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## New Lessons for Pleading the FTAIA

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## New Lessons for Pleading the FTAIA

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### I. INTRODUCTION

In September 2011, in *Minn-Chem Inc. v. Agrium Inc.*,<sup>2</sup> the Seventh Circuit concluded that allegations of price-fixing in foreign commerce, with effects on domestic U.S. commerce due to the integrated worldwide market for the agricultural fertilizer component potash, were insufficient to survive a motion to dismiss under the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.<sup>3</sup> The complaint's failing was the lack of plausible allegations of a direct effect of overseas price-fixing on domestic or import markets.

*Minn-Chem v. Agrium* illustrates a squaring of the burdens facing private antitrust plaintiffs seeking extraterritorial application of the law. The substantive standard under the Foreign Trade Antitrust Improvements Act was difficult to meet prior to *Twombly* and *Iqbal*. Combining it with a pleading standard created to protect against false positive errors from private antitrust enforcement substantially increases the challenge to private plaintiffs.

### II. FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

Since 1982 the Foreign Trade Antitrust Improvements Act (“FTAIA”) has defined the extent of the extraterritorial reach of the antitrust laws. The statute excludes application of the Sherman Act “to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations.” In addition to the exception for import commerce contained in the parenthetical, the statute contains three exceptions which, if met, will allow the Sherman Act to be applied: (1) conduct having a “direct, substantial, and reasonably foreseeable effect” on domestic trade or commerce; (2) conduct with a direct, substantial, and reasonably foreseeable effect on import trade or commerce; and (3) conduct having a direct, substantial, and reasonably foreseeable effect on the business of a U.S. exporter. For all three exceptions, the effect must “give rise to a claim” under the Sherman Act, and the Supreme Court has clarified that “a claim” means the claim being brought.<sup>4</sup>

The circumstances in which the FTAIA defines the application of U.S. law are various. Competitor suits<sup>5</sup> and government enforcement,<sup>6</sup> dominant firm suits and concerted conduct accusations, all potentially implicate the FTAIA. But the law governing the extraterritorial reach of the antitrust laws has developed largely in the contexts of private plaintiff claims seeking treble

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<sup>2</sup> 657 F.3d 650 (7th Cir. 2011).

<sup>3</sup> 550 U.S. 544 (2007); 129 S. Ct. 1937 (2009).

<sup>4</sup> 15 U.S.C. 6a; see *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

<sup>5</sup> See, e.g., *Liamuiga Tours v. Travel Impressions Ltd.*, 617 F. Supp. 920 (E.D.N.Y. 1985); *The "In" Porters v. Hanes Printables, Inc.*, 663 F. Supp. 494 (1987).

<sup>6</sup> See *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004).

damages relief for a) cartel conduct occurring overseas with effects on U.S. commerce and b) cartel conduct in U.S. commerce causing harm to a plaintiff located overseas.<sup>7</sup>

Recent months have seen two such opinions from the federal courts of appeals—*Minn-Chem, Inc. v. Agrium Inc.*,<sup>8</sup> and *Animal Science Products, Inc. v. China Minmetals Corp.*,<sup>9</sup> and within the past few years numerous others have been issued by federal trial courts and courts of appeals.

The Supreme Court's primary statement on the FTAIA, *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*,<sup>10</sup> was also a private cartel case. A sense emerges from reading *Empagran* and cases decided in its wake that U.S. antitrust courts may be indulging a thinly guised impatience with global antitrust class action litigation. Certainly, arguments made to the Court by business interests, the U.S. government, and foreign governments in support of the *Empagran* result highlighted perceptions of U.S. antitrust courts' extraterritorial overreaching and the resulting dual harms to economic activity and international comity.<sup>11</sup>

Malleable standards for determining whether a direct, substantial, and reasonably foreseeable effect on covered areas of commerce, giving rise to the plaintiff's claim, exists, grant courts broad cover for decisions to dismiss. I observed after *Empagran* that, based on some of the decisions interpreting its holding, it may be “difficult—perhaps impossible” to meet the directness requirement where conduct and harm are geographically remote from one another.<sup>12</sup> *Minn-Chem v. Agrium* supports that observation.

