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THE "ELEMENT" OF SURPRISE: THE THIRD CIRCUIT BUCKS THE  
FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT TREND IN  
*ANIMAL SCIENCE PRODUCTS, INC. v. CHINA MINMETALS CORP.*

DANIEL WOTHERSPOON\*

## I. INTRODUCTION

Parties injured by worldwide anticompetitive conduct have long preferred to litigate their claims in the United States.<sup>1</sup> This is because the United States has some of the harshest antitrust laws in the world.<sup>2</sup> To police and regulate this influx of foreign-born litigation, Congress passed the Foreign Trade Antitrust Improvements Act (FTAIA) in 1982 to clarify the extraterritorial reach of the existing antitrust statute, the Sherman Act.<sup>3</sup> Since its inception, courts have largely viewed FTAIA as a jurisdictional limitation on the Sherman Act.<sup>4</sup> Under this view, FTAIA limits the ability of the U.S. federal courts to hear and resolve certain antitrust cases involving extraterritorial conduct.<sup>5</sup>

Beginning in the early 1990s, however, a minority view developed that questioned the jurisdictional view and proposed that the FTAIA is instead a substantive restriction on the Sherman Act.<sup>6</sup> Under this view, FTAIA is not a limitation on the courts' ability to hear cases, but is instead an ele-

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\* J.D. Candidate, 2013, Villanova University School of Law. This Casebrief reflects the state of the law as of May 2012. The author would like to thank the editorial staff of the *Villanova Law Review* for their invaluable comments and advice. This Article would not exist but for the unwavering love and support of the author's family and Jennifer Robert.

1. See S. Lynn Diamond, Note, Empagran, *the FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOK. J. INT'L L. 805, 805 (2006) (discussing extraterritorial reach of Sherman Act).

2. See *id.* (noting that "[t]he United States has the most developed and aggressive antitrust regime in the world").

3. See Evan Malloy, Comment, *Closing the Antitrust Door on Foreign Injuries: U.S. Jurisdiction over Foreign Antitrust Injuries in the Wake of Empagran*, 38 TEX. TECH L. REV. 395, 396 (2006) (stating that FTAIA was enacted to clarify extraterritorial reach of U.S. antitrust law). For a further discussion of FTAIA, see *infra* notes 41-68 and accompanying text.

4. See Edward Valdespino, Note, *Shifting Viewpoints: The Foreign Trade Antitrust Improvement Act, a Substantive or Jurisdictional Approach*, 45 TEX. INT'L L.J. 457, 457 (2009) (noting subtle shift from jurisdictional to substantive view). For a further discussion of the jurisdictional view of FTAIA, see *infra* notes 41-56 and accompanying text.

5. See Valdespino, *supra* note 4, at 464 (discussing difference between jurisdictional grants and substantive causes of action).

6. For a further discussion of the substantive view of FTAIA, see *infra* notes 57-68 and accompanying text.

ment of the plaintiff's cause of action.<sup>7</sup> Although some Supreme Court justices and circuit court judges supported the substantive view, it was not fully embraced by a circuit court until 2011.<sup>8</sup> In *Animal Science Products, Inc. v. China Minmetals Corp.*,<sup>9</sup> the Third Circuit held that the FTAIA exceptions are properly viewed as an element of a foreign antitrust claim as opposed to a limitation on the court's subject matter jurisdiction.<sup>10</sup>

This Casebrief discusses the Third Circuit's decision to break from prior precedent in its interpretation of FTAIA and analyzes the decision's potential impact on foreign antitrust litigation.<sup>11</sup> Part II, which follows this Introduction, traces the development of FTAIA from its origins in determining the extraterritorial reach of the Sherman Act through the way it has been shaped by the federal circuit courts and the Supreme Court.<sup>12</sup> Part II also addresses Supreme Court precedent that directly impacted the Third Circuit's decision in *Animal Science Products*.<sup>13</sup> Part III discusses the Third Circuit's opinion in *Animal Science Products*.<sup>14</sup> Part IV analyzes the decision's potential impact on foreign antitrust suits within the Third Circuit, including both the procedural impact and pertinent policy considerations.<sup>15</sup> Part IV also offers advice to practitioners handling foreign antitrust cases in the Third Circuit.<sup>16</sup> Finally, Part V concludes that other circuits will likely embrace, or be forced to embrace, the Third Circuit's view of FTAIA and discusses the potential implications for foreign entities conducting business in the United States.<sup>17</sup>

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7. See *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 469 (3d Cir. 2011) (“[I]n enacting FTAIA, Congress exercised its Commerce Clause authority to delineate the elements of a successful antitrust claim . . .”).

8. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813–14 (1993) (Scalia, J., dissenting) (discussing distinction between legislative and judicial jurisdiction); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 964 (7th Cir. 2003) (Wood, J., dissenting) (“FTAIA adds an element to an antitrust claim . . .”).

9. 654 F.3d 462 (3d Cir. 2011).

10. For a further discussion of the Third Circuit's decision and rationale in *Animal Science Products*, see *infra* notes 101–22 and accompanying text.

11. For an analysis of the Third Circuit's decision in *Animal Science Products*, see *infra* notes 123–58 and accompanying text.

12. For a discussion of the state of foreign antitrust law before FTAIA and the way the circuits shaped FTAIA application, see *infra* notes 18–40 and accompanying text.

13. For a discussion of the Supreme Court's decision in *Arbaugh v. Y & H Corp.* and the Court's creation of the “clearly states” rule, see *infra* notes 69–81 and accompanying text.

14. For a discussion of the Third Circuit's opinion in *Animal Science Products*, see *infra* notes 96–122 and accompanying text.

15. For an analysis of the impact of the Third Circuit's decision on foreign antitrust litigation and the policy implications behind it, see *infra* notes 126–58 and accompanying text.

16. For suggestions to Third Circuit practitioners, see *infra* notes 159–68 and accompanying text.

17. For a concluding discussion of the Third Circuit's analysis of FTAIA and the implications for foreign business within the United States, see *infra* notes 169–172 and accompanying text.

## II. BACKGROUND

Congress enacted the Sherman Antitrust Act in 1890 with the primary goal of protecting American consumers by prohibiting monopolies and restraints of trade.<sup>18</sup> The Sherman Act provides that “every contract, combination . . . or conspiracy, in restraint of trade . . . is hereby declared to be illegal” and a felony offense.<sup>19</sup> While Congress attempted to provide a useful guide for the development of antitrust law, courts and commentators have long criticized the Sherman Act for being overly broad.<sup>20</sup> In addition to its failure to specify who can bring suit, the Sherman Act does not even describe the type of conduct that gives rise to antitrust claims.<sup>21</sup>

A. *Origins of FTAIA*

The Sherman Act’s generality and lack of guidance became a major issue in the early twentieth century as the United States became more economically involved with foreign countries.<sup>22</sup> Although section 2 of the

18. See Deborah J. Buswell, Note, *Foreign Trade Antitrust Improvements Act: A Three Ring Circus—Three Circuits, Three Interpretations*, 28 DEL. J. CORP. L. 979, 984 (2003) (describing purpose of Sherman Act).

19. Sherman Antitrust Act, 15 U.S.C. § 1 (2004).

20. See Note, *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws*, 114 HARV. L. REV. 2122, 2126 (2001) (stating that Sherman Act is “remarkably general in its proscriptions” and noting that some have criticized the Act as “little more than a legislative command that the judiciary develop a common law of antitrust.”) (*quoting* PHILLIP E. AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES*, at 4 (5th ed. 1997)).

21. See 15 U.S.C. §§ 1–2 (failing to provide specific guidance for application of act). Sections 1 and 2 of the Sherman Antitrust Act provide:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

*Id.*

22. See Chris Norton, *United States Changing Foreign Policy*, NEWSFLAVOR (Feb. 27, 2010), <http://newsflavor.com/politics/international-relations/united-states-changing-foreign-policy/> (“Early 20th century United States tended to depart from their prior form of expansionism in favor of one that looked to the world’s wealth.”); see also *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 423–24 (5th Cir. 2001) (noting that “[t]he history of this body of case law is confusing and unsettled”).

