No. 10-1712

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

v.

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

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

The Honorable Ruben Castillo

APPELLANTS' ANSWER TO PETITION FOR REHEARING EN BANC

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Counsel for Appellant JSC Uralkali

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1712

Short Caption: Minn-Chem, Inc. v. Agrium Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Mosaic Company; Mosaic Crop Nutrition, LLC

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Mosaic Crop Nutrition, LLC is wholly-owned subsidiary of The Mosaic Company, which has no parent

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

The Mosaic Company – None; Mosaic Crop Nutrition, LLC – The Mosaic Company

---

Attorney's Signature: s/ Stephen M. Shapiro Date: November 2, 2011

Attorney's Printed Name: Stephen M. Shapiro

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: Mayer Brown LLP
71 South Wacker Drive, Chicago, IL 60606

Phone Number: (312) 782-0600 Fax Number: (312) 701-7711

E-Mail Address: sshapiro@mayerbrown.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1712

Short Caption: Minn-Chem, Inc. v. Agrium Inc.

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Mayer Brown LLP

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

The Mosaic Company – None; Mosaic Crop Nutrition, LLC – The Mosaic Company

---

Attorney's Signature: s/ Britt M. Miller Date: 11/2/11

Attorney's Printed Name: Britt M. Miller

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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E-Mail Address: bmiller@mayerbrown.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1712

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Mayer Brown LLP

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

The Mosaic Company – None; Mosaic Crop Nutrition, LLC – The Mosaic Company

---

Attorney's Signature: s/ Richard J. Favretto Date: 11/2/11

Attorney's Printed Name: Richard J. Favretto

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Washington, DC 20006

Phone Number: 202-263-3000 Fax Number: 202-263-3300

E-Mail Address: rfavratto@mayerbrown.com

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Appellate Court No: 10-1712

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The Mosaic Company – None; Mosaic Crop Nutrition, LLC – The Mosaic Company

---

Attorney's Signature: s/ Charles A. Rothfeld Date: 11/2/11

Attorney's Printed Name: Charles A. Rothfeld

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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E-Mail Address: crothfeld@mayerbrown.com

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The Mosaic Company – None; Mosaic Crop Nutrition, LLC – The Mosaic Company

---

Attorney's Signature: s/ Michael B. Kimberly Date: 11/2/11

Attorney's Printed Name: Michael B. Kimberly

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Phone Number: 202-263-3000 Fax Number: 202-263-3300

E-Mail Address: mkimberly@mayerbrown.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1712

Short Caption: MINN-CHEM, INCORPORATED, et al. v. AGRIUM INCORPORATED, et al.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Agrium Inc. and Agrium U.S. Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Melveny & Myers LLP; Perkins Coie LLP; Rothschild, Barry & Myers, LLP (withdrawn); Hennigan, Bennett & Dorman (withdrawn)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Agrium U.S. Inc. is owned by 3631591 Canada Ltd., which in turn is owned by Agrium Inc.; Agrium Inc. has no parent corporation.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable.

Attorney's Signature: s/ Richard Parker Date: November 2, 2011

Attorney's Printed Name: Richard Parker

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Phone Number: (202) 383 5300 Fax Number: (202) 383-5414

E-Mail Address: rparker@omm.com

rev. 01/08 AK

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable.

Attorney's Signature: s/ Patrick M. Collins Date: November 2, 2011

Attorney's Printed Name: Patrick M. Collins

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

Address: 131 S. Dearborn Street, suite 1700
Chicago, Illinois 60603

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E-Mail Address: PCollins@perkinscoie.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1712

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

JSC Belarusian Potash Company ("BPC")

BPC Chicago, LLC

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

White & Case LLP

Edwards Wildman Palmer LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

BPC: JSC Uralkali (50%), JSC Belaruskali (43.37%), State Association Belarusian Railways (5%); JSC Grodno Azot (1.63%)

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

JSC Uralkali (50%)

Attorney's Signature: /s/ Robert A. Milne Date: 11/2/2011

Attorney's Printed Name: Robert A. Milne

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes X No ___.

