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## Divined Comity: Assessing the Vitamin C Antitrust Litigation and Updating the Second Circuit's Prescriptive Comity Framework

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# DIVINED COMITY: ASSESSING THE VITAMIN C ANTITRUST LITIGATION AND UPDATING THE SECOND CIRCUIT'S PRESCRIPTIVE COMITY FRAMEWORK

*William Weingarten\**

## ABSTRACT

*In re Vitamin C Antitrust Litigation*, recently decided by the Second Circuit, sets a grave precedent for American plaintiffs seeking redress for antitrust injuries wrought by foreign defendants. The case involved a group of Chinese manufacturers and exporters of vitamin C, who conspired to fix prices and restrict output in the export market, injuring American consumers in import commerce. The foreign manufacturers conceded that they had colluded in fixing prices and restricting output, in flagrant violation of U.S. antitrust law. And yet, with the assistance of the Chinese government—intervening as *amicus curiae*—the defendants were successfully able to argue, on appeal from a jury finding against them, that “prescriptive comity”—a species of international comity doctrine—justified the Second Circuit’s dismissal of the claim. The district court below had erred, on international comity grounds, in declining to abstain from exercising jurisdiction over the claim.

This Note assesses the outcome of *In re Vitamin C Antitrust Litigation*, concluding that it was incorrectly decided in several respects. This Note then proposes two means by which prevailing “prescriptive” comity frameworks like the Second Circuit’s might be reconfigured to minimize the separation of powers tensions inherent in prescriptive comity doctrine, and provide courts with a clear,

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\* J.D. Candidate, Fordham University School of Law, 2024; B.A., New York University College of Arts & Science, 2020. I would like to thank Professor Thomas Lee for his expertise and invaluable feedback throughout the research and writing process for this Note. I would also like to thank Professor Laurence Sorkin for the exceptional guidance and support he has provided me since this Note’s inception. In addition, I want to express my gratitude to the editors and staff of the *Fordham Journal of Corporate & Financial Law* for their assistance during the editing process. Finally, I want to thank my family and friends for their “virtually unflagging” care and support.

common-sense approach to evaluating future abstention defenses rooted in prescriptive comity.

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## INTRODUCTION

Globalization has “multiplied the types and complexity of cases in U.S. federal courts implicating international comity . . . .”<sup>1</sup> It should come as no surprise, then, that international comity doctrine has seen a striking revival in courts and academic circles alike. As an abstention doctrine, international comity doctrine has famously been described as, “the recognition which one nation allows within its territory to the legislative, executive[, ] or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”<sup>2</sup>

The doctrine’s appeal to foreign defendants (especially sovereign defendants) should be clear: it provides them a means by which U.S. courts may decline to exercise their subject-matter jurisdiction over

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1. Samuel Estreicher & Thomas H. Lee, *In Defense of International Comity*, 93 S. CAL. L. REV. 169, 170 (2020).

2. *Hilton v. Guyot*, 16 S. Ct. 139, 164 (1895).

claims implicating foreign interests.<sup>3</sup> Equally apparent should be comity doctrine's inherent tension, given the burdens it places on judges to make foreign policy decisions ordinarily entrusted to the political branches.<sup>4</sup> To complicate—and, perhaps, to explain—comity's renewed relevance, modern globalization has coincided with the “rise of state capitalism in emerging countries . . . .”<sup>5</sup> Careful scrutiny of the doctrine, and its application by U.S. courts, is thus pressing to both legal scholarship and political reality.

Forces of globalization have similarly added new complexity to the United States' private cross-border antitrust enforcement regime.<sup>6</sup> Where American plaintiffs' antitrust claims satisfy the strictures of the Foreign Trade Antitrust Improvement Act of 1982 (“FTAIA”), and can thus be pursued extraterritorially, the Sherman Act imposes severe penalties on the foreign anticompetitive conduct at issue.<sup>7</sup> The past century is replete with foreign actors being brought into U.S. courts to answer for the anticompetitive harms they have allegedly wrought on American import commerce and consumers.<sup>8</sup> Judicial abstention from such cases has repercussions, not only for would-be foreign defendants, but also for the industries in which they operate and the sovereigns within whose borders they reside.

International comity doctrine and antitrust law have influenced each other's growth for over a century, since the seminal *American Banana* case.<sup>9</sup> International comity and sub-doctrines in its conceptual orbit—for

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3. Estreicher & Lee, *supra* note 1, at 178.

4. See Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 71 (2019).

5. Angela Huyue Zhang, *Strategic Comity*, 44 YALE J. INT'L L. 281, 282–83 (2019).

6. See *id.*

7. See 15 U.S.C. § 1 (rendering unlawful “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations”); see also 15 U.S.C. § 6a (setting limitations on the U.S. antitrust laws' extraterritorial reach).

8. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); see also *Hewlett-Packard Co. v. Quanta Storage, Inc.*, 961 F.3d 731 (5th Cir. 2020) (upholding a \$438.65 million award entered against foreign optical disk drive manufacturer that conspired with other manufacturers to fix the price of optical disk drives in American import commerce).

9. See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909); see also Douglas H. Ginsburg & John M. Taladay, *The Enduring Vitality of Comity in a Globalized World*, 24 GEO. MASON L. REV. 1069, 1080–85 (2017) (discussing the transition from *American Banana*'s “territorial” approach to an approach that made the Sherman Act applicable extraterritorially unless comity dictated otherwise).

example, the presumption against extraterritoriality<sup>10</sup>—transformed over the course of a twentieth century that saw significant changes in “the world order and the growing prominence of the United States in it.”<sup>11</sup>

Twentieth century changes to comity doctrine coincided with significant developments in U.S. antitrust enforcement, “as the growing trans-border features of the world economy engendered opportunities for firms to manipulate U.S. markets by offshore acts and conspiracies.”<sup>12</sup> Courts are increasingly being asked to decide in what cases comity considerations overcome the strong public policy interest in enabling private claimants to pursue antitrust claims in federal court.

U.S. courts are challenged to carry out the judicial branch’s mission while remaining mindful of the judiciary’s place in the American constitutional order. Overzealously extending U.S. antitrust law to foreign conduct could aggrandize the judiciary relative to the executive and legislative branches, which are empowered to articulate and pursue the United States’ foreign interests.<sup>13</sup> Equally, where Congress has codified its intent that the Sherman Act apply transnationally, courts abstaining from exercising jurisdiction over such claims risk undermining Congress’s authority in foreign affairs.<sup>14</sup> And, failing to adhere to principles embedded in comity doctrine may frustrate foreign sovereigns interested in protecting their citizens from American legal sanctions.

This Note analyzes a recent, watershed case in international comity doctrine in the antitrust context: *In re Vitamin C Antitrust Litigation*

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10. See William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2102 (2015) (“Prescriptive comity operates as a principle of restraint in American law today mainly through the presumption against extraterritoriality.”). As Dodge notes, only one of the two rationales upholding the modern presumption against extraterritoriality reflects international comity. *Id.*

11. Estreicher & Lee, *supra* note 1, at 181.

12. *Id.*

13. See Gardner, *supra* note 4, at 71 (“[F]or those concerned about the domestic division of power within our constitutional system, the current approach to abstention in transnational cases unnecessarily aggrandizes the federal judicial power at the expense of Congress and the states.”).

14. See 15 U.S.C. § 6a; see also Gardner, *supra* note 4, at 67 (“In addition to inviting uncertainty and inconsistency, th[e] open-ended use of abstention in transnational cases is in tension with the Supreme Court’s renewed emphasis on the ‘virtually flagging obligation’ of the federal courts ‘to exercise the jurisdiction given them’ by Congress.”) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

(“*Vitamin C I*”).<sup>15</sup> The Vitamin C Antitrust Litigation ended nearly two decades after American purchasers of vitamin C first filed complaints against several Chinese vitamin C manufacturers (“the Manufacturers” or “the Defendants”).<sup>16</sup> The Second Circuit’s disposition of the case yields as many questions as it does answers.<sup>17</sup>

This Note is divided into three broad parts. Part I consists of two sections. Section I provides an overview of the law pertinent to the Vitamin C Antitrust Litigation, including relevant antitrust law and international comity doctrine.<sup>18</sup> Section II sets forth, in detail, the facts and procedural history of the Vitamin C Antitrust Litigation.<sup>19</sup>

Part II assesses the holding in *Vitamin C II*, the final judgment in the litigation. It concludes that Judge Wesley’s dissenting opinion better interprets and applies the “true conflict” inquiry in the antitrust context than the majority opinion.<sup>20</sup>

Part III of this Note consists of two normative sections.<sup>21</sup> Each Section suggests a means of improving the Second and other Circuits’ prescriptive comity frameworks, in view of The Vitamin C Antitrust Litigation and in recognition of the separation of powers tensions in the current comity frameworks.

