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The Competing Approaches to the Foreign Trade Antitrust Improvements Act: A Fundamental Disagreement

Morgan Franz

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I. INTRODUCTION

Between 2011 and 2012, the Third Circuit decided an antitrust case involving a company owned by the Chinese government;¹ the Seventh Circuit decided a case involving companies based in Canada, Russia, and Belarus;² and the Northern District of California decided a dispute involving companies from South Korea, Japan, and Taiwan.³ As federal courts in the United States are confronted with a rising number of antitrust lawsuits implicating foreign conduct and foreign interests,⁴ other countries are becoming increasingly concerned about United States interference with the regulation of foreign markets, particularly because of the potential for foreign citizens to bypass their own antitrust regulation systems in favor of the more generous treble-damages remedy available in American courts.⁵ In the midst of this concern, uncertainty has arisen among circuit and district courts as to whether the Foreign Trade Antitrust Improvements Act

1. *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012).

2. *Minn-Chem., Inc. v. Agrium, Inc.*, 683 F.3d 845, 848–49 (7th Cir. 2012).

3. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 958–59 (N.D. Cal. 2011).

4. See Petition for Writ of Certiorari at 27 n.5, *China Minmetals Corp. v. Animal Sci. Prods., Inc.*, 132 S. Ct. 1744 (2012) (No. 11-846), 2012 WL 30298, at *27 n.5 (“The increasing frequency of disputes involving the FTAIA is evidenced by the growing number of cases in which district courts have addressed the issue. While the number of reported district court cases with FTAIA rulings in the first fifteen years of the statute’s existence can be counted on two hands, those same two hands can be used to count the FTAIA’s appearance before district courts in just the last two years.”).

5. In the Supreme Court’s most recent antitrust decision involving foreign conduct, several foreign nations filed amicus briefs voicing concern about the United States interfering in their antitrust regulation systems, which can differ significantly both in the conduct prohibited and in the remedies available. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167–68 (2004); see also Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 384 (1997) (describing how the reach of American antitrust law has been met with resistance from other countries).

(FTAIA)⁶ limits the subject matter jurisdiction of United States courts over foreign anticompetitive conduct or instead establishes an additional element to a Sherman Act claim.⁷ This uncertainty has led to inconsistent foreign antitrust decisions both among the circuits and among district courts within the same circuit, further aggravating the confusion about the reach of United States antitrust law.⁸

Historically, the FTAIA was widely considered a limitation on subject matter jurisdiction rather than on the merits of an antitrust claim.⁹ However, in August 2011, the Third Circuit overruled its precedent and declared that the FTAIA imposes a substantive-merits limitation rather than a jurisdictional bar.¹⁰ Since that decision, some courts have followed suit: in October 2011, for example, a California district court disregarded Ninth Circuit precedent¹¹ and agreed with the Third Circuit that the FTAIA did not address subject matter jurisdiction.¹² Most notably, in June 2012, the Seventh Circuit became the second circuit court to overrule its precedent in favor of an elements-based interpretation of the FTAIA.¹³ However, not all courts have agreed with this interpretation, and the circuits are now split.¹⁴

This shift in the way some courts understand the FTAIA is largely a result of a recent set of Supreme Court cases meant to clarify when a statute will be treated as jurisdictional.¹⁵ In 2006, the Supreme Court decided *Arbaugh v. Y & H Corp.*, articulating the standard that the legislature must “clearly state” that a statute’s scope is jurisdictional in order for it to be treated as such.¹⁶ The Court subsequently refined the test to focus on the

6. 15 U.S.C. § 6a (2012).

7. See *infra* notes 138–77 and accompanying text.

8. See *infra* notes 138–77 and accompanying text.

9. See *infra* notes 43–58 and accompanying text.

10. *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 466 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012) (overruling *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 300 (3d Cir. 2002)).

11. *United States v. LSL Biotechs.*, 379 F.3d 672 (9th Cir. 2004).

12. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 958–59 (N.D. Cal. 2011). However, other district courts in California have continued to treat the FTAIA as jurisdictional. See, e.g., *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); *Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1185 (N.D. Cal. 2009).

13. *Minn-Chem., Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2011) (overruling *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003)).

14. See *infra* notes 138–77 and accompanying text.

15. See *infra* notes 88–136 and accompanying text.

16. 546 U.S. 500, 515 (2012).

intent of Congress¹⁷ and the legal character of the requirement,¹⁸ a non-categorical approach that takes into account factors such as text, context, and relevant historical treatment.¹⁹ Although neither *Arbaugh* nor any of the subsequent cases applying the “clearly states” test have involved the FTAIA, courts ruling on the FTAIA since 2006 have relied heavily on the reasoning of *Arbaugh* and its progeny in their analyses of the statute.²⁰ Most modern courts hold that *Arbaugh* supports a substantive interpretation of the FTAIA, but there are also compelling arguments that *Arbaugh* supports a jurisdictional interpretation of the FTAIA.²¹

This Comment explores the history and reasoning behind this recent re-examination of the FTAIA in light of *Arbaugh*, examines both the propriety and the implications of the competing interpretations of the FTAIA, and argues that the resolution of the competing approaches is beyond the purview of the lower courts. Part II provides an overview of the extraterritorial reach of the Sherman Act leading up to the FTAIA, as well as the judicial treatment of the FTAIA prior to *Arbaugh*.²² Part III discusses the impact of *Arbaugh* and subsequent Supreme Court cases applying the “clearly states” test on the jurisdictional characterization of the FTAIA, ultimately leading to a circuit split.²³ Part IV applies the “clearly states” test to the FTAIA and looks at the factors that weigh in favor of and against a jurisdictional interpretation of the FTAIA.²⁴ Part V explores the consequences of the competing approaches²⁵ and contends that the lower courts should not decide the jurisdiction issue because the Supreme Court and Congress possibly differ in their approaches to the extraterritorial reach of American law—rather, the Supreme Court should address the issue and Congress, either by silence or legislative reaction, should settle the issue.²⁶ Part VI concludes.²⁷

17. See *infra* note 212 and accompanying text.

18. See *infra* note 123 and accompanying text.

19. See *infra* notes 118–23 and accompanying text.

20. See *infra* notes 138–66 and accompanying text.

21. See *infra* notes 178–269 and accompanying text.

22. See *infra* notes 28–87 and accompanying text.

23. See *infra* notes 88–177 and accompanying text.

24. See *infra* notes 178–269 and accompanying text.

25. See *infra* notes 270–95 and accompanying text.

26. See *infra* notes 299–307 and accompanying text.

27. See *infra* notes 308–14 and accompanying text.

II. A HISTORY OF THE FTAIA PRIOR TO *ARBAUGH*A. *The Extraterritorial Reach of the Sherman Act Before the Enactment of the FTAIA*

The Supreme Court first considered the extraterritorial reach of the Sherman Act²⁸ in *American Banana Co. v. United Fruit Co.*, in which the Court held that the Sherman Act did not govern anticompetitive acts that took place in Panama and Costa Rica.²⁹ The Court articulated an “almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”³⁰ Justice Holmes, writing for the Court, reasoned that to hold an actor to United States law rather than the laws of the place where the acts occurred would be unjust and would interfere with the authority of foreign sovereigns, contrary to international comity.³¹

The strict territorial interpretation of the Sherman Act advocated by *American Banana* was subsequently softened by *United States v. Aluminum Co. of America*, when the Second Circuit considered whether Congress had chosen to attach antitrust liability to acts performed overseas.³² The court first noted, in accord with *American Banana*'s territorial approach, that the words of a statute should not be read “without regard to the limitations customarily observed by nations upon the exercise of their powers.”³³ However, the court also recognized Congress's power to impose liability for extraterritorial conduct that had consequences within the United States.³⁴ Ultimately, Judge Learned Hand, writing for the Second Circuit, created an effects test for determining the extraterritorial reach of the Sherman Act: the Sherman Act covered agreements that were “intended to affect imports and did affect them.”³⁵

While neither *American Banana* nor *Alcoa* directly addressed subject matter jurisdiction, circuit courts after *Alcoa* and prior to the enactment of

28. 15 U.S.C. §§ 1–7 (2012).

29. 213 U.S. 347, 357 (1909).

30. *Id.* at 356.

31. *Id.*

32. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945).

33. *Id.*

34. *Id.*

35. *Id.* at 444.

the FTAIA largely treated the extraterritorial application of the Sherman Act as an issue of subject matter jurisdiction.³⁶ In 1977, the Ninth Circuit held that there must be an effect on commerce before federal courts can “legitimately exercise subject matter jurisdiction” under the Sherman Act.³⁷ Two years later, the Third Circuit stated that subject matter jurisdiction was at issue in determining whether the Sherman Act applied to overseas conduct.³⁸ In 1980, the Seventh Circuit held that to establish subject matter jurisdiction, an intentional effect on American commerce must be shown.³⁹ The Second and Tenth Circuits also treated the extraterritorial application of the Sherman Act as an issue of subject matter jurisdiction.⁴⁰

B. Judicial Application of the FTAIA Prior to Arbaugh

Following *Alcoa*, the effects test was applied in a variety of forms,⁴¹ leading to unpredictability in litigation, and ultimately prompting Congress to resolve the inconsistent approaches through enactment of the FTAIA.⁴² In the FTAIA, Congress codified an effects test that removes foreign conduct from the reach of the Sherman Act unless the conduct: (1) has a direct, substantial and reasonably foreseeable effect on United States commerce;

36. See *United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 951 (7th Cir. 2003), *overruled by* *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 848 (7th Cir. 2012) (“The [FTAIA] was enacted against a backdrop of almost 60 years of precedent which characterized the application of the Sherman Act to the conduct of foreign markets as a matter of subject matter jurisdiction.”).

37. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976).

38. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1291 (3d Cir. 1979).

39. *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1253–55 (7th Cir. 1980).

40. See *Nat’l Bank of Can. v. Interbank Card Ass’n*, 666 F.2d 6, 8 (2d Cir. 1981) (citing *Timberlane* and treating the threshold question as jurisdictional); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 869 (10th Cir. 1981) (holding that an effect on U.S. commerce is necessary to “support jurisdiction of an American court”). The Fifth Circuit also may have considered the effects test as a limitation on subject matter jurisdiction. See *Am. Rice, Inc. v. Ark. Rice Growers Coop. Ass’n*, 701 F.2d 408, 413 (5th Cir. 1983) (looking at the effects test to guide courts in determining whether a court has “jurisdiction to entertain” a trademark action involving commerce between the U.S. and a foreign nation). *But cf.* *Indus. Dev. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 884 n.7 (5th Cir. 1982) (disagreeing with the Third and Seventh Circuits’ characterization of the effects test as a test of subject matter jurisdiction), *vacated*, 460 U.S. 1007 (1983).

41. Compare *Timberlane*, 549 F.2d at 613 (applying a test that balances considerations of international comity with domestic effects), with *Nat’l Bank of Can.*, 666 F.2d at 8 (applying an effects test similar to that of *Alcoa*).

42. H.R. REP. NO. 97-686, at 2 (1982) (recognizing the need for a statutory test because “courts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists”).

and (2) that effect gives rise to a Sherman Act claim.⁴³ The Supreme Court applied the FTAIA's domestic effects test in two important cases prior to its *Arbaugh* decision: *Hartford Fire Insurance Co. v. California*⁴⁴ and *F. Hoffman-La Roche Ltd. v. Empagran S.A.*⁴⁵

In *Hartford Fire*, the Court considered a motion to dismiss⁴⁶ based in part on a complaint filed by nineteen states and various private plaintiffs alleging that London-based reinsurers violated section 1 of the Sherman Act by conspiring to refuse coverage of certain domestic policies.⁴⁷ The majority determined that this conduct satisfied the effects test.⁴⁸ The London reinsurers did not dispute that the Court had "a minimal basis for the exercise of jurisdiction,"⁴⁹ but rather argued that the district court should have declined to exercise jurisdiction based on considerations of international comity.⁵⁰ Justice Souter's citation of the legislative history, as well as the content of Justice Scalia's dissent, indicate that the majority interpreted this as a question of subject matter jurisdiction.⁵¹ However, the

43. The text of the FTAIA in relevant part is as follows:

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

- (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 sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a (2012).

44. 509 U.S. 764 (1993).

45. 542 U.S. 155 (2004).

