

# An Overseas Sea Change For U.S. Antitrust Laws? New Developments in the Interpretation of the Foreign Trade Antitrust Improvements Act

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Did it just get easier for plaintiffs to apply U.S. antitrust laws to foreign conduct? Quite possibly, yes. In a recent, thorough opinion, the Third Circuit lowered the bar for plaintiffs seeking recovery for anticompetitive behavior that occurs overseas but affects U.S. commerce. In *Animal Science Products, Inc. v. China Minmetals Corp., et al.*,<sup>[1]</sup> the court overturned its previous rulings (and at the same time set itself apart from other circuits) interpreting the Foreign Trade Antitrust Improvements Act ("FTAIA"),<sup>[2]</sup> the statute that governs the extraterritorial application of U.S. antitrust laws; the panel rejected the prevailing view that the FTAIA enhances the burden borne by plaintiffs to establish federal court jurisdiction in cases involving overseas conduct, and held that the statute instead merely adds an element to an antitrust cause of action, one that defendants must rebut to prevail on a motion to dismiss. Under the Third Circuit's new law, defendants will find it more difficult to win early dismissal, and avoid expensive discovery, in antitrust cases involving foreign conduct affecting U.S. commerce. Moreover, there is now a circuit split that invites Supreme Court attention. Given the increase, and increasing significance, of global trade, this is an invitation the Court should accept.

## Overview of the Issues

The FTAIA was enacted to put well-defined limits on the application of U.S. antitrust laws to conduct that occurs overseas; under the Act, U.S. antitrust laws do not reach conduct involving trade or commerce with foreign nations unless it has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce (including, e.g., imports and exports). Previously, the Third Circuit, in line with decisions in other circuits, treated this U.S. effects requirement as a jurisdictional limitation on the ability of U.S. courts to hear plaintiffs' antitrust claims based on foreign conduct; unless plaintiffs offer evidence of U.S. impact, usually at the outset of the case, they are vulnerable to dismissal from U.S. federal court for lack of subject-matter jurisdiction. In *Animal Science*, the Third Circuit rejected that jurisdictional interpretation in favor of one that treats the U.S. effects requirement as a substantive element of an antitrust claim; while plaintiffs must plead and eventually prove U.S. commercial effects, they need not do so to establish U.S. federal court jurisdiction. The difference, while seemingly subtle, may have profound effects on plaintiffs' ability to sue and recover from companies engaged in conduct that occurs overseas but affects U.S. commercial activity, because the standards for a motion to dismiss on jurisdictional grounds differ in important ways from those governing a motion to dismiss for failure to state a claim or for summary judgment. If other circuits follow suit, or the Supreme Court forces them to, plaintiffs even outside the Third Circuit will have a far easier time reaching anticompetitive foreign conduct that harms them through its impact on U.S. markets.

### **The FTAIA and Its Troubles**

The FTAIA was enacted in 1982 to address confusion about the extraterritorial reach of U.S. antitrust laws. Prior to its enactment, the extent to which foreign conduct fell within the purview of U.S. antitrust laws was governed by a two-part test developed at common law. Anticompetitive behavior occurring entirely overseas would be subject to U.S. competition laws only if the actors "intended to affect imports and did affect them."<sup>[3]</sup> The FTAIA eliminated the intent element in favor of an enhanced effects test under which U.S. antitrust laws would apply to foreign conduct only if it has "a direct, substantial, and reasonably foreseeable effect" on domestic markets (including both imports and exports).

Since its enactment, the FTAIA has been roundly criticized for its ambiguity and opacity. [4] Courts have struggled, for example, with the statute's use of the concept of "direct" effects on U.S. commerce. [5] Courts also have reached differing conclusions on whether U.S. impact must be both "direct" and "substantial"; while most courts have required domestic effects to be both direct and substantial, some have viewed the two requirements disjunctively. [6] A further ambiguity in the statute, whether it requires the domestic effect of defendants' foreign conduct to have caused the very injury that the plaintiff is suing over rather than a hypothetical injury to a would-be U.S. plaintiff (the latter of which would permit a foreign plaintiff to sue a foreign defendant in a U.S. court under U.S. antitrust laws over entirely foreign conduct and foreign injury), was resolved by the Supreme Court in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, [7] which held that a claim under U.S. antitrust laws requires the domestic effects of the objected-to foreign conduct to have caused the plaintiff's injury.