Sherman Act mentions “trade or commerce . . . with foreign nations,” the statute does not address whether foreign or domestic plaintiffs can sue under the statute or what type of foreign conduct or effects implicate the statute.<sup>23</sup> Therefore, the federal courts have had to interpret the extraterritorial reach of the Sherman Act—and they have disagreed about the issue since the earliest applications of the statute.<sup>24</sup>

### 1. *Shedding the Isolationist View of the Sherman Act*

Judicial uncertainty and confusion have marked the analysis of the Sherman Act’s applicability to foreign conduct since the Supreme Court first applied the statute in *American Banana Co. v. United Fruit Co.*<sup>25</sup> in 1909.<sup>26</sup> In *American Banana*, a domestic defendant monopolized the banana trade to the detriment of a domestic plaintiff.<sup>27</sup> Taking into account issues of sovereignty and international comity, the Court declined to extend the reach of the Sherman Act to the defendant’s actions abroad.<sup>28</sup> Over time, however, the Court slowly began to expand the Sherman Act’s extraterritorial reach.<sup>29</sup>

In 1927, the Court reversed course from *American Banana* in *United States v. Sisal Sales Corp.*,<sup>30</sup> which held that in some instances, the Sherman Act extends to conduct outside of the United States.<sup>31</sup> The *Sisal* Court stepped beyond prior precedent by applying the Sherman Act to a foreign defendant whose domestic conduct was incidental to a conspiracy.<sup>32</sup> Although the defendant was charged with obtaining a sisal monopoly in Mexico through actions taken within Mexico, the Court held that the ef-

23. See 15 U.S.C. § 2 (providing little guidance about foreign application of act).

24. See *Den Norske*, 241 F.3d at 423 (noting that federal courts have long disagreed about extraterritorial reach of United States antitrust laws).

25. 213 U.S. 347 (1909).

26. See 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 275–78 (Aspen Publishers 3d ed. 2006) (detailing early FTAIA precedent).

27. See *id.* at 275 (describing facts of case).

28. See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (“[T]he general and almost universal rule is 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.”).

29. See, e.g., *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917) (holding that cartel formed outside United States but whose actions had effect on U.S. commerce was subject to Sherman Act); *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 98–99 (1913) (holding that Sherman Act reaches foreign citizens and corporations operating in U.S. territory); *United States v. Am. Tobacco Co.*, 221 U.S. 106, 132–34 (1911) (holding that Sherman Act applies against foreign defendants where conspiracy also involved domestic defendants and threatened United States economy).

30. 274 U.S. 268 (1927).

31. See *id.* at 275 (distinguishing case from *American Banana* and noting that *American Banana* rationale is not applicable).

32. See AREEDA & HOVENKAMP, *supra* note 26, at 277–78 (“[A]ny planning or conduct by the defendant within the United States was hardly crucial to its Mexican monopoly obtained by the acts within Mexico.”).

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fect on United States commerce was sufficient to trigger liability under the Sherman Act.<sup>33</sup>

While the *Sisal* decision slightly expanded the Sherman Act's reach, it did not change the lower courts' analysis of the Sherman Act in any meaningful way.<sup>34</sup> Most of the antitrust cases in the early twentieth century continued to focus on domestic conduct and domestic effects—there remained no clear standard for determining the extraterritorial application of the Sherman Act.<sup>35</sup> Courts were largely content to analogize their facts to or distinguish them from *American Banana* until 1945 when the Second Circuit settled on a test in *United States v. Aluminum Co. of America (Alcoa)*.<sup>36</sup>

## 2. *The Second Circuit Tries to Provide Guidance: The Alcoa Effects Test*

In *Alcoa*, the Second Circuit sought to provide a clear standard for the level of domestic effect that was required to implicate the Sherman Act.<sup>37</sup> The court held that the defendant, a Canadian corporation, violated the Sherman Act by conspiring with European aluminum producers to refuse to sell aluminum in the United States.<sup>38</sup> Articulating its test, the Second Circuit stated that foreign conduct falls within the Sherman Act if it is "intended to affect imports and did affect them."<sup>39</sup> Although the test made clear that courts should focus their analysis on the location of the effects and not the conduct, courts have found the test difficult to apply and consequently some circuits have refused to fully accept it.<sup>40</sup>

33. See *Sisal Sales Corp.*, 274 U.S. at 275 (1927) (distinguishing case from *American Banana* because all conduct had occurred within United States and holding that Sherman Act applied).

34. See *id.* at 276 ("The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties.").

35. For cases that focused on domestic effects and conduct, see *supra* note 29.

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

37. See Note, *Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach*, 70 YALE L.J. 259, 261–62 (1960) (describing necessity of determining extraterritoriality of Sherman Act); see also Spencer Weber Waller, *Antitrust and American Business Abroad Today*, 44 DEPAUL L. REV. 1251, 1260 (1995) (noting that "[t]he antitrust horizon had been permanently altered by the jurisdictional aspects of the *Alcoa* decision in 1945").

38. See *Alcoa*, 148 F.2d at 422–24 (detailing facts of case).

39. *Id.* at 444. Judge Learned Hand expounded on the effects test by holding that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders . . ." *Id.* at 443.

40. See, e.g., *Nat'l Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981) (modifying effects test to make it narrower); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614–15 (9th Cir. 1976) (creating tripartite test where "effects test" is only one factor to consider); *United States v. Gen. Elec. Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949) (doing away with determining extent of effects and instead simply determining whether effect was deleterious), *decision supplemented*, 115 F. Supp. 835 (D.N.J. 1953); *United States v. Timken Roller Bearing Co.*, 83 F.

B. *Foreign Trade Antitrust Improvements Act: Congress's "Inelegant" Language Leads Courts Astray*

To clarify the extraterritorial reach of the Sherman Act and cut back on the large number of cases brought by foreign parties involving only minor effects on domestic commerce, Congress passed the Foreign Trade Antitrust Improvements Act of 1982.<sup>41</sup> FTAIA's first aim was to clarify that the Sherman Act's focus is to protect American consumers and exporters, not foreign consumers or producers.<sup>42</sup> FTAIA's second goal was to clarify the level of effect on United States commerce that is sufficient to implicate the Sherman Act.<sup>43</sup>

To that end, FTAIA states that foreign conduct will generally not implicate the Sherman Act unless an exception applies.<sup>44</sup> The first FTAIA exception provides that the Sherman Act covers foreign conduct involving

Supp. 284, 309 (N.D. Ohio 1949) (describing requisite effect on United States commerce as "direct and influencing"), *modified by* Timken Roller Bearing Co v. United States, 341 U.S. 593 (1951), *overruled by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

41. See JEFFREY L. KESSLER & SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 7:4 (Thomson/West 2d ed. 2006) (noting that situations where "challenged conduct produced no appreciable effects on U.S. commerce" are "uncontroversial" under FTAIA); see also Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a (1982). The FTAIA provides:

Sections 1 to 7 of this title [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 sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

*Id.*

42. See AREEDA & HOVENKAMP, *supra* note 26, at 287 (describing legislative intent behind FTAIA); see also 15 U.S.C. § 6a (stating that trade and commerce with foreign nations shall not implicate Sherman Act unless it is import trade and commerce).

43. See 15 U.S.C. § 6a (providing that foreign conduct must have "direct, substantial and reasonably foreseeable effect[s]" on United States commerce); see also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 n.23 (1993) ("The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy . . .").

44. See *An Overseas Sea Change for U.S. Antitrust Laws? New Developments in the Interpretation of the Foreign Trade Antitrust Improvements Act*, CLIENT ALERT (Proskauer Rose L.L.P., Washington, D.C.), Sept. 7, 2011, available at <http://www.proskauer.com/publications/client-alert/an-overseas-sea-change-for-us-antitrust-laws/> (noting that one of FTAIA's biggest departures from *Alcoa* effects test is elimination of intent requirement); see also Richard J. Link, *Construction and Application of Foreign Trade Antitrust Improvements Act (FTAIA)*, 15 U.S.C.A. § 6a, 1 A.L.R. Fed. 2d 483, § 2 (2005) (noting that FTAIA initially places all "nonimport activity involving foreign

“import trade or import commerce.”<sup>45</sup> Under the second exception, the Sherman Act also applies to foreign conduct that “has a direct, substantial, and reasonably foreseeable effect” on United States commerce.<sup>46</sup>

1. *Missing the Forest for the Trees: The Prevailing Analysis of FTAIA*

Although the purposes of FTAIA are to clarify the extraterritorial reach of the Sherman Act and to provide guidance to courts addressing foreign antitrust issues, the “inelegant” language of the statute has led to more confusion than clarity.<sup>47</sup> Over the past thirty years, courts have predominantly interpreted FTAIA as jurisdictional, requiring foreign conduct claims to be dismissed for lack of subject matter jurisdiction unless the international anticompetitive conduct falls within the “import trade or commerce” or “effects” exceptions.<sup>48</sup> Yet that is where the consensus ends; due to FTAIA’s ambiguity, courts have largely disagreed on how to interpret the language of its exceptions.<sup>49</sup>

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commerce” outside reach of Sherman Act, and then brings such conduct back within Sherman Act through two exceptions).

