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Herbert J. Hovenkamp

University of Pennsylvania Carey Law School

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Antitrust's "Jurisdictional" Reach Abroad

Herbert Hovenkamp*

Until recently decisions interpreting the Foreign Trade Antitrust Improvement Act (FTAIA)¹ have held or assumed that the provision states a limitation on the subject matter jurisdiction of the federal courts rather than a limitation on the merits of the antitrust claim.² In many decisions the issue has limited practical importance, because the complaint would have been dismissed on either interpretation of the statute. For example, in its *Empagran* decision the Supreme Court appeared to assume that the FTAIA is jurisdictional.³ Nevertheless, the decision appears to have been based exclusively on the allegations contained in the complaint, rather than independent fact findings by the judge.⁴ If the complaint itself is insufficient to state a claim then the action fails on either interpretation of the statute.

Whatever the practical differences between the two interpretations, the theoretical differences are very real. In a Rule 12(b)(6) motion to dismiss for failure to state a claim the judge's purview of the facts is limited to what is alleged in the complaint plus some other facts subject to the court's judicial notice, and the judge must accept the alleged facts as true. By contrast, if the FTAIA is jurisdictional then the complaint must not merely state a claim under these 12(b)(6) standards, but the judge may also go "off complaint" to consider whether alleged facts are true or examine other facts pertaining to jurisdiction. A purely "facial" challenge would look at the jurisdictional facts alleged in a complaint, much as would be done in a 12(b)(6) challenge.⁵ In a broader "factual" challenge, however, the defendant would be entitled to submit affidavits or other

* Ben V. & Dorothy Willie Professor of Law, University of Iowa.

¹ Pub. L. No. 97-290, 96 Stat. 1233 (Oct. 8, 1982), codified at various sections of 12, 15, and 30 U.S.C., but most relevantly at 15 U.S.C. §6a.

² See 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶272i (3d ed. 2006).

³ *F. Hoffman-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 159-160 (2004).

⁴ *See id.* at 159.

⁵ *See Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 300 n.4 (3d Cir. 2002) (distinguishing "facial" and "factual" challenges, and noting that in considering a factual challenge the court "accords plaintiff's allegations no presumption of truth. In a factual attack, the court must weigh the evidence relating to jurisdiction, with discretion to allow affidavits, documents, and even limited evidentiary hearings.").

evidence tending to show lack of jurisdiction. The judge would be entitled to decide these facts, or else to consider additional evidence on its own motion. As one court has stated it,

Motions to dismiss under Rule 12(b)(1) may take one of two forms ... First, a party may make a facial challenge to the plaintiff's allegations concerning subject matter jurisdiction, thereby questioning the sufficiency of the complaint. In addressing a facial attack, the district court must accept the allegations in the complaint as true. "Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends."⁶ In addressing a factual attack, the court does not "presume the truthfulness of the complaint's factual allegations," but "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)."⁷

Explicitly referencing the FTAIA, another court has observed:

it was error for the district court to accept the mere allegations of the complaint as a basis for finding subject matter jurisdiction. ... In these circumstances, the court should have looked outside the pleadings to the submissions. The district court should consider all the submissions of the parties and may hold an evidentiary hearing, if it considers such a hearing is warranted, in resolving the question of jurisdiction. Before arriving at its legal conclusion regarding the existence *vel non* of subject matter jurisdiction, the district court should resolve the disputed factual matters by means of findings of

⁶ Quoting *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995).

⁷ *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 546 (10th Cir. 2001). Accord *HUB Partners v. CNG Transmission Corp.*, 239 F.3d 333 (3d Cir. 2001); *White v. Lee*, 227 F.3d 1214, 1241 (9th Cir. 2000); *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 721 (6th Cir. 1999) (in "factual" attack on subject matter jurisdiction, as opposed to a "facial" attack, district court obliged to make fact findings); *Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999), cert. denied, 529 U.S. 1003 (2000). See also 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1350 (Civ. 3d 1996 & Supp.) (Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction must survive both a "facial" and a "factual" attack; this is in contrast to Rule 12(b)(6) motion, which need survive only the facial attack).

fact.⁸

Other important differences are that if the statute at issue is jurisdictional the court may ascertain relevant jurisdictional facts at any time during the proceeding.⁹ As the Supreme Court stated in *Arbaugh*, "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."¹⁰ If the issues is jurisdictional it cannot be waived.¹¹