Part III, Section I posits a means by which U.S. courts can access the executive branch’s position on “true conflict” questions in prescriptive comity cases.<sup>22</sup> Specifically, the Section suggests that the Department of

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15. See *In re Vitamin C Antitrust Litig. (Vitamin C II)*, 8 F.4th 136 (2d Cir. 2021), cert denied, 143 S. Ct. 85 (mem.); see also *In re Vitamin C Antitrust Litig. (Vitamin C I)*, 837 F.3d 175 (2d Cir. 2016), vacated sub nom. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018), remanded to 8 F.4th 136 (2d Cir. 2021). This Note refers to the litigation in its entirety as “The Vitamin C Antitrust Litigation.”

16. See *Vitamin C II*, 8 F.4th at 179–80. The Defendant Manufacturers’ full names are as follows: Hebei Welcome Pharmaceutical Co. Ltd. (“Hebei”), Jiangsu Jiangshan Pharmaceutical Co. Ltd. (“Jiangsu Jiangshan”), Northeast Pharmaceutical Group Co. Ltd. (“Northeast”), and Weisheng Pharmaceutical Co. Ltd. (“Weisheng”). *Id.* Following the denial of their summary judgment motion, Jiangsu Jiangshan and Weisheng settled the suit with Plaintiffs, leaving Hebei and Northeast to contest the district court’s denial of the Manufacturers’ abstention defenses below. See *id.* at 141–42.

17. This Author suggests that readers seeking to analyze all facets of the case do so with a pinhole projector on hand, to minimize the risk of acute blindness.

18. See *infra* at 13.

19. See *infra* at 24.

20. See *infra* at 44.

21. See *infra* at 51.

22. See *infra* at 51.

Justice (DOJ) and Federal Trade Commission (FTC) adopt a policy of weighing in on such questions in prescriptive comity cases. Doing so would reduce the foreign policy guesswork that district courts are forced to engage in when evaluating comity defenses.

Part III, Section II argues for a reworking of the prevailing, and notoriously fraught, multi-factor comity tests, which comprise step two of the Second Circuit's prescriptive comity analysis.<sup>23</sup> By elevating the analytical weight of two factors, and subordinating the remaining ones, this Note offers a multi-factor test that (a) better guides courts and litigants through abstention analyses and (b) produces sensible outcomes.

## I. THE VITAMIN C ANTITRUST LITIGATION

### A. ANTITRUST LAW, INTERNATIONAL COMITY, AND *HARTFORD FIRE*

#### 1. *U.S. Antitrust Law and Its Extraterritorial Application.*

The Supreme Court has referred to the antitrust laws in general, and the Sherman Act in particular, as the “Magna Carta of free enterprise,” recognizing the Act’s scope and significance to the United States’ free market system.<sup>24</sup> Section 1 of the Act prohibits contracts, combinations, and conspiracies “in [unreasonable] restraint of trade or commerce among the Several states or with foreign nations . . . .”<sup>25</sup> The Act renders horizontal price-fixing conspiracies, dubbed the cardinal sin of antitrust law, illegal *per se*.<sup>26</sup> Other agreements under section 1 of the Sherman Act are evaluated under the less stringent “rule of reason” or “quick look” tests.<sup>27</sup>

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23. See *infra* at 68.

24. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); see also *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (describing the Sherman Act as “a comprehensive charter of economic liberty . . . [that] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress”).

25. 15 U.S.C. § 1 (1890).

26. See *Leegin Creative Leather Prods., Inc v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal citations omitted) (“Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices [] or to divide markets . . . .”); see also *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (warning that collusion between competitors is the “supreme evil of antitrust”).

27. See, e.g., *Nat’l Soc’y. of Pro. Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (holding that “no elaborate industry analysis is required to demonstrate the



The Clayton Act was enacted in 1914 to clarify, extend, and support the mandates of the Sherman Act.<sup>28</sup> Among other things, Section 4 of the Clayton Act authorizes private citizens to bring claims for “threefold damages” under the U.S. antitrust laws, compensating for their antitrust injuries, and deterring defendants from future anticompetitive conduct.<sup>29</sup> Section 26 of the Clayton Act enables private plaintiffs to seek injunctive relief against antitrust violations.<sup>30</sup> By establishing a dual, public-plus-private system of enforcement, the Clayton Act gave the United States’ then-fledgling antitrust regime the tools to become the formidable force it is today.<sup>31</sup>

In 1982, the FTAIA codified a test to determine when the antitrust laws would reach conduct occurring abroad.<sup>32</sup> Just prior to the FTAIA’s enactment, courts had employed numerous tests—sometimes, but not always, invoking comity doctrine—to decide whether the Sherman Act should apply extraterritorially.<sup>33</sup>

Rather than provide courts with the clarity they sought, the FTAIA led to inconsistent results as lower courts grappled with its poorly drafted provisions.<sup>34</sup> Chiefly, courts disagreed over what it meant for cases to “arise under” the antitrust laws.<sup>35</sup>

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anticompetitive character of” horizontal agreements among competitors to refuse to discuss prices); *Texaco Inc. v. Dagher*, 547 U.S. 1, 2 (2006) (internal citations omitted) (“Under rule of reason analysis, antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive. *Per se* liability is reserved for ‘plainly anticompetitive’ agreements.”).

28. See 15 U.S.C. §§ 12–27; see also *Yankees Ent. & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 666 (S.D.N.Y. 2002) (observing that the Clayton Act “was passed to strengthen and clarify the Sherman Act”).

29. 15 U.S.C. § 15(a) (“[A]ny person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained.”).

30. 15 U.S.C. § 26.

31. See Milton Katz, *The Consent Decree in Antitrust Administration*, 53 HARV. L. REV. 415, 431 (1940) (“[S]ince the passage of the Sherman Act, and . . . since the adoption of the Federal Trade Commission and Clayton Acts, administrative law in America has progressed steadily toward maturity.”).

32. See 15 U.S.C. § 6a.

33. See *Timberlume Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614–15 (9th Cir. 1976) (establishing an influential multi-factor comity test); see also RESTATEMENT (THIRD) OF THE FOREIGN REL. L. U.S. § 403(2) (AM. L. INST. 1987).

34. See Ginsburg, *supra* note 9, at 1084.

35. Compare *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 396 (2d Cir. 2002) with *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 427 (5th Cir. 2001).

Not only was the statute's text ambiguous, but it was silent on the role comity had to play.<sup>36</sup> Did the FTAIA render comity obsolete in the antitrust context?<sup>37</sup> By holding that antitrust claims—otherwise cognizable under the FTAIA—were barred on comity grounds, would the judiciary be acting consistently with the FTAIA and Congress's will? In the landmark *Empagran* case, the Supreme Court made clear not just that comity doctrine had survived the FTAIA's passage, but that principles of comity should indeed guide courts in interpreting the statute.<sup>38</sup>

A claim's validity under the FTAIA does not, therefore, foreclose comity doctrine from justifying dismissal in "rare" and "extraordinary" cases.<sup>39</sup> But what exactly does international comity doctrine consist of, and how has the doctrine's continued force influenced private and public enforcement against anticompetitive foreign conduct harming Americans in import commerce?

## 2. *International Comity Doctrine Pre-Hartford Fire*

International comity is a critical component of a functioning transnational legal order.<sup>40</sup> As an abstention doctrine, international comity "takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just

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36. See Ginsburg, *supra* note 9, at 1084 ("[*Empagran*] has been described as both a course-change from *Hartford Fire*'s limited application of comity and a 'strong endorsement of the principle of comity'" in interpreting the FTAIA.); see also *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 173 (2004).

37. The Court's opinion in *Hartford Fire* had left this an open question. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993) ("When it enacted the FTAIA, Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity.").

38. See *Empagran*, 542 U.S. at 173 (employing prescriptive comity as a rule of construction applicable to the FTAIA).

39. See Brief for the United States as Amicus Curiae at 18, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (Nov. 14, 2017) (emphasis added) ("Comity-based dismissals should be rare . . . [but] federal courts may, in *extraordinary* circumstances, dismiss private Sherman Act claims based on principles of comity.").

