ANIMAL SCIENCE AND *MINN-CHEM*: A NEW ERA IN INTERPRETING THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

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INTRODUCTION

During the 1990s, U.S. airlines allowed licensed travel agents to make airline reservations for passengers through their electronic reservation systems in exchange for a commission.[1] In July 1999, travel agents' commission rates were set at 7 percent.[2] However, in December 1999, four major U.S. air carriers—American Airlines, Continental Airlines, United Airlines, and Delta Airlines—decreased the commission rates for Latin American travel agents to 6 percent within several days of one another.[3] In response, Latin American travel agents brought an action against these airlines alleging a horizontal price-fixing conspiracy in violation of the Sherman Antitrust Act.[4] However, the airlines successfully moved to dismiss the case for lack of subject matter jurisdiction[5] under the Foreign Trade Antitrust Improvements Act ("FTAIA").[6]

Since its enactment in 1982, relatively few federal courts have decided cases requiring interpretation of the FTAIA.[7] When the Third Circuit decided

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[1] Turicentro, S.A. v. Am. Airlines Inc., 303 F.3d 293, 296 (3d Cir. 2002), *overruled in part by* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012).

[2] *Id.* at 297.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 297-98.

[6] 15 U.S.C. § 6a (2006). The FTAIA was enacted to limit the application of U.S. antitrust laws on foreign conduct to claims involving: (1) domestic commerce, (2) import commerce, or (3) foreign conduct that has a direct effect on U.S. commerce. *See* James M. Pearl & Alicia Hancock, *Unanimous En Banc Seventh Circuit Decision Expands Extraterritorial Reach of US Antitrust Laws*, O'MELVENY & MEYERS LLP (June 27, 2012), http://www.omm.com/fcwsite/abc.aspx?url=newsroom%2fpenPDF.aspx%3fpub%3d1265.

[7] *Turicentro*, 303 F.3d at 299.

Turicentro, S.A. v. American Airlines Inc.[8] in 2002, it interpreted the FTAIA similarly to other U.S. federal courts—as a limit on the federal courts' subject matter jurisdiction to hear foreign antitrust claims.[9] However, in 2011, after considering the implications of the U.S. Supreme Court's ruling on jurisdictional statutory interpretation in *Arbaugh v. Y & H Corp.*,[10] the Third Circuit strayed from its own precedent and other circuits' interpretations of the FTAIA in its groundbreaking *Animal Science Products, Inc. v. China Minmetals Corp.*[11] opinion.[12] There, the court decided that the FTAIA is not intended to be a jurisdictional statute, but rather is intended to set forth the elements of a successful Sherman Act claim.[13] The Seventh Circuit followed suit in June 2012, overturning its own precedent, in its *Minn-Chem, Inc. v. Agrium Inc.*[14] decision.[15] In so doing, the Third and Seventh Circuits created a circuit split with the Ninth and the D.C. Circuits regarding the proper interpretation of the FTAIA.[16]

At first glance, the distinction between the jurisdictional interpretation and the substantive interpretation of the FTAIA may not seem significant. However, there are serious procedural implications for parties to an antitrust action when courts interpret the FTAIA as a statute defining subject matter jurisdiction rather than as a statute setting forth the elements of a Sherman Act claim.[17] For instance, if courts interpret the FTAIA as a jurisdictional statute, then an antitrust defendant may move to dismiss a plaintiff's foreign antitrust claim under the FTAIA pursuant to Federal Rule of Civil Procedure 12(b)(1): lack of subject matter jurisdiction.[18] However, if courts interpret the FTAIA as merely setting forth the elements of a Sherman Act claim, then an antitrust defendant must move to dismiss a plaintiff's foreign antitrust claim

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8 303 F.3d 293 (3d Cir. 2002), *overruled in part by* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012).

9 *See* Edward Valdespino, Note, *Shifting Viewpoints: The Foreign Trade Antitrust Improvement Act, a Substantive or Jurisdictional Approach*, 45 TEX. INT'L L.J. 457, 458-59 (2009); *see also* Herbert J. Hovenkamp, *Antitrust's "Jurisdictional" Reach Abroad* 1 (Univ. of Iowa Legal Studies Research Paper No. 11-41, 2011), *available at* http://ssrn.com/abstract=1962370 ("Until recently decisions interpreting the Foreign Trade Antitrust Improvement Act (FTAIA) have held or assumed that the provision states a limitation on the subject matter jurisdiction of the federal courts rather than a limitation on the merits of the antitrust claim." (footnote omitted)).

10 546 U.S. 500 (2006).

11 654 F.3d 462 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012).

12 *See generally id.* at 467-69.

13 *Id.* at 467-68.

14 683 F.3d 845 (7th Cir. 2012) (en banc).

15 *Id.* at 852.

16 *See* Pearl & Hancock, *supra* note 6.

17 *See id.*

18 *See* Patrick G. Secor, Case 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, 253 (2012).

under the FTAIA pursuant to Federal Rule of Civil Procedure 12(b)(6): failure to state a claim upon which relief can be granted.[19] Such procedural differences may often lead to vastly different outcomes for the parties to a case.[20] For instance, differing interpretations of the FTAIA affect when a party may bring a motion to dismiss and determine how the court handles any disputed facts.[21]

This Comment focuses on the evolving interpretation of the FTAIA and the impact that the interpretation will have on antitrust litigation in the future. Part I provides a brief history of the FTAIA and summarizes how various circuit courts have previously interpreted the FTAIA as a statute conferring subject matter jurisdiction. Part I also discusses the *Arbaugh* decision and how it gave rise to the Third Circuit's groundbreaking decision—and the subsequent Seventh Circuit decision—that overturned past precedent, interpreting the FTAIA as a statute setting forth the elements of a successful Sherman Act claim. Part II analyzes the procedural impact on defendants' ability to make, and plaintiffs' ability to survive, FTAIA challenges. Part III argues that the Third and Seventh Circuits were correct in finding that the FTAIA does not define subject matter jurisdiction but rather sets forth the elements of a Sherman Act claim. Finally, Part IV contends that the U.S. Supreme Court should resolve the circuit split between the Ninth and D.C. Circuits and the Third and Seventh Circuits, ultimately leaving it to Congress to rewrite the FTAIA if it originally intended the statute to be one defining subject matter jurisdiction.

I. BACKGROUND

Since its enactment thirty years ago, federal courts have struggled to consistently apply the FTAIA to cases involving foreign antitrust claims. This Part begins by providing a brief history of the FTAIA and outlines the early FTAIA cases interpreting the statute as one conferring subject matter jurisdiction. It then describes the Supreme Court's decision in *Arbaugh v. Y & H Corp.* and explains how this decision led to the Third and Seventh Circuits' substantive interpretations of the FTAIA.[22]

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19 *See* Pearl & Hancock, *supra* note 6.

20 *See Minn-Chem*, 683 F.3d at 852-53.

21 *Id.*

22 *See* discussion *infra* Part I.C.

A. *A Brief History of the FTAIA's Enactment*

In the late 1970s, U.S. courts noted that there was no black-letter rule determining the Sherman Act's application to cases involving foreign commerce.[23] As a result, federal district courts differed as to "the proper test for determining whether U.S. antitrust jurisdiction over international transactions exist[ed]."[24] Congress recognized these inconsistencies and was also concerned about American courtrooms becoming flooded with actions related to foreign conduct that had little to do with U.S. commerce.[25] It therefore codified the language from *United States v. Aluminum Co. of America*,[26] which had predominantly defined the extraterritorial reach of U.S. courts with respect to antitrust actions.[27]

President Ronald Reagan signed the FTAIA into law in 1982.[28] The law states that the Sherman Act:

> shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
> (2) such effect gives rise to a claim under the provisions of [the Sherman Act].[29]

The FTAIA established "that the Sherman Act does not apply to conduct, foreign or domestic, unless that conduct has a direct, substantial, and reasonably foreseeable effect on domestic markets or on U.S. export opportunities."[30] The purpose of the legislation is to clarify the scope of federal courts' ability to hear antitrust cases involving foreign conduct.[31] As such, it "is a limiting statute; it removes a court's ability to apply the Sherman Act to antitrust claims relating to foreign trade or commerce."[32]

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23 Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 311 (2007) (citing Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 611 (9th Cir. 1976)).

24 *Id.* at 305.

25 Valdespino, *supra* note 9, at 460-61.

26 148 F.2d 416 (2d Cir. 1945); Huffman, *supra* note 23, at 313.

