Interview with Judge Diane Wood, Chief Judge, Seventh Circuit Court of Appeals

Editor's Note: *Our interviewee, Judge Diane Wood, is the Chief Judge of the U.S. Court of Appeals for the Seventh Circuit. She is also the 2015 recipient of the Antitrust Division's prestigious John S. Sherman Award in 2015 for her contributions to the field of antitrust, making her only the 11th person and the first woman to earn that award.*

As Bill Baer said in presenting her this award, Judge Wood, in her two decades on the bench, has earned a reputation as a thoughtful and persuasive jurist. She is the author of a number of important antitrust opinions, including one of the most influential decisions defining the limits on the extraterritorial application of the U.S. antitrust laws under the Foreign Trade Antitrust Improvements Act (FTAIA), Minn-Chem, Inc. v. Agrium, Inc.*, in which she wrote the unanimous en banc opinion for the Seventh Circuit. All the other courts of appeals to decide the question since then have agreed with Judge Wood that the FTAIA defines an element of an offense rather than a limitation on a court's power to hear a case.*

Judge Diane Wood

Judge Wood is a noted scholar of antitrust law and a lead author of one of the premier casebooks in antitrust, Trade Regulation*. She has also long been one of the leaders in shaping U.S. antitrust enforcement policy in the international arena. As a visiting professor at Cornell Law School in 1985, Judge Wood helped the Antitrust Division revise the Division's first* Antitrust Enforcement Guidelines for International Operations*. From 1993 to 1995, she served as Deputy Assistant Attorney General in the Antitrust Division, overseeing appellate matters, legal policy, and international enforcement. In that role, she was the moving force in publishing another revision to the International Guidelines, which came out in 1995 and remained in place for over 20 years until the DOJ and FTC published an updated version earlier this year.*

Judge Wood has long been a forceful advocate for increased international cooperation in antitrust enforcement. In a 1995 address to the DePaul Law Review Symposium, she foresaw the need for antitrust enforcers around the world to agree on core principles: "As the economic world shrinks, it will be vitally important to ensure the effective enforcement of competition laws that are designed to maximize consumer welfare and economic efficiency . . . ." Her foresight helped lead to the creation of the International Competition Network in 2001, which as she says in our interview, has since become an effective vehicle for promoting cooperation and convergence among the more than 130 jurisdictions on every continent but Antarctica that now have competition laws.

In this interview, Judge Wood offers her views on the benefits to consumers of the global spread of competition law over the last 25 years, as well as on some of the issues the proliferation of those laws has caused for businesses that operate in multiple jurisdictions. She also offers her views on how the seeming backlash against free trade and globalization both in the U.S. and Europe may impact competition policy and what actions governments might take to mitigate some of the concerns being expressed. Associate Editor William Kolasky interviewed Judge Wood for Antitrust *on Jan. 12, 2017, along with Editorial Chair Gregory Wrobel and Articles Editor Lisa Fales.*

GREGORY WROBEL: Good afternoon, Judge Wood. On behalf of the editorial board of Antitrust magazine, we are grateful and pleased that as part of the cover theme for the Spring 2017 issue, you have agreed to share comments with us about international competition law and enforcement and about the recent updates to the Antitrust Enforcement Guidelines for International Operations of the U.S. Department of Justice and Federal Trade Commission.

WILLIAM KOLASKY: Judge Wood, thank you very much for agreeing to talk with us. Since you were at the Justice Department nearly 25 years ago, antitrust has become a truly global enterprise. Back then, fewer than 40 jurisdictions had competition laws. Today, more than 130 do. What do you think accounts for the spread of antitrust over this period?

JUDGE DIANE WOOD: Probably several things account for it. At that time, the spread of antitrust was beginning to gain momentum. The European Union had, just a few years earlier in 1989, added a merger regulation to its competition

laws and many countries were modeling their laws on the EU laws.

Around the same time, Mexico, a year or so before NAFTA took effect, decided to pass a state-of-the-art competition law, which became very influential throughout Latin America. Other Latin American countries were also seeing this as the useful way to do several things—to achieve consumer benefits; to achieve market access; and to help prevent corruption through a more transparent market.

Plus, of course, as of 1993 to 1995, we weren't too many years away from the fall of the Soviet Union. And many of the Central and Eastern European countries were looking to become full-pledged members of the international community.

