

The Foreign Trade Antitrust Improvements Act: Did *Arbaugh* Erase Decades of Consensus Building?

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Congress passed the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) to help resolve a simple and increasingly important issue: when does U.S. antitrust law apply to foreign conduct? Passage of the FTAIA capped an extended period of debate within the antitrust community (including judicial decisions, antitrust enforcement agency actions, guidelines and policies, and voluminous writings of practitioners and scholars from the U.S. and other jurisdictions) regarding the best answer to that question.

As written, the FTAIA limits and defines the extraterritorial reach of the Sherman Act. From its passage in 1982 until the Third Circuit's decision thirty years later in *Animal Science Products, Inc. v. China Minmetals Corp.*,¹ federal courts (including the Supreme Court itself) interpreted the FTAIA as a statute addressing the subject-matter jurisdiction of the federal courts.²

Animal Science and the more recent *Minn-Chem, Inc. v. Agrium Inc.*³ decision, however, hold that the FTAIA—where applicable—creates a new substantive element of a Sherman Act claim. These decisions are based upon *Arbaugh v. Y&H Corporation*,⁴ a Supreme Court decision under the Civil Rights Act of 1964. *Arbaugh* announced a new standard requiring that statutes not clearly designated as jurisdictional should not be treated as such.⁵

However, there is powerful evidence that the FTAIA is jurisdictional and was intended to be so by the Congress that enacted it. The understandings expressed during the policy debates and in the legislative history that led to its enactment, the structure of the statute itself, and bedrock principles of international comity that are recognized by the Supreme Court support that conclusion. If that weighty evidence does not satisfy the *Arbaugh* test, then perhaps the decision's appealing but simplistic pronouncement should be questioned.

This distinction is more than an academic exercise. The shift in interpretation fundamentally alters the method, cost, and burdens associated with defending antitrust claims that involve international dimensions. Motions to dismiss under Federal Rule of Civil Procedure 12(b)(1) based on lack of subject-matter jurisdiction place the burden on the plaintiff to establish jurisdiction.

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¹ 654 F.3d 462 (3d Cir. 2011).

² *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155 (2004); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 272i2 n.83 (3d ed. 2006) (“At this writing all Circuits agree that the FTAIA’s limitations on the reach of the Sherman Act are ‘jurisdictional.’”) (citing *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003) (en banc); *Den Norske Stats Oljeselskap As v. HeereMac V.O.F.*, 241 F.3d 420 (5th Cir. 2001); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998); *Carpet Group Int’l. v. Oriental Rug Importers Ass’n*, 227 F.3d 62, 69 (3d Cir. 2000); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 813 (9th Cir. 1988); *United States v. Anderson*, 326 F.3d 1319, 1329 (11th Cir.); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1085 (D.C. Cir. 1998)).

³ 683 F.3d 845 (7th Cir. 2012) (en banc).

⁴ 546 U.S. 500 (2006).

⁵ *Id.* at 515–16.

Conversely, if the FTAIA establishes a substantive element of an antitrust claim, motions to dismiss must be filed through Rule 12(b)(6). In this “substantive” 12(b)(6) mode, the facts alleged in the complaint must be *assumed* true and the burden of showing that the plaintiff cannot prevail on the FTAIA “element” rests with the defendant-movant. From a practical perspective, it will be much more difficult for defendants to meet that burden without significant discovery, and neither courts nor litigants are likely to be attracted to the idea of restricting discovery solely to the FTAIA issues in the 12(b)(6) context. Thus, realistically, the shift from “jurisdiction” to “substance” will postpone jurisdictional determinations in most cases until the summary judgment stage.

The inability to put the plaintiff to proof of jurisdiction at the outset thus makes a significant difference. Parties who might otherwise have escaped the notoriously burdensome and expensive antitrust discovery process, which the FTAIA was intended to preclude in certain circumstances, will be compelled to endure that process to a far greater extent than would result from treatment of the FTAIA as jurisdictional.

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In reality, the prospect of shouldering these burdens may lead a defendant to settle a case that might have been dismissed prior to discovery as a result of a Rule 12(b)(1) motion. Given the frequency of private treble-damage actions (at this writing, there are more than fifty pending antitrust multidistrict litigations working their way through the federal system, many, if not most, involving pleas for class treatment⁶), this is a matter of central importance to the private antitrust enforcement process and should be a major concern of federal court administration.

