Comment

Discovering Civil Antitrust Violations Overseas

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The Third Circuit recently held that the Foreign Trade Antitrust Improvement Act (FTAIA) creates a substantive element of a plaintiff's claim for extraterritorial application of U.S. antitrust laws rather than a jurisdictional limitation. This Comment argues that, while a substantive interpretation imposes additional costs on all litigating parties, for claims arising under statutes addressing overseas conduct, the challenges that plaintiffs face in international discovery greatly exceed those of defendants. Blocking statutes enacted by many nations prevent FTAIA plaintiffs from efficiently attaining litigation materials. This Comment flags these problems, notes their implications beyond the FTAIA, and outlines potential reforms.

Introduction

In August 2011, the Third Circuit's *Animal Science Products, Inc. v. China Minmetals Corp.*[1] decision reversed its own circuit precedent to hold that

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1. 654 F.3d 462 (3d Cir. 2011).

the Foreign Trade Antitrust Improvement Act (FTAIA) creates a *substantive*, rather than jurisdictional, bound on the extraterritorial application of U.S. antitrust laws. The distinction, according to recent Supreme Court precedent, is fundamental. When a fact—here a substantial effect of overseas antitrust violations on American commerce—is characterized as substantive, a failure to prove that fact indicates that the plaintiff cannot establish a violation of the particular law at issue. When a fact is jurisdictional, however, its absence completely deprives the court of the power to resolve the dispute between the parties.

The *Animal Science* ruling augurs consequences for plaintiffs seeking overseas discovery to substantiate their claims. Many foreign nations have adopted "blocking" statutes—statutes that protect countries' respective domestic corporations from the reach of foreign laws—that make it extraordinarily difficult for American plaintiffs to obtain documents and depositions from foreign entities. Litigants, therefore, may find themselves without the ability to even establish their claims to the degree necessary to initiate earnest settlement discussions. Plaintiffs' difficulties in international discovery, a necessary form of pretrial inquiry for claims arising under the FTAIA's uniquely foreign-focused subject matter, greatly outweigh the traditional discovery and litigation costs befalling defendants. A similar effect will likely occur for other statutory regimes governing foreign conduct and its effects on the United States.

This Comment seeks to explain the legal foundation for the Third Circuit's ruling and why its approach hobbles antitrust enforcement affecting U.S. imports. The piece also sketches some intermediate solutions to help antitrust plaintiffs overcome the impairments stemming from *Animal Science*—at least until and unless the Supreme Court restores the traditional jurisdictional approach to the FTAIA's provisions.

In Part I, I introduce the FTAIA. The Supreme Court jurisprudence regarding a statute's jurisdictional or substantive character appears in Part II. Then, Part III explains the Third Circuit's *Animal Science* opinion and Part IV emphasizes the consequences of applying a substantive reading to the FTAIA. I explain the international discovery regime and the phenomenon of blocking statutes in Part V, and Part VI sketches some potential solutions.

I. The Foreign Application of U.S. Antitrust Law

Foreign application of U.S. antitrust law is nothing new.[2] The Sherman Act itself extends to contracts, combinations, or conspiracies "in restraint of

2. For a general defense of the application of American antitrust laws against foreign defendants, see John H. Shenefield, *The Perspective of the U.S. Department of Justice*, *in* PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 12 (Joseph P. Griffin ed., 1979).

trade or commerce among the several states, *or with foreign nations*" and prohibits monopolization of a similar character.[3] Jurisprudence in this area increasingly has looked overseas, culminating in Judge Learned Hand's "effects" test in *United States v. Aluminum Co. of America (Alcoa)*,[4] which determined whether substantive U.S. antitrust law should apply to foreign defendant corporations or foreign plaintiff groups.[5] There, the Second Circuit held that American antitrust law applies to uniquely *American* injuries: extraterritorial acts must be "intended to affect imports [entering the United States] and [must actually] affect them."[6] The Supreme Court has actively cited the *Alcoa* effects test for this proposition, most recently in 2004.[7]

