

Shifting Viewpoints: The Foreign Trade Antitrust Improvement Act, A Substantive or Jurisdictional Approach

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Since being passed in 1982, the Foreign Trade Antitrust Improvement Act (FTAIA) has been viewed predominantly as a jurisdictional limitation to the Sherman Act. All of the Circuits currently agree with this interpretation and although the Supreme Court has not ruled on this issue specifically, in its Empagran decision the Court refers to the FTAIA in jurisdictional terms. There are, however, those that see the FTAIA as a restriction on the substantive applicability of the Sherman Act rather than a jurisdictional limitation. This view is supported by Justice Scalia in his Hartford Fire dissent and by Judge Wood, of the 7th Circuit, in her dissent in United Phosphorus.

In 2006 the Supreme Court held in Arbaugh, a Title VII (Civil Rights Act of 1964) case, that, “when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.”¹ Since there is nothing in the language of the FTAIA indicating that its limitations are jurisdictional, the Arbaugh decision may require the Circuits to review their treatment of this issue.

This article will analyze these two very different treatments of the FTAIA and discuss the effects that the Arbaugh decision may have on its future. After an introductory overview of the issues in Part I, Part II will give a brief history and explanation of the FTAIA; Part III will analyze the differences between jurisdictional and substantive statutory interpretation; Part IV will discuss how these different interpretations are applied to the FTAIA in United Phosphorus and Hartford Fire. Part V will analyze the Arbaugh case and its possible effects on the statutory interpretation of the FTAIA; and finally, Part VI will discuss the future of the FTAIA.

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1. Arbaugh v. Y&H Corp., 546 U.S. 500, 516 (2006).

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I.	INTRODUCTION: <i>ARBAUGH</i> , AN END TO JURISDICTIONAL DRIVE-BY'S ON THE FTAIA	

From its nascent days to the present, the Foreign Trade Antitrust Improvement Act (FTAIA) has been viewed predominantly as a jurisdictional limitation to the

Sherman Act rather than a limit on its substantive applicability.² All of the Circuits currently interpret the FTAIA as jurisdictional, and although the Supreme Court has not ruled on this issue specifically, in its *Empagran* decision the Court refers to the FTAIA in jurisdictional terms.³ There are however, those who see the FTAIA as a limit on the substantive applicability of the Sherman Act rather than a jurisdictional limitation, and the prevailing winds may be changing, eventually displacing the majority's view with that of the minority. This approach is supported, most notably and most vocally, by Justice Scalia in his dissent in *Hartford Fire*,⁴ and by Judge Wood of the Seventh Circuit in her dissent in *United Phosphorus*.⁵

The Second Circuit has long been a progenitor of important decisions in the commercial sphere, and has been especially notable in the field of antitrust where Judge Learned Hand's 1945 *Alcoa* decision announced the "effects test" and the rule of extraterritoriality.⁶ It is no wonder then that careful attention is paid to the decisions handed down from the Second Circuit and that these decisions are carefully scrutinized; changes in the treatment of issues there can have rippling effects throughout the judicial system. Judge Lynch of the Southern District of New York knows this well, and it comes as no surprise that he does not take lightly the possible shift coming in the Second Circuit's treatment of the Foreign Trade Antitrust Improvement Act (FTAIA). In his 2008 opinion, *Boyd v. AWB Limited*, Judge Lynch wrote a nearly 350-word footnote on the debate over the treatment of the FTAIA as either a jurisdictional limitation or as a limitation on the substantive applicability of the statute, even though neither party challenged the characterization of the statute as jurisdictional.⁷ He quoted the Supreme Court, calling "the tendency of courts to term the non-existence of a critical fact a 'jurisdictional defect' rather than merely the failure to prove an element of the claim . . . 'drive-by jurisdictional rulings.'"⁸

Like the rest of the country, the Second Circuit currently characterizes the FTAIA as a limitation on the court's jurisdiction,⁹ but it appears from his writing in *Boyd* that Judge Lynch favors a move from a jurisdictional view of the FTAIA to a substantive one,¹⁰ and he thinks that this may be delivered through a Supreme Court Decision in a Title VII (Civil Rights Act of 1964) case.¹¹ In 2006, the Supreme Court held in *Arbaugh* that "when Congress does not rank a statutory limitation on

2. See H.R. REP. NO. 97-686, at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2487 (illustrating that the earliest reports on the FTAIA referred to it in jurisdictional terms).

3. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW para. 272i2 at 296 (3d ed. 2006).

4. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting).

5. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 955 (7th Cir. 2003) (Wood, J., dissenting).

6. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 444 (2d Cir. 1945).

7. *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236, 243 n.6 (S.D.N.Y. 2008).

8. *Id.* at 244 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006)).

9. See *Filitech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998) (characterizing FTAIA's requirements as jurisdictional).

10. See *Boyd*, 544 F. Supp. 2d at 243 n.6 ("Although the Second Circuit in *Filitech* characterized the FTAIA's limitations as a constraint on courts' 'jurisdiction,' the express language of the FTAIA—*i.e.*, that the Sherman Act 'shall not apply' to certain kinds of foreign conduct—suggests a limitation, not on a courts power to decide the case, but rather, on the substantive applicability of the statute.") (internal citations omitted).

11. See *id.* (discussing *Arbaugh*).

coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.”¹² In concluding his analysis of the treatment of the FTAIA, Judge Lynch wrote, “Because nothing in the statutory language of the FTAIA indicates that its limitations are jurisdictional, *Arbaugh* may require that the Second Circuit review its treatment of that issue.”¹³ If Judge Lynch is correct, and he almost certainly is, the *Arbaugh* decision will force the lower courts to switch to a substantive view of the FTAIA, which will have serious consequences regarding the way U.S. courts deal with the extraterritoriality of our antitrust laws.

II. A BRIEF HISTORY OF THE FOREIGN TRADE ANTITRUST IMPROVEMENT ACT

A. *Shaky Ground: The Common Law Roots of the FTAIA*

The story of the extraterritorial application of U.S. antitrust laws begins in 1909 with Justice Holmes’ opinion in *American Banana Co. v. United Fruit Co.*¹⁴ In this case, Justice Holmes affirmed the lower courts dismissal of an antitrust claim based on “the general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”¹⁵ Justice Holmes further stated that, “[a] conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.”¹⁶ *American Banana* set up what was later referred to as a “strict territorial test.”¹⁷ This standard only lasted until 1945, however, when “*American Banana*’s strict territorial test was moderated, if not rejected” by Judge Learned Hand’s decision in *Alcoa*.¹⁸

Due to the inability of the Supreme Court to produce a quorum (four Justices were forced to recuse themselves in light of previous involvement with parties to the suit),¹⁹ and pursuant to 15 U.S.C. § 29, which at the time authorized the designation of a court of appeals as a court of last resort for certain antitrust cases, Judge Hand fashioned the “effects test” to define the extraterritorial reach of U.S. antitrust courts.²⁰ Since the *Alcoa* decision, “it has been relatively clear that it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies.”²¹ Judge Hand’s effects test consisted of two parts. Overseas conspiracies would be subject to U.S. antitrust laws only “if they . . . intended to affect imports *and* did affect them.”²² Confusion over the meaning and application

12. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006).

13. *Boyd*, 544 F. Supp. 2d at 243 n.6.

14. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

15. *Id.* at 356.

16. *Id.* at 359.

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

18. *Id.*

19. Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, ST. JOHN’S L. REV. 569, 591–92 (2004).

20. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 444 (2d Cir. 1945).

21. H.R. REP. NO. 97-686, at 5 (1982).

22. *Alcoa*, 148 F.2d at 444 (emphasis added).

of the “effects test” in the subsequent four decades led to a call for clarification and eventually to the passing of the FTAIA.²³

B. The FTAIA: An Improvident Solution

Title IV of the Export Trading Company Act of 1982, the Foreign Trade Antitrust Improvement Act, was signed into law by President Ronald Reagan in 1982.²⁴ The purpose of this Act was to clarify the extraterritorial reach of the U.S. antitrust laws.²⁵ Congress was becoming increasingly worried about American courtrooms being inundated with suits brought to satisfy foreign interests and having only nominal effects on domestic commerce.²⁶ In addition, Congress was concerned about a lack of consistency between courts regarding their role in enforcing U.S. antitrust laws abroad, and the negative impact that this was having on international commerce.²⁷ The legislative solution to this was the FTAIA. Since being signed into law, the FTAIA has been harshly criticized for being inelegantly worded,²⁸ “introduc[ing] confusion into a regime that, before its enactment, was . . . modestly successful,” and failing in its overall objective.²⁹

Despite these criticisms the FTAIA is still an extremely important statute and is intended to serve a number of different functions. First and most importantly, the FTAIA makes it clear that the purpose of U.S. antitrust laws is to protect American economic interests and not foreign interests.³⁰ This goal was achieved by limiting the Sherman Act to:

[C]onduct 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.³¹

23. Export Trading Company Act of 1982, Pub. L. No. 97-290, tit. IV, §§ 401–03, 96 Stat. 1233, 1246–47 (codified at 15 U.S.C. § 6a (2000)).