40. See Benjamin G. Bradshaw et al., *Foreign Sovereignty and U.S. Antitrust Enforcement: Is 'the State Made Me Do It' a Viable Defense?*, 26 ANTITRUST 19, 24 (2012) (describing international comity as "[p]erhaps the doctrine best suited for the fast-changing global economy [] one of the oldest and most flexible . . . which allows courts to balance the competing concerns of respect for foreign sovereigns and enforcing the U.S. antitrust laws").

and efficiently functioning rules of international law.”<sup>41</sup> The frequently cited *Hilton v. Guyot* describes the doctrine as follows:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive[, or] judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.<sup>42</sup>

Comity incorporates principles of reciprocity and good will, making courts instrumental in fostering mutual respect among nations.<sup>43</sup> Unsurprisingly, applications of the doctrine create friction with the separation of powers doctrine, as courts are tasked with evaluating the policy objectives of foreign sovereigns and the United States.<sup>44</sup>

Despite this potentially problematic dimension of international comity, the doctrine serves many public and private ends.<sup>45</sup> These include preserving amicable working relations with foreign countries and preventing United States courts from being flooded with litigation best resolved in alternative forums.<sup>46</sup>

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41. *In re Maxwell Commc’n Corp.*, 93 F.3d 1036, 1048 (2d Cir. 1996).

42. *Hilton v. Guyot*, 16 S. Ct. 139, 163–64 (1895).

43. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) (*Aérospatiale*) (Blackmun, J., concurring in part and dissenting in part); *see also* Cindy G. Buys, *Not so Respectful Consideration: The U.S. Supreme Court’s Deference or Lack Thereof to Foreign Government Statements of Law*, 10 PENN ST. J. L. & INT’L AFF. 49, 57–58 (2021).

44. *See, e.g.*, Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 54–56 (2010) (discussing the Second Circuit’s refusal to find a true conflict in *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 286 (2d Cir. 2007)) (per curiam), despite both the U.S. and South African governments warning of “the potential for [the] lawsuit to deter future investment in South Africa”).

45. *See* Buys, *supra* note 43, at 58–59.

46. *See* JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005) (“Whatever its precise contours, international comity is clearly concerned with maintaining amicable working relationships between nations, a ‘shorthand for good neighborliness, common courtesy and mutual respect between those who labor in adjoining judicial vineyards.’”).

One scholar justifies comity's continued use as "necessary to avoid 'the inconveniences which would result from a contrary doctrine.'"<sup>47</sup> Others more enthusiastically defend comity, in general, as an important and historically entrenched part of the judicial duty.<sup>48</sup> Still, other commentators have sought to diminish comity doctrine's force in order to alleviate its practical difficulties and the tensions created thereby.<sup>49</sup> However, all can agree on one thing: "[g]reater clarity is needed" to realize comity's aims and evade its pitfalls.<sup>50</sup>

Courts have crafted a panoply of tests to evaluate defenses on international (prescriptive) comity grounds. The most widely used are the multi-factor tests flowing from cases like *Timberlane Lumber Company*,<sup>51</sup> a Ninth Circuit case, and *Mannington Mills*, a Third Circuit case.<sup>52</sup> These multi-factor comity tests have both admirers and critics.<sup>53</sup> Notably, the

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47. Childress III, *supra* note 44, at 60. For Professor Childress, contrary doctrines include the territoriality principle driving the Supreme Court's holding in *American Banana*, a seminal case in antitrust law and comity doctrine. *See* *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (holding that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done"); *see also* *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 3 (1st Cir. 1997) (describing *American Banana*'s ancillary holding that, "in cases of doubt, a statute should be 'confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power'"). The territoriality principle, while providing a bright line rule, generates perverse incentives for foreign defendants. *See* Kelly L. Tucker, *In The Wake of Empagran—Lights Out on Foreign Activity Falling Under Sherman Act Jurisdiction? Courts Carve out a Prevailing Standard*, 15 *FORDHAM J. CORP. & FIN. L.* 807, 810–12 (2010) (describing courts' quickly distinguishing the *American Banana* holding).

48. *See* Estreicher & Lee, *supra* note 1, at 191 ("[J]udicial discretion to manage international comity as a federal common law matter was the original position and historical practice for centuries, not an aberration or a new development.").

49. *See, e.g.*, Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 *YALE L. J.* 1170, 1204 (2007) (suggesting that "in cases in which the executive has adopted an interpretation via rulemaking or adjudication, or is otherwise entitled to deference . . . the executive's interpretations should prevail over the comity doctrines").

50. Estreicher & Lee, *supra* note 1, at 215.

51. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).

52. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

53. *See* Bradshaw, *supra* note 40, at 23 ("The flexibility of the comity analysis allows courts to take into the account the legal, political, and economic conditions that shape foreign defendants' actions.").

Supreme Court has not endorsed either of these multi-factor comity tests.<sup>54</sup>

### 3. *Hartford Fire and the Advent of the True Conflict Inquiry*

In 1993, the Supreme Court's opinion in *Hartford Fire* cast doubt upon the multi-factor tests predominating lower courts.<sup>55</sup> The Court held only that the existence of a "true conflict" between U.S. and U.K. law would justify dismissal on comity grounds.<sup>56</sup> Before *Hartford Fire*, the extent to which such conflict existed was just one of the several factors to be weighed under the *Timberlane* and *Mannington Mills* frameworks.<sup>57</sup>

As relevant here, the case concerned an alleged conspiracy by a group of London reinsurers and brokers "to coerce [by boycott] primary insurers in the United States to offer [commercial general liability] insurance only on a claims-made basis."<sup>58</sup> The London reinsurers claimed immunity from the antitrust laws' coverage under the United States' McCarran-Ferguson Act.<sup>59</sup> The Supreme Court upheld the Ninth Circuit's finding that they were not immune under the Act<sup>60</sup> and also held that abstention on international comity grounds was unwarranted.<sup>61</sup> But in doing so, the Court neglected to endorse the *Timberlane* test employed by the Ninth Circuit below.<sup>62</sup>

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54. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."). In *Hartford Fire*, the Court cited favorably to *Alcoa*, which posits a so-called "effects test" rather than to *Timberlane* or *Mannington Mills*. See *id.*

55. *Id.*

56. *Id.* at 820.

57. See *Timberlane*, 549 F.2d at 614–15; see also *Mannington Mills*, 595 F.2d at 1297–98.

58. *Id.* at 776.

59. See *id.* at 798.

60. See *id.* at 780–81.

61. *Id.* at 789–99.

62. Ginsburg, *supra* note 9, at 1083 ("After passage of the FTAIA, the role of the *Timberlane* balancing test was unclear. *Hartford Fire* appeared to resolve the matter by narrowing the application of international comity considerations and broadening application of the substantial effects test.").

The Court began its analysis by recognizing that, under *United States v. Aluminum Company of America*,<sup>63</sup> the Sherman Act applies “to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”<sup>64</sup> Satisfied that the Sherman Act applied to the defendants’ conduct in this manner, the Court proceeded to “[t]he only substantial question in this litigation”: whether a true conflict existed between the U.K.’s “comprehensive regulatory regime” and U.S. antitrust law.<sup>65</sup>

The Court defined a “true conflict” as arising (1) when “foreign law requires the defendant to act in a fashion prohibited by U.S. law,” or (2) “when compliance with the laws of the United States and the defendant’s country is otherwise impossible.”<sup>66</sup> Because the *Hartford Fire* defendants could comply with both U.K. and U.S. law simultaneously, no “true conflict” existed, and abstaining on international comity grounds was therefore unwarranted.<sup>67</sup> The Court found it unnecessary to consider any of the remaining *Timberlane* factors.<sup>68</sup>

#### 4. Justice Scalia’s Dissent

Justice Scalia’s influential dissent in *Hartford Fire* simultaneously criticized the majority for its adoption and application of the true conflict inquiry,<sup>69</sup> and endorsed multi-factor tests in the *Timberlane* mold.<sup>70</sup> Significantly, Scalia separated international comity doctrine, writ large,

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63. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (“*Alcoa*”) (Learned Hand, J.).

64. *Hartford Fire*, 509 U.S. at 795–96 (quoting *Alcoa*, 148 F.2d at 444 (internal citations omitted)).