46. The motion to dismiss was brought under 12(b)(1) and 12(b)(6). Fed R. Civ. P. 12(b)(1), 12(b)(6). See *In re Ins. Antitrust Litig.*, 723 F. Supp. 464, 471–72 (N.D. Cal. 1989).

47. *Hartford Fire*, 509 U.S. at 794–95.

48. *Id.* at 796. Justice Souter delivered this part of the opinion, with Chief Justice Rehnquist and Justices White, Blackmun, and Stevens joining. *Id.* at 766. Justice Scalia dissented, joined by Justices O'Connor, Kennedy, and Thomas. *Id.* For an in-depth look at the dissent, see *infra* notes 64–74 and accompanying text.

49. *Id.* at 795.

50. *Id.* at 797. The opinion noted that in the legislative history of the FTAIA, Congress had expressed no view as to whether a court with Sherman Act jurisdiction could decline to exercise that jurisdiction based on international comity. *Id.* at 798.

51. See *id.* (quoting the legislative history of the FTAIA, which states in relevant part that "[i]f a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court[']s ability to employ notions of comity"). The quoted legislative history itself cites to *Timberlane*, which treated the FTAIA as effecting subject matter jurisdiction. See

Court declined to decide the question.⁵²

In *Empagran*, the Supreme Court held that where price fixing adversely affects domestic and foreign purchasers, but the foreign effect is independent of any domestic effect, the FTAIA's domestic effects exception does not apply to claims based solely on the adverse foreign effect.⁵³ The defendants moved to dismiss the case under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim.⁵⁴ On appeal, the Supreme Court remanded the case to the D.C. Circuit, which dismissed the case for lack of subject matter jurisdiction under the FTAIA.⁵⁵ Although the district and circuit courts certainly considered the FTAIA to be an issue of subject matter jurisdiction, the Supreme Court never clearly addressed the issue, and both sides of the debate have found support in *Empagran*'s text.⁵⁶

Between the enactment of the FTAIA and *Arbaugh*, circuit courts

supra note 37 and accompanying text. Additionally, in a footnote, Justice Souter quotes with approval a source stating that the Sherman Act is a "prime exampl[e] of the simultaneous exercise of prescriptive jurisdiction and grant of subject matter jurisdiction." *Hartford Fire*, 509 U.S. at 796 n.22 (alteration in original) (quoting DAVID WESTIN & GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 542, n.5 (2d ed. 1992)). Justice Scalia's dissent attacks an interpretation of the FTAIA as implicating subject matter jurisdiction, which leads to an inference that the majority supported this interpretation. *See infra* notes 64–74 and accompanying text.

52. *Hartford Fire*, 509 U.S. at 798. The Court instead found the substantial question to be whether there was a conflict between domestic and foreign law and, finding no conflict, the claims survived dismissal. *Id.* at 798–99.

53. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004). The analysis focuses mainly on the "gives rise to" language of the FTAIA. *Id.* at 173–74.

54. *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, No. Civ.001686TFH, 2001 WL 761360, at *1, *4 (D.D.C. June 7, 2001) (dismissing in part for lack of subject matter jurisdiction).

55. *Empagran S.A. v. F. Hoffmann-La Roche Ltd (Empagran II)*, 417 F.3d 1267, 1269 (D.C. Cir. 2005).

56. A jurisdictional reading is supported by the fact that the case was brought up on a 12(b)(1) motion to dismiss, which was never contested by the Court, as well as the fact that the Court cited with approval a treatise that supports a jurisdictional interpretation. *See Empagran*, 542 U.S. at 166 (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 273, pp. 51–52 (Supp. 2003)), which warns of the U.S. providing "worldwide subject matter jurisdiction" to foreign antitrust plaintiffs). In addition, the Court looked at whether the correct scope of the FTAIA was set out in either *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001) or *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir. 2002). *Empagran*, 542 U.S. at 160–61. Both *Den Norske* and *Kruman* treated the FTAIA as jurisdictional. *Empagran*, 542 U.S. at 160–61. *See Den Norske*, 241 F.3d at 431; *Kruman*, 284 F.3d at 390. As for support of an elements approach, the *Empagran* opinion speaks in several places of the application of American law to foreign conduct, which the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) declares is the language of merits, not subject matter jurisdiction. *See Minn-Chem, Inc. v. Agrum, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012).

continued to largely treat the extraterritorial application of the Sherman Act as a matter of subject matter jurisdiction.⁵⁷ However, the circuit courts did not always clearly distinguish between analysis under 12(b)(1) and a 12(b)(6) motion, and, consequently, later courts have called the reliability of their holdings into question.⁵⁸

C. Dissenting Voices

Among the broad acceptance of the FTAIA as a jurisdictional limitation, two dissenting opinions emerged⁵⁹ that are notable for the influence of their reasoning on the current courts that treat the FTAIA's requirements as substantive.⁶⁰ In *Hartford Fire Insurance Co. v. California*, Justice Scalia dissented from a majority opinion holding a district court had subject matter jurisdiction over a Sherman Act claim under the FTAIA.⁶¹ In *United Phosphorus Ltd. v. Angus Chemical Co.*,⁶² Judge Wood, relying in part on Scalia's dissent, dissented from a majority opinion holding the FTAIA was jurisdictional.⁶³

1. Justice Scalia in *Hartford Fire*

Justice Scalia interpreted the claims in *Hartford Fire* as raising two distinct questions: "whether the District Court had jurisdiction, and whether

57. See *McBee v. Delica Co.*, 417 F.3d 107, 122–23 (1st Cir. 2005); *United States v. LSL Biotech.*, 379 F.3d 672, 679 (9th Cir. 2004); *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 717 (6th Cir. 2003); *United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 951–52 (7th Cir. 2003); *United States v. Anderson*, 326 F.3d 1319, 1329–30 (11th Cir. 2003); *Kruman*, 284 F.3d at 390; *Turicentro S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 300 (3d Cir. 2002); *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 286 (4th Cir. 2002); *Den Norske*, 241 F.3d at 421; *Empagran II*, 417 F.3d at 1269. Contemporary articles discussing these cases also used the language of subject matter jurisdiction. See, e.g., Edward D. Cavanagh, *The FTAIA and Empagran: What Next?*, 58 SMU L. REV. 1419 (2005).

58. See, e.g., *United Phosphorus*, 322 F.3d at 962 (Wood, J., dissenting) (criticizing the courts in *Empagran II*, *Kruman*, and *Den Norske* for "focus[ing] on the merits of the FTAIA analysis rather than the precise procedural manner in which it was presented").

59. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812 (1993) (Scalia, J., dissenting); *United Phosphorus*, 322 F.3d at 942 (Wood, J., dissenting).

60. See, e.g., *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 468 n.7, 469 n.8 (3d Cir. 2011) (approving of Scalia's dissent in *Hartford Fire* and Wood's dissent in *United Phosphorus*).

61. 509 U.S. 764, 812 (1993) (Scalia, J., dissenting).

62. 322 F.3d 942 (7th Cir. 2003).

63. *Id.* at 952.

the Sherman Act reaches the extraterritorial conduct alleged.”⁶⁴ As to the question of subject matter jurisdiction, Justice Scalia believed that jurisdiction was established by the assertion of non-frivolous Sherman Act claims⁶⁵ and by 28 U.S.C. § 1331, which gives district courts jurisdiction over cases “arising under” federal statutes.⁶⁶ Regarding the second question—the extraterritorial reach of the Sherman Act—Justice Scalia reasoned that it turned on whether Congress intended for the Sherman Act to reach the conduct at issue; if a plaintiff could not prevail on that issue, the court should rule that the plaintiff failed to state a claim under the statute rather than dismissing the claim for lack of jurisdiction.⁶⁷

Scalia went on, however, to discuss a type of jurisdiction that was relevant to the FTAIA inquiry: legislative jurisdiction, also known as jurisdiction to prescribe,⁶⁸ which refers to “the authority of a state to make its substantive laws applicable to particular persons and circumstances.”⁶⁹

64. 509 U.S. at 812 (Scalia, J., dissenting).

65. *Id.*; see 15 U.S.C. § 4 (2012) (granting district courts jurisdiction to “prevent and restrain violations” of the Sherman Act). In regards to frivolous claims, in *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998), Justice Scalia, writing for the majority, stated that district courts have jurisdiction

if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another, unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous

(internal quotations and citations omitted).

66. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812 (1993); see 28 U.S.C. § 1331. In coming to this conclusion, Justice Scalia relied on precedent from *Lauritzen v. Larsen*, 345 U.S. 571 (1953). In *Lauritzen*, a foreign sailor brought a Jones Act claim against a foreign shipowner, and the shipowner contested the jurisdiction of the district court over the claim. *Id.* at 573. The Supreme Court determined that the district court had jurisdiction, reasoning that

[a]s frequently happens, a contention that there is some barrier to granting plaintiff’s claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact.

Id. at 575. Justice Scalia also cited *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 359 (1959) (“As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action.” (quoting *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 249 (1951))).

67. *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting). This is similar to the Court’s later reasoning in *Morrison* that the extraterritorial reach of a statute is an element of a claim and does not effect subject matter jurisdiction. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

68. *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting).

69. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. IV, intro. note (1987). The Restatement distinguishes between jurisdiction to prescribe, jurisdiction to adjudicate, and

Scalia then inquired whether international comity counseled against the exercise of prescriptive jurisdiction.⁷⁰ In making this determination, Justice Scalia applied section 403 of the Third Restatement of Foreign Relations Law,⁷¹ which lists factors for determining whether an exercise of prescriptive jurisdiction is reasonable.⁷² Justice Scalia emphasized that this consideration of prescriptive comity was not made in order to determine whether the court should decline adjudicatory jurisdiction, as held in the majority opinion,⁷³ but rather to determine the scope of the Sherman Act's application.⁷⁴

2. Judge Wood in *United Phosphorus*

Judge Wood, in her *United Phosphorus* dissent, laid out four reasons for construing the FTAIA as imposing elements of a Sherman Act claim.⁷⁵ First, Judge Wood stated that the FTAIA's language was not jurisdictional, especially when compared to the language of true jurisdiction-stripping statutes.⁷⁶ In particular, the FTAIA's language stating that the Sherman Act does not "apply" in certain circumstances was not to be equated with language stating that courts do not have competence to try a category of

jurisdiction to enforce. *Id.* at § 401; *see also infra* note 87.

70. *Hartford Fire*, 509 U.S. at 818 (Scalia, J., dissenting). This is in contrast to the majority, which treated international comity as implicating abstention from adjudicative jurisdiction. *Id.* at 820. However, Justice Scalia distinguished "the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere" from "'prescriptive comity': the respect sovereign nations afford each other by limiting the reach of their laws," and contended that lower courts applying "international comity" to the extraterritorial application of the Sherman Act should be applying prescriptive comity. *Id.* at 817.

71. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

72. *Hartford Fire*, 509 U.S. at 818-19.

73. *Id.* at 798.

74. *Id.* at 820.

75. *United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 954-55 (7th Cir. 2003) (Wood, J., dissenting), *overruled by* *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012).

76. *Id.* at 954. Judge Wood first noted that the Supreme Court had treated statutes with jurisdictional language as non-jurisdictional, but had never treated a statute phrased in terms of the application of the statute as jurisdictional. *Id.*; *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (treating the Emergency Planning and Community Right-To-Know Act as non-jurisdictional despite the statute's use of the word jurisdiction). Second, Judge Wood cited *Czerkies v. U.S. Dep't of Labor*, 73 F.3d 1435 (7th Cir. 1996) (en banc) for the proposition that jurisdiction-stripping rules must be expressed clearly in the language of the statute. *United Phosphorus*, 322 F.3d at 954. However, the Supreme Court in *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) calls this proposition into question, stating that "Congress, of course, need not use magic words in order to speak clearly" about the jurisdictional nature of a statute.

claims.⁷⁷

Judge Wood's second reason was that a characterization of the FTAIA as limiting subject matter jurisdiction was inconsistent with the Court's holding in *Steel Co. v. Citizens for a Better Environment*.⁷⁸ Key to the analysis in *Steel Co.* was the long-accepted concept that "the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'"⁷⁹ According to Judge Wood, cases involving the FTAIA were such that plaintiffs would have a right to recover if there was the requisite impact on domestic commerce, and would be unable to recover absent those effects.⁸⁰

Third, Judge Wood was troubled by the harsh procedural consequences of limiting subject matter jurisdiction, particularly in light of the purposes of the FTAIA.⁸¹ For example, the inquiry of whether there is a "direct, substantial, and reasonably foreseeable" effect on United States commerce could be complicated and thus "threaten[] to become a preliminary trial on the merits," consuming significant judicial resources.⁸² In addition, either litigants or the court could raise the question of subject matter jurisdiction at any time in the litigation, even after extensive and costly discovery and trial processes.⁸³ Furthermore, if a district court were to find valid jurisdiction, foreign parties would be subject to deferential appellate review of that finding, and appellate courts would be limited in their ability to give consideration to issues of international comity.⁸⁴

Finally, Judge Wood stated that a subject matter jurisdiction reading of the FTAIA was not consistent with the historical judicial treatment of the extraterritorial application of the Sherman Act.⁸⁵ Judge Wood contended

77. *United Phosphorus*, 322 F.3d at 955.