27 Valdespino, *supra* note 9, at 460-61.

28 Huffman, *supra* note 23, at 286.

29 15 U.S.C. § 6a (2006).

30 Valdespino, *supra* note 9, at 462.

31 Huffman, *supra* note 23, at 286.

32 Valdespino, *supra* note 9, at 462.

B. *The Early FTAIA Cases*

1. The Ninth Circuit Has Consistently Held that the FTAIA Confers Subject Matter Jurisdiction

McGlinchy v. Shell Chemical Co.[33] was one of the first federal court of appeals opinions to interpret the FTAIA in a review of a motion to dismiss for lack of subject matter jurisdiction.[34] In *McGlinchy*, a chemical company bought "all the patents, rights, and commercial product facilities for" a resin used to manufacture piping.[35] The chemical company contracted with the plaintiff to sell its piping in Southeast Asia, South America, Africa, and the Middle East.[36] After the chemical company cancelled the contract, the plaintiff brought an action alleging unilateral refusal to deal in violation of federal antitrust laws.[37] The Ninth Circuit heard the case on appeal after the district court dismissed the case for lack of subject matter jurisdiction.[38]

Noting there was little binding circuit court precedent interpreting the FTAIA, the Ninth Circuit looked to district court case law to guide its interpretation and application of the FTAIA.[39] The court in *McGlinchy* found the FTAIA "was intended to exempt from United States antitrust law conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad."[40] The Ninth Circuit also cited cases referring to the FTAIA as a "jurisdictional nexus"[41] and as the "requirements . . . to establish subject matter jurisdiction."[42] Thus, the court, finding that the plaintiff had only alleged injury to customers in Southeast Asia, affirmed the district court's dismissal on the ground that the court lacked subject matter jurisdiction under the FTAIA.[43]

The Ninth Circuit again addressed a case on appeal from a dismissal for lack of subject matter jurisdiction in *United States v. LSL Biotechnologies*.[44]

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33 845 F.2d 802 (9th Cir. 1988).

34 *See id.* at 813 (noting that there was "little case law interpreting" the FTAIA).

35 *Id.* at 805.

36 *Id.*

37 *Id.* at 813.

38 *Id.* at 804-05.

39 *See McGlinchy*, 845 F.2d at 813-14.

40 *Id.* at 814 (quoting Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102, 1106 (S.D.N.Y. 1984)) (internal quotation marks omitted).

41 *Id.* (quoting Liamuiga Tours v. Travel Impressions, Ltd., 617 F. Supp. 920, 924 (E.D.N.Y. 1985)) (internal quotation marks omitted).

42 *Id.* (quoting The 'In' Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 499 (M.D.N.C. 1987)).

43 *Id.* at 813.

44 379 F.3d 672 (9th Cir. 2004).

There, LSL created a joint business venture with Hazera, another biotechnologies company.[45] LSL and Hazera intended to create a genetically altered tomato seed that would grow tomatoes with a longer shelf life, allowing the tomatoes to be harvested when ripe and transported to northern regions of the United States in the winter months without spoiling.[46] A dispute between the companies resulted in mediation and renegotiation of the parties' contract in Israeli courts.[47] The new contract contained a restrictive clause stating that Hazera itself could not develop, produce, or market the types of genetically altered tomato seeds originally contemplated by the joint business venture.[48]

Finding that the restrictive clause "constitute[d] a naked restraint of trade in violation of Section 1 of the Sherman Act," the United States filed an antitrust complaint in the district court, where the court ultimately dismissed the claim for lack of subject matter jurisdiction.[49] The Ninth Circuit found that, under the FTAIA, the Sherman Act should not apply to foreign commerce if the conduct in question did not harm domestic commerce.[50] As such, citing its own precedent in *McGlinchy*, the court held that "the FTAIA provides the guiding standard for jurisdiction over foreign restraints of trade"[51] and noted that other circuits also interpreted the FTAIA as the rule for finding jurisdiction over foreign anticompetitive conduct.[52] Agreeing with the district court that the anticompetitive effects of the agreement between LSL and Hazera on the U.S. economy were speculative, the Ninth Circuit held that there was no subject matter jurisdiction under the FTAIA.[53]

The most recent Ninth Circuit decision interpreting the FTAIA as jurisdictional is *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*,[54] in which the defendants entered into a global conspiracy to fix the prices of dynamic random access memory ("DRAM").[55] Centerprise International, Ltd., a British computer manufacturer, brought an antitrust action in the United States claiming that the increased prices in the United States resulted in it having to pay higher prices for DRAM abroad.[56] In its decision, the court noted ambiguity in the FTAIA, stating that "[i]t is unclear . . . whether the FTAIA is more appropriately viewed as withdrawing jurisdiction from the federal courts when a plaintiff fails to establish proximate cause or as simply establishing a limited cause of action requiring plaintiffs to prove

45 *Id.* at 674.
46 *Id.*
47 *Id.* at 674-75.
48 *Id.* at 675.
49 *Id.* at 675-76.
50 *LSL Biotechnologies*, 379 F.3d at 679.
51 *Id.*
52 *Id.* at 680 n.5.
53 *Id.* at 681-83.
54 546 F.3d 981 (9th Cir. 2008).
55 *Id.* at 984.
56 *Id.*

proximate cause as an element of the claim."[57] Nevertheless, the court maintained the jurisdictional approach to the FTAIA, upholding the district court's dismissal for lack of subject matter jurisdiction because Centerprise had not pleaded any causal link between the increase in U.S. prices and its own injury.[58]

2. The District of Columbia Circuit Has Similarly Found that the FTAIA Confers Subject Matter Jurisdiction

The D.C. Circuit first decided an FTAIA case in *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*,[59] in which two telecommunications companies formed a joint venture to create an FM radio broadcasting system that would reach the entire Caribbean.[60] After the formation of the joint venture, Caribbean Broadcasting System ("Caribbean Broadcasting"), which was one of the companies' competitors, unsuccessfully attempted to sell advertising on its own FM radio broadcasting station in the British Virgin Islands.[61] Caribbean Broadcasting subsequently brought an antitrust action against the two companies claiming that its advertising sales had failed because the joint venture had attempted to monopolize the market by deceptively marketing its own FM radio broadcast as a Caribbean-wide system.[62] Caribbean Broadcasting also alleged the joint venture had engaged in anticompetitive conduct by "fil[ing] sham objections to [Caribbean Broadcasting's] application for a broadcast license, thereby delaying [its] entry into [the] broadcasting [market]."[63]

The case reached the D.C. Circuit on appeal from a dismissal for lack of subject matter jurisdiction under the FTAIA.[64] In its review of the district court's decision, the D.C. Circuit identified the key issue as whether the allegations were sufficient to confer subject matter jurisdiction.[65] Specifically, the court noted, "[i]t does seem clear . . . that we should use the standard set forth in the FTAIA to analyze whether conduct related to international trade has had an effect of the nature and magnitude necessary to provide us with subject matter jurisdiction."[66] Finding that the allegations specified that U.S.

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57 *Id.* at 985 n.3.
58 *Id.* at 990.
59 148 F.3d 1080 (D.C. Cir. 1998).
60 *Id.* at 1082.
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.* at 1083.
65 *Caribbean Broad.*, 148 F.3d at 1085.
66 *Id.*

consumers had suffered anticompetitive harm, the court in *Caribbean Broadcasting* reversed the district court's decision, finding that the court had subject matter jurisdiction.[67]

The D.C. Circuit again addressed the FTAIA in *Empagran S.A. v. F. Hoffmann-Laroche, Ltd.*,[68] where foreign companies that had purchased vitamins in foreign countries, from foreign manufacturers, alleged price fixing in violation of Section 1 of the Sherman Act.[69] Without addressing the interpretation of the FTAIA, the D.C. Circuit in *Empagran* seemed to facially accept the FTAIA as a jurisdictional statute.[70] It thus affirmed the district court's dismissal for lack of subject matter jurisdiction under the FTAIA, finding no direct effect on U.S. commerce.[71]

3. The Third Circuit's Early Cases Initially Interpreted the FTAIA as Conferring Subject Matter Jurisdiction

The Third Circuit set forth its original interpretation of the FTAIA in *Carpet Group International v. Oriental Rug Importers Ass'n*,[72] when a corporation, which tried to make imported oriental rugs less expensive and more available to retailers by having them buy the rugs directly from the manufacturers, brought an antitrust action against a rug importers and wholesalers association.[73] The complaint alleged the association tried to harm the corporation's mission by threatening manufacturers that would have attended the corporation's trade shows.[74] In the district court, the magistrate judge found that there was no subject matter jurisdiction under the FTAIA because the plaintiffs had not alleged any effects on U.S. commerce.[75] Apparently accepting other circuits' interpretations of the FTAIA, the Third Circuit viewed the relevant question on appeal as whether the district court had subject matter jurisdiction under the FTAIA. Finding that the association's misconduct involved import commerce, the Third Circuit held that subject matter jurisdiction did not exist.[76]

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67 *Id.* at 1087.