There is a further and potentially more significant long-run international effect to consider as a possible result of a shift in construction of the FTAIA. As antitrust laws have spread from the U.S. to over a hundred jurisdictions worldwide, there is increasing pressure to create systems of private redress (including collective redress such as class actions) for antitrust violations in many of these other jurisdictions. Private litigation is already an active concern in Australia and Canada, for example, where private antitrust class actions are already typical. Major jurisdictions, such as China and the European Union, are actively encouraging private antitrust litigation. The cost and complexity of antitrust litigation could spin out of control if litigants are left at sea for extended periods in every jurisdiction where private claims might be lodged. Litigants would be burdened with discovery and other litigation chores in every antitrust system with a colorable claim to jurisdiction over the conduct in suit.

Quick and efficient sorting out of where jurisdiction is properly asserted may become critical as these international litigation burdens multiply. If it shifts to the substantive model of FTAIA construction, the United States may be increasing the mega-tonnage of the antitrust “cluster bomb”—to use Judge Posner’s vivid metaphor—of multiple antitrust proceedings and remedies (e.g., criminal penalties, direct-purchaser and indirect-purchaser class actions for treble damages, and *parens patriae* claims) by delaying and adding significantly to the litigation burdens of private damage proceedings. This may further entrench a system in which even innocent defendants (or defendants who deserve to bear minimal liability only) are forced to pay exorbitant sums to claimants simply to avoid intolerable process costs and burdens, even where the facts entitle such defendants to vindication under the law. This is neither just nor tolerable from the enforcement policy perspective. Especially in a shaky global economy where the sacrifice of business flexibility and efficiency through imposition of excessive litigation cost must be considered reckless, the United States should not encourage—much less lead the way toward—this result.

⁶ MDL Statistics Report—Distribution of Pending MDL Dockets, http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-10-2013.pdf.

Foreign Reach of Antitrust Law

The basic question of “when does U.S. antitrust law apply to foreign conduct?” was first addressed by the Supreme Court more than a century ago. In *American Banana Co. v. United Fruit Co.*,⁷ Justice Holmes wrote for a unanimous Court that an allegation by one U.S. banana supplier that its competitor sought to eliminate it and thereby “to control and monopolize the banana trade” did not state a Sherman Act claim because the alleged anticompetitive conduct took place entirely in Costa Rica.

Before long, however, this deceptively appealing territorial principle began to be undermined by the Supreme Court. In *United States v. American Tobacco Co.*,⁸ the Court exercised jurisdiction over an antitrust claim aimed at market-division contracts executed in England.⁹ U.S. and British companies, previously engaged in head-to-head competition in each other’s markets, were found to be within the jurisdiction of the U.S. federal courts because the market division had a substantial impact on U.S. commerce.¹⁰ The Court continued in this direction in *United States v. Sisal Sales Corp.*, holding that the Sherman Act applied to U.S. conspirators seeking to control trade in sisal through a series of acts carried out in Mexico: “[B]y their own deliberate acts, here and elsewhere, [the conspirators] brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.”¹¹

By the time of Judge Learned Hand’s pathbreaking decision in *United States v. Aluminum Co. of America*, the governing principles seemed to focus on whether the conduct produced an anti-competitive effect within the United States: “[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.”¹² In other words, even a foreign party engaging in foreign conduct can be reached under the Sherman Act so long as there is a prohibited U.S. effect, as suggested earlier by *American Tobacco* and *Sisal Sales*.

The debate over the reach of U.S. antitrust law expanded and evolved as global commercial integration accelerated in the post-World War II era, producing more opportunities to invoke U.S. antitrust law against foreign parties operating in global commerce touching the United States. In the 1970s, U.S. antitrust enforcement, both public and private, directed against foreign participants in an alleged uranium cartel, was viewed with such alarm that many of our closest allies (Australia, Canada, France, and the United Kingdom) passed “blocking” or “claw back” statutes to stiffen resistance of their resident companies to the assertion of U.S. antitrust jurisdiction. Blocking statutes attempted to impede or prohibit compliance with discovery requests and/or enforcement of judgments emanating from U.S. antitrust proceedings, while “claw back” statutes sought to deter attacks on foreign companies through civil suits brought under U.S. antitrust law’s treble-damages provisions by enabling a foreign defendant to sue a plaintiff to recover a portion of the damages paid by the defendant. Finally, U.S. companies increasingly complained they were handicapped in competing for off-shore business against foreign firms that were not subject to the strict antitrust constraints imposed by U.S. law.