78. 523 U.S. 83 (1998).

79. *Steel Co.*, 523 U.S. at 89 (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)).

80. *United Phosphorus*, 322 F.3d at 955.

81. *Id.* at 957.

82. *Id.* In support of this point, Judge Wood pointed to *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), where it took twelve years to resolve a jurisdictional issue. *United Phosphorus*, 322 F.3d at 957. In addition, Judge Wood noted that if the FTAIA is interpreted as jurisdictional, parties cannot stipulate the effects on U.S. commerce in order to resolve their dispute quickly, which also reduces the efficiency of the litigation. *Id.* at 958.

83. *Id.* at 957.

84. *Id.* at 958–59.

85. *Id.* at 959.

that the language of *American Banana* did not address the competence of courts to resolve Sherman Act claims, but rather how much conduct Congress intended to regulate in enacting the Sherman Act.⁸⁶ Judge Wood similarly interpreted *Alcoa* as addressing whether Congress intended to attach liability to certain conduct, as opposed to addressing the competence of the court to hear the case.⁸⁷

III. THE FTAIA AFTER *ARBAUGH*

A. *The Changing Landscape of Statutory Interpretation: Arbaugh and its Progeny*

In 2006, the Supreme Court decided *Arbaugh v. Y & H Corp.*,⁸⁸ the first in a series of decisions aimed at addressing how to determine whether a statute imposes a jurisdictional limitation or an additional element of a claim.⁸⁹ *Arbaugh* set forth a seemingly bright-line “clearly states” test,⁹⁰ but that test was subsequently modified by later applications that made clear that the Court was not embracing a categorical approach.⁹¹ Along with affecting the characterization of a variety of statutes, *Arbaugh* and its progeny have provided the primary impetus for circuit courts deviating from the traditional treatment of the FTAIA as jurisdictional.⁹²

86. *Id.*

87. *Id.* at 960. According to Judge Wood, the international unpopularity of *Alcoa* sparked a slough of scholarly writing that was drawn from heavily in the creation of the Third Restatement of Foreign Relations Law. *Id.* at 960–61. Judge Wood found it particularly significant that the Restatement distinguishes between jurisdiction to prescribe and jurisdiction to adjudicate. *Id.* at 961; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 cmt. c (differentiating between prescriptive jurisdiction and subject matter jurisdiction by stating that “[j]urisdiction to prescribe with respect to transnational activity depends not on a particular link, such as minimum contacts (‘use of the mails,’ or ‘crossing state lines’), which have been used to define ‘subject matter jurisdiction’ for constitutional purposes, but on a concept of reasonableness based on a number of factors to be considered and evaluated”).

88. 546 U.S. 500 (2012).

89. See *infra* notes 93–136 and accompanying text.

90. See *infra* notes 93–105 and accompanying text.

91. See *infra* notes 106–36 and accompanying text.

92. See *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 851–52 (7th Cir. 2012) (citing *Arbaugh* and stating that the Supreme Court’s decision in *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), provides all the guidance needed to depart from a jurisdictional interpretation of the FTAIA); *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467–68 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012) (overturning prior precedent treating the FTAIA as jurisdictional in light of *Arbaugh*).

1. *Arbaugh*'s "Clearly States" Test

In *Arbaugh*, the Supreme Court determined that the employee-numerosity provision of Title VII set forth an element of a Title VII claim rather than a jurisdictional threshold.⁹³ Jennifer Arbaugh, a bartender and waitress, brought a Title VII action charging sexual harassment against her employer, Y & H Corp.⁹⁴ Two weeks after the jury returned a verdict for Arbaugh, Y & H Corp. moved to dismiss the complaint for lack of subject matter jurisdiction, asserting for the first time in the course of litigation that it was not amenable to suit under Title VII because there were fewer than fifteen employees on its payroll.⁹⁵ Believing this requirement to be jurisdictional, the trial court dismissed the case despite its recognition that doing so was both "unfair and a waste of judicial resources."⁹⁶ The Fifth Circuit, bound by its precedent holding the employee-numerosity provision to be jurisdictional, affirmed.⁹⁷

In its analysis of whether the employee-numerosity provision was jurisdictional, the Supreme Court acknowledged that courts, including the Supreme Court, had been "less than meticulous" in distinguishing between subject matter jurisdiction and elements of a claim for relief.⁹⁸ The Court then created a "readily administrable bright line" test for determining whether a statute was jurisdictional: "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."⁹⁹

In applying the "clearly states" test to the Title VII statute, the Court noted that Title VII's jurisdictional provision¹⁰⁰ does not "specif[y] any threshold ingredient akin to 28 U.S.C. § 1332's monetary floor,"¹⁰¹ and

93. *Arbaugh*, 546 U.S. at 516.

94. *Id.* at 503–04.

95. *Id.* at 504. Y & H Corp. based this assertion on a provision in the definitions section of the Title VII statute that limits the definition of employer to "a person . . . who has fifteen or more employees for each working day." *Id.* at 503 (quoting 42 U.S.C. § 2000e(b) (2012)).

96. *Id.* at 504 (internal quotation marks omitted).

97. *Id.* at 509.

98. *Id.* at 511. The Court referred to those prior decisions as "drive-by jurisdictional rulings" that should have "no precedential effect" on the question of subject matter jurisdiction. *Id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)).

99. *Id.* at 515–16.

100. 42 U.S.C. § 2000e–5(f)(3) (2012).

101. *Arbaugh*, 546 U.S. at 515.

appears in a separate provision, entitled “Definitions,” that makes no reference to jurisdiction.¹⁰² The Court also discussed the consequences of attaching a jurisdictional label to the employee-numerosity provision,¹⁰³ characterizing the likely results as “unfair and a waste of judicial resources.”¹⁰⁴ Applying the bright-line test in consideration of these factors, the Court ultimately held that the Title VII employee-numerosity provision was an element of a Title VII claim and not a jurisdictional limitation.¹⁰⁵

2. Refining the “Clearly States” Test

Since ruling on *Arbaugh*, the Supreme Court has had several opportunities to apply the “clearly states” test to other statutes, although never specifically to the FTAIA.¹⁰⁶ In 2007, the Supreme Court decided *Bowles v. Russell*, where it determined, in a 5–4 decision,¹⁰⁷ that a statutory limitation on the length of an extension of time to file a notice of appeal was jurisdictional.¹⁰⁸ Significantly, the Court made this determination despite a complete lack of jurisdictional language in the statute.¹⁰⁹ Most important to

102. *Id.* at 505, 515.

103. *Id.* at 513–14. In particular the Court noted: (1) that subject matter jurisdiction could never be waived or forfeited, and could be raised by the court sua sponte; (2) that if subject matter jurisdiction turned on contested facts, the trial judge could be authorized to review evidence in her determination, but if it was an element of a claim, the jury was the proper trier of fact; and (3) that lack of subject matter jurisdiction requires dismissal of the entire complaint, while a motion to dismiss for failure to state a claim allows for the exercise of supplemental jurisdiction over state law claims. *Id.* at 514.

104. *Id.* at 515.

105. *Id.* at 516.

106. See *infra* notes 107–36 and accompanying text.

107. 551 U.S. 205, 206 (2007).

108. *Id.* at 206–07.

109. See 28 U.S.C. § 2107(c) (2012), which states:

The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Judge Wood, in her *United Phosphorus* dissent, stated that while there were examples of Supreme Court cases, such as *Steel Co.*, treating statutes with jurisdictional language as non-jurisdictional,

the Court's reasoning was the longstanding judicial treatment of statutory limitations on the time to appeal as jurisdictional.¹¹⁰

In 2010, the Supreme Court determined in *Reed Elsevier v. Muchnick* that the Copyright Act's registration requirement was a precondition to filing a claim rather than a limitation on subject-matter jurisdiction.¹¹¹ In its analysis, the Court first stated that the text of the statute did not "clearly state[]" that the registration requirement was jurisdictional.¹¹² The text of the statute did use the word "jurisdiction,"¹¹³ but the use of the word in that context was to clarify that federal courts had authority to determine the issue of registrability when the Register was not party to the suits; the statute did not address the subject matter jurisdiction of the courts over claims involving unregistered works.¹¹⁴

The Court next noted that the registration requirement was not located in a jurisdictional provision, and that the jurisdictional provision of the Copyright Act, 28 U.S.C. § 1338(a), did not condition its jurisdictional grant on registration.¹¹⁵ The Court further pointed out that 17 U.S.C. § 411 expressly allows federal courts to adjudicate claims involving unregistered works in certain circumstances and stated that it would be "unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions."¹¹⁶ The Court subsequently concluded that the historical judicial treatment of § 411(a) as jurisdictional, though a factor in the analysis, was

"there [were] no examples of the opposite approach—treating something as jurisdictional that is phrased in terms of the scope of application of a statute." *United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 954 (7th Cir. 2003) (Wood, J., dissenting), *overruled by* *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 848 (7th Cir. 2012). This is likely not such an example, as the statute is not phrased in terms of application. *See* 28 U.S.C. §2107(c).

110. *Bowles*, 551 U.S. at 209–12. In that discussion, the Court distinguished jurisdictional rules from claims-processing rules, *id.* at 210–11, distinguished statutory limitations imposed by Congress from limitations set forth in procedural rules, *id.* at 210–12, and distinguished *Arbaugh* from *Bowles* as addressing a limitation on the number of employees rather than a time limit, *id.* at 211.

111. 559 U.S. 154, 157 (2010).

112. *Id.* at 163.

113. The relevant portion of the statute states:

The Register [of Copyrights] may, at his or her option, become a party to the [copyright infringement] action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

17 U.S.C. § 411(a) (2012).

114. *Reed Elsevier*, 559 U.S. at 164.

115. *Id.* at 164–65.

116. *Id.* at 165.

not dispositive and that the other factors discussed demonstrated that the registration requirement was not jurisdictional.¹¹⁷

The holding of *Reed Elsevier* was, on its face, surprising in light of *Bowles*, as each case involved a statute that had long been treated as jurisdictional by courts.¹¹⁸ However, the Court distinguished its holding from *Bowles*, rejecting a categorical approach to determining whether a statute is jurisdictional¹¹⁹ and stating that “*Bowles* stands for the proposition that context . . . is relevant to whether a statute ranks a requirement as jurisdictional.”¹²⁰ In further departure from any categorical approach, the Court looked to *Zipes v. Trans World Airlines*,¹²¹ which the Court relied on in *Arbaugh*,¹²² and refined the “clearly states” test by stating that “the jurisdictional analysis must focus on the legal character of the requirement, which [is] discerned by looking to the condition’s text, context, and relevant historical treatment.”¹²³

This contextual approach was reaffirmed in *Henderson ex rel. Henderson v. Shinseki*,¹²⁴ in which the Court determined that, despite the holding of *Bowles*, a 120-day deadline for seeking review in Veterans Court was not jurisdictional.¹²⁵ The Court noted that the text of the statute was not jurisdictional¹²⁶ and was placed in a section titled “Procedure.”¹²⁷ The Court

117. *Id.* at 169.

118. *Id.* at 167.

119. *Id.* The Court specifically rejected a categorical approach: “*Bowles* did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such. Nor did it hold that all statutory conditions imposing a time limit should be considered jurisdictional.” *Id.*

120. *Id.* at 168. See also Howard M. Wasserman, *The Demise of “Drive-By Jurisdictional Rulings”*, 105 NW. U. L. REV. COLLOQUY 184, 200 (2011) (“*Bowles* thus reflects a balance between *Arbaugh*’s plain-language approach and considerations of history and precedent”).

