

Alert

Antitrust/ Competition

7th Circuit Extends Reach of FTAIA

By Joseph Adamson

An *en banc* panel of the Seventh Circuit Court of Appeals held in *Minn-Chem, Inc. et al., v. Agrium Inc., et al.* that the Foreign Trade Antitrust Improvements Act (FTAIA)¹ relates to the merits of an antitrust claim, rather than to the subject-matter jurisdiction of a court.² The court's decision, which overrules a 2003 decision by the same court, removes a jurisdictional barrier to plaintiffs challenging foreign conduct in U.S. courts, and clarifies the scope of the FTAIA. This decision eases the burden on plaintiffs alleging that foreign conduct violates U.S. law and can be challenged in U.S. courts, and will likely result in fewer successful motions to dismiss by defendants at the outset of an antitrust case involving foreign conduct.

Background of the FTAIA

The reach of the Sherman Act to conduct taking place entirely outside of the United States was established by *United States v. Aluminum Co. of America (Alcoa)*.³ The Second Circuit held in *Alcoa* that the Act reached conduct that was "intended to affect imports and did affect them."⁴ In 1982, Congress passed the FTAIA to establish a uniform test to determine the "intended effects" of the foreign conduct in question. The FTAIA states that the Sherman Act extends to foreign, non-import conduct only when:

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.⁵

A number of early decisions had interpreted the FTAIA as limiting the subject-matter jurisdiction of a court to hear Sherman Act cases concerning foreign conduct. In its first case considering this question, *United Phosphorus, Ltd. v. Angus Chemical Co.*, the Seventh Circuit held that Congress intended for the FTAIA to strip federal courts of jurisdiction over foreign-based antitrust claims. The decision followed decades of precedent after *Alcoa* in which the application of the Sherman Act to foreign conduct was referred to by courts as an issue of subject-matter

jurisdiction.⁶ The court in *United Phosphorus* relied on decisions of other lower courts, opinions of commentators on antitrust law, and guidelines promulgated by the DOJ and FTC in support of this finding. However, a substantial minority of the *en banc* court disagreed. The dissenters argued that the text of the FTAIA contained no clear congressional statement that intended to restrict the subject matter jurisdiction of the federal courts. They also argued that the history of the application of the antitrust laws to foreign conduct, and the policies that the antitrust laws and the FTAIA were designed to further, both suggest that the FTAIA's test is of the elements of a claim rather than of the court's jurisdiction.

Procedural History of *Minn-Chem*

The Seventh Circuit was again faced with the question of the Sherman Act's reach to foreign conduct in *Minn-Chem*. The Plaintiffs were direct purchasers of imported potash from some of the defendants, and claimed that the defendants conspired to fix the price of the global supply of potash. They alleged claims under the FTAIA because of the global scope of the alleged conspiracy, and because some defendants—and members of the alleged conspiracy—would not otherwise have been reached under the Sherman Act because they did not sell products to the Plaintiffs in the United States. The defendants moved to dismiss the case for lack of subject matter jurisdiction and for failure to state a claim. The district court denied the defendants' motion to dismiss, but certified the ruling for interlocutory appeal.

The three-judge Seventh Circuit panel that first heard *Minn-Chem* noted that the *United Phosphorus* dissent's approach to determining whether a statute describes an element of a claim or a limit on a court's jurisdiction had prevailed with the Supreme Court's later ruling in *Morrison v. Nat'l Austl. Bank*, although *Morrison* did not concern the FTAIA, but a similar provision of the Securities Exchange Act.⁷ The panel also noted that *United Phosphorus* might be ripe for reconsideration, but declined to rule on whether the FTAIA should be described as an element of a claim or as a matter of jurisdiction. Instead, the panel found that the FTAIA required dismissal of the plaintiffs' claims under either interpretation.

The FTAIA Concerns the Elements of an Antitrust Claim and Does Not Strip Federal Courts of Jurisdiction

An *en banc* court reversed the panel, finding first that *Morrison's* analysis of the court's jurisdiction should be extended to the FTAIA, and second that the complaint sufficiently stated a claim under the FTAIA. *Morrison* held that § 10(b) of the Securities Exchange Act related to the scope of conduct that is prohibited by the Securities Exchange Act rather than to the jurisdictional issue of the court's power to hear the case.⁸ According to *Morrison*, "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case."⁹ The Seventh Circuit found that the FTAIA similarly describes what foreign conduct is regulated by the Sherman Act, relying in part on the

Supreme Court's description of the FTAIA as regulating what conduct falls under Sherman Act scrutiny in *F. Hoffman-La Roche Ltd. v. Empagran*.¹⁰

The court's ruling in *Minn-Chem* clarified that the FTAIA's limitations on the extraterritorial reach of the antitrust laws describe what conduct the law regulates, and what conduct lies outside of its reach. As the dissenting opinion in *United Phosphorus* originally noted, the FTAIA does not include the term "jurisdiction" or any similar phrase. Instead, the statute describes the foreign "conduct" to which the statute applies. In contrast, "when Congress decides to strip the courts of subject-matter jurisdiction in a particular area, it speaks clearly."¹¹ The *Minn-Chem* court found that the FTAIA establishes the merits of an antitrust claim when the conduct at issue takes place overseas. The FTAIA "removes [all other foreign commerce] from the Sherman Act's reach, unless those activities adversely affect . . . imports to the United States."¹² The Act then "brings such conduct back within the Act" by satisfying each of two criteria within the statute. First, the conduct must have a "direct, substantial, and reasonably foreseeable effect" on either U.S. domestic commerce or export commerce of a U.S. exporter. Second, the direct, substantial, and foreseeable effect on commerce must give rise to a substantive claim under the Sherman Act.¹³ The court held that these provisions, like § 10(b) of the Securities Exchange Act at issue in *Morrison*, "describe what conduct the law purports to regulate and what lies outside its reach," and thus found that the FTAIA must be

interpreted the same way as the Securities Exchange Act was in *Morrison*.¹⁴ The provisions of the FTAIA describe the elements of the conduct that is made illegal by the Sherman Act and the FTAIA, not the court's jurisdiction to hear cases under the FTAIA.

