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I. INTRODUCTION

The Seventh Circuit, sitting en banc in Minn-Chem v. Agrium, issued an important opinion interpreting two key aspects of the Foreign Trade Antitrust Improvement Act ("FTAIA"). The en banc decision reversed the original panel decision in the case and concluded that the FTAIA is an element for proving a substantive violation of the Sherman Act rather than a jurisdictional requirement, and it also broadened the definitions of both import commerce and direct effect under the FTAIA. Judge Diane Wood, an expert in international antitrust, authored the en banc opinion as well as the dissenting opinion in the original panel decision in this case.

The governing law in this case is the FTAIA, a notoriously poorly drafted statute, which was passed in 1982 for the purpose of clarifying the role of the judiciary in adjudicating antitrust suits where the illegal conduct has taken place outside the United States. As a result of the en banc decision in Minn-Chem v. Agrium, the Seventh Circuit may have provided needed clarity in interpreting the FTAIA but may also have deepened a circuit split over how to apply U.S. antitrust law to international anticompetitive conduct.

II. CASE HISTORY

The product at issue is potash, which is one of the key ingredients used to manufacture fertilizer. The potash industry is highly concentrated, with the majority of production originating in Canada, Belarus, and Russia and dominated by a few firms.¹ In addition, the cost of opening a

new mine requires approximately $2.5 billion, severely limiting entry to new producers. The variable costs represent the majority of the cost of production, reducing the producer’s incentive to operate mines at full capacity.

The Plaintiffs allege in their Complaint that the Defendant producers engaged in a conspiracy to fix prices through controlled output restrictions. This was facilitated by the formation of the International Fertilizer Industry Association, where competitors arranged meetings to raise prices. In addition to the direct collusion, there is also considerable cross ownership among producers and consolidation in the industry. Many of the major producers have formed formal joint ventures with each other for marketing and distribution purposes. The anticompetitive effects of these arrangements have also been acknowledged by the industry itself. Senior executives of competing producers engaged in site visits of competing production facilities. During the Class Period, major producers engaged in a series of mine shutdowns and reduced exports to importing nations, resulting in a six-fold increase in the price of potash.

The Defendants filed motions to dismiss both Complaints on grounds that the court lacked subject matter jurisdiction to hear the case. The motions stated that the alleged conduct occurred outside that US and the conduct did not have a “direct, substantial, and reasonably

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2 Id. at 13.
3 Id.
4 Id. at 18-19.
5 Id. at 13-14.
6 Id. at 15-17.
7 Direct Purchasers Complaint at 16-17 (Dmitry Rybolovlev, who controls a large Russian potash producer, stated, “joint operations allows [potash producers] to avoid needless competition”).
8 Id. at 17-18.
9 Id. at 20-24; see also Id. at 25, Figure 1 (prices in the US increased from approximately $150 per ton on July 1, 2003 to $900 per ton in 2009); Minn-Chem v. Agrium, 657 F.3d 650, 654 (7th Cir. 2011) (“[f]rom 2003 to 2008, potash prices in the United States increased by a staggering amount – roughly 600%”).
foreseeable effect” on US commerce. The District Court denied the motions to dismiss the Direct Purchaser Complaints because they were sufficiently pled and the claims met the subject matter jurisdictional requirement. However, the District Court dismissed the Indirect Purchaser Complaints under the Defendants’ FRCP 12(b)(6) motion to dismiss because those plaintiffs did not have standing to file a Sherman Act claim, as their harm was too indirect.

The Seventh Circuit reversed the District Court, following the Defendants interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). The Court held that the alleged illegal conduct must be directed at the US import market to establish subject matter jurisdiction. The Complaints failed to allege conduct that plausibly suggested the Defendants sought to increase prices or establish quotas for the US market. The Complaint only alleged that the anticompetitive conduct targeted the markets in Brazil, China, and India, which then established a benchmark price for potash in the US. The Defendant’s conduct was not directed at domestic commerce and the evidence of “benchmarking” prices in China, Brazil, and India was not sufficient to demonstrate a direct effect.

IV. SEVENTH CIRCUIT EN BANC DECISION

The Seventh Circuit agreed to rehear the appeal en banc on December 2, 2011 and issued its opinion on June 27, 2012, reversing their earlier decision and precedent by affirming the

11 Id. at 925.
12 Id. at 937.
13 Id. at 941.
14 Minn-Chem, 657 F.3d at 656-657.
15 Id. at 661.
16 Id. (“contrary to what the district court seemed to think, it is not enough that the defendants are engaged in the U.S. import market… ‘import trade or commerce reception requires that the defendant’s [foreign anticompetitive] conduct target [U.S.] import goods or services’”).
17 Id. at 661; see also Direct Purchasers Complaint at 25 (“Defendants negotiate term contracts for purchases of potash throughout the world. Agreements with buyers in Brazil, India, and China typically are made first, and the prices established in those markets directly influence prices in other major markets”); Direct Purchasers Complaint at 25 (“Defendants knew and intended that their global conspiracy would directly affect prices of potash in the United States”).
18 Minn-Chem, 657 F.3d. at 662-64.
District Court’s denial of the defendant’s motion to dismiss. The Court opinion addressed both the jurisdictional question and interpreted the meaning of “import commerce” and “direct” domestic effect.