Congress incorporated Judge Hand's ideas in the 1982 FTAIA.[8] The enactment created a new Sherman Act section 7, which enumerated twin exceptions to the general rule of limited suits: suits are available for activities (i) that "ha[ve] a direct, substantial, and reasonably foreseeable effect" on United States commerce;[9] and (ii) where the statutory effect "gives rise to a claim" under antitrust law.[10] Notably, these sections do not create an alternative substantive offense, but rather they serve as an elemental prerequisite to any suit against foreign defendants under the existing U.S. antitrust laws.[11]

In the immediately following years, the circuits divided on multiple dimensions of FTAIA application.[12] But the courts did have one thing in common: they had all read the statute as a jurisdictional prerequisite to an antitrust claim.[13]

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3. 15 U.S.C. §§ 1, 2 (2006) (emphasis added).

4. 148 F.2d 416 (2d Cir. 1945). For an earlier analysis, effectively overruled by *Alcoa*, see *American Banana v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

5. In the *Alcoa* case, Judge Hand sat on a court of last resort where "a quorum of six [Supreme Court] justices qualified to hear the case was wanting." *Alcoa*, 148 F.2d at 421; *see* 15 U.S.C. § 29 (1946) (recodified at 28 U.S.C. § 2109 (2006) (authorizing lower courts to hear cases where the Supreme Court lacks a quorum)). Judge Hand's opinion is widely respected and today enjoys authority akin to a Supreme Court precedent. *See* Am. Tobacco Co. v. United States, 382 U.S. 781, 811 (1946) (acknowledging the unique circumstances in *Alcoa* and commenting that those circumstances "add to its weight as precedent").

6. *Alcoa*, 148 F.2d at 444.

7. F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004).

8. Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified as amended in scattered sections of 12, 15, and 30 U.S.C.).

9. 15 U.S.C. § 6a (2006).

10. *Id.* This test may be applied to instances where the effect is merely intended as well as where a party both intended to have and did have an anticompetitive effect. *See* IB PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 280 (3d ed. 2006).

11. 15 U.S.C. § 6a(2) ("[S]uch effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.").

12. *See* Deborah J. Buswell, Note, *Foreign Trade Antitrust Improvements Act: A Three Ring Circus—Three Circuits, Three Interpretations*, 28 DEL. J. CORP. L. 979 (2003) (explaining that the Fifth Circuit adopted a restrictive, defendant-friendly view of the statute's application to foreign conduct, while the Second Circuit took a far more expansive approach; the D.C. Circuit opted for a middle path).

13. AREEDA & HOVENKAMP, *supra* note 10, at 296 (citing cases).

II. Supreme Encouragement: Substantive Readings of Federal Statutes

Federal courts enjoy only limited jurisdiction. Accordingly, statutes that confer federal powers of review are the subject of much litigation—a lack of jurisdiction not only allows the defendant to prevail, but it also insulates him from the costs of even litigating the issue.[14] A substantive element of a claim, however, does not provide an immediate and complete bar to suit. Instead, it establishes an additional component of an offense that plaintiffs must show through relevant and admissible evidence—evidence often obtained in discovery.

The Supreme Court began to distinguish earnestly between substantive and jurisdictional claims in *Arbaugh v. Y & H Corp.*[15] The *Arbaugh* opinion asserted that the case "concern[ed] the distinction between two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief."[16] These two categories later became known as jurisdictional and substantive claims, respectively. The *Arbaugh* Court also critically described the "profligate" and "less than meticulous"[17] invocations of "jurisdiction" in lower courts and chastised itself for continuing the trend of imprecise language.[18] The Court emphasized the importance of seriously and thoroughly considering a law's jurisdictional or substantive effect, avoiding what it dubbed "drive-by jurisdictional rulings."[19] Since *Arbaugh*, the Supreme Court has imposed substantive constructions on many,[20] but not all,[21] provisions previously thought to announce jurisdictional limitations.