24. *Id.*

25. H.R. REP. NO. 97-686, at 2.

26. AREEDA & HOVENKAMP, *supra* note 3, at 286–87.

27. H.R. REP. NO. 97-686, at 2 (1982).

28. AREEDA & HOVENKAMP, *supra* note 3, at 288.

29. Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 286 (2007).

30. AREEDA & HOVENKAMP, *supra* note 3, at 287.

31. Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a (2000).

What this means in plain English is 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. The FTAIA was also intended to eliminate the perception that “antitrust law prohibits efficiency-enhancing joint export activities” by “encourag[ing] the business community to engage in efficiency producing joint conduct in the export of American goods and services,”³² as well as “alleviate tension between the United States and its trading partners arising from extraterritorial application of U.S. competition policy in conflict with foreign competition law.”³³ Finally, the FTAIA was intended to “serve as a simple and straightforward clarification of existing American Law and the Department of Justice enforcement standards,” creating, “[a] clear benchmark . . . for businessmen, attorneys and judges as well as our trading partners.”³⁴

C. *Cracks in the Foundation: Analysis of the FTAIA*

The FTAIA is a limiting statute; it removes a court’s ability to apply the Sherman Act to antitrust claims relating to foreign trade or commerce (other than import trade or import commerce), then it gives some of that power back.³⁵ U.S. antitrust law only applies to claims when the conduct falls outside the scope of the FTAIA, such as wholly domestic conduct or import trade or import commerce, and if the conduct falls within one of the narrow exceptions set up within the act.³⁶ To fall within one of the exceptions of the FTAIA, the conduct must meet two requirements. Section 1 requires that the conduct must have “a direct, substantial, and reasonably foreseeable effect” on domestic commerce, import commerce, or the business of U.S. exporters, and Section 2 requires that the conduct “gives rise to a claim” under U.S. antitrust laws.³⁷

The “cumbersome, ambiguous, and inelegant language” of the FTAIA³⁸ has given rise to three major problems in its interpretation. The first problem is understanding what Congress meant by “direct, substantial and reasonably foreseeable.” Second is the requirement that conduct “give[] rise to a claim,” and finally, there is the use of the language “shall not apply.”

The need for a “direct” effect has been the subject of much debate in the courts. *Intel* stated that “but for causation is not the type of direct causation contemplated by the FTAIA”³⁹ and *Biotechnologies* defined an effect as “direct” under the FTAIA if “it follows as an immediate consequence of the defendant’s activity” with no “intervening developments.”⁴⁰ These interpretations of “direct”

32. H.R. REP. NO. 97-686, at 2, 4 (1982).

33. Huffman, *supra* note 29, at 305.

34. H.R. REP. NO. 97-686, at 2.

35. 15 U.S.C. § 6a.

36. *Id.*

37. *Id.*

38. AREEDA & HOVENKAMP, *supra* note 3, at 288.

39. *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 561 (D. Del. 2006); *see also* *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2006) (“The statutory language—‘gives rise to’—indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for ‘nexus’ the appellants advance[. . .]”).

40. *United States v. LSL Biotechnologies*, 379 F.3d 672, 680–81 (9th Cir. 2004).

seem contradictory to the intent of Congress as discussed in the legislative history, which clearly indicates that spillover effects in the domestic market are enough to meet the “direct” requirement⁴¹—a much more reasonable interpretation in today’s vastly integrated global economy.

Courts have also disagreed over whether the effect has to be *both* “direct” and “substantial.” In contrast to the majority of post-FTAIA decisions, two cases from the Southern District of New York have stated that both size and directness are not necessary.⁴² While the “direct” requirement has made it more difficult for plaintiffs to bring claims than it was under the *Alcoa* effects test, the “reasonably foreseeable” requirement has made it easier. “Reasonably foreseeable” is much less stringent than the “intent” requirement from *Alcoa*. This change in language was meant to eliminate a defense based on ignorance of the effects of one’s actions.⁴³

The “gives rise to a claim” requirement of section 2 of the FTAIA has been the main factor driving some very important and drawn out litigation in federal courts. This language was a central issue of debate in the Supreme Court’s most recent case regarding the FTAIA,⁴⁴ a case that has become the “primary source of the modern rules governing extraterritoriality under the FTAIA.”⁴⁵ This debate caused a serious split within the courts of appeals. The Fifth Circuit in *Den Norske* held that “gives rise to a claim” requires that the domestic effect of the defendant’s conduct must have caused *the* injury that the plaintiff is suing over,⁴⁶ while the D.C. Circuit held in *Empagran* that there only needed to be the possibility of a claim by a private party in the United States, thus allowing foreign plaintiffs to bring suits based on hypothetical domestic plaintiffs.⁴⁷ The Second Circuit took this interpretation even further in *Christie’s* by extending this hypothetical domestic claim to claims that could be brought by the U.S. government (which is allowed to bring a claim without having to show demonstrable harm).⁴⁸

On *Empagran’s* third trip to the Supreme Court this debate was finally settled. The Court rejected the D.C. Circuit’s textualist reading of the FTAIA and held that plaintiffs must demonstrate that the defendant’s conduct gives rise to “the claim” that is the basis for the suit rather than “a claim”; the court held that where an adverse foreign effect is independent of any adverse domestic effect, the FTAIA does not apply.⁴⁹

41. H.R. REP. NO. 97-686, pts. D(4), E(2) (1982) (discussing the sufficiency of spillover in the context of international cartels).

42. See *Papst Motoren GmbH & Co. v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F. Supp. 864, 868 (S.D.N.Y. 1986) (holding that “any demonstrable effect on United States commerce will suffice, so long as it is not de minimus.” (citing *Dominicus Americana Bohio v. Gulf & W. Indus. Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979))); *El Cid, Ltd. v. N.J. Zinc Co.*, 551 F. Supp. 626, 629 (S.D.N.Y. 1982) (“[I]t is probably not necessary for the effect on foreign commerce to be both substantial and direct so long as it is not de minimus.” (quoting *Dominicus*, 473 F. Supp. at 687)).

43. H.R. REP. NO. 97-686, at 9.

44. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

45. Huffman, *supra* note 29, at 318.

46. *Den Norske Stats Oljeselskap v. HeereMac VOF*, 241 F.3d 420, 421 (5th Cir. 2001).

47. *Empagran S.A. v. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 350 (D.C. Cir. 2003), *vacated*, 542 U.S. 155 (2004).

48. *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 399–400 (2d Cir. 2002), *abrogated by F. Hoffmann-La Roche Ltd. v. Empagran*, 542 U.S. 155 (2004).

49. *Empagran*, 542 U.S. at 174–75.

Use of the language “shall not apply” has also created debate about the proper interpretation of the FTAIA. Judge Wood wrote that this “straightforward language” indicates that the courts should not construe the FTAIA’s tests as going to the subject-matter jurisdiction of the court.⁵⁰ This interpretation of the language of the FTAIA is also supported by Judge Lynch in *Boyd*. He wrote that “the express language of the FTAIA—*i.e.*, that the Sherman Act ‘shall not apply’ to certain kinds of foreign conduct—suggests a limitation not on the court’s power to decide the case, but rather, on the substantive applicability of the statute.”⁵¹

III. STATUTORY LIMITATIONS: JURISDICTIONAL OR SUBSTANTIVE

*Jurisdictional grants empower courts to hear and resolve cases brought before them by parties; substantive causes of action grant parties permission to bring those cases before the court. The substantive cause of action is a ticket permitting individuals to enter the federal judicial process; jurisdiction empowers the court to punch the ticket. Both are necessary for a civil action to be litigated.*⁵²

A. *Confusing the Issues*

The failure of a party to meet one of these jurisdictional or substantive elements leads courts to dismiss causes of action for lack of subject-matter jurisdiction rather than properly dismissing them for failure to state a claim.⁵³ “Federal courts frequently err by treating factual elements of substantive federal causes of action as going to the jurisdiction of the federal court.”⁵⁴ An error of this nature can have serious consequences for parties by affecting whether their claims are evaluated under Federal Rule of Civil Procedure 12(b)(1), or under Rule 12(b)(6). While some courts have stated that there is little difference between the two rules,⁵⁵ there are in fact some extremely important differences.