45. See Link, *supra* note 44, at § 2 (describing “import trade or commerce” exception as threshold issue under FTAIA). For a further discussion about how courts have interpreted this exception, see *infra* notes 47–56 and accompanying text.

46. See Link, *supra* note 44, at §2 (discussing FTAIA’s clarification of Sherman Act’s extraterritorial reach). Much of the litigation surrounding FTAIA has focused on interpreting and applying this exception. See Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 315 (2007) (describing litigation concerning effects test and noting “interpretive problems”). In 2004, the Supreme Court eventually settled the issue holding that the plaintiff’s claim must arise from the anticompetitive conduct’s effect on United States commerce. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 173 (2004) (discussing required effect of conduct).

47. See Buswell, *supra* note 18, at 984 (noting that FTAIA “[m]udd[ie]d the waters further”); see also AREEDA & HOVENKAMP, *supra* note 26, at 288 (referring to FTAIA’s language as “cumbersome, ambiguous, and inelegant”).

48. See, e.g., *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 344 (D.C. Cir. 2003) (describing “precise issue presented” as whether FTAIA authorizes subject matter jurisdiction), *vacated*, 542 U.S. 155 (2004); *Filetech S.A. v. France Telecom S.A.*, 304 F.3d 180, 181 (2d Cir. 2002) (agreeing with district court that plaintiff failed to establish that court had subject matter jurisdiction over foreign defendant); *Kruman v. Christie’s Int’l P.L.C.*, 284 F.3d 384, 401 (2d Cir. 2002) (applying FTAIA to hold that defendants cannot escape scrutiny for lack of subject matter jurisdiction), *abrogated by Empagran*, 542 U.S. 155 (2004); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 431 (5th Cir. 2001) (finding that district court properly dismissed antitrust claim for lack of subject matter jurisdiction under FTAIA); *Carpet Grp. Int’l v. Oriental Rug Imps. Ass’n*, 227 F.3d 62, 78 (3d Cir. 2000) (holding that FTAIA is inapplicable and therefore court has subject matter jurisdiction over case), *overruled by Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1085 (D.C. Cir. 1998) (employing FTAIA standards to determine whether court has subject matter jurisdiction).

49. See Edward D. Cavanagh, *The FTAIA and Empagran: What Next?*, 58 SMU L. REV. 1419, 1424–25 (2005) (discussing ways in which courts have tried to define standards set by FTAIA exceptions); Jonathan T. Schmidt, Note, *Keeping U.S. Courts*

The majority of FTAIA analysis and litigation has focused on interpreting the statute's requirement that the conduct "gives rise to a claim" and the impact of this language on the jurisdictional analysis.<sup>50</sup> The debate led to a split within the circuit courts spearheaded by the Fifth Circuit and the D.C. Circuit.<sup>51</sup> The Fifth Circuit interpreted the "gives rise to a claim" language to require that the foreign injury and domestic effect be interrelated enough that a domestic plaintiff could have brought a Sherman Act suit.<sup>52</sup> The D.C. Circuit, on the other hand, held that the "effects exception" applies even where the foreign injury is independent of the domestic effect.<sup>53</sup> After many years and much litigation, the Supreme Court settled the issue in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*<sup>54</sup> by agreeing with the Fifth Circuit and holding that the domestic effect must "give rise to" the plaintiff's claim; it is not enough if the domestic effect is independent of the foreign injury.<sup>55</sup> Although there were extensive disagreements over FTAIA, the circuits rarely addressed whether the statute was jurisdictional or substantive—they simply presumed that it was jurisdictional.<sup>56</sup>

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*Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, 31 YALE J. INT'L L. 211, 223–32 (2006) (describing differing approaches by circuits and Supreme Court).

50. Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (1982). See Huffman, *supra* note 46, at 318 ("The requirement that a harm in domestic commerce 'give[] rise to a claim' has been the basis for extensive litigation at all levels of the federal court system since at least the late 1990s, and has removed the primary interpretive issue under the FTAIA.")

51. Compare *Den Norske*, 241 F.3d at 421 (holding that domestic effect of defendant's conduct must have caused particular injury at heart of suit), with *Empagran*, 315 F.3d at 350 (holding that there only needs to be possibility of claim by private party in United States, thus allowing foreign plaintiffs to bring suits based on hypothetical domestic domestic plaintiffs).

52. See *Den Norske*, 241 F.3d at 428 ("In sum, we find that the plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.")

53. See *Empagran*, 315 F.3d at 350 ("We hold that, where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce.")

54. 542 U.S. 155 (2004).

55. See *id.* at 163 (holding that where "the price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect . . . [T]he FTAIA exception does not apply (and thus the Sherman Act does not apply)" to claims based solely on foreign effect).

56. See Valdespino, *supra* note 4, at 468 (noting, in 2009, that "all of the Circuits currently agree that the FTAIA should be interpreted as limiting a court's jurisdiction").

2. *Challenging the Consensus: United Phosphorus, Ltd. v. Angus Chemical Co. Unearths the Substantive vs. Jurisdictional Debate*

Despite criticism by the Supreme Court in the early 1990s, the jurisdictional view of FTAIA continued to prevail largely without challenge.<sup>57</sup> However, in *United Phosphorus, Ltd. v. Angus Chemical Co.*,<sup>58</sup> the Seventh Circuit resolved to address the issue and determine whether FTAIA was jurisdictional as courts had long held, or whether it was substantive and therefore an element of the plaintiff's Sherman Act claim.<sup>59</sup> The case involved a suit brought by an Indian chemical manufacturer and an American firm against an American chemical company for using anticompetitive means to harm their business.<sup>60</sup> The defendants filed a Rule 12(b)(1) motion to dismiss, contending that the court lacked subject matter jurisdiction under FTAIA.<sup>61</sup> The district court granted the motion to dismiss, and the plaintiffs appealed.<sup>62</sup> In holding that the district court properly treated the issue as one of subject matter jurisdiction, the Seventh Circuit noted that no circuit had adopted the view that FTAIA is an element of a Sherman Act claim.<sup>63</sup>

In dissent, Judge Wood criticized the jurisdictional view of FTAIA and laid the groundwork for applying the substantive view of the statute in subsequent cases.<sup>64</sup> According to Judge Wood, the majority's reliance on circuit court decisions and agency publications was misplaced.<sup>65</sup> In her view, the court could resolve the issue simply by critically reading the stat-

57. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) ("The second question—the extraterritorial reach of the Sherman Act—has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct.").

58. 322 F.3d 942 (7th Cir. 2003).

59. *See id.* at 944 ("The primary issue involves whether the relevant provision of FTAIA is jurisdictional or whether it states an additional element of a Sherman Act claim.").

60. *See id.* (describing facts of case). Specifically, plaintiffs claimed that the defendant, upon learning that plaintiffs were going to acquire certain technology, filed a frivolous lawsuit, which occupied plaintiffs' time and resources and kept them from acquiring the technology. *See id.* (same).

61. *See id.* at 944–45 (describing procedural posture of case).

62. *See id.* (agreeing with defendants that plaintiffs failed to allege that defendants' conduct had "direct, substantial, and reasonably foreseeable effect" on domestic commerce).

63. *See id.* at 950 ("But with reference to FTAIA, the argument that the statute sets out an element of the claim or a basis for legislative jurisdiction has not gained approval.").

64. *See Valdespino*, *supra* note 4, at 480 (noting that Justice Wood "anticipat[ed] this shift" from jurisdictional to substantive view); *see also Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 469 n.8 (3d Cir. 2011) (adopting Justice Wood's analysis of FTAIA issue and stating "the FTAIA's limitations should not rank as jurisdictional").

