No. 10-1712

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MINN-CHEM, INC., et al.,
Plaintiffs-Appellees,

v.

AGRIUM INC., et al.,
Defendants-Appellants.

On Interlocutory Appeal from an Order of the
United States District Court for the Northern District of Illinois
MDL Docket No. 1996, Case No. 08-cv-6910
(The Honorable Ruben Castillo)

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY ON REHEARING *EN BANC*

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STATEMENT OF INTEREST

The United States and the Federal Trade Commission enforce the federal antitrust laws and have a strong interest in the correct interpretation of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which added Section 6a to the Sherman Act, 15 U.S.C. § 6a. The FTAIA also added Section 5(a)(3) to the FTC Act, 15 U.S.C. § 45(a)(3), which closely parallels Section 6a and limits the antitrust enforcement authority of the FTC. This amicus brief addresses the meaning of the "import commerce" and "direct effects" exceptions in the FTAIA but does not express a view on the proper disposition of this case. It is filed pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF ISSUES

1. Whether the FTAIA's import commerce exception is limited to conduct that specifically targets U.S. import commerce.

2. Whether the FTAIA's direct effects exception is limited to effects that follow as an immediate consequence of the challenged conduct.

STATEMENT

This case involves an alleged foreign conspiracy to fix the price of potash in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. It raises important questions regarding the proper interpretation of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a.

1. Section 1 of the Sherman Act prohibits agreements "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. The FTAIA, however, provides that:

> Sections 1 to 7 of [the Sherman Act] 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.

15 U.S.C. § 6a.

The FTAIA initially places all conduct involving foreign commerce, with the exception of co nduct involving import commerce, outside the Sherman Act's reach. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* , 542 U.S. 155, 162 (2004). Thus, the FTAIA leaves the

into the United States, because the price of potash in these foreign markets served as a "benchmark" for U.S. sales. *Id.* at 9-10.

Defendants moved to dismiss the Sherman Act claims for lack of subject-matter jurisdiction under the FTAIA and alternatively for failure to state a claim upon which relief can be granted. Slip Op. 10. The district court denied the motion. *Id*. It ruled that the import commerce exception to the FTAIA was satisfied because the defendants imported potash into the United States and there was a sufficiently "tight nexus between the alleged [global conspiracy] and [d]efendants' import activities . . . to conclude that the former 'involved' the latter." *Id.* at 19. The court also concluded that plaintiffs sufficiently alleged a price-fixing conspiracy to state a claim under Section 1. *Id.* at 10.

3. On a certified interlocutory appeal, a two-judge panel of this Court vacated the district court's decision. Slip. Op. 1-27. [1] The panel explained that the district court "essentially conflate[d] the 'import commerce' exception and the 'direct effects' exception" by assuming that "foreign anticompetitive conduct can 'involve' U.S. import commerce even if it is directed entirely at markets overseas." *Id.* at 19. The panel

[1] Judge Evans, the third member of the panel, died before the case was decided.

further noted that the district court had erred in reasoning that "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." *Id.* at 19-20.

The panel then held that "the relevant inquiry under the import-commerce exception is 'whether the defendants' alleged anticompetitive behavior was directed at an import market,'" which "'requires that the defendants' [foreign anticompetitive] conduct target [U.S.] import goods or services.'" Slip Op. 20-21 (quoting *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011)). Plaintiffs failed to satisfy that requirement, the panel concluded, because they did not sufficiently allege either "that the offshore defendants agreed to an American price or production quota for potash" or "that the defendants agreed to worldwide production quotas for all members of the conspiracy or that a global cartel price was ever set." *Id.* at 21. Rather, plaintiffs "describe[d] anticompetitive conduct aimed at the potash markets in Brazil, China, and India—not the U.S. import market." *Id.*

The panel also concluded that plaintiffs' claims did not come within the "direct effects" exception (an issue the district court had not reached). Slip Op. 21-27. The panel found "compelling" the definition of "direct" adopted in *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004): that an effect is "direct" if "it follows as an immediate consequence of the defendant's activity," and hence, "[a]n effect cannot be 'direct' where it depends on . . . uncertain intervening developments." Slip Op. 22 (quoting *LSL Biotechs.*, 379 F.3d at 680-81). The alleged effects failed to satisfy this requirement, the panel held, because the complaints lacked "specific factual content to support the asserted proposition that prices in China, India, and Brazil serve as a 'benchmark' for prices in the United States and that this benchmark, if it exists, has a strong enough relationship with the domestic potash market to raise a plausible inference that the defendants' foreign anticompetitive conduct has a 'direct, substantial, and reasonably foreseeable effect' on domestic or import commerce." *Id.* at 24. Thus, dismissal of the Sherman Act claims was required. *Id.* at 27.