65. *Hartford Fire*, 509 U.S. at 795–99.

66. Scott A. Burr, *The Application of U.S. Antitrust Law to Foreign Conduct: Has Hartford Fire Extinguished Considerations of Comity?*, 15 U. PA. J. INT’L BUS. L. 221, 244 (1994) (criticizing the *Hartford Fire* holding).

67. 509 U.S. at 798–99.

68. *See id.*

69. *See id.* at 820 (Scalia, J., dissenting) (criticizing the majority for its determination “that no ‘true conflict’ counseling nonapplication of United States law . . . exists unless compliance with United States law would constitute a *violation* of another country’s law” as an unduly difficult hurdle for defendants to overcome).

70. *See id.* at 817 (citing then-recent lower court precedent, including *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 608–15, as demonstrative of “prescriptive comity” as opposed to the “comity of courts”).

into two “related but distinct” sub-doctrines: “prescriptive” and “adjudicative” comity.<sup>71</sup>

a. Against Reliance on True Conflicts

Justice Scalia decried the majority’s “true conflict” test for unjustifiably supplanting prescriptive comity analyses that had been incorporated into federal common law from international custom.<sup>72</sup> Scalia supported the continued use of multi-factor comity tests, even going so far as to repeat the *Timberlane* majority and legal scholar Kingman Brewster’s aims to create a “jurisdictional rule of reason.”<sup>73</sup> For Scalia, courts should exercise their subject-matter jurisdiction over transnational claims *unless it would be unreasonable to do so*.<sup>74</sup> What Scalia saw as the majority’s fixation on true conflicts would not, on its own, suffice to separate reasonable from unreasonable grounds for judicial abstention.

b. Prescriptive and Adjudicative Comity

In the abstention context, Justice Scalia split international comity doctrine into two related but distinct sub-doctrines: “prescriptive” and “adjudicative” comity.<sup>75</sup> A third abstention sub-doctrine, “sovereign party comity,” was not mentioned in Scalia’s dissent but has been pushed by

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71. See *In re Picard*, 917 F.3d 85, 101 (2d Cir. 2019) (“Although prescriptive and adjudicative comity sometimes demand similar analysis, each asks a different question and is rooted in a different legal theory. We therefore treat them as distinct doctrines, albeit related ones.”).

72. *Hartford Fire*, 509 U.S. at 816–17 (Scalia, J., dissenting) (“We are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the ‘Conflict of Laws.’”) (quoting *Alcoa*, 148 F.2d at 443 (1945)).

73. See *Timberlane*, 549 F.2d at 613 (introducing “an evaluation and balancing of the relevant considerations . . . in the words of Kingman Brewster, a ‘jurisdictional rule of reason’”).

74. See *Hartford Fire*, 509 U.S. at 818 (“[A] nation having some ‘basis’ for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction ‘with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.’”) (citing RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 403(1) (AM. L. INST. 1987)).

75. *Id.* at 817–18.

scholars and acknowledged by courts.<sup>76</sup> Prescriptive comity is “the practice of using international law to limit the extraterritorial reach of statutes . . . .”<sup>77</sup> Post-*Hartford Fire*, the Second Circuit has described prescriptive comity as a doctrine “which might shorten the reach of a statute.”<sup>78</sup> Questions of prescriptive comity are questions as to the substantive reach of a statute.<sup>79</sup> Thus, questions of comity in cases arising under the Sherman Act bear upon the extension and outer bounds of the Sherman Act itself.<sup>80</sup>

Adjudicative comity—also referred to as the “comity of courts”—posits a distinct basis for judicial abstention.<sup>81</sup> Under adjudicative comity, U.S. courts may decline to exercise their jurisdiction over a claim out of deference to parallel or concluded proceedings in a foreign forum.<sup>82</sup>

Adjudicative comity closely resembles *forum non conveniens* doctrine. Like *forum non conveniens*, adjudicative comity abstention is “a discretionary act of deference . . . to decline to exercise jurisdiction in a case properly adjudicated in a foreign state.”<sup>83</sup> The difference between adjudicative comity and *forum non conveniens* doctrine lies in the former’s grounding in principles of comity—mutual respect, reciprocity,

76. See Dodge, *supra* note 10, at 2116–19 (discussing sovereign party comity).

77. *Hartford Fire*, 509 U.S. at 818.

78. *In re Maxwell Commc’n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996) (noting that prescriptive comity “shorten[s] the reach of a statute”).

79. See *Hartford Fire*, 509 U.S. at 820:

[T]he Court’s comity analysis, which proceeds as though the issue is whether the courts should ‘decline to exercise . . . jurisdiction,’ . . . rather than whether the Sherman Act covers this conduct, is simply misdirected. I do not at all agree, moreover, with the Court’s conclusion that the issue of the substantive scope of the Sherman Act is not in the cases.

80. See *id.*

81. See *id.* at 817 (noting that prescriptive comity is distinct from “the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere.”).

82. See *In re Arcapita Bank B.S.C.(C)*, 640 B.R. 604, 618 (Bankr. S.D.N.Y. 2022); see also *Mujica v. Aircan, Inc.*, 771 F.3d 580, 599 (9th Cir. 2014) (“[A]djudicatory comity ‘involves . . . the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction.’”) (citing *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005)).

83. *In re Maxwell Commc’n Corp.*, 93 F.3d at 1047.



and goodwill—and the latter’s grounding primarily in goals of efficiency and fairness.<sup>84</sup>

### 5. *The Doctrinal Fallout of Hartford Fire*

After *Hartford Fire* both the Supreme Court and courts below have reconciled the majority holding with Scalia’s dissenting opinion. In *Empagran*, a case construing the FTAIA decided almost a decade after *Hartford Fire*, the Supreme Court itself underscored the relevance of “prescriptive comity,” adopting Justice Scalia’s terminology, in construing the FTAIA.<sup>85</sup>

The Second, Ninth, and D.C. Circuits have all accepted the prescriptive-adjudicative distinction in international comity doctrine.<sup>86</sup> For example, in the recent case *Usoyan v. Republic of Turkey*, the D.C. Circuit acknowledged “three faces of [comity] doctrine in U.S. law: deference to foreign lawmakers (“prescriptive comity”), deference to foreign tribunals (“adjudicative comity”), and deference to foreign litigants (“sovereign party comity”).”<sup>87</sup> In prescriptive comity cases, all three circuits conduct a two-step inquiry treating *Hartford Fire*’s true conflict inquiry as a threshold test.<sup>88</sup> Once a true conflict is found, courts proceed to consider additional comity factors.<sup>89</sup>

The Second and Ninth Circuits, for their part, have clearly indicated that the two sub-doctrines call for distinct analyses.<sup>90</sup> In *Mujica v. Airscan Inc.*, for example, the Ninth Circuit held that a true conflict was *not* a prerequisite for abstention in adjudicative comity cases, but *was* so in

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84. *See id.*

85. *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004).

86. *See, e.g.,* *Usoyan v. Republic of Turkey*, 6 F.4th 31, 48–49 (D.C. Cir. 2021).

87. *Id.* at 48 (quoting Dodge, *supra* note 10, at 2078).

88. *See, e.g., In re Sealed Case*, 932 F.3d 915, 931–32 (D.C. Cir. 2019); *In re Maxwell Commc’n Corp.*, 93 F.3d at 1050; *In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998) (internal quotation omitted) (“[I]nternational comity [is] limited to cases in which there is in fact a true conflict between domestic and foreign law.”).

89. *See In re Simon*, 153 F.3d at 999.