65. *See United Phosphorus*, 322 F.3d at 953 (Wood, J., dissenting) ("But neither the majority nor those earlier opinions have distinguished carefully between judicial and legislative jurisdiction . . .").

ute.<sup>66</sup> Moreover, the Seventh Circuit previously specified that jurisdiction rules must be stated clearly, yet the language of FTAIA does not refer to jurisdiction.<sup>67</sup> Judge Wood reasoned that FTAIA's "shall not apply" language should thus be construed as setting substantive limitations, not as delineating the courts' competency to hear a claim.<sup>68</sup>

C. *Arbaugh v. Y & H Corp.: The Supreme Court "Clearly States" Its Views on Jurisdictional Statutes*

In 2006, the Supreme Court handed down a decision in *Arbaugh v. Y & H Corp.*<sup>69</sup> that closely followed Judge Wood's reasoning in *United Phosphorus*.<sup>70</sup> Although *Arbaugh* did not concern FTAIA, the Court's decision to adopt Wood's reasoning set the stage for the circuit courts to rethink their FTAIA jurisprudence.<sup>71</sup> In *Arbaugh*, the Court faced the very same issue concerning the distinction between jurisdiction-stripping statutes and substantive, "elemental" statutes.<sup>72</sup> The plaintiff brought a Title VII action against her employer for sexual harassment.<sup>73</sup> The defendant filed

66. *See id.* at 955 (Wood, J., dissenting) (reading FTAIA critically and stating "[t]he fact that the FTAIA does not contain a clear congressional statement that it is intended to restrict the subject matter jurisdiction of the federal courts (or for that matter even a brief mention of the term 'jurisdiction') should be enough to resolve the question before us").

67. *See Czerkies v. U.S. Dep't of Labor*, 73 F.3d 1435, 1439 (7th Cir. 1996) ("The circuits are in agreement: door-closing statutes do not, unless Congress expressly provides, close the door to constitutional claims, provided that the claim is colorable and the claimant is seeking only a new hearing or other process rather than a direct award of money by the district court."); Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (1982) (lacking explicit language that refers to jurisdictional limitation).

68. *See United Phosphorus*, 322 F.3d at 955 (Wood, J., dissenting) ("Language like that of the FTAIA, stating that a law does not 'apply' in certain circumstances, cannot be equated to language stating that the courts do not have the fundamental competence to consider defined categories of cases.")

69. 546 U.S. 500 (2006).

70. *See Valdespino, supra* note 4, at 480 ("This new rule seems to be almost directly derived from Judge Wood's dissent in *United Phosphorus* and one must surely give her credit for anticipating this shift.")

71. *See id.* at 482–83 (discussing future of FTAIA litigation in wake of *Arbaugh* decision). For a discussion of an FTAIA case applying the *Arbaugh* reasoning, see *infra* notes 96–122 and accompanying text.

72. *See Erez Reuveni, Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. DAVIS L. REV. 1071, 1097 (2010) (noting that *Arbaugh* "address[ed] the issue of the propriety of labeling a dismissal as jurisdictional"); Howard M. Ullman et al., *Exposing Foreign Cos. to U.S. Antitrust Litigation*, LAW360 (Sept. 28, 2011), <http://www.orrick.com/fileupload/3955.pdf> (stating that Supreme Court in *Arbaugh* distinguished between substantive limitations and subject matter jurisdiction of U.S. courts).

73. *See Arbaugh*, 546 U.S. at 503–04 (detailing factual background of case). Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against its employees on the basis of sex. *See id.* at 504 (same). Title VII defines employer as any person with fifteen or more employees. *See id.* at 504–05 (discussing definitions in Title VII).

a Rule 12(b)(1) motion to dismiss asserting that it employed fewer than fifteen employees and therefore could not be sued under Title VII.<sup>74</sup> The district court interpreted the fifteen-employee rule as a jurisdictional limitation and dismissed the claim with prejudice.<sup>75</sup>

The Fifth Circuit affirmed, but the Supreme Court unanimously held that the fifteen-employee requirement was not a jurisdictional matter; it was a substantive aspect of the plaintiff's Title VII claim.<sup>76</sup> The Court began its reasoning by addressing the circuit courts' "profligate" use of the term "jurisdiction."<sup>77</sup> According to the Court, cases where a claim is dismissed for lack of subject matter jurisdiction without considering the "subject-matter jurisdiction/ingredient-of-a-claim-for-relief dichotomy" are "'drive-by jurisdictional rulings' that should be accorded 'no precedential effect.'"<sup>78</sup> The Court noted that while Congress does have the power to make certain statutory elements "jurisdictional," that power does not extend to the courts absent jurisdictional language in the statute.<sup>79</sup> To clarify the confusion, the Court created a "readily administrable bright line" rule.<sup>80</sup> The "clearly states" rule requires that courts interpret statutes that lack jurisdictional language as non-jurisdictional in character.<sup>81</sup>

74. *See id.* at 508 (noting procedural posture of case). The jury returned a verdict for *Arbaugh* but, because 12(b)(1) motions cannot be waived, the defendant was able to move to dismiss after the court entered judgment on the verdict. *See id.* at 509 (same)

75. *See id.* at 504, 509 (noting district court recognized that granting motion would cause waste of judicial resources, but that district court believed itself obliged to dismiss).

76. *See id.* at 504 ("[Title VII's] numerical threshold does not circumscribe federal-court subject-matter jurisdiction. Instead, the employee-numerosity requirement relates to the substantive adequacy of *Arbaugh's* Title VII claim, and therefore could not be raised defensively late in the lawsuit . . .").

77. *See id.* at 510 (noting that Supreme Court has also been inconsistent when determining whether statutes are jurisdictional).

78. *Id.* at 511 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)).

79. *See id.* at 514–15 (describing Congress's power to make statutes jurisdictional); *see also* Reuveni, *supra* note 72, at 1098 (noting that *Arbaugh* Court reasoned that "a court's power to adjudicate depends only on whether Congress or the Constitution confers upon the courts the authority to adjudicate the underlying dispute").

80. *Arbaugh*, 546 U.S. at 516. The "clearly states" rule provides:

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.

*Id.* at 515–16 (citations omitted).

81. *See* Jonathan M. Rich et al., *Third Circuit Eases Burden on Foreign Injury Antitrust Plaintiffs*, ANTITRUST LAWFLASH (Morgan, Lewis & Bockius L.L.P., Washington, D.C.), Aug. 29, 2011, at 2, available at [http://www.morganlewis.com/pubs/Antitrust\\_LF\\_ThirdCircuitEasesBurdenonAntitrustPlaintiffs\\_29aug11.pdf](http://www.morganlewis.com/pubs/Antitrust_LF_ThirdCircuitEasesBurdenonAntitrustPlaintiffs_29aug11.pdf) (stating that

D. *The Third Circuit's Pre-Arbaugh Approach to FTAIA*

Until *Arbaugh*, the Third Circuit's FTAIA jurisprudence fell in line with that of the other circuits in interpreting FTAIA as a jurisdictional statute.<sup>82</sup> Despite recognizing the statute's cumbersome and convoluted language, the Third Circuit did not address the jurisdictional/substantive issue in any of its FTAIA cases.<sup>83</sup> The circuit first addressed FTAIA in the 2000 case *Carpet Group International v. Oriental Rug Importers Association*.<sup>84</sup> In *Carpet Group*, the plaintiff brought suit against Oriental Rug Importers, alleging that the defendants conspired to sabotage the plaintiff's efforts to facilitate sales between foreign manufacturers and United States retailers.<sup>85</sup> Before the district court and on appeal, the defendants objected to the courts' subject matter jurisdiction on FTAIA grounds.<sup>86</sup> The district court granted the defendant's motion, but the Third Circuit reversed on appeal.<sup>87</sup> The reversal was not predicated upon the district court's jurisdictional view of FTAIA; it was predicated on its application of that view in the particular case.<sup>88</sup> The Third Circuit held that the plaintiff alleged sufficient evidence to support the contention that the conduct fell within an exception to FTAIA and therefore the statute did not limit the court's subject matter jurisdiction.<sup>89</sup>

Employing a rationale similar to that in *Carpet Group*, the Third Circuit again addressed FTAIA in *Turicentro, S.A. v. American Airlines, Inc.*;<sup>90</sup>

*Arbaugh* held "that courts should regard statutory limitations as substantive unless Congress specifically stated that they are jurisdictional").

82. *See id.* at 1 (discussing Third Circuit's FTAIA jurisprudence before *Animal Science Products*).

83. *See, e.g., Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 300 (3d Cir. 2002) ("In rather convoluted language, the Foreign Trade Antitrust Improvements Act introduces two requirements . . ."), *overruled by Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011); *Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000) ("We first turn to the relevant provisions of the 'inelegantly phrased' FTAIA." (quoting *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997))), *overruled by Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011).

84. 227 F.3d 62 (3d Cir. 2000), *overruled by Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011).

85. *See id.* at 64 (describing allegations in plaintiff's amended complaint).

86. *See id.* (describing procedural posture of case). The defendants asserted that the plaintiffs failed to prove that defendants' actions had a substantial effect on United States commerce. *See id.* (same).