4. On December 2, 2011, the Court granted plaintiffs' petition for rehearing *en banc* and vacated the panel's decision. Dkt. 58.

SUMMARY OF ARGUMENT

1. Congress enacted the FTAIA to make clear to U.S. exporters and U.S. firms doing business abroad that the Sherman Act does not apply to their business arrangements "as long as those arrangements adversely affect only foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* , 542 U.S. 155, 161 (2004). But Congress also sought to ensure that purchasers in the United States remained fully protected by the federal antitrust laws. Thus, the FTAIA leaves the Sherman Act applicable to conduct "involving" import trade or commerce (the import commerce exception) and to conduct that has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States, U.S. import commerce, or the export trade of a U.S. exporter (the direct effects exception). 15 U.S.C. § 6a.

2. The import commerce except ion guarantees the continuing applicability of the Sherman Act to import restraints that harm purchasers in the United States. The exception does not apply merely because the defendants engaged in import commerce; rather, the conduct being challenged must itself "involv[e]" import trade or commerce. 15 U.S.C. § 6a. In a Section 1 case, the conduct involves

import commerce when the challenged agreement is, at least in part, in restraint of import commerce.

Courts have described the FTAIA's import commerce exception as applying when the challenged conduct is "directed at an import market," *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 303 (3d Cir. 2002), or "target[s] import goods or services," *Animal Sci. Prods.,*

U.S. firms when the federal antitrust laws apply to conduct involving export commerce or other commerce outside the United States, Congress intended to “increase United States exports of products and

business of carrying cement and fe rtilizer between Taiwan and South Vietnam. H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494. Yet, such anticompetitive cond uct "should not, merely by virtue of the American ownership, come within the reach of our antitrust laws." *Id.*

Congress's solution was the FTAIA. It provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless such conduct has a direct, substantial, an d reasonably foreseeable effect" on commerce within the United States, U.S. import commerce, or export trade of a U.S. exporter. 15 U.S.C. § 6a.

For conduct that does not involve commerce within the United States, the FTAIA makes the Sherman Act inapplicable unless the conduct comes within a statutory exception. The first exception applies to conduct involving import commerce. By providing that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations," the FTAIA leaves the Sherman Act fully applicable to conduct involving import commerce. 15 U.S.C. § 6a; *see Animal Sci. Prods., Inc. v. China Minmetals Corp.* , 654 F.3d 462, 466 (3d Cir. 2011) ("[T]he FTAIA provides that it does not apply (and thus that the Sherman Act *does* apply) if the defendants were involved in 'import trade or import commerce' (the 'import trade or commerce' exception)."). This exception was included so there would be "no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law." H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494.

The second exception applies to conduct involving only non-import foreign commerce that, nevertheless, affects the United States. The FTAIA leaves the Sherman Act applicable to such conduct if it has a

"direct, substantial, an d reasonably foreseeable effect" on commerce within the United States, U.S import commerce, or the export trade of a U.S. exporter. 15 U.S.C. § 6a(1). This exception also requires that "such effect gives rise to a claim under [the Sherman Act]." 15 U.S.C. § 6a(2).[3]

II. The Import Commerce Exception Is Not Limited to Conduct that Specifically Targets U.S. Import Commerce.

whether the "alleged *conduct by the defendants* 'involved' import trade or commerce").

Section 1 of the Sherman Act applies when the challenged contract, combination, or conspiracy is , at least in part, in restraint of import commerce. For instance, a pr ice-fixing conspiracy among foreign manufacturers "involv[es]" import commerce if the conspirators fix the price of goods sold in or for delivery to the United States—i.e., goods in import commerce. *See Animal Sci.* , 654 F.3d at 471 n.11 (emphasizing the importance of defendants' "sales of magnesite for delivery in the

at 470. The Third Circuit disagreed. *Id.* "[T]he relevant inquiry is whether the defendants' alleged anticompetitive behavior 'was directed at an import market,'" or, "to phrase it slightly differently, the import trade or commerce exception requires that the defendants' conduct target import goods or services." *Id.* (quoting *Turicentro* , 303 F.3d at 303).