90. *Compare* *Mujica v. Airscan, Inc.*, 771 F.3d 580, 602 (9th Cir. 2014) (“[W]e have not read *Hartford Fire* as imposing a rigid new set of requirements for finding comity. At least in cases considering adjudicatory comity, we will consider whether there is a conflict between American and foreign law as one factor in, rather than a prerequisite to, the application of comity.”) with *In re Maxwell Commc’n Corp.*, 93 F.3d at 1050 (“International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction.”).

prescriptive comity cases.<sup>91</sup> The Second Circuit similarly applies the true conflict inquiry only in evaluating prescriptive comity defenses.<sup>92</sup> And in *In re Sealed Case*, the D.C. Circuit followed suit before upholding the District Court's multi-factor analysis pulled from the Supreme Court's opinion in *Aérospatiale*.<sup>93</sup>

In their article, Professors Samuel Estreicher and Thomas Lee point out that the lines separating prescriptive and adjudicative comity are easily blurred in practice.<sup>94</sup> Estreicher and Lee rightly observe that the multi-factor comity tests confound factors pertinent to prescriptive comity, on the one hand, with factors relevant to adjudicative or even sovereign party comity, on the other.<sup>95</sup> The “factors to be weighed . . . mix up prescriptive or regulatory comity concerns (for example, nationality of the parties) with considerations of adjudicative comity (such as reciprocal practice).”<sup>96</sup> Similarly, it is difficult to tell how *Mannington Mills* Factor (4)<sup>97</sup> should inform a court's determination of the substantive reach of a statute like the Sherman Act.<sup>98</sup>

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91. See *Mujica*, 771 F.3d at 602 (“At least in cases considering adjudicatory comity, we will consider whether there is a conflict between American and foreign law as one factor in, rather than a prerequisite to, the application of comity.”); *but see* Gardner, *supra* note 4, at 107–08 (criticizing *Mujica*'s conflation of prescriptive comity with adjudicative comity tests in case wrongly identified as calling for an adjudicative comity analysis). The resulting test, claims Professor Gardner, “[did] not fit well the analysis of abstention and may mislead future judges . . . when trying to resolve complicated questions of comity.” *Id.*

92. Compare *Vitamin C II*, 8 F.4th at 147–60 (conducting a true conflict inquiry), with *In re Arcapita Bank* B.S.C.(C), 640 B.R. 604, 618 (Bankr. S.D.N.Y. 2022) (indicating that international comity abstention, generally, requires a finding of a true conflict). This Note would assert that *In re Arcapita* was mistaken in making this point; the true conflict test was borne of and is intimately tied to cases of prescriptive, not adjudicative comity.

93. See *In re Sealed Case*, 932 F.3d at 931–32 (citing *Aérospatiale*, 482 U.S. at 544 n.28).

94. See Estreicher & Lee, *supra* note 1, at 185–86.

95. *Id.* at 176.

96. *Id.*

97. The “availability of a remedy abroad and the pendency of litigation there.” *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979).

98. See *id.* at 1297–98 (setting out the Third, and now Second Circuits' ten-factor comity test).

## B. AN IN-DEPTH ACCOUNT OF THE VITAMIN C ANTITRUST LITIGATION

1. *Chinese Price-Coordination Prior to the Relevant Period in the Vitamin C Antitrust Litigation*

The Chamber of Commerce of Medicines & Health Products Importers & Exporters (“the Chamber”) was founded in 1989.<sup>99</sup> From that year on, the Chamber operated under the control of what is today the Chinese Ministry of Commerce (“the Ministry” or “MOFCOM”).<sup>100</sup> In 1996, a price war broke out among Chinese vitamin C producers and exporters.<sup>101</sup> This price war led the Chinese government to heavily regulate the domestic vitamin C industry.<sup>102</sup>

The Ministry announced in 1997 that it would impose production quotas on the vitamin C market.<sup>103</sup> In 1998, the Ministry established a “Vitamin C Sub-Committee” to coordinate the price of vitamin C in the export market.<sup>104</sup> Sub-Committee membership consisted of regulated vitamin C manufacturers and exporters, including the four Defendants.<sup>105</sup> Failure by members to abide by the Sub-Committee’s coordinated prices could lead to the defecting firm’s punishment, consisting of “warning, open criticism[,] and even revocation of . . . membership.”<sup>106</sup>

This “1997 regime” was supplanted after a second price war broke out in 2000.<sup>107</sup> Renewed Chinese regulation enabled Chinese vitamin C producers and exporters to capture a 60 percent share of the global vitamin C market.<sup>108</sup> However, soon after the price war had concluded, China acceded to the World Trade Organization (the “WTO”) in 2001.<sup>109</sup> As part of this process, China had to reform its existing laws to comply with the WTO’s rules of accession.<sup>110</sup> To satisfy these rules, China

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99. *Vitamin C II*, 8 F.4th at 148.

100. *See id.* at 141.

101. *Id.* at 148.

102. *Id.* at 140.

103. *Id.* at 148.

104. *Id.* at 148–49.

105. *Id.* at 149.

106. *Id.*

107. *Id.* at 149–50. The replacement of the 1997 regime came in the wake of flattened Chinese vitamin C export prices. Importing countries, including the European Union, had been threatening anti-dumping lawsuits against China. *Id.*

108. *Id.* at 149.

109. *Id.*

110. *Id.*

abolished the 1997 regime in late December 2001.<sup>111</sup> In January 2002, China represented to the WTO that it had “[given] up export administration of . . . vitamin C.”<sup>112</sup>

## 2. *The PVC Regime*

But in the 1997 regime’s place came the 2002 Notice, and with it the “Price Verification and Chop” regime (the “PVC regime”).<sup>113</sup> The PVC regime’s functioning can be summarized as follows. Vitamin C and other export products were subjected to price review by import and export chambers rather than Customs (which reviewed coordinated prices under the 1997 regime).<sup>114</sup> Following review, each chamber submitted “industry-wide negotiated prices” to the Ministry and Customs.<sup>115</sup> Customs would later apply a “chop” (a seal of approval) permitting Sub-Committee members to export at the industry-wide negotiated prices.<sup>116</sup>

Importantly, the PVC regime boasted a substantially less developed sanctions system than its predecessor.<sup>117</sup> Sub-Committee members could freely quit with no specified consequences, and membership in the Sub-Committee was not required for companies to be able to export vitamin C.<sup>118</sup> Customs and the import and export chambers could suspend the PVC regime, but doing so required the Sub-Committee’s approval by vote.<sup>119</sup>

Also, unlike the 1997 Notice, the 2002 Charter recast the Sub-Committee as a coordination group “established on a voluntary basis.”<sup>120</sup> The Chambers’ role under the PVC regime lay in verifying that exporters’ “industry agreements” complied with regulations issued by the Ministry and Customs, and—if they did so—to affix a chop.<sup>121</sup>

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111. *Id.*

112. *Id.*

113. *See id.* at 150 n.23 (“A ‘chop’ is a seal recognized by Chinese customs officials indicating that an export contract or shipment conforms to the relevant rules and regulations.”).

114. *See id.* at 529–30.

115. *See id.*

116. *See id.*

117. *See id.* at 530 (comparing the penalty provisions faced before and after the institution of the PVC regime).

118. *See id.* at 528–31 (for an in-depth discussion of the PVC regime).

119. *See id.* at 530–31.

120. *Vitamin C II*, 8 F.4th at 164 (Wesley, J., dissenting).

121. *Id.* at 151.

### 3. *American Plaintiffs File Suit*

In June 2002, the Chamber directed the Sub-Committee to “coordinate and guide” the vitamin C industry.<sup>122</sup> In 2003, the Chamber published a notice informing Sub-Committee members that the “agreed prices are the *minimum* prices” and that they had “put the limit on the floor prices but not the ceiling prices.”<sup>123</sup> The PVC regime thus sought to prevent Sub-Committee members from pricing below a coordinated minimum price point.<sup>124</sup> Over the next couple of years, market prices in the vitamin C export market deviated substantially from the fixed minimum price.<sup>125</sup>

In 2005, several American purchasers of vitamin C filed complaints against the four Manufacturers dominating the vitamin C export market.<sup>126</sup> The Plaintiffs claimed that the Manufacturers had unlawfully conspired, through an “industry trade association,” to fix prices and restrict output in the vitamin C export market.<sup>127</sup> This conspiracy had caused Plaintiffs antitrust injury in import commerce, entitling them to damages and injunctive relief under the Sherman and Clayton Acts.<sup>128</sup> As Plaintiffs pursued their claim, other Chinese manufacturers of vitamins and other mineral export products faced concurrent suits in U.S. courts.<sup>129</sup>

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122. *Id.* at 151–52.

123. *Id.* at 152–53.

124. *Id.*; see also Zhang, *supra* note 5, at 306 (“The district court found that, while the Chamber had been charged with the responsibility to coordinate export prices to avoid anti-dumping suits and below-cost pricing, the firms themselves enjoyed significant discretion in determining their profit margins.”).