87. *See id.* at 78 ("[S]ubject matter jurisdiction exists under the Sherman Act, and . . . plaintiffs have antitrust standing.").

88. *See id.* at 73 ("The crux of [plaintiffs'] case involves conduct in the United States, not conduct abroad. . . . [T]hese activities are not the type of conduct Congress intended to remove from our antitrust jurisdiction when it enacted the FTAIA.").

89. *See id.* at 78 ("[T]he plaintiffs have offered sufficient evidence to demonstrate that the activities of the wholesale importers were intended to and adversely did impact on domestic commerce . . .").

90. 303 F.3d 293 (3d Cir. 2002), *overruled by Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011).

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however, the court arrived at a different conclusion.<sup>91</sup> *Turicentro* involved a suit by Latin American and Caribbean travel agents alleging that an airline trade association had engaged in horizontal price fixing in violation of the Sherman Act.<sup>92</sup> The district court dismissed the action for lack of subject matter jurisdiction, citing a complete lack of evidence that the defendants' conduct caused any injury to the United States economy.<sup>93</sup> On appeal, the Third Circuit agreed with the district court that the issue was one of subject matter jurisdiction.<sup>94</sup> The Third Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction, noting that the plaintiff failed to allege a "direct, substantial, and reasonably foreseeable effect" on United States commerce.<sup>95</sup>

### III. ANIMAL SCIENCE PRODUCTS, INC. v. CHINA MINMETALS CORP.: THE THIRD CIRCUIT EMBRACES THE ARBAUGH STANDARD

Many commentators viewed the Supreme Court's decision in *Arbaugh* as hugely significant in shaping the way courts would interpret questionable jurisdictional statutes in the future.<sup>96</sup> The "clearly states" rule was straight forward, easily applicable and seemed to settle, at long last, FTAIA's substantive/jurisdictional issue.<sup>97</sup> However, with regard to

91. See *id.* at 297–98, 308 (holding that District Court was correct in finding that FTAIA deprived it of subject matter jurisdiction).

92. See *id.* at 296–97 (describing factual background of case).

93. See *Turicentro*, S.A. v. Am. Airlines, Inc., 152 F. Supp. 2d 829, 834 (E.D. Pa. 2001) (“[A]ssuming as true that the alleged conspiracy and the actions taken in furtherance thereof did occur within United States commerce, the plaintiffs aver nothing from which this Court could find that Defendants’ purported conspiracy caused any injury which was felt in the U.S. or which affected the American economy in any way.”), *aff’d sub nom.* *Turicentro*, S.A. v. Am. Airlines Inc., 303 F.3d 293 (3d Cir. 2002), *overruled by* *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011).

94. See *Turicentro*, 303 F.3d at 300 (“[T]he central issue on appeal is whether the Foreign Trade Antitrust Improvements Act bars subject matter jurisdiction in this Sherman Antitrust case. Therefore, our primary task is one of statutory interpretation.”).

95. See *id.* at 307 (noting that “[p]laintiffs’ injuries occurred exclusively in foreign markets[,]” and “[t]hey are not of the type Congress intended to prevent through the Foreign Trade Antitrust Improvements Act or the Sherman Act”).

96. See, e.g., 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) (describing *Arbaugh* as “jurisprudentially significant” and noting that “the *Arbaugh* Court also cast doubt on the precedential value of any previous holding”); Valdespino, *supra* note 4, at 482–83 (noting that question is not “if” *Arbaugh* will bring about change in FTAIA jurisprudence, but “when” change will occur and “what” it will mean).

97. Compare *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515–16 (2006) (describing “clearly states” rule), with Sherman Antitrust Act, 15 U.S.C. § 1 (2004) (failing to use jurisdictional language). FTAIA contains no jurisdictional language which should rank it as non-jurisdictional under the “clearly states” test. See Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (1982) (lacking explicit language that refers to jurisdictional limitation).

FTAIA, *Arbaugh* has not caused a significant change within the circuits.<sup>98</sup> Because *Arbaugh* was a Title VII case and did not address FTAIA directly, it did not expressly overrule prior decisions.<sup>99</sup> Of the few circuits presented with FTAIA litigation post-*Arbaugh*, only the Third Circuit has utilized the “clearly states” rule.<sup>100</sup>

#### A. Factual and Procedural Background

*Animal Science Products* involved a class action suit by two United States corporations against several Chinese producers and exporters of magnesite.<sup>101</sup> The plaintiffs alleged that the defendants engaged in a conspiracy to fix the prices of the magnesite that they sold in the United States.<sup>102</sup> As a result of the conspiracy, the plaintiffs were forced to purchase the defendants’ magnesite at supracompetitive prices.<sup>103</sup> The plaintiffs further

98. See, e.g., *Centerprise Int’l, Ltd. v. Micron Tech, Inc.* (*In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*), 546 F.3d 981, 985 n.3 (9th Cir. 2008) (noting that jurisdictional/substantive issue is unsettled but declining to address it); *Inquivosa SA v. Ajinomoto Co.* (*In re Monosodium Glutamate Antitrust Litig.*), 477 F.3d 535, 536 (8th Cir. 2007) (affirming district court’s dismissal for lack of subject matter jurisdiction).

99. See 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 L.L.P., San Francisco, Cal.), Nov. 14, 2011, at 1–2, available at [http://www.nixonpeabody.com/linked\\_media/publications/Antitrust\\_Alert\\_11\\_14\\_2011.pdf](http://www.nixonpeabody.com/linked_media/publications/Antitrust_Alert_11_14_2011.pdf) (discussing impact of *Arbaugh* on FTAIA jurisprudence).

100. See *Animal Sci. Prods. Inc. v. China Minmetals Corp.*, 654 F.3d 462, 468–69 (3d Cir. 2011) (discussing *Arbaugh* and applying “clearly states” rule). Commentators have espoused several reasons for why Circuits have been unwilling to adopt the “clearly states” test in their FTAIA jurisprudence. See, e.g., Foote & Russell, *supra* note 99, at 2 (noting that Circuits may not want to change their settled jurisprudence and may not feel obligated to do so by *Arbaugh*); Valdespino, *supra* note 4, at 482 (stating that there has been dearth of FTAIA cases since *Arbaugh* and general reluctance of federal courts to make drastic changes).

101. See *Animal Sci. Prods.*, 654 F.3d at 464 (detailing facts of case before district court). Magnesite is the naturally occurring carbonate form of magnesium. See *Animal Sci. Prods., Inc. v. China Nat’l Metals & Minerals Imp. & Exp. Corp.*, 596 F. Supp. 2d 842, 851 (D.N.J. 2008) (describing magnesite). Over eighty percent of the world’s magnesite reserves are estimated to come from China. See *id.* (same). Magnesite is mined from magnesium deposits and delivered from the mine to a crushing plant where it is crushed in three stages. See *id.* (same).

102. See *Animal Sci. Prods.*, 654 F.3d at 464 (describing plaintiff’s allegations). The Department of Justice describes price-fixing as, “an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold.” U.S. DEP’T OF JUSTICE, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For*, ANTITRUST PRIMER, (U.S. DEP’T OF JUSTICE, Washington, D.C.), Sept. 28, 2005, at 2, available at <http://www.justice.gov/atr/public/guidelines/211578.pdf>. There are many forms of price-fixing, but any agreement to restrict price competition is a violation of the Sherman Act. See *id.* (describing price-fixing).

103. See *Animal Sci. Prods.*, 596 F. Supp. 2d at 852 (describing defendants’ alleged anticompetitive conduct). The plaintiffs alleged that prices of magnesite in their industry (animal feed) rose twenty-five percent as a result of the defendants’ collusive arrangements. See *id.* at 853 (discussing plaintiffs’ allegations).