WILLIAM KOLASKY: What benefits do you think the spread of antitrust over the last 20 to 25 years has delivered to consumers around the world?

JUDGE WOOD: That's a tough question to answer, because there is probably a good empirical study in there somewhere. But certainly what we were hoping, and I think has happened in many places, is that the benefits of competition, including lower prices, better quality, and more choice for consumers around the world, have spread.

I will comment that in many countries, and the United States may be one of them, there's always a little bit of tension, because sometimes the advocates for antitrust are large corporations that are hoping for what I just referred to as market access. They want to be able to break into another country. From a U.S. point-of-view, that means you're talking about distributional restraints. And as you know, at least domestically, our law of distributional restraints is a rule of reason-based approach at this point.

WILLIAM KOLASKY: What about in other jurisdictions around the world: have they, too, been moving toward more of a rule of reason approach with respect to distributional restraints? Or do they still have per se illegality with respect to some vertical restraints?

JUDGE WOOD: Certainly the most important other jurisdiction is still going to be the European Union for a long time. And they have moved in what we would call a rule of reason direction. As you know, they now have economists on staff. They've changed their guidelines for distributional restraints.

As the EU has matured, they've been a little less worried about exclusive territories drawn around national boundaries. And they now have safe harbors for non-price vertical restraints, so I think they've moved in a rule of reason direction at least with respect to non-price restraints. Vertical price restraints still tend to be more sensitive.

So I think, at the EU level anyway, there's now a fair amount of common ground. If you talk about the Asian countries, however—for example, if you talk about the Chinese anti-monopoly law—I think you're still seeing a difference in philosophy that's pretty important.

WILLIAM KOLASKY: Can you comment on that difference in philosophy?

JUDGE WOOD: Well, I think the inspiration for that law, which is not surprising, is that the Chinese are interested in protecting their own market. I think there are a lot more efforts within that law to regulate business practices. As you know, our law is pretty structural. We have very strong prohibitions built into Section 1 of the Sherman Act.

And we even prosecute hardcore cartels criminally. But we have a more careful approach for single-firm behavior because we don't want to deter competitive actions. Ultimately, of course, we'll enforce. But we've taken to heart Learned Hand's admonition that the successful firm, having succeeded, shouldn't be turned upon.

And I'm not sure that philosophy is embraced in countries like China. I think they're more worried about the specifics of what the big firms are doing. One of my co-authors in my antitrust casebook, also a Department of Justice alumnus, Doug Melamed, said that during his period at Intel, the jurisdictions they were worried about, in order, were, number one, the European Union, number two, China, and number three, the United States. I thought that was very telling.

WILLIAM KOLASKY: That is very telling and very interesting. Going back to the benefits you described earlier in terms of lower prices and greater choice, do you think those benefits and the contribution that the antitrust laws has made to them are appreciated by the public at large?

JUDGE WOOD: Probably not. I think that's probably why you asked me that question.

I think antitrust law is hard for the public to understand. What they certainly do understand is high prices. And so you'll remember that when we've had, let's say, spikes in the price of gasoline at the pump or spikes in other kinds of prices, there's very often a great public cry for antitrust enforcement action, either by the Federal Trade Commission or by the Department of Justice.

And I can recall generations of FTC chairs going to Congress and trying to explain that, "Yes, we're looking at this. But we can't really stop the market." And other than intervening with actual price controls, which would be quite antithetical to antitrust, we are usually not in a position to do much about it. I think the public is also—going all the way back to 1890 when the law was passed—aware, however, that if a big firm seems to be bullying somehow, that doesn't strike them as correct.

Whoever the big firm *du jour* is—whether it's Microsoft or whether it's Google or whether it's, in earlier years, IBM or Standard Oil—when they are trying to squeeze other people out of markets, or deny access to gateways that you might

need for network industries, then I think the public gets a sense of unfairness.

WILLIAM KOLASKY: Let's turn to the flip side of this. What problems do you think the proliferation of antitrust laws has created? You mentioned Intel, and the fact that they worry more about the EU and China than about the U.S. So, more generally, do you see the spread of antitrust creating problems, especially for multinational businesses?