Pleading under Rule 12(b)(6) and presumably under 12(b)(1) in a facial challenge is governed by the standards articulated in the Supreme Court's *Twombly*¹² and *Iqbal*¹³ decisions, which requires a fair degree of specificity.¹⁴ Indeed, the implications of heightened pleading standards are very likely to bring 12(b)(6) and 12(b)(1) pleading closer together in one very important sense. Even under 12(b)(6) standards the plaintiff must plead jurisdictional facts with sufficient clarity and detail to show entitlement to relief. Acting under Rule 12(b)(1) a judge may additionally verify these facts, but it seems unlikely that statutory reach over the activity will simply be presumed in the 12(b)(6) context. The plaintiff will have to plead specific facts showing that the United States antitrust laws apply to the conduct in question under the terms of the FTAIA.

Nevertheless, the 12(b)(6) approach of regarding the inquiry into reach as part of the merits rather than jurisdiction generally favors plaintiffs. Prior to trial allegations and evidence are typically construed against the movant, while in the 12(b)(1) proceeding

⁸ *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 930-931 (2d Cir. 1998). On remand the court made fact findings and dismissed the complaint for lack of subject matter jurisdiction. *Filetech S.A. v. France Telecom S.A.*, 212 F. Supp. 2d 183 (S.D.N.Y. Mar. 22, 2001), *aff'd*, 304 F.3d 180 (2d Cir. 2002).

⁹ See 5B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350, pp. 243-249 (3d ed.2004).

¹⁰ *Arbaugh v Y&H Corp.*, 546 U.S. 500, 514 (2006).

¹¹ *Ibid.* See also *United States v. Cotton*, 535 U.S. 625, 630 (2002).

¹² *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹³ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹⁴ On the impact of these cases in the pleading of antitrust complaints, see 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶307 (3d ed. 2007); Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L.REV. BULL. 55 (2010).

the judge acts as a neutral fact finder. Further, to the extent that the 12(b)(6) interpretation protracts the litigation, perhaps delaying the issue of extraterritorial reach until summary judgment or even the trial stage, plaintiffs will be able to obtain more favorable settlements.

Recently the Third Circuit held that the FTAIA's limitations on the reach of the antitrust laws should be regarded as a part of the merits of an antitrust claim rather than a limitation on subject matter.¹⁵ The Third Circuit was following Supreme Court decisions subsequent to *Empagran* which declared that a federal statute will not be construed as jurisdictional unless the legislature "clearly states" that its limitation should "count as jurisdictional."¹⁶ Interestingly, the *Arbaugh* decision listed earlier decisions that had assumed a jurisdictional interpretation too quickly, but *Empagran* and the FTAIA were not among them.¹⁷

In its jurisprudence on extraterritorial reach the Supreme Court has stated two principles that may sometimes pull against one another. One is that extraterritoriality is not to be presumed.¹⁸ The other is that, even in cases involving the presumption against extraterritoriality, the issue of reach should be regarded as part of the coverage of the statute rather than as limiting federal subject matter jurisdiction, unless Congress has clearly stated the contrary.¹⁹

The presumption against extraterritorial reach is a canon of statutory construction and thus presents a question of law. It almost certainly does not apply in any blanket fashion to the Sherman Act, however, whose language is clearly not "boilerplate" and reaches restraints with a scope that tracks the language of the foreign commerce clause of the United States Constitution. Further, while the FTAIA was intended to limit the Sherman Act's extraterritorial reach, it also expressly acknowledged that some extraterritorial reach exists. The statute provides that the Sherman Act "shall not apply

¹⁵ *Animal Science Prods., Inc. v China Minmetals Corp.*, 654 F.3d 462, 469 n.9 (3d Cir. 2011).

¹⁶ *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514–16 (2006). See also *Morrison v. Nat'l Austl. Bank*, 130 S.Ct. 2869, 2876–2878 (2010).

¹⁷ See *Arbaugh*, 536 U.S. at 511-512, discussing *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988).

¹⁸ *Morrison v. National Australia Bank, Ltd*, 130 S.Ct. 2869, 2877-2878 (2010).