68 417 F.3d 1267 (D.C. Cir. 2005).

69 *Id.* at 1268.

70 Without much analysis, the court states in footnote 4, "[i]n light of our decision on FTAIA subject matter jurisdiction, we need not consider the appellees' alternative argument." *Id.* at 1269 n.4. Earlier, when the case was before the U.S Supreme Court, the Court "appeared to assume that the FTAIA is jurisdictional." Hovenkamp, *supra* note 9, at 1.

71 *Empagran*, 417 F.3d at 1271.

72 227 F.3d 62 (3d Cir. 2000).

73 *Id.* at 63-64.

74 *Id.* at 64-65.

75 *Id.* at 67.

76 *Id.* at 73.

The Third Circuit applied its precedent in *Carpet Group* to *Turicentro, S.A. v. American Airlines Inc.*,[77] where the court found that the FTAIA determined whether subject matter jurisdiction existed in the case.[78] In *Turicentro*, Latin American travel agents brought an action against four major U.S. air carriers alleging a horizontal price-fixing conspiracy after the airlines simultaneously decreased those travel agents' commission rates.[79] The airlines successfully moved to dismiss the case for lack of subject matter jurisdiction under the FTAIA.[80] Interpreting the FTAIA on appeal, the Third Circuit specified that the FTAIA "only removes certain non-import commerce from federal antitrust jurisdiction."[81] Finding that the FTAIA restricted the alleged conduct, the court affirmed the district court's dismissal for lack of subject matter jurisdiction.[82]

4. Though the Seventh Circuit Initially Held that the FTAIA Conferred Subject Matter Jurisdiction, It Questioned this Interpretation

The Seventh Circuit first decided a case interpreting the FTAIA in *United Phosphorus, Ltd. v. Angus Chemical Co*.[83] In *United Phosphorus*, a chemical company brought an antitrust action alleging one of its competitors in India "attempted to monopolize, did monopolize, and conspired to monopolize the market for certain chemicals" used in the manufacture of tuberculosis medicine.[84] The district court dismissed the case for lack of subject matter jurisdiction pursuant to the FTAIA because the plaintiffs had failed to allege any effect on U.S. commerce.[85] The *United Phosphorus* case was also the first time a court thoroughly analyzed and questioned the validity of the jurisdictional interpretation that the other circuit courts had given the FTAIA.[86] Its review of the statute was prompted, in part, by the dissent from *Hartford Fire Insurance Co. v. California*,[87] in which Justice Scalia stated

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77 *See* discussion *supra* Introduction.

78 *See* Turicentro, S.A. v. Am. Airlines Inc., 303 F.3d 293, 299-300 (3d Cir. 2002), *overruled in part by* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012).

79 *Id.* at 297.

80 *Id.* at 297-98.

81 *Id.* at 302.

82 *Id.* at 304.

83 *See* 322 F.3d 942, 944 (7th Cir. 2003) (en banc), *overruled en banc by* Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845 (7th Cir. 2012).

84 *Id.* at 944-45.

85 *Id.*

86 *Id.* at 944.

87 509 U.S. 764 (1993). In *Hartford Fire*, U.S. states brought a Sherman Act claim against British and American insurance companies that boycotted certain general liability insurers. *Id.* at 770. The Su-

that the FTAIA "has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on regulatory power over the challenged conduct."[88]

Ultimately, the Seventh Circuit in *United Phosphorus* found that the FTAIA should be interpreted as a statute defining subject matter jurisdiction based on prior decisions of other courts.[89] The Seventh Circuit's questions regarding the FTAIA presented in *United Phosphorus* were addressed again nine years later in *Minn-Chem, Inc. v. Agrium Inc.*, which overruled the court's precedent in deciding that, in fact, the FTAIA is not intended to confer subject matter jurisdiction.[90]

C. *Recent Interpretations of the FTAIA*

1. *Arbaugh v. Y & H Corp.* Changed the Way Courts Viewed Jurisdictional Versus Substantive Statutes

The *Arbaugh v. Y & H Corp.* case, while not related to the FTAIA, considered whether to interpret a federal statute as jurisdictional or as setting forth an element of a claim.[91] In *Arbaugh*, the plaintiff was a waitress in one of the defendant's restaurants.[92] She brought an action against her employer under Title VII of the Civil Rights Act of 1964 alleging she had been constructively discharged from her job after one of the restaurant's owners sexually harassed her.[93] The district court dismissed the case for lack of subject matter jurisdiction because of a provision of Title VII exempting employers with less than fifteen employees from the laws set forth in Title VII.[94] The Fifth Circuit affirmed the dismissal, and the U.S. Supreme Court granted certiorari to resolve the circuit split regarding the jurisdictional interpretation of the employee-numerosity provision.[95]

In its *Arbaugh* decision, the Supreme Court reaffirmed that Congress granted subject matter jurisdiction in actions arising under the Constitution or laws of the United States.[96] The plaintiff in *Arbaugh* brought her action

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preme Court ruled that jurisdiction existed under the FTAIA. *Id.* at 797-99. Justice Scalia's dissent, however, suggested a new interpretation of the FTAIA as a statute setting forth the elements of a Sherman Act claim rather than as one conferring subject matter jurisdiction. *Id.* at 813 (Scalia, J., dissenting).

88 *United Phosphorus*, 322 F.3d at 947 (quoting *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting)) (internal quotation marks omitted).

89 *See id.* at 953 (Wood, J., dissenting).

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

91 546 U.S. 500, 503 (2006).

92 *Id.* at 507.

93 *Id.*

94 *Id.* at 503-04.

95 *Id.* at 509.

96 *Id.* at 513 (citing 28 U.S.C. § 1331 (2006)).

under Title VII pursuant to this statutory grant of jurisdiction.[97] However, the Court noted that Title VII requires a defendant employer to have at least fifteen employees for a Title VII action to be brought against it, and the Court indicated there was a need to resolve whether the employee-numerosity provision of Title VII was jurisdictional or substantive.[98] Acknowledging that the concepts of subject matter jurisdiction and elements of a claim are often confused, the Court reversed the district court's opinion, finding that the employee-numerosity provision is intended to set forth an element of a claim.[99]

Specifically, the Court posited that Congress could have made the employee-numerosity provision jurisdictional, just as it has previously made other legislative provisions jurisdictional.[100] Indeed, as with many federal statutes, Congress included a separate jurisdiction-conferring statute in Title VII, which states, "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter."[101] As the definition of "employer" under Title VII contains no jurisdictional language, the Court in *Arbaugh* found that there is nothing in Title VII that suggests Congress intended the courts to treat it as a statute conferring subject matter jurisdiction.[102] Accordingly, the Court reached its conclusion that the employee-numerosity provision of Title VII should be treated as an element of a Title VII claim, and not as jurisdictional.[103]

2. In *Animal Science*, the Third Circuit Overturned Its Precedent and Interpreted the FTAIA as Setting Forth the Elements of a Sherman Act Claim

Animal Science Products, Inc. v. China Minmetals Corp. was the first FTAIA case post-*Arbaugh* to reanalyze the circuit courts' previous interpretations of the FTAIA.[104] The plaintiffs were American companies that bought magnesite from several Chinese magnesite producers and brought an action alleging these producers had engaged in a price-fixing conspiracy that affected U.S. commerce.[105] The district court dismissed the claim under the FTAIA for lack of subject matter jurisdiction, and the case reached the Third

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97 *Arbaugh*, 546 U.S. at 513.

98 *Id.* at 513-14.

99 *Id.* at 503, 516.

100 *Id.* at 514-15.

101 *Id.* at 505-06 (quoting 42 U.S.C. § 2000e-5(f)(3) (2012)) (internal quotation marks omitted).

102 *Id.* at 515-16.

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

104 Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 465 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012).

105 *Id.* at 464.