⁷ 213 U.S. 347, 354 (1909).

⁸ 221 U.S. 106 (1911).

⁹ *Id.* at 172, 181–84.

¹⁰ *Id.*

¹¹ 274 U.S. 268, 276 (1927).

¹² 148 F.2d 416, 443 (2d Cir. 1945).

These conditions led in 1977 to one of the first major initiatives of the President's Export Council, a still-extant advisory committee, which proclaims in the "Recommendations and Accomplishments" section of its website: "After two and one half years of dialogue with representatives of Justice Department's Antitrust unit, the Council helped the Department of Commerce develop the 'Antitrust Guide for International Operations.'"¹³ The reference is undoubtedly to the first version of the Antitrust Division's international guidelines, published under the indicated title.

Designed partly to deflect criticism that U.S. antitrust law inappropriately trenches on the discretion of other sovereigns to police their own markets and partially to define more carefully the conditions under which the Department of Justice would feel free to prosecute foreign parties for foreign anticompetitive conduct, the 1977 Guide presented extended discussion, illustrated by examples, of the various considerations and legal doctrines that often come into play in such cases. The Guide featured the issue of when U.S. antitrust jurisdiction could be asserted and also explained the government's views on such issues as foreign sovereign compulsion, international comity and the act of state doctrine.¹⁴

The debate regarding the proper limits of U.S. antitrust law culminated in the passage of two pieces of related legislation in 1982. First was the Export Trading Company Act, which provided a specific administrative mechanism for protection of U.S.-based export ventures from U.S. antitrust attack. Collaborations meeting certain standards were entitled to apply for and receive certification (Export Trade Certificate of Review) by the Secretary of Commerce. Export Trade Certificates of Review continue to be issued under these provisions.¹⁵

The second and far more consequential product of the jurisdictional debate was the FTAIA. In full, it states:

§ 6a. Conduct involving trade or commerce with foreign nations

This Act [15 U.S.C. §§ 1 et seq.] 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.

If this Act applies 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.¹⁶

With its passage, Congress attempted to limit and define the extraterritorial application of the Sherman Act.

¹³ International Trade Administration, President's Export Council History, <http://trade.gov/pec/history.asp>.

¹⁴ After passage of the FTAIA, the Department of Justice twice issued updated versions of the Guide (in 1988 and 1995). See U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations (1995); U.S. Dep't of Justice, Antitrust Enforcement Guidelines for International Operations (1988).

¹⁵ Select USA, Export Trade Certificate of Review Program, <http://selectusa.commerce.gov/investment-incentives/export-trade-certificate-review-program>.

¹⁶ 15 U.S.C. § 6a.

FTAIA: From Jurisdictional Prerequisite to Substantive Element

Since the enactment of the FTAIA, courts have struggled to achieve the level of standardization regarding the application of the Sherman Act to foreign conduct that Congress sought to implement. Courts have been asked to apply the difficult language of the statute to determine issues such as the meaning of “direct, substantial, and reasonably foreseeable effect,”¹⁷ and what type of activity constitutes “conduct involving trade or commerce . . . with foreign nations.”¹⁸ Thoughtful analysis led to numerous disagreements regarding the correct application of the statute to foreign conduct. It was for many years, however, relatively uncontroversial that the FTAIA regulated the subject-matter jurisdiction of the federal courts.¹⁹

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The conclusion that the FTAIA determined whether U.S. courts are able to hear claims remained undisturbed for nearly thirty years. After the Supreme Court’s ruling in *Arbaugh*,²⁰ however, the federal judiciary began to re-evaluate that principle and some have determined that the FTAIA creates a substantive element of an antitrust claim.

In *Arbaugh*, the Court confronted “the distinction between two sometimes confused or conflated concepts: federal-court ‘subject-matter’ jurisdiction over a controversy; and the essential ingredients of a federal claim for relief.”²¹ Specifically, it addressed whether the minimum numerical requirement to be considered an “employer” under Title VII of the Civil Rights Act is properly related to the subject-matter jurisdiction of relevant federal courts or, alternatively, enumerates a substantive element of a Title VII claim. In that case, the defendant lost at trial, and subsequently (and successfully in the lower courts) moved to dismiss the verdict for want of federal subject-matter jurisdiction because the defendant had fewer than the requisite number of employees.²²

After recognizing that “jurisdiction” is a term that is frequently used imprecisely,²³ the Court in *Arbaugh* sought to simplify the analysis:

If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But

¹⁷ *United States v. LSL Biotechnologies*, 379 F.3d 672, 683 (9th Cir. 2004).

