

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

No. 01-3329

---

BHP NEW ZEALAND LTD.;  
NEW BHP STEEL PTY LTD.;  
BHP STEEL (JLA) PTY LTD.;  
BROKEN HILL PROPRIETARY COMPANY, LTD.,  
Appellants

v.

UCAR INTERNATIONAL, INC.;  
UCAR CARBON COMPANY, INC.;  
SGL CARBON A.G.;  
TOKAI CARBON CO., LTD.;  
TOKAI CARBON U.S.A. INC.;  
THE CARBIDE/GRAPHITE GROUP, INC.;  
NIPPON CARBON CO., LTD.;  
SEC CORPORATION  
(D.C. Civil No. 99-cv-04772)

(Amended in accordance with Clerk's Order dated 2/21/02)

---

No. 01-3340

---

IN RE: GRAPHITE ELECTRODES ANTITRUST LITIGATION  
(MDL No. 1244)

FERROMIN INTERNATIONAL TRADE CORPORATION;  
EKINCILER DIS TICARET A.S.; EKINCILER DEMIR  
CELIK SANAYI A.S.; ASIL CELIK SANAYI VE  
TICARET, A.S.; DILER DEMIR CELIK ENDUSTRISI VE  
TICARET A.S.; YAZICI DEMIR CELIK SANAYI VE

TICARET A.S.; COLAKOGLU METALURJI A.S.; SIAM YAMATO STEEL COMPANY, LIMITED; SIAM CONSTRUCTION STEEL COMPANY, LIMITED; SIAM IRON AND STEEL COMPANY, LIMITED; SMORGON STEEL GROUP, LTD.; SHANGHAI PUDONG IRON & STEEL (GROUP) CO., LTD.; SHANGHAI NO. 5 STEEL (GROUP) CO., LTD.; FU SHUN STEEL PLANT IMPORT & EXPORT COMPANY; INTERNATIONAL ECONOMIC & TRADING CO. (WUGANG GROUP); CHINA METALLURGICAL IMPORT & EXPORT MAGANG CO.; LAI WU IRON & STEEL COMPANY; DAYE STEEL GROUP IMPORT & EXPORT CO.; ZHANGJIAGANG NOVEL STEEL CO. LTD.; JIANGSU SHAGANG GROUP CO., LTD.; ZHANGJIAGANG SHEEN FAITH STEEL CO., LTD.; GUANGZHOU IRON & STEEL CO., LTD.; GUANGZHOU IRON & STEEL HOLDING LTD. CORP.; IZMIR DEMIR CELIK SANAYI A.S.; ICDAS CELIK ENERJI TERSANE VE ULASIM SANAYI A.S.

v.

UCAR INTERNATIONAL, INC.; UCAR CARBON COMPANY, INC.; SGL CARBON A.G.; TOKAI CARBON CO., LTD.; TOKAI CARBON U.S.A., INC.; THE CARBIDE/GRAPHITE GROUP, INC.; NIPPON CARBON CO., LTD.; SEC CORPORATION  
(D.C. Civil No. 99-cv-00693)

Ferromin International Trade Corporation, Ekinciler Dis Ticaret AS, Ekinciler Demir Celik Sanayi AS, Asil Celik Sanayi VE Ticaret, AS, Diler Demir Celik Endustrisi BE Ticaret AS, Yazici Demir Celik Sanayi VE Ticaret AS, Colakoglu Metalurji AS, Siam Yamato Steel Company, Limited, Siam Construction Steel Company, Limited, Siam Iron and Steel Company, Limited, Smorgon Steel Group, Ltd, Shanghai Pudong Iron & Steel (Group) Co., Ltd., Shanghai No. 5 Steel (Group) Co., Ltd., FU Shun Steel Plant Import & Export Company, International Economic & Trading Co. (Wugang Group), China Metallurgical Import & Export Magang Co., Lai Wu Iron & Steel Company, Daye Steel Group Import & Export Co., Zhangjiagang Novel Steel Co.