The most important consequences of determining whether a certain fact goes to jurisdiction or whether it goes to the substantive applicability of a statute is determining when, where, and by whom those facts are resolved.⁵⁶ If a certain fact goes to the jurisdiction of the court, judges make findings on those particular facts.⁵⁷ “[I]n a 12(b)(6) motion the court looks only at the face of the complaint, but in a challenge to the court’s jurisdiction under 12(b)(1) the court may be required to look

50. *United Phosphorus, Ltd., v. Angus Chem. Co.*, 322 F.3d 942, 953–54 (7th Cir. 2003) (Wood, J., dissenting).

51. *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236, 243 n.6 (S.D.N.Y. 2008).

52. Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 676 (2005).

53. *Id.*

54. *Id.* at 643; *see, e.g., United Phosphorus*, 322 F.3d at 953 (Wood, J., dissenting); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting).

55. *See, e.g., Hamilton Chapter of Alpha Delta Phi, Inc., v. Hamilton Coll.*, 128 F.3d 59, 63 (2d Cir. 1997) (“Where, as is the case here with respect to Hamilton’s interstate commerce argument, a jurisdictional challenge is addressed to the complaint, the analyses under *Rule 12(b)(1)* and *Rule 12(b)(6)* merge: the critical inquiry is into the adequacy of plaintiffs’ allegations that the challenged conduct affects interstate commerce.”).

56. Wasserman, *supra* note 52, at 662.

57. *Id.*

beyond the complaint to facts tending to establish or undermine jurisdiction.”⁵⁸ The Seventh Circuit articulated the distinction between jurisdictional and substantive challenges:

Normally we do not scrutinize a complaint so closely because under our system of notice pleading, we set a very low threshold to determine whether a complaint states a claim upon which relief can be granted. Such is not the case when a complaint is challenged for want of jurisdiction. 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.⁵⁹

Another consequence is the non-waivability of jurisdiction.⁶⁰ Cases dismissed under 12(b)(1) are left open to attack at any time during the proceedings, including during appellate proceedings.

If, rather than going to the jurisdiction of the court, facts are relevant to the substance of the claim, they should be determined at a later phase of the trial. If factual elements of a plaintiff’s claim are disputed, this is a determination that should be made by the fact finder rather than the court.⁶¹

B. *Understanding the Confusion*

Confusion over the interpretation of factual, substantive elements “derives from misapprehension of the meaning and effect of jurisdictional elements”⁶² Justice Scalia and Judge Wood have both commented on the distinction between “legislative” and “judicial” jurisdiction.⁶³ A proper understanding of the purpose and effect of jurisdictional elements would alleviate much of this confusion.⁶⁴ The purpose that various factual elements serve within a particular statute should guide courts in their decisions over whether or not to treat those elements as jurisdictional. The Sherman Act, for example, is limited to restraints of trade affecting interstate commerce specifically because Congress’s power to regulate this activity is derivative of its power to “regulate Commerce with foreign Nations, and among the several States”⁶⁵ Jurisdictional elements are “fact[s] included in a statute that must be pled and proven by the plaintiff in each case, serving as a nexus between a particular

58. AREEDA & HOVENKAMP, *supra* note 3, at 296.

59. Bastien v. AT&T Wireless Services, Inc., 205 F.3d 983, 990 (7th Cir. 2000).

60. 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.”).

61. 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) (“When there is a dispute as to what acts or events have actually occurred, or what conditions have actually existed, the jury has the task of resolving the conflict.” (quoting Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1869–70 (1966))).

62. Wasserman, *supra* note 52, at 684.

63. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813–20 (1993) (Scalia, J., dissenting); United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 953 (7th Cir. 2003) (Wood, J., dissenting).

64. Wasserman, *supra* note 52, at 684.

65. U.S. CONST. art. I, § 8, cl. 3.

piece of legislation and Congress's constitutional power to enact that legislation and to regulate the conduct at issue."⁶⁶ These elements concern Congress's constitutionally granted power to regulate conduct through legislation; they have nothing to do with the subject-matter jurisdiction of the judicial branch.⁶⁷ Under this interpretation, the failure of a plaintiff to plead and prove a jurisdictional element of a claim would "mean[] only that the statute by its terms does not reach (or subject to sanction) the real-world actors and conduct at issue."⁶⁸ In other words, the plaintiff would not have the necessary ticket to enter the federal judicial process.

C. *Properly Determining Jurisdiction*

Trials are divided up into many different phases: determining the jurisdiction of the court should be done at the outset and should be based on jurisdiction-granting statutory language.⁶⁹ If at this point the court finds that it does not have jurisdiction, it is required by law to dismiss the action.⁷⁰ Once a court has found that it does have jurisdiction, then, and only then, does the court have the appropriate authority to look into the merits of the case and grant or deny a 12(b)(6) motion.⁷¹

When looking at the question of whether or not a federal court has jurisdiction over a claim, it is important to remember that Congress granted federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."⁷² Congress further granted the federal courts original jurisdiction in certain types of civil actions, specifically, actions "arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."⁷³ Jurisdictional granting statutes such as these should be the main focus of the courts when making a 12(b)(1) determination; unless the jurisdiction granted by these statutes is expressly stripped from the courts then a dismissal for lack of subject-matter jurisdiction will be inappropriate.⁷⁴

Before a court can properly determine whether a jurisdiction-granting statute such as those mentioned above applies, they must first determine the meaning of the phrase "arising under." Two recent cases have attempted to clarify this phrase. In *Steel Co. v. Citizens for a Better Environment*, Justice Scalia wrote, "the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one

66. Wasserman, *supra* note 52, at 679; *see also* Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 81–82 (3d Cir. 2003) (explaining jurisdiction elements link to Congressional power under the commerce clause).

67. Wasserman, *supra* note 52, at 684.

68. *Id.* at 687.

69. *Id.* at 693; *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 89, 98 (1998) (illustrating the history and the necessity of determining jurisdiction before moving on to the merits).

70. Fed. R. Civ. P. 12(h)(3).

71. Wasserman, *supra* note 52, at 693; *see also* Bell v. Hood, 327 U.S. 678, 682 (1946) ("For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.").

72. 28 U.S.C. § 1331 (2006).

73. 28 U.S.C. § 1337 (2006).

74. United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 954–55 (7th Cir. 2003) (Wood, J., dissenting).

construction and will be defeated if they are given another.”⁷⁵ In *Jones*, the meaning of “arise under” was modified somewhat further; according to *Jones*, a cause of action arises under an Act in the sense that it is “made possible” by that Act.⁷⁶

D. *Limiting Jurisdictional Fact-Finding by the Courts*

“Courts should understand that under no circumstances will a factual issue enumerated in a substantive federal cause of action implicate judicial jurisdiction.”⁷⁷ One reason that courts may be eager to change substantive elemental facts into jurisdictional facts is that they have become accustomed to engaging in jurisdictional fact finding to resolve disputes at the 12(b)(1) phase of litigation.⁷⁸ The power for courts to engage in this kind of jurisdictional fact finding is, contrary to the belief of most courts,⁷⁹ actually quite limited. The power of courts to make factual determinations regarding subject-matter jurisdiction is generally circumscribed to determinations regarding the parties to a suit, such as findings regarding the domicile of parties in diversity cases and the status of parties, when that status is an issue of jurisdiction, as it is in cases brought under the Foreign Sovereign Immunities Act or the Alien Tort Claims Act.⁸⁰

These party-based jurisdictional statutes are grounded on issues of fact unrelated to the merits of the claims or the equities of the circumstances giving rise to the action, issues of fact subject to resolution by the court. The jurisdictional facts—party domicile, the defendant’s status as a sovereign, or the plaintiff’s status as an alien—have nothing to do with the underlying tort or contract claim.⁸¹

On the other hand, when determining whether a claim “arises under” an act of Congress, the factual questions go directly to the substance of the claim.⁸² Wasserman proposes the following inquiry to determine whether or not a court has jurisdiction:

“[A]rising under” . . . jurisdictional grants . . . ask only for a prediction from the court: Does it appear (based solely on the pleading) that the

75. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)).

76. *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 382 (2004).

77. Wasserman, *supra* note 52, at 699.

78. *Id.*; see also *Bell v. Hood*, 327 U.S. 678, 682 (1946) (“The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.”); *Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir. 1990) (explaining the difference between facial and factual attacks on subject-matter jurisdiction and the proper role of the court when factual attacks on jurisdiction also go to the merits of the claim).

79. See Wasserman, *supra* note 52, at 656 (“When courts confuse jurisdictional facts and law with merits facts and law, issues are adjudicated and resolved at the wrong time and in the wrong manner by the wrong fact finder within the adjudicative process.”).

80. *Id.* at 699–700.

81. *Id.* at 701.