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E-Mail Address: rmilne@whitecase.com

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BPC Chicago, LLC

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

JSC Uralkali (50%)

Attorney's Signature: /s/ Jack E. Pace III Date: 11/2/2011

Attorney's Printed Name: Jack E. Pace III

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes__ No X

Address: c/o White & Case LLP, 1155 Avenue of the Americas
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Phone Number: (212) 819-8520 Fax Number: (212) 354-8113

E-Mail Address: jpace@whitecase.com

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Edwards Wildman Palmer LLP

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

JSC Uralkali (50%)

Attorney's Signature: /s/ Michael L. McCluggage Date: 11/2/2011

Attorney's Printed Name: Michael L. McCluggage

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes___ No X

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Phone Number: (312) 201-2548 Fax Number: (855) 584-0181

E-Mail Address: mmccluggage@edwardswildman.com

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Potash Corporation of Saskatchewan Inc.

PCS Sales (USA), Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jones Day

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

See Attached Rider.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

See Attached Rider.

Attorney's Signature: S/ Daniel E. Reidy Date: November 2, 2011

Attorney's Printed Name: Daniel E. Reidy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes__ No _X_.

Address: Jones Day
77 West Wacker Drive, Chicago, IL 60601-1692

Phone Number: 312-782-3939 Fax Number: 312-782-8585

E-Mail Address: dereidy@jonesday.com

RIDER

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Potash Corporation of Saskatchewan Inc. has no parent corporations;

Parent companies of PCS Sales (USA), Inc. include Potash Holding Company, 609430 Saskatchewan Limited, and Potash Corporation of Saskatchewan Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

No publicly held company owns 10% or more of Potash Corporation of Saskatchewan Inc. or of PCS Sales (USA), Inc.

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Potash Corporation of Saskatchewan Inc.

PCS Sales (USA), Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jones Day

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

See Attached Rider.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

See Attached Rider.

Attorney's Signature: S/ Michael Sennett Date: November 2, 2011

Attorney's Printed Name: Michael Sennett

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes__ No _X_.

Address: Jones Day
77 West Wacker Drive, Chicago, IL 60601-1692

Phone Number: 312-782-3939 Fax Number: 312-782-8585

E-Mail Address: msennett@jonesday.com

RIDER

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Potash Corporation of Saskatchewan Inc. has no parent corporations;

Parent companies of PCS Sales (USA), Inc. include Potash Holding Company, 609430 Saskatchewan Limited, and Potash Corporation of Saskatchewan Inc.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1712

Short Caption: Minn-Chem, Inc., et al. v. Agrium Inc., et al.

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See Attached Rider.

Attorney's Signature: S/ Brian J. Murray Date: November 2, 2011

Attorney's Printed Name: Brian J. Murray

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes X No ___.

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See Attached Rider.

Attorney's Signature: S/ Paula S. Quist Date: November 2, 2011

Attorney's Printed Name: Paula S. Quist

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes___ No _X_.

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E-Mail Address: pquist@jonesday.com

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Attorney's Signature: s/Duane M. Kelley Date: 11/2/11

Attorney's Printed Name: Duane M. Kelley

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes X No ___

Address: 35 W. Wacker Drive, Chicago, IL 60601-9703

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1712

Short Caption: Minn-Chem, Inc. v. Agrium Inc.

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Attorney's Signature: s/ Thomas M. Buchanan Date: 11/2/11

Attorney's Printed Name: Thomas M. Buchanan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes___ No X___

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E-Mail Address: tbuchanan@winston.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1712

Short Caption: In re: Agrium, Inc., et al.