Ltd, Zhangjiagang Sheen Faith Steel Co., Ltd., Guangzhou Iron & Steel Co., Ltd., Guangzhou Iron & Steel Holding Ltd. Corp., Izmir Demir Celik Sanayi AS, and Icdas Celik Enerji Tersane VE Ulasim Sanayi AS,

Appellants

(Amended in accordance with Clerk's Order dated 2/21/02)

\_\_\_\_\_  
No. 01-3991  
\_\_\_\_\_

IN RE: GRAPHITE ELECTRODES ANTITRUST LITIGATION  
(MDL No. 1244)

FERROMIN INTERNATIONAL TRADE CORPORATION;  
EKINCILER DIS TICARET A.S.; EKINCILER DEMIR  
CELIK SANAYI A.S.; ASIL CELIK SANAYI VE  
TICARET, A.S.; DILER DEMIR CELIK ENDUSTRISI VE  
TICARET A.S.; YAZICI DEMIR CELIK SANAYI VE  
TICARET A.S.; COLAKOGLU METALURJI A.S.; SIAM  
YAMATO STEEL COMPANY, LIMITED; SIAM  
CONSTRUCTION STEEL COMPANY, LIMITED; SIAM  
IRON AND STEEL COMPANY, LIMITED; SMORGON  
STEEL GROUP, LTD.; SHANGHAI PUDONG IRON &  
STEEL (GROUP) CO., LTD.; SHANGHAI NO. 5 STEEL  
(GROUP) CO., LTD.; FU SHUN STEEL PLANT IMPORT  
& EXPORT COMPANY; INTERNATIONAL ECONOMIC  
& TRADING CO. (WUGANG GROUP); CHINA  
METALLURGICAL IMPORT & EXPORT MAGANG CO.;  
LAI WU IRON & STEEL COMPANY; DAYE STEEL  
GROUP IMPORT & EXPORT CO.; ZHANGJIAGANG  
NOVEL STEEL CO. LTD.; JIANGSU SHAGANG GROUP  
CO., LTD.; ZHANGJIAGANG SHEEN FAITH STEEL CO.,  
LTD.; GUANGZHOU IRON & STEEL CO., LTD.;  
GUANGZHOU IRON & STEEL HOLDING LTD. CORP.;  
IZMIR DEMIR CELIK SANAYI A.S.; ICDAS CELIK  
ENERJI TERSANE VE ULASIM SANAYI A.S.

v.

UCAR INTERNATIONAL, INC.; UCAR CARBON COMPANY, INC.;  
SGL CARBON A.G.; TOKAI CARBON CO., LTD.; TOKAI CARBON  
U.S.A., INC.; THE CARBIDE/GRAPHITE GROUP, INC.; NIPPON  
CARBON CO., LTD.; SEC CORPORATION  
(D.C. Civil No. 99-cv-00693)

Ucar International, Inc., Ucar Carbon Co., Inc., The  
Carbide/Graphite Group, Inc., Nippon Carbon Co., Ltd., SEC  
Corporation, SGL Carbon AG, Tokai Carbon Co., Ltd. and  
Tokai Carbon U.S.A., Inc.,

Appellants

(Amended in accordance with Clerk's Order dated 2/21/02)

---

On Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Civil Nos. 99-cv-04772 and 99-cv-00693)  
District Judge: Hon. Charles R. Weiner

---

Argued March 11, 2003

Before: SLOVITER, NYGAARD, and ALARCÓN\*, Circuit Judges

(Filed August 9, 2004)

---

---

\*Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting  
by designation.

James vanR. Springer (Argued)  
Kenneth L. Adams  
R. Bruce Holcomb  
James R. Martin  
Dickstein Shapiro Morin & Oshinsky LLP  
Washington, D.C. 20037-1526

Attorneys for all Appellants

Kevin R. Sullivan (Argued)  
Grace M. Rodriguez  
Peter M. Todaro  
Jeffrey T. Tao  
King & Spalding  
Washington, D.C. 20006-4706

Francis Patrick Newell  
Montgomery, McCracken, Walker & Rhoads, LLP  
Philadelphia, PA 19109-1029

Attorneys for Appellees/Cross-Appellants,  
UCAR International Inc. and UCAR Carbon Co., Inc.

Stuart J. Baskin  
Jerome S. Fortinsky  
Paul S. Hessler  
Shearman & Sterling  
New York, New York 10022

Daniel Segal  
Hangley Aronchick Segal & Pudlin  
Philadelphia, PA 19103

Attorneys for Appellee/Cross-Appellant,  
SGL Carbon AG

Craig D. Bachman  
Kenneth R. Davis II  
Thomas W. Sondag  
Lane Powell Spears Lubersky LLP  
Portland, OR 97204-3158

Matthew A. White  
Wolf Block Schorr & Solis-Cohen  
Philadelphia, PA 19103

Attorneys for Appellees/Cross-Appellants,  
Tokai Carbon Co., Ltd. and Tokai Carbon U.S.A., Inc.