125. See *Vitamin C II*, 8 F.4th at 152 (Wesley, J., dissenting).

126. See *Vitamin C I*, 837 F.3d at 179.

127. See *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 548–89 (E.D.N.Y. 2008) (Trager, J.). It became clear after discovery went forward and the Ministry entered the litigation that the Chamber was not a traditional trade association. *Vitamin C I*, 837 F.3d at 155. Note that the vitamin C cartel only fixed prices in the export market, not in the domestic Chinese market. *Id.*

128. See *In re Vitamin C Antitrust Litig.*, 820 F. Supp. 2d 522, 524 (E.D.N.Y. 2011) (Cogan, J.) (Plaintiffs sought only an injunction against Northeast.).

129. See *Animal Sci. Prods., Inc. v. China Nat’l Metals & Mins. Imp. & Exp. Corp.*, 702 F. Supp. 2d 320 (D.N.J. 2010), *vacated*, 654 F.3d 462 (3d Cir. 2011) (district court applying a highly deferential foreign sovereign compulsion analysis to defendant magnesite cartelists); see also *Resco Prods., Inc. v. Bosai Mins. Grp. Co.*, No. 06-235, 2010 WL 2331069, at \*1 (W.D. Pa. June 4, 2010) (concerning bauxite cartelists).

The Manufacturers readily conceded that they had violated U.S. antitrust laws by participating in a horizontal price-fixing conspiracy.<sup>130</sup> In their defense, they invoked abstention defenses rooted in the act of state,<sup>131</sup> foreign sovereign compulsion,<sup>132</sup> and international comity doctrines.<sup>133</sup> These defenses were each to the same effect: the Manufacturers' antitrust violation had been compelled by the Chinese government's regulatory directive, and the District Court should therefore abstain from exercising its jurisdiction over the claim.<sup>134</sup> The Manufacturers additionally pointed out that the Chamber, alleged by the Plaintiffs to be a "trade association," was, in fact, a government-supervised entity which carried out the government's compulsion of the vitamin C cartel.<sup>135</sup>

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130. *Vitamin C II*, 8 F.4th at 140 ("This antitrust case is unusual in that the parties before us generally agree that the alleged anticompetitive conduct occurred. The dispute centers instead on "whether Chinese law required the Chinese sellers' conduct.").

131. *See Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("Under [act of state doctrine], the courts of one state will not question the validity of public acts [] performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts."); *see also* *W.S. Kirkpatrick & Co., Inc. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)) (describing the doctrine "as a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs").

132. For a description of foreign sovereign compulsion doctrine, *see Interamerican Refin. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970) ("[S]overeignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign."). *But see Vitamin C II*, 8 F.4th at 147 (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706–07 (1962)) ("[Foreign sovereign compulsion doctrine] applies only to the scope of conduct actually compelled under threat of severe sanctions.").

133. *See In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 525–26 (E.D.N.Y. 2011) (Cogan, J.). The same defenses had been made, successfully, in magnesite and bauxite cases. *Id.*

134. *Id.* An additional state action defense was offered to the District Court, but after Judge Cogan rejected it, the defense was abandoned on appeal. *Id.*

135. *See id.* at 525.

#### 4. *The Chinese Government Enters Proceedings as Amicus Curiae*

The Ministry entered the proceedings in support of the Manufacturers' abstention defenses, making the vitamin C antitrust litigation an exceedingly rare instance in which the Chinese government appeared before a U.S. court as *amicus curiae*.<sup>136</sup> On the abstention defense rooted in international comity doctrine, the Ministry's briefs stated that, under the Chinese government's interpretation of its own law, the legal directives mandating the formation of the vitamin C cartel were in irreconcilable, "true conflict" with U.S. antitrust law.<sup>137</sup> The Ministry justified China's compulsion of a cartel as pursuant to China's "opening-up," a planned reorientation of China's national economy from a socialist to a more market capitalist model.<sup>138</sup> The Ministry thus demanded that the District Court refrain from exercising jurisdiction over the American plaintiffs' claim, and dismiss the suit.<sup>139</sup>

#### 5. *Pre-Trial Motions*

The Manufacturers' abstention defenses, initially raised in a 12(b)(1) motion, failed before Judge Trager.<sup>140</sup> At such an early stage in the litigation, Trager underscored the ambiguous factual record.<sup>141</sup> Additionally, Trager found that China's entry into the litigation was not in itself sufficient to justify dismissal.<sup>142</sup> Judge Trager thus denied the motion to dismiss, hoping that further discovery would shed light on "whether [D]efendants were performing [a] government function,

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136. See *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 546, 552 (E.D.N.Y. 2008) (Trager, J.) ("The Chinese government's appearance as *amicus curiae* is unprecedented. It has never before come before the United States as *amicus* to present its views."); see also Brief of Amicus Curiae Ministry of Commerce of the People's Republic of China in Support of Respondents, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (Apr. 4, 2018); Brief for China Chamber of International Commerce as Amicus in Support of Respondents, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharma. Co.*, No. 16-1220 (Apr. 4, 2018).

137. See *Vitamin C II*, 8 F.4th at 154–55.

138. *Id.* at 150 ("[I]n 2002, to 'adapt to the new situation of [China's] opening up to the outside world' . . . the Ministry abolished the 1997 Notice [and] promulgated [the 2002 Notice]" implementing a Price Verification and Chop system.).

139. See *id.*

140. See *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559.

141. See *id.*

142. See *id.* at 557.

whether they were acting as private citizens pursuant to governmental directives[,] or whether they were acting as unrestrained private citizens.”<sup>143</sup>

After discovery, the Manufacturers’ abstention defenses again failed—this time before Judge Cogan, who denied their motions for summary judgment and for judgment as a matter of law post-trial.<sup>144</sup> Cogan’s analysis centered on China’s PVC regime, concluding that it was unlikely the regime *coerced* the Manufacturers’ conduct.<sup>145</sup> This doomed the Manufacturers’ foreign sovereign compulsion and comity defenses.<sup>146</sup>

Cogan reached this conclusion in view of (a) evidence indicating that the Manufacturers’ participation on the Sub-Committee was voluntary rather than coerced; (b) a lack of sanctions that could be imposed on defectors from the cartel under the PVC regime (and evidence that what sanctions did exist were under-enforced); and (c) the Manufacturers’ failure to show that the PVC regime compelled output limitations as well as, and distinct from, the price-fixing agreements.<sup>147</sup>

Upon Judge Cogan’s denial of the Defendants’ motion for summary judgment, two of the Manufacturers—Jiangsu Jiangshan and Weisheng—settled with the Plaintiffs.<sup>148</sup> At trial, a jury found against the other Defendants and awarded the Plaintiffs nearly \$150 million in trebled damages.<sup>149</sup>

## 6. *Vitamin C I*

On appeal, the Second Circuit accepted the Defendants’ international comity defense.<sup>150</sup> The Court concluded that (1) a true conflict existed between Chinese law and U.S. antitrust law, and (2) the *Mannington Mills*

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143. *Id.* at 547.

144. *See In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 525 (E.D.N.Y. 2011) (Cogan, J.).

145. *See id.*

146. *See id.* at 566 (“In short, ‘self-discipline’ does not involve coercion—as the term ‘self-discipline’ suggests on its face, defendants were engaged in consensual cartelization.”).

147. *See id.* Judge Cogan’s argument that the PVC regime did not compel the Manufacturers’ output-limiting agreements, as distinct from the price-fixing agreements, was not adopted by Judge Wesley in his *Vitamin C II* dissent. *See id.*

148. *See Vitamin C II*, 8 F.4th at 141–42.

149. *Animal Sci. Prods. v. Hebei Welcome Pharma. Co.*, 138 S. Ct. 1865, 1871–72 (2018).