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Attorney's Signature: /s/ Jeffrey Kessler Date: 11/2/11

Attorney's Printed Name: Jeffrey Kessler

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes X No ___

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E-Mail Address: jkessler@dl.com

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Attorney's Signature: /s/ A. Paul Victor Date: 11/2/11

Attorney's Printed Name: A. Paul Victor

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes__ No _X_

Address: Dewey & LeBoeuf LLP, 1301 Avenue of the Americas, New York, NY 10019

Phone Number: (212) 259-8000 Fax Number: (212) 259-6333

E-Mail Address: pvictor@dl.com

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Attorney's Signature: /s/ Eamon O'Kelly Date: 11/2/11

Attorney's Printed Name: Eamon O'Kelly

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes__ No _X_

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E-Mail Address: eokelly@dl.com

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Attorney's Signature: /s/ Elizabeth Bradshaw Date: 11/2/11

Attorney's Printed Name: Elizabeth Bradshaw

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes__ No X

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E-Mail Address: ebradshaw@dl.com

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Pursuant to this Court's order of October 19, 2011, Defendants-Appellants Agrium Inc., Agrium U.S. Inc., BPC Chicago, LLC, JSC Belarusian Potash Company, JSC Silvinit, JSC International Potash Company, JSC Uralkali, The Mosaic Company, Mosaic Crop Nutrition LLC, Potash Corporation of Saskatchewan Inc., and PCS Sales (USA), Inc. hereby answer and oppose the petition for rehearing en banc.

STATEMENT

This case does not warrant review by the en banc Court: The panel's decision is both correct and unexceptional. Plaintiffs' assertion of a conflict with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2165 (2011), rests on a plain misstatement of the panel's holding, which faithfully applied the principle of those decisions to a complaint that (as the panel demonstrated) fails to make the allegations necessary to satisfy the Foreign Trade Antitrust Improvements Act ("FTAIA"). And plaintiffs have offered no reason for the full Court to second-guess the panel's construction of the FTAIA—a matter of first impression for this Court, and one that the panel resolved consistently with the approach taken by every other court of appeals to have addressed the question. The full Court therefore should reject plaintiffs' invitation "simply to provide in effect another intermediate appellate court to review for 'mere' panel error" in this fact-bound case. *Arnold v. E. Air Lines, Inc.*, 712 F.2d 899, 915 (4th Cir. 1983); *see also W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247, 273 (1953) (Jackson, J., dissenting) ("Rehearings en banc are not appropriate where the effect is simply to interpose another review by an enlarged Court of Appeals between decision by a conventional three-judge court and petition to [the Supreme] Court.").

1. This case is an international class action alleging a global conspiracy to reduce output and raise the price of potash, a fertilizer ingredient. Although plaintiffs allege that defendants sold potash in this country, "all of the anticompetitive conduct identified in the complaint is alleged to have occurred outside the United States." Slip op. 9. Thus, plaintiffs do not claim that any aspect of the alleged conspiracy took place in or was directed at the U.S. market; "the complaint does not allege that the defendants agreed to worldwide production quotas or a global cartel price, nor are there allegations that the defendants ever imposed a price or supply quota on the American potash market specifically." Slip op. 23. Instead, plaintiffs assert that prices established by defendants for overseas sales to China, India, and Brazil—through lawful joint marketing arrangements approved by foreign governments—had a spillover effect on defendants' sales into the United States. Slip op. 9-10. *See* SA13 ¶¶52; SA21-22 ¶¶90, 94-95; SA25-26 ¶111; SA28-29 ¶¶120, 123-24, 127; SA33 ¶¶142, 144.[1]

Defendants moved the district court to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that the suit was foreclosed by the FTAIA, which "limits the Sherman Act's extraterritorial reach by making it generally inapplicable to foreign anticompetitive conduct," unless such "conduct [1] is 'conduct involving . . . import commerce' or [2] has 'a direct, substantial, and reasonably foreseeable effect' on domestic or import commerce." Slip op. 17 (quoting 15 U.S.C. § 6a). The district court denied the motion, reasoning "that because the defendants import po-

[1] Plaintiffs' antitrust allegations have been the subject of reviews by the Federal Trade Commission (Letter from Donald S. Clark, Sec'y of the FTC, to Sen. Byron L. Dorgan (Sept. 2, 2008), *available at* No. 10-8007, Dkt. 7) and the Australian government (ACCC Examination of Fertiliser Prices (July 21, 2008), *available at* http://tinyurl.com/6af9t73), both of which found the allegations meritless.

tash into the United States and were generally accused of conspiring to fix the price of potash globally, there [is] a sufficiently tight nexus between the alleged illegal conduct and defendants' import activities to conclude that the former 'involved' the latter." Slip op. 19 (internal quotation marks & alterations omitted). The court also denied the defendants' motion to dismiss the complaint for failure adequately to allege conspiracy under *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