Circuit on appeal.[106] Describing the FTAIA as "inelegantly phrased," using "rather convoluted language," the Third Circuit found it necessary to look to new case law to reinterpret the court's approach to FTAIA cases.[107]

Instead of maintaining a jurisdictional approach, the Third Circuit relied on Supreme Court precedent and adopted the *Arbaugh* rule, even though *Arbaugh* did not directly pertain to the FTAIA.[108] Because the FTAIA, like Title VII in *Arbaugh*, does not mention jurisdiction, the *Arbaugh* "clearly states" rule called into question the Third Circuit's previous interpretation of the FTAIA as a statute defining subject matter jurisdiction.[109] The Third Circuit thus held that the FTAIA should be interpreted as providing the substantive elements of a claim.[110] It thereby overturned its own precedent in *Carpet Group* and *Turicentro*, which viewed the FTAIA as a jurisdictional statute limiting a court's ability to hear Sherman Act claims.[111]

3. In *Minn-Chem*, the Seventh Circuit Followed Suit in Overturning Its Precedent

In *Minn-Chem, Inc. v. Agrium Inc.*, purchasers of potash—a mineral used in fertilizers—brought a class action lawsuit alleging a global price-fixing conspiracy of potash producers.[112] When the defendants moved to dismiss under the FTAIA for lack of subject matter jurisdiction, "[t]he district court denied [their motion], but it certified its ruling for interlocutory appeal."[113] In light of the Third Circuit's recent *Animal Science* decision, the Seventh Circuit found that its interpretation of the FTAIA needed to be reconsidered.[114] It thus asked whether, under recent Supreme Court precedent, the FTAIA affected a court's subject matter jurisdiction or related to the elements of a Sherman Act claim.[115]

Applying the same "clearly states" rule as the Third Circuit did in *Animal Science*, the Seventh Circuit concluded that because the FTAIA was silent as to subject matter jurisdiction, it intended to set forth the elements of a

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106 *Id.* at 464-65.

107 *Id.* at 465 (quoting Turicentro, S.A. v. Am. Airlines Inc., 303 F.3d 293, 300 (3d Cir. 2002), *overruled in part by Animal Sci. Prods.*, 654 F.3d at 469) (internal quotation marks omitted).

108 John R. Foote & Blaire Z. Russell, *A New Direction for the FTAIA: Recent Interpretations May Expand the Foreign Reach of U.S. Antitrust Law*, ANTITRUST NEWSL. (Nixon Peabody LLP), Nov. 14, 2011, at 2, *available at* http://www.nixonpeabody.com/linked_media/publications/Antitrust_Alert_11_14_2011.pdf.

109 *Id.* at 1-2.

110 *Animal Sci. Prods.*, 654 F.3d at 468.

111 *Id.* at 467-68.

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

113 *Id.*

114 *Id.* at 852.

115 *Id.* at 851.

Sherman Act claim.[116] In so holding, the Seventh Circuit overturned its own precedent in *United Phosphorus*.[117] Together, the Third and Seventh Circuits thereby created a circuit split with the Ninth and D.C. Circuits regarding the proper interpretation of the FTAIA. This split creates serious procedural implications for parties bringing foreign antitrust actions under the FTAIA in these four circuits.[118] The following section highlights and analyzes these effects.

II. THE PROCEDURAL IMPACTS OF THE NEW INTERPRETATION OF THE FTAIA

As noted above, the Third and Seventh Circuits construe the FTAIA as a statute setting forth the elements of a Sherman Act Claim, whereas the Ninth and D.C. Circuits have found that the statute defines subject matter jurisdiction. While the distinction between these two interpretations of the FTAIA may not seem relevant at first glance, the procedural differences are significant.[119] How the FTAIA is interpreted affects when a party may bring its motion to dismiss, and it determines how the court handles any disputed facts.[120] For instance, if the statute is jurisdictional, a motion to dismiss is brought pursuant to Federal Rule of Civil Procedure 12(b)(1): lack of subject matter jurisdiction.[121] If the statute is substantive, however, a motion to dismiss is brought pursuant to Federal Rule of Civil Procedure 12(b)(6): failure to state a claim upon which relief can be granted.[122] Often, the procedure affects the outcome of litigation.[123]

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116 *Id.* at 852.

117 *Id.*

118 *See* Pearl & Hancock, *supra* note 6.

119 *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 (2012); Hovenkamp, *supra* note 9, at 1.

120 Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 852-53 (7th Cir. 2012) (en banc).

121 *See* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 469 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012); United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 946 (7th Cir. 2003) (en banc), *overruled by Minn-Chem*, 683 F.3d 848; Bauer, *supra* note 119, at 25-26; Christine C. Levin et al., *It's a Jungle Out There:* Animal Science *Ruling Highlights Need for Strict Application of* Twombly *to Claims Subject to FTAIA*, 101 ANTITRUST & TRADE REG. REP. (BNA) No. 701, at 2 (Dec. 2, 2011).

122 *See Minn-Chem*, 683 F.3d at 852; *Animal Sci. Prods.*, 654 F.3d at 469; Levin et al., *supra* note 121, at 2.

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

A. *Timing of Motions to Dismiss Differs Between the Jurisdictional and Substantive Approaches to the FTAIA*

The timing of bringing a motion to dismiss is one of the procedural implications of the two different interpretations of the FTAIA. Parties typically bring motions to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) early in the case.[124] However, subject matter jurisdiction must be established at all stages of the litigation.[125] As a result, a party can never forfeit or waive the right to bring a motion to dismiss for lack of subject matter jurisdiction[126] and can challenge a federal court's subject matter jurisdiction at any time.[127] Thus, if a court fails to dismiss a foreign antitrust action for lack of subject matter jurisdiction early on, the court can resolve it when it determines that the alleged conduct does not have a direct effect on domestic commerce.[128] Moreover, even if a party fails to raise dismissal for lack of subject matter jurisdiction, a judge has an obligation to raise it whenever that judge believes the court may no longer have jurisdiction.[129] Parties may even seek dismissal for lack of subject matter jurisdiction after a trial and entry of judgment, on appeal, or before the U.S. Supreme Court.[130]

On the other hand, parties may only raise motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) before the start of a trial; if the parties fail to raise a 12(b)(6) motion prior to this time, they lose the opportunity to raise it later in the lawsuit.[131] As a result, the resolution of an action could be delayed until much later in the case, and, as noted by the Seventh Circuit in *United Phosphorus*, "the potential for a lawsuit to have an effect on foreign markets would exist while the case remained pending."[132]

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124 *See id.*

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

126 Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006); *see also* Hovenkamp, *supra* note 9, at 3.

127 *Arbaugh*, 546 U.S. at 506; *see also* Hovenkamp, *supra* note 9, at 3; Sylvie K. Kern, Is the FTAIA Jurisdictional? Subject Matter Jurisdiction After *Arbaugh* and *Reed Elsevier* 108-09 (Fall 2010) (manuscript), *available at* http://www.antitrustglobal.com/about-us (follow "Is the FTAIA Jurisdictional?" hyperlink).

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

129 *See* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *see also Arbaugh*, 546 U.S. at 514; *United Phosphorus*, 322 F.3d at 952; Hovenkamp, *supra* note 9, at 3.

130 *Arbaugh*, 546 U.S. at 506.

131 *Id.* at 507; *see also* Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 853 (7th Cir. 2012) (en banc).

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

B. *Parties' Burdens of Proof Change When the FTAIA Is Interpreted as Setting Forth the Elements of a Claim*

The varying burdens of proof are another procedural implication of the two interpretations of the FTAIA. In 12(b)(1) motions to dismiss for lack of subject matter jurisdiction, the non-movant has the burden of proving that jurisdiction exists.[133] Typically, the non-movant is the plaintiff.[134] Additionally, defendants may contest jurisdiction by facially attacking the sufficiency of the pleadings, or by attacking the facts.[135] For a facial attack, the court accepts the complaint's allegations as true, and the judge of the court is a neutral fact finder.[136] However, under a factual attack, the court does not need to accept the allegations in the complaint as true.[137] The court may allow affidavits, documents, limited evidentiary hearings, and other extrinsic evidence to resolve any factual disputes.[138] Defendants are thus often successful in their motions to dismiss early in the litigation.[139]

On the other hand, in 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted, the burden of proof is on the moving party, and the weight of the evidence is construed against the moving party.[140] Further, the moving party is frequently the defendant in the case.[141] It is thus "more difficult for defendants to dispose of meritless foreign claims early in the litigation."[142] Under 12(b)(6) motions to dismiss, courts also accept the allegations in the complaint as true.[143] This makes the court less likely to dismiss the action than it would be under a 12(b)(1) motion.[144] If there are disputed facts, the plaintiff may request pretrial discovery,[145] and ultimately, "[i]f satisfaction of an essential element of a claim for relief is at issue . . .