## II. TWOMBLY AND IQBAL

Three years after *Empagran* addressed the parameters of the antitrust laws' extraterritorial reach, *Twombly*—and two years later *Iqbal*—were decided. Together the cases define the standards for pleading federal claims. They require that private plaintiffs' allegations rise to the level of a “plausible inference” of illegal conduct, a degree of likelihood greater than a “mere possibility” but stopping short of “probability.”<sup>13</sup>

Last year Mark Anderson and I demonstrated that *Twombly* and *Iqbal* required the analysis of pleadings in federal court with a view to the expected cost of false positive errors from permitting litigation to proceed past the motion to dismiss stage.<sup>14</sup> With regard to the claims of violations of Section 1 of the Sherman Act, at issue in *Twombly*, and constitutional civil rights, at issue in *Iqbal*, the fear of chilling effects on desirable conduct outweighed the benefits of allowing plaintiffs to proceed to discovery and potentially trial. Our analysis of *Twombly* is particularly relevant to the analysis of FTAIA cases because most of those are Section 1 cartel conduct cases.

<sup>7</sup> See Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 341 (2007), available at <http://papers.ssrn.com/abstract=986708>.

<sup>8</sup> 657 F.3d 650 (7th Cir. 2011).

<sup>9</sup> 654 F.3d 462 (3d Cir. 2011).

<sup>10</sup> 542 U.S. 155 (2004).

<sup>11</sup> See Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement*, 60 SMU L. REV. 103, 115, 123-25 (2007) (arguing that over-deterrence concerns and international comity ramifications underlay the *Empagran* decision, supporting limiting antitrust standing to those private plaintiffs alleging harm in domestic or import commerce), available at <http://papers.ssrn.com/abstract=925876>.

<sup>12</sup> *Id.* at 137. *Empagran* addressed a different but related directness inquiry. See *infra* Part III.

<sup>13</sup> See *Twombly*, 550 U.S. at 556 (not imposing probability at the pleading stage; stating the plausibility standard); *Iqbal*, 129 S. Ct. at 1950 (mere possibility is insufficient).

<sup>14</sup> See Mark Anderson & Max Huffman, *Iqbal, Twombly and the Expected Cost of False Positive Error*, 20 CORNELL J. L. & PUB. POL'Y 1, 20-29 (2010), available at <http://papers.ssrn.com/abstract=1548232>.

Liability under Section 1 presents great social costs in terms of disincentives for firms to engage in beneficial conduct. Plaintiffs seeking to establish agreement commonly allege attendance at trade shows and meetings to show opportunity to conspire—those allegations were present in *Minn-Chem v. Agrium*—but participation in trade shows and meetings may facilitate the development of industry best practices inuring to consumers' benefits. Preventing such activity is socially costly. Litigation under Section 1 is likely to impose those costs. The expense of discovery on the agreement element of Section 1 claims, which may entail extensive depositions and document requests, is high and borne uniquely by defendants. Taken together, there is a high expected cost of false positive error, defined as the likelihood of costly chilling effects created by allowing plaintiffs access to discovery and potential subsequent stages of litigation.<sup>15</sup>

We argued that the expected cost framework should be applied to every element of every claim to which the *Twombly/Iqbal* rule is applied. Cases like *Minn-Chem v. Agrium* that apply *Twombly* and *Iqbal* to the FTAIA raise the question: To what degree can the extraterritorial reach of the antitrust laws impose high expected costs from false positive error unique from the costs that are imposed in any cartel conduct litigation? I discuss *Minn-Chem v. Agrium* and some other recent decisions under the FTAIA in the next section, before discussing how our framework might influence courts' approaches to motions to dismiss on the basis of the FTAIA.