2. The panel reversed on an interlocutory appeal, finding it unnecessary to address the sufficiency of the complaint's conspiracy allegations because plaintiffs failed adequately to allege facts sufficient to satisfy the FTAIA. Pointing to *Twombly* and *Iqbal*, the panel noted that, "to avoid dismissal, the complaint must include sufficient factual content to support a plausible inference that the defendants' alleged anticompetitive activity—all of which occurred overseas—either 'involved U.S. import trade or import commerce' or had a 'direct substantial, and reasonably foreseeable effect' on U.S. domestic or import commerce." Slip op. 18-19 (ellipses and brackets omitted). The panel found that the complaint did not adequately allege conduct satisfying either prong of this test.

Adopting the reasoning of the Third Circuit, the panel explained first that "the relevant inquiry under the import-commerce exception is 'whether the defendants' alleged anticompetitive behavior was directed at an import market,'" and not merely whether "the defendants are engaged in the U.S. import market" generally. Slip op. 20 (quoting *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011) (quoting *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 303 (3d Cir. 2002))). Because the complaint here did not allege "'foreign anticompetitive conduct

target[ed at] U.S. import goods or services,'" and instead "describe[d] anticompetitive conduct aimed at the potash markets in Brazil, China, and India," the panel "conclude[d] that the complaint cannot survive dismissal based on the FTAIA's import-commerce exception and must stand or fall based on the direct-effects exception alone." Slip op. 20-21 (quoting same).

The panel next determined that plaintiffs' allegations do not fall within the direct-effects exception. Looking to the reasoning of the Ninth Circuit—which "has held that an effect is 'direct' if 'it follows as an immediate consequence of the defendant's activity'" (slip op. 22 (quoting *United States v. LSL Biotechs.*, 379 F.3d 672, 680 (9th Cir. 2004)))—the panel observed that "the complaint offers very little of substance concerning the relationship between the defendants' alleged overseas anticompetitive conduct and the American domestic market for potash"; lacks "factual content"; and "does not . . . raise a plausible inference that price increases [abroad] 'directly' and 'substantially' affected prices in the United States." Slip op. 22, 24-25. Rejecting plaintiffs' "ripple effects" theory of causation as "too speculative and indirect," the panel ordered dismissal of the Sherman Act claim. Slip op. 26-27.

Having reached this conclusion, the panel found it unnecessary to decide whether the FTAIA's limits on the scope of the Sherman Act are jurisdictional: "the FTAIA bars this suit and therefore dismissal is required whether the statute is properly construed to state a jurisdictional requirement *or* an element of the plaintiffs' Sherman Act claim." Slip op. 16-17.

REASONS FOR DENYING THE PETITION

The "function of en banc [re]hearings is not to review alleged errors for the benefit of losing litigants" (*HM Holdings, Inc. v. Rankin*, 72 F.3d 562, 563 (7th Cir. 1995) (per curiam) (quoting *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) (per curiam))) or to reconsider arguments when the parties continue to assert "a difference of opinion as to the application of recognized rules to the particular circumstances" of a case. *United States v. Robinson*, 585 F.2d 274, 282 (7th Cir. 1978) (en banc) (H. Wood, J., dissenting). En banc review is "reserved," instead, "for the truly exceptional cases" (*Easley v. Reuss,* 532 F.3d 592, 594 (7th Cir. 2008) (per curiam))—for example, when further "consideration is necessary to secure or maintain uniformity of the court's decisions" or when the petition presents "a question of exceptional importance," such as one that has divided the circuits. Fed. R. App. P. 35(a), (b)(1)(B). This Court has interpreted these conditions narrowly, admonishing that rehearing en banc will be granted only in "extraordinary circumstances." *HM Holdings*, 72 F.3d at 562.