82. See *id.* at 694–99 (discussing the definition of “arising under” and the possible factual determinations a federal court may decide to determine whether an action arises under a federal statute).

plaintiff seeks relief created or made possible by a federal enactment? Does it appear that the outcome of the dispute between the parties will turn on an interpretation, construction, or application of the federal Constitution or federal statute to some set of factual circumstances? If the court predicts an affirmative answer to those questions, it has jurisdiction.

. . . . The prediction I propose involves even less rigorous inquiry. A court applying an “arising under” jurisdictional grant should look no further—indeed may look no further—than the four corners of the pleadings to discern the origin of the plaintiff’s cause of action, with no consideration of the potential or ultimate legal or factual validity of that cause of action.⁸³

IV. THE FIGHT OVER THE FTAIA: *HARTFORD FIRE* AND *UNITED PHOSPHORUS*

Although all of the Circuits currently agree that the FTAIA should be interpreted as limiting a court’s jurisdiction,⁸⁴ there has been some heated debate on this issue.⁸⁵ The most prominent critics of this position are Justice Kennedy, Justice Thomas, and Justice Scalia, who wrote a notable dissent that was joined by Justice O’Connor in *Hartford Fire*, and Justice Wood of the Seventh Circuit, who some believe may be “the federal judiciary’s foremost thinker on antitrust extraterritoriality issues.”⁸⁶ In *United Phosphorus*, Judge Wood wrote for the dissent, joined by judges Easterbrook, Manion, and Ilana Diamond Rovner, in a “deeply divided”⁸⁷ Seventh Circuit Court en banc decision.⁸⁸

A. *Hartford Fire*

1. Vacillation: The Majority Opinion

Hartford Fire was an antitrust case brought in the Northern District of California by nineteen states and numerous private parties.⁸⁹ The claim was that a group of domestic insurers, domestic and foreign reinsurers, and insurance brokers had agreed to boycott general liability insurers that used nonconforming forms.⁹⁰ The District Court granted the defendant’s motion to dismiss on, among other things, the conclusion that “the principal of international comity barred it from

83. *Id.* at 701.

84. AREEDA & HOVENKAMP, *supra* note 3, at 296.

85. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 746, 796 n.22, 813 (1993) (illustrating the disagreement between Justice Souter and Justice Scalia on whether the FTAIA addresses prescriptive or subject-matter jurisdiction); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 953 (7th Cir. 2003) (Wood, J., dissenting) (criticizing the majority for failing to “distinguish[] carefully between judicial and legislative jurisdiction”).

86. Huffman, *supra* note 29, at 330.

87. Wasserman, *supra* note 52, at 688.

88. *United Phosphorus*, 322 F.3d at 953.

89. *Hartford Fire*, 509 U.S. at 764.

90. *Id.* at 764, 770–71.

exercising Sherman Act jurisdiction.”⁹¹ The Court of Appeals disagreed with this analysis and the Supreme Court affirmed this part of the Court of Appeals decision.⁹² For the purpose of this article, discussion will be limited to the question presented in No. 91-1128.⁹³

a. Jurisdiction and the FTAIA: An Easy Answer

The majority’s opinion regarding the reach of U.S. antitrust laws is divided into two parts: first is the jurisdictional question, and second is the role that comity plays in the exercise of jurisdiction. The jurisdictional question was one that the majority felt was easily answered:

At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede. Although the proposition was perhaps not always free from doubt, it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect.⁹⁴

The majority did not feel the need to take up the jurisdictional debate over the FTAIA. The only references made to this polemic are in footnotes, one of which is directly targeted at Justice Scalia’s dissent.⁹⁵

b. No Need to Decide: The Role of Comity

One of the main defenses put forth by the London reinsurers was that jurisdiction should be declined based on the principal of international comity.⁹⁶ The District Court agreed and granted their motion to dismiss.⁹⁷ The Court of Appeals also agreed that the principal of international comity should play a role in the decision over whether or not to exercise jurisdiction, however, in the end they decided this principal was outweighed by other factors.⁹⁸

91. *Id.* at 764.

92. *Id.* at 769–70.

93. *Id.* at 779 n.9 (“The question presented in No. 91-1128 is: ‘Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws in light of this Court’s teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?’”).

94. *Id.* at 795–96 (internal citations omitted).

95. *Hartford Fire*, 509 U.S. at 796 n.22.

96. *Id.* at 797.

97. *Id.* at 764.

98. *Id.* at 797–98 (“[T]he Court of Appeals believed that ‘application of [American] antitrust laws to the London reinsurance market ‘would lead to significant conflict with English law and policy,’” and that “[s]uch a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of

The majority determined, in one of its sparse references to the FTAIA, that “Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity.”⁹⁹ Once again, as with the jurisdictional debate over the FTAIA, the court decided this was a question that it did not need to address.¹⁰⁰ The majority agreed with the Court of Appeals that the principal of “international comity would not counsel against exercising jurisdiction” in the instant case,¹⁰¹ however, their decision was based on the notion that there was no “true conflict” between the domestic and foreign law.¹⁰²

2. A Different Set of Questions: The Dissent

a. Jurisdiction: Another Easy Answer

Justice Scalia’s dissent in *Hartford Fire* (regarding No. 91-1128) was also divided into two parts. He began by pointing out that the petition raised two distinct questions: the question of whether the District Court had jurisdiction to hear the claim and the question of the extraterritorial reach of the Sherman Act.¹⁰³ Justice Scalia answered the first question in the affirmative with only a very cursory analysis. He based his answer to the jurisdictional question on the fact that the Respondents asserted nonfrivolous claims under the Sherman Act and that the District Courts are vested with subject-matter jurisdiction over all cases “arising under” federal statutes under 28 U.S.C. § 1331.¹⁰⁴ Justice Scalia made brief reference to the frequent confusion over barriers to plaintiff’s claims due to challenges being inappropriately construed as going to subject-matter jurisdiction but refuted this possibility in the present action by stating simply that “[a] cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact.”¹⁰⁵

b. Elucidation: The Extraterritorial Reach of the Sherman Act

Justice Scalia conformed to the idea that concerns over the extraterritorial reach of domestic laws have to do with Congress’s authority to make substantive law applicable to primary conduct that takes place beyond U.S. borders.¹⁰⁶ He began the second part of his analysis by asserting this belief quite forcefully: “The second question—the extraterritorial reach of the Sherman Act—has nothing to do with the

jurisdiction.’ But other factors, in the court’s view, including the London reinsurers’ express purpose to affect United States commerce and the substantial nature of the effect produced, outweighed the supposed conflict and required the exercise of jurisdiction in this litigation.”) (alterations in original) (citations omitted).

99. *Id.* at 798 (citations omitted).

100. *Id.*

101. *Hartford Fire*, 509 U.S. at 798.

102. *Id.* at 798–99.

103. *Id.* at 812 (Scalia, J., dissenting).

104. *Id.*

105. *Id.* at 812 (Scalia, J., dissenting) (quoting *Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953)).

106. Wasserman, *supra* note 52, at 689.

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.”¹⁰⁷ Despite the extraterritorial reach of the Sherman Act having nothing to do with the courts, Justice Scalia moved on to explain that “[t]here is, however, a type of ‘jurisdiction’ relevant to determining the extraterritorial reach of a statute . . . known as ‘legislative jurisdiction,’ or ‘jurisdiction to prescribe,’” that is relevant to determining the extraterritorial reach of a statute.¹⁰⁸ Citing to the Restatement (Third) of Foreign Relations Law, Scalia defined this jurisdiction as “the authority of a state to make its law applicable to persons or activities” and noted that it is quite separate from the “jurisdiction to adjudicate.”¹⁰⁹ He asserted, without reservation, that Congress possesses legislative jurisdiction over the acts alleged in the current complaint, and pointed out that “this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected.”¹¹⁰

Justice Scalia based the remainder of his analysis on “[t]wo canons of statutory construction”: the “presumption against extraterritoriality”¹¹¹ and the venerable doctrine handed down by Chief Justice Marshall in *Charming Betsy* that “an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹¹² According to Justice Scalia, the presumption against extraterritoriality has been overcome with respect to U.S. antitrust laws and it is now well established that the Sherman Act applies extraterritoriality, however, courts have frequently recognized that even when this presumption does not apply, “statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principals of international law.”¹¹³ As Justice Scalia puts it, “the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence.”¹¹⁴

c. The Confusion of Comity

In order to make his final determination regarding the extraterritorial reach of domestic antitrust laws, Justice Scalia relied on the principle of international comity.¹¹⁵ But as with jurisdiction, he believes that there has been a failure on the part of the courts, including the Court of Appeals in the present case, to distinguish between two distinct types of comity: “prescriptive comity,” or “comity of nations,” and “comity of the courts.”¹¹⁶ According to Justice Scalia, prescriptive comity is “the respect sovereign nations afford each other by limiting the reach of their laws” and is assumed to be incorporated into our substantive laws having extraterritorial reach.¹¹⁷ “Considering comity in this way is just part of determining whether the Sherman Act

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

108. *Id.*

109. *Id.*

110. *Id.* at 813–14.