Kenneth I. Schacter  
Timothy A. Valliere  
Bingham McCutchen LLP  
New York, New York 10022

Attorneys for Appellee/Cross-Appellant,  
Nippon Carbon Co., Ltd.

A. Paul Victor  
Scott Martin  
Christopher V. Roberts  
Weil, Gotshal & Manges, LLP  
New York, New York 10153-0119

Jerome R. Richter  
William H. Roberts  
Blank Rome  
Philadelphia, PA 19103

Attorneys for Appellee/Cross-Appellant,  
SEC Corporation

Stephen D. Brown  
Joseph A. Tate  
George G. Gordon

Carolyn H. Feeney  
Dechert  
Philadelphia, PA 19103

Attorneys for Appellee/Cross-Appellant,  
Carbide Graphite Group

### OPINION OF THE COURT

SLOVITER, Circuit Judge.

The appeals before us stem from two antitrust actions filed by two groups of plaintiffs, which include foreign corporations engaged in the production of steel and a U.S. corporation that acted on behalf of two such foreign steel producers. One action, led by BHP New Zealand, was filed by a New Zealand company and three Australian companies (collectively referred to as “BHP”).<sup>1</sup> The other action, led by Ferromin International Trade Corp., was filed by 26 foreign corporations with their principal places of business in the United States, Thailand, Turkey, Australia, China, Austria, and Sweden, and one U.S.-based affiliate that acted on behalf of two of the Turkish plaintiffs in this group (collectively referred to as “Ferromin”).<sup>2</sup> The actions were filed against a

---

<sup>1</sup> The BHP-led plaintiffs include: BHP New Zealand Steel Ltd.; NSW BHP Steel Pty Ltd.; BHP Steel (JLA) Pty Ltd.; and Broken Hill Proprietary Company, Ltd. App. at 3.

<sup>2</sup> Plaintiffs in the Ferromin-led action were Ferromin International Trade Corporation; Ekinciler dis Ticaret A.S.; Ekinciler Demir Celik Sanayi A.S.; Asil Celik Sanayi VE Ticaret, AS; Diler Demir Celik Endustrisi VE Ticaret AS; Yazici Demir Celik Sanayi VE Ticaret AS; Colakoglu Metalurji A.S.; Siam Yamato Steel Company, Ltd.; Siam Construction Steel Company, Ltd.; Siam Iron and Steel Company, Ltd.; Smorgon Steel Group, Ltd.; Shanghai Pudong Iron & Steel (Group) Company, Ltd.; Shanghai No.

group of American, Japanese, and German companies that manufacture and sell graphite electrodes in the domestic and foreign graphite electrode markets (collectively referred to as “UCAR”).<sup>3</sup> The two actions were consolidated in the District Court.

To produce steel, plaintiffs use a high-temperature technique that requires the burning of large quantities of graphite electrodes. Plaintiffs allege that defendants conspired to artificially inflate graphite electrode prices by establishing a global cartel that fixed prices and allocated business among graphite electrode producers throughout

---

5 Steel (Group) Company, Ltd.; FU Shun Steel Plant Import & Export Company; International Economic & Trading Company (Wugang Group); China Metallurgical Import & Export Magang Company; Lai Wu Iron & Steel Company; Daye Steel Group Import & Export Company; Zhangjiagang Novel Steel Company, Ltd.; Zhangjiagang Sheen Faith Steel Company, Ltd.; Guangzhou Iron & Steel Company, Ltd.; Guangzhou Iron & Steel Holding Ltd. Corporation; Izmir Demir Celik Sanayi A.S.; Bohler Edelstahls GMBH; Uddeholm Tooling AB; and Icdas Celik Enerji Tersane VE Ulasim Sanayi A.S. App. at 1 (Ferromin, et al., Notice of Appeal).

Jiangsu Shagang Group Company, Ltd., was a plaintiff in the Ferromin action. Although we do not have any record of Jiangsu Shagang abandoning its claims against UCAR, it is not listed among the Appellants in the Notice of Appeal. App. at 1.