### **The Jurisdiction/Substantive Element Debate**

The latest, and perhaps most fundamental, issue to frustrate attempts to decipher the FTAIA concerns whether its effects test represents a jurisdictional limit on the ability of U.S. courts to hear an antitrust claim concerning foreign conduct, or instead constitutes a substantive element that must be satisfied for plaintiffs to have an antitrust cause of action. A substantive cause of action has been likened to a ticket permitting a plaintiff to enter the federal judicial process, and the jurisdiction of a federal court has been viewed as the power that allows that court to punch plaintiff's ticket. [8] The question here is whether Congress set forth the effects test as an element plaintiffs must satisfy to acquire a ticket to the federal judicial process, or as a limit on U.S. courts' ability to punch such tickets.

### **Why the Jurisdiction/Substantive Element Debate Matters**

This may seem like an elusive distinction, devoid of real substance -- after all, whether the FTAIA's effects test is a jurisdictional requirement or an element in a cause of action, it must still be satisfied for a plaintiff to prevail in court. There are, however, tremendous practical implications flowing from the resolution of this issue. If the test is jurisdictional, then a court confronted with it in a motion to dismiss for lack of jurisdiction under Federal Rule of Procedure 12(b)(1) may look beyond the four corners of the plaintiff's complaint and determine whether there is evidence sufficient to establish the court's subject-matter jurisdiction over the controversy; and, in such factual (as opposed to facial) challenges to the court's jurisdiction, the plaintiff bears the burden of adducing such evidence, likely without the benefit of discovery or an opportunity to develop an appropriate record, and without the presumption of truthfulness of its allegations.<sup>[9]</sup> In the *Animal Science* case itself, for example, "the District Court engaged in extensive fact-finding and held that the FTAIA deprived it of subject matter jurisdiction."<sup>[10]</sup> If, however, the test is an element in an antitrust cause of action, then a court confronted with the question in a motion to dismiss for failure to state claim under Rule 12(b)(6) may not look beyond the complaint, and must take all well-pleaded allegations as true, or treat the motion as one for summary judgment; in either case, the defendant bears the burden of persuasion.<sup>[11]</sup> Under the Third Circuit's new law rejecting the jurisdictional interpretation of the test, defendants will face greater difficulty achieving early dismissal of FTAIA cases because they will be confined to the more plaintiff-friendly Rule 12(b)(6) or summary judgment context.

The Third Circuit, moreover, lowered the bar for plaintiffs even further by interpreting the test more favorably to plaintiffs in two further respects. First, whereas the District Court in *Animal Science* held that defendants are beyond the reach of U.S. antitrust laws unless they are "physical importers of goods," the Third Circuit rejected that requirement, saying that "the relevant inquiry is whether the defendants' alleged anticompetitive behavior 'was directed at an import market.'"<sup>[12]</sup> Anticompetitive conduct falls within the purview of U.S. antitrust laws, in other words, even if it merely "target[s] import goods or services."<sup>[13]</sup> Second, the Third Circuit confirmed, contrary to the District Court's view, that the FTAIA's effects test "does not contain a 'subjective intent' requirement"; it is sufficient if U.S. effects would be "reasonably foreseeable" to "an objectively reasonable person."<sup>[14]</sup>

## **How the Third Circuit Came To Reject the Jurisdictional Interpretation of the FTAIA**

It would be a mistake to take the Third Circuit's *Animal Science* decision lightly. It is a carefully reasoned opinion that derives support from the Supreme Court's decision in *Arbaugh v. Y&H Corp.*,<sup>[15]</sup> and aligns itself with Judge Wood's meticulous dissent in *United Phosphorus, Ltd. v. Angus Chemical Co.*<sup>[16]</sup> The panel in *Animal Science* defined its task to be to

determine whether, in enacting the FTAIA, Congress legislated pursuant to its Commerce Clause authority to articulate substantive elements that a plaintiff must satisfy to assert a meritorious claim for antitrust relief or whether Congress acted pursuant to its Article III powers to define the jurisdiction of the federal courts.<sup>[17]</sup>

The panel found the means to fulfill this task in the Supreme Court's recent *Arbaugh* decision. In *Arbaugh*, the Supreme Court authored a bright-line rule to distinguish between statutory elements that are jurisdictional and those that articulate a "substantive merits" limitation:

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.<sup>[18]</sup>

After noting that the statutory text of the FTAIA is "wholly silent in regard to the jurisdiction of the federal courts," the Third Circuit concluded that the FTAIA is a nonjurisdictional statute.<sup>[19]</sup>

### **A Circuit Split Ripe for Supreme Court Attention**

In reaching this conclusion, the Third Circuit overturned its own previous position,<sup>[20]</sup> and expressly disagreed with the Seventh Circuit's decision in *United Phosphorus*, which predated *Arbaugh*. Indeed, the *Animal Science* rejection of the jurisdictional interpretation of the FTAIA is also at odds with the views of the numerous other circuits.<sup>[21]</sup> Thus, there is now a circuit split on this issue. Though *MSG* and *DRAM* were both decided after *Arbaugh*, neither acknowledges *Arbaugh*'s bright-line jurisdictional rule. In light of the Third Circuit's application of *Arbaugh* to the FTAIA jurisdictional debate, the issue may now be framed in a way that is ripe for Supreme Court attention.

### **Practical Takeaways**

*Animal Science* changes the nature of Third Circuit antitrust litigation addressing foreign conduct. It remains to be seen, however, whether other circuits will follow, or be forced to do so by the Supreme Court. Plaintiffs and defendants in all jurisdictions, however, would be prudent to prepare for a new world order in FTAIA litigation

<sup>[1]</sup> No. 10-2288 (3d Cir. Aug. 17, 2011).

<sup>[2]</sup> 15 U.S.C. 6a.

<sup>[3]</sup> *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 444 (2d Cir. 1945).

<sup>[4]</sup> See Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, at 288 (3d ed. 2006); Max Huffman, "A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act," 44 *Hous. L. Rev.* 285, 286 (2007).

<sup>[5]</sup> Compare, for example, *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 555, 561 (D. Del. 2006), and *United States v. LSL Biotechnologies*, 379 F.3d 672, 680-81 (9th Cir. 2004), both of which adhere to a very strong proximate cause concept, with the legislative history of the statute at H.R. Rep. No. 97-686, pts. D(4), E(2) (1982), which reflects a much looser view that mere "spillover" effects of foreign cartels on domestic markets is sufficiently "direct" to invoke U.S. antitrust law.

<sup>[6]</sup> See, e.g., *Papst Motoren GmbH & Co. v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F. Supp. 864, 868 (S.D.N.Y. 1986).

<sup>[7]</sup> 542 U.S. 155 (2004).

[8] See Howard M. Wasserman, "Jurisdiction and Merits," 80 Wash. L. Rev. 643, 676 (2005).

[9] *Animal Science* at 16 n.9; see also *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000).

[10] *Animal Science* at 6 (citing *Animal Science Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, 702 F. Supp. 2d 320 (D.N.J. 2010)); see also *Carpet Group*, 227 F.3d at 65-70 (describing extensive evidentiary submissions, not all of which were credited, in connection with defendants' Rule 12(b)(1) motion).

[11] *Animal Science* at 16 n.9.

[12] *Animal Science* at 17 (citing *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 303 (3d Cir. 2002), and *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395 (2d Cir. 2002)).

[13] *Animal Science* at 18.

[14] *Animal Science* at 20.

[15] 546 U.S. 500 (2006).

[16] 322 F.3d 942 (7th Cir. 2003). See also Justice Scalia's dissent in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993). For an extended discussion of FTAIA jurisprudence that to a large extent anticipates the Third Circuit's *Animal Science* decision, see Edward Valdespino, "Shifting Viewpoints: The Foreign Trade Antitrust Improvement Act, a Substantive or Jurisdictional Approach," *Texas International Law Journal*, Vol. 45, Nbr. 2 (January 2009).

[17] *Animal Science* at 11-12.

[18] *Arbaugh*, 546 U.S. at 515-16.

[19] *Animal Science* at 14.

[20] See *Turicentro*, 303 F.3d at 300-02, and *Carpet Group*, 227 F.3d at 71-73 (3d Cir. 2000).

[21] See, e.g., *Filitech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998); *In re Monosodium Glutamate (MSG) Antitrust Litig.*, 477 F.3d 535 (8th Cir. 2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981 (9th Cir. 2008).