111. *Id.* at 814.

112. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

113. *Hartford Fire*, 509 U.S. at 814–15.

114. *Id.* at 818.

115. *Id.* at 817.

116. *Id.* at 817–18.

117. *Id.* at 817.

prohibits the conduct at issue.”¹¹⁸ Based again on the Restatement (Third), Justice Scalia would have let the determination of whether comity limited the extraterritorial reach of domestic law be based on a standard of reasonableness.¹¹⁹ Based on this standard, Justice Scalia felt that an assertion of legislative jurisdiction in the present case would be considered unreasonable and, in the absence of statutory language to the contrary, it was inappropriate to assume that Congress had made such an assertion.¹²⁰ He summarized his critique of the majority opinion as follows:

It is evident from what I have said that the Court’s comity analysis, which proceeds as though the issue is whether the courts should “decline to exercise . . . jurisdiction,” rather than whether the Sherman Act covers this conduct, is simply misdirected. I do not at all agree, moreover, with the Court’s conclusion that the issue of the substantive scope of the Sherman Act is not in the cases.¹²¹

B. *United Phosphorus*

1. Falling in Line: The Majority Opinion

In *United Phosphorus*, an Indian company and a U.S. firm involved in a joint venture filed an antitrust claim against another U.S. firm alleging that the defendants “attempted to monopolize, did monopolize, and conspired to monopolize the market for certain chemicals, in violation of § 2 of the Sherman Act.”¹²² The primary issue in the case was “whether the relevant provision of FTAIA [was] jurisdictional or whether it state[d] an additional element of a Sherman Act claim.”¹²³ The defendants originally raised the issue of subject-matter jurisdiction in 1994, shortly after the case was filed, but their initial 12(b)(1) motion was denied.¹²⁴ In 2000, after considerable discovery, the defendants renewed their 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction and for summary judgment; the defendants contended that under FTAIA § 1¹²⁵ the court lacked subject-matter jurisdiction.¹²⁶ In 2001, Magistrate Judge Ian H. Levin granted the defendants’ motion to dismiss.¹²⁷

After lengthy analysis, the court held that “the district court properly treated the issue as one of subject matter jurisdiction.”¹²⁸ The appellate court’s ruling was based on a number of different factors. First and foremost was the Supreme Court’s ruling in *Hartford Fire*,¹²⁹ as well as the failure of any of the other circuits to adopt

118. *Hartford Fire*, 509 U.S. at 817–18.

119. *Id.* at 818.

120. *Id.* at 819.

121. *Id.* at 820 (internal citations omitted).

122. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d at 944 (2003).

123. *Id.*

124. *Id.*

125. FTAIA § 1 requires a “direct, substantial, and reasonably foreseeable effect on [domestic] commerce.” Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6(a) (2000).

126. *United Phosphorus*, 322 F.3d at 944.

127. *Id.* at 945.

128. *Id.* at 952.

129. *Id.* at 951 (“In *Hartford*, as well, it is not likely that references to jurisdiction are really references

the position that the FTAIA sets out an element of the claim or a basis for legislative jurisdiction.¹³⁰ The majority noted that even though there are differences between the circuits concerning the interpretation of the Act and its effect on the previous common law, “all have treated the issue as one of subject matter jurisdiction.”¹³¹ The majority also delved into the legislative history of the FTAIA to support its holding, where it determined that “jurisdiction stripping is what Congress had in mind in enacting FTAIA.”¹³² They based this determination on specific language in the legislative history that refers to the FTAIA as a “predicate for antitrust jurisdiction” as well as “establish[ing] the standards necessary for assertion of United States Antitrust jurisdiction.”¹³³

Other justifications given by the majority for supporting the jurisdictional interpretation of the FTAIA were the policy considerations:

There are good policy reasons for the prevailing approach. The extraterritorial scope of our antitrust laws touches our relations with foreign governments, and so, it seems, it is prudent to tread softly in this area. If FTAIA sets out an issue on the merits, resolution of the issue could be delayed until late in the case, and the potential for a lawsuit to have an effect on foreign markets would exist while the case remained pending. In contrast, if this important issue goes to subject matter jurisdiction, it can be resolved early in the litigation Treating the matter as one of subject matter jurisdiction reduces the potential for offending the economic policies of other nations. In short, FTAIA limits the power of the United States courts (and private plaintiffs) from nosing about where they do not belong. And the power of the courts is precisely what subject matter jurisdiction is about.¹³⁴

2. A Different Point of View: The Dissent

Judge Wood did not pull any punches in her scathing dissent, nor did she waste any time getting to the point. She referred to what she considered the key language of the statute, “shall not apply,” immediately, and made it clear that it is this “straightforward language” that should control the courts analysis.¹³⁵ Judge Wood pointed out that the issue before the court is both an issue of first impression for the Seventh Circuit, and an issue that had “never been analyzed thoroughly by any other court.”¹³⁶ She chastised the majority for adopting the jurisdictional interpretation “largely because the word ‘jurisdiction’ appears in many prior decisions of lower

to legislative, rather than subject-matter, jurisdiction. Justice Souter made it clear that he disagreed with Justice Scalia’s contention that under FTAIA what is at issue is legislative jurisdiction.”).

130. *Id.* at 950.

131. *Id.*

132. *United Phosphorus* 322 F.3d at 951.

133. *Id.* at 952.

134. *Id.*

135. *Id.* at 953 (Wood, J., dissenting).

136. *Id.*

courts and in certain materials published by the government’s antitrust enforcement agencies and the American Bar Association.”¹³⁷

Judge Wood’s complete lack of faith in the ability of any of these institutions to correctly analyze the issue is apparent forthwith. She echoed Justice Scalia’s dissent in *Hartford Fire* when she stated:

[N]either the majority nor those earlier opinions have distinguished carefully between judicial and legislative jurisdiction—or, to put it differently, between jurisdiction to decide a case and jurisdiction to prescribe a rule of law. The central question now before us is whether the FTAIA affects the former or the latter power. Given the fact that “jurisdiction is a word of many, too many, meanings,” it is plain that the analysis cannot stop with the observation that the FTAIA somehow affects “jurisdiction.”¹³⁸

Judge Wood found four “compelling reasons” why the court should adopt an “elemental” approach rather than construing the FTAIA’s test as one going to the subject-matter jurisdiction of the court: the language of the statute, the Supreme Court’s decision in *Steel Co.*, the procedural consequences, and the “long history of the application of U.S. antitrust laws to foreign conduct.”¹³⁹

a. Yeah It’s That Easy: The Language

Under Judge Wood’s reading of the FTAIA, one would “search in vain . . . for any hint” of jurisdictional stripping language, which “should be enough to tip the balance toward the ‘element’ characterization.”¹⁴⁰ Judge Wood explained that the Seventh Circuit had recognized that jurisdiction-stripping rules must be expressed clearly,¹⁴¹ which lends great weight to her earlier contention that the absence of this “express language” is enough by itself to necessitate an “elemental” characterization of the FTAIA.¹⁴² According to Judge Wood, “[l]anguage 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.”¹⁴³

b. Who Are We to Argue with the Supreme Court: *Steel Co.*

In *Steel Co.*, the Supreme Court held that the district court has jurisdiction “if the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be

137. *Id.*

138. *United Phosphorus*, 322 F.3d at 953 (internal citations omitted).

139. *Id.* at 953–4.

140. *Id.* at 954.

141. *Id.*; *Czerkies v. U.S. Dep’t of Labor*, 73 F.3d 1435, 1439 (7th Cir. 1996) (en banc) (“The circuits are in agreement: door-closing statutes do not, unless Congress expressly provides, close the door to constitutional claims.”).

142. *United Phosphorus*, 322 F.3d at 954 (Wood, J., dissenting).