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14. Generally, claims unavailable in the federal courts may be brought in state courts of general jurisdiction; however, the FTAIA is commonly considered the exclusive jurisdiction of the federal courts. *See* Daniel Wotherspoon, *The "Element" of Surprise: The Third Circuit Bucks the Foreign Trade Antitrust Improvements Act Trend in* Animal Science Products, Inc. v. China Minmetals Corp., 57 VILL. L. REV. 785, 804 & n.155 (2012) (noting that a jurisdictional approach would cause plaintiffs to experiment with litigation in state courts and to attempt creative arguments that may avoid removal to federal tribunals).

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

16. *Id.* at 503.

17. *Id.* at 510-11.

18. *Id.* at 510.

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

20. The most recent manifestation of this jurisprudential evolution occurred in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), where the Court's choice to adopt a substantive application of a securities statute abrogated a litany of case law. *See id.* at 2878-81.

21. *See* Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs, 130 S. Ct. 584, 597 (2009) (citing Bowles v. Russell, 551 U.S. 205, 209-11 (2007)) ("In contrast, relying on a long line of this Court's decisions left undisturbed by Congress, we have reaffirmed the jurisdictional character of the time limitation for filing a notice of appeal stated in 28 U.S.C. § 2107(a)."); *see also* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 132 (2008) (explaining that a court must consider sua sponte the timeliness of a lawsuit filed against the United States in the Court of Federal Claims).

Legal scholarship was largely welcoming of this newfound distinction between sources of Congress's constitutional power.[22] The analysis proceeds from a simple proposition: "[a]bsent a congressional exercise of . . . jurisdiction-defining power, the federal courts are presumed to be closed to a particular case."[23] The problem presented in *Arbaugh*, however, relates to situations where Congress's enacted text *lacks* a clear invocation of power or where precedent presumes its exercise. The *Arbaugh* opinion, along with subsequent scholarship, does not move beyond the separation-of-powers, good government approach to the substantive/jurisdictional divide.[24] This Comment does not take issue with this approach in the abstract; the questions of federal jurisdiction addressed in *Arbaugh* and related scholarship are interesting and important theoretical matters, and certainly any reviewing court must seriously consider congressional text. Any method of interpretive theory, however, must take into account the practical realities of its applications, even if only to find that constitutional necessity outweighs countervailing concerns.[25] This is especially true in the context of international litigation, where the courts' reasoning may prevent litigation from surviving even a motion to dismiss. In such situations, the constitutional discussion commands a more nuanced approach; it must address the newfound inability of plaintiffs to air their claims in a meaningful way before federal courts. Perhaps the confusion will force Congress to speak more clearly in its intentions, but until then, courts will continue to grapple with these interpretive questions.

III. The Third Circuit's *Animal Science* Perspective

In 2005, Animal Science, an American company, sued its Chinese supplier of magnesite,[26] alleging that it had violated the Sherman Act by engaging in a conspiracy to fix the price of magnesite exported for sale into the

22. *See generally* Howard M. Wasserman, *Jurisdiction & Merits*, 80 WASH. L. REV. 643 (2005) (describing the error associated with drive-by jurisdictional rulings). Long before the *Arbaugh* decision, the restators of foreign relations law shared this point of view. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 & cmt. a (1987).

23. Stephen R. Brown, *Hearing Congress's Jurisdictional Speech: Giving Meaning to the "Clearly-States" Test in* Arbaugh v. Y & H Corp., 46 WILLAMETTE L. REV. 33, 34 (2009).

24. Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 36-39 (2011) (describing the jurisdictional characterization of statutes and discussing the lack of clear jurisdictional bars); Eamonn O'Hagan, *Stop Changing the Subject! Recent Supreme Court Jurisprudence on Whether Statutory Requirements Are Subject Matter Jurisdictional or Claims Processing Rules*, 20 J. BANKR. L. & PRAC. 53 (2011) (explaining strategies for advocating dismissal of bankruptcy actions on jurisdictional grounds under the Supreme Court's recent decisions); Howard M. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings,"* 105 NW. U. L. REV. COLLOQUY 184, 186-89 (2011) (reviewing cases where the Court has scrutinized jurisdiction).