JUDGE WOOD: Well, sure. It's a challenge for any business that's doing business in countries with standards that are inconsistent. This is actually the same concern that Richard Whish and I were asked to investigate way back in the early '90s, when we did our study for the OECD on mergers that are reviewed in more than one jurisdiction. At the time, we were shocked to find that for one of the transactions we had been asked to investigate, the companies thought they might be reviewed by 21 different authorities. They finally whittled it down to, I think, nine—if I remember correctly. Which they thought was still a large number of merger filings to have to make, and authorities to have to persuade that their merger was consistent with whatever the standards were: efficient, helpful, whatever.

Well, 21 does not sound like anything today, given the number of jurisdictions with mandatory merger notification regimes we now have today. Somebody might think that they got a break if that's all there were.

So here are a couple of other problems. Number one, when is it that a company becomes so big that it should be considered a dominant firm? We've known for years that the threshold for dominance, if you will, is quite different in the United States—I'll call it 70 percent—than in Europe, where the threshold remains much lower. The idea of a firm being dominant, therefore, gets triggered at a much lower level there.

And once you're dominant, or once you're a monopolist, you are under stricter scrutiny by the antitrust authorities and by the courts backing up those authorities than you are when you're just a little guy. Pretty much everybody understands that if you have no market power, you're probably not going to be bothered under either Section 2, or Article 102, or whatever other law we're talking about.

So dominance is one area where you still see a lot of differences. Another I mentioned briefly is the law governing distributional restraints. I think the differences are narrowing, but they're still there. And merger control is approached differently. There are other theoretical differences that I think are less important.

The Europeans still take the position that there may be some kind of collective dominance theory. We gave up on that back in the '80s with the FTC's cereals cases and the other cases that we had back then. But there are still big differences. So if companies are trying to serve all masters in a world where it's really just a global market, that's going to be hard for them.

LISA FALES: Judge Wood, you pointed out that there are significant differences among the various enforcement regimes—in merger review, dominance standards, and distribution standards. Going back, then, to one of your earlier answers, do you think those differences are driven mostly by differences in philosophies among the various antitrust enforcement regimes that drive their enforcement?

JUDGE WOOD: That's a very good question and one I've asked myself many times. I think I wrote a paper many years ago, actually, in which I was exploring whether antitrust was a one-size-fits-all area of law or whether it needed to be tailored more to local circumstances.

I think there is some tailoring to local circumstances that is appropriate. Here are a couple of things that I would look at. One thing is how is the law enforced? In the United States, we have a very welcoming approach to enforcers. We have two federal agencies, we have all 50 state attorneys general, and we have every private party that is injured in its business or property. It's an all-comers approach. That means we need to spend more time worrying about over-deterrence.

We need to make sure that the cases that are being pursued are worthy cases to be pursued because anybody with $450 can file a complaint in federal district court. Countries that have a single public authority in charge of their competition law enforcement, which is the normal model around the world, don't have to worry as much about that over-deterrence problem.

What they have to worry about instead is under-deterrence. They have to worry about whether the authority is devoting its resources to the right places, what happens to the cases that they can't reach—and I can remember discussing this with the authorities of many countries about their approach to deciding which cases they should devote their resources to and, also, what kinds of remedies are possible.

This is something that's noticeable with the European Commission. They are less reluctant to impose conduct remedies, let's say, in their dominance cases because those remedies are enforced by the Commission itself. They don't have to go to a federal district court judge who's going to sit there and worry about every last little tweak in the telecommunications policy, as we had to in the case of the AT&T consent decree here in the U.S.

That, of course, changed with the enactment of the Telecommunications Act of 1996, but it's a good example of how we do it and maybe why we have a different approach, under which we think: "We don't want that kind of remedy as a normal matter because of the way we have to implement it." That's one thing.

Another thing that varies is the economic structure onto which the competition law is superimposed. In our case, antitrust law grew up with the country, beginning at the end of the 19th century when new business forms were just being developed. Our economy continued to grow at a tremendous

clip throughout the 20th century, and now into the 21st, and our antitrust laws have developed with it.

If you then compare, say, the African countries deciding to enact competition laws, they have had very different experiences. They don't necessarily have the same entrepreneurial business culture that we have here. And then there are countries like South Africa, where a huge part of the population has been badly suppressed in its efforts to participate in the market.