150. *See Vitamin C I*, 837 F.3d at 179.



factors further weighed against exercising jurisdiction.<sup>151</sup> The District Court had thus abused its discretion in refusing to abstain.<sup>152</sup>

The Second Circuit's two-step comity analysis reflects its reconciliation of *Hartford Fire* with the multi-factor tests that preceded it.<sup>153</sup> The Second Circuit treats a finding of a true conflict under *Hartford Fire* as a threshold condition for the court to apply a multi-factor comity test—here the Third Circuit's.<sup>154</sup> The Second Circuit thus joins other circuits in interpreting *Hartford Fire* narrowly rather than making a true conflict, on its own, a sufficient basis for abstention.<sup>155</sup>

The outcome of *Vitamin C I* hinged primarily on the Court's answer to a question arising under Rule 44.1 of the Federal Rules of Civil Procedure: what degree of deference does a U.S. district court owe a foreign government's proffered interpretation of its own laws?<sup>156</sup> The Second Circuit disagreed with Judges Trager and Cogan, holding that foreign governments' interpretations of their own law, where reasonable, merited absolute deference from the court.<sup>157</sup> Since the Ministry's proffered interpretation stated that a true conflict existed under *Hartford Fire*, the Rule 44.1 holding was all but outcome-determinative.<sup>158</sup>

### 7. *Animal Science*

The Supreme Court reversed the Second Circuit's resolution of the Rule 44.1 issue, holding that Rule 44.1 demanded respectful consideration, not absolute deference, to a foreign government's proffered interpretations of its own laws.<sup>159</sup> The Court reversed and remanded to the Second Circuit.<sup>160</sup> In doing so, the Supreme Court offered

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151. *See id.* at 194–95.

152. *Id.* at 182 (holding that the district court abused its discretion by not abstaining, on international comity grounds, from asserting jurisdiction). Once again, the Author's thoughts on the standard of review actually employed by the Second Circuit are outside the scope of this paper.

153. *See id.* at 185.

154. *See id.* (“We read *Hartford Fire* narrowly . . . as suggesting that the remaining factors in the [*Mannington Mills*] comity balancing test are still relevant to an abstention analysis.”).

155. *See, e.g.,* *Mujica v. Aircan, Inc.*, 771 F.3d 580, 602 (9th Cir. 2014).

156. *Vitamin C I*, 837 F.3d at 189; FED. R. CIV. P. 44.1.

157. *Vitamin C I*, 837 F.3d at 189.

158. *Id.*

159. *Animal Sci. Prods. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1869 (2018).

160. *Id.* at 1875.

no opinion as to whether the Second Circuit properly ruled on the true conflict issue or the remaining comity factors.<sup>161</sup>

What was most significant about the Supreme Court's holding in *Animal Science* was not so much the Rule 44.1 holding as it was the Court's unwillingness to address any aspect of the Defendants' international comity defense on the merits. The Solicitor General submitted an ultimately influential amicus brief to the Supreme Court but was equally reluctant to stake a firm position on the comity defense itself.<sup>162</sup> The Ministry, meanwhile, submitted an *amicus* brief to the Supreme Court affirming its claim of a true conflict under *Hartford Fire* between Chinese regulations and U.S. antitrust law.<sup>163</sup> On remand, in *Vitamin C II*, the Second Circuit would voice its frustration with the executive branch's radio silence.<sup>164</sup>

#### 8. *Vitamin C II*

The Plaintiffs' case against the vitamin C Defendants returned to the Second Circuit, with instructions to give the Ministry's interpretation of Chinese law respectful consideration, but not absolute deference.<sup>165</sup> The lengthy legal analysis that ensued led the Second Circuit to the same conclusions it had reached in its earlier decision.<sup>166</sup> In a 2-1 decision, the Court reaffirmed its finding of a true conflict, and concluded that the comity factors weighed against the district court's exercising jurisdiction over the claim.<sup>167</sup> The case was therefore dismissed.<sup>168</sup>

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161. *Id.*

162. *See infra* at 51.

163. *See* Brief of Amicus Curiae Ministry of Commerce of the People's Republic of China at 26, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (Apr. 4, 2018).

164. *Vitamin C II*, 8 F.4th at 161 (“As the Department of State has not weighed in or otherwise signaled a view one way or another on this case, we are left somewhat in the dark.”).

165. *See id.* at 140.

166. *See id.*

167. *See id.*

168. *See id.* at 143.

## a. The Majority Opinion

The majority began by restating the Second Circuit's synthesis of *Hartford Fire* and the *Mannington Mills* test.<sup>169</sup> While the multi-factor balancing test is "the" international comity test, the Second Circuit interprets *Hartford Fire* to mandate that, "to warrant dismissal on the basis of [prescriptive] international comity, the two countries' legal demands must be irreconcilable."<sup>170</sup> If a true conflict does exist, the Court will proceed to the Third Circuit's multi-factor comity test.<sup>171</sup>

The Court next stated the Second Circuit's analytical distinction between foreign sovereign compulsion doctrine and the true conflict component of prescriptive comity.<sup>172</sup> The former abstention defense requires a defendant to show *both* that a foreign government's order compelled the defendant to violate American law *and* that the defendant's failure to comply with the foreign law "portends a significant risk of substantial sanctions."<sup>173</sup> The true conflict inquiry embedded in prescriptive comity, meanwhile, requires only that "foreign law, taken at face value, 'requires [the defendants] to act in some fashion prohibited by [U.S.] law.'<sup>174</sup>

The Court explained that, under foreign sovereign compulsion doctrine, the substantial threat of sanctions accompanying a conflict in terms justifies abstention *on its own*.<sup>175</sup> Prescriptive comity doctrine, then, would encompass conflicts which lead to no such threat. But the mere existence of a true conflict would not be sufficient, standing alone, to justify dismissal: consideration of the several comity factors must also support abstention.<sup>176</sup>

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169. *See id.* at 144–45.

170. *Id.* at 144.

171. *Id.* at 145 (citing *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 391 (2d Cir. 2011)) (adding that "we have described the 'conflict between domestic and foreign law' as merely 'an important criterion for a comity dismissal'").

172. *Id.*

173. *Id.* at 145–46.

174. *Id.* at 146–47 (justifying the distinction by noting that "whereas FSC is a standalone basis for abstention, the finding of a true conflict is only one step—albeit a critical one—in a comity analysis").

175. *Id.* at 147.

176. *Id.*

## i. The True Conflict Inquiry

The Court found that the PVC regime in effect from 2002-2005, and described above, created a true conflict between Chinese regulations and U.S. antitrust law.<sup>177</sup> The majority acknowledged dissenting Judge Wesley's correct observation: the Chinese government had not compelled any fixed prices *above* the coordinated minimum.<sup>178</sup> The majority was satisfied, however, that "Chinese law [] required the defendants to coordinate—that is, to fix—market prices for vitamin C exports."<sup>179</sup> The majority did not believe that a true conflict must have affected the *precise* course of conduct giving rise to the cause of action in order to justify a court's abstention.<sup>180</sup>

Thus, for the majority, a true conflict lay where China's overall regulatory scheme (a) specifically compelled and enforced a minimum export price figure through the PVC regime and (b) issued a general directive to the Sub-Committee to coordinate on prices above that mark.<sup>181</sup> "[B]ecause Chinese law 'require[d]' the defendants 'to act in [a] fashion prohibited by the law of the United States' in their role as leading vitamin C export firms," compliance with the laws of both countries was impossible.<sup>182</sup>

## ii. The Mannington Mills Factors

Having found a true conflict, the Court proceeded to reason through several of the *Mannington Mills* factors, finding that on balance they weighed in favor of abstention and dismissal.<sup>183</sup> Importantly, the majority opinion expressed frustration that the United States government's failure

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177. *See id.* at 151.

178. *See id.* at 152–53 (concluding that a true conflict existed with respect to above-floor export rates coordinated by the Manufacturers because Chinese law generally "required the defendants to coordinate . . . market prices for Vitamin C exports").

179. *Id.* at 153 ("[C]ontrary to the dissent's conjecture, [Defendants] could not have complied with Chinese law [] by 'independently setting their prices at or above the industry-coordinated minimum price . . . .' Coordination of *market* prices as well as minimum prices was fundamental to the [Chinese] *Vitamin C* export system.").

180. *Id.*

181. *Id.*

182. *Id.* at 158 (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993)).