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alleged that the price-fixing scheme impacted hundreds of millions of dollars of United States commerce.<sup>104</sup> Based on these allegations, the plaintiffs filed suit in federal court claiming that the defendants' actions violated Section 1 of the Sherman Act.<sup>105</sup>

Raising the subject matter jurisdiction issue sua sponte, the district court dismissed the plaintiffs' complaint without prejudice, citing FTAIA.<sup>106</sup> The plaintiffs submitted an amended complaint with evidence supporting their allegations, but this time the defendants followed the court's example and moved to dismiss for lack of subject matter jurisdiction.<sup>107</sup> In response, the district court examined whether either of the FTAIA's exceptions applied to the case.<sup>108</sup> After extensive fact-finding, the court determined that the plaintiffs' evidence was insufficient to satisfy either exception and again held that FTAIA deprived it of subject matter jurisdiction.<sup>109</sup>

### B. *Third Circuit's Reasoning*

On appeal, the Third Circuit fundamentally disagreed with the district court's FTAIA analysis.<sup>110</sup> The court held that FTAIA constitutes a substantive limitation rather than a limitation on the court's subject mat-

104. See *Animal Sci. Prods.*, 654 F.3d at 464 (describing plaintiff's allegations).

105. See *id.* (explaining basis of plaintiffs' suit).

106. See Michael B. Himmel & Jamie R. Gottlieb, *Getting Out from Under Antitrust Litigation: How It Just Got Harder for Foreign Entities to Stay Out of the U.S. Antitrust Labyrinth*, BLOOMBERG LAW REPORTS (Oct. 12, 2011), <http://www.lowenstein.com/files/Publication/b7354e4e-4b19-4b33-af2d-8289df010763/Presentation/PublicationAttachment/35124f3c-2663-49f5-be30-89721a9c8e06/Getting%20Out%20From%20Under%20Antitrust%20Litigation.pdf> (noting procedural background of case). The court instructed the plaintiffs that:

[I]n the event Plaintiffs file an amended complaint, Plaintiffs *must* incorporate in their submission evidentiary proof allowing the Court to conduct a *factual determination* (in contrast with the facial analysis conducted herein) and to conclusively satisfy itself as to presence or lack of subject matter jurisdiction over this action.

*Animal Sci. Prods.*, 596 F. Supp. 2d at 881.

107. See *Animal Sci. Prods.*, 654 F.3d at 464 (detailing procedural background of case). Though the complaint listed seventeen Chinese corporations as defendants, only five remained defendants through the appeal. See *id.* (same). These corporations were grouped as either the China Minmetals defendants or the Sinosteel defendants, and are the parties that filed the motion to dismiss. See *id.* at 464–65 (same).

108. For a discussion of FTAIA's exceptions, see *supra* notes 44–46 and accompanying text.

109. See Christopher Walsh, *FTAIA Compliance in a Post-Twombly World*, LAW360 (Feb. 13, 2009), <http://www.gibbonslaw.com/UserFiles/Image/1235670326.pdf> (discussing court's application of *Twombly* pleading standards in analyzing plaintiffs' complaint through FTAIA exceptions).

110. See *Animal Sci. Prods.*, 654 F.3d at 467–68 (“Understandably, the District Court in this case adhered to [ ] precedent. . . . [H]owever, we will now . . . hold that the FTAIA constitutes a substantive merits limitation rather than a jurisdictional limitation.”).

ter jurisdiction.<sup>111</sup> In so holding, the court vacated the district court's decision and overturned *Turicentro* and *Carpet Group* in one fell swoop.<sup>112</sup> Relying heavily on the reasoning in *Arbaugh*, the Third Circuit examined FTAIA's statutory text for references to district court jurisdiction.<sup>113</sup> The court determined that the statute was "wholly silent" in regard to jurisdiction and merely read that the Sherman Act "shall not apply" under certain conditions.<sup>114</sup>

Applying *Arbaugh's* "clearly states" rule, the Third Circuit reasoned that FTAIA must be interpreted as a substantive limitation due to the absence of jurisdictional language.<sup>115</sup> In interpreting FTAIA in this way, the Third Circuit made it clear that, as an element of their claims for relief, plaintiffs will need to demonstrate FTAIA's inapplicability to their case by showing that an exception applies.<sup>116</sup> Consequently, the Third Circuit instructed the district court that, on remand, it could only consider a Rule 12(b)(6) motion to dismiss for failure to state a claim.<sup>117</sup>

After reframing the issue, the Third Circuit provided the district court with guidance concerning how to interpret the FTAIA question on remand.<sup>118</sup> Addressing the "import trade or commerce exception," the Third Circuit stated that the district court correctly reasoned that the exception must be given strict construction, but that it erred in defining that standard.<sup>119</sup> The exception does not require that the defendant be the physical importer of the goods, as the district court held, but instead requires that the defendant's conduct "target import goods or services."<sup>120</sup> In regard to the "effects" exception, the Third Circuit criticized the district

111. *See id.* at 469 (holding that FTAIA is substantive)

112. *See id.* at 467–68 (overturning prior Third Circuit cases only as to jurisdictional issue).

113. *See id.* at 468–69 (describing Supreme Court's reasoning in *Arbaugh*).

114. *See id.* at 468; Ullman et al., *supra* note 72, at 2 (describing Third Circuit's application of *Arbaugh*).

115. *See Animal Sci. Prods.*, 654 F.3d at 468–69 ("The FTAIA neither speaks in jurisdictional terms nor refers in any way to the jurisdiction of the district courts.").

116. *See id.* at 470–71 (discussing exceptions to FTAIA); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 953–54 (7th Cir. 2003) (Wood, J., dissenting) (noting difference between jurisdictional and "element" approach and defining element approach as acknowledgement that FTAIA criteria describe element of plaintiff's claim).

117. *See Animal Sci. Prods.*, 654 F.3d at 469 ("Unmoored from the question of subject matter jurisdiction, the FTAIA becomes just one additional merits issue.").

118. *See id.* at 470–71 (providing District Court with instructions for remand). The Third Circuit made it clear, however, that, because FTAIA is merely an element of the claim, the district court was under no obligation to settle the FTAIA issue and was free to resolve the matter through other means. *See id.* at 469–70 (same).

119. *See id.* at 470 (disagreeing with district court's analysis of FTAIA exceptions); *see also* Walsh, *supra* note 109, at 3 ("[T]he [district] court found that the complaint failed to adequately allege that any of the defendants actually imported magnesite in the United States.").

120. *Animal Sci. Prods.*, 654 F.3d at 470. The Third Circuit noted that while evidence that defendants physically imported the goods into the United States may

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court for reading a “subjective intent” requirement into the statute.<sup>121</sup> According to the Third Circuit, the inclusion of the “reasonably foreseeable” language in the statute creates an objective standard such that the effect on United States commerce must have been foreseeable to an objectively reasonable person.<sup>122</sup>

#### IV. CRITICAL ANALYSIS AND IMPACT

It is unlikely that *Animal Science Products* will significantly change all facets of foreign antitrust litigation in the Third Circuit.<sup>123</sup> However, the decision represents a significant change in the way the Third Circuit will view FTAIA going forward.<sup>124</sup> By embracing the substantive view of FTAIA, the decision will have procedural and substantive effects on foreign antitrust litigation that will change the way practitioners approach the resolution of these cases.<sup>125</sup>

##### A. Procedural Impact

Prior to *Animal Science Products*, defendants in foreign antitrust suits invoked the protections of FTAIA by raising Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction.<sup>126</sup> Under the jurisdictional interpretation of FTAIA, defendants could move to dismiss the case because the alleged foreign conduct did not fall within either exception and therefore the court could not consider the claim.<sup>127</sup> Defendants preferred this FTAIA interpretation because it allowed for cases to be dis-

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satisfy the exception, it is not a necessary prerequisite as the district court had held. *See id.* (clarifying FTAIA exception for District Court).

121. *See id.* at 471 (noting district court’s use of phrase “intent-to-affect”).

122. *See* Scott B. Murray & David L. Cook, *Third Circuit Reverses Course on Jurisdiction for Sherman Act Claims Against Foreign Defendants*, 205 N.J. L.J. 1, 2 (2011), available at [http://www.sillscummis.com/Repository/Files/2011\\_September\\_Murray\\_and\\_Cook.pdf](http://www.sillscummis.com/Repository/Files/2011_September_Murray_and_Cook.pdf) (noting that it is unclear whether district court actually relied on this reasoning, but that plaintiffs had questioned district court’s language).

123. *See Animal Sci. Prods.*, 654 F.3d at 469–70 (noting that decision does not compel district court to resolve FTAIA issue and that district court may choose to decide case through other means).

124. For further discussion of the Third Circuit’s FTAIA jurisprudence prior to *Animal Science Products*, see *supra* notes 82–95 and accompanying text.

125. *See* Cavanagh, *supra* note 49, at 1424–25 (noting that substantive view of FTAIA brings with it procedural and substantive changes).