You can understand, then, why they may have different goals set out in their competition laws and why they may have adopted a somewhat different set of principles.

WILLIAM KOLASKY: That's a natural segue into a couple of questions about our remedial structure as compared to that of other countries. As you know, the United States is one of only 14 countries that have criminal sanctions for hardcore antitrust violations and we're probably the only country that regularly puts individuals in jail for those violations.

As a judge who has now been on the bench for roughly 20 years, do you think criminal sanctions for individuals are important to effective deterrence? And would you urge more countries to criminalize cartel behavior?

JUDGE WOOD: Well, it's a big question. I have to say, in the United States, where we do not have civil fines for antitrust violations, unlike Europe and a great number of other places, criminal sanctions are an important deterrent. That's an interesting piece of the puzzle, too, because sometimes a civil fine might be just the right middle ground.

Even though, of course, you don't want the fine to be so small that it's just a slap on the wrist. But, corporations are run by people. And it seems to me that holding the responsible corporate officers to task for what they've done—whether it's an antitrust violation, or a securities violation, or a mortgage foreclosure, or whatever it may be—is actually probably focusing on the right set of people.

They are the ones who can change the corporate culture. And so I've never been all that bothered by the fact that we, in appropriate cases, pursue the individuals. Actually, the comparison I would make is to the *Arthur Andersen* case. Remember how upset people were that the Department of Justice went against Arthur Andersen the firm, instead of the accountants who had been doing whatever they were doing and who had been responsible for the Enron mess?

And people objected to the Department's strategy. They said, here are all these innocent people losing their jobs—lots of perfectly honorable accountants and business analysts, not to mention the staff working with them. Why should you go after the firm when you could be much more targeted by going after the responsible individuals? I think there may be some truth to that.

WILLIAM KOLASKY: The other way in which our remedial structure differs from that of many other countries—and you've alluded to this—is we have long made private remedies available to the victims of antitrust violations. That is now beginning to change with more other countries, especially in Europe, starting to adopt private remedies for antitrust violations.

Having been a judge for roughly two decades, do you view these private remedies as important in terms of compensating the victims for the effects of the violation as opposed to simply having civil fines that go into the treasuries of the governments?

JUDGE WOOD: Well, that's also a very big question. I would encourage the antitrust bar to take a step back and look at the whole system. My essential feeling is that it's a good thing that we have private rights of action. And they have been exercised, I think, in many appropriate cases where people really do get their treble damages.

But as you know, this is just a piece of the picture. Look, for example, at Rule 23(b)(3) class actions. Who is running them? How are they addressed? What's the remedial structure? Do the damages, at the end of the day, even if there's a class settlement, which is the way they're invariably resolved, really get paid to the victims of the anticompetitive behavior?

What do you do with all the money that nobody files a claim for? Does it go to some *cy pres* recipient? Does it escheat to the state? There are a lot of administrative problems with the way this system works. And it could stand improving, not just for antitrust, but for any area of law where a large group of people have been injured by a common practice, and they're deserving of some sort of financial relief but we have only very clumsy ways to get it to them.

LISA FALES: I'm curious about what you think accounts for the proliferation of class actions in the United States?

JUDGE WOOD: Well, I'm going to take a little bit of issue with that. I just went to a symposium—there are lots of them going around this year. But I went to one in November at the University of Pennsylvania. And I was laughing because I pointed out that this was a title that only a legal nerd could love. The title was, something like: "Celebrating the 50th Anniversary of the 1966 Amendments to Rule 23 of the Federal Rules of Civil Procedure." Now, that was really the title. It's worth pausing on, though, because the class action as we know it is 50 years old. It was born in 1966 when Rule 23 was amended; before that, there were no class actions to speak of. Actually one of the things that prompted, by the way, the amendment in 1966 was antitrust, with the electrical price-fixing cases from around the early '60s. But that's what gave us the (b)(3) class action, which is what we're talking about.

In a (b)(3) common question class action, the common question has to predominate for the class action to be a superior method of proceeding. What we've been seeing since then is a set of efforts to bring this under some kind of con-

trol. We have the Supreme Court looking carefully at what does it take to have a common question. What does it mean to be typical? What are we going to do about the agency problems between the class and the lawyer and the named representative? You have the *Walmart* case, which was a huge development in this area, tightening up on those things. In light of these developments, I'm not sure that there are more class actions now.