25. *See generally* Edward Valdespino, *Shifting Viewpoints: The Foreign Trade Antitrust Improvement Act, A Substantive or Jurisdictional Approach*, 45 TEX. INT'L L.J. 457 (2009) (beginning the conversation about the practical consequences of a substantive approach to the FTAIA).

26. A metal "used, among other things, to melt steel, make cement, and clean wastewater." Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 464 n.1 (3d Cir. 2011).

United States.[27] While the defendants did not argue that the trial court lacked jurisdiction to resolve foreign antitrust violations, the judge raised the issue sua sponte,[28] dismissing on jurisdictional grounds.[29]

The Third Circuit vacated and remanded, finding that the FTAIA is viewed most properly as a substantive limitation—an element of the antitrust violation, rather than a limit on subject matter jurisdiction.[30] The court asserted that it must "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."[31] The court's reasoning on this point stemmed from an analysis of congressional powers; it distinguished "the constitutional authority to set forth the elements of a successful claim for relief and the constitutional authority to delineate the subject matter jurisdiction of the lower courts."[32] The Third Circuit scrutinized the statutory language to find that the text failed to address the jurisdiction of the federal courts.[33] Therefore, according to the court, the statute presented a substantive merits element, and Congress had enacted the law under its "Commerce Clause authority to delineate the elements of a successful antitrust claim *rather than its Article III authority to limit the jurisdiction of the federal courts*."[34]

IV. Shifting Costs Under the *Animal Science* Interpretation

The seemingly innocuous distinction between jurisdictional and substantive readings of the FTAIA has substantial effects on parties' need for foreign discovery. While costs associated with a substantive approach to purely domestic disputes would fall relatively equally on all parties, in the context of

27. Animal Sci. Prods., Inc. v. China Minmetals Corp., 702 F. Supp. 2d 320, 329 (D.N.J. 2010).

28. *Id.* at 330-31.

29. *Id.* at 464.

30. *Animal Science*, 654 F.3d at 471.

31. *Id.* at 467.

32. *Id. See also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813-20 (1993) (Scalia, J., dissenting) (distinguishing between the two, naming them "legislative jurisdiction" and "judicial jurisdiction," respectively).

33. *Animal Science*, 654 F.3d at 468 ("The FTAIA neither speaks in jurisdictional terms nor refers in any way to the jurisdiction of the district courts.").

34. *Id.* at 469 (emphasis added). A panel of Seventh Circuit judges had previously disagreed with this interpretation, finding that the FTAIA presented a jurisdictional bar to suit based on comity analysis. United Phosphorus, Ltd. v. Angus Chemical Co., 322 F.3d 942, 947 (7th Cir. 2003) ("The Sherman Act, tracking, as it does, the Commerce Clause, is well within legislative jurisdiction. Nevertheless, principles of international comity dictate how a statute will be interpreted . . . ."). A subsequent en banc panel of the Seventh Circuit, however, overruled the panel decision, employing reasoning parallel to that of the Third Circuit in *Animal Science*. Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 851-53 (7th Cir. 2012) (en banc).

an FTAIA suit *defendants'* costs are tremendously outweighed by *plaintiffs'* increased difficulties in obtaining discovery from foreign nationals.

For defendants, the *Animal Science* decision, and the substantive FTAIA interpretation it urges, extends obligations beyond an initial, rote motion to dismiss. If courts no longer remove antitrust cases on simple pretrial motions raising lack of subject matter jurisdiction—motions typically handled with dispatch—defendants will be forced to resort to backstops: either they could engage with the facts of the case and allege plaintiffs' failure to state a claim upon which relief can be granted under Rule 12(b)(6),[35] or they could take the more costly route and continue directly to discovery. Under either scenario, defendants would certainly incur charges from additional attorney hours and expenses.[36] The argument of increased costs to defendants constitutes an oft-repeated refrain, and these expenditures are certainly meaningful and necessary for individuals and corporations with substantial U.S. contacts.[37] But the FTAIA aims at a very different type of defendant—one that resides overseas and may retreat easily from the reach of the American legal system.