### III. PLEADING THE FTAIA

#### A. *Minn-Chem v. Agrium*

The Seventh Circuit in *Minn-Chem v. Agrium* had a choice of decision rationales, either of which might have led to dismissal. A conclusion of no extraterritorial application required dismissal either for lack of subject-matter jurisdiction or for failure to state a claim.<sup>16</sup> The court also might have analyzed the substantive allegations in the complaint, a price-fixing claim relying on observations of parallel pricing and output practices that were alleged to be difficult to explain as competitive conduct, as well as "plus factors" of motive and opportunity to conspire.<sup>17</sup>

The Seventh Circuit reversed the district court's declining to dismiss on the basis of the plaintiffs' failure adequately to plead an exception to the FTAIA's general rule of no extraterritorial application. The court concluded that the pleading standard announced in *Twombly* and *Iqbal* applied, regardless whether the FTAIA analysis was a subject-matter jurisdiction question or an element of the plaintiffs' antitrust claim.<sup>18</sup> The court thus required the plaintiffs to plead facts giving rise to a plausible inference that the alleged overseas conduct had a direct, substantial, and reasonably foreseeable effect on domestic or import commerce. It rejected the district court's conclusion that the plaintiffs had alleged conduct in import commerce (the exception to the FTAIA's broad rule contained in the statute's parenthetical expression).<sup>19</sup>

Plaintiffs' argument for an FTAIA exception turned on the interconnectedness of the world-wide potash market. They alleged that prices in wholly foreign commerce were fixed, and

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<sup>15</sup> *Id.* at 30-35.

<sup>16</sup> *See* *Minn-Chem*, 657 F.3d at 656-57; *Animal Science Prods.*, 654 F.3d at 469-70.

<sup>17</sup> *Minn-Chem v. Agrium*, 657 F.3d at 657, 662.

<sup>18</sup> *Id.* at 656-57. Other courts have recognized the application of *Twombly* and *Iqbal* to questions of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), although both *Twombly* and *Iqbal* arose in the context of motions to dismiss for failure to state claims under Rule 12(b)(6). *See, e.g.,* *Castro v. United States*, 560 F.3d 381, 386 (5th Cir. 2009).

<sup>19</sup> *Minn-Chem v. Agrium*, 657 F.3d at 660-61.

those prices served as benchmarks for prices in domestic commerce. “Potash sales in the United States are made . . . at prices that are set according to benchmarks established by defendants based on sales in India, China and elsewhere.” Plaintiffs also alleged, “prices established in [foreign] markets directly influence prices in other major markets.”<sup>20</sup> A plausible inference from those allegations would be that supra-competitive prices overseas lead to supra-competitive prices in the United States. This sort of spill-over from an effect in a foreign market into U.S. domestic commerce may be precisely what Congress had in mind when including the direct effects exception in the FTAIA.<sup>21</sup>

It is difficult to imagine what more the plaintiffs in *Minn-Chem v. Agrium* might have alleged. The court implied allegations “that the defendants agreed to worldwide production quotas or a global cartel price” or “imposed a price or supply quota on the American market specifically” might be sufficient. But as that court previously had observed, such allegations would end-run the direct effect exception entirely, allowing extraterritorial application to conduct because it “involves” import commerce—the first exception to the FTAIA’s prohibition on extraterritoriality, which is unique from the direct effects exception.<sup>22</sup> The court seemingly ignored the reality, which it had noted just pages earlier and the Third Circuit had recognized a month prior, that the two exceptions are different.<sup>23</sup>

*Minn-Chem v. Agrium* is not unique in its skeptical treatment of allegations of harm based on interconnected geographic markets or a worldwide market. Since *Empagran*, substantially similar worldwide market allegations frequently have been made in private actions relying on FTAIA exceptions to support extraterritorial application of antitrust prohibitions. Courts frequently have held those allegations to be insufficient.