121. 455 U.S. 385 (1982). *Zipes* is notable for its reliance on various factors, including legislative history, in determining whether a statute was jurisdictional. *Id.* at 393–94.

122. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2012).

123. *Reed Elsevier*, 559 U.S. at 166 (internal quotations and citations omitted) (citing *Zipes*, 455 U.S. at 393–95).

124. 131 S. Ct. 1197 (2011).

125. *Id.* at 1204. This holding was surprising because *Bowles* had held that a statutory limitation on the length of an extension of time to file a notice of appeal was jurisdictional. See *supra* note 108 and accompanying text.

126. *Id.* See also 38 U.S.C. § 7266(a) (2012), which provides:

In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans’ Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed

further noted the dramatic differences between civil litigation and the Veterans Court system created by Congress.¹²⁸ However, most telling to the Court was Congress's longstanding solicitude toward veterans.¹²⁹

The Supreme Court's 2010 decision in *Morrison v. National Australia Bank Ltd.*¹³⁰ was the Court's first application of *Arbaugh's* "clearly states" test to determine whether the extraterritorial reach of a statute was a question of subject matter jurisdiction,¹³¹ and is therefore seen by many as the most salient decision for analysis of the FTAIA.¹³² The Court in *Morrison* determined that the extraterritorial reach of section 10(b) of the Securities Exchange Act of 1934¹³³ was a merits question rather than a question of jurisdiction.¹³⁴ The opinion did not mention the text, structure, or judicial history of the Securities Exchange Act in making its decision on whether the statute was jurisdictional.¹³⁵ Rather, the Court's key reasoning was that "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question."¹³⁶ This reasoning has proved to be particularly

127. *Henderson*, 131 S. Ct. at 1205 (stating that this placement suggested that the limitation was a claim-processing rule).

128. *Id.* at 1205–06. Among the most significant differences are that civil litigation is adversarial and plaintiffs collect evidence and bear the burden of persuasion, while Veterans Court is informal and non-adversarial, and the Department of Veterans Affairs must assist veterans in developing evidence and give veterans the benefit of any doubt. *Id.* at 1206. Moreover, in civil courts, both parties can appeal an adverse judgment and a final judgment can only be reopened in limited circumstances, while in Veterans Court a decision in the veteran's favor is final, a veteran can have de novo review if unsuccessful, and a veteran can reopen a claim merely by presenting new evidence that is material to the case. *Id.*

129. *Id.* The contrast between civil courts and Veterans Court is evidence of this solicitude, *see supra* note 128, and explains the difference in outcome from the *Bowles* decision, *Henderson*, 131 S. Ct. at 1205–06. The *Henderson* Court further noted that "Congress is free to attach the conditions that go with the jurisdictional label to a rule that we would prefer to call a claim-processing rule," and emphasized that the relevant inquiry was Congress's intent regarding the 120-day deadline. *Id.* at 1203.

130. 130 S. Ct. 2869 (2010).

131. *Id.* at 2876–77.

132. *See infra* note 162 and accompanying text.

133. 15 U.S.C. § 78j(b) (2012) (prohibiting "us[ing] or employ[ing], in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.").

134. *Morrison*, 130 S. Ct. at 2877.

135. *Id.* at 2876–77.

136. *Id.* at 2877. The majority opinion distinguished this merits question from subject matter

compelling to lower courts applying the “clearly states” test to the FTAIA.¹³⁷

B. The Development of a Circuit Split

As lower courts have begun applying *Arbaugh*'s “clearly states” test to the FTAIA, a circuit split has developed.¹³⁸ Prior to the Supreme Court's decision in *Arbaugh*, circuit courts largely treated the FTAIA as a limitation on the subject matter jurisdiction of the courts.¹³⁹ However, in 2011, the Third Circuit decided *Animal Science Products, Inc. v. China Minmetals Corp.*,¹⁴⁰ in which the court overturned its prior precedent¹⁴¹ and held that the FTAIA “imposes a substantive merits limitation rather than a jurisdictional bar.”¹⁴² In 2012, the Seventh Circuit followed suit in *Minn-Chem, Inc. v. Agrium, Inc.*,¹⁴³ overturning its prior precedent¹⁴⁴ and determining that the FTAIA sets forth the elements of a Sherman Act claim rather than a jurisdictional limitation.¹⁴⁵

1. The Third Circuit in *Animal Science*

The *Animal Science* case arose out of allegations that Chinese producers of magnesite¹⁴⁶ engaged in a price-fixing conspiracy that had a significant economic impact in the United States.¹⁴⁷ In the district court, the claim was dismissed for lack of subject-matter jurisdiction under the FTAIA, an issue

jurisdiction, saying that “[s]ubject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case” and “presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief.” *Id.* (internal quotations and citations omitted).

137. See *infra* notes 191–201 and accompanying text.

138. See *infra* notes 139–77 and accompanying text.

139. See *supra* note 57 and accompanying text.

140. 654 F.3d 462 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012).

141. *Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293 (3d Cir. 2002), *overruled by Animal Sci.*, 654 F.3d at 467–68; *Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62 (3d Cir. 2000), *overruled by Animal Sci.*, 654 F.3d at 467–68.

142. *Animal Sci.*, 654 F.3d at 466.

143. 683 F.3d 845 (7th Cir. 2012).

144. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 954 (7th Cir. 2003), *overruled by Minn-Chem*, 683 F.3d 845.

145. *Minn-Chem*, 683 F.3d at 852.

146. “Magnesite is mined from magnesium deposits and used, among other things, to melt steel, make cement, and clean wastewater.” *Animal Sci. Prods.*, 654 F.3d at 464 n.1.

147. *Id.* at 464.

that was brought up sua sponte by the district court.¹⁴⁸ On appeal, the Third Circuit held that the FTAIA “imposes a substantive merits limitation rather than a jurisdictional bar,” vacated the district court’s judgment, and remanded the case for reconsideration in light of its new interpretation of the FTAIA.¹⁴⁹

The Third Circuit began its analysis in *Animal Science* by distinguishing between Congress’s Commerce Clause authority to set forth elements of a meritorious Sherman Act claim and Congress’s Article III authority to define the jurisdiction of federal courts.¹⁵⁰ In applying *Arbaugh’s* “clearly states” test to the FTAIA, the Third Circuit looked first to the text and found that “[t]he FTAIA neither speaks in jurisdictional terms nor refers in any way to the jurisdiction of the district courts.”¹⁵¹ Rather, the court found that the text stated only that the Sherman Act “shall not apply” under certain conditions.¹⁵² The court concluded that under the *Arbaugh* test, the language of the FTAIA imposed substantive elements rather than a jurisdictional limitation¹⁵³ and equated this to a finding that Congress had used its Commerce Clause authority to define elements of a Sherman Act claim rather than its Article III authority to define the jurisdiction of federal courts.¹⁵⁴

2. The Seventh Circuit in *Minn-Chem*

The Seventh Circuit’s *Minn-Chem* decision overturning *United Phosphorus* was written by Judge Wood,¹⁵⁵ who also authored the dissent in

148. *Id.* at 464–65. The case was originally dismissed without prejudice, with the instruction that any refiling include evidentiary proof sufficient for the court to satisfy itself as to the presence of subject matter jurisdiction. *Id.* at 465. The plaintiffs subsequently refiled, and the district court, after engaging in extensive fact-finding, determined that it did not have subject matter jurisdiction over the claim. *Id.*

149. *Id.* at 466.

150. *Id.* at 467.

151. *Id.* at 468.

152. *Id.* *But cf. infra* note 187 and accompanying text (providing an example of how the “shall not apply” language can, in some cases, be jurisdictional).

153. *Id.* at 468–69.

154. *Id.* at 469. The court also noted that, in keeping with the *Reed Elsevier’s* implication that context is relevant in determining whether a statute is jurisdictional, Judge Wood’s *United Phosphorus* dissent shows that the relevant context also supports a non-jurisdictional interpretation of the FTAIA. *Id.* at 469 n.8.

155. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 848 (7th Cir. 2012).

United Phosphorus.¹⁵⁶ In *Minn-Chem*, United States companies that purchased potash¹⁵⁷ accused foreign potash producers of price-fixing in violation of United States antitrust laws.¹⁵⁸ The district court denied the foreign defendants' motion to dismiss, but certified an interlocutory appeal.¹⁵⁹ In an en banc rehearing,¹⁶⁰ the Seventh Circuit held that "the FTAIA's criteria relate to the merits of a claim, and not to the subject-matter jurisdiction of the court" and affirmed the district court's determination that the complaint properly stated a claim under federal antitrust law.¹⁶¹

In her analysis, Judge Wood stated that the Supreme Court's *Morrison* decision provided all the guidance necessary for determining that the FTAIA is substantive rather than jurisdictional.¹⁶² The Seventh Circuit reasoned that the FTAIA centered on whether it was reasonable to apply the Sherman Act to significantly foreign conduct,¹⁶³ which was the type of language that *Morrison* held to be a merits question.¹⁶⁴ The Court further noted that the text of the FTAIA did not contain jurisdictional language, but rather spoke of conduct, which is the language of elements.¹⁶⁵ The court also believed that treating the FTAIA as substantive was a more sound approach procedurally.¹⁶⁶

156. *United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 953 (7th Cir. 2003), *overruled by Minn-Chem*, 683 F.3d 845.

157. Potash is "a naturally occurring mineral used in agricultural fertilizers and other products." *Minn-Chem*, 683 F.3d at 848.

158. *Id.*

159. *Id.*

160. A Seventh Circuit panel initially voted to reverse the district court. *Id.*

161. *Id.*

162. *Id.* at 852.

163. *Id.* For this proposition, the court also relied on *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161–62 (2004).

164. *Minn-Chem*, 683 F.3d at 852; *see Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

165. *Minn-Chem*, 683 F.3d at 852.

166. *Id.* In particular, the court stated that a defendant would have to bring a 12(b)(6) claim rather than a 12(b)(1) claim. *Id.* This was significant in the eyes of the court because 12(b)(1) claims can be brought at any time in the course of litigation, regardless of whether the parties raise the issue and regardless of the amount of time and expense that has been put toward the litigation. *Id.* at 853. In contrast, a 12(b)(6) can only be brought as late as trial; however, the court opined that the kind of foreign connections implicated by the FTAIA would likely be easily detectable and parties would still have ample time to challenge claims under the FTAIA. *Id.*

3. Other Circuits

In 2012, the Sixth Circuit considered a 12(b)(1) motion challenging a FTAIA claim in *Carrier Corp. v. Outokumpu Oyj*.¹⁶⁷ The court ultimately held that the complaint met “any threshold jurisdictional requirement imposed by the Sherman Act on claims involving foreign conduct.”¹⁶⁸ In a footnote, the court noted the confusion among the circuits as to whether the FTAIA’s requirements were jurisdictional, but declined to rule on the issue as it had not been directly addressed by the parties.¹⁶⁹

The Ninth Circuit has also declined to rule on this issue since *Arbaugh*.¹⁷⁰ In the 2008 case *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*,¹⁷¹ the Ninth Circuit noted the lack of clarity regarding whether the FTAIA was substantive or jurisdictional but did not rule on the issue because it was neither argued by the parties nor outcome-determinative.¹⁷² However, not all district courts within the Ninth Circuit have managed to avoid the issue, and courts forced to confront it have reached different conclusions in their rulings.¹⁷³

Without addressing the topic directly, the Eighth Circuit has implicitly continued to treat the FTAIA as jurisdictional.¹⁷⁴ The Federal Circuit,

167. 673 F.3d 430, 435 (6th Cir. 2012). The dispute involved Sherman Act claims brought by American air-conditioner manufacturers against foreign copper-tubing producers and their American subsidiaries. *Id.* at 435–36.

168. *Id.* at 440.

169. *Id.* at 439 n.4. The footnote suggests that, had the court ruled on the issue, it would have ruled the same way that *Animal Science* and *Minn-Chem* did. In particular, the court noted that the language of the non-jurisdictional statute in *Morrison* somewhat mirrors the language of the FTAIA, and called *Hartford Fire* a “drive-by jurisdictional ruling[.]” *Id.*

170. See *infra* notes 171–72 and accompanying text.

171. 546 F.3d 981 (9th Cir. 2008). In this case, a British computer manufacturer filed a class action against American and foreign manufacturers of memory chips for price fixing. *Id.* at 984.