No such circumstances are presented here. Although plaintiffs recite an improbably long list of Supreme Court and Seventh Circuit decisions that they assert to be in conflict with the panel's holding, that contention cannot withstand even the most cursory examination—unsurprisingly, as this Court has never before addressed either the substantive meaning of the FTAIA or the application of *Twombly* in the FTAIA context. In reality, "[t]he only basis for the petition is that [plaintiffs would] prefer[] this Court to find in [their] favor." *HM Holdings*, 72 F.3d at 563. Yet "'[m]ere substantive disagreement with a panel decision is not, under FRAP 35, sufficient

reason for an en banc rehearing.'" *Landell v. Sorrell*, 406 F.3d 159, 165-66 (2d Cir. 2005) (Sacks, Katzmann, Sotomayor, & Parker, JJ., concurring in denial of rehearing en banc). Because that is all plaintiffs offer here, the petition should be denied.

A. The Panel's Decision Does Not Conflict With *Text Messaging*.

In seeking en banc review, plaintiffs' initial contention is that, "by holding that plaintiffs' allegations fail to satisfy *Twombly*, . . . the panel's opinion misconstrued plaintiffs' allegations in conflict with this Court's decision in *In re Text Messaging*." Pet. 2. In making this argument, plaintiffs claim that they adequately pled the existence of a conspiracy. Pet. 2-4. But this argument is premised on a fundamental misreading of the panel's decision. Plaintiffs conflate the question whether the complaints' allegations plausibly give rise to an inference of an anticompetitive agreement (the issue in *Text Messaging*, and one that the panel expressly did *not* resolve here (*see* slip op. 12)) with the question whether those allegations plausibly give rise to an inference of foreign conduct involving import commerce or having a direct effect on U.S. consumers (the issue the panel actually decided in this case). Whether or not the complaint's allegations of "collusive conduct" (Pet. 3) are sufficient to state a claim on the *merits* therefore is irrelevant to the panel's disposition of the appeal. Because the panel expressly declined to address the adequacy of the allegations of conspiracy, the central issue in *Text Messaging*, the panel's decision could not possibly conflict with that prior ruling.

On the pleading question the panel did decide, plaintiffs do not take issue with the proposition that the *Twombly* and *Iqbal* "plausibility" standard must be applied to determine whether the complaint's factual allegations satisfy the FTAIA. Pet. 2

(citing slip op. 17-18). Thus, plaintiffs acknowledge their burden to "plausibly plead facts that give rise to an inference of subject-matter jurisdiction under the FTAIA." Pet. 14. And the panel demonstrated in detail that the complaints' allegations on this score are insufficient: "Despite its length, . . . the complaint offers very little of substance concerning the relationship between the defendants' alleged overseas anti-competitive conduct and the American domestic market for potash"; provides only "generalized allegations" and an "absence of specific factual content to support the asserted proposition that prices in China, India, and Brazil serve as a 'benchmark' for prices in the United States"; and makes an allegation of a "'global fertilizer market' [that] is . . . conclusory and unhelpful, . . . provid[ing] no context whatsoever for this statement that might make it more meaningful." Slip op. 22, 24-25. At bottom, the complaint simply makes the generalized assertion that defendants conspired to take steps exclusively in foreign markets that ultimately would raise U.S. prices, and "this wholly conclusory statement is akin to a recitation of the elements of the Sherman Act claim, which is insufficient under *Twombly* and *Iqbal*." Slip op. 21. Absent a dissenting opinion, there is no reason for the en banc Court to review this specific and fact-bound determination.[2]

[2] Although immaterial for present purposes, we also note that this case involves none of the "parallel plus" factors that the Court regarded as significant in *Text Messaging*. To identify just one such distinction, the defendants in *Text Messaging* "changed their ['heterogeneous and complex'] pricing structures" "all at once" "to a uniform pricing structure" and "then simultaneously" raised prices "in the face of steeply falling costs." *Id.* Here, by contrast, pricing and production decisions were alleged to be irregular, spaced out over weeks or months, different in magnitude, and often did not involve all of the defendants; those decisions also were responsive to shifts in demand or other industry developments. *See* Opening Br. 61-64; Reply Br. 24-26, 30 (charts detailing irregular timing of supposedly coordinated pricing and supply decisions).