126. *See, e.g.,* Centerprise Int’l, Ltd. v. Micron Tech, Inc. (*In re* Dynamic Random Access Memory (DRAM) Antitrust Litig.), 546 F.3d 981, 985 n.3 (9th Cir. 2008) (stating that defendants premised their motion to dismiss “solely on jurisdictional grounds”); Carpet Grp. Int’l v. Oriental Rug Imps. Ass’n, 227 F.3d 62, 64 (3d Cir. 2000) (noting that defendants objected to court’s subject matter jurisdiction on grounds that FTAIA barred plaintiffs’ claims), *overruled by* *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011).

127. For examples of cases where defendants moved to dismiss for lack of subject matter jurisdiction and courts discussed how FTAIA’s exceptions affect that determination, see *supra* note 126 and accompanying text.

missed early and because 12(b)(1) motions heavily weigh in their favor.<sup>128</sup> In a 12(b)(1) motion, the plaintiff bears the burden of convincing the court that it has subject matter jurisdiction over the case.<sup>129</sup> To do so, the plaintiff must proffer evidence to satisfy this burden but is given neither the benefit of a presumption nor an opportunity to gather this evidence through discovery.<sup>130</sup>

Another detriment to the plaintiff that is inherent in the jurisdictional view of FTAIA is the 12(b)(1) motion's potential to strip plaintiffs of their right to a jury.<sup>131</sup> A 12(b)(1) motion goes to the court's ability to decide the case, a fact not subject to jury trial.<sup>132</sup> Instead, the court engages in jurisdictional fact-finding, which often takes place in protracted preliminary hearings.<sup>133</sup> While it may seem as though the trade-off for burdening the plaintiff is preserving time and resources by dismissing cases at the outset, the preliminary hearings often become trials in and of themselves.<sup>134</sup> In fact, in *United Phosphorus*, it took eight years, twenty-four depositions, and over 8,000 pages of exhibits just to resolve the jurisdictional issue.<sup>135</sup> Not only is the plaintiff at a disadvantage under the juris-

128. See Himmel & Gottlieb, *supra* note 106, at 4 (explaining significance of jurisdictional/substantive distinction).

129. See *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991) (noting that prejudice against plaintiff would occur if 12(b)(6) motion was treated as 12(b)(1)).

130. See *Robinson v. Dalton*, 107 F.3d 1018, 1021 (3d Cir. 1997). The Third Circuit stated:

[W]hen there is a factual question about whether a court has jurisdiction, the trial court may examine facts outside the pleadings and thus "the trial court may proceed as it never could under [Rule] 12(b)(6) or [Rule] 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case. . . . [N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims."

*Id.* (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

131. See Howard M. Wasserman, *The Demise of "Drive-by Jurisdictional Rulings"*, 105 Nw. U. L. REV. 947, 954 (2011) (noting danger of conflating legislative and judicial jurisdiction); see also *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 990 (7th Cir. 2000) ("On a motion to dismiss under Rule 12(b)(1), the court is not bound to accept the truth of the allegations in the complaint, but may look beyond the complaint and the pleadings to evidence that calls the court's jurisdiction into doubt.").

132. See Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 988 (2009) ("Courts are told to decide subject-matter jurisdiction questions first in most cases. But they must resolve them always and unflinchingly, even if last.").

133. See Himmel & Gottlieb, *supra* note 106, at 4 (discussing ways in which 12(b)(1) motions favor defendant).

134. See *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 957 (7th Cir. 2003) (Wood, J., dissenting) ("[A]n inquiry into whether a particular course of conduct has a 'direct, substantial, and reasonably foreseeable effect' on either the domestic commerce of the United States or its import commerce threatens to become a preliminary trial on the merits.").

135. See *id.* at 944 (majority opinion) (describing procedural posture of case).

dictional view, but the courts' and parties' resources can be tied up for long periods of time in these trials within trials.<sup>136</sup>

The decision in *Animal Science Products* dramatically swings the procedural battle in favor of the plaintiff.<sup>137</sup> By interpreting FTAIA as a substantive merits limitation on the Sherman Act, the Third Circuit's ruling strips the defendant of the ability to bring a 12(b)(1) motion on the basis of FTAIA.<sup>138</sup> Instead, a foreign antitrust defendant must now resort to either a 12(b)(6) motion to dismiss for failure to state a claim, or a Rule 56(c) motion for summary judgment, both of which favor the plaintiff.<sup>139</sup> By characterizing FTAIA as a substantive statute, the Third Circuit made it clear that it would view FTAIA criteria as an element of the plaintiff's antitrust claim.<sup>140</sup> Consequently, a motion to dismiss based on FTAIA goes to the merits of the case and implicates factual questions.<sup>141</sup> As long as a plaintiff can satisfy the pleading standards, the plaintiff can survive a 12(b)(6) motion and the defendant's hope of resolving a case early essentially evaporates.<sup>142</sup>

A defendant's other option under *Animal Science Products*, a summary judgment motion, is equally disadvantageous.<sup>143</sup> One of the most important advantages of a 12(b)(1) motion to a defendant is that it allows a case

136. For a further discussion of the problems of timeliness and drain on judicial resources inherent in the jurisdictional view of FTAIA, see *supra* notes 134–36 and accompanying text.

137. See Foote & Russell, *supra* note 99, at 3 (describing potential impact of *Animal Science Products* and stating, “[p]rocedural differences in the way that jurisdictional and substantive limitations are treated can be determinative in the timing and outcome of a defendant’s challenge based on the FTAIA”).

138. See *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 469 (3d Cir. 2011) (“[The renewed] motions must be decided pursuant to the procedural framework that governs a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) . . . rather than a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).”).

139. See Himmel & Gottlieb, *supra* note 106, at 4 (noting that “plaintiff has the upper-hand” in 12(b)(6) and Rule 56(c) motions).

140. See *United Phosphorus*, 322 F.3d at 956 (Wood, J., dissenting) (referring to debate over FTAIA as “‘element’ versus ‘jurisdiction’” debate); see also *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (stating that when statute is substantive, it acts as element of plaintiff’s claim for relief).

141. See Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 910 (2010) (noting that courts faced with 12(b)(6) motions should “weigh the remaining facts and determine if they are sufficient to ‘nudge [the] claims across the line from conceivable to plausible’” (alteration in original) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007))).

142. See Himmel & Gottlieb, *supra* note 106, at 5 (describing *Twombly* and *Iqbal* standards and what antitrust plaintiffs must plead to withstand motion to dismiss).

143. See *id.* at 4 (noting that plaintiff “has the upper-hand” in both 12(b)(6) and 56(c) motions).

to be resolved without the need for discovery.<sup>144</sup> Under the Third Circuit's ruling, if the plaintiff's claim survives a 12(b)(6) motion, the defendant must expend considerable time and energy in discovery to prove that no genuine issue of material fact exists.<sup>145</sup> Further, unlike a 12(b)(1) motion, the burden of proof for a summary judgment motion rests with the defendant as the moving party.<sup>146</sup>

### B. Policy Considerations

The Third Circuit's shift from a jurisdictional to a substantive view of FTAIA also carries certain policy considerations.<sup>147</sup> The policy arguments espoused by proponents of the jurisdictional view include issues of timeliness and foreign relations.<sup>148</sup> First, because a 12(b)(1) motion allows the court to dismiss a case at its outset without examining the factual allegations, the jurisdictional view of FTAIA allowed for meritless cases to be resolved quickly.<sup>149</sup> While this is normally the case when it comes to subject matter jurisdiction, FTAIA provides specific standards that a court must examine before making a decision on the motion.<sup>150</sup> Determining whether to dismiss a Sherman Act case for want of subject matter jurisdiction requires an inquiry into whether the conduct has a "direct, substantial, and reasonably foreseeable effect" which can take time and become a drain on judicial resources.<sup>151</sup>

The second policy matter raised by proponents of the jurisdictional approach involves the relationship between United States courts and for-

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144. See Walsh, *supra* note 109, at 2–3 (detailing advantages of 12(b)(1) motion to defendants, noting non-waivability, and fact that it can lead to immediate dismissal of case at pleadings stage).

145. See Rich et al., *supra* note 81, at 2 (noting that *Animal Science Products* will lead to increased discovery costs thereby enhancing plaintiffs' settlement leverage).

146. See Foote & Russell, *supra* note 99, at 3 (noting that, in summary judgment motion, "plaintiff is entitled to all reasonable inferences from the facts in its favor").

147. See *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 952 (7th Cir. 2003) (discussing policy considerations that must be made when analyzing FTAIA); see also *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467 (3d Cir. 2011) (describing "threshold question" simply as requiring court to distinguish between two sources of congressional authority).

