to do with the court’s jurisdiction and everything to do with whether, in enacting the statute, Congress asserted regulatory power over the challenged conduct.\(^{83}\) Subject matter jurisdiction—i.e., a tribunal’s power to hear a case—was deemed an entirely distinct question.\(^{84}\)

Taken together, *Arbaugh* and its sister cases seemingly advance a “plain language” method of statutory construction. Where a particular provision within a statute does not expressly address whether courts should have the ability to adjudicate a particular type of case, that issue will not be imputed.\(^{85}\) Nor will the Court conflate matters of substance and to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” (footnote omitted) (citation omitted).

\(^{75}\) 130 S. Ct. 1237 (2010).
\(^{76}\) Id. at 1241.
\(^{78}\) *Reed Elsevier*, 130 S. Ct. at 1247 (citation omitted).
\(^{79}\) 130 S. Ct. 2869 (2010).
\(^{80}\) Id.
\(^{81}\) Id. at 2877.
\(^{82}\) Id.
\(^{83}\) Id.
\(^{84}\) Id.; see also Wasserman, *supra* note 12, at 949 (“Justice Scalia’s position presumes that there is something essential, definable, and recognizable as ‘jurisdiction’ that is, and must remain, distinct from substantive merits.”).
\(^{85}\) In this way, the movement to end drive-by jurisdictional rulings might be deemed an inevitable cause célèbre of the more conservative justices. See John F. Manning, *Justice Scalia and the
jurisdiction even though it might be argued that they implicitly overlap. "Morrison" is telling on this point, for the inherently geographical character of the legal subject at hand was not alone sufficient to constrain courts from hearing cases.

Though this approach might seem strict, it can be applauded to the extent that it incentivizes clarity and precision in legislative drafting. It also provides stability by preventing the lower courts from coloring a statute as jurisdictional at their discretion. Further, where there is a record of legislative intent that the statute should serve as a jurisdictional bar—as in the case of the FTAIA—Congress need only memorialize that intent within the confines of the statute. Congress, of course, still retains the power to rewrite statutory provisions and explicitly classify them as jurisdictional proscriptions.

C. Predecessors to Minn-Chem

The Supreme Court considered the diverse statutory provisions discussed above—governing sexual harassment, copyright, and extraterritorial securities laws—and ruled that they were not jurisdictional in nature. However, it has not done the same for the FTAIA. In light of the limitations of its annual docket and the need to address myriad pressing national legal controversies, perhaps the Court believed that the bright lines of "Arbaugh" and company were sufficiently instructive for the lower courts. For the most part, this apparent belief holds true. Following in the highest court’s trend of ending drive-by jurisdictional rulings, various circuits seem to be gradually coming to reason on their own accords that the FTAIA is not a jurisdictional statute.

In 2003, just before the advent of the Roberts Court and the attendant decline of drive-by jurisdictional rulings, the Third Circuit decided "United Phosphorus, Ltd. v. Angus Chemical Co." The essential finding was that the FTAIA served as a limit to subject matter jurisdiction. At the time, this result was relatively uncontroversial, as it left a long line of precedent undisturbed. But in her dissent, Judge Diane Wood reasoned 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

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86 See supra note 51.
87 322 F.3d 942 (7th Cir. 2003) (en banc), overruled by Minn-Chem Inc. v. Agrium, Inc., 683 F.3d 845 (7th Cir. 2012) (en banc).
88 Id. at 952.
89 Id. at 951–52.
do not have fundamental competence to consider defined categories of
cases.” 90 Judge Wood was a black-robed Cassandra of sorts, as roughly a
decade later she delivered the majority opinion of Minn-Chem—which
overruled United Phosphorus. 91

The contemporary shift toward treating the FTAIA as a substantive
statute began in 2011 with Animal Science Products, Inc. v. China
Minmetals Corp. 92 The plaintiff-appellants were domestic purchasers of
magnesite, who alleged that Chinese exporters were engaging in price-
fixing in violation of the Sherman Antitrust Act. 93 On appeal was the
district court’s dismissal of a complaint for lack of subject matter
jurisdiction under the FTAIA. 94 Looking to the changing tides, the Third
Circuit vacated the district court’s decision and remanded the cause for
further proceedings. 95 It duly noted the directives of Arbaugh and the
modern need to “differentiat[e] between statutory elements that serve as a
predicate to establishing a successful federal claim for relief on the merits,
and statutory elements that define a federal court’s adjudicative
authority.” 96 Applying Arbaugh’s bright line rule, the Third Circuit noted
the FTAIA’s total silence on the jurisdiction of federal courts and
concluded that the FTAIA could not be interpreted as a jurisdictional bar. 97

