No. 10-1712

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MINN-CHEM, INCORPORATED, ET AL.,

Plaintiffs-Appellees

v.

AGRIUM INCORPORATED, 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 *AMICUS CURIAE* AMERICAN ANTITRUST INSTITUTE SUPPORTING APPELLEES' PETITION FOR REHEARING EN BANC

RICHARD M. BRUNELL
Director of Legal Advocacy
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, D.C. 20008
(617) 435-6464

October 7, 2011

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Cir. R. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it. No law firm has appeared, or is expected to appear, for *amicus curiae* in this matter.

s/ Richard M. Brunell

Richard M. Brunell
American Antitrust Institute
2919 Ellicott St., N.W.
Washington, D.C. 20008
(617) 435-6464
rbrunell@antitrustinstitute.org

October 7, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Legislative History

Other

INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws in the United States and around the world. AAI is managed by its Board of Directors with the guidance of an Advisory Board consisting of over 115 prominent antitrust lawyers, law professors, economists and business leaders.[1] AAI submits this brief because the panel's decision adds novel and unjustified conditions to the Foreign Trade Antitrust Improvement Act, which are likely to undercut the enforcement of the antitrust laws against international cartels and harm American businesses and consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case warrants en banc review because the panel's crabbed reading of the Foreign Trade Antitrust Improvement Act ("FTAIA") is

---

[1] AAI's Board of Directors alone has approved this filing for AAI. The individual views of members of the Advisory Board may differ from AAI's positions. Certain members of AAI's Advisory Board or their law firms represent parties on either side of this appeal, but they played no role in the Directors' deliberations. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other entity – other than AAI or its counsel – has contributed money that was intended to fund the preparation or submission of this brief.

inconsistent with precedent and the purposes of the statute, and unnecessarily restricts antitrust enforcement against international cartels by the government and private parties at a time when global cartels are burgeoning and causing extraordinary harm to U.S. businesses and consumers.

The Justice Department "has prosecuted international cartels affecting billions of dollars in U.S. commerce" in numerous sectors of the world economy, cartels "cost[ing] U.S. businesses and consumers billions of dollars annually." Scott D. Hammond, Deputy Ass't Attorney General for Criminal Enforcement, Antitrust Division, U.S. Dept. of Justice, *Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program* 17 (March 26, 2008), *available at* http://www.justice.gov/atr/public/speeches/232716.pdf. "Of the over $4 billion in criminal fines imposed in Division cases since FY 1997, well over 90 percent were obtained in connection with the prosecution of international cartel activity." *Id.* And the vast proportion of fines have been obtained from foreign-based corporations, "reflect[ing] the fact that the typical international cartel likely consists of a U.S. company and three or four of its competitors that are market leaders in Europe, Asia, and throughout the world." *Id.* Moreover, the scourge of international cartels continues apace,

notwithstanding stepped up enforcement efforts. *See id.* (noting that over 50 sitting grand juries were investigating suspected international cartel activity).

Yet the panel's decision throws up new hurdles to the prosecution of foreign cartels and the compensation of their American victims. Congress made it crystal clear in the FTAIA that "import restraints, which can be damaging to American consumers, remain covered by the" Sherman Act, H.R. Rep. No. 97-686, at 8 (1982) (internal quotation marks omitted), and it expected that "any major activities of an international cartel would likely have the requisite impact on United States commerce," *id.* at 13. Nonetheless, the panel added a requirement – nowhere stated in the statute or the case law – that foreign cartels that import their products into the U.S. must specifically target U.S. imports in order to be subject to the Sherman Act. Alternatively, to establish that an international cartel is subject to the Sherman Act under the FTAIA's "direct, substantial, and reasonably foreseeable effect" test, the panel adopted a new, narrow definition of the term "direct" ("follows as an immediate consequence of the defendant's activity") that is entirely unmoored to the purpose of the statute or the relevant case law.

Having erected these hurdles, the panel dismissed the complaint, although it alleges that a worldwide cartel of potash producers (including

one American firm) shut down or reduced output at various potash mines throughout the world over a period of time, which resulted in higher prices throughout the world, including the U.S., *one of the two largest consumers of potash*. Direct Purchaser Amended Consolidated Class Action Complaint ("Compl.") ¶¶ 51, 87-108. In addition, the complaint alleges that because of the global nature of the potash market, defendants' conduct in other countries has a direct and intended impact on the potash market in the U.S. *Id.* ¶ 145; *see also id.* ¶ 146 ("Global prices set a benchmark for domestic potash prices.").[2]

The panel's insistence that the defendants' collusion to reduce output and fix prices worldwide is not actionable under the Sherman Act not only reflects an overly restrictive interpretation of the FTAIA, but an unrealistic view of how global cartels involving raw materials can work. For example, the panel thought it significant that the complaint fails to allege that the cartel members agreed to specific supply quotas or prices in the U.S. *See* slip op. at 21, 23. Yet OPEC, for example, works by restricting output,