143. *Id.* at 955.

defeated if they are given another.”¹⁴⁴ This holding was delivered despite the fact that the statute at issue uses the word “jurisdiction” to describe the permitted actions.¹⁴⁵ Applying this holding to *United Phosphorus*, Judge Wood contended that “the plaintiffs will have a right to recover if defendants’ activities have the requisite effect on either U.S. domestic or import commerce (and they can prove the remainder of their federal antitrust claim), and they will lose if those effects are lacking.”¹⁴⁶

Judge Wood opined that in enacting the FTAIA, Congress “established the ‘direct, substantial, and reasonably foreseeable’ effect on commerce test as an element of the plaintiff’s claim.”¹⁴⁷ Pointing out that the Supreme Court, in *Hartford Fire*, did not address the FTAIA’s effect on the case,¹⁴⁸ Judge Wood averred that the majority was wrong in suggesting that *Hartford Fire* held to the contrary.¹⁴⁹ In addition, she declared that the legal principals put forth by Justice Scalia in his dissent¹⁵⁰ were adopted by the Supreme Court in *Steel Co.*, and *United States v. Cotton*¹⁵¹ and thus the approach that she advocates is “entirely consistent” with Supreme Court doctrine.¹⁵²

c. Ludicrous Speed: The Procedural Consequences

Judge Wood wrote about the potential waste of judicial resources if the FTAIA is treated as a jurisdictional inquiry. She stated that jurisdictional inquiries such as those needed to evaluate diversity or whether a claim “arises under” federal law are “well-defined and do not normally consume enormous judicial resources,”¹⁵³ however:

In contrast, an 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. Indeed, the record in one famous international antitrust case, *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, should give advocates of the “subject-matter jurisdiction” approach pause. That case was originally filed in the district court in 1973. In 1974, the district court dismissed for want of “subject-

144. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (citing *Bell v. Hood*, 327 U.S. 678, 685 (1946)).

145. 42 U.S.C. §§ 11046(a)(1), 2(c), (2009).

146. *United Phosphorus*, 322 F.3d at 955 (Wood, J., dissenting).

147. *Id.*

148. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796 n.23 (1993).

149. *United Phosphorus*, 322 F.3d at 956 (Wood, J., dissenting).

150. *See Hartford Fire*, 509 U.S. at 812 (“I believe that the District Court had subject-matter jurisdiction over the Sherman Act claims against all the defendants Respondents asserted nonfrivolous claims under the Sherman Act, and 28 U.S.C. § 1331 vests district courts with subject-matter jurisdiction over cases ‘arising under’ federal statutes.”).

151. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) (“*Bain’s* [121 U.S. 1 (1887)] elastic concept of jurisdiction is not what the term ‘jurisdiction’ means today, *i.e.*, the courts’ statutory or constitutional power to adjudicate the case.” (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998))).

152. *United Phosphorus*, 322 F.3d at 956 (Wood, J., dissenting).

153. *Id.* at 957.

matter jurisdiction.” The Ninth Circuit reversed in 1976. Six years of discovery then took place, in which the parties explored the effects of the alleged conspiracy on U.S. commerce. In 1983, the district court again dismissed the action for want of jurisdiction. Up on appeal again to the Ninth Circuit, the case was affirmed, though on somewhat different grounds. In 1985, the Supreme Court denied certiorari, with a note indicating that Justice White and Blackmun would have granted review. Thus, at least 12 years after the case was filed, the “jurisdictional” issue was finally resolved. Had it been resolved in the affirmative, there is no telling how many more years would have passed before the litigation was over. This is no way to decide whether the federal courts are competent to hear a case.¹⁵⁴

In an only slightly better display of judicial efficiency, *United Phosphorus* itself took eight years, twenty-four depositions, and 8,000 pages of exhibits to resolve the jurisdictional issue.¹⁵⁵

Judge Wood ended her discussion of the procedural implications with a rather blunt synopsis:

The subject-matter jurisdiction characterization makes no sense, either from the point of view of the policies being furthered by the FTAIA, or from the standpoint of judicial administration. We should not adopt a perverse decision just because parties have chosen to file motions under Rule 12(b)(1) instead of Rule 12(b)(6) or Rule 56, or because courts have unquestioningly adopted the diction of ‘subject-matter jurisdiction’ without careful examination.¹⁵⁶

d. History Lesson: Application of U.S. Antitrust Laws to Foreign Conduct

Judge Wood ended her defense of an “elemental” approach to the FTAIA with a review of the history of the application of U.S. antitrust laws to foreign conduct.¹⁵⁷ She began, of course, with *American Banana*, maintaining that nothing in the language of the decision suggested that the court thought that it was dealing with an issue of subject-matter jurisdiction in the sense of the court’s power to adjudicate.¹⁵⁸ “It was the legislative branch, in short, which the Court thought had not reached out to cover an intergovernmental dispute affecting international trade in bananas. There was not a hint that the federal courts had no competence to decide that the Sherman Act did not reach that far.”¹⁵⁹

Judge Wood then turned to *Alcoa* and its generation of voluminous scholarly writing on the subject of prescriptive jurisdiction, culminating in the Restatement

154. *Id.* (internal citations omitted).

155. *Id.* at 944.

156. *Id.* at 959 (Wood, J., dissenting).

157. *Id.*

158. *United Phosphorus*, 322 F.3d at 959 (Wood, J., dissenting).

159. *Id.*

(Third) of Foreign Relations Law of the United States.¹⁶⁰ Judge Wood concluded that “the domestic concept of subject-matter jurisdiction has no bearing on the question whether the United States validly prescribed a certain rule of law.”¹⁶¹ Relying on section 415, which covers the prescriptive jurisdiction in cases dealing with anticompetitive activities, specifically comment b,¹⁶² Judge Wood attempted to nullify the majority’s reliance on the language found in House Report No. 97-686 to support their position that Congress intended the FTAIA to be a jurisdictional limitation:

It is this topic of prescriptive jurisdiction, and how far the U.S. antitrust laws were actually reaching, that was before Congress when it enacted the FTAIA. (While it is true that the House Report on the FTAIA uses the word “jurisdiction” with some regularity, it also speaks repeatedly about whether U.S. antitrust law should be applied to particular transactions. It is therefore impossible to draw any firm conclusions from that brief document that will assist us in resolving the issue presented before us.)¹⁶³

Finally, Judge Wood discussed how the FTAIA is being handled in modern day federal courts. She concluded that with respect to modern decisions such as *Empagran*, *Kruman*, and *Den Norske*, there is a discrepancy between “what the court said in passing” and what the court did.¹⁶⁴ Judge Wood saw *Empagran* “as a case acknowledging that a dismissal for failure to meet the standards of the FTAIA is one for failure to state a claim” instead of lack of subject-matter jurisdiction.¹⁶⁵ Discussing the *Kruman* case, Judge Wood pointed out that “the court paid no attention to the issue now before us; it was concerned instead about the type of effect on domestic (or import) commerce the FTAIA requires before conduct could be ‘regulated by the Sherman Act’” which severely undercuts the majority’s reasoning.¹⁶⁶

C. *Don’t Call it a Comeback: The Rise of Comity in Empagran*

In 2004 the U.S. Supreme Court sat to hear its second case regarding the FTAIA.¹⁶⁷ While the main issue in this case was the nexus of effects required between domestic and foreign injury,¹⁶⁸ another important impact that it had was

160. *Id.* at 960.

161. *Id.* at 961.

162. Comment b states that “Congress apparently believed that activity whose anti-competitive effects are felt only in foreign states should not be a concern of United States antitrust regulation, but that activities carried out abroad that have ‘direct, substantial, and reasonably foreseeable’ effect in the United States or on the import trade of the United States (as by limiting imports or fixing the price of imported products) should be subject to the Sherman and FTC Acts.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 415 cmt. b (1987).

163. *United Phosphorus*, 322 F.3d at 961–62 (Wood, J., dissenting) (internal citations omitted).

164. *Id.* at 963.

165. *Id.*

166. *Id.* at 963–64.

167. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

168. *Id.*

settling one of the major unresolved issues from *Hartford Fire*,¹⁶⁹ namely that of the role of comity. In a unanimous decision, the Supreme Court reversed the D.C. Circuit holding that the FTAIA “significantly limited the ability of foreign firms to invoke the United States antitrust laws to remedy foreign injuries,”¹⁷⁰ and they did it based on principals of prescriptive comity.

We conclude that principles of prescriptive comity counsel against the Court of Appeals’ interpretation of the FTAIA. Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America’s antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.¹⁷¹

Not only did the court base this decision on the principals of prescriptive comity, but in doing so it also favorably cited to Justice Scalia’s dissent from *Hartford Fire*,¹⁷² eliminating any doubt as to whether, when referring to prescriptive comity, it was referring to the interpretation that Justice Scalia put forward in that case. The Supreme Court’s overt acceptance of the principal of prescriptive comity when analyzing the FTAIA will have significant impact if and when the FTAIA is interpreted as a limitation on the extraterritorial applicability of the Sherman Act.