People are still bringing them, in many areas. But the Supreme Court has now required a great deal more work for the plaintiff who wants to bring a class, and that means money. It's expensive to gather proof on commonality and on predominance. And it continues to be unclear about where issue classes come in, which could be quite important for antitrust.

You may know that the Advisory Committee on Civil Rules of the Judicial Conference is putting out some public comments, various proposals to amend Rule 23. And so over the next year or so, you may want to keep your eye on that.

WILLIAM KOLASKY: One more question about class actions. It's been 20 years since the 1997 amendments to Rule 23, which added Rule 23(f) allowing for appeals to the courts of appeals from decisions to either grant or deny class certification. After that amendment, the Seventh Circuit—your court—was one of the courts that took the lead in trying to bring greater rigor to the class certification process. How well do you think that's worked?

JUDGE WOOD: I think it's worked pretty well. I mean, the main thing that we did in some of our early cases was to say, for example, if you're going to be relying on expert testimony, as you probably will be in an antitrust case, you've got to go through the Rule 702 *Daubert* exercise.

Why should we go to all this trouble to certify a class action if you don't have anything but junk science behind you? So that's what I mean by saying we're front-loading the cost more as time is going on. Rule 23(f), I think, has done a nice job in letting the courts of appeals pick the cases that seem more in need of some kind of immediate appellate intervention.

In our court, we handle it through the motions process. It's a little bit hard for the outside world to get a sense of what's going on; and it's not because we don't want you to. But when I say the motions process, it means when I'm motions judge—which it sometimes feels like is all the time—there's a cycle of six months and it just goes through automatically.

I'll get a Rule 23(f) request. And if I and the other two motions judges that week think that this is a case where there is a new question—or a death knell, or whether a bet-the-company kind of case, whatever the reasons may be—then we'll say yes and accept the appeal.

At that point you know about the case because it's out there in the open. There's a class appeal. But the denominators—the full set of requests—are because you have to dig around in the court's motions rulings. Because if we decide that it's just OK to wait until a final judgment, truth be told, we often never see it because the case probably is settled anyway.

And you know what the litigation rates look like, less than two percent of cases in the federal courts of all types actually go to trial. It's just a very, very small number.

WILLIAM KOLASKY: Returning to international issues, we've talked about the benefits the spread of antitrust has provided to the public generally. But over the past year, we seem to be seeing something of a public backlash against globalization generally. We saw that in the Brexit vote in England. Some people would say we saw that in the results of the 2016 election here in the U.S. What effects do you think this backlash to globalization—if I can call it that—may have on the commitment of countries around the world to having free-market economies protected by strong competition laws?

JUDGE WOOD: Well, it's a complicated question. Let me offer a couple of reactions. First of all, I actually think competition law is on a pretty solid footing. The reason—or at least the reason for my optimism—is that as antitrust was beginning to really spread in the 1990s, you may remember that there was a great push on the part of many people to pull competition law into the World Trade Organization, which of course was brand new in 1995. I happened to be an opponent of that because I wasn't sure that there was enough consensus around the world about what we were really talking about when we said competition law. I also had the sense that it was the kind of law that was going to be stronger if it went from the grassroots up, as opposed to from the top down from Geneva or from anywhere else, such as Brussels or Washington.

What happened, instead of the WTO, which I still think would have been a mistake, was the International Competition Network, which is alive and well, and functioning quite effectively. And the nice thing about the ICN is that it is completely voluntary. Everybody who has chosen to have a competition law can be a member.

People get together and they discuss best practices. I think there's been a tremendous amount of useful learning among countries that are relatively new to this area. I think people feel that it's their law. And I would say, countries that I have visited give me that impression as well.

It's their law, and so they don't think anybody else in some other country told them to do it. Now, the thing that does concern me, and this is an area that I always had a big interest in, is the intersection between competition law and trade law, because, obviously, the health of our markets in many sectors depends on vigorous competition from companies all over the world, not just from the United States.

Just to take a couple of examples, if you're asking how does competition operate in the automobile industry, you'd be

crazy if you didn't include the European producers and the Japanese producers and the Korean producers and whoever else; lots of other companies. Never mind locating a factory in Mexico; there are just so many other companies from so many different countries.