The real problematic effect of a substantive reading is its frustration of *plaintiffs'* attempts to litigate against foreign individuals and corporations. It adds another claim that plaintiffs must prove through discovery, rather than an issue the judge decides at an early stage. Additionally, the removal of an opportunity for Rule 12(b)(1)[38] disposition rescinds the occasion for settlement negotiation that plaintiffs surviving that motion traditionally enjoy.[39] These factors, coupled with an inability to unearth key evidence held overseas, could result in tremendous under-enforcement of U.S. antitrust laws, even for would-be-meritorious claims. Judges conducting an *Arbaugh* analysis should, therefore, consider the sizable practical ramifications of converting jurisdictional bars to suit into substantive provisions in claims typically asserted against foreign defendants. A short overview of international discovery hurdles appears below.

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35. FED. R. CIV. P. 12(b)(6).

36. *See generally* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 450 (2008) (discussing the effects of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)) ("In effect, then, the Court has moved forward the burden that plaintiffs must carry at later stages in the litigation up front to the pleading stage.").

37. *See* Eric O'Connor, *Prevailing Antitrust Defendants Recover $367,000 in e-Discovery Costs*, ANTITRUST L. BLOG (May 24, 2011), http://www.antitrustlawblog.com/2011/05/articles/article/prevailing-antitrust-defendants-recover-367000-in-ediscovery-costs (claiming that e-discovery alone, not including attorneys' fees and other costs, can often "run several hundred thousand dollars or more" for antitrust defendants).

38. FED. R. CIV. P. 12(b)(1).

39. *See, e.g.*, Mark Thomas Smith, *Strategic Motions To Dismiss (or Lack Thereof)*, ABA LITIGATION NEWS, http://apps.americanbar.org/litigation/litigationnews/trial_skills/pretrial-motion-dismiss.html (last visited Mar. 22, 2013) (discussing the signaling opportunities available at the motion to dismiss stage and their effects on settlement negotiations).

V. International Discovery and Foreign Impediments

The real impact of the Third Circuit's rule obtains for those plaintiffs who seek to pursue FTAIA actions against countries with "blocking statutes"—provisions that take advantage of loopholes in international agreements to hide their citizens from foreign discovery requests. The statutes take a variety of forms, typically imposing criminal sanctions on persons and corporations within the enacting state who comply with a foreign court's discovery request.[40] Outside the enacting state, the blocking statutes operate to frustrate those seeking testimony and documents necessary to support their legal claims.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[41] was originally adopted in 1968 to "facilitate the transmission and execution of [discovery requests] and to further the accommodation of the different methods which [countries] use for this purpose" as well as to "improve mutual judicial co-operation in civil or commercial matters."[42] The treaty now boasts fifty-seven contracting states, among them most of the major western trading nations.[43] Decades after the treaty's signing, the U.S. Supreme Court found that the purpose of the Hague Convention was to "establish a system for obtaining evidence located abroad that would be 'tolerable' to the state executing the request and would produce evidence 'utilizable' in the requesting state."[44]

Any U.S. litigant seeking to obtain evidence for use in a judicial proceeding under the Hague Convention can proceed through one of three routes: "Letters of Request,"[45] diplomatic or consular officers, or appointed commissioners. Each of these paths involves complicated procedures that add substantial delay to the discovery process.[46] Yet even if these procedures functioned flawlessly, Article XXIII of the Hague Convention provides a substantial escape clause that allows member states to assert that they "will not execute Letters of Request issued for the purpose of obtaining pre-trial

40. ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION LAW DEVELOPMENTS 751-52 (2009).

41. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555 [hereinafter Hague Convention].

42. *Id.* at pmbl. Note that this provision does not apply to criminal investigations, and it may not even extend to other areas of American law such as tax. *See* ABA SECTION OF ANTITRUST LAW, OBTAINING DISCOVERY ABROAD 27 (2d ed. 2005).