183. *See id.* at 160 (citing *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979)).

to weigh in on the comity analysis had “left [the Court] somewhat in the dark.”<sup>184</sup>

The Court ran through the following factors: (1) nationality of the parties and site of the anticompetitive conduct; (2) effectiveness of enforcement and alternative remedies; (3) foreseeable harms to American commerce; (4) reciprocity; and (5) the possible effect of exercising jurisdiction on foreign relations.<sup>185</sup> Of these five, the Court found that all but factor (3)—foreseeable harms to American commerce—weighed in favor of abstention.<sup>186</sup>

As for the nationality of the parties, the Court found that the challenged conduct’s having occurred entirely in China weighed in the Manufacturers’ favor.<sup>187</sup> As to the effectiveness of enforcement and alternative remedies, the Court noted that while upholding the jury verdict would deter future anticompetitive conduct, “it also seems likely that China will continue to set minimum prices.”<sup>188</sup> The second factor therefore did not weigh strongly in favor of or against dismissal.<sup>189</sup> As for foreseeable harms to American commerce, the majority acknowledged that the Chinese government and “[D]efendants actively sought to avoid U.S. liability while inflating profits at the expense of consumers, foreseeably including Americans such as [Plaintiffs].”<sup>190</sup>

It is difficult to square this concession with the Court’s ensuing reciprocity analysis. The majority noted that the parties had not raised any comparable instances of the United States having mandated price-fixing agreements by American exporters.<sup>191</sup> Nevertheless, the Court reasoned—without any support in Chinese law—that if the United States mandated such anticompetitive conduct and price-fixing American exporters were sued in a Chinese court, the United States “would undoubtedly expect” Chinese courts to abstain on comity grounds.<sup>192</sup> The reciprocity analysis was thus premised on the assumption that the courts of a foreign nation—

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184. *Id.* at 161.

185. *Id.* at 159–63.

186. *Id.*

187. *Id.* at 160.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 161.

192. *Id.*

one that deliberately sought to evade U.S. antitrust laws to its own gain—would return the favor were they called upon to do so.<sup>193</sup>

This reciprocity analysis is equally difficult to square with the Court’s assessment of the “possible effect on foreign relations” were it to uphold the denial of the Manufacturers’ abstention defense.<sup>194</sup> The majority pointed out that China had “taken umbrage” at the district court’s treatment of its position and that enforcement of the damages award and injunction would prove a further “irritant.”<sup>195</sup> It then stated the Supreme Court’s “general observation—raised in the context of the presumption against extraterritoriality—that the judiciary should seek to avoid erroneously adopting an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”<sup>196</sup> To the extent that the Supreme Court’s “general observation” was applicable to the Vitamin C Antitrust Litigation, the Court’s prediction that Chinese courts would reciprocate the U.S. court’s abstention—in hypothetical future proceedings abroad—aggrandized the judicial power relative to the political branches.<sup>197</sup>

#### b. The Dissenting Opinion

Judge Wesley’s dissent emphasized two points. First, that under the 2002 Notice and subsequent directives and communications, the PVC regime did not *require* Sub-Committee members or non-members to do anything.<sup>198</sup> Both members and non-members would be treated equally, meaning that Sub-Committee members faced with violating U.S. antitrust law could simply resign, set what prices they wished, and face no Chinese sanctions.<sup>199</sup> Thus, the dissent argued, no true conflict existed because the

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193. *Id.*

194. *Id.*

195. *Id.* In one of its briefs, MOFCOM had stated its preference that “conflict should be addressed ‘through diplomatic channels,’ and not through ‘the unnecessary irritant of a private antitrust action.’” *See id.* at 156 n.34.

196. *Id.* at 161–62 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013)).

197. *See Gardner, supra* note 4, at 68 (“Underlying the Court’s recent wariness of prudential doctrines [including ‘international comity abstention’] . . . is a separation-of-powers concern that these doctrines of ‘judicial restraint’ have only served to increase judicial power.”).

198. *See Vitamin C II*, 8 F.4th at 164 (Wesley, J., dissenting) (“As a threshold matter, the plain text of the regulations and agency charter demonstrates Chinese law did not *require* the defendants to *coordinate* vitamin C prices and quantities at all.”).

199. *Id.* at 164.

Manufacturers could have avoided violating U.S. antitrust laws by reneging from the price coordination scheme.<sup>200</sup>

Second, and more importantly, Judge Wesley underscored that Chinese law at no point required the Manufacturers to agree on prices above the minimum export price, which is (a) what the Manufacturers did do and (b) what the Plaintiffs sued them for doing.<sup>201</sup> The Ministry's own brief described the PVC regime as the "minimum export price rule."<sup>202</sup> Accordingly, even if Chinese law did require vitamin C exporters to coordinate in setting a price, it required them only to set a minimum price.<sup>203</sup> Colluding on prices above that minimum was the Manufacturers' choice, not a legal obligation.<sup>204</sup>

The dissent criticized the majority's finding of a true conflict under these circumstances. Wesley described the finding as "go[ing] above and beyond accommodating the central interests of the foreign state."<sup>205</sup> For Judge Wesley, "[i]nternational comity is a careful balancing act" of public and private interests.<sup>206</sup> The true conflict inquiry should demand that all, and not merely, part of the Defendants' price-fixing conduct was compelled.<sup>207</sup> Because the Defendants could have complied with both Chinese and American law by either (a) resigning from the Subcommittee and reneging on the cartel, or (b) not colluding on prices above the compelled minimum rate, no true conflict existed.<sup>208</sup> Abstention was thus unwarranted given the above considerations and "the 'virtually

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200. *Id.* ("[U]nder the PVC regime, the defendants . . . could have complied with Chinese law without violating the Sherman Act by resigning from the Subcommittee and thereby independently setting their prices at or above the industry-coordinated minimum price.").

201. *See id.* at 164–66.

202. Amicus Curiae Brief Letter from Carter G. Phillips, Ministry of the People's Republic of China at 2–3, *Vitamin C II*, 8 F.4th 136, No. 13-4791 (Sept. 7, 2018) (referring to China's compulsory policy as "the minimum export price rule").

203. *Vitamin C II*, 8 F.4th at 165.

204. *Id.* at 166.

205. *Id.*

206. *Id.*

207. *See Gardner, supra* note 4, at 70 ("[E]xceptions [to the strong default rule that federal courts should exercise Congressionally granted jurisdiction] should be narrow and defined with particularity.").

208. *Vitamin C II*, 8 F.4th at 167.

unflagging obligation of the federal courts to exercise the jurisdiction given them.”<sup>209</sup>

## II. ASSESSING THE *VITAMIN C II* HOLDING

Both the majority and dissenting opinions in *Vitamin C II* set forth technically plausible interpretations of the true conflict inquiry under *Hartford Fire*. The dissent, however, posits and applies a more tenable interpretation than the majority does. The dissent’s true conflict inquiry, requiring that a true conflict specifically compel the conduct giving rise to the cause of action, is more desirable than the majority’s because international comity abstentions should be granted only in rare cases, especially in the antitrust context.<sup>210</sup> The majority interprets true conflicts too broadly, allowing foreign defendants an easy means of evading private enforcement and undermining the principles that animate and justify international comity doctrine.

### A. LEGAL SHORTCOMINGS IN THE *VITAMIN C II* HOLDING

International comity is meant to be rarely applied as a basis for judicial abstention.<sup>211</sup> This principle reflects both comity’s quasi-political roots, generating separation of powers tensions,<sup>212</sup> and courts’ “virtually unflagging obligation . . . to exercise the jurisdiction given them.”<sup>213</sup> Nowhere is this truer than in the antitrust context, where the United States has repeatedly demonstrated a formidable interest in seeing the antitrust laws enforced against conduct occurring abroad.<sup>214</sup>

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209. *Id.* (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

210. See Brief for the United States as Amicus Curiae, *supra* note 39, at 18 (emphasis added) (“Comity-based dismissals [in Sherman Act cases] should be rare . . . [but] federal courts may, in extraordinary circumstances, dismiss private Sherman Act claims based on principles of comity.”).

211. Brief Amici Curiae of Professors Samuel Estreicher and Thomas Lee in Support of Neither Party at 12, *Animal Sci. Prods. Inc. v. Hebei Welcome Pharma. Co.*, No. 16-1220 (Mar. 5, 2018).

212. See Gardner, *supra* note 4, at 72 (detailing separation-of-powers as a basis both for enforcing jurisdictional obligation and permitting some judicial discretion to abstain on international comity grounds).

213. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

214. See, e.g., 15 U.S.C. § 6a; U.S. DOJ & FTC, ANTITRUST GUIDELINES FOR INT’L ENF’T & COOP. (2017) [hereinafter *Antitrust Guidelines*], <https://www.justice.gov/>



Comity asks courts to exercise quasi-political discretion to “maintain[] amicable working relationships between nations.”<sup>215</sup> To do so, courts must construe the diplomatic interests of the United States and a foreign government, respectively, and otherwise work to foster goodwill.<sup>216</sup> The lines between international comity and diplomacy blur easily, cautioning courts to exercise their discretion in accordance with U.S. policy.<sup>217</sup> In *Hartford Fire*, the Supreme Court interpreted “