Some change is also percolating in the district courts, meaning that
more circuits may soon have occasion to similarly decide the modernized
question of whether the FTAIA is jurisdictional. For example, within the
Ninth Circuit, where the issue has not been broached at the appellate level
since Chief Justice Roberts took his post, 98 some trial courts are
independently bucking the FTAIA’s jurisdictional label. In an order
denying a joint dispositive motion regarding certain claims, 99 one court
opted to follow the holding of Animal Science Products, deciding that “the

90 Id. at 955 (Wood, J., dissenting).
91 Minn-Chem, 683 F.3d 845. For a reflective summary of this turn-about in Judge Wood’s own
words, see Diane P. Wood, When to Hold, When to Fold, and When to Reshuffle: The Art of
Decisionmaking on a Multi-Member Court, 100 CALIF. L. REV. 1445, 1467-68 (2012).
92 654 F.3d 462 (3d Cir. 2011).
93 Id. at 464.
94 Id.
95 Id. at 471.
96 Id. at 466.
97 Id. at 468-69.
98 The emphasis here is that the issue has not been answered by the Ninth Circuit in the post-
Arbaugh era. In a case that closely pre-dated Arbaugh, the FTAIA was treated as a limit on subject
matter jurisdiction. See United States v. LSL Biotechnologies, 379 F.3d 672, 683 (9th Cir. 2004)
(affirming district court’s dismissal for lack of subject matter jurisdiction under the FTAIA). More
recently, the Ninth Circuit declined to answer the question. See In re Dynamic Access Memory
(DRAM) Antitrust Litig., 546 F. 3d 981, 985 n.3 (9th Cir. 2008) (declining to answer the question of
whether the FTAIA is a jurisdictional or substantive statute because the point was not argued by the
parties).
FTAIA does not affect subject matter jurisdiction." However, other trial courts appear more hesitant to act without clear top-down leadership from the Ninth Circuit.

D. Minn-Chem

Enter Judge Wood, joined by—among others—her fellow Seventh Circuit jurists, lecturers at the University of Chicago Law School, and general antitrust heavyweights Frank Easterbrook and Richard Posner. In *Minn-Chem*, the plaintiff-appellees accused several global producers of potash (a mineral used in agricultural fertilizers and other various chemical products) of price-fixing in violation of the Sherman Antitrust Act. In their complaint, the plaintiff-appellees asserted that more than half of the world’s potash reserves are located in Canada, Russia, and Belarus. Relatively, seven companies hailing almost exclusively from those locales allegedly produce roughly seventy-one percent of the world’s potash supply. At the threshold, Judge Wood paused to underscore that homogenous commodities like potash are especially vulnerable to price-fixing.

The relevant thrust of *Minn-Chem* begins with the now-familiar question of whether the FTAIA controls subject matter jurisdiction or, alternatively, outlines the substantive provisions of extraterritorial antitrust claims. Without hesitation, Judge Wood reflected upon the prominent roles that the FTAIA’s legislative history and precedent played in *United Phosphorus*—the dead man walking. She then recounted the emergence of Supreme Court edicts to consider jurisdiction much more cautiously, as was done in *Morrison*, *Arbaugh*, and *Reed Elsevier*. Now it was the Seventh Circuit’s turn to join the Third Circuit in reconsidering the specific impact of these cases on interpreting the FTAIA.

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100 Id. at 959.
101 See *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-MD-01819 CW, 2010 WL 5477313, at *3 (N.D. Cal. Dec. 31, 2010) (“Because *Arbaugh* did not clearly overrule the Ninth Circuit’s treatment of the FTAIA as a jurisdictional statute, and the Ninth Circuit has not found that it did, the Court is obliged to treat the FTAIA as jurisdictional.”).
104 Id. at 848.
105 Id.
106 Id. at 849.
107 Id. at 848.
108 Id. at 851.
109 Id. at 851–52.
Judge Wood neatly and succinctly encapsulated that interpretation:

We add briefly that the interpretation we adopt today—that the FTAIA spells out an element of a claim—is the one that is . . . more consistent with the language of the statute . . . . When Congress decides to strip the courts of subject-matter jurisdiction in a particular area, it speaks clearly. The FTAIA, however, never comes close to using the word “jurisdiction” or any commonly accepted synonym. Instead, it speaks of the “conduct” to which the Sherman Act (or the Federal Trade Commission Act) applies. This is the language of elements, not jurisdiction.110

The emphasis placed on the explicit language of the FTAIA cannot be understated. By doing so, Minn-Chem embraced the bright-line rule of Arbaugh that requires Congress to openly declare its intentions to give jurisdictional effect to a statutory provision—within that same provision—before courts will do so themselves.