While conduct "directed at" or "targeting" import commerce satisfies the import commerce exception, those terms do not convey the full breadth of the statutory term "involving." Adopting those terms as a standard risks rewriting, and thereby narrowing, the FTAIA's import commerce exception. *Cf. Vainisi v. CIR* , 599 F.3d 567, 572 (7th Cir. 2010) (cautioning courts not to "rewrite statutes . . . merely because [the courts] think they imperfectly express congressional intent").

Terms like "directed at" and "targeting" suggest that the import commerce exception applies only if the defendants specifically or

be singled out for anticompetitive conduct. [4] *Cf. Kruman v. Christie's Int'l PLC,* 284 F.3d 384, 393 (2d Cir. 2002) ("Our markets benefit when antitrust suits stop or deter any conduct that reduces competition in our markets regardless of where it occurs and whether it is also directed at foreign markets."), *abrogated on other grounds by Empagran* , 542 U.S. 155.

"Directed at" and "targeting" also might be misunderstood to suggest that the import commerce exception turns on the proportion or dollar value of products sold in or for delivery to the United States. A price-fixing conspiracy "involv[es]" U.S. import commerce even if the conspirators set prices for products sold around the world (so long as the agreement includes products sold into the United States) and even if only a relatively small proportion or dollar amount of the price-fixed goods were sold into the United States.

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[4] Applying the import commerce exception to conduct that restrains U.S. import

While borrowing the “directed at” and “targeting” formulations from the Third Circuit, the panel ap

Court should make clear that the import commerce exception is not limited to conduct specifically targeting U.S. import commerce.

III. The Direct Effects Exception Is Not Limited to Effects that Follow as an Immediate Consequence of the Challenged Conduct.

The direct effects exception to the FTAIA provides that conduct involving (non-import) trade or commerce with foreign nations is

illuminate its text"); *A.M.I. Diamonds Co. v. Hanover Ins. Co.* , 397 F.3d 528, 530 (7th Cir. 2005) (where contractual or statutory text is not written in terms of its purposes, "the task for the court is to interpret the text in light of its purposes"). So viewed, "direct" is best defined as "reasonably proximate."

Antitrust courts historically limited Section 1 liability to conduct with a "direct effect in restraint of trade or commerce among the several states, or with foreign nations." *Hopkins v. United States* , 171 U.S. 578, 586-87 (1898); *see Anderson v. United States* , 171 U.S. 604, 616 (1898); *LSL Biotechs.* , 379 F.3d at 685-86 (Aldisert, J., dissenting). [7] The reasoning in these cases suggested that the existence of such a direct effect is "a question of proximity and de[g]ree." *N. Sec. Co. v. United States* , 193 U.S. 197, 409-10 (1904) (Holmes, J., dissenting); *see also Anderson*, 171 U.S. at 616 (an agreement "only indirectly and unintentionally" affecting interstate trade or commerce is not within the scope of the Sherman Act); *Hopkins* , 171 U.S. at 596 ("charges of the

[7] Antitrust courts stopped requiring proof of a "direct effect" on interstate commerce after the Supreme Court abam2 Tw [(0cr8[("reas3)4(te)3.)2"rotectes o15(mm(r)4.8cr)4.8().1( )]TJT*D -.

nature described do not amount to a regulation of interstate trade or commerce because they touch it only in an indirect and remote way"); *United States v. Joint Traffic Ass'n* , 171 U.S. 505, 568 (1898) ("An agreement . . . with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."); *cf. Carter v. Carter Coal Co.* , 298 U.S. 238, 327-28 (1936) (Cardozo, J., dissenting) (surveying cases and observing that "direct" means "the causal relation . . . is so close and intimate and obvious").

Antitrust courts also have long relied on the concept of "directness" in determining whether a private plaintiff's injury gives rise to standing under the antitrust laws. *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 476-77 & n.12 (1982) (citing cases). [8] The

causation between a defendant’s action and a plaintiff’s injury or (in

conspirators' restraint of trade in the inputs (which is non-import foreign commerce) would proximately cause effects on import commerce in the finished goods, notably by increasing the price. This effect should be viewed as direct, and therefore, the direct effects exception would apply (assuming the effect was also reasonably foreseeable and substantial). *Cf. Mandeville Island Farms*, 334 U.S. at 235-38 (an unlawful restraint of local commerce in sugar beets had the requisite effect on interstate commerce in sugar). In addition, a cartel making no sales into the United States would come within the direct effects exemption if it created "a world-wide shortage . . . that had the effect of raising domestic prices." H.R. Rep. No. 97-686, at 13, *reprinted in* 1982 U.S.C.C.A.N. at 2498.