¹⁹ *Arbaugh, Morrison, Id.*

to conduct involving trade or commerce (*other than import trade or import commerce*) with foreign nations” unless its additional conditions are met.²⁰ That is to say, in the FTAIA Congress expressly stated that the Sherman Act *does* reach “import” trade or commerce.²¹

The principle favoring nonjurisdictional interpretation is also an issue of law. Nevertheless, it places greater control with the fact finder to the extent that issues of extraterritorial reach and domestic impact are addressed under ordinary pleading or summary judgment standards in which facts are ordinarily construed against the movant. That is, in a jurisdictional motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), facts pertaining to the statutory requirements of extraterritorial reach are decided by the judge. By contrast, if issues concerning extraterritorial reach are subject to a 12(b)(6) motion to dismiss they are facts subject to the ordinary pleading and summary judgment rules that construe facts against the movant, and may later make them subject to jury trial.

It is perhaps likely, although not inevitable, that the Supreme Court will conclude that the FTAIA is not a jurisdictional provision at all. The purpose of the Supreme Court's *Arbaugh* holding was to require a clear statement, and the “shall not apply” language of the FTAIA provision quoted above certainly creates some ambiguity. The rule that the Supreme Court stated in *Arbaugh*, however, was that the “legislature” must clearly state its intention to make the statute jurisdictional.²² Although the explicit language of the FTAIA – “shall not apply” -- might be regarded as ambiguous, the Conference Report and other legislative history of the FTAIA are not. The Conference Report noted that the statute was designed to eliminate uncertainty that American companies faced when engaged in international trade by establishing a clear “jurisdictional threshold” for

²⁰15 U.S.C. §6a (emphasis added).

²¹ See also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (“[I]t 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.”)

²²*Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514–16 (2006):

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.

application of the antitrust laws.²³ The House Committee concluded that the domestic effect standard articulated in the provision should serve as a requirement “for antitrust jurisdiction,” with a “court” deciding in the first instance if those “requirements for subject matter jurisdiction are met.” Further, the Committee Report stated that the FTAIA “only establishes the standards necessary for assertion of United States antitrust jurisdiction. The substantive issues on the merits of plaintiffs' claim would remain unchanged.”²⁴ The most reasonable interpretation of these statements is that Congress clearly intended for the FTAIA to limit subject matter jurisdiction, but that it was less clear when it actually drafted the FTAIA, whose “shall not apply” language can be interpreted either way. Of course, at the time Congress drafted the FTAIA it did not yet have the benefit of the *Arbraugh* holding to the effect that a statute’s “jurisdictional” conduct must be unambiguous. Congress at the time was far less careful about how it drafted jurisdictional language.

The FTAIA and the Foreign Commerce Clause

Whether or not the FTAIA is jurisdictional as a statute, the Constitutional authority of Congress to enact antitrust laws emanates from the Commerce Clause, which gives Congress the authority “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁵ The difference between “with” and “among” remains important, even after judicial expansion that permitted broader “affecting commerce” holdings in the 1940s.²⁶ Trade between Ohio and Illinois is commerce “among” the states, but trade between Australia and Indonesia is not United States commerce “with” foreign nations. Rather, it is “among” (actually, between) foreign nations. Such trade is presumably outside of United States’ jurisdictional reach unless some other factual element sufficient to be construed as commerce “with” foreign nations or perhaps some other jurisdiction creating effect is shown. This is so quite apart from the FTAIA. The Sherman Act’s own language tracks the language of the Commerce Clause, reaching restraints “of trade or commerce among the several

²³S. Conf. Rep. 97-644, 97th Cong., 2d Sess. 30 (1982). See also H.R. Conf. Rep., 97-924, 97th Cong., 2d Sess. (1982) (The new title incorporates two sections from H.R. 5235 which “modify the Sherman Act and Section 5 of the Federal Trade Commission Act to require a ‘direct, substantial, and reasonable foreseeable’ effect on Commerce in the United States, or on the export commerce of a U.S. resident, as a jurisdictional threshold for enforcement actions....”)

²⁴H.R. Rep. 97-686, at 2-3, 5-6, 9, 11, 13.

²⁵ UNITED STATES CONST., Art. 1, §8 cl. 3.

²⁶ *Wickard v. Filburn*, 317 U.S. 111, 124-125 (1942).