B. The Panel's FTAIA Holding Does Not Warrant En Banc Review.

Plaintiffs also take issue with the panel's construction of the FTAIA. On the face of it, this argument does not warrant the en banc Court's attention. The panel's decision was the first by this Court to address the substantive scope of the FTAIA, which necessarily means that there is no intra-circuit conflict to resolve. And plaintiffs are wrong in asserting tension between the panel's decision and holdings of the Supreme Court or other courts of appeals.

1. The panel properly concluded that the import exception is inapplicable here.

Plaintiffs and their *amicus* contend that it is enough to satisfy the FTAIA's import exception to allege baldly that a defendant is engaged "in anticompetitive conduct with respect to [a] global . . . market," so long as the defendant also is separately "engaged in [U.S.] import commerce" through means not alleged to involve anticompetitive activity. Pet. 6-7. According to this unprecedentedly sweeping interpretation of the statute, "importers of [a] cartel product" are *per se* subject to the import commerce exception even when their alleged "anticompetitive conduct" takes place entirely abroad, is directed exclusively at foreign markets, and does not in any way "target[] the U.S. [import] market" or U.S. consumers. AAI Amicus Br. 6-7.

The problem with plaintiffs' argument is that it finds no basis in the text of the statute, the "starting point" of "any such question" of statutory interpretation. *Int'l Union of Operating Eng'rs v. Ward*, 563 F.3d 276, 283 (7th Cir. 2009). As the Third Circuit has recognized, the FTAIA's double negative—that the Sherman Act "shall *not* apply to conduct involving trade or commerce (*other than* import trade or import commerce)" (15 U.S.C. § 6a) (emphasis added)—means that the Sherman Act "applies

to *conduct involving* import trade or import commerce with foreign nations" (*Turicentro*, 303 F.3d at 301 (emphasis added; internal quotation marks omitted)) and not merely to *parties involved in* import commerce. Thus, as the panel properly held in this case, "it is not enough that the defendants are engaged in the U.S. import market"; instead, "the relevant inquiry under the import-commerce exception is 'whether the defendants' alleged anticompetitive behavior was directed at an import market.'" Slip op. 20 (quoting *Animal Sci.*, 654 F.3d at 470).

That conclusion is consistent with decisions of every other circuit to have considered the issue. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395, 398-399 (2d Cir. 2002) (the conduct "that is the focus" of the import exception is the conduct "that [is] illegal under the Sherman Act"), *abrogated on unrelated grounds by F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 71 (3d Cir. 2000) (the "proper inquiry" under the import exception is "whether the . . . *conduct* . . . being challenged as violative of the Sherman Act[] 'involved' import trade or commerce"); *see also Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 344 (D.C. Cir. 2003) (the word "conduct" in the FTAIA means "acts that are illegal under the Sherman Act"), *vacated on unrelated grounds*, 542 U.S. 155 (2004).

The panel's holding also is consistent with the Department of Justice's 1995 Antitrust Enforcement Guidelines, which make clear that "sales in or into the United States" by a member of a global cartel do *not* provide the basis for a U.S. antitrust suit under the FTAIA's import exception when such sales "are not within the scope of the [cartel] agreement." U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust En-*

forcement Guidelines for International Operations § 3.121 (ill. ex. C, var. 1), *available at* http://tinyurl.com/22vjpp8. Indeed, "in the absence of an agreement with respect to the U.S. market," legal "sales into the U.S. market" by global cartel members "do not raise antitrust concerns" at all; the "mere fact that . . . U.S. prices may ultimately be affected by the cartel agreement is not enough for . . . the FTAIA." *Id.*

Against this backdrop, plaintiffs' suggestion (Pet. 7) that the panel's decision is in tension with the Third Circuit's decision in *Animal Science* is bewildering. In that case, the Third Circuit expressly reaffirmed its prior holdings—in accord with decisions of the Second and D.C. Circuits and the enforcement policies of the Department of Justice—that courts applying the FTAIA's import exception must "assess whether the plaintiffs adequately allege that the defendants' [anticompetitive] conduct is directed at a U.S. import market and not solely whether the defendants physically imported goods into the United States." 654 F.3d at 471. In other words, according to the Third Circuit, the "defendants' [allegedly illegal] conduct" must "target import goods or services." *Id.* That is just what the panel concluded in this case.[3]