¹⁸ *F. Hoffmann-LaRoche Ltd v. Empagran S.A.*, 542 U.S. 155 (2004). In *Empagran*, the Supreme Court held that foreign purchasers of goods that were injured by a price-fixing agreement could not bring an antitrust claim in the United States simply because a domestic purchaser of the same goods was also injured. *Id.* at 159. This decision was reached, in part, because principles of comity recognize that foreign sovereigns have a legitimate interest in regulating their own commercial affairs. *Id.* at 164–65. The case was on appeal from the Ninth Circuit, which explicitly indicated that the FTAIA governed subject matter jurisdiction. *Empagran v. F. Hoffman-LaRoche*, 315 F.3d 338, 343, 357 (9th Cir. 2003).

¹⁹ AREEDA & HOVENKAMP, *ANTITRUST LAW*, *supra* note 2, (“At this writing all Circuits agree that the FTAIA’s limitations on the reach of the Sherman Act are ‘jurisdictional.’”); *see also* cases cited *supra* note 2. However, even briefly before *Arbaugh*, some opined that the FTAIA did not govern subject-matter jurisdiction. *United Phosphorus v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003) (en banc) (Wood, J., dissenting). In *United Phosphorus*, the Seventh Circuit, in an en banc opinion, concluded that the FTAIA governed subject-matter jurisdiction. *Id.* at 952. In her dissent, Judge Wood stated that “neither the majority nor those earlier opinions have distinguished carefully between judicial and legislative jurisdiction—or, to put it differently, between jurisdiction to decide a case and jurisdiction to prescribe a rule of law. The central question now before us is whether the FTAIA affects the former or the latter power.” *Id.* at 953. She believed that the FTAIA should be viewed as creating a substantive element of an antitrust claim because it was not constructed like a “true jurisdiction-stripping statute[.]” *Id.* at 954. In her view, “The fact that the FTAIA does not contain a clear congressional statement that it is intended to restrict the subject matter jurisdiction of the federal courts (or for that matter even a brief mention of the term ‘jurisdiction’) should be enough to resolve the question before us.” *Id.* at 955.

²⁰ 546 U.S. 500 (2006).

²¹ *Id.* at 503.

²² *Id.* at 503–04.

²³ *Id.* at 510–11.

when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.²⁴

The Court described this as a “readily administrable bright line” test.²⁵ The Court criticized numerous “drive-by jurisdiction rulings” that did not explicitly consider whether a dismissal should be for lack of jurisdiction or for failure to state a claim, but its ruling in *Hoffman-LaRoche Ltd. v. Empagran*²⁶ was not among them, and *Arbaugh* did not mention the FTAIA in any way.²⁷

Although *Arbaugh* did not refer to antitrust law, courts began to apply it in this area given the Supreme Court’s broad articulation of the jurisdiction-versus-merits standard. In *Animal Science*, the Third Circuit determined that under the *Arbaugh* standard, the FTAIA created a substantive element of an antitrust claim rather than a limitation on subject-matter jurisdiction.²⁸ The Court held that the

FTAIA neither speaks in jurisdictional terms nor refers in any way to the jurisdiction of the district courts. Indeed, the statutory text is wholly silent in regard to the jurisdiction of the federal courts. . . . We therefore overrule our earlier precedent that construed the FTAIA as imposing a jurisdictional limitation on the application of the Sherman Act.²⁹

The Seventh Circuit followed suit in *Minn-Chem*, overruling its earlier en banc precedent on that point.³⁰

District courts are divided on the impact of *Arbaugh* on the FTAIA. In *In Re TFT-LCD (Flat Panel) Antitrust Litigation*, Judge Illston in the Northern District of California declined to follow binding Ninth Circuit precedent,³¹ which stated that “[t]he FTAIA provides the standard for establishing when subject matter jurisdiction exists over a foreign restraint of trade.”³² While acknowledging that other district courts in the circuit continue to follow the Ninth Circuit’s holding in *LSL Biotechnologies*, Judge Illston concluded that that precedent could not survive *Arbaugh*.³³ Accordingly, the court concluded that “application of [*Arbaugh*’s] ‘clearly states’ test necessitates the finding that the FTAIA does not affect subject matter jurisdiction.”³⁴ More recently, however, another district court took the opposite approach: Judge Scheindlin in the Southern District of New York analyzed some of the “merits” opinions and concluded that “while current thinking may point against finding the FTAIA to be jurisdictional, this Court is bound by precedent until it is overruled by the Second Circuit or the Supreme Court.”³⁵

²⁴ *Id.* at 515–16 (citation omitted).