States, or with foreign nations" in §1; and every person who monopolizes "any part of the trade or commerce among the several States, or with foreign nations" in §2. Even under expansive "affecting commerce" interpretations, courts periodically dismiss antitrust complaints involving purely local conduct on interstate jurisdictional grounds.²⁷

Some things do constitute commerce "with" foreign nations but would be excluded under the FTAIA. For example, a cartel in the United States that exported all of its output and had no harmful effects within the United States might injure a foreign purchaser in Europe. Such a restraint would constitute commerce "with" foreign nations, which appears to embrace products that move in both directions, but the FTAIA would not embrace an injury that accrued only to the foreign purchaser.

The statute provides that:

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

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.²⁸

Some antitrust actions brought by foreign plaintiffs for injuries felt in foreign countries could not be reached under the Sherman Act even if the FTAIA did not exist. This would be true of transactions that occurred purely among two foreign nations, with no domestic effects whatsoever. Other transactions have only the most tenuous effect

²⁷ See 2B AREEDA & HOVENKAMP, ANTITRUST LAW, note ___ at ¶266.

²⁸ Pub. L. No. 97-290, 96 Stat. 1233 (Oct. 8, 1982). The Act is codified at various sections of 12, 15, and 30 U.S.C. The quoted provision appears in 15 U.S.C. §6a.

on United States commerce. For example, in *Empagran* the plaintiffs were foreign farmers from the Ukraine, Australia and elsewhere who purchased vitamins from foreign sellers. Apparently none of the challenged transactions involved either a United States buyer, a United States seller, or other intermediary.²⁹ However, the foreign sellers were participants in a global price-fixing conspiracy that did involve United States firms and presumably United States buyers. As a result one could say that the cartel "as a whole" was within the jurisdiction of the United States as involving commerce with foreign nations. However, the effects that caused injury to the United States purchasers were not the ones that "give[] rise to a claim," within the FTAIA's requirement.³⁰

In domestic cases the Supreme Court has generally applied an analysis that looks to the general effects of the restraint in order to establish subject matter jurisdiction, and then permits the plaintiff's cause of action even if the injuries suffered by the individual plaintiff seem quite local.³¹ That is to say, under this interpretation the general restraint must meet the commerce requirement, but the particular injury that the plaintiff suffered does not necessarily need to meet it. This issue provoked a 5-4 split in the Supreme Court's *Pinhas* decision, where the majority held that an alleged boycott excluding the plaintiff fell within the jurisdiction of the Sherman Act even though the particular restraint imposed on the plaintiff involved only a single physician's staff privileges at a single hospital. Justice Scalia and three other dissenters insisted that while Congress has the power to reach all restraints affecting interstate commerce, it did not do so in §1 of the Sherman Act:

That enactment does not prohibit all conspiracies using instrumentalities of commerce that Congress could regulate. Nor does it prohibit all conspiracies that have sufficient constitutional "nexus" to interstate commerce to be regulated. It prohibits only those conspiracies that are "in restraint of trade or commerce among the several States." This language commands a judicial inquiry into the nature and potential effect of each particular restraint.³²

²⁹ See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003) *vacated sub nom. F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004).

³⁰ See the quoted language in text at note ___, *supra*.

³¹ *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991); see ¶266g.

³² *Id.*, 500 U.S. at 334.

The interpretation of Justice Scalia's *Pinhas* dissent parallels the "gives rise to a claim" language in the FTAIA,³³ which requires a showing not only of the relevant jurisdictional effects, but adds the requirement that these affects, already within foreign commerce subject matter jurisdiction, are the ones that give rise to the plaintiff's claim. Perhaps noteworthy is that Justice Scalia interpreted this narrowing constraint on the Sherman Act's coverage as "jurisdictional."³⁴

Pleading Requirements and Looking Beyond the Pleadings

The biggest practical difference between motions to dismiss for failure to state a claim under FRCP 12(b)(6) and motions to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1) is that in the 12(b)(6) motion the judge is obliged to restrict the universe of relevant facts to those stated in the complaint plus others of which the court may take judicial notice. By contrast, in a 12(b)(1) situation the judge may call for discovery on the jurisdictional issue and, upon obtaining it, may decide the relevant jurisdictional facts without a jury and without any requirement that all alleged facts must be accepted as alleged or that all reasonable inferences must be construed in the plaintiff's favor. As the Third Circuit articulated the differences in *Animal Science*, in a 12(b)(1) case the burden rests with the plaintiff, "who must establish that there is subject matter jurisdiction; by contrast, the defendant carries the burden in a Rule 12(b)(6) motion."³⁵

While the theoretical differences between these two procedures are significant, the practical one may not be in the great majority of situations. Even under 12(b)(6) pleading standards the plaintiff must plead its case with sufficient particularity to survive dismissal.³⁶ For example, at the least a plaintiff purchaser must identify the parties from

³³ 15 U.S.C. §6a.