Plaintiffs devote the rest of their import-exception analysis to rearguing the merits. Pet. 8-13. They claim, for example, that the panel's reading of the import exception renders the direct-effects exception a superfluous "subset of the import-commerce exception" (Pet. 8) and "ignore[s] the purposes of modern U.S. antitrust

[3] Plaintiffs' suggestion that the panel has "read[] an intent requirement" into the FTAIA's import exception "where other circuits have found none" (Pet. 8 (citing *Animal Sci.*, 654 F.3d at 471)) is baseless. The panel opinion says not a word about intent. And if plaintiffs have in mind the panel's statement that the anti-competitive conduct must "'target'" or be "'directed'" at the U.S. import market to fall within the import exception, the panel's language on this requirement was taken directly from the Third Circuit's *Animal Science* decision. Slip op. 20-21 (quoting *Animal Sci.*, 654 F.3d at 470).

law." Pet. 9-10. For the reasons presented in our merits briefs and the many cases cited there (Opening Br. 18-31; Reply Br. 3-14), each of these contentions is wrong.

2. The panel correctly determined that plaintiffs did not plausibly allege a direct effect on U.S. markets.

Although plaintiffs do not expressly disagree with the panel's construction of the plain language of the FTAIA's direct-effects exception, they nevertheless argue that its decision on this point "is in clear conflict with congressional intent." Pet. 10. According to plaintiffs, Congress's intent—which they purport to divine, not from the language of the statute, but from an artfully edited snippet of a single House Report—was to make antitrust disputes involving foreign conduct directed entirely at overseas markets actionable in U.S. courts, so long as that conduct has a "ripple" or "spillover" effect on U.S. markets. Pet. 10. On this theory, the Sherman Act "prohibit[s] economic arrangements," no matter where they take place or at whom they are targeted, if they "harm U.S. consumers" in even the remotest way. Pet. 11.

Plaintiffs' problem, once again, is the plain text of the statute. The FTAIA provides that the antitrust laws create a cause of action for harm resulting from foreign anticompetitive conduct that does not involve U.S. import markets only when that conduct has "a *direct*, substantial, and reasonably foreseeable effect" on U.S. consumers. 15 U.S.C. § 6a(1) (emphasis added). As the panel concluded here, "an effect is 'direct' if 'it follows as an immediate consequence of the defendant's activity,'" and *not* when "'it depends on uncertain intervening developments.'" Slip op. 22 (quoting *LSL Biotechs.*, 379 F.3d at 680-681). Plaintiffs' contrary assertion, that indirect and attenuated "ripple" or "spillover" effects of foreign conduct are enough to give rise to liability under the U.S. antitrust laws, would read the word "direct" out of the FTAIA al-

together. It is unsurprising that no court has endorsed their freewheeling interpretation of the law.[4]

Plaintiffs also are wrong in asserting that the panel's interpretation of the direct-effects limitation on the extraterritorial reach of the Sherman Act means that "global cartels [now may] conspire with impunity to rig the global marketplace." Pet. 11. To the contrary, the panel held the complaint here insufficient not because global cartels are *per se* immune from suit in the United States, but because the defective complaint in this case simply "does not allege that the defendants agreed to worldwide production quotas" or any other cartel conduct that might implicate one or both exceptions to the FTAIA. Slip op. 23. Moreover, overseas cartels are not free to act with impunity even when they are outside the scope of U.S. antitrust law: not "all disputes [have to] be resolved under our laws and in our courts." *Mitsubishi Motors Corp. v. Soler Chrystler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). As a former Assistant Attorney General in charge of the Antitrust Division has said, "we should expect that other nations and communities will use *their* antitrust laws to protect *their* consumers against those who restrain competition in *their* markets." Donald I. Baker, *Antitrust and World Trade: Tempest in an International Teapot*, 8 Cornell Int'l L.J. 16, 41 (1974).