If you're talking about airframe competition, you can't talk only about Boeing and not Airbus; that would be crazy. The market depends on competition. And if you happen, as I do, to fly United Airlines all the time, sometimes you're in an Airbus 320 and sometimes you're in a Boeing 737-900.

It's clear that the airlines like having the choice. And if international trade begins to diminish those choices, it is going to have an effect on competition too.

WILLIAM KOLASKY: That is a natural segue into the next question, which is, as you say, the intersection between competition policy and trade policy. It's probably a little known fact that John Sherman was better known during his lifetime for the Sherman Tariff Act than he was for the Sherman Antitrust Act.

One of the reasons for his sponsorship of the Sherman Antitrust Act was his recognition that if you were going to raise barriers to foreign commerce, you need strong antitrust laws to assure adequate domestic competition. Have you given any thought to—assuming the United States moves in the direction of greater protectionism—what effect, if any, that should have on the enforcement of our antitrust laws domestically?

JUDGE WOOD: Well, I certainly hope that the first doesn't happen. The Smoot-Hawley Tariff Act of 1930 did not work out well either for the United States or the world. For that reason, the way I have thought we should attack this problem is, number one, to take it very seriously. I think if this election taught us anything, it's that a great number of people feel that the burden of free trade has fallen disproportionately on them, and that the benefits—if there are some—are not enough to balance off against that burden. If I had been running the world during the election, I would have said—and would say now, too, if I were speaking to Congress—what we need is to spread that burden in a more equitable way.

If we all like buying TVs for $500 instead of $800, then we shouldn't just place all the burden of the free trade that gives us those lower prices on one set of people. That, of course, is just one industry but there are many others for which it is just as real.

You may remember that in the Trade Act of 1974, there's a title called Adjustment Assistance. That title deals with worker adjustment assistance; it deals with community adjustment assistance; and it deals with business adjustment assistance. It essentially says—I'm paraphrasing and probably being a little too generous—if you lost your job because of disruptions due to international trade, then we're going to help retrain you, we're going to help you move to another area if you need to, and we're going to acknowledge that you are being asked to bear a big part of the burden of trade.

In my view, where free trade delivers a national benefit at your expense, the country owes you some recompense. I analogize it to building a highway through your backyard, which may be helping the entire community. But if they build that highway, they're going to compensate you for the use of your land. You shouldn't be donating your backyard to the public.

I think that people in those communities throughout this country that have suffered from international trade—that have watched factories close down and that have watched jobs go away—need a better answer than, "Well, it's good for you." You know, they don't want to hear that. And I understand that. I wouldn't want to hear that either.

WILLIAM KOLASKY: That is a very thoughtful answer to a difficult question. To shift gears a little bit, you are credited with being one of the principal authors of the 1995 International Guidelines. In November of last year, the FTC and DOJ published a proposed set of updated guidelines to take account of developments over the past 20-plus years. Have you had a chance to read the proposed update? And I'd be interested in hearing what your overall reaction to it is.

JUDGE WOOD: Well, I looked at it quickly, but not as carefully as I would like to if I had the time. I think it makes a great deal of sense to do this now. The Supreme Court has issued decisions in this area. The courts of appeals have issued important decisions.

Our whole understanding of what it means to talk about extraterritorial jurisdiction has become more finely tuned, which is one of the subjects of Justice Breyer's book, *The Court and the World: American Law and the New Global Realities* (2015). It's quite appropriate for the Guidelines to reflect those changes, and to reflect the changes about the various doctrines that implicate foreign governments too.

And, of course, the need for international cooperation is greater than ever. With 130 countries in the world now having competition laws, you better be cooperating, to the extent you can. We still have tremendous restrictions on how much we can cooperate, and I'm sorry that the efforts to create a network of actual bilateral cooperation agreements didn't go very far. I think it's still a good idea but it's something that really hasn't taken off.

LISA FALES: Judge Wood, are there particular areas of the 1995 Guidelines that you think could use particular attention in terms of proposing changes?

JUDGE WOOD: The one thing that we were trying to do in the 1995 Guidelines, and maybe overachieved on, is we were trying to ask the question, what is different about the inter-

national setting? And the one message that we wanted to be very clear on, is that the underlying law is not different.

