

Antitrust Alert

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En Banc Seventh Circuit Further Opens U.S. Courts to Foreign Cartel Activities That Affect Domestic Commerce

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In an important decision interpreting the Foreign Trade Antitrust Improvements Act (FTAIA), Judge Diane Wood, writing for the Seventh Circuit en banc, clarified the reach of U.S. antitrust laws over foreign conduct. The ruling breathed new life into a previously dismissed purchaser class action lawsuit against mostly foreign potash producers. *Minn-Chem v. Agrium*, No. 10-1712, 2012 U.S. App. LEXIS 13131 (7th Cir. Jun. 27, 2012).

In 2008, U.S. purchasers of potash, a mineral used in agricultural fertilizers, sued seven producers, all but one of whom are headquartered outside the United States. The complaint alleged that the defendants had engaged in a global cartel that included manipulating output and capacity and engaging in joint ventures that were designed to police the cartel, with the effect of increasing prices for potash up to 600%. All of the relevant activity occurred outside the United States.

The defendants immediately raised the argument that the complaint did not meet the requirement of FTAIA. The district court denied a motion to dismiss in 2009, but certified an immediate appeal to the Seventh Circuit. A Seventh Circuit panel concluded in September 2011 that FTAIA precluded the complaint, but the court subsequently decided to review the issue en banc.

The en banc decision contains several important holdings. First, Judge Wood concluded in light of recent Supreme Court decisions, particularly *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (2010), that the Seventh Circuit's previous decision in *United Phosphorous v. Angus Chemical*, 322 F.3d 942 (7th Cir. 2003) (en banc) should be overruled, and that "the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of federal courts." *Minn-Chem*, 2012 U.S. App. LEXIS 13131 at *16.

Second, the court then continued to clarify the reach of the statute, passed in 1982. The court addressed two questions: first, how to define pure import commerce that is not subject to the special limiting rules established by FTAIA, and second, what it takes to show that foreign conduct has a "direct, substantial and reasonably foreseeable" effect on domestic commerce. *Id.* at *19. With respect to the first question, the court suggested that it distills into whether import trade has been substantially and intentionally affected by an anti-competitive arrangement that would violate the U.S. antitrust laws. Parsing the language of the second question, the court adopted a standard suggested by the government in its amicus brief and interpreted the FTAIA's provision requiring a "direct" effect as excluding foreign activities that are "too remote" from the ultimate effects on U.S. domestic or import commerce. Notably and of consequence in this case, it rejected a definition of "direct" effect as one that would have an "immediate consequence." *Id.* at *29-30. The court emphasized that this understanding of FTAIA should allay any concern that a foreign company that does any import business at all 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.

Finally, based on these standards, the court held that the plaintiffs, who alleged that they purchased potash from foreign sellers as well as non-sellers (such as marketing and sales agents), plausibly pled concerted action on the face of the complaint, even with regard to conduct that fell outside U.S. import commerce. As to the entities who

do not sell directly into the United States, the court held that plaintiffs' allegations regarding their activities (such as price negotiations and supply restrictions ultimately resulting in price increases) had a sufficiently direct, substantial, and reasonably foreseeable effect on import commerce as to withstand a motion to dismiss.

The court reasoned that limiting jurisdiction over foreign cartels, especially those over natural resources traded in a unified international market, could effectively leave the alleged cartels unchecked, as host countries — since they reap economic rents from other countries — may have no incentive to prosecute such cartels, and, moreover, export cartels are often exempt from a country's antitrust laws.

The en banc panel specifically emphasized that its decision was not meant to have any bearing on the merits of the dispute. It noted that the ruling that the case can proceed is not a statement about the ultimate merits of the case and merely allows the case to continue to discovery. One could surmise that defendants may well file a petition for a writ of certiorari in the Supreme Court. For now, this case stands as an important decision by an influential appellate court interpreting FTAIA in a way that will bring more cases under the scrutiny of the Sherman Act and U.S. federal courts. It will also increase the leverage of Department of Justice's Antitrust Division in its international enforcement initiatives.

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