Bohler Edelstahl GMBH and Uddeholm Tooling AB, subsequent to the filing of the Notice of Appeal, have abandoned their claims against UCAR and were dismissed from the case on February 21, 2002.

<sup>3</sup> The Ferromin and BHP actions name the same defendants: UCAR International, Inc.; UCAR Global Enterprises, Inc.; UCAR Carbon Company, Inc.; SGL Carbon A.G.; Tokai Carbon Company, Ltd.; Tokai Carbon U.S.A., Inc.; The Carbide/Graphite Group, Inc.; Nippon Carbon Company, Ltd.; and SEC Corp.

Subsequent to the filing of the Notices of Appeal, on February 21, 2002, UCAR Global Enterprises, Inc. was removed as an appellee/cross-appellant from appeal 01-3329, 01-3340, and 01-3991.



the worldwide market. App. at 58-59, 107-08.

Defendants filed motions to dismiss pursuant to Federal Rule Civil Procedure 12(b)(1), arguing that the plaintiffs' claims were beyond the subject matter of the Sherman Act. The District Court, by order of June 13, 2001, granted in part and denied in part the defendants' motions to dismiss the complaints. See Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc., 153 F. Supp. 2d 700 (E.D. Pa. 2001). UCAR cross-appeals the same order. The District Court held that it had no subject matter jurisdiction over antitrust suits for overcharges on electrodes purchased outside the United States. It also ruled that claims based on items purchased abroad but invoiced in the United States were within the jurisdiction of the federal courts. Both sets of parties appeal, following certification by the District Court of certain of its rulings under 28 U.S.C § 1292(b) and its certification of the other rulings with the statements required under Federal Rule Civil Procedure 54(b).

The principal question before us on appeal is whether the Sherman Act's coverage with respect to activities involving foreign commerce, as defined by the general exclusionary rule and the specific exceptions contained in the Foreign Trade Antitrust Improvement Act ("FTAIA"), 15 U.S.C. § 6a, extends to the specific antitrust claims asserted by plaintiffs. While this case was pending our decision, the Supreme Court issued its opinion in F. Hoffman-LaRoche Ltd. v. Empagran S.A., 124 S.Ct. 2359 (2004), in which it held that where the alleged anticompetitive conduct causes an adverse foreign effect that is independent of the domestic effects of the conduct, "the FTAIA [domestic-

injury] exception does not apply (and thus the Sherman Act does not apply) . . . .” Id. at 2366. The Court reasoned that “two sets of considerations, the one derived from comity and the other reflecting history, convince us that Congress would not have intended the FTAIA’s exception to bring independently caused foreign injury within the Sherman Act’s reach.” Id. at 2371. The Court, however, stated no position regarding situations in which the foreign injury was not independent of the alleged anticompetitive conduct’s domestic effects because the Court of Appeals had not addressed that issue. Id. at 2372.

We requested that the parties provide us with letter memoranda addressing the effect of the Supreme Court’s opinion in Empagran on the appeal before us. Both parties agree that, to the extent that plaintiff steel producers claim foreign injuries that are independent of the domestic effects of the alleged anticompetitive conduct, Empagran controls our ruling on such claims. Letter from plaintiff-appellants’ counsel to the court of June 30, 2004, at 1-2; Letter from defendant-appellees’ counsel to the court of July 1, 2004, at 1. Plaintiffs, however, assert that the basic questions on appeal, in light of Empagran, are:

Have plaintiffs made a preliminary showing, sufficient to proceed with this litigation, that the prices they paid for graphite electrodes were linked to, and not “independent” from, the raising of prices in the United States by defendants’ alleged global price-fixing cartel?

If not, should plaintiffs have an opportunity to make such a showing on remand?

Letter from plaintiffs-appellant’s counsel, at 1. Defendants, on the other hand, maintain

that the District Court erred in allowing the claims of certain plaintiffs based on foreign purchases of graphite electrodes that were invoiced in the United States to proceed.

Letter from defendants-appellees' counsel, at 4.

Because the District Court, and the parties, did not have the benefit of Empagran, we will remand the case to the District Court for its reconsideration. The District Court, should it deem it necessary or helpful, may give the parties the opportunity to present evidence as to whether the alleged anticompetitive conduct's domestic effects were linked to the alleged foreign harm. The District Court may consider and take evidence, if necessary, on any other related issue. For the reasons set forth above, we will vacate the decision of the District Court and remand for further proceedings consistent with this opinion.