172. *Id.* at 983.

173. 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.”); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 958–59 (N.D. Cal. 2011) (holding that the FTAIA is not jurisdictional) (“Although the Court does not lightly disregard the Ninth Circuit’s decision in *LSL Biotechnologies*, that decision cannot withstand *Arbaugh*.”); *Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1185 (N.D. Cal. 2009) (treating the FTAIA as jurisdictional).

174. *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 536 (8th Cir. 2007) (affirming the lower court’s dismissal for lack of subject matter jurisdiction).

relying in part on Judge Wood's *United Phosphorous* dissent, determined that whether an action was within the extraterritorial reach of the Copyright Act was an element of a claim rather than a limitation on subject matter jurisdiction.¹⁷⁵ The other circuits have not ruled on the FTAIA since *Arbaugh*, likely leaving them with precedent supporting a jurisdictional interpretation of the FTAIA.¹⁷⁶ The Supreme Court has not yet intervened to clarify the issue, and denied writ of certiorari in *Animal Science*.¹⁷⁷

IV. APPLYING THE "CLEARLY STATES" TEST TO THE FTAIA

The *Animal Science* and *Minn-Chem* courts both construed *Arbaugh*'s "clearly states" test, and its subsequent applications, to compel a reading of the FTAIA as effecting the merits of a claim rather than a court's ability to hear the case.¹⁷⁸ In addition, some courts that have declined to rule on the issue have noted that *Arbaugh* likely impacts the characterization of the FTAIA, and suggested that, if not for contrary circuit precedent, they would treat the FTAIA as imposing merits of a Sherman Act claim.¹⁷⁹ Particularly after *Morrison*, many feel that the modern interpretation of the FTAIA is the correct one, and that the FTAIA will ultimately be treated as substantive rather than jurisdictional.¹⁸⁰ Although some aspects of the "clearly states" test support the modern elements interpretation of the FTAIA,¹⁸¹ there are also compelling and often overlooked reasons to believe that the *Arbaugh* test supports a jurisdictional reading of the FTAIA.¹⁸²

A. *The Likely Direction of the Courts: An Element Interpretation of the FTAIA*

Both the Third and Seventh Circuits, in determining that the FTAIA

175. *Litecubes, LLC v. N. Light Prods., Inc.*, 523 F.3d 1353, 1365 n.3, 1366 (Fed. Cir. 2008).

176. *See supra* note 57 and accompanying text.

177. *China Minmetals Corp. v. Animal Sci. Prods., Inc.*, 132 S. Ct. 1744 (2012) (denying certiorari).

178. *See supra* notes 150–66 and accompanying text.

179. *See supra* notes 167–77 and accompanying text.

180. *See, e.g.*, Wasserman, *supra* note 120, at 188 (arguing that *Morrison* establishes that the extraterritorial application of American statutory law, including which foreign harms American law protects against, is "explicitly defined as a merits issue[,] and courts of appeals should follow that understanding").

181. *See infra* notes 183–210 and accompanying text.

182. *See infra* notes 211–69 and accompanying text.

imposed elements of a Sherman Act claim, looked to the text of the FTAIA.¹⁸³ The Seventh Circuit also looked to the judicial treatment of similar provisions, namely in *Morrison*, and to the procedural consequences of a jurisdictional interpretation of the FTAIA.¹⁸⁴

1. The Language and Structure of the FTAIA

Arbaugh and its progeny consistently looked to two factors: the language and structure of the statute.¹⁸⁵ In the case of the FTAIA, there is no clear jurisdictional language in the statute¹⁸⁶—the “shall not apply” language of the FTAIA is ambiguous, having been used in both substantive and jurisdictional provisions.¹⁸⁷ Additionally, the FTAIA is separate from the Sherman Act’s jurisdiction-granting provision.¹⁸⁸ While these factors alone are insufficient to determine the nature of the statute under *Arbaugh*’s “clearly states” test,¹⁸⁹ circuit courts have found these factors to weigh

183. See *supra* notes 151–53, 165 and accompanying text.

184. See *supra* notes 162–64, 166 and accompanying text. The Third Circuit addressed these issues indirectly by stating in a footnote its agreement with Judge Wood’s *United Phosphorus* dissent. See *supra* note 154.

185. See *supra* notes 102, 109, 112–15 and accompanying text. *But cf.* note 135 and accompanying text.

186. See *supra* note 43. Litigants have argued that the FTAIA indeed does contain jurisdictional language in the form of a reference to and modification of a jurisdictional provision. See *Petition for a Writ of Certiorari of Sinosteel Corp., Sinosteel Trading Co., Ltd. and Liaoning Mayi Metals & Minerals Co., Ltd. at 15–16, China Minmetals Corp. v. Animal Sci. Prods., Inc.*, 132 S. Ct. 1744 (2012) (No. 11-847), 2012 WL 73207. Litigants argue that because the FTAIA states that “Sections 1 to 7 of this title shall not apply,” and that includes section 4 (the jurisdiction-granting section of the FTAIA), jurisdiction only applies if there is the requisite effect on commerce and therefore there is jurisdictional language in the statute. *Id.* However, this is far from clear language—at best creating ambiguity—and also leads to the difficult result that if the § 4 jurisdiction-granting provision does not apply without the requisite effect on commerce, nor does § 7, which provides the definition of a person. See 15 U.S.C. § 7 (2012). A more reasonable reading seems to be that Congress was using the phrase “Sections 1 to 7 of this title” as shorthand for the Sherman Act.

187. See Herbert J. Hovenkamp, *Antitrust’s “Jurisdictional” Reach Abroad*, (Univ. of Iowa Coll. of Law, Legal Studies Research Paper No. 11-41, 2011) (arguing that the “shall not apply” language of the FTAIA can be interpreted either way), available at <http://ssrn.com/abstract=1962370>. For an example of the “shall not apply” language being used as a limitation on subject matter jurisdiction, see *Campbell v. United States*, 337 F. Supp. 2d 219, 222 (D. Mass. 2004) (stating that the Federal Tort Claims Act, 28 U.S.C. § 2680(h), “shall not apply” to claims for assault and battery, and therefore if a plaintiff’s claim arises under § 2680(h), the court does not have subject matter jurisdiction to hear it).

188. See 15 U.S.C. § 4 (granting federal courts jurisdiction to prevent violations of the Sherman Act).

189. See *supra* notes 106–17; see also *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197,

toward a reading of the FTAIA as an element of a Sherman Act claim.¹⁹⁰

2. Treatment of Similar Provisions: *Morrison*

The decisions following *Arbaugh*, particularly *Bowles* and *Morrison*, also looked at the treatment of similar provisions in determining the jurisdictional nature of a statute.¹⁹¹ Because the FTAIA involves the extraterritorial application of United States statutory law,¹⁹² many courts have looked to *Morrison*, which dealt with the nature of a statute in the context of its extraterritorial application,¹⁹³ in their consideration of the FTAIA.¹⁹⁴ In *Morrison*, the Court overruled circuit precedent that treated the extraterritorial application of statutes as an issue of subject matter jurisdiction,¹⁹⁵ and declared that the extraterritorial application of a statute is a merits question.¹⁹⁶ While *Morrison* provided the clearest statement of the Court's approach to the extraterritorial application of statutes, it was not a new canon of statutory interpretation; the Court had previously held that any question that did not go to the power of the courts to hear a case was a question of merits and not of jurisdiction.¹⁹⁷

The key language of *Morrison* states that “to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits

1203 (2011) (stating that “Congress, of course, need not use magic words in order to speak clearly” about the jurisdictional nature of a statute).

190. See *Animal Sci. Prods.*, 654 F.3d at 468–69; *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012).

191. See *supra* notes 106–10, 130–36 and accompanying text.

192. See *supra* note 43.

193. See *supra* notes 131–34 and accompanying text.

194. See *Animal Sci. Prods.*, 654 F.3d at 466 (noting *Morrison*'s holding that the extraterritorial reach of a statute presented a merits issue); *Minn-Chem*, 683 F.3d at 851–52 (stating that *Morrison* provides all the guidance needed regarding the extraterritorial application of a statute).

195. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010). Specifically, the Court overruled *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), but noted that “[t]he Second Circuit is hardly alone in taking this position.” *Morrison*, 130 S. Ct. at 2877 (citing as examples *In re CP Ships Ltd. Securities Litigation*, 578 F.3d 1306, 1313 (11th Cir. 2009) and *Continental Grain (Australia.) Pty., Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979)).

196. *Morrison*, 130 S. Ct. at 2877.

197. See, e.g., *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 596 (2009) (holding that subject matter jurisdiction refers only to the power of a court to hear a case); see also *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 628 (2009) (noting a conflation of jurisdictional issues with the merits of a claim); *United States v. Denedo*, 556 U.S. 904, 915 (2009) (same).

question.”¹⁹⁸ The FTAIA fits neatly into this formula; to ask what conduct the FTAIA reaches—in other words, whether the conduct has a direct, substantial, and reasonably foreseeable effect on United States commerce and gives rise to a Sherman Act claim¹⁹⁹—is to ask what conduct the FTAIA prohibits, which is a merits question.²⁰⁰ This reasoning was instrumental in *Minn-Chem*, in which the court stated that it could “see no way to distinguish this case from *Morrison*.”²⁰¹

3. Procedural Consequences

The Court in *Arbaugh* also considered the procedural consequences of attaching a jurisdictional label to a statute.²⁰² The Seventh Circuit has argued that an elements interpretation of the FTAIA is a stronger approach procedurally than the jurisdictional approach.²⁰³ First, applying the FTAIA’s

198. *Morrison*, 130 S. Ct. at 2877.

199. *See supra* note 43.

200. *See Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012). The petition for certiorari from the *Animal Science* case questioned this reasoning, stating:

[T]o ask what conduct the FTAIA reaches is *not* to ask what conduct the FTAIA prohibits. Unlike Section 10(b)’s antifraud provision, the FTAIA does not prohibit any conduct. Rather, the FTAIA removes from federal courts the power to adjudicate whether foreign conduct that might otherwise be actionable under the Sherman Act violates the antitrust laws Therefore, to continue the analogy, to ask what conduct the FTAIA reaches is to ask what foreign conduct is *outside* the reach of the Sherman Act and beyond the adjudicatory powers of the federal courts, which is not a merits question but one of subject matter jurisdiction.

Petition for a Writ of Certiorari of Sinosteel Corp., Sinosteel Trading Co., Ltd. and Liaoning Mayi Metals & Minerals Co., Ltd. at 14–15, *China Minmetals Corp. v. Animal Sci. Prods., Inc.*, 132 S. Ct. 1744 (2012) (No. 11-874), 2012 WL 73207. This argument is based on the assumption that the FTAIA is jurisdictional, and therefore does not pose a challenge to applying the *Morrison* reasoning. However, the structure of this argument raises the question whether the *Morrison* reasoning similarly rests on the assumption that the FTAIA prohibits conduct, rather than removing certain conduct from the jurisdiction of the U.S. courts.

201. *Minn-Chem*, 683 F.3d at 852. Although Judge Wood’s *United Phosphorus* dissent relied significantly on *Steel Co.*, her majority opinion in *Minn-Chem* mentioned it only in passing, 683 F.3d at 852, likely because *Morrison* provided such strong support for her position. However, if Congress’s intent was for the FTAIA to go to jurisdiction and not affect the merits of a Sherman Act claim, *see infra* notes 216–249 and accompanying text, the *Steel Co.* argument may lose its force. If Congress deemed the FTAIA to be jurisdictional, the right of plaintiffs to recover is based on the actual Sherman Act claim; the domestic effects are examined solely for the purpose of establishing subject matter jurisdiction. *Cf. supra* notes 78–80 and accompanying text.

202. *See supra* notes 103–04 and accompanying text.

