

# AntitrustConnect Blog

## Second Circuit Clarifies Application of Foreign Trade Antitrust Improvements Act

Jeffrey May (Wolters Kluwer) · Sunday, June 8th, 2014

The U.S. Court of Appeals in New York City on June 4 [ruled](#) that the Foreign Trade Antitrust Improvements Act (FTAIA) barred the antitrust claims of a Taiwanese electronics manufacturing company with facilities in China against a group of foreign competitors. In its decision, the court followed the Seventh Circuit's recent decision in *Minn?Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 2012-1 Trade Cases ¶77,943.

The judgment of the district court dismissing Lotes Co., Ltd.'s claims was affirmed, but on alternative grounds. Even if Lotes had alleged the statutorily required "direct, substantial, and reasonably foreseeable effect" on U.S. domestic or import commerce, any such effect did not "give[] rise to" the claim as required by the FTAIA, the appellate court explained.

The dispute in this case arises out of the development of the latest industry standard for Universal Serial Bus (USB) connectors, known as USB 3.0. Lotes and defendants Hon Hai Precision Industry and Foxconn Kunshan are foreign companies that compete directly in the USB 3.0 connectors market. Lotes alleged that the defendants attempted to leverage their ownership of certain key patents to gain control of a new technological standard for USB connectors and thereby gain monopoly power over the entire USB connector industry.

The manufacturing and assembly of consumer electronics products containing the USB connectors is done almost exclusively in China. In order to pursue Sherman Act claims, Lotes alleged that curbing competition in China would have downstream effects worldwide, including in the United States. Price increases in USB 3.0 connectors would be passed on through each stage in the production process to consumers in the United States, according to Lotes. As a result of an alleged patent hold-up, Lotes contended that its lost sales and potential elimination as a competitor in China would "damage competition, increase prices, and harm consumers in the United States."

### **Jurisdictional vs. Substantive.**

At the outset, the court ruled that the requirements of the FTAIA, which limits the Sherman Act's scope as applied to foreign commerce, were substantive and nonjurisdictional in nature. Following a binding Second Circuit decision (*Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 1998-2 Trade Cases ¶72,288) and noting a split among the circuits, the district court dismissed the suit for lack of subject matter jurisdiction after concluding that the FTAIA's restrictions were jurisdictional. The panel has now overruled *Filetech* to the extent it held that the FTAIA was a

jurisdictional statute. The Second Circuit noted that the Seventh Circuit's 2012 *en banc* decision in *Minn-Chem* and the Third Circuit's 2011 decision in *Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 2011-2 Trade Cases ¶77,566 reached the same conclusion that the FTAIA goes to the merits of a Sherman Act claim.

Although the FTAIA's requirements were nonjurisdictional and thus potentially waivable, the court rejected Lotes's argument that the defendants waived them by contract in the case. Even if the court considered the issue, which was raised for the first time on appeal, Lotes's argument was meritless.

**“Direct, substantial, and reasonably foreseeable effect.”**

The Second Circuit sided with the Seventh Circuit and rejected the approach of the Ninth Circuit with respect to what constitutes a “direct, substantial, and reasonably foreseeable effect” on U.S. domestic or import commerce for purposes of the FTAIA. According to the court, “direct” requires only a reasonably proximate causal nexus.

Once again, the panel looked to the reasoning of the Seventh Circuit's *Minn-Chem* decision. Under this approach, which also was advocated by the Department of Justice Antitrust Division and the FTC, “the term ‘direct’ means only ‘a reasonably proximate causal nexus.’” The Second Circuit concluded that this “less stringent approach reflects the better reading of the statute” than demanding that a domestic effect must follow as an immediate consequence of a defendant's foreign anticompetitive conduct. The court rejected the Ninth Circuit's “immediate consequence” standard, outlined in a 2004 decision in *U.S. v. LSL Biotechnologies*, 379 F.3d 672, 2004-2 Trade Cases ¶74,506.

Although the panel concluded that the district court erred by misinterpreting the FTAIA and applying the wrong legal standard in dismissing Lotes's antitrust claims for failure to satisfy the FTAIA's domestic effects exception, the appellate court did not reach the “rather difficult question.” Instead, it focused on whether any assumed domestic effect would give rise to Lotes's claim. “

**Causation.**

Finally, the court affirmed the district court's judgment on the alternative ground that any domestic effect caused by the defendants' foreign anticompetitive conduct did not give rise to Lotes's claims as required by the statute. Generally, the FTAIA excludes wholly foreign conduct from the reach of the Sherman Act, except where two requirements are met: (1) the foreign conduct has a “direct, substantial, and reasonably foreseeable effect” on U.S. domestic, import, or certain export commerce; and (2) that effect “gives rise to a claim under” the Sherman Act. The court held that the domestic effect must proximately cause the plaintiff's injury. However, Lotes's injury preceded any domestic effect in the causal chain.

The case is *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, No. 13?2280.

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