FTAIA as an Element of the Sherman Act

The Seventh Circuit stated that the FTAIA is an element for proving an antitrust violation under the Sherman Act, overturning United Phosphorus and Minn-Chem v. Agrium (2011). The dissent in United Phosphorus had argued that the FTAIA was a merits question and did not serve to limit the jurisdiction of the federal courts.

The Seventh Circuit relied on the Supreme Court decision in Morrison v. National Australia Bank, which held that the extraterritorial reach of section 10(b) of the Securities Exchange Act, a similarly worded statute, was not a question of subject matter jurisdiction but rather a merits question. In the en banc decision in Minn-Chem, the Court held that “the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts.”

This decision is also consistent with the Third Circuit decision in Animal Science Products v. China Minmetals Corp, which held that “the FTAIA’s language must be interpreted as imposing a substantive merits limitation rather than a jurisdictional bar.” The Third Circuit held that this was a proper exercise of Congressional authority under the Commerce Clause in establishing an element of an antitrust claim versus an Article III limitation on the jurisdiction of

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20 United Phosphorus v. Angus Chemical, 322 F.3d 942, 952 (7th Cir. 2003).
21 Id. at 953-954 (“[i]n my view, there are at least four compelling reasons why we should not construe the FTAIA’s test as one going to the subject matter jurisdiction of the court, and instead should adopt what I will call an element approach”).
22 Morrison v. Nat’l Australian Bank, Ltd, 130 S.Ct. 2869, 2877 (2010) (“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”).
the federal courts. The Third Circuit also stated that the lower court may entertain motions to dismiss, but that those motions must be made on a failure to state a claim pursuant to FRCP 12(b)(6).

**Interpretation of Import Commerce and Direct Domestic Effect**

The Seventh Circuit also clarified the FTAIA’s impact on import commerce and direct domestic affect. They held that import commerce and domestic commerce are excluded from the special requirements of the FTAIA and are instead to be subjected to the Sherman Act’s general requirements. For import commerce, the Court held that “transactions in which a good or service is being sent directly into the United States” are under the jurisdiction of US antitrust laws.

The Seventh Circuit broadened the definition of direct effect on domestic commerce when the illegal conduct occurred outside the US. This is an element of the standard used for non-domestic, non-import trade or commerce. This conduct must have a “direct, substantial, and reasonably foreseeable effect” on domestic commerce. In its decision in *Minn-Chem v. Agrium* (2011), the Court relied on the Ninth Circuit definition of direct, defining it as “follows as an immediate consequence of the defendant’s… activity.” However, in *Minn-Chem v. Agrium* (2012), the Court adopted the Department of Justice Antitrust Division proposed definition of direct to mean a “reasonably proximate causal nexus” between the anticompetitive activity and domestic effect. This definition is consistent with the approach adopted in *F. Hoffmann-La

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25 Id. at 469.
26 Id.
27 *Minn-Chem*, 2012 WL 2403531 at 19 (“the only outstanding question is whether this import trade has been substantially and intentionally affected by an anticompetitive arrangement”).
28 Id. at 16.
Roche v. Empagran, which held that foreign anticompetitive conduct that harms domestic US commerce is subjected to US antitrust laws.31

The Court held that the second and third elements requiring substantial impact and reasonably foreseeable were easily met. The conduct was substantial because the US imported 5.3 million tons of potash in 2008 and the majority of these imports were from the Defendants.32 In addition, the price of potash increased 600% during the Class Period, from 2003-2008.33 In addition, the conduct was reasonably foreseeable. Potash is a homogeneous commodity with little room for international arbitrage and the Defendant producers control 71% of the global market for potash.34 Therefore, the Court concluded that it is reasonably foreseeable that the alleged cartel arrangement would have a foreseeable impact on the US potash market.

V. CONCLUSION

Minn-Chem v. Agrium (2012) changes the way in which the Seventh Circuit will review cases where the anticompetitive conduct occurred outside the US. It overturned established precedent in United Phosphorus and concurs with the Third Circuit interpretation of the FTAIA as an element of a Sherman Act claim.

This decision does little to resolve the circuit split whether to regard the FTAIA as a subject matter jurisdictional limitation or creating an element for proving a Sherman Act violation by a foreign defendant. The Seventh Circuit joined the Third Circuit when it overturned United Phosphorus and Minn-Chem v. Agrium (2011). However, both the Ninth Circuit in United States v. LSL Biotechnologies35 and D.C. Circuit in Empagran v. F. Hoffmann-La Roche36

31 F. Hoffmann-La Roche v. Empagran, 542 U.S. 155, 165 (2004) (“our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable… insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused”).
33 Id.
34 Id.
35 LSL Biotechnologies, 379 F.3d 672 (9th Cir. 2004).
continue to hold that the FTAIA acts as a subject matter jurisdictional limitation on Sherman Act claims.

This decision also creates a circuit split with the Ninth Circuit in defining direct effect on US commerce. As outlined in *US v. LSL Biotechnologies*, the Ninth Circuit defined direct effect as “follows as an immediate consequence of the defendant’s… activity.” Meanwhile, the Seventh Circuit adopted a broader definition of a “reasonably proximate causal nexus” between the foreign anticompetitive conduct and the effect on US commerce.

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37 *LSL Biotechnologies*, 379 F.3d at 680.