203. *United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 956–57 (7th Cir. 2003) (Wood, J., dissenting).

effects test can be complicated, and therefore does not lend itself to quick resolution.²⁰⁴ In contrast, if the effects test is an element of a claim, the court can determine antitrust cases on a more straightforward issue, such as market power, and avoid engaging in the domestic effects analysis.²⁰⁵ Additionally, subject matter jurisdiction must be present at all times and therefore can be raised at any time in the litigation, including sua sponte by the court, regardless of the amount of time and resources already invested in the process.²⁰⁶ In contrast, a motion to dismiss for failure to state a claim can only be brought as late as trial.²⁰⁷

While these procedural outcomes weigh toward an elements reading of the FTAIA, use of the 12(b)(6) motion also makes it less likely that defendants will be able to receive dismissals.²⁰⁸ Critics of the substantive approach thus argue that use of the 12(b)(6) motion expands the reach of the Sherman Act, an outcome that is incongruent with the purpose of the FTAIA as defined by the Supreme Court in *Empagran*.²⁰⁹ This has possible

204. *Id.*

205. *Id.*

206. *Minn-Chem*, 683 F.3d at 853. In one of the most egregious examples, a court took twelve years to resolve the issue of subject matter jurisdiction in an international antitrust case. *See United Phosphorus*, 322 F.3d at 957 (discussing the twelve-year procedural history of *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*).

207. *Minn-Chem*, 683 F.3d at 853.

208. *See Hovenkamp*, *supra* note 187, at 3–4 (“Prior to trial allegations and evidence are typically construed against the movant, while in the 12(b)(1) proceeding the judge acts as a neutral fact finder. Further, to the extent that the 12(b)(6) interpretation protracts the litigation, perhaps delaying the issue of extraterritorial reach until summary judgment or even the trial stage, plaintiffs will be able to obtain more favorable settlements.”). Many of the procedural consequences tend to favor plaintiffs. First, in a 12(b)(1) motion, the plaintiff bears the burden of establishing that the court has subject matter jurisdiction over the action and the complaint’s allegations are not given any presumption of truth. *United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003), *overruled on other grounds*, *Minn-Chem*, 683 F.3d 845. A 12(b)(6) motion, in contrast, only permits facial attacks on the complaint, shifts the burden of proof to the defendant, and requires the court to construe the allegations of the complaint in the light most favorable to the plaintiff. *See Hovenkamp*, *supra* note 194. However, the heightened pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), have arguably minimized these differences. *See Hovenkamp*, *supra* note 187, at 3; *see also* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 664–65 (2005) (“[T]o the extent judges have become freer in resolving factual disputes, both in granting summary judgment and in reviewing jury findings, the procedural consequences of the jurisdiction/merits confusion may become less practically significant.”).

209. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (“[T]he FTAIA’s language and history suggest that Congress designed the Act to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act’s scope as applied to foreign commerce.”).

implications for international comity as well; as the Court in *Empagran* noted, the technical nature of international antitrust cases could lead to lengthy proceedings “where procedural costs and delays could themselves threaten interference with a foreign nation’s ability to maintain the integrity of its own antitrust enforcement system.”²¹⁰ Therefore, the procedural consequences do not conclusively recommend one approach over another.

B. A Case for a Jurisdictional Interpretation of the FTAIA

Arbaugh’s “clearly states” test specifies that the legislature must clearly state the jurisdictional nature of the statute.²¹¹ In *Henderson*, the Supreme Court further clarified that the purpose of the “clearly states” test is to “capture Congress’s likely intent,” stating that “[u]nder *Arbaugh*, we look to see if there is any ‘clear’ indication that Congress wanted the rule to be ‘jurisdictional.’”²¹² While the Third and Seventh Circuits have mainly looked to the text of the statute to find Congress’s intent,²¹³ the text is not the only place from which to discern congressional intent; the legislative history of the FTAIA and Congress’s reaction to *Morrison*, insofar as they reveal the clear intent of Congress, are relevant to the analysis.²¹⁴ Along with congressional intent, the treatment of similar effects tests and the historical judicial treatment of the FTAIA also support the traditional interpretation of the FTAIA.²¹⁵

1. Congressional Intent

a. Legislative History

By far, the strongest argument for a jurisdictional reading of the FTAIA

210. *Id.* at 168–69.

211. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515–16 (2006).

212. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (emphasis added) (quoting *Arbaugh*, 546 U.S. at 515–16).

213. *See supra* notes 150–66 and accompanying text.

214. *See, e.g.*, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393–94 (1982) (using legislative history to determine the nature of a statute). The *Arbaugh* Court relied on *Zipes* in its analysis. *Arbaugh*, 546 U.S. at 515. Courts generally do not look to the legislative history if the statutory text is clear. *See, e.g.*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). In the case of the FTAIA, the language of the statute is ambiguous. *See supra* note 187 and accompanying text.

215. *See infra* notes 216–69 and accompanying text.

is found in its legislative history.²¹⁶ However, the legislative history has been given short shrift by circuit courts treating the FTAIA as imposing elements of a Sherman Act claim.²¹⁷ The most powerful pro-jurisdiction statement in the legislative history of the FTAIA comes in a section entitled “Effect of Legislation and Current Law.”²¹⁸ It states:

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.*²¹⁹

This statement is particularly significant because not only does it use the word jurisdiction, which—admittedly—“is a word of many, too many,

216. See H.R. REP. NO. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487.

217. See *United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 961–62 (7th Cir. 2003) (Wood, J., dissenting) (“While it is true that the House Report on the FTAIA uses the word ‘jurisdiction’ with some regularity, it also speaks repeatedly about whether U.S. antitrust law should be applied to particular transactions. . . . It is therefore impossible to draw any firm conclusions from that brief document that will assist us in resolving the issue presently before us.”); see also *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 851 (7th Cir. 2012) (overruling prior precedent with the brief statement that the earlier court had relied in part on legislative history); *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012) (overturning precedent and treating the FTAIA as an element of a Sherman Act claim with no mention of the legislative history); Patrick G. Secor, Comment, *Antitrust Law: Jurisdictional Review—Analysis of Sherman Act Claims Against Foreign Defendants Requires a Merits-Based Review—Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), 35 SUFFOLK TRANSNAT’L L. REV. 245, 251–52 (2012) (“In deciding that the plain language of the FTAIA did not strip jurisdiction from the federal courts, the Third Circuit failed to address the conflicting legislative history of the Act. . . . The Third Circuit’s reading of Arbaugh to apply only to the exact text of legislation fails to address the contradiction between its own finding and the clear legislative intent.”).

218. H.R. REP. NO. 97-686, at 13 (1982) *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498.

219. *Id.* (emphasis added). This is not an isolated statement; elsewhere, the legislative history again states

[i]n providing that the federal courts may assert the jurisdiction of the United States antitrust laws if conduct affects [U.S. commerce], the committee does not intend to alter existing concepts of antitrust injury or antitrust standing. This bill only establishes the standards necessary for assertion of United States antitrust jurisdiction. The substantive antitrust issues on the merits of the plaintiffs’ claim would remain unchanged.

Id. at 11. The legislative history uses the phrase “subject matter jurisdiction” four times, *e.g.*, *id.* at 13, and also speaks of “effects that are necessary to create jurisdiction under the antitrust laws” of the United States, *e.g.*, *id.* at 5.

meanings,”²²⁰ but it also specifically refers to subject matter jurisdiction, which is a term of art with which Congress is assumed to be familiar.²²¹ Furthermore, it shows that Congress understood the consequences of such a jurisdictional reading by stating the result: the merits of a Sherman Act claim would remain unchanged.²²² The House Report also states that satisfaction of the effects test would “serve as the predicate for antitrust jurisdiction.”²²³ Therefore, the legislative history strongly suggests that Congress, the body with the power to divest federal courts of subject matter jurisdiction,²²⁴ intended for the FTAIA to be a limitation on subject matter jurisdiction.²²⁵

Critics argue that if Congress was so clear about its intent, it would have spoken clearly in the text.²²⁶ However, there are at least two reasons why Congress may not have used clearer jurisdiction-stripping language in the text.²²⁷ First, at the time the FTAIA was enacted, Congress did not have the benefit of the *Arbaugh* decision and arguably was not on notice that the clarity of its jurisdictional language would be so significant.²²⁸ Second, it is

220. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

221. *See Morissette v. United States*, 342 U.S. 246, 250 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”). The specific use of the term “subject matter jurisdiction” also calls into question Judge Wood’s claim that Congress was actually addressing prescriptive jurisdiction. *See United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 961–62 (7th Cir. 2003) (Wood, J., dissenting), *overruled by Minn-Chem, Inc. v. Agrum, Inc.*, 683 F.3d 845, 848 (7th Cir. 2012).

222. H.R. REP. NO. 97-686, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498.

223. *Id.* at 11.

224. *See, e.g., Kontrick v. Ryan*, 540 U.S. 443, 452–53 (2004); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989) (“We start from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress in the exact degrees and character which to Congress may seem proper for the public good.” (internal quotations omitted)).

225. *See Hovenkamp, supra* note 187, at 6 (“The most reasonable interpretation of these statements is that Congress clearly intended for the FTAIA to limit subject matter jurisdiction, but that it was less clear when it actually drafted the FTAIA, whose ‘shall not apply’ language can be interpreted either way.”).

226. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (noting the danger that relying on legislative materials will incentivize manipulation of the legislative history to gain results that were not achieved in the statutory text).

227. *See infra* notes 228–30 and accompanying text.

228. *See Hovenkamp, supra* note 187, at 6 (“Of course, at the time Congress drafted the FTAIA it did not yet have the benefit of the *Arbaugh* holding to the effect that a statute’s ‘jurisdictional’

a rule of statutory construction that if Congress, in enacting a statute, means to change the treatment of a judicially created concept, it must be specific about that intent.²²⁹ Prior to the enactment of the FTAIA, the extraterritorial reach of the Sherman Act was almost universally treated as an issue of subject matter jurisdiction.²³⁰ Therefore, it would have been reasonable for Congress to assume that the effects test would continue to function as a limitation on jurisdiction and to see no need to be clear in this regard.²³¹

Another criticism of reliance on the legislative history of the FTAIA is the existence of language in the legislative history that speaks of whether United States antitrust law applies to particular transactions.²³² This being the language of merits, according to *Morrison*,²³³ it is used to support the notion that the legislature was not clear about its use of the term jurisdiction.²³⁴ However, Congress does have the power to make the extraterritorial application of United States law to particular conduct a question of subject matter jurisdiction²³⁵—the relevant question is whether it has done so in the case of the FTAIA.

conduct must be unambiguous. Congress at the time was far less careful about how it drafted jurisdictional language.”). Additionally, even now, “magic words” are not necessary for Congress to express intent to limit subject matter jurisdiction. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011).

229. See *Midatlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494, 501 (1986); see also *Shinseki*, 131 S. Ct. at 1203 (“When ‘a long line of this Court’s decisions left undisturbed by Congress’ . . . has treated a similar requirement as ‘jurisdictional,’ we will presume that Congress intended to follow that course.” (citing *Union Pac. R.R. v. Bhd. of Locomotive Eng’rs and Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 597 (2009))).

230. See *supra* notes 29–40 and accompanying text.

231. The only clear language necessary under this canon of construction would be if Congress wanted the FTAIA to be substantive—and this clarity is conspicuously absent. See *supra* note 43.

232. See *United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 961–62 (7th Cir. 2003) (Wood, J. dissenting), *overruled by Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 848 (7th Cir. 2012); see also, e.g., H.R. REP. NO. 97-686, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2847 (stating that the purpose of the FTAIA is to “make explicit” the Sherman Act’s “application only to conduct” that satisfies the effects test).

233. See *infra* notes 130–36 and accompanying text.

234. See *United Phosphorus*, 322 F.3d at 961–62.

235. One example of this is the Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976). See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434–35 (1989) (“[T]he FSIA ‘must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.’” (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 498 (1983))). Another example, as discussed in the next section, is Congress’s response to *Morrison*. See *infra* notes 236–49 and accompanying text.

b. Congress's Response to Morrison

While it is true that *Morrison* treated the extraterritorial application of United States law as a question of merits,²³⁶ it is equally true that in cases following *Arbaugh*, the Supreme Court has rejected a categorical approach to determining the jurisdictional nature of a statute.²³⁷ Therefore, the fact that the FTAIA speaks to the application of United States law to particular conduct does not make *Morrison* conclusive in the analysis.²³⁸ Moreover, Congress's reaction to *Morrison* further calls into question its use in an FTAIA analysis.²³⁹

Congress responded to *Morrison* by drafting the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),²⁴⁰ which “was worded in terms of the federal courts’ subject matter jurisdiction.”²⁴¹ Specifically, the “Extraterritorial Jurisdiction” section of the Act states that courts “shall have jurisdiction” in actions involving extraterritorial conduct that has a “foreseeable substantial effect within the United States.”²⁴² Congress’s adoption of this jurisdictional language was particularly surprising as it was used despite the clear holding of *Morrison* that the extraterritorial reach of a statute is not an issue of subject matter

236. See *infra* notes 130–36 and accompanying text.

237. See *infra* notes 119–23 and accompanying text.

238. *But cf.* *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (“The Supreme Court’s decision in *Morrison*, we believe, provides all the guidance we need to conclude that, like § 10(b) of the Exchange Act, the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts.”).