Judge Wood later told an audience of antitrust enthusiasts that Minn-Chem “tied up a bit of old business” and that this procedural element of the decision did not seem “cert-worthy . . . [because it was] very solidly grounded in Supreme Court cases.”111 While this outcome may not seem revolutionary in light of the recent momentum working broadly against drive-by jurisdictional rulings,112 Minn-Chem nonetheless serves as an important cornerstone as we contemplate the future of extraterritorial antitrust cases. Symbolically, it represents more than an esoteric procedural change, as the early pre-trial balance of power in FTAIA cases has decidedly shifted in favor of potential plaintiffs. Because early motions to dismiss for lack of jurisdiction have ostensibly been removed from the arsenals of FTAIA defendants, at least one means of avoiding expensive discovery has been foreclosed. For now, the practical effects of this change are speculative—will it actually produce a greater volume of antitrust litigation against foreign actors? If so, will diplomatic tensions expedite congressional revisions to the FTAIA so that it does qualify as a jurisdictional statute?

Significantly, in the absence of Supreme Court guidance that is custom-tailored to the FTAIA, some circuit courts do appear prepared to take cues and find that the statute is substantive and not jurisdictional.

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110 Id. at 852.
112 See discussion supra Part III.B.
This apparent convergence is a success story for self-reformation beneath the Supreme Court.

IV. THE QUESTION OF THE PROPER CAUSATION STANDARD

A. Predecessor to Minn-Chem

Recall that the FTAIA ensnares conduct that “has a direct, substantial, and reasonably foreseeable effect” on U.S. commerce.\(^{113}\) Unfortunately, the statute lacks a section devoted to definitions—and even such a simple word as “direct” can be tortured in the hands of attorneys.\(^{114}\) What exactly constitutes a “direct” effect under the FTAIA is the subject of a recent split between the Ninth and Seventh Circuits. And unlike the first contest of whether the FTAIA is a jurisdictional or substantive statute, this second conflict seems more likely to be settled on the basis of administrative law.

In 2004, the Ninth Circuit issued its decision for United States v. LSL Biotechnologies.\(^{115}\) The defendants had entered into a joint business venture with Hazera to develop genetically modified tomato seeds that would ensure a longer shelf life.\(^{116}\) Unlike their tomatoes, the business relationship quickly spoiled.\(^{117}\) Following mediation, the defendants and Hazera added a restrictive clause to their contract, which prevented Israel-based Hazera from selling the tomato seeds in North America.\(^{118}\) The United States filed suit, alleging that the restrictive clause violated the Sherman Antitrust Act.\(^{119}\) Declining the United States request to adopt the “effects test” from Alcoa\(^{120}\)—which was so liberally and inconsistently interpreted\(^{121}\)—the Ninth Circuit instead opted to use the exact wording of the FTAIA.\(^{122}\) (The Alcoa effects test would have made any conduct actionable so long as it had “some substantial effect in the United States,” regardless of whether that effect was direct.) Borrowing a

\(^{113}\) 15 U.S.C. § 6a(1) (2012); see supra Part II.C.

\(^{114}\) Nor is a dictionary enlightening. See Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party on Rehearing En Banc at 20 n.6, Minn-Chem Inc. v. Agrium, Inc., 683 F.3d 845 (7th Cir. 2012) (No. 10-1712) (“The 1981 edition of Webster’s Third New International Dictionary, published one year prior to the enactment of the FTAIA, contained seven primary meanings for ‘direct’ in the archival form, encompassing 31 more specific, subsidiary meanings.” (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 640 (1981))).

\(^{115}\) 379 F.3d 672 (9th Cir. 2004).

\(^{116}\) Id. at 674.

\(^{117}\) Id.

\(^{118}\) Id. at 675.

\(^{119}\) Id.

\(^{120}\) United States v. Alcoa, 148 F.2d 416, 444 (2d Cir. 1945); see supra text accompanying notes 29–31.

\(^{121}\) See supra notes 32–34 and accompanying text.