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133 *See Minn-Chem*, 683 F.3d at 853; Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 469 n.9 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012); *United Phosphorus*, 322 F.3d at 946; Secor, *supra* note 18, at 253.

134 *See* Bauer, *supra* note 119, at 25-26; Secor, *supra* note 18, at 253; Hovenkamp, *supra* note 9, at 9.

135 Kern, *supra* note 127, at 108.

136 *United Phosphorus*, 322 F.3d at 946; Turicentro, S.A. v. Am. Airlines Inc., 303 F.3d 293, 300 n.4 (3d Cir. 2002), *overruled in part by Animal Sci. Prods.*, 654 F.3d at 469; Hovenkamp, *supra* note 9, at 3-4.

137 Kern, *supra* note 127, at 108.

138 Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006); *Animal Sci. Prods.*, 654 F.3d at 469 n.9; *Turicentro*, 303 F.3d at 300 n.4; *see also* Kern, *supra* note 127, at 108.

139 Kern, *supra* note 127, at 108.

140 *Animal Sci. Prods.*, 654 F.3d at 469 n.9; Secor, *supra* note 18, at 253; Hovenkamp, *supra* note 9, at 3-4.

141 Bauer, *supra* note 119, at 25; Secor, *supra* note 18, at 253; Hovenkamp, *supra* note 9, at 9.

142 Levin et al., *supra* note 121, at 1.

143 *Animal Sci. Prods.*, 654 F.3d at 469 n.9; Bauer, *supra* note 119, at 25; Secor, *supra* note 18, at 253-54; Hovenkamp, *supra* note 9, at 1.

144 Secor, *supra* note 18, at 253-54.

145 Bauer, *supra* note 119, at 25.

the jury is the proper trier of contested facts."[146] As such, relevant facts are decided much later in the trial.[147] Thus, cases are longer and more expensive for the defendants, because early dismissal is difficult to achieve.[148] Because defendants pay for the majority of discovery costs,[149] the number of settlements under the substantive interpretation of the FTAIA increases, as early settlement is more preferable to defendants than the costs associated with a full trial.[150]

Nevertheless, under 12(b)(6) motions to dismiss, antitrust pleadings must still be governed by the standard articulated in *Bell Atlantic Corp. v. Twombly*.[151] The *Twombly* standard requires plaintiffs to make "[f]actual allegations . . . enough to raise a right to relief above the speculative level."[152] A plaintiff must still therefore identify the parties to the suit, must allege specifically how it was harmed under the Sherman Act, and must set forth claims that the defendant's conduct had an effect on U.S. commerce, such that the claim is permissible under the FTAIA.[153]

C. *The Overall Effects of the Procedural Differences on Parties to a Case*

Finally, the procedural implications of the two interpretations of the FTAIA have an effect on the likelihood of a particular outcome for either party to the case. Because defendants can impose litigation costs on plaintiffs by delaying litigation on the merits with a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, defendants are largely more successful on 12(b)(1) motions.[154] Many courts grant 12(b)(1) motions to dismiss, "finding that plaintiffs had failed to meet their burden of establishing the court's jurisdiction over claims for foreign purchases."[155] Importantly, subject matter jurisdiction goes to a court's capacity to hear and adjudicate a plaintiff's claim; without subject matter jurisdiction, a Sherman Act case may not come before a federal court at all.[156]

Additionally, 12(b)(1) motions to dismiss for lack of subject matter jurisdiction remove plaintiffs' right to a jury trial more frequently than do 12(b)(6) motions to dismiss for failure to state a claim upon which relief can

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146 Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006).

147 *See* Valdespino, *supra* note 9, at 465.

148 Secor, *supra* note 18, at 254.

149 *See* Levin et al., *supra* note 121, at 2.

150 Secor, *supra* note 18, at 254; *see also* Hovenkamp, *supra* note 9, at 4.

151 550 U.S. 544 (2007).

152 *Id.* at 555.

153 *See generally* FED. R. CIV. P. 8; *see also* Hovenkamp, *supra* note 9, at 9-10.

154 Kern, *supra* note 127, at 108-09.

155 Levin et al., *supra* note 121, at 2.

156 *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1350 (3d ed. 2004).

be granted.[157] Motions to dismiss for lack of subject matter jurisdiction involve determining whether a court has the authority to decide the case before it, which is never a fact a jury may decide.[158] This approach tends to favor defendants over plaintiffs.[159] A jury, however, "is the default factfinder on facts that go to substantive merits."[160] Thus, if the FTAIA is interpreted as a substantive statute, there is a greater possibility that plaintiffs will be awarded the opportunity to have a jury hear the merits of the case, especially in cases involving money damages.[161]

Motions to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, however, tend to favor plaintiffs.[162] Unlike 12(b)(1) motions to dismiss, 12(b)(6) motions to dismiss have nothing to do with a court's authority to hear a case.[163] Rather, such motions challenge the sufficiency of the allegations contained in the plaintiff's complaint against Federal Rule of Civil Procedure 8, which outlines the plaintiff's pleading requirements.[164] Unfortunately for defendants, if a plaintiff no longer has the burden of proving subject matter jurisdiction, they will likely include as many claims as they can in their complaints, hoping that the sheer mass of their allegations will allow them to survive a defendant's 12(b)(6) motion to dismiss.[165] This frequently increases the likelihood that unsubstantiated claims "will reach the merits stage [of litigation], only to be dismissed after years of costly discovery."[166]

Going forward, these procedural implications will affect the ways in which parties will have to approach foreign claims in the Third and Seventh Circuits.[167] For instance, defendants will now be required to attack the merits of plaintiffs' complaints, rather than filing a motion to dismiss for lack of subject matter jurisdiction, thereby compelling plaintiffs to prove jurisdiction exists.[168] "One strategy for attacking the merits of the claim would be to show

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157 *See* Daniel Wotherspoon, Casebrief, *The "Element" of Surprise: The Third Circuit Bucks the Foreign Trade Antitrust Improvements Act Trend in* Animal Science Products, Inc. v. China Minmetals Corp., 57 VILL. L. REV. 785, 802 (2012).

158 *See id.*

159 *Id.* at 801-03.

160 Howard M. Wasserman, Colloquy Essay, *The Demise of "Drive-By Jurisdictional Rulings,"* 105 NW. U. L. REV. 947, 954 (2011); *see also* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1083 (2003) ("[The jury's] role is to evaluate the evidence and to reconstruct what took place, as it would have appeared to an objective on-the-scene observer. In other words, at a minimum the jury is the master of 'historical' facts." (footnote omitted)).

161 *See* Wasserman, *supra* note 160, at 954.

162 Hovenkamp, *supra* note 9, at 3.

163 *See* WRIGHT & MILLER, *supra* note 156, § 1356.

164 *See id.*

165 Levin et al., *supra* note 121, at 2.

166 *Id.* at 3.

167 *See* Wotherspoon, *supra* note 157, at 805-06.

168 *Id.* at 806.

that the plaintiff's injury was not directly caused by the anticompetitive conduct's domestic effect."[169] On the other hand, although they will no longer have the burden of proving subject matter jurisdiction, plaintiffs will be required to specifically allege each of the FTAIA's elements under the *Twombly* standard—particularly the effects of the defendants' conduct on U.S. trade or commerce—to survive defendants' motions to dismiss for failure to state a claim upon which relief can be granted.[170]

III. DID THE THIRD AND SEVENTH CIRCUITS GET IT RIGHT?

A. *The Substantive Interpretation Versus the Jurisdictional Interpretation*

In interpreting the FTAIA as a statute setting forth the elements of a successful Sherman Act claim, the Third and Seventh Circuits created a circuit split with the Ninth and D.C. Circuits, which still interpret the FTAIA as jurisdictional.[171] Indeed, in *McGlinchy v. Shell Chemical Co.*—its first case deciding an FTAIA issue—the Ninth Circuit noted that there "[was] little case law interpreting the [FTAIA]."[172] However, rather than interpreting the statute itself, the Ninth Circuit relied on district court language calling the FTAIA jurisdictional as evidence that the FTAIA must be interpreted as such.[173] It then relied on this precedent to uphold the FTAIA's jurisdictional interpretation in *United States v. LSL Biotechnologies*.[174] Interestingly, the Ninth Circuit has questioned whether its jurisdictional interpretation of the FTAIA is correct.[175] In *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, the court noted uncertainty as to whether the FTAIA is intended to establish subject matter jurisdiction or to set forth the elements of a claim.[176] Ultimately, though, the court decided not to address its interpretation of the FTAIA because the parties did not raise the issue in the case.[177]

Rather than relying on district court precedent to find a jurisdictional approach to the FTAIA, the D.C. Circuit has primarily relied on the corresponding House Report.[178] Specifically, the D.C. Circuit in *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC* supported its interpretation by citing to a portion of the House Report that referred to the legislation

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169 *Id.*

170 *See id.*

171 *See* Pearl & Hancock, *supra* note 6.