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[4] Plaintiffs' approach also ignores decades of case law, beginning with the landmark decision in *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945). There, Judge Learned Hand wrote for the court that "[a]lmost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two." *Id.* at 443. Despite such "repercussions" on domestic markets, U.S. antitrust laws do not reach anticompetitive "agreements made beyond our borders" and directed at foreign markets: "the international complications likely to arise from an effort in this country to treat such agreements as unlawful" makes plain that "Congress certainly did not intend the [Sherman] Act to cover them." *Id.*

As this last point suggests, plaintiffs' argument also wholly ignores significant considerations of international comity that support the panel's holding. As a general matter, the Supreme Court has emphasized that courts should "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164; *see also Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877-2878 (2010). And that principle applies with special force in the circumstances of this case, where the joint marketing arrangements that form the centerpiece of plaintiffs' allegations are "explicitly authorized and encouraged" by the laws of the nations in which defendants operate. Slip op. 4.[5] Plaintiffs' attempt to premise U.S. liability on such overseas activity—directed exclusively at *non*-U.S. markets—would directly interfere with other nations' efforts to regulate commercial conduct taking place within their jurisdiction. As the Supreme Court has warned, it must be presumed that Congress did not intend to engage in such "an act of legal imperialism." *Empagran*, 542 U.S. at 169.

3. This case does not provide an occasion for revisiting United Phosphorus.

Finally, plaintiffs criticize the panel for "sidestep[ing]" (Pet. 1, 15) reconsideration of *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003) (en banc), in which this Court held that the FTAIA is a limitation on subject matter jurisdiction rather than an element of a Sherman Act claim on the merits. The panel expressly "reserve[d] . . . for another day" the question whether *United Phosphorus* is still good law. Slip op. 17. But it did so for good reason: As this Court long ago recog-

[5] The panel specifically discussed the law of Canada, in which three defendants operate. Slip op. 4. The joint marketing operations of two other defendants have similarly been approved by executive order of the government of Belarus. *See* Opening Br. 7.

nized, it is "ill-advised to get involved in difficult questions . . . that would neither change the outcome [of the appeal] nor enable [the Court] to avoid a discussion of the merits." *Price v. Pierce*, 823 F.2d 1114, 1118 (7th Cir. 1987).

That is the case here. As the panel explained, "substantive review of the FTAIA" in this case "is no different whether viewed through the lens of Rule 12(b)(1)" for lack of subject matter jurisdiction "or Rule 12(b)(6)" for failure to state a claim. Slip op. 16. Because "nothing in the analysis" in this case turns on the jurisdiction/merits distinction, there is no reason to decide whether "a new Rule 12(b)(6) label" should be applied to "the same Rule 12(b)(1) conclusion." Slip op. 15-16 (quoting *Morrison*, 130 S. Ct. at 2877). That makes this case a singularly bad one in which to decide whether *United Phosphorus* remains good law.

Plaintiffs nevertheless complain that the panel's decision not to pass on the continuing validity of *United Phosphorus* will "create[] further confusion within this Circuit" and risk "lengthy, costly, and potentially unnecessary further proceedings in the district court." Pet. 14. Neither claim holds water. To begin with, if any course of action is likely to create confusion in this Circuit, it is passing in *dictum* on an issue that is irrelevant to the outcome of the case. And with respect to plaintiffs' argument concerning further proceedings in the district court, the short answer is that there should be none: the panel ordered the Sherman Act claim dismissed on its face. In any event, unsupported speculation concerning further proceedings on remand (were there to be any) is no reason to reach a question irrelevant to the disposition of an interlocutory appeal; it is even less a reason to take the "extraordinary" step (*HM Holdings*, 72 F.3d at 562) of granting an en banc rehearing.

CONCLUSION

The petition for rehearing en banc should be denied.

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The undersigned attorney hereby certifies that on November 2, 2011, he filed electronically the foregoing Answer to Petition for Rehearing En Banc using the Court's CM/ECF system, which will serve the same upon all counsel of record via electronic mail. Pursuant to the parties' agreement, he furthermore certifies that he caused one hard copy of the foregoing Answer to Petition for Rehearing En Banc to be placed with a third-party commercial carrier for overnight delivery to the following:

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