²⁵ *Id.* at 516.

²⁶ See discussion *supra* note 18 and *infra* p.9.

²⁷ 546 U.S. at 511–12.

²⁸ 654 F.3d 462, 467–68 (“In light of the Supreme Court’s subsequent decision in *Arbaugh*, and other recent cases, however, we will now overturn this aspect of our *Turicentro* and *Carpet Group* decisions and hold that the FTAIA constitutes a substantive merits limitation rather than a jurisdictional limitation.”) (citation omitted).

²⁹ *Id.* at 468–69 (citations and footnotes omitted).

³⁰ 683 F.3d 845, 851–53.

³¹ 822 F. Supp. 2d 953 (N.D. Cal. 2011).

³² *United States v. LSL Biotechnologies*, 379 F.3d 672, 683 (9th Cir. 2004).

³³ 822 F. Supp. 2d 953, 958–59.

³⁴ *Id.* at 959.

³⁵ *Lotes Co. v. Hon Hai Precision Indus. Co.*, 2013 U.S. Dist. LEXIS 69407 at *25 (S.D.N.Y. May 14, 2013).

The certiorari petition in *Minn-Chem* did not take up the issue. The defendants below filed a petition for review on two grounds: an alleged conflict among the U.S. Courts of Appeals regarding the meaning of direct effect under the FTAIA,³⁶ and an alleged circuit split with regard to the scope of the phrase “conduct involving . . . import trade or import commerce.”³⁷ Both of these issues go to the meaning of the FTAIA requirements, rather than the issue of whether the statute governs the subject-matter jurisdiction of the courts. Despite the glaring circuit split on the jurisdiction-versus-substance issue, the defendants chose not to challenge the Seventh Circuit’s holding on that question. It appears that *Minn-Chem* could not have been the vehicle for the Supreme Court to address the issue in any event; a settlement in the case (a class action) is pending approval before the district court as of this writing. Technically, however, the petition remains pending before the Supreme Court.

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Jurisdictional Evidence

Three different types of evidence support the conclusion that the FTAIA should be considered a limit on the subject-matter jurisdiction of the courts rather than a definition of a new substantive element of an antitrust claim. Although the plain language of the statute does not explicitly use the term “jurisdiction,” each of these sources provides clear evidence that the statute was intended to be jurisdictional.

First, the entire Congressional debate that culminated in adoption of the FTAIA assumed it was meant to regulate jurisdiction. The law was passed specifically to address one basic question: when should U.S. courts have jurisdiction over antitrust claims involving foreign conduct and/or parties? The legislative history confirms this. For example, the key House of Representatives Report contains the following language in a section entitled “Effect of Legislation and Current Law”:

A very important question is the effect of the legislation on current antitrust law. *It is the intent of the sponsors of the legislation and the Committee to address only the subject matter jurisdiction of United States antitrust law in this legislation.* H.R. 5235 does not affect the legal standards for determining whether conduct violates the antitrust laws, and thus the substantial antitrust issues on the merits of a claim would remain unchanged.³⁸

That statement is not the only clear expression in the House Report. The Report goes on to say that “[b]y more precisely defining the subject matter jurisdiction of U.S. antitrust law, H.R. 5235 in no way limits the ability of a foreign sovereign to act under its own laws against an American-based export cartel having unlawful effects in its territory.”³⁹

The Senate Conference Report also supports this position. It made clear that the FTAIA modified the Sherman Act and Section 5 of the Federal Trade Commission Act by creating a “jurisdictional threshold for enforcement actions.”⁴⁰ Furthermore, the principal legislators behind the FTAIA also made statements to support this conclusion. For example, Peter Rodino, then Chairman of the House Judiciary Committee, said that the FTAIA would have a beneficial effect in two

³⁶ Petition for Writ of Certiorari, *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845 (No. 12-650) 2012 WL 5928328 at *14.