148. See Valdespino, *supra* note 4, at 482–83 (describing potential policy implications).

149. See *United Phosphorus*, 322 F.3d at 952 (noting how viewing FTAIA as jurisdictional leads to timely resolution of cases).

150. For further discussion of the FTAIA exceptions, see *supra* notes 48–56 and 118–22 and accompanying text.

151. See *United Phosphorus*, 322 F.3d at 957 (Wood, J., dissenting) (noting difference between normal subject matter jurisdiction inquiries and subject matter jurisdiction inquires for FTAIA).

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eign economics.<sup>152</sup> Treating FTAIA as jurisdictional limits the power of United States courts to meddle in foreign nations' economic policies.<sup>153</sup> By placing this check on the courts, FTAIA streamlines foreign antitrust litigation and promotes international comity.<sup>154</sup>

The countervailing policy argument for a substantive approach, however, points out that if FTAIA strips the federal courts of subject matter jurisdiction, those cases would revert to state courts.<sup>155</sup> State courts would likely vary in the way they approach the cases with some dismissing for *forum non conveniens*, some applying the substantive view and dismissing on the merits, and others simply keeping the case and adjudicating it.<sup>156</sup> This lack of uniformity would lead to problems with foreign nations whose companies would be unable to predict the consequences of their conduct within the United States.<sup>157</sup> The substantive approach would keep these suits within the federal system and provide stability to FTAIA litigation and relations with foreign sovereigns.<sup>158</sup>

### C. Strategies for Practitioners

The decision in *Animal Science Products* will have important implications for the way practitioners litigate foreign antitrust cases in the Third

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152. See Kenneth R. O'Rourke et al., *The FTAIA in State Court: A Defense Perspective*, LAW360 (Feb. 24, 2010), <http://www.omm.com/files/upload/FTAIAarticle.pdf> (stating that goal of FTAIA is to respect foreign sovereignty).

153. See *United Phosphorus*, 322 F.3d at 952 ("FTAIA limits the power of the United States courts (and private plaintiffs) from nosing about where they do not belong").

154. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993) (examining issues of international comity to determine whether exercise of jurisdiction is proper).

155. See *United Phosphorus*, 322 F.3d at 958 (Wood, J., dissenting) (noting that "state courts can and will hear foreign commerce antitrust cases where 'direct, substantial, and reasonably foreseeable' effects are missing"); see also O'Rourke et al., *supra* note 152, at 1 ("As federal courts tighten the reins on private antitrust actions, some antitrust plaintiffs are focusing their attention on litigating in state court. And they are being creative about how to avoid removal to federal court.").

156. See *United Phosphorus*, 322 F.3d at 958 (Wood, J., dissenting) (discussing possible state court approaches to dealing with foreign antitrust suits); see also Schmidt, *supra* note 49, at 255 (noting that *forum non conveniens* could be used to clear up court congestion).

157. See *United Phosphorus*, 322 F.3d at 958 (Wood, J., dissenting) (noting friction that jurisdictional approach could cause with foreign sovereigns); see also Edward D. Cavanagh, *The FTAIA and Claims by Foreign Plaintiffs Under State Law*, 26 ANTITRUST 43, 46 (2011) ("The application of state antitrust laws to foreign claims beyond the bounds set by the FTAIA and *Empagran* would likely introduce uncertainty and confusion in the law and frustrate the Congressional intent that the United States speak with one voice on the issue of American jurisdiction over foreign commerce.").

158. See Cavanagh, *supra* note 157, at 45–46 (noting that state courts would not be able to adjudicate foreign antitrust suits under substantive view of FTAIA).

Circuit.<sup>159</sup> To begin, foreign defendants can no longer invoke FTAIA in a motion to dismiss for lack of subject matter jurisdiction.<sup>160</sup> *Animal Science Products* places FTAIA's focus squarely on the merits, meaning foreign defendants must strategize ways to attack the plaintiff's allegations, as opposed to simply submitting a Rule 12(b)(1) motion and forcing the plaintiff to defend against it.<sup>161</sup> One strategy for attacking the merits of the claim would be to show that the plaintiff's injury was not directly caused by the anticompetitive conduct's domestic effect.<sup>162</sup> Under the Supreme Court's analysis of the "effects" exception in *Empagran*, a defendant can successfully move to dismiss on the merits by showing that the plaintiff's claim is based on allegations of a merely hypothetical conspiracy that "must have" affected domestic commerce.<sup>163</sup>

Plaintiffs' major goal after *Animal Science Products* is to adequately address the elements of FTAIA in their complaint.<sup>164</sup> While the *Animal Science Products* decision places the burden on the defendant, it would be unwise for the plaintiff to think they can simply ignore or gloss-over FTAIA in their complaint and survive a motion to dismiss.<sup>165</sup> Plaintiffs must avoid generality when describing the effect of the defendant's conduct on domestic commerce.<sup>166</sup> Merely stating that the effects of the injury were felt worldwide, including the United States, is likely not enough to survive a 12(b)(6) motion to dismiss under the *Animal Science Products* rationale.<sup>167</sup> However, in the wake of *Animal Science Products*, a foreign antitrust claim that is stated with particularity and adequately addresses the

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159. For a further discussion of the practical implications for Third Circuit practitioners, see *infra* notes 160–168 and accompanying text.

160. For a discussion of why defendants can no longer move to dismiss for lack of subject matter jurisdiction, see *supra* notes 110–17 and accompanying text.

161. See Himmel & Gottlieb, *supra* note 106, at 4–5 (discussing ways which defendants can "break [ ] the chain" in order to win dismissal on merits).

162. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 173 (2004) ("Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach.").

163. See Himmel & Gottlieb, *supra* note 106, at 3–4 (explaining possible responses that foreign defendants can take to substantive interpretation of FTAIA). For a further discussion of the Supreme Court's analysis of the "effects" exception in *Empagran*, see *supra* notes 54–56 and accompanying text.

164. See *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 964 (7th Cir. 2003) (Wood, J., dissenting) ("FTAIA adds an element to an antitrust claim . . .").

165. See Himmel & Gottlieb, *supra* note 106, at 3–5 (discussing tactics foreign defendants can use to attack complaints that inadequately address FTAIA).

166. See *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 471 (3d Cir. 2011) (detailing how district court should assess plaintiffs' claim and noting what plaintiffs must allege).

167. See *id.* ("District Court should assess whether the plaintiffs adequately alleged that the defendants' conduct is directed at a U.S. import market and not solely whether the defendants physically imported goods into the United States.").

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FTAIA exceptions has a very good chance of surviving a motion to dismiss and making it to trial.<sup>168</sup>

#### V. CONCLUSION

Although the Third Circuit's decision in *Animal Science Products* deviates from the established view of FTAIA, there is evidence that it is merely the first step in a complete overhaul of the way the circuits view the statute.<sup>169</sup> For now, foreign antitrust defendants in the Third Circuit will find it considerably more difficult to secure dismissal at the early pleading stages.<sup>170</sup> Instead, there will likely be more discovery and trials in the Third Circuit, which will in turn lead to more costs, in both time and money, for foreign defendants.<sup>171</sup> Thus, foreign companies must examine the implications of the *Animal Science Products* decision, and consider the likelihood of prolonged antitrust litigation if their conduct falls within the reach of the Third Circuit.<sup>172</sup>

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168. See Murray & Cook, *supra* note 122, at 2 (noting that *Animal Science Products* "makes it significantly easier for a federal antitrust plaintiff's Sherman Act claims against foreign defendants to survive a motion to dismiss under the FTAIA"); Rich et al., *supra* note 81, at 2 ("[T]he Third Circuit's decision makes it easier for such claims to survive an FTAIA challenge.").

169. See *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650, 653 (7th Cir. 2011) (discussing *Arbaugh* and also stating "*United Phosphorus* may be ripe for reconsideration, but we need not undertake that task here. Whether it blocks jurisdiction or establishes an element of a Sherman Act claim, the FTAIA applies here to bar this antitrust suit."), *reh'g en banc granted, opinion vacated* (Dec. 2, 2011).

170. For a discussion of the burden shifting between 12(b)(1) and 12(b)(6) motions, see *supra* notes 126–46 and accompanying text.

171. See Foote & Russell, *supra* note 99, at 3 (discussing trend set by Third Circuit and its potential effects on foreign defendants); Himmel & Gottlieb, *supra* note 106, at 4–5 (explaining potential effects of substantive view on foreign defendants and suggesting litigation strategies).

172. See Murray & Cook, *supra* note 122, at 2 (noting impact of relaxed jurisdictional protections on foreign import and export companies).

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