The FTAIA Requires "Direct" Effects to Have a "Reasonably Proximate Causal Nexus"

The court also made a significant finding on the scope of the FTAIA's requirement that foreign conduct have a "direct" effect on U.S. Commerce. The *Minn-Chem* court focused on the facts alleged in the Complaint to determine whether the Defendants' alleged actions satisfied the requirement of a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce. The court found that a price increase of over 600% from 2003 to 2008, and the defendants' control of 71% of the world's supply of potash, satisfied the requirements that the alleged cartel had a substantial and foreseeable effect on the U.S. market. The court then found that the requirement of a "direct" effect was meant to exclude certain activity, the consequences of which were too remote to punish as the cause of those effects, from the reach of the antitrust laws. The Plaintiffs had alleged that Defendants conspired to limit supply and raise prices in other markets, then used those prices as a benchmark for sales to the United States. The court found that these allegations stated a claim under the FTAIA sufficient to withstand a motion to dismiss, because an effect is "direct" if there is a "reasonably proximate causal nexus."¹⁵ The

court's holding explicitly adopted the interpretation of this provision supported by the Department of Justice's Antitrust Division. The court declined to follow the Ninth Circuit's more restrictive interpretation of the FTAIA that a "direct" effect is one that "follows as an immediate consequence of the defendant's activity."¹⁶ The *Minn-Chem* interpretation expands the scope of conduct for which defendants may be liable under the FTAIA.

Antitrust Defendants Face a Greater Burden in Future Motions to Dismiss

The court in *Minn-Chem* clarified that defendants may be liable under the FTAIA for conduct that takes place entirely outside of the United States, if that conduct has a direct, substantial, and foreseeable effect on U.S. commerce or on export trade or commerce originating in the United States. The court also clarified the burden that plaintiffs face in pleading that foreign conduct violates U.S. law and can be challenged in U.S. courts. Following *Minn-Chem*, a plaintiff is only required to plead the elements of conduct satisfying the FTAIA with sufficient substance and particularity to withstand a motion to dismiss for failure to state a claim.¹⁷ A plaintiff previously had the burden of establishing that a claim met the requirements of the FTAIA as an element of subject-matter jurisdiction. Unlike allegations going to the merits of a claim, allegations necessary to establish subject-matter jurisdiction are not accepted as true by the reviewing court and may be challenged in a motion to dismiss at any time. A plaintiff seeking to prove that a court has jurisdiction

to hear a claim must "clearly allege facts demonstrating that he is a proper party to invoke judicial resolution."¹⁸ In contrast, allegations meant to establish the merits of a case must be accepted as true by the court considering a motion to dismiss for failure to state a claim.¹⁹ In addition, while a motion to dismiss for failure to state a claim can only be brought as late as trial, a motion to dismiss for lack of subject-matter jurisdiction can be brought at any time because a court's power to decide a case must be secure at all times.²⁰

Moreover, the court's decision to adopt the DOJ's interpretation of "direct" broadens the scope of conduct that is potentially reached by the Sherman Act under the FTAIA. This decision will likely result in the survival of more antitrust claims alleging unlawful conduct taking place entirely outside of the United States, when those claims are faced with early motions to dismiss.

1 15 U.S.C. § 6a.

2 *Minn-Chem, Inc. et al., v. Agrium Inc., et al.*, No. 10-1712, (June 27, 2012).

3 148 F.2d 416 (2d Cir. 1945).

4 *Id.* at 444.

5 15 U.S.C. § 6a.

6 *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (2003).

7 *Minn-Chem, Inc. et al., v. Agrium Inc., et al.*, No. 10-1712, (Sept. 23, 2011), citing *Morrison v. Nat'l Austl. Bank*, 130 S.Ct. 2869 (2010).

8 130 S.Ct. 2869 (2010).

9 *Id.* At 2877 (internal citations omitted).

10 542 U.S. 155, 161 (2004).

11 *Minn-Chem*, No. 10-1712 (June 27, 2012).

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- 12 *Id.*
- 13 See 15 U.S.C. § 6a.
- 14 *Minn-Chem*, No. 10-1712 (June 27, 2012).
- 15 Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. Ann. Surv. Am. L., 415, 430 (2005) (remarks of the Deputy Assistant Attorney General).
- 16 *United States v. LSL Biotechs.*, 379 F.3d 672, 681 (9th Cir. 2004).
- 17 See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); see also *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
- 18 *Minn-Chem*, No. 10-1712 (June 27, 2012).
- 19 See *Richards v. Duke University*, 480 F.Supp.2d 222 (D.D.C. 2007).
- 20 Fed. R. Civ. P. 12(h).

If you would like more information about FTAIA or Weil's Antitrust practice, please speak to your regular contact at Weil, or to:

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