World-wide market allegations relate to two distinct “directness” inquiries. One, which *Minn-Chem v. Agrium* illustrates, asks about the relationship between foreign conduct and domestic effect. The second, of which *Empagran* is an example, asks whether a plaintiff’s harm felt in foreign commerce is sufficiently related to a domestic effect to allow that plaintiff to sue. (This latter question is best understood as a question of antitrust standing, although courts have not often followed that approach.<sup>24</sup>) Courts hold that there is a sufficient relationship if there is a proximate causal connection between a U.S. effect and the plaintiff’s harm. Though the two inquiries—direct effects and proximate cause—are different, the allegations of interconnected world-wide markets used to satisfy each are closely comparable.

Successfully establishing a sufficiently interconnected world-wide market to meet either the directness inquiry in the FTAIA or the proximate cause inquiry from the D.C. Circuit’s opinion on remand in *Empagran (Empagran II)* has proved to be difficult for antitrust plaintiffs. An extreme example is one California district court’s dismissing a complaint by plaintiffs who were purchasers in foreign commerce, which included allegations that price-fixing in U.S. commerce proximately caused their harm. The plaintiffs alleged they were prepared to end-run the fixed

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<sup>20</sup> *Id.* at 662 (quoting the complaint).

<sup>21</sup> Huffman, *Retrospective*, *supra* note 7 at 327 & n.254 (citing the legislative history).

<sup>22</sup> *Id.* at 661-62

<sup>23</sup> See *Animal Science Prods.*, 654 F.3d at 8-9.

<sup>24</sup> Huffman, *A Standing Framework*, *supra* note 11, at 139-155. There are exceptions. See, e.g., *In re Transpacific Passenger Air Transp. Litig.*, 2011 WL 1753738, at \*8 (N.D. Cal. 2011) (no antitrust standing for a plaintiff claiming injury suffered in foreign commerce).

prices in foreign commerce by purchasing in the United States if prices in the United States had not also been fixed.<sup>25</sup> The Ninth Circuit held in the *DRAM* litigation that even if “maintaining higher U.S. prices” was “necessary to sustain the higher prices globally,” that was insufficient to meet that the *Empagran II* proximate cause requirement.<sup>26</sup>

The Second Circuit, in its *Elevators* opinion issued shortly after *Twombly* was decided, suggested allegations that would be minimally required to establish a world-wide market. Those included “allegations of global marketing or fungible products,” “indication that participants monitored prices in other markets,” and “plausible . . . analysis of the interchangeability of use or the cross-elasticity of demand.” The court summarized these as “facts linking transactions in Europe to transactions and effects here” other than “conclusory allegations.”<sup>27</sup>

One complaint that recently did survive a motion to dismiss on FTAIA grounds, in the *TFT-LCD* multi-district litigation, included allegations of a single “global price for all LCD Panel purchases around the world.”<sup>28</sup> The district court in *TFT-LCD* was careful to note that the single global price did not rely on claims of interconnectedness of markets leading to arbitrage opportunities. Notably, this is the sort of allegation the Seventh Circuit in *Minn-Chem v. Agrium* suggested might have been sufficient to meet the direct effects exception.

To know whether courts like *Minn-Chem v. Agrium*, interpreting the direct effects exception, or the courts following the D.C. Circuit's *Empagran II* proximate cause rule for claims by foreign purchasers react properly in their skeptical review of allegations relating to extraterritoriality, I next analyze the concerns for false positive error if the motions to dismiss are denied.

## **B. Expected Cost of False Positive Errors**

It is possible the *Minn-Chem v. Agrium* plaintiffs’ inability to make sufficient allegations of a direct effect reflected the absence of a direct effect, just as other plaintiffs’ frequent inability to make sufficient allegations of an agreement reflect the likely absence of an agreement. But it is also possible the plaintiffs were not privy to evidence establishing that direct effect and would have been able, after discovery, to make the required showing. The question whether plaintiffs should have the opportunity for discovery turns on the expected error cost analysis that underlay *Twombly* and *Iqbal*. That analysis suggests the Seventh Circuit's dismissing, without leave for discovery, may have been too hasty.