239. See *infra* notes 241–49 and accompanying text.

240. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

241. Richard Painter et al., *When Courts and Congress Don’t Say What They Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INTL. L. 1, 15 (2011).

242. The relevant text is as follows:

(b) Extraterritorial jurisdiction

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the [Securities and Exchange] Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—

- (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
- (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

15 U.S.C. § 78aa(b) (2012). This “foreseeable substantial effect” test is similar to the FTAIA’s “direct, substantial, and reasonably foreseeable” standard. See *supra* note 43.

jurisdiction,²⁴³ as well as the Court's similar 2009 decision in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment*.²⁴⁴

Congress's adoption of this language, while surprising, was almost certainly intentional.²⁴⁵ In addition to Congress's knowledge of *Union Pacific* and *Morrison*, a month and a half before the House passed the original bill, the SEC and the Solicitor General told Congress that extraterritoriality was not an issue of subject matter jurisdiction.²⁴⁶ In addition, the final day of the Dodd-Frank House–Senate Conference was the same day that *Morrison* was decided and the Senate adopted the previously drafted jurisdictional provision after learning of *Morrison*'s holding.²⁴⁷ Therefore, Congress, even with notice of the judicial treatment of extraterritorial application of statutes as going to the merits and with the benefit of *Arbaugh*'s “clearly states” test, used clear jurisdictional language in the Dodd-Frank Act to “turn[] the extraterritorial issue into a question of jurisdiction rather than the merits.”²⁴⁸ This raises the question of whether Congress's reaction to *Morrison* in the Dodd-Frank Act reveals a fundamental difference in the way that the Supreme Court and Congress view the extraterritorial application of United States law.²⁴⁹

243. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

244. 558 U.S. 67 (2009); see also *Painter et al.*, *supra* note 241, at 21. Indeed, as early as 1959, the Supreme Court had treated extraterritoriality as a merits question. *Id.* at 3; see *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 359, 381–84 (1959). Making the extraterritorial reach of a statute an issue of subject matter jurisdiction is well within Congress's power, as recognized by *Arbaugh*. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 n.11 (2006) (“Congress has exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors, some of them also relevant to the merits of a case.”).

245. See *Painter et al.*, *supra* note 241, at 25.

246. See *Painter et al.*, *supra* note 241, at 17.

247. See *Painter et al.*, *supra* note 241, at 25 (“Under these circumstances, Congress's intent to override *Morrison* in SEC and DOJ actions (even if less than artfully worded) is clear and is likely to carry substantial weight.”).

248. See *Painter et al.*, *supra* note 241, at 21. The SEC, which was an influential part of the formation of the Dodd-Frank Act, see *infra* note 250, agrees with this characterization, see *Study on Extraterritorial Private Rights of Action*, 75 Fed. Reg. 66,822, 66,823 n.1 (Oct. 29, 2010) (“[T]he Dodd-Frank Act largely codified the long-standing appellate court interpretation of the law that had existed prior to the Supreme Court's decision in *Morrison* by setting forth an expansive conducts and effects test, and providing that the inquiry is one of subject matter jurisdiction.”).

249. See *Painter et al.*, *supra* note 241, at 21 (stating that Congress's language in the Dodd-Frank Act “might reflect a difficult point of law, on which the courts have reached contrary conclusions”).

2. Treatment of Similar Provisions: The Effects Test

Congress's reaction to *Morrison* in the Dodd-Frank Act, in reinstating the jurisdictional limitation previously used by circuit courts, arguably also reinstates the effects test used by those courts, which bears resemblance to the effects test in the FTAIA.²⁵⁰ This is not the only effects test that Congress has deemed jurisdictional.²⁵¹ The Foreign Sovereign Immunities Act (FSIA) employs an effects test very similar to that of the FTAIA,²⁵² and Congress and the Supreme Court have consistently treated that test as a limitation on subject matter jurisdiction.²⁵³ The FSIA initially removes all foreign sovereigns from the jurisdiction of United States courts, and then brings them back within the jurisdiction of the courts if one of several statutory exceptions applies.²⁵⁴ The exception most closely tracking the language of the FTAIA is the commercial activity exception of 28 U.S.C. § 1605(a)(2), which provides that foreign sovereigns are not immune for commercial activity that has a "direct effect" in the United States.²⁵⁵ The similarities between the two tests led the Ninth Circuit to adopt the FSIA's definition of "direct" in the FTAIA's domestic effects inquiry.²⁵⁶

250. The Dodd-Frank Act grants jurisdiction over "conduct occurring outside the United States that has a foreseeable substantial effect within the United States." *See supra* note 242. The SEC attorneys who "provid[ed] technical assistance to members of Congress that included, among other things, explaining the provisions' intended effect of codifying the courts of appeals' approach to extraterritoriality with respect to SEC and DOJ enforcement actions" intended to return to the previous jurisdictional effects test, and thus influenced the jurisdictional language. Painter et al., *supra* note 241, at 22 n.89.

251. *See infra* notes 257–60 and accompanying text.

252. *See* 28 U.S.C. § 1605(a)(2) (2012).

253. Congress's jurisdictional language is clear in the statutory text, which states that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. This jurisdictional language has been respected and upheld by the Supreme Court. *See, e.g., Samantar v. Yousuf*, 560 U.S. 305, 324–25 (2010) (holding that where the FSIA did not govern a claim of immunity, the FSIA did not deprive a court of subject-matter jurisdiction).

254. *See Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 610–11 (1992).

255. *Id.* at 611; *see* 28 U.S.C. § 1605(a)(2).

256. *See United States v. LSL Biotech.*, 379 F.3d 672, 680 (9th Cir. 2004) (following the Supreme Court's precedent in *Republic of Argentina* that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity"). *But cf. Minn-Chem., Inc. v. Agrum, Inc.*, 683 F.3d 845, 856–57 (7th Cir. 2012) (rejecting the Ninth Circuit definition in favor of the DOJ's definition of direct as "a reasonably proximate causal nexus") (quoting Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. AM. L. 415, 430 (2005) (remarks of the Deputy Assistant Attorney General)).

Another effects test that is closely tied both to *Morrison* and the FTAIA is that of the Racketeer Influenced and Corrupt Organizations Act (RICO).²⁵⁷ As the Second Circuit noted, “precedents concerning subject matter jurisdiction for international securities transactions and antitrust matters” guide the extraterritorial application of RICO.²⁵⁸ Prior to *Morrison*, the majority of courts applied the same effects test used for section 10(b) of the Securities Exchange Act to RICO claims to determine whether subject matter jurisdiction existed.²⁵⁹ That test provided for subject matter jurisdiction “if conduct material to the completion of the racketeering occurs in the United States, or if significant effects of the racketeering are felt [in the United States].”²⁶⁰

Within a few months of the *Morrison* decision, the Second Circuit abrogated its prior use of the effects test,²⁶¹ holding that the proper question is whether “a United States federal court can provide relief, not . . . whether the court possesses subject matter jurisdiction to hear the claim.”²⁶² Other courts have since held that, in light of *Morrison*, the effects test in regards to RICO is no longer good law.²⁶³ Nevertheless, the Dodd-Frank Act’s return to the pre-*Morrison* subject matter jurisdiction effects test may call these rulings into question.²⁶⁴ The pre-*Morrison* jurisdictional treatment of the RICO effects test together with the similar treatment of the FSIA’s effects tests gives rise to a colorable claim that Congress believes effects tests to be jurisdictional in nature.²⁶⁵

3. Historical Judicial Treatment

The historical judicial treatment of a statute is an additional

257. 18 U.S.C. §§ 1961–68 (2012).

258. *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996), *abrogated on other grounds by* *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010).

259. See R. Davis Mello, Note, *Life After Morrison: Extraterritoriality and RICO*, 44 VAND. J. TRANSNAT’L L. 1385, 1399 (2011).

260. See Mello, *supra* note 259, at 1399 (alteration in original) (quoting *Liquidation Comm’n of Banco Intercont’l, S.A. v. Renta*, 530 F.3d 1339, 1351–52 (11th Cir. 2008)).

261. See *N. S. Fin. Corp.*, 100 F.3d 1046.

262. *Norex Petrol. Ltd.*, 631 F.3d at 31.

263. See Mello, *supra* note 259, at 1403–04.

264. See *supra* notes 241–49 and accompanying text.

265. While this development weighs in favor of a jurisdictional reading of the FTAIA, it is not dispositive, as the Court has rejected a categorical approach to determining the nature of statutes. See *supra* notes 119–23 and accompanying text.

consideration to which courts have given varying weight when determining whether a statute is jurisdictional.²⁶⁶ Here, the factor is far from dispositive. Certainly the clear trend in the circuit courts prior to *Arbaugh* was to treat the FTAIA as jurisdictional.²⁶⁷ However, later circuit decisions have questioned the rigor of the analyses in these cases.²⁶⁸ Additionally, even though the Courts in *Hartford Fire* and *Empagran* considered FTAIA issues brought on a 12(b)(1) motion, neither of the opinions addressed the jurisdictional issue directly, and both opinions contained language that, under *Morrison*, would go to the merits of a Sherman Act claim.²⁶⁹ Therefore the historical judicial treatment of the FTAIA, while a factor to be considered, is not particularly helpful in determining the legal character of the FTAIA.

V. THE CONSEQUENCES AND RESOLUTION OF THE COMPETING APPROACHES TO THE FTAIA

The clear trend of the circuit courts in applying *Arbaugh* to the FTAIA is to treat the FTAIA as a substantive limitation.²⁷⁰ The Third and Seventh Circuits have based this decision primarily on the text and location of the statutory provision and on *Morrison*'s characterization of extraterritorial application as a merits question.²⁷¹ However, there are also compelling reasons to continue treating the FTAIA as a jurisdictional limitation, particularly Congress's seemingly clear intent.²⁷² The approach that carries the day will have consequences that impact civil procedure, international

266. While this factor was a significant part of the decision in *Bowles*, see *supra* note 110 and accompanying text, it was not dispositive in *Reed Elsevier*, see *supra* note 117 and accompanying text.

267. See *supra* note 57 and accompanying text.

268. See *supra* notes 58 and accompanying text.

269. See *supra* notes 46–56 and accompanying text. The same is true of Supreme Court decisions regarding the extraterritorial application of the Sherman Act prior to the enactment of the FTAIA. See *supra* notes 28–36 and accompanying text.

270. See *supra* note 180 and accompanying text.

271. See *supra* notes 150–66 and accompanying text. Application of the “clearly states” test bears this out; these factors provide the best support for the position, whereas the procedural consequences are less compelling. See *supra* notes 183–210 and accompanying text.

272. See *supra* notes 193–230. The nature of the effects test and the relevant historical treatment, while relevant, are less compelling than the congressional intent because the purpose of the “clearly states” test is to discern the intent of Congress, and Congress has the right to make any statutory limitation jurisdictional. See *supra* notes 250–69, and accompanying text; see *infra* note 314.

comity, and the jurisdictional designation of other related statutes.²⁷³ Although the uncertainty as to the nature of the FTAIA has arisen in the district and circuit courts, the resolution of the issue is ultimately beyond the purview of the lower courts.²⁷⁴

A. Practical Consequences

1. Procedure

The competing interpretations of the FTAIA are not merely theoretical; they have real procedural consequences.²⁷⁵ The primary procedural consequence of a substantive interpretation of the FTAIA is that plaintiffs basing their claims on foreign conduct will have to plead and prove an additional element in Sherman Act cases.²⁷⁶ Additionally, the interpretation chosen determines who the decision-maker will be: the court decides whether there is subject matter jurisdiction, while whether an element of a claim has been satisfied is considered by the jury.²⁷⁷ A third procedural difference between the two approaches is that parties who want to contest an antitrust suit will have to file either a 12(b)(1) or 12(b)(6) motion.²⁷⁸ The

273. See *infra* notes 275–97 and accompanying text.

274. See *infra* notes 302–14 and accompanying text.

275. See, e.g., *Minn-Chem., Inc. v. Agrium, Inc.*, 683 F.3d 845, 852–53 (7th Cir. 2012) (“This is not a picky point that is of interest only to procedure buffs. Rather, this distinction affects how disputed facts are handled, and it determines when a party may raise the point.”). In *Arbaugh*, the Court looked to the procedural consequences of attaching a jurisdictional label to a statute in its analysis. See *supra* notes 103–04 and accompanying text. This factor was also given consideration both in Judge Wood’s *United Phosphorus* dissent, see *supra* notes 81–84 and accompanying text, and her subsequent majority opinion in *Minn-Chem*, see *supra* note 166 and accompanying text.