³⁴ *Pinhas*, 500 U.S. at 333, 336:

To determine Sherman Act jurisdiction it looks *neither* to the effect on commerce of the restraint, *nor* to the effect on commerce of the defendants' infected activity, but rather, it seems, to the effect on commerce of the activity from which the plaintiff has been excluded. As I understand the Court's opinion, the test of Sherman Act jurisdiction is whether the entire line of commerce from which Dr. Pinhas has been excluded affects interstate commerce.

³⁵ *Animal Science Prods., Inc. v China Minmetals Corp.*, 654 F.3d 462, 469 n. 9 (3d Cir. 2011).

³⁶ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

whom he purchased. If they are alleged to be involved in a cartel the plaintiff would have to identify as best as possible the participants in the cartel and make allegations concerning its general effect on domestic or foreign commerce as defined by the Constitution. The plaintiff would also have to allege with some particularity how it was injured and, under the FTAIA, offer fact specific allegations to the effect that the effect on reachable commerce is what "gives rise to a claim."

For example, the district court in *Animal Science* found that the relevant pleadings were "not cognizable even for the purposes of facial review, as defined in *Twombly* and *Iqbal*."³⁷ The plaintiff had made very general allegations of a conspiracy among unspecified co-conspirators and also made a general allegation that the conspiracy had the "purpose and effect of fixing prices of magnesite and magnesite products exported to and purchased in the United States."³⁸ That is to say, if the district court was correct the case was properly dismissed under *either* a 12(b)(6) merits standard or a 12(b)(1) jurisdictional standard. Significantly, however, the issue was raised *sua sponte* by the court "in light of the jurisdictional uncertainties presented by the case at bar."³⁹ In sum, the court considered the issue at all only because it had the power to do so, given that the reach of the FTAIA was deemed to be jurisdictional, but then it decided the question exclusively by reference to the pleadings. In reversing, the Third Circuit held that the issue of FTAIA reach pertained to subject matter rather than jurisdiction, and thus required that the analysis be limited to the four corners of the complaint. It did not decide that the complaint stated a claim for Rule 12(b)(6) purposes, but rather remanded to the district court for that determination.⁴⁰

Even if the FTAIA is not jurisdictional, the plaintiff must *plead* sufficient facts to "state a claim" under the FTAIA, which entails pleading of a "direct, substantial, and reasonably foreseeable effect" that "gives rise to a claim" under the Sherman Act. Indeed, the district court's "jurisdictional" analysis of the FTAIA in the *Animal Science* case was based on allegations in the complaint itself which the court found lacking in

³⁷ *Animal Science*, 702 F.Supp.2d 320, 341 (D.N.J. 2010).

³⁸ *Id.* at 339-340.

³⁹ *Id.* at 330, and citing a district court's "continuing obligation to sua sponte raise the issue of subject matter jurisdiction" on the court's "own motion."

⁴⁰ *Animal Science*, 654 F.3d at 469-470.

factual specificity.⁴¹ However, the court also buttressed these conclusions with evidence taken from exhibits provided by experts for both sides.⁴²

The *Minn-Chem* decision in the Seventh Circuit did not dispute that the FTAIA's limitations were jurisdictional, following its own previous decisions on that issue.⁴³ Nevertheless, the court analyzed the claims solely by looking at the face of the plaintiff's complaint, which was by United States potash buyers against Canadian, Belarusian and Russian potash producers for allegedly forming a cartel and price fixing in other foreign markets, which was alleged to cause substantial price increases in the United States as well. The defendants moved to dismiss under 12(b)(1) and 12(b)(6) in the alternative, and the district court considered the motion under (12)(b)(6) standards, looking exclusively at the face of the complaint.⁴⁴ However, as the Seventh Circuit concluded, the district court erred in essentially merging the import commerce exception with the direct effects exception. The defendant's conduct fell outside of the FTAIA's reach because the conduct itself was not alleged to target the United States. As a result, the complaint did not state a sufficient link between the foreign conduct and the United States:

If foreign anticompetitive conduct can "involve" U.S. import commerce even if it is directed entirely at markets overseas, then the "direct effects" exception is effectively rendered meaningless. Under the district court's reading of the statute,

⁴¹ As the district court noted,

The bulk of Plaintiffs' pleadings related to the FTAIA exception fail to assert any facts (offering, instead, a kaleidoscope of self-serving conclusions and/or recitals of legal elements) and the remainder of Plaintiffs' statements assert facts that either negate Plaintiffs' claims or are self-contradicting, or inapposite to Plaintiffs' position, or unwarranted in light of Plaintiffs' own evidence, or based on deficient assumptions and inexplicable conclusions.

702 F.Supp.2d at 362. See also *id.* at 363-364, analyzing ambiguities in the plaintiffs' complaint.

⁴² See *id.* at 375.

⁴³ *Minn-Chem, Inc. v. Agrium, Inc.*, 657 F.3d 650 (7th Cir. 2011) (to the extent it is relevant, the author was consulted by a defendant). See also *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir.2003) (en banc) (concluding that FTAIA is jurisdictional) (to the extent it is relevant, the author was consulted by a defendant).

⁴⁴ *Potash Antitrust Litig.*, 667 F.Supp.2d 907, 941-942 (N.D.Ill. 2009).

a foreign company that does *any* import business in the United States would violate the Sherman Act whenever it entered into a joint-selling arrangement overseas *regardless* of its impact on the American market. This would produce the very interference with foreign economic activity that the FTAIA seeks to prevent.⁴⁵

The Seventh Circuit also took the approach of looking at the complaint alone under (12(b)(6), relying on the pleading standards articulated in *Twombly* and *Iqbal*.⁴⁶ The court noted the Supreme Court's intervening decisions suggesting that the FTAIA would now be determined not to be jurisdictional,⁴⁷ and suggested that the "jurisdictional" holding of its previous *United Phosphorous* case⁴⁸ might be "ripe for reconsideration."⁴⁹ However, because the defendants were entitled to dismissal under either 12(b)(1) or 12(b)(6) it did not need to confront the issue.

By contrast, in its earlier *United Phosphorous* decision the district court had made factual findings pertaining to subject matter jurisdiction attendant on a 12(b)(1) dismissal motion, and the Seventh Circuit concluded that these factual findings were not clearly erroneous. The plaintiffs were Indian firms who alleged that they were hoping to enter the market for Nitroparaffins and their derivatives but were restrained from doing so by the exclusionary practices of American firms.⁵⁰ In dismissing the complaint under Rule 12(b)(1) the district court relied on additional evidence beyond the complaint that indicated that the plaintiffs in fact had no real ability to sell these products in the United States.⁵¹

Other appellate and district court decisions prior to *Animal Science* offer similar mixtures of analysis. Nearly all of them were decided consistent with the assumption

⁴⁵ 657 F.3d at 660-661, citing *Empagran*, 542 U.S. at 161.

⁴⁶ 657 F.3d at 653, citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁴⁷ See *Id.* at 653, citing *Morrison v. Nat'l Austl. Bank*, ___ U.S. ___, 130 S.Ct. 2869, 2876-77 (2010); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006).

⁴⁸ *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir.2003) (en banc).

⁴⁹ *Minn-Chem*, 657 F.3d at 653.

⁵⁰ See *United Phosphorus, Ltd v. Angus Chem Co.*, 131 F.Supp.2d 1004 (N.D.Ill. 2006).

⁵¹ *Id.* at 1010-1015.

(never rigorously disputed) in the Supreme Court's *Empagran* decision that the question of FTAIA reach is "jurisdictional." Of course, *Twombly* and *Iqbal* cut across all cases. That is, first the allegations stated in the complaint itself must suffice to state a claim. Then an only then does a court go beyond the complaint to ascertain relevant jurisdictional facts.