The harm from false positive errors where the FTAIA is concerned flows from the international comity ramifications of extraterritorial overreaching. (There are the economic costs in the nature of chilling concerns that antitrust enforcement presents generally, but those costs are adequately considered in the review of the substantive elements of the plaintiffs' claims.) The Supreme Court in *Empagran* made clear the international comity ramifications of extraterritorial overreaching were substantial. It cited to briefs filed by the governments of Germany, Canada, and Japan, which argued for a restrictive interpretation of FTAIA exceptions to limit interference in those countries’ own competition policy regimes. I have argued that *Empagran* “elevate[d] the

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<sup>25</sup> eMag Sol'ns LLC v. Toda Kogyo Corp., 2005 WL 1712084, at \*4 (N.D. Cal. 2005).

<sup>26</sup> In re Dynamic Random Access Memory Antitrust Litig., 546 F.3d 981, 988 (9th Cir. 2008).

<sup>27</sup> In re Elevator Antitrust Litig., 502 F.3d 47, 52 (2d Cir. 2007) (quoting *Empagran II*, 417 F.3d at 1270, *Dec-K Enters., Inc. v. Haveafil Sdn. Bhd.*, 299 F.3d 281, 295 (4th Cir. 2002), and *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001)).

<sup>28</sup> In re TFT-LCD Antitrust Litig., 785 F. Supp. 835, 842-43 (N.D. Cal. 2011).



comity question from an afterthought in *Hartford Fire [Insurance Co. v. California]* to a preeminent decision rationale.”<sup>29</sup>

The high cost of error alone does not answer the question. A court still must ask how likely it is that permitting the plaintiffs to take discovery on the question of directness will impose those costs. The likelihood dimension is a question of the nature of the proceedings that would take place if the case were permitted to proceed—at the motion to dismiss stage of proceedings, the issue is discovery. The more burdensome the discovery, the greater the likelihood of false positive error.

The question of burden is, in part, a question of the extent to which information sought is public or non-public. Non-public information is both more cherished and more costly to produce. With regard to the FTAIA directness inquiry, the likelihood of a false positive error is relatively low. The direct effect question is related to the nature of the worldwide market—in *Minn-Chem v. Agrium*, the potash market. Such a market analysis relies on public information available to the plaintiff as easily as it is to the defendant. Proving directness entails hiring an industry expert rather than deposing defendants’ executives or submitting burdensome document requests. The inquiry proceeds more along the lines of proving market power as an element of a substantive antitrust claim, relying on facts found in the public domain and equally available to both parties, than along the lines of proving a covert agreement.

Professor Anderson and I concluded that where proof of economic facts can be made from publicly available information or from information held by third parties, the likelihood of a false positive error was low.<sup>30</sup> That conclusion would apply to the directness inquiry under the FTAIA as well. That conclusion suggests greater leeway in alleging directness to meet an FTAIA exception is appropriate.

#### IV. CONCLUSION

*Minn-Chem v. Agrium* is the latest in a long line of opinions reflecting courts’ suspicions of private plaintiff efforts to expand the scope of private antitrust enforcement, either by drawing links between harm in the United States and a plaintiff’s harm overseas (as in *Empagran II*), or by drawing links between conduct occurring overseas and a harm felt in the United States.

*Minn-Chem v. Agrium* is interesting because it gives a window into the application of *Twombly* and *Iqbal* to the FTAIA inquiry. Careful analysis suggests the court may have been overly skeptical in its review of the complaint for two reasons: Plaintiffs’ allegations did raise the possibility of a direct effect, and the likelihood of a false positive error from permitting discovery on the crux question of the world-wide interconnectedness of the potash market was low—suggesting plaintiffs deserved leeway in stating those allegations.

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<sup>29</sup> Huffman, *A Standing Framework*, *supra* note 11 at 124 (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), and *Empagran*, 542 U.S. at 164-69).

<sup>30</sup> Anderson & Huffman, *False Positive Error*, *supra* note 14 at 37, 40-41.