V. LAYING DOWN THE LAW: *ARBAUGH* AND ITS EFFECTS

A. *What Does Fifteen Mean: The Case*

On February 22, 2006 the United States Supreme Court handed down a decision in a Title VII¹⁷³ case that may have significant impact on the future of the FTAIA.¹⁷⁴ The central issue in this case was the very same issue that caused such consternation for Judge Wood in *United Phosphorus*:¹⁷⁵ “the distinction between two sometimes confused or conflated concepts: federal-courts ‘subject-matter’ jurisdiction over a controversy; and the essential ingredients of a federal claim for

169. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 765, 798 n.24 (1993) (“Justice Scalia contends that comity concerns figure into the prior analysis whether jurisdiction exists under the Sherman Act. This contention is inconsistent with the general understanding that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that *concerns of comity come into play, if at all*, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction”) (internal citations omitted and emphasis added).

170. AREEDA & HOVENKAMP, *supra* note 3, at 307.

171. *Empagran*, 542 U.S. at 169.

172. *Id.* at 164.

173. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2009) (prohibiting employment discrimination based on race, color, religion, sex and national origin).

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

175. See *United Phosphorus*, 322 F.3d at 953 (Judge Wood criticizing the majority for their failure to distinguish “carefully between judicial and legislative jurisdiction”).

relief.”¹⁷⁶ It seems that just over three years after that decision, the Supreme Court was finally ready to rise to her challenge to “distinguish[] carefully between judicial and legislative jurisdiction.”¹⁷⁷

Jennifer Arbaugh brought a Title VII action in federal court against her former employer, Y & H Corporation, charging sexual harassment.¹⁷⁸ Two weeks after the court entered judgment for Arbaugh, Y & H moved to dismiss the entire action for lack of subject-matter jurisdiction.¹⁷⁹ The defendants based their 12(b)(1) motion to dismiss on an assertion that they had fewer than fifteen employees and were therefore not amenable to suit under Title VII.¹⁸⁰ The trial court, believing that the fifteen or more employee requirement was a jurisdictional element, considered itself obligated to grant the motion to dismiss and vacated its prior judgment and dismissed Arbaugh’s Title VII claim with prejudice.¹⁸¹ The Fifth Circuit affirmed, but in a unanimous decision, the Supreme Court rejected this categorization and held that “the 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.”¹⁸²

The Supreme Court noted the confusion that often arises in the federal courts over the distinction between jurisdictional and substantive elements:

On the subject matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous. “Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff’s need and ability to prove the defendant bound by the federal law asserted as the predicate for relief—a merits related determination.” Judicial opinions, the Second Circuit incisively observed, “often obscure the issue by stating that the court is dismissing ‘for lack of jurisdiction’ when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim.” We have described such unrefined dispositions as “drive-by jurisdictional rulings” that should be accorded “no precedential effect” on the question whether the federal court had authority to adjudicate the claim in suit.¹⁸³

The Court explained that Congress does have the power to make certain statutory elements “jurisdictional,” but, “neither § 1331, nor Title VII’s jurisdictional provision specifies any threshold ingredient akin to 28 U.S.C. § 1332’s monetary floor. Instead, the fifteen employee threshold appears in a separate provision that does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.”¹⁸⁴

176. *Arbaugh*, 546 U.S. at 503.

177. *United Phosphorus*, 322 F.3d at 953.

178. *Arbaugh*, 546 U.S. at 504.

179. *Id.* at 503–04.

180. *Id.* at 504.

181. *Id.*

182. *Id.*

183. *Id.* at 511 (citations omitted).

184. *Arbaugh*, 546 U.S. at 515. (citations omitted).

In an attempt to clear up the confusion over this issue once and for all, the Supreme Court fashioned a “readily administrable bright line” rule.¹⁸⁵ “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.”¹⁸⁶

B. Delayed Reaction: The Effects of Arbaugh

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. However, having argued this point from the beginning, and having been one of its most eloquent champions, I can only imagine that Judge Wood is now feeling the terrible pangs of frustration at the conspicuous lack of an impact that the *Arbaugh* ruling has had regarding the FTAIA. Granted, there have been fewer than twenty cases concerning the FTAIA heard in federal courts since *Arbaugh*’s new “bright line” rule was handed down,¹⁸⁷ and only two of those have made it to courts of appeals.¹⁸⁸ Both of those cases however, have continued to treat the FTAIA as a jurisdictional limitation and neither case made any reference to the *Arbaugh* decision.¹⁸⁹ Both were dismissed for lack of subject-matter jurisdiction.¹⁹⁰ As the only two cases that have made it to the appellate level post-*Arbaugh*, the most bothersome aspect is that each of these cases had glaringly obvious opportunities to apply *Arbaugh*’s rule.

In *MSG*, the defendants filed a motion at the district court level to dismiss the claim for both lack of subject-matter jurisdiction and for failure to state a claim.¹⁹¹ The district court initially denied the motion, but after reconsideration it was granted.¹⁹²

[T]he appellees moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim, alleging that the FTAIA precluded the claim from being brought under the Sherman Act. The district court denied the appellees’ motion. Following the D.C. Circuit’s decision in *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, (*Empagran II*),

185. *Id.* at 502.

186. *Id.* at 515–16. (citations omitted).

187. *See, e.g.*, *Animal Sci. Prod., Inc. v. China Nat’l Metals & Minerals Imp. & Exp. Corp.*, 596 F. Supp. 2d 842, 842 (D.N.J., December 30, 2008); *Commercial St. Express, LLC v. Sara Lee Corp.*, No. 08 C 1179, 2008 WL 5377815, at *3 (N.D. Ill. Dec. 18, 2008); *Emerson Elec. Co. v. Le Carbone Lorraine*, No. 05-6042, 2008 WL 4126602, at *1 (D.N.J. Aug. 27, 2008); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2008 WL 2219837, at *1 (N.D. Cal. May 27, 2008); *Sun Microsystems, Inc. v. Hynix Semiconductor, Inc.*, 608 F. Supp. 2d 1166, 1174 (N.D. Cal. 2009).

188. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 981 (9th Cir. 2008); *In re Monosodium Glutamate (MSG) Antitrust Litig.*, 477 F.3d 535 (8th Cir. 2007).

189. *DRAM*, 546 F.3d at 985; *MSG*, 477 F.3d at 537.

190. *See DRAM* at 985 n.3 (“Accordingly, we assume without deciding that the district court correctly dismissed under Rule 12(b)(1).”); *MSG*, 477 F.3d at 536 (“Appellants appeal from the district court’s dismissal of their complaint for lack of subject matter jurisdiction. We affirm.”).

191. *MSG*, 477 F.3d at 537.

192. *Id.*

the appellees filed a motion for reconsideration of the district court's order denying their motion to dismiss. The district court, relying on *Empagran II*, granted the motion and dismissed the complaint with prejudice, holding that the appellants had not stated a claim under the Sherman Act because they had not shown that the domestic effect of the global price-fixing cartel proximately caused their injuries.¹⁹³

The Eighth Circuit reviewed the district court's dismissal for lack of subject-matter jurisdiction *de novo*.¹⁹⁴ In conducting their review of subject-matter jurisdiction, the Eighth Circuit made repeated reference to the appellant's failure to satisfy the causation standard that had recently been set up in *Empagran* and quoted the district courts holding that "the appellants therefore failed to state a claim under the Sherman Act."¹⁹⁵ Unfortunately, the appellate court equated this failure to state a claim with a failure to meet the second requirement of the FTAIA (giving rise to a claim) and used this as its basis for upholding the dismissal for lack of subject-matter jurisdiction.¹⁹⁶ It is difficult to understand why the Eighth Circuit did not take this opportunity to apply *Arbaugh* to the FTAIA, but instead perpetuated the confusion between subject-matter jurisdiction and the merits of a claim distinction that *Arbaugh* was intended to clear up.

Even more troubling is the Ninth Circuit's failure in this capacity, especially since they went so far as to recognize the confusion between the jurisdiction and the merits:

The district court granted defendants' motion to dismiss, which was premised solely on jurisdictional grounds. It is unclear, however, 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 proximate cause as an element of the claim. *Compare Empagran S.A. v. F. Hoffmann-LaRoche*, (affirming dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction), with *In re Elevator Antitrust Litigation*, (affirming dismissal on 12(b)(6) grounds). The Supreme Court's decision in *Empagran I* provides little guidance because, although the district court had dismissed under Rule 12(b)(1), the Court did not explicitly address whether the issue was properly viewed as one of federal question subject matter jurisdiction or of a failure to state a claim under federal law. We decline to resolve the question, because it was not argued by the parties and in this case the result and analysis are the same. Accordingly, we assume without deciding that the district court correctly dismissed under Rule 12(b)(1).¹⁹⁷

193. *Id.* (citations omitted).

194. *Id.*

195. *Id.* at 538–39.

196. *Id.*

197. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 985 n.3 (9th Cir. 2008).