172 McGlinchy v. Shell Chem. Co., 845 F.2d 802, 813 (9th Cir. 1988).

173 *See id.* at 813-15.

174 379 F.3d 672, 679 (9th Cir. 2004).

175 *See* 546 F.3d 981, 985 n.3 (9th Cir. 2008).

176 *Id.*

177 *Id.*

178 *See* Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1085 (D.C. Cir. 1998).

as the "Effects That Are Necessary To Create Jurisdiction Under the Antitrust Laws."[179] In *Empagran S.A. v. F. Hoffmann-Laroche, Ltd.*, the D.C. Circuit seemed to facially accept this approach to interpreting the FTAIA.[180]

While the Third and Seventh Circuits have now adopted an interpretation of the FTAIA which has created a circuit split with the Ninth and D.C. Circuits, they have not always held that the FTAIA is a substantive statute. Like the D.C. Circuit, the Third Circuit in *Carpet Group International v. Oriental Rug Importers Ass'n* relied on congressional intent to initially find that the FTAIA was a statute defining subject matter jurisdiction.[181] Specifically, it held, "these activities are not the type of conduct Congress intended to remove from our antitrust jurisdiction when it enacted the FTAIA. The FTAIA therefore does . . . not divest the District Court of subject matter jurisdiction."[182] Likewise, in *United Phosphorus, Ltd. v. Angus Chemical Co.*, the Seventh Circuit referred to legislative history, finding:

> [J]urisdiction stripping is what Congress had in mind in enacting the FTAIA. The statute 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. We must presume that Congress expects statutes to be read to conform with Supreme Court precedent.[183]

The dissent in *United Phosphorus*, however, criticized the majority's approach, arguing that legislative history using jurisdictional language is not dispositive.[184] Instead, Judge Wood posited that these courts misinterpreted Congress's intent in enacting the FTAIA and confused Congress's authority to set forth the elements of a claim with Congress's authority to grant subject matter jurisdiction.[185] Eight years later, after relying on the Supreme Court's precedent in *Arbaugh v. Y & H Corp.*, the Third and Seventh Circuits would adopt the substantive interpretation of the FTAIA.[186]

The Third Circuit was the first to overturn its precedent and hold that the FTAIA sets forth the elements of a Sherman Act claim, thereby creating the circuit split with the Ninth and D.C. Circuits.[187] In *Animal Science Products, Inc. v. China Minmetals Corp.*, the Third Circuit commented that courts

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179 *See id.* (citing H.R. REP. NO. 97-686, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490).

180 *See supra* note 70.

181 *See* Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n, 227 F.3d 62, 73 (3d Cir. 2000), *overruled by* Animal Sci. Prods. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012).

182 *Id.*

183 United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 951 (7th Cir. 2003) (en banc), *overruled en banc by* Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845 (7th Cir. 2012).

184 *See id.* at 953 (Wood, J., dissenting).

185 *Id.*

186 *See* Foote & Russell, *supra* note 108, at 1-2.

187 *Id.* at 2.

had not previously been careful about distinguishing between jurisdictional statutes and statutes that set forth the elements of a claim.[188] As a result, the court noticed that cases were often decided using a jurisdictional analysis without considering whether a substantive analysis would have been more appropriate.[189] Just as Judge Wood pointed out in *United Phosphorus*, the Third Circuit then identified the "two sources of congressional authority: the constitutional authority to set forth the elements of a successful claim for relief and the constitutional authority to delineate the subject matter jurisdiction of the lower courts."[190] The first power is known as Congress's "legislative jurisdiction," and the second power is known as Congress's "judicial jurisdiction."[191]

Stating that Congress had already given courts subject matter jurisdiction over antitrust cases pursuant to its judicial jurisdiction in 28 U.S.C. § 1337(a),[192] the court determined that Congress had enacted the FTAIA pursuant to its legislative jurisdiction, and relied on the Supreme Court's precedent in *Arbaugh* to adopt a bright-line approach to interpreting the FTAIA.[193] This rule articulates that unless a statute "clearly states" that it confers subject matter jurisdiction, it should be interpreted as a statute providing the substantive elements of a claim.[194] Applying this framework to the FTAIA, the Third Circuit overturned its own precedent in *Carpet Group* and *Turicentro, S.A. v. American Airlines Inc.*[195]

For similar reasons, the Seventh Circuit followed suit a year later, overturning *United Phosphorus*.[196] Indeed, the court in *Minn-Chem, Inc. v. Agrium Inc.* stated:

> When Congress decides to strip the courts of subject-matter jurisdiction in a particular area, it speaks clearly. The FTAIA, however, never comes close to using the word "jurisdiction" or any commonly accepted synonym. Instead, it speaks of the "conduct" to which the Sherman

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188 Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 466 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012).

189 *Id.* at 466-67.

190 *Id.* at 467.

191 *Id.* (internal quotation marks omitted).

192 This statute states that federal courts will have jurisdiction over any actions "arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C. § 1337(a) (2006).

193 *Animal Sci. Prods.*, 654 F.3d at 467-68. The Third Circuit stated, "In *Arbaugh*, the Supreme Court articulated a 'readily administrable bright-line,' 'clearly states' rule to determine whether a statutory limitation sets forth a jurisdictional requirement or a substantive merits element . . . . A review of the FTAIA's statutory text compels the same conclusion in this case." *Id.* at 468 (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006)).

194 *Id.* at 468 (quoting *Arbaugh*, 546 U.S. at 515).

195 *Id.* at 467-68.

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

> Act (or the Federal Trade Commission Act) applies. This is the language of elements, not jurisdiction.[197]

With these recent holdings, the Third and Seventh Circuits not only created a circuit split, but also conflicted with the Department of Justice and the Federal Trade Commission's views of the FTAIA.[198] Additionally, the American Bar Association explained that with "respect to *subject matter jurisdiction*, the *International Antitrust Guidelines* state that 'anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.'"[199] This conflict in interpretation raises the question: were the Third and Seventh Circuits correct in reinterpreting the FTAIA?

B. Arbaugh *and the Statutory Language Indicate the Substantive Interpretation Is Correct*

The courts have noted that whether to interpret a provision of a statute as jurisdictional or substantive is a commonly confused question.[200] However, this Comment first contends that, with respect to the FTAIA, interpretation is not a difficult issue. In *Arbaugh*, the Supreme Court stated:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.[201]

By holding as such, the Supreme Court adopted a bright-line approach to interpreting statutes.[202] Specifically, *Arbaugh*'s rule dictates that if legislation does not contain jurisdictional language, then there is simply nothing indicating that the statute should be read as jurisdictional.[203] Importantly, the Court in *Arbaugh* noted that if Congress had intended Title VII's employee-

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197 *Id.* at 852.

198 "[T]he guidelines for the agencies state '[T]he jurisdictional limits of the Sherman Act and the FTC Act are delineated in the FTAIA.'" United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 949 (7th Cir. 2003) (en banc) (alteration in original) (quoting *Antitrust, Unfairness, Deception Policies and Guidelines*, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107), *overruled by Minn-Chem*, 683 F.3d at 848.

199 *Id.* (emphasis added) (quoting 2 AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 1120 (5th ed. 2002)) (internal quotation marks omitted).

200 Valdespino, *supra* note 9, at 465.

201 Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006) (footnote omitted) (citation omitted).

202 Alicia J. Batts, *An Overseas Sea Change for U.S. Antitrust Laws? New Developments in the Interpretation of the Foreign Trade Antitrust Improvements Act*, PROSKAUER (Sept. 7, 2011), http://www.proskauer.com/publications/client-alert/an-overseas-sea-change-for-us-antitrust-laws/.