[2] Curiously the panel thought that the complaint's allegation of a "global fertilizer market" was conclusory, slip op. at 25, notwithstanding that the details paint a picture of a market that could not be described as anything other that global. It involves the production of a fungible raw material that is produced in a small number of countries throughout the world (largely in Canada and the former Soviet Union), and which is mined and exported by a relatively small number of companies to the rest of the world (with the U.S. and China the largest consumers).

which causes oil prices to rise in the U.S., without an agreement on specific U.S. supply quotas or prices. As the FTC has explained, "OPEC's members recently agreed among themselves to reduce output to a level far short of the amount that would be pumped in a freely competitive market. . . . The result is oil prices that substantially exceed the marginal cost of supplying oil. The same activity undertaken by a group of commercial firms would constitute a *per se* violation of the U.S. antitrust laws." Prepared Statement of the Federal Trade Commission Presented by Richard G. Parker, Director, Bureau of Competition, Before the House Judiciary Committee, *Solutions to Competitive Problems in the Oil Industry* (March 29, 2000), *available at* http://www.ftc.gov/os/2000/03/opectestimony.htm.

The panel also thought it significant that the complaint does not allege "that the defendants agreed to worldwide production quotas for all members of the conspiracy or that a global cartel price was ever set," slip op. at 21, 23, but an output cartel can be quite effective in boosting prices without such specific agreements. *Cf. United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940) (major oil companies conspired to buy up distress gasoline from independents to raise spot market price and thereby boost prices on contracts with jobbers pegged to spot market price).

ARGUMENT

I. THE PANEL ERRED BY ADDING A "SPECIFIC TARGET" REQUIREMENT TO THE IMPORT-COMMERCE EXCLUSION

The panel held that conduct that involves "import commerce," which is excluded from the limitations of the FTAIA,[3] must be "'directed at an import market'" or "'target [U.S.] import goods or services.'" Slip op. at 20-21 (quoting *Animal Science Products, Inc. v. China Minmetals Corp.*, 2011 WL 3606995, at *5 (3d Cir. Aug. 17, 2011)). Under this "target" requirement, it is not enough that the prices of foreign cartel members' imports into the U.S. have been raised as a result of the cartel (or that the importers "knew and intended that their global conspiracy would directly impact prices of potash on world markets and within the United States," Compl. ¶ 144). Rather, plaintiffs must allege that the defendants' anticompetitive conduct *specifically* targets the U.S. market. Slip op. at 21 ("The complaint's specific factual allegations describe anticompetitive

[3] The panel characterizes conduct involving import commerce as an "exception" to the FTAIA, whereas in reality the FTAIA by its terms does not apply to conduct involving "import trade or import commerce." *See* 15 U.S.C. §6a; *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000) ("[T]he initial sentence of Section 6a, along with its 'import trade or commerce' parenthetical, provides that the antitrust law *shall* apply to conduct 'involving' import trade or commerce with foreign nations (provided, of course, that jurisdiction is found to exist under the Sherman Act itself).").

conduct aimed at the potash markets in Brazil, China, and India–not the U.S. import market."); *id.* (no allegations that the "offshore defendants agreed to an American price or production quota for potash").

The panel's specific-target test is unsupportable. The panel derives the test from the Third Circuit's recent *Animal Science Products* opinion, but in that case the Third Circuit held that the targeting of the U.S. import market was only one way that conduct may "involve" import commerce under the FTAIA; the requirement is also satisfied where, as here, the defendants are the importers of the cartel product. *See Animal Science Products*, 2011 WL 3606995, at *6 n.11 ("This opinion has made clear that the import exception is not limited to importers, but also applies if the defendants' conduct is directed at an import market.").

Moreover, the specific-target test is *more restrictive* than the reasonable foreseeability test for non-import commerce under the FTAIA. *See Animal Science Products*, 2011 WL 3606995 at *6 & n.12 (observing that there is no "subjective intent" requirement under the FTAIA, and that the effects test may be satisfied "without regard to whether United States consumers are alone in suffering . . . injury"); *cf. Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 393 (2d Cir. 2002) (antitrust laws apply to "anticompetitive conduct directed at foreign markets that directly affects the

competitiveness of domestic markets"), *overruled on other grounds*, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). Even the "intended effects" test under the case law does not require a specific intent to affect U.S. commerce. *See* 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272e (3d ed. 2006) ("any restriction that had or tended to have a substantial impact in fact would, according to the objective test, be 'intended' to affect United States commerce").