Some court have purported to decide the jurisdictional issue but in fact have looked only at the language of the complaint, principally because the defendant's attack was purely "facial."⁵² In the protracted *Carpet Group* litigation the plaintiffs offered a great deal of collateral documentary evidence in support of jurisdiction. The district court appeared to have dismissed the complaint by examining the pleadings and not considering the collateral evidence.⁵³ In reversing, the Third Circuit panel concluded that both the district judge and the magistrate who had initially examined the case "ignored significant additional evidence offered by the plaintiffs to back up their other allegations."⁵⁴

It is probably worth noting that most of the "collateral" evidence that the plaintiff's put forward in *Carpet Group* would probably end up being described in the complaint

⁵² E.g., *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 299-300 (3d Cir. 2002) (purely facial challenge addressed under 12(b)(1) but apparently looking only at the face of the complaint). On the "jurisdictional" issue the *Animal Science* decision expressly overruled *Turicentro*. See *Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467-468 (3d Cir. 2011). See also *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424-425 (5th Cir. 2001) (observing that on a 12(b)(1) motion the court may consider supplemental evidence but apparently looking only at the complaint; also observing that the defendant had filed motions to dismiss under both 12(b)(1) and 12(b)(6), but that district court had ruled only on the former). In *Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080 (D.C. Cir. 1998), the court found jurisdiction under the FTAIA in the face of motions to dismiss for lack of subject matter jurisdiction, but it appeared to have looked only at the complaint, holding that the district court had erroneously found that the complaint failed to allege jurisdiction. See *id.* at 1083.

⁵³ See *Carpet Group, Int'l v. Oriental Rug Importers Ass'n., Inc.*, 227 F.3d 62 (3d Cir. 2000).

⁵⁴ *Id.* at 70. Much of the balance of the panel's opinion was then taken up with the question of the district judge's obligation to sift through the collateral evidence. *Id.* at 70 – 73. A later decision on the merits denied a motion for summary judgment on some, but not all, of the plaintiff's claims with little discussion of the FTAIA. 256 F.Supp.2d 249 (D.N.J. 2003); yet later, the Third Circuit affirmed a judgment on a jury verdict for the defendants, again with little discussion of the FTAIA. *Carpet Group Intern. V. Oriental Rug Importes Ass'n., Inc.*, 173 F3d.App. 178 (3d Cir. 2006).

under *Twombly/Iqbal* pleading standards. The judge would have to consider it anyway, although under 12(b)(6) standards requiring the court to accept the allegations as true.⁵⁵

Conclusion

In its *Arbaugh* decision the Supreme Court insisted that a federal statute's limitation on reach be regarded as "jurisdictional" only if the legislature was clear that this is what it had in mind. The Foreign Trade Antitrust Improvement Act (FTAIA) presents a puzzle in this regard, because *Congress* seems to have been quite clear about what it had in mind; it simply failed to use the correct set of buzzwords in the statute itself, and well before *Arbaugh* assessed this requirement. Even if the FTAIA is to be regarded as non-jurisdictional, the extraterritorial reach of the Sherman Act is hardly unlimited. It reaches only to restraints affecting commerce "with" foreign nations rather than those affecting commerce "among" the several states. At the same time, however, the canon of construction against extraterritorial application should not apply to the Sherman Act. First, the statutory language condemning restraints of trade or monopolization of commerce "among the several States, or with foreign nations" is not boilerplate and clearly extends to foreign commerce. Second, the FTAIA itself expressly recognizes or grants the Sherman Act's extraterritorial reach to "import trade or import commerce."

The implications for interpreting the FTAIA as limiting the antitrust law's subject coverage rather than the court's jurisdiction are mainly that, even if the language of the complaint states a claim, the district court will be able to conduct its own jurisdictional fact findings. Further, this inquiry may occur at any time during the proceeding, may occur on the court's own motion, and cannot be waived. A nonjurisdictional interpretation of the FTAIA will thus make it more difficult for defendants to obtain dismissals at an earlier stage. Even here, however, the Supreme Court *Twombly* and *Iqbal* decisions require greater specificity in pleading, and will thus serve to diminish the difference between the standards for a motion to dismiss for lack of jurisdiction, and a motion to dismiss for failure to state a claim.

⁵⁵ See *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 558 (D. Del. 2006):

In reviewing a factual challenge to the Court's subject matter jurisdiction, the Court is not confined to the allegations of the complaint, and the presumption of truthfulness does not attach to the allegations in the plaintiff's complaint.... Instead, the Court may consider evidence outside the pleadings, including affidavits, depositions and testimony, to resolve any factual issues bearing on jurisdiction (internal citations omitted).