203 *See Arbaugh*, 546 U.S. at 515-16.

numerosity provision to be jurisdictional in nature, it has the option of rewriting the statute to reflect this intent.[204]

The Supreme Court's precedent in *Arbaugh* is significant in that it "cast doubt on the precedential value of any previous holding—from the Supreme Court down—that characterized a statutory requirement as jurisdictional . . . signal[ing] to lower federal courts a potential tectonic shift in the jurisdictional landscape."[205] Indeed, the *Arbaugh* rule can be easily applied to the FTAIA because the FTAIA does not explicitly speak to subject matter jurisdiction, even though *Arbaugh* does not overrule any FTAIA cases.[206] Accordingly, the Third and Seventh Circuits used this analytical framework in their *Animal Science* and *Minn-Chem* decisions, which found that courts should not read a jurisdictional interpretation into the FTAIA because the statute does not contain jurisdictional language, and thus Congress must not have intended it to be interpreted as such.[207] Rather, Congress intended the language of the FTAIA to plainly dictate the foreign conduct that the Sherman Act does not reach.[208]

The FTAIA does not speak to a court's authority to hear an antitrust case before it; it speaks to the substantive elements of a Sherman Act claim.[209] A factual element of a claim will never implicate subject matter jurisdiction; rather, a substantive element of a claim is a fact

> ' . . . included in a statute that must be pled and proven by the plaintiff in each case, serving as a nexus between a particular piece of legislation and Congress's constitutional power to enact that legislation and to regulate the conduct at issue.' . . . [*T*]*hey have nothing to do with the subject-matter jurisdiction of the judicial branch*.[210]

Again, there is no jurisdictional language contained in the FTAIA.[211] The nature of this straightforward language indicates the courts should not construe the statute as defining subject matter jurisdiction of federal courts.[212] As Judge Wood noted in her *United Phosphorus* dissent, when Congress intends

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204 *See id.* at 515 (stating the Court wanted to "leave the ball in Congress' court").

205 Stephen R. Brown, *Hearing Congress's Jurisdictional Speech: Giving Meaning to the "Clearly-States" Test in* Arbaugh v. Y & H Corp., 46 WILLAMETTE L. REV. 33, 36-37 (2009).

206 *See* Foote & Russell, *supra* note 108, at 2.

207 *See* Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 852 (7th Cir. 2012) (en banc); Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 468 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012).

208 *See* Valdespino, *supra* note 9, at 464 (citing Boyd v. AWB Ltd., 544 F. Supp. 2d 236, 243 n.6 (S.D.N.Y. 2008)).

209 *Id.*

210 *Id.* at 465-66 (emphasis added) (quoting Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 679 (2005)).

211 *See* 15 U.S.C. § 6a (2006).

212 *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006).

for a provision of a statute to be jurisdictional, it speaks clearly.[213] In other statutes, Congress has written provisions granting subject matter jurisdiction directly into its legislation and is clear when it intends to strip courts of their subject matter jurisdiction.[214] It failed to do so when it enacted the FTAIA, and thus it follows that a requirement for an effect on interstate commerce would be an element of a claim rather than a provision conferring subject matter jurisdiction.

Moreover, Congress has already enacted a jurisdiction-granting statute related to the Sherman Act: 28 U.S.C. § 1337(a).[215] Federal courts also have subject matter jurisdiction under 28 U.S.C. § 1331 because the Sherman Act is a federal law.[216] When courts are ruling on a Rule 12(b)(1) motion, the main focus of their determination should be based on jurisdictional-granting statutes such as these. Unless the courts have been stripped of subject matter jurisdiction under these statutes, any dismissal for lack of subject matter jurisdiction is improper.

C. *Why Courts Have Previously Misinterpreted the Statute*

If the interpretation of the FTAIA is clear from the language of the statute, why then has there been such variation in how courts have interpreted the legislation? One critic has suggested that courts may want to treat the FTAIA as a jurisdictional statute because they are used to conducting jurisdictional fact finding in other non-FTAIA actions.[217] Frequently, jurisdictional statutes require the court to resolve disputes related to facts such as a party's domicile or the status of a party early in the case.[218] Other times, courts are required to decide whether an action "arises under" a federal law and must therefore look at the elements of the claim for relief, asking whether the outcome of the case will turn on the construction of an act of Congress.[219] This pattern of early fact-finding leads courts to inherently look for questions related to jurisdiction at the outset of a case.[220] However, the courts' inclination to look for jurisdictional issues should not therefore automatically lead to a jurisdictional interpretation of the FTAIA, especially if that was not Congress's intent in enacting the statute. An unnecessary examination as to

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

214 *See Arbaugh*, 546 U.S. at 514-15.

215 *See supra* note 192.

216 Federal courts have jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2006).

217 *See* Valdespino, *supra* note 9, at 467.

218 *See id.*

219 *See id.* at 467-68.

220 *See id.* at 467.

whether foreign conduct has a direct effect on U.S. commerce would lead to a waste of judicial resources.

A more likely theory is that, when the FTAIA was enacted in 1982, the House Report related to the legislation referred to the FTAIA as a jurisdictional statute.[221] In fact, when the D.C. Circuit decided its *Caribbean Broadcasting* case, it relied in part on language from the House Report referring to the FTAIA as the "Effects That Are Necessary To Create Jurisdiction Under the Antitrust Laws."[222] Before their recent *Animal Science* and *Minn-Chem* decisions, the Third and Seventh Circuits also looked at this questionable congressional intent to find a jurisdictional interpretation of the FTAIA in *Carpet Group* and *United Phosphorus*.[223] Additionally, the Supreme Court in its *Hartford Fire Insurance Co. v. California* decision suggested that Congress's intent in enacting the FTAIA was to create a statute conferring subject matter jurisdiction, not a statute setting forth the elements of a claim.[224] However, there are several compelling arguments as to why the legislative history using jurisdictional language is not dispositive.

First, and most importantly, as was established above, the FTAIA is clear on its face.[225] Therefore, it is not even necessary to look at the House Report because it needs no interpretation. If Congress had intended the FTAIA to be jurisdictional, it would have written jurisdictional language into the text of the legislation. Second, interpreting the FTAIA as jurisdictional is inconsistent with Supreme Court precedent. The Court in *Arbaugh* has established a bright-line rule determining whether statutes confer subject matter jurisdiction.[226] The federal courts should apply this framework to statutory interpretation cases, as the Third and Seventh Circuits did in *Animal Science* and *Minn-Chem*, at least until the Supreme Court has determined what it finds to be the appropriate interpretation of the FTAIA. Finally, as outlined below, policy arguments related to the length and expense of trial favor the substantive approach over the jurisdictional approach to the FTAIA.

D. *The Effects of Courts Applying the Substantive Interpretation*

As mentioned above, the jurisdictional interpretation of the FTAIA often leads to unnecessary examination as to whether foreign conduct has a

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221 *See* H.R. REP. NO. 97-686, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490.

222 *See* Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1085 (D.C. Cir. 1998) (quoting H.R. REP. NO. 97-686, at 3); H.R. REP. NO. 97-686, at 5.

223 *See* United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 951-52 (7th Cir. 2003) (en banc), *overruled en banc by* Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845 (7th Cir. 2012); Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n, 227 F.3d 62, 73 (3d Cir. 2000), *overruled by* Animal Sci. Prods. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744, 1744 (2012).

224 *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993).

225 *See* 15 U.S.C. § 6a (2006) (containing no language pertaining to subject matter jurisdiction).

226 Batts, *supra* note 202.

direct effect on U.S. commerce, which wastes judicial resources. Another procedural issue contributing to the protraction and expense of jurisdictional fact finding is that the question of subject matter jurisdiction may be raised at any time.[227] Thus, under the jurisdictional approach to the FTAIA, a losing party may ask an appellate court, or even the Supreme Court, to revisit the issue of domestic effects at all stages of the litigation.[228] Courts will also be required to address subject matter jurisdiction if they ever have doubts as to the effects of foreign conduct on U.S. commerce, even if the parties never raised the issue.[229]

The majority in *United Phosphorus* argued that because U.S. antitrust laws have the potential to affect our country's relationships with foreign nations, courts need to be cautious when deciding cases involving foreign claims.[230] The majority contended that if the FTAIA is substantive legislation setting forth the elements of a Sherman Act claim, then FTAIA issues will not be resolved until late in the case; this will likely have an effect on foreign trade and commerce until the lawsuit is resolved.[231] This procedural effect thus leads to a greater chance of "offending the economic policies of other nations."[232]

However, expanding on the principles of international comity, a justification for viewing the FTAIA as a statute setting forth the elements of a claim rather than as a jurisdictional statute has to do with the notion that the United States should respect foreign nations by restricting the scope of its antitrust laws to conduct that has a direct effect on domestic commerce.[233] Frequently, foreign claimants choose to bring antitrust actions in the United States because the United States has some of the world's most stringent antitrust laws.[234] As a result, when U.S. courts hear these claims, they risk interfering in other countries' economic policies.[235] In his *Hartford Fire* dissent, Justice Scalia noted that in practice, when statutes confer subject matter jurisdiction, courts hesitate to decline to exercise subject matter jurisdiction.[236] This reality has the potential to expand the extraterritorial reach of the Sherman Act when the whole purpose of enacting the FTAIA was to limit it. If the FTAIA were interpreted as a statute setting forth the elements of a Sherman Act claim, though, courts are more likely to rely on international comity principles to limit the reach of the Sherman Act.[237]

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227 *See* discussion *supra* Part II.A.