³⁷ *Id.* at *17.

³⁸ H.R. REP. NO. 97-686 at 13 (1982) (emphasis added).

³⁹ *Id.* at 13–14.

⁴⁰ S. REP. NO. 97-644 at 29–30 (1982) (Conf. Rep.).

areas, one of which was to “iron out wrinkles in the jurisdictional fabric that have led to legitimate doubts among exporters about what conduct is or is not permitted.”⁴¹ He provided additional clarity, stating that the changes brought about by the FTAIA do not “affect the substantive standards that a court applies in determining whether the antitrust laws have been violated. Instead, [it] draws a more precise jurisdictional line indicating the point at which U.S. antitrust laws simply do not apply.”⁴² Thus, the legislative history confirms that Congress passed the FTAIA to settle the decades-long debate regarding the extraterritorial reach of the Sherman Act, a jurisdictional issue distinct from whether the foreign conduct at issue constitutes a substantive violation of antitrust law.

Second, the structure of the FTAIA itself demonstrates that the statute addresses jurisdiction. The FTAIA has three operative sections for this analysis.⁴³ First, the prefatory language removes foreign conduct from the reach of the Sherman Act.⁴⁴ Then, generally, subsection 1 brings conduct back within the ambit of U.S. antitrust laws if it had a “direct, substantial, and reasonably foreseeable” domestic effect.⁴⁵ Finally, subsection 2 indicates that, assuming subsection 1 is satisfied, a potential litigant must then satisfy the substantive elements of an antitrust claim.⁴⁶ The dichotomy is clear. The language indicates that once a plaintiff satisfies the threshold requirements of the FTAIA, the court then begins its analysis of the substantive elements, i.e., the merits, of the plaintiff’s claim. The FTAIA does not address the merits at all. The FTAIA’s structure clarifies not only the intended purpose of the legislation, but it also speaks directly to the proper interpretation of the statute as adopted.⁴⁷

Finally, determining that the FTAIA is not jurisdictional undermines the principle of comity, which Congress did not alter with the FTAIA⁴⁸ and the Supreme Court recognized as critical in *Hoffmann-LaRoche Ltd. v. Empagran*.⁴⁹ Both Congress and the Court understood that foreign conduct can be dealt with in foreign jurisdictions where the conduct occurs. Therefore, when that is

⁴¹ 128 CONG. REC. 18952 (Aug. 3, 1982) (statement of Rep. Rodino).

⁴² *Id.*; see also H.R. REP. NO. 97-686 at 18 (statement of Chairman Rodino) (“As explained more fully in the Committee’s Report, the Committee added [the effects language] to make it absolutely clear that the basis of American antitrust jurisdiction has to be a domestic *anticompetitive* effect.”).

⁴³ 15 U.S.C. § 6a.

⁴⁴ *Id.* (“This Act [15 U.S.C. §§ 1 et seq.] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . .”).

⁴⁵ *Id.*

⁴⁶ *Id.* (stating that foreign conduct having consequences on U.S. commerce will satisfy this requirement of the FTAIA only if “such effect gives rise to a claim under the provisions of this Act [15 U.S.C. §§ 1 et seq.], other than this section.”); see also *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158 (2004) (“[The FTAIA] excludes from the Sherman Act’s reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act ‘shall not apply to conduct involving trade or commerce . . . with foreign nations.’ 96 Stat. 1246, 15 U.S.C. § 6a. It then creates exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters.”).

⁴⁷ One of the authors (Lipsky) can personally attest—having served as Deputy Assistant Attorney General for the Antitrust Division of the Department of Justice with responsibility (inter alia) for coordinating the Division’s positions on federal antitrust legislation at the time that the FTAIA was under consideration—that the second subsection was specifically inserted at the request of the Administration to assure that proof of jurisdiction under the FTAIA would not be sufficient to establish substantive liability. The language and placement of the provision makes this obvious in any event.

⁴⁸ The House Report states that “[i]f a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts’ ability to employ notions of comity or otherwise to take account of the international character of the transaction.” H. R. REP. NO. 97-686 at 13 (internal citation omitted).