While it is true that the Court in *Empagran I* didn't decide the issue regarding the appropriate application of the FTAIA, the *Arbaugh* decision did.¹⁹⁸ It is even more disheartening in my view that the Court believes it is unnecessary to "resolve the question" because the "result and analysis are the same."¹⁹⁹ Under a 12(b)(1) motion, the Court may look beyond the face of the complaint to determine if it has jurisdiction,²⁰⁰ while under a 12(b)(6) motion, the Court must take the allegations in the complaint as true.²⁰¹ If there is a genuine issue regarding facts, that is an issue for the fact finder, usually a jury, rather than for the Court.²⁰² And as has already been discussed, the resulting procedural implications of dismissal under these two rules are dramatically different.²⁰³

It seems that the *Arbaugh* decision has had little to no precedential effect on the treatment of the FTAIA as of yet. The "readily administrable bright line rule," while certainly bright, has yet to be administered to the FTAIA. It leaves one to ask the question, why? There are a number of possibilities ranging from the sheer lack of FTAIA cases to the general recalcitrance of federal courts to make drastic changes. Whatever the reason, the fact of the matter is that since this rule was delivered in a Title VII case rather than in an FTAIA case, it has had a hard time making an impact on the extraterritoriality of our antitrust laws.

VI. THE TIMES THEY ARE A CHANGING: THE FUTURE OF THE FTAIA

Despite an unfortunately slow start, the FTAIA now exists in a post-*Arbaugh* world. So the question really is not one of *if Arbaugh* will bring about a change, but rather *when* that change will occur, and more importantly what that change will mean. Businessmen, attorneys, judges, U.S. trading partners, and members of Congress should start thinking now about how this almost inevitable shift in the interpretation of the FTAIA will affect them. How will the application of the FTAIA be modified if its elements are treated as substantive limitations rather than jurisdictional limitations?

First, there will be procedural implications. It will be much harder for defendants to have FTAIA claims dismissed for lack of subject-matter jurisdiction. This will be an important consideration in light of the significant differences between 12(b)(1) and 12(b)(6) motions. The question of when, where, and who will decide the issues will be altered; and the "irresistible invitation to the losing party in an international antitrust case to invite the Supreme Court to revisit the complex

198. *Id.* at 983 ("The Supreme Court's decision in *Empagran I* provides little guidance because, although the district court had dismissed under Rule 12(b)(1), the Court did not explicitly address whether the issue was properly viewed as one of federal question subject matter jurisdiction or of a failure to state a claim under federal law."); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character. Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue.").

199. *DRAM*, 546 F.3d at 983.

200. *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 990 (7th Cir. 2000).

201. *Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

202. *Miller*, *supra* note 61, at 1083.

203. *See* pt. 3(A), *supra*.

question²⁰⁴ will no longer be so readily available. Another procedural change is that the requirements of the FTAIA will become an additional element needing to be properly pled and proved as an element of certain Sherman Act claims.²⁰⁵

While procedure is an important aspect of the interpretation of the FTAIA and is the vehicle through which the courts are currently analyzing this statute, the procedural effects are best understood in light of their substantive implications. Procedural changes are well and good, but the heart of the matter really goes to how such a paradigmatic shift will eventually influence the underlying policy concerns of both the courts and the legislature. The debate in *United Phosphorus* illustrates the tension over these concerns. The majority claims that there are “good policy reasons for the prevailing (jurisdictional) approach” including timely resolution of issues in FTAIA cases and reduction of “the potential for offending the economic policies of foreign nations.”²⁰⁶ Judge Wood counters this argument by illustrating the waste of judicial resources that can occur when the FTAIA is treated as a limit on jurisdiction²⁰⁷ as well as asserting that a substantive approach will actually be more helpful in avoiding diplomatic tensions than a jurisdictional one.²⁰⁸

Although the defendants argued that the policies behind the FTAIA—particularly the avoidance of diplomatic tensions with other countries—are better served by the jurisdictional characterization, that assumes that district courts will systematically reject jurisdiction. There is no reason at all to make such an assumption. If district courts find the FTAIA test satisfied, foreign parties will be stuck with deferential appellate review of those facts. This also means that appellate courts will not be free to give plenary consideration to the sensitive issues of international comity that can arise in these cases—issues better resolved at the level of the court of appeals or the Supreme Court than by a solitary district judge.²⁰⁹

This brings us to a discussion of the second major consideration: what role comity will play in the future.

It is apparent that the Supreme Court does not want the FTAIA to be used as a vehicle to expand the extraterritorial reach of the Sherman Act.²¹⁰ If lack of subject-matter jurisdiction is no longer a viable option to rein in the extraterritorial reach of the Sherman Act, then prescriptive comity may be the answer that they turn to.

204. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 958 (7th Cir. 2003) (Wood, J., dissenting).

205. *See id.* at 944 (“Today, for the first time in this court, we encounter the Foreign Trade Antitrust Improvements Act, a 1982 amendment to the Sherman Act, which affects its reach in foreign commerce. The primary issue involves whether the relevant provision of FTAIA is jurisdictional or whether it states an additional element of a Sherman Act claim. This in turn affects how a court deals with it and, in this case, what the outcome will be.”) (citations omitted).

206. *Id.* at 952.

207. *Id.* at 957 (Wood, J. dissenting).

208. *Id.* at 958.

209. *Id.* at 958–59.

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

Unfortunately, adoption of this approach will leave the Supreme Court in a very awkward position.

In the Supreme Court's latest decision on the FTAIA²¹¹ it referred frequently to notions of prescriptive comity,²¹² the same kind of comity that Justice Scalia referred to in his dissent in *Hartford Fire*.²¹³ Judge Wood also made references to prescriptive comity in her *United Phosphorus* dissent.²¹⁴

On the one hand, if the court adopts Justice Scalia's interpretation of the role of comity in determining the extraterritorial reach of the Sherman Act, then the Court will effectively limit the application of domestic antitrust laws to foreign conduct.²¹⁵ There is a problem though; under this approach, prescriptive comity is used as a threshold test to limit the legislative jurisdiction of the Sherman Act.²¹⁶ In deciding whether the Act even applies to certain conduct, the court would be required to conduct a reasonability test at the beginning of every claim.²¹⁷ This is exactly the kind of "case by case comity analysis" that the Court declared unworkable in *Empagran*.²¹⁸

On the other hand, if the Court declines to adopt Scalia's prescriptive comity threshold analysis then the extraterritorial reach of U.S. antitrust laws will be greatly expanded, which the Supreme Court previously declared was not the intent of the FTAIA.²¹⁹ It is possible that the Supreme Court may try to distinguish the next FTAIA case that it hears from its holding in *Arbaugh*, yet, in my personal opinion, the close tie between Title VII and the Sherman Act created by their link to 28 U.S.C. § 1331 would make this a seemingly impossible feat. It would require a deft pen and no small amount of judicial chicanery for the Supreme Court to convincingly distinguish the two.

In recognizing the waste of judicial resources that can result from misconstruing statutory elements as going to the subject-matter jurisdiction of federal courts, the Supreme Court has made it clear that in order for a threshold limitation on a statute's scope to be considered jurisdictional Congress must state this explicitly.²²⁰ When it comes to this question, it has decided that the wisest course of action is to "leave the ball in Congress's court."²²¹ It is with only the slightest hint of reservation

211. *Id.*

212. *See id.* at 169 ("We conclude that principles of prescriptive comity counsel against the Court of Appeals' interpretation of the FTAIA.").

213. *Hartford Fire Ins. Co. v. California*, 509 U.S. 746, 817 (1993).

214. *United Phosphorus*, 322 F.3d at 959.

215. *See Hartford Fire*, 509 U.S. at 818 ("Some antitrust courts, including the Court of Appeals in the present cases, have mistaken the comity at issue for the 'comity of courts,' which has led them to characterize the question presented as one of 'abstention,' that is, whether they should 'exercise or decline jurisdiction.' As I shall discuss, that seems to be the error the Court has fallen into today. Because courts are generally reluctant to refuse the exercise of conferred jurisdiction, confusion on this seemingly theoretical point can have the very practical consequence of greatly expanding the extraterritorial reach of the Sherman Act.") (citations omitted).

216. *Id.*

217. *Id.*

218. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 156 (2004).

219. *See id.*, ("[T]he FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce.").

220. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502 (2006).

221. *Id.*

that I say, *when* the FTAIA is determined to be a substantive limitation rather than a jurisdictional one by the courts, that the ball will be squarely back in Congress's court. If the legislature intended or has subsequently come to intend that the FTAIA be treated as a limit on subject-matter jurisdiction then it will be up to them to rewrite the FTAIA and state this intent explicitly. Until that time, I would urge the lower courts to take the initiative, heed the advice of the Supreme Court, and begin properly interpreting the FTAIA as a substantive test, giving “‘drive-by jurisdictional rulings’ . . . ‘no precedential effect’”²²²

222. *Id.* at 511.