228 *See United Phosphorus*, 322 F.3d at 957-58 (Wood, J., dissenting).

229 *Id.* at 958.

230 *Id*. at 952 (majority opinion).

231 *Id.*

232 *Id.*

233 *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

234 Wotherspoon, *supra* note 157, at 785.

235 *Id.* at 805.

236 *See Hartford Fire*, 509 U.S. at 818 n.9 (Scalia, J., dissenting).

237 *See id.* at 817-18.

IV. NEED FOR SUPREME COURT INTERVENTION

In *Arbaugh v. Y & H Corp.*, the U.S. Supreme Court had granted certiorari to clarify the circuit split on whether the employee-numerosity provision of Title VII was jurisdictional or substantive.[238] This Part argues that the Supreme Court must do the same with respect to the FTAIA, determining an interpretation of the statute once and for all.

In the House Report released when the FTAIA was enacted, Congress said that the purpose behind enacting the FTAIA was that courts employed different tests for determining whether the federal courts had jurisdiction over foreign antitrust claims.[239] The FTAIA was meant to clarify the extraterritorial reach of the Sherman Act and the FTC Act.[240] The House Report also stated:

> 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 the legislation. [The FTAIA] 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.[241]

Nevertheless, despite these intentions, when Congress enacted the FTAIA, it failed to use any jurisdictional language in writing the statute.[242]

In its *Arbaugh* decision, the Supreme Court has already held that Congress must explicitly state that it intends to make a statute jurisdictional.[243] In the past, Congress has written provisions granting subject matter jurisdiction directly into its legislation, and it is clear when it intends to strip courts of their subject matter jurisdiction.[244] However, Congress clearly did not include such language in the FTAIA.[245] As such, the Supreme Court should not overturn the recent Third and Seventh Circuit precedent on the inclination that Congress meant to explicitly write jurisdiction into the FTAIA. If Congress had intended to do so, it would have, or it would have rewritten the legislation at some point in the thirty years since it was enacted.

Nevertheless, the distinction between the two interpretations is considerable and leads to policy concerns both nationally and internationally.[246]

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238 *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 509 (2006).

239 H.R. REP. NO. 97-686, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487.

240 *Id*. at 2.

241 *Id*. at 13.

242 *See* 15 U.S.C. § 6a (2006) (containing no language pertaining to subject matter jurisdiction).

243 *Arbaugh*, 546 U.S. at 515-16; *see also* Valdespino, *supra* note 9, at 484.

244 *See Arbaugh*, 546 U.S. at 514-15.

245 *See supra* note 242.

246 *See* Edward D. Cavanagh, *The FTAIA and Claims by Foreign Plaintiffs Under State Law*, ANTITRUST, Fall 2011, at 43, 45-46; Wotherspoon, *supra* note 157, at 805.

First, when federal courts dismiss a case for lack of subject matter jurisdiction, the action goes to state court, which leads to a lack of uniformity in the application of antitrust laws.[247] It also allows states to apply their own antitrust laws to foreign claims.[248] Second, even among the appellate courts, the procedural implications of the different approaches will result in varied antitrust outcomes across the different circuits. Not only will this encourage forum shopping among antitrust plaintiffs looking for a favorable outcome for their complaint, it will lead to an inconsistent approach across the United States with respect to American antitrust laws and the laws or economic policies of foreign nations.

Such uncertainty in the law stands in conflict with the justifications for enacting the FTAIA in the first place: to promote consistency in the application of the United States's antitrust laws.[249] Thus, the Supreme Court has an interest in ensuring that foreign antitrust actions remain in federal courts, in large part to promote stability and certainty for foreign entities who want to determine the outcome of their actions in the United States.[250] Because international trade is a national issue, as one commentator has noted, "[i]n enacting the FTAIA, Congress enabled the United States to speak with one voice with respect to the interaction between American antitrust law and foreign commerce."[251]

Therefore, rather than having the lower federal courts speculate as to congressional intent, in the interest of national and international consistency, the Supreme Court should grant certiorari and apply its precedent in *Arbaugh* to the interpretation of the FTAIA. If the Supreme Court determines that the FTAIA is not a jurisdictional statute, it forces the proverbial ball of FTAIA interpretation back into Congress's court, where it belongs. Then, Congress has a choice. It may either decide to leave the FTAIA as is, or, if it *did* truly intend for the FTAIA to be jurisdictional, it will be forced to rewrite the statute to incorporate language conferring subject matter jurisdiction into it. If Congress decides to rewrite the statute, then "courts and litigants will be duly instructed and will not be left to wrestle with the issue" of FTAIA interpretation any longer.[252]

CONCLUSION

For the first twenty-nine years of the law's existence, federal courts and agencies interpreted the FTAIA as a statute that defined subject matter jurisdiction under the Sherman Act. However, in light of the Supreme Court's

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247 *See* Wotherspoon, *supra* note 157, at 805.

248 *See* Cavanagh, *supra* note 246, at 46.

249 *See id.* at 45-46.

250 *See* Wotherspoon, *supra* note 157, at 804-05.

251 Cavanagh, *supra* note 246, at 45.

252 Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006).

decision in *Arbaugh v. Y & H Corp.*, in the last year the Third and Seventh Circuits have interpreted this legislation as dictating the substantive elements of a Sherman Act claim. In *Arbaugh*, the Supreme Court adopted a bright-line rule articulating that unless a statute "clearly states" that it intends to confer subject matter jurisdiction, courts should interpret the statute as one setting forth the elements of a successful claim for relief. Although *Arbaugh* was not an FTAIA case and did not overrule any FTAIA decisions, it created persuasive precedent for how federal courts should interpret the FTAIA.

When the Third and Seventh Circuits decided *Animal Science Products, Inc. v. China Minmetals Corp.* and *Minn-Chem, Inc. v. Agrium Inc.*, respectively, they not only overturned their own precedents but also created a circuit split with the Ninth and D.C. Circuits, as well as significantly changed the application of the FTAIA in their courts. Procedurally, defendants in the Third and Seventh Circuits will now be required to move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) rather than 12(b)(1), which shifts the burden of proof to defendants, requiring them to demonstrate that plaintiffs failed to adequately state their claim. On the other hand, the substantive interpretation of the FTAIA will benefit plaintiffs because they will no longer have the burden of proving subject matter jurisdiction. They will also be less likely to have their right to a jury trial stripped. While some judges and scholars have concerns that this interpretation will result in lengthier and more expensive litigation costs, leading to an increase in settlements, various policy arguments justify this interpretation of the FTAIA.

The Third and Seventh Circuits correctly interpreted the FTAIA, as evidenced by the fact that Congress failed to write any jurisdictional language into the statute, though it has done so in other legislation it has enacted. This makes the FTAIA clear on its face. Additionally, though courts are accustomed to conducting jurisdictional fact-finding at the start of non-FTAIA actions, due to the nature of the federal courts' jurisdiction in FTAIA cases, jurisdictional fact-finding under the FTAIA begins to resemble a preliminary trial on the merits. This is a waste of judicial resources and leads to protracted litigation, often without regard for the laws and economic policies of foreign nations.

The House Report written in connection with the FTAIA suggests that Congress intended the FTAIA to define the subject matter jurisdiction of federal courts; thus its failure to clearly state that intent in the FTAIA is curious. A lack of clear congressional intent has led to varying interpretations across the circuit courts, and the procedural implications are significant enough that the U.S. Supreme Court must grant certiorari to determine the proper interpretation, leaving Congress the option of agreeing with the Supreme Court's holding or rewriting its legislation. This resolution will, hopefully, finally lead to the certainty in interpretation that the courts have been seeking since the FTAIA's inception.