⁴⁹ 542 U.S. 155 (2004).

the case, it may be relatively simple to have a U.S. case dismissed in favor of a more appropriate foreign venue. However, by converting the FTAIA from jurisdictional to substantive, the process for assessing the viability of a U.S. claim is made much more difficult, costly, and complex, as discussed in the introduction. Those challenges stem from the differences between filing a motion to dismiss based on Federal Rule of Civil Procedure 12(b)(6) rather than 12(b)(1), which has traditionally governed motions on the application of the FTAIA. Filing under the former requires potential defendants to be subjected to the types of drawn-out proceedings that the Court sought to avoid in *Empagran*.⁵⁰

Furthermore, in *Empagran*, the Court treated the FTAIA as governing subject-matter jurisdiction, as the case arose from a Rule 12(b)(1) motion.⁵¹ Additionally, it quoted legislative proceedings indicating that the FTAIA regulates jurisdiction. For example, it quoted the portion of the House Report that stated that “there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor.”⁵² It also quoted a portion of an antitrust treatise that said, assuming the court of appeals’ broader interpretation of the international scope of U.S. antitrust laws under the FTAIA in that case:

[T]he United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign’s provisions for private antitrust enforcement, provided that a different plaintiff had a cause of action against a different firm for injuries that were within U.S. [other-than-import] commerce.”⁵³

Courts that have concluded that the FTAIA creates a substantive element of an antitrust claim have not directly engaged this evidence. For example, the Third Circuit stated that “[i]n *Arbaugh*, the Supreme Court articulated a ‘readily administrable bright line,’ ‘clearly states’ rule,” and the FTAIA did not meet that standard because it “neither speaks in jurisdictional terms nor refers in any way to the jurisdiction of the district courts.”⁵⁴ Similarly, the Seventh Circuit stated that interpreting the FTAIA as creating a substantive element is “both more consistent with the language of the statute and sounder from a procedural standpoint,” but it did not engage in any real analysis of the evidence, other than a brief discussion of the statute’s language.⁵⁵ Certainly none of these courts meaningfully addressed the potentially significant changes in antitrust litigation—including the possibility of significantly delaying jurisdictional rulings and thus materially enhancing burdens on defendants—that might follow from this change in construction of the FTAIA.

Conclusion

Arbaugh intended to establish a clear and easily applied standard for determining whether a statute governs jurisdiction or enumerates an element of a substantive cause of action. It is equally clear, however, that Congress passed the FTAIA to govern the subject-matter jurisdiction of the courts. Whatever its supposed defects, the FTAIA was a reasonable effort to bring consistency to the extraterritorial application of U.S. antitrust law after decades of uncertainty. Given the extraor-

⁵⁰ *Id.* at 168–69.

⁵¹ *Id.* at 159–60 (citing the district court and court of appeals opinions, which noted that the motion to dismiss was based on, inter alia, Federal Rule of Civil Procedure 12(b)(1), which governs subject-matter jurisdiction).

⁵² *Id.* at 163.

⁵³ *Id.* at 166 (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 273 (Supp. 2003) (emphasis added)).

⁵⁴ *Animal Sci. Prods. Inc. v. China Minmetals Corp.*, 654 F.3d 462, 468 (3d Cir. 2011).

⁵⁵ *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (en banc).

Courts that have concluded that the FTAIA creates a substantive element of an antitrust claim have not directly engaged this evidence.

dinary scope and power of the U.S. antitrust enforcement arsenal—a scope and power still virtually unique among the competition laws of the world (lengthy periods of incarceration for individual wrong-doers, mandatory treble damages in civil suits, one-way fee shifting in favor of victorious plaintiffs, and opt-out class action procedures, to name just a few of the most fearsome aspects of U.S. antitrust)—it is regrettable that *Arbaugh* is being applied to undermine Congress’s thoughtful response to this longstanding but increasingly important question. It is especially troubling because *Arbaugh* shows no trace of having considered the possibility that the Court’s decision might have this far-reaching collateral effect.

The legislative history, the structure of the statute, and principles of comity related to the FTAIA dictate the conclusion that Congress passed the statute to address subject-matter jurisdiction. Yet no court or tribunal has concluded that this evidence satisfies the *Arbaugh* standard. Even more alarming, none have even given it serious consideration. It seems unwise to categorically conclude that a statute may govern subject-matter jurisdiction only if it contains the magic words, especially when all indicators suggest that the legislature adopted a law to do just that. Any test that requires courts to interpret a statute in a manner contrary to such clear evidence should be reevaluated. ●