We do not, in American antitrust laws, discriminate against people based on their nationality. If a foreign firm wants to acquire a U.S. firm—putting Exon-Florio to one side, which is not an antitrust law—the same standards apply as if a U.S. firm wants to do it.

We wanted to be very clear that the assumptions of the law did not have anything to do with the international setting. What does make things different? Clearly, the reach of our process and how far out we're going to look for foreign activities that have an effect within the United States. That's one of the areas that I think—there are probably more examples—is a good place to put their attention.

WILLIAM KOLASKY: Along those lines, in terms of the extraterritorial reach of the U.S. antitrust laws, that obviously raises the question of the Foreign Trade Antitrust Improvement Act or FTAIA, as it has come to be called. You were also the author of what I think has been one of the most influential FTAIA decisions over the last ten years, the *Minn-Chem* case.

That case involved, if I recall, two critical issues. The first is whether FTAIA is a substantive statute or a jurisdictional statute. The second is what the standard should be for determining whether the effect of anticompetitive conduct outside the United States on U.S. commerce is sufficiently direct to bring it under the U.S. antitrust laws.

On both those issues, most of the courts that have issued decisions since then have largely followed your en banc decision in *Minn-Chem*. But there are still a number of older courts of appeals cases from before *Minn-Chem*, which still treat the FTAIA as a jurisdictional statute.

I don't know whether it's appropriate to ask you whether you think the Supreme Court needs to resolve that circuit conflict, or whether that is something that will just resolve itself naturally over time.

JUDGE WOOD: Well, as you know, in the *Minn-Chem* decision, which was a unanimous opinion of the en banc Seventh Circuit, we understood the Supreme Court's cases in other areas, particularly the *National Bank of Australia v. Morrison* case, to demand more precision in the use of the concept of jurisdiction in the sense of Rule 12(b)(1) subject matter jurisdiction. We still get occasional cases like that. I think that as the other circuits have the issue put squarely in front of them, they also will follow *Morrison*.

The Supreme Court itself has really tried to say, "Wait a minute. If you're just talking about the power of the federal court to hear the case and to say "yes or no," unless Congress has been very specific, we don't assume that that power has been taken away. Actually, Justice Scalia pioneered this principle in the dissenting part of his opinion in the *Hartford Insurance* case. He was saying, "We're not talking here about the power of the court to hear the case. We're talking about whether the law that Congress wrote actually reaches this conduct." That is the 12(b)(6) issue, not a 12(b)(1) issue. I think they're going to get it. But we'll see.

WILLIAM KOLASKY: Thank you. Greg, Lisa, do either of you have any other questions?

GREGORY WROBEL: I noticed a news report in the last few days about an indictment in the United States regarding bid rigging over financial indexes, against individual defendants who are U.K. citizens. Their counsel have criticized the indictments because U.K. authorities had investigated the matter fully and decided there wasn't an adequate basis for criminal charges. Which leads to the question whether you see a role for international comity considerations in connection with criminal enforcement of antitrust and competition laws?

JUDGE WOOD: Well, I won't say too much about that since it's pending. But I will say that as the 1995 Guidelines state—and I believe this is still going to be stated in the updated Guidelines—at a minimum, as prosecutorial discretion is exercised by the Department of Justice, the Department has always been committed to considering the interest of foreign nations in the type of comity that you're talking about. But beyond that, I should probably not comment.

WILLIAM KOLASKY: That leads to one more question. Greg mentioned the word "comity," and I've been struggling to figure out how to ask a more general question about comity because that's another issue that is covered by the updated international Guidelines.

Some of the organizations that have commented on those updated guidelines have suggested that they put too much emphasis on the courts deferring to the executive agencies with respect to issues of international comity. Is that an area that you would feel comfortable commenting on?

JUDGE WOOD: Well, I don't have too much to say about that. I mean, we have separation of powers. And so if the Department of Justice wants to come argue something before us, the courts will listen attentively.

WILLIAM KOLASKY: Thank you, Judge Wood.

JUDGE WOOD: Well, thank you, very interesting questions.

WILLIAM KOLASKY: And your answers were even more interesting.

GREGORY WROBEL: Judge Wood, thank you again for taking the time to talk with us today. I am sure our readers will find your comments as insightful as we do. ■