43. Status Table of *20: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (last visited Apr. 30, 2013).

44. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 530-31 (1987).

45. These are also referred to as "Letters of Rogatory."

46. *See* Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. PA. L. REV. 1461, 1466 (1984).

discovery of documents as known in Common Law countries."[47] Laws enacted to exploit this provision are "blocking statutes," and they represent a large impediment to discovery collection overseas.

Many foreign countries have blocking statutes in place. These provisions reflect the hostility between different judicial systems, particularly the dissimilarities between American style pretrial procedures and those of a civil law system.[48] However, even in countries without a civil law tradition, self-interest often results in blocking statutes that protect countries' respective domestic entities from the reach of U.S. antitrust laws.[49]

The United States Supreme Court's decision in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*[50] certified as "well settled" the proposition that blocking statutes "do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."[51] Blocking statutes' criminal enforcement provisions, however, prevent foreign citizens from complying with such an order. Additionally, a foreign nation may refuse to enforce a judgment obtained through evidence found within their borders if the Hague Convention's procedures are not followed, thus shielding citizens from sanctions a U.S. court may impose for failure to comply with discovery requests.[52] Currently, fifteen countries have established blocking statutes;[53] these laws are particularly influential because "[i]n general, foreign nondisclosure regulations of all types are enforced by criminal penalties" that apply to Americans who seek discovery on foreign

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47. Hague Convention, *supra* note 41, at 2568. The hurdles associated with consular officers and appointed commissioners are similarly high. Diplomatic officers may not compel production, they are restricted to deposition and not document evidence, and nation states have the prerogative to require that agents ask the permission of the relevant foreign host state before taking a deposition. *Id.* at 2564-65. An appointed commissioner may only depose cooperative witnesses, and only with the host nation's consent. *Id.* at 2565-66; *see also* ABA SECTION OF ANTITRUST LAW, *supra* note 42, at 38-39 (describing the procedures).

48. In civil law jurisdictions, the discovery process is conducted by a judge, the sole investigator of the facts. The skepticism toward parties inherent in this system may explain some of the mistrust of American-style discovery. *See* David Brewer, *Obtaining Discovery Abroad: The Utility of the Comity Analysis in Determining Whether To Order Production of Documents Protected by Foreign Blocking Statutes*, 22 HOUS. J. INT'L L. 525, 528 (2000).

49. *See* David E. Teitelbaum, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 846-48 (1986).

50. 482 U.S. 522 (1987).

51. *Id.* at 544 n.29.

52. J. Joseph Tanner, *International Discovery: Around the World in Ninety Minutes*, 2008 A.B.A. SEC. LITIG. 34, *available at* http://mcmillan.ca/Files/BHarrison_AroundtheWorldinNinety Minutes.pdf.

53. David W. Ogden & Sarah G. Rapawy, *Discovery in Transnational Litigation: Procedures and Procedural Issues*, 2007 A.B.A. BUS. L. SEC. 19, *available at* http://apps.americanbar.org/buslaw/newsletter/0058/materials/ppl.pdf ("Approximately 15 countries have enacted blocking statutes or adopted measures to prevent the extraterritorial application of U.S. discovery procedures against foreign persons."). Countries employing these statutes include Australia, Canada, China, France, and the United Kingdom. *See* Note, *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, 50 LAW & CONTEMP. PROBS. 197 (1987).

soil.[54] Litigants are unlikely to trifle with these harsh consequences in order to pursue a civil suit.

To fully understand the power behind these statutes, take the Chinese statute that Animal Science faces. Article 263 of China's Civil Procedure Law provides that "no foreign agency or individual may, without the consent of the competent authorities of the People's Republic of China, serve documents, carry out an investigation or take evidence within the territory of the People's Republic of China."[55] These provisions are so strict that the U.S. Department of State warned American citizens seeking evidence from within China's borders that their actions could subject them to "detention and/or arrest."[56] The State Department went on to explain the delays associated with successful discovery through Chinese channels: "Requests may take more than a year to execute. It is not unusual for no reply to be received or [received only] after considerable time has elapsed, [or] for Chinese authorities to request clarification from the American court with no indication that the request will eventually be executed."[57]

As the Chinese example illustrates, litigants facing blocking statutes are stopped in their tracks. These impediments provide a tremendous frustration to parties who cannot resolve even initial questions—those previously thought jurisdictional—prior to expending efforts in discovery.