276. See Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 330 (stating that while traditional Sherman Act claims have two elements—an agreement and a restraint of trade—the FTAIA would add a third element regarding the domestic effect of the conduct).

277. *Id.*

278. See Wasserman, *Jurisdiction and Merits*, *supra* note 208, at 662–69. In a 12(b)(1) motion, the plaintiff bears the burden of establishing that the court has subject matter jurisdiction over the action and the complaint’s allegations are given any presumption of truth. *United Phosphorus Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 946 (7th Cir. 2003), *rev’d on other grounds*, *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012). If the attack is factual rather than facial, the court is allowed to weigh evidence beyond the complaint in making its determination. *Id.* A 12(b)(6) motion, in contrast, permits only facial attacks on the complaint, shifts the burden of proof to the defendant, and requires the court to construe the allegations of the complaint in the light most favorable to the plaintiff. *Minn-Chem*, 683 F.3d at 853. In addition, a dismissal for lack of subject

12(b)(6) is generally acknowledged to be more favorable to plaintiffs,²⁷⁹ increasing the likelihood that defendants will settle.²⁸⁰ However, the heightened pleading standards of *Twombly*²⁸¹ and *Iqbal*²⁸² have arguably minimized these differences.²⁸³ Additionally, the pre-trial dismissal is not typically dependent on the distinction between jurisdiction and merits.²⁸⁴ Therefore, these procedural differences, while significant, are only occasionally outcome-determinative.²⁸⁵

2. International Comity

The concern of international comity was of particular importance in *Hartford Fire*²⁸⁶ and *Empagran*.²⁸⁷ In *Hartford Fire*, Justice Souter stated that “concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act

matter jurisdiction is usually without prejudice, but requires the dismissal of the entire claim, while a dismissal on the merits precludes plaintiffs from re-filing the case, but the court can still exercise supplemental jurisdiction over pendant claims. See Marc I. Steinberg & Kelly Flanagan, *Transnational Dealings—Morrison Continues to Make Waves*, 46 INT’L LAW. 829, 839 (2012).

279. See Hovenkamp, *supra* note 187, at 3–4 (“Prior to trial allegations and evidence are typically construed against the movant, while in the 12(b)(1) proceeding the judge acts as a neutral fact finder. Further, to the extent that the 12(b)(6) interpretation protracts the litigation, perhaps delaying the issue of extraterritorial reach until summary judgment or even the trial stage, plaintiffs will be able to obtain more favorable settlements.”); see also Steinberg, *supra* note 278, at 839 (“With the exception of potential claim preclusion, the characterization of an issue as merit-based appears to favor plaintiffs. When an issue is deemed a merits question there is a limited time for challenges by defendants, no independent judicial obligation to ensure that merit requirements are met, and a jury to resolve disputes concerning contested facts.”).

280. See Joseph P. Bauer, *The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to American Banana?*, 65 ME. L. REV. 3, 25–26 (2012) (explaining that under a 12(b)(6) motion involving disputed facts, “the plaintiff would be entitled to some pre-trial discovery, raising the likelihood that the defendant might settle”).

281. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

282. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

283. See Hovenkamp, *supra* note 187, at 3. See also Wasserman, *Jurisdiction and Merits*, *supra* note 208, at 664–65 (“[T]o the extent judges have become freer in resolving factual disputes, both in granting summary judgment and in reviewing jury findings, the procedural consequences of the jurisdiction/merits confusion may become less practically significant.”).

284. See Steinberg & Flanagan, *supra* note 278, at 839.

285. See, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (stating that remand over the difference between a 12(b)(1) and 12(b)(6) motion was unnecessary “[s]ince nothing in the analysis of the courts below turned on” the distinction).

286. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797–800, 817–20 (1993).

287. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164–69 (2004).

jurisdiction.”²⁸⁸ The legislative history agrees that “[i]f a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the courts’ ability to employ notions of comity.”²⁸⁹ If the FTAIA is ultimately considered to be substantive, jurisdiction is assumed under 28 U.S.C. § 1331 so long as a non-frivolous Sherman Act claim is asserted, and courts will therefore be able to dismiss cases based on comity concerns without establishing a domestic effect.²⁹⁰ However, if the FTAIA is considered to limit jurisdiction, the effects test will have to be satisfied to establish jurisdiction before the court considers international comity,²⁹¹ which seems to be Congress’s intent in the legislative history.²⁹² These differences may also have implications for whether courts define “direct” broadly or narrowly, which will impact comity through the number of suits that are subject to the jurisdiction of American courts.²⁹³

3. Implications for Other Statutes

If the competing approaches to the FTAIA are a result of the differing views of the Supreme Court and Congress, the resolution of those differences will have broad consequences.²⁹⁴ First, although *Arbaugh* rejects a categorical approach to determining the nature of a statute, the treatment of similar provisions is a factor in the “clearly states” analysis,²⁹⁵ and therefore the ultimate treatment of the FTAIA would be applicable to the analysis of the extraterritorial application of any statute. If Congress unambiguously

288. *Hartford Fire*, 509 U.S. at 797 n.24.

289. H.R. REP. NO. 97-686, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498.

290. *See supra* notes 65–66 and accompanying text.

291. *See supra* note 288 and accompanying text.

292. *See supra* note 289 and accompanying text.

293. Circuit courts have applied two major definitions for “direct.” *See supra* note 256 and accompanying text. The Ninth Circuit, which treated the FTAIA as jurisdictional, adopted a more strict definition, while the Seventh Circuit, which treated the FTAIA as substantive, adopted a broader definition. *See supra* note 262. Therefore, it is possible that the approach to the FTAIA that carries the day will also define “direct.” Judge Wood has noted that a jurisdictional reading of the FTAIA would mean that a ruling of jurisdiction by a district court would be entitled to deferential review by the appellate court, limiting the higher court’s ability to take international comity into account. *See supra* note 84 and accompanying text. This criticism will be particularly salient if the FTAIA is deemed jurisdictional and the lower courts adopt a broad definition of “direct,” opening up the possibility that a lower court will claim jurisdiction over attenuated conduct, and the appellate court will have difficulty dismissing for comity reasons.

294. *See infra* notes 295–97 and accompanying text.

295. *See, e.g., supra* note 110 and accompanying text.

treats the FTAIA as jurisdictional, that act would confirm that Congress reclassified section 10(b) of the Securities Exchange Act as jurisdictional in enacting the Dodd-Frank Act, and would effectively overrule the holding of *Morrison* that the extraterritorial application of a statute is an element of a claim.²⁹⁶ That decision would have further ramifications for RICO because of its close relationship to the Securities Exchange Act and antitrust litigation.²⁹⁷ However, if Congress ultimately agrees with the holding in *Morrison* and treats the FTAIA as imposing an additional element of a Sherman Act claim, the legislature should clarify its use of jurisdictional language in the Dodd-Frank Act.²⁹⁸

B. How Should the Conflict be Resolved?

Thus far, the lower courts have departed from the traditional interpretation of the FTAIA without any FTAIA-specific precedent from the Supreme Court, relying instead on application of the Court's precedent in *Arbaugh* and *Morrison*.²⁹⁹ However, these courts have acted as though the only clear statement the legislature can make must be in the text of the statute,³⁰⁰ and in the process have overlooked the clear congressional intent found in the legislative history.³⁰¹ Moreover, Congress's response to *Morrison* should give lower courts pause before applying *Morrison*'s outcome to the FTAIA, particularly in light of the FTAIA's clear legislative history.³⁰² The Dodd-Frank Act signals that the Supreme Court and Congress have different ideas about whether the extraterritorial reach of a statute should be an issue of merits or of subject matter jurisdiction.³⁰³ If this is the case, the issue is clearly beyond the purview of the lower courts; instead, the Supreme Court should decide the question and Congress should have an opportunity to respond, either through inaction amounting to acceptance or through legislation that more clearly expresses that the FTAIA

296. See *supra* notes 241–48 and accompanying text.

297. See *supra* note 258 and accompanying text.

298. See *supra* notes 241–48 and accompanying text.

299. See *supra* notes 138–77 and accompanying text.

300. See *supra* notes 150–66 and accompanying text.

301. See *supra* note 217 and accompanying text.

302. See *supra* notes 216–35 and accompanying text.

303. See Painter et al., *supra* note 241, at 21 (stating that Congress's language in the Dodd-Frank Act "might reflect a difficult point of law, on which the courts have reached contrary conclusions").

is jurisdictional.³⁰⁴

Whether or not there is a fundamental difference between the Supreme Court and Congress regarding extraterritoriality and subject matter jurisdiction will become clear in the coming years, as the Supreme Court more clearly articulates its views on jurisdiction³⁰⁵ and the legislature has ample time to consider and respond.³⁰⁶ In the meantime, it is not realistic for lower courts to avoid the jurisdictional issue completely.³⁰⁷ However, without further guidance from either the legislature or the Supreme Court, lower courts will find themselves in the difficult and inappropriate position of discerning a path between Supreme Court precedent and congressional intent.

VI. CONCLUSION

In applying the “clearly states” test to the FTAIA, the text of the statute and the holding of *Morrison* provide the most compelling reasons for treating the FTAIA as substantive.³⁰⁸ However, if the purpose of the “clearly states” test is truly to “capture Congress’s likely intent,”³⁰⁹ due consideration should be given to Congress’s clear jurisdictional intent expressed in the FTAIA’s legislative history.³¹⁰ If Congress’s reaction to *Morrison* in the Dodd-Frank Act is any indication, the FTAIA is caught up in a fundamental disagreement between Congress and the Supreme Court regarding whether the extraterritorial reach of a statute is a question of merits or of subject matter jurisdiction.³¹¹ Therefore, the resolution of the dispute is beyond the purview of the lower courts, regardless of any sound reasons the courts have used in their analyses.³¹² Instead, the most appropriate course is for the Supreme Court to intervene.³¹³ Then, Congress will have the opportunity to

304. See, e.g., *supra* notes 236–49 and accompanying text.

305. *Arbaugh* and its progeny reflect a recognition of the clarity lacking in previous jurisdictional rulings and a desire to bring predictability to this area of the law. See *supra* notes 98–99.

306. See, e.g., *supra* notes 236–49 and accompanying text.

307. See, e.g., *supra* notes 170–73 and accompanying text.

308. See *supra* notes 150–66, 185–201 and accompanying text.

309. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011).

310. See *supra* notes 216–35 and accompanying text.

311. See *supra* notes 236–307 and accompanying text.

312. See *supra* notes 299–307 and accompanying text.

313. See *supra* notes 299–307 and accompanying text.

react and, either by action or inaction, resolve the debate.³¹⁴ Until then, foreign companies and governments will bear the risk of participating in a global marketplace where the reach of United States antitrust law, and its potential interference with foreign legal systems, is uncertain and unpredictable.³¹⁵

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314. Congress must have the last word because, as the Court in *Henderson ex rel. Henderson v. Shinseki* noted, “Congress is free to attach the conditions that go with the jurisdictional label.” 131 S. Ct. at 1203. See also *supra* note 224 and accompanying text.

315. See, e.g., *supra* notes 11–12 and accompanying text (illustrating different jurisdictional outcomes for foreign interests in antitrust cases decided within the Northern District of California between 2009 and 2012).

* J.D. Candidate, 2014, Pepperdine University School of Law; B.A. in Literature and Philosophy, 2007, Azusa Pacific University. I thank the editors and staff of the *Pepperdine Law Review* for their meticulous editing and for their friendship. I also thank my professors at Pepperdine, who provide an unparalleled education and care deeply for their students as individuals. Finally, I thank the most generous, intelligent, funny, and kind study partner I could ask for—my husband Jacob.