Principles of prescriptive comity fully support defining "direct" as reasonably proximate. By leaving the Sherman Act applicable to conduct that has a reasonably proximate (and substantial and reasonably foreseeable) effect on commerce within the United States, import commerce, or export commerce of a U.S. exporter, Congress sought to redress domestic antitrust injuries in this commerce. American "courts have long held that application of our antitrust laws

to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Empagran*, 542 U.S. at 165.[10]

The panel here found "compelling" the definition of "direct" adopted by the panel majority in *LSL Biotechnologies*: that an effect is "direct" if "it follows as an immediate consequence of the defendant's activity," and hence, "[a]n effect cannot be 'direct' where it depends on . . . uncertain interv ening developments." Slip Op. 22. (quoting 379 F.3d at 680-81). But the *LSL* majority's reasoning was seriously flawed, and its definition threatens effective antitrust enforcement.

When the FTAIA was enacted in 1982, there were many "ordinary and common" usages of the term "direct." *LSL Biotechs.*, 379 F.3d at 692 (Aldisert, J., dissenting); *see also supra* note 6. The definition of "direct" adopted by the *LSL* majority corresponds to one such usage—"proceeding from one point to another in time or space without deviation or interruption"—while the definition adopted by the *LSL*

[10] Similarly, by leaving the Sherman Act a pplicable to conduct that restrains import commerce, Congress sought to redress the do mestic injury caused by that restraint on U.S. imports.

dissent corresponds to another—“characterized by or giving evidence of a close especially logical, causal, or consequential relationship.”

limits of the reach of the antitrust laws, the FSIA deals with the general immunity of foreign nations fr om suit in U.S. courts and applies to numerous federal statutes. Moreover, while both statutes have a "direct effects" exception, the language of the exceptions differs. As the *Weltover* Court emphasized, the FSIA's "direct effects" exception does

foreseeable," so the *LSL* majority's definition of "direct" robs the "reasonable foreseeab[ility]" requir ement of any func tion. Thus, the *LSL* majority's definition of "direct" violates the "cardinal principle" that a statute should be interpreted so that, if possible, "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

In contrast, if direct is defined as "reasonably proximate," the import commerce and direct effects exceptions fit comfortably together: the former applies when the challenged conduct itself involves import commerce, while the latter applies when the challenged conduct proximately causes an effect on import commerce (or on commerce within the United States or certain export commerce). While proximate cause includes notions of foreseeability, proximate cause and reasonable foreseeability are distinct concepts. And defining "direct" as reasonably proximate gives each of the three parts of the direct effects exception its own function: "direct" goes to the effect's cause, "substantial" goes to its amount, and "reasonably fore seeable" goes to its objective predictability.

Finally, adopting the *LSL* majority's definition of "direct" could

States from anticompetitive conduct. Many finished goods sold in the United States are manufactured or assembled abroad and incorporate component parts sold, manufactured, or assembled in other countries.[12] Courts applying the *LSL* majority's definition of "direct" could erroneously find that the foreign assembly of these finished goods

United States. *Cf. Metallgesellschaft AG v. Sumitomo Corp. of Am.* , 325 F.3d 836, 842 (7th Cir. 2003) (“In a global economy, where domestic and foreign markets are interrelated and influence each other, it is

CONCLUSION

The Court should hold that the FTAIA's import commerce exception is not limited to conduct specifically targeting U.S. imports. The Court should also hold that the direct effects exception is not limited to effects that follow as an immediate consequence but includes those proximately caused by the challenged conduct.

Respectfully submitted.

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January 12, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,222 words, excluding the pa rts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface us ing Microsoft Office Word 2007 with 14-point New Century Schoolbook font in the body and 12-point New Century Schoolbook font in the footnotes.

January 12, 2012 /s/ Nickolai G. Levin
Nickolai G. Levin

CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby ce rtify that on January 12, 2012, I electronically filed the foregoing Brief for the United States and the Federal Trade Commission as Amici Cu riae in Support of Neither Party on Rehearing *En Banc* with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. Once the brief is accepted for filing by the Clerk's Office, I will send 30 copies to the Clerk of the Court by FedEx.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

January 12, 2012 /s/ Nickolai G. Levin
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