\(^{122}\) LSL Biotechnologies, 379 F.3d 672 at 679.

\(^{123}\) Id. (quoting Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993)).
definition of “direct” that had been deemed appropriate for the Foreign Sovereign Immunities Act, the Ninth Circuit held that—for FTAIA purposes—an effect would be direct if it “follows as an immediate consequence of the defendant’s activity.” 124 Relatedly, an effect would not be considered direct if it was dependent on intervening, uncertain developments. 125 Therefore, under LSL Biotechnologies, any intervening break in the causal chain between a defendant’s conduct and the alleged effect would prevent the ultimate application of the Sherman Antitrust Act. This direct causation standard is favorable to prospective defendants, as it serves to narrow the universe of conduct that will trigger liability under the FTAIA.

B. Minn-Chem

In 2012, the Seventh Circuit decided Minn-Chem,126 seemingly creating a rift on what standard of causation properly governs the FTAIA. Minn-Chem benefitted from an amicus brief submitted by the Department of Justice (DOJ) and the Federal Trade Commission (FTC), which posited that an effect should qualify as “direct” under the FTAIA so long as it was “reasonably proximate” to the conduct. 127 Writing for the Seventh Circuit, Judge Wood found this amicus brief to be persuasive.128 Rather than viewing “direct” in a singular fashion, she reasoned that the phrase “direct, substantial, and reasonably foreseeable effect” should operate as an integrated clause within the FTAIA.129 As a result of this semantic exercise, Minn-Chem held that—for FTAIA purposes—the term “direct” should mean “a reasonably proximate casual nexus.”130 In contrast to the holding of LSL Biotechnologies, this proximate causation standard is more plaintiff-friendly because it expands the scope of conduct that may trigger liability under the FTAIA.

For now, these divergent interpretations ostensibly stand as law in their respective circuits. Although the foreign-based defendants of Minn-Chem filed a petition for a writ of certiorari that presented the question of whether the Ninth Circuit or Seventh Circuit articulated the proper causation standard, the Supreme Court recently dismissed that petition.131

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124 Id. at 680.
125 Id. at 681.
129 Id. at 857.
130 Id.
An answer from the Supreme Court was thus avoided altogether for a settlement price tag of $110 million. Curiously, the latent question of international comity was very much entangled in this matter—the Queen of Saskatchewan, Canada, submitted an amicus brief in support of the petitioners.

Query, though, what might transpire if the causation standard were to be scrutinized under the forces of additional litigation. Because the DOJ and FTC directly proffered an interpretation concerning the FTAIA, which they administer, some classic questions of administrative law arise. Did Congress speak sufficiently to the precise question at issue by using the lone word “direct” within the FTAIA, or was that word sufficiently ambiguous as part of a tripartite causation standard to invite additional agency interpretation? If one supposes that Congress did leave sufficient ambiguity behind, was the agencies’ interpretation of the word “direct” based on a permissible construction of the statute? Only time will tell whether other parts of the federal judiciary will follow in Minn-Chem’s footsteps by readily accepting the proximate causation standard proffered by the DOJ and FTC.

IV. CONCLUSION

The extraterritorial application of U.S. antitrust law has ebbed and flowed in cycles of overexpansion and contraction. The FTAIA, initially thought to be a statutory remedy for these fluctuations, has not always been interpreted uniformly throughout the nation’s court system. In the thirty years since its enactment, the FTAIA had typically served as a foreign defendant’s tool that, early on, could frustrate attempts to haul the company into federal court. But modern changes seem to indicate that we are entering a new period where U.S. antitrust law may have a more extensive reach abroad. First, as the campaign against drive-by jurisdictional rulings has gained steam, the circuit courts of appeals appear to be converging and have displayed a newfound willingness to interpret the FTAIA as a statute that sets forth the substantive elements of an antitrust claim. This will generally make it more difficult for FTAIA defendants to obtain dismissals early in the litigation timeline. Second, an

132 Bronstad, supra note 19.
133 Brief for Amicus Curiae Her Majesty the Queen in Right of the Province of Saskatchewan, Canada, in Support of Petitioners, Minn-Chem, 82 U.S.L.W. 3070 (No. 12-650).
134 See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (“First, always, is the question whether Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).
135 See id. at 843 (“If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).
unresolved conflict exists as to whether a strict “directness” or more liberal “proximate” causation standard should govern FTAIA claims. As an adopter of the more liberal standards, Minn-Chem serves as the symbol of a revitalized FTAIA.