According to the panel, the fact that the cartel members are importers could not be sufficient to invoke the "import-commerce exception" to the FTAIA because "[u]nder the district court's reading of the statute, 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." Slip op. at 19-20. However, satisfying the import-commerce exclusion does not mean that foreign anticompetitive conduct involving imports is actionable without any impact on the U.S. market.[4] On the contrary, foreign anticompetitive conduct that is not governed by the FTAIA presumably must still satisfy the pre-FTAIA Sherman Act requirement that the conduct produce some

[4] And it surely does not mean that any joint selling arrangement (foreign or otherwise) violates the Sherman Act even when it does business in the U.S. *See, e.g., Broadcast Music, Inc. v. CBS, Inc.,* 441 U.S. 1 (1979).

substantial effect in the United States. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."); U.S. Justice Dept. & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.1 (1995) ("*International Guidelines*") (*Hartford Fire* test applies to import commerce); *cf. United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 960 (7th Cir. 2003) (en banc) (Wood, J., dissenting) ("'intended effects' test . . . arguably still applies in import cases"). However, a cartel of foreign companies organized for the purpose of raising the price of a product produced outside the U.S., who make substantial sales of the product into the United States, "clear[ly]" satisfies the *Hartford Fire* test. *International Guidelines* § 3.11, Ex. A.[5]

II. THE PANEL ERRED BY ADOPTING A NARROW DEFINITION OF "DIRECT EFFECT" UNDER THE EFFECTS EXCEPTION

Although the district court never addressed the question, the panel held that under the FTAIA exception for conduct that "has a direct,

[5] The alternative interpretation offered by the district court is also reasonable, namely that the import-commerce exclusion applies where, as here, there is a "tight nexus between the alleged illegal conduct and Defendants' import activities." *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 927 (N.D. Ill. 2009).

substantial and reasonably foreseeable effect" on U.S. commerce, "an effect is 'direct' if 'it follows as an immediate consequence of the defendant's activity," and that "[a]n effect cannot be 'direct' where it depends on . . . uncertain intervening developments.'" Slip op. at 22 (quoting *United States v. LSL Biotechnologies*, 379 F.3d 672, 680-81 (9th Cir. 2004) (ellipsis in original)). The panel found this definition from the Ninth Circuit "compelling," but it has no basis in the legislative history of the FTAIA, the case law under the "intended effects" test, or the purposes of the antitrust laws. Rather, the "follows as an immediate consequence" formulation was simply borrowed by the Ninth Circuit from the Supreme Court's interpretation of the Foreign Sovereign Immunity Act ("FSIA"), which, unlike the FTAIA, has no separate foreseeability or substantiality requirements. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992).[6]

The legislative history of the FTAIA provides an example of conduct that Congress believed would be covered by the Sherman Act, but which is inconsistent with the panel's strict definition of "direct." *See* H.R. Rep. No.

[6] Indeed, the Supreme Court's formulation under the FSIA was a paraphrase of the lower court's discussion of a rather specific circumstance far removed any concern of the FTAIA. *See Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991) ("For the financial loss to be 'direct', the corporate entity must itself be placed in financial peril as an immediate consequence of the defendant's unlawful activity.").

97-686 at 13 (1982) ("[I]f a domestic export cartel were so strong as to have a 'spillover' effect on commerce within this country – by creating a worldwide shortage or artificially inflated world-wide price that had the effect of raising domestic prices – the cartel's conduct would fall within the reach of our antitrust laws. Such an impact, *at least over time*, would meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce.") (emphasis added). The enforcement agencies' International Guidelines provide another counter-example. *See International Guidelines* § 3.121, Ex. B (FTAIA test satisfied where foreign cartel that produces a product in several foreign countries sells to an intermediary outside the U.S. that is not part of the cartel but whom they know will resell the product in the U.S.).

The Justice Department has offered a better interpretation of "direct," namely "a reasonably proximate causal nexus," or "not too remote." 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); *see also* Brief for Appellant United States of America 38, *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004) (No. 02-16472) ("DOJ *LSL Biotechnologies* Brief"), *available at*

http://www.justice.gov/atr/cases/f200200/200243.pdf (directness is a synonym for proximate cause). This definition finds support in the cases involving standing under § 4 of the Clayton Act, which treated directness and proximate cause as comparable in 1982 when the FTAIA was enacted. *See* Delrahim, *supra*, at 430 & n.76 (citing *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477 n.13 (1982)); *see also McCready*, 457 U.S. at 476 n.12. Defining "direct" in terms of proximate cause

> rightly focuses the inquiry . . . into a relationship of logical causation rather than something else such as time or geography. [And], it is a reminder that public policy undergirds concepts such as 'proximate cause' and 'direct.' . . . . The 'policy unequivocally laid down by the [Sherman] Act is competition,'" *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4-5 (1958), and the FTAIA, which is part of the Sherman Act, should therefore be interpreted in light of its fundamental purpose to protect United States consumers.

DOJ *LSL Biotechnologies* Brief at 37-38; *see also F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) ("[O]ur 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.").

CONCLUSION

The court should grant *en banc* rehearing to correct the panel's decision and ensure that unjustified limitations on the application of the Sherman Act to foreign anticompetitive conduct do not undercut the critical task of enforcing the antitrust laws against international cartels.

Respectfully submitted,

AMERICAN ANTITRUST INSTITUTE

s/ Richard Brunell

RICHARD M. BRUNELL
Director of Legal Advocacy
2919 Ellicott St., N.W.
Washington, D.C. 20008
(617) 435-6464

October 7, 2011

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

s/ Richard M. Brunell