VI. Potential Paths Toward Reform

No discussion of this topic is complete without a nod to various options available to those inclined towards reform.

First, one could imagine the ambitious step of amending the Hague Convention to prevent blocking statutes and ensure an efficacious discovery system for litigants around the globe. Such a solution, however, is unlikely to come to fruition in the foreseeable future—sovereign nations are unlikely to give away today what they insisted on retaining forty years ago.

A more realistic approach encourages judges to develop a heightened awareness of the difficulties plaintiffs face in international discovery. The *Société Nationale* opinion[58] nicely depicts the current problem: American judges believe that the Federal Rules of Civil Procedure provide a one-size-fits-all solution, reasonably and equally effective for all litigants. Sensitizing judges to the obstacles in international discovery could ameliorate the disadvantages of applying a substantive interpretation to legal claims provable only with

54. Teitelbaum, *supra* note 49, at 849.

55. Civil Procedure Law of the People's Republic of China (promulgated by Order No. 44 of the President of the People's Republic of China, April 9, 1991), art. 263, *available at* http://www.china.org.cn/english/government/ 207339.htm.

56. Tanner, *supra* note 52, at 35.

57. *Id.*

58. *See supra* discussion at notes 50-51 and accompanying text.

evidence held overseas. This awareness could result in a new substantive cannon of statutory construction, one that requires a clear statement to apply a non-jurisdictional restriction for statutes seeking to regulate foreign conduct.[59] In enacting a law with overseas application, like the FTAIA, Congress likely meant to regulate that conduct in an efficient manner, a manner sufficient not only to redress wrongs but also to deter them from occurring. The Third Circuit's current method of statutory construction obstructs that purpose.

Another potential stopgap uniquely suits trial courts. There, judges attempting to preside over lawsuits reaching foreign conduct could adopt a judicial inference adverse to a foreign party evading their discovery requests; if a defendant invokes a blocking statute, the judge could assume that alleged adverse facts appear in the undiscoverable materials and rule accordingly. This option would mimic the procedures currently employed where a party fails to comply with ordinary discovery requests,[60] and it could mitigate the consequences of circuit court opinions requiring a substantive interpretation of the FTAIA or similar statutes.

Ultimately, however, the option of statutory change may prove optimal. Rather than requiring judges to behave in an overly realist manner to shift their jurisprudence over time, reform could consist of an amendment to the Sherman Act clarifying that the FTAIA provides a jurisdictional, rather than substantive, bar to suit. Such a statute would swiftly clarify the law in this area without the cost and uncertainty otherwise plaguing future lawsuits.

VII. Conclusion

A substantive interpretation of the FTAIA, following the Third Circuit's application of *Arbaugh* in *Animal Science*, will likely allow more claims to proceed to the point where foreign blocking statutes will prevent plaintiffs from proving their case and obtaining a final judgment. This inability of would-be-prevailing plaintiffs to obtain compensation discourages future private enforcement and leaves key American statutes under-enforced. Given the high volume of foreign imports entering American markets from countries with robust blocking statutes, judges and policymakers interpreting foreign-looking statutes like the FTAIA should no longer remain blind to the tremendous difficulties associated with discovery activities under the Hague Convention. American law will need to address these problems in order to restore the FTAIA's promise of redress for American injuries perpetrated by overseas entities.

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59. This approach has coalesced in the federalism canon, which requires that if Congress wants to "upset" the "usual constitutional balance of federal and state powers," it must clearly state its intention to do so within the statute. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

60. *See* FED. R. CIV. P. 37(b)(2)(A)(i); *see also* 8B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2289 n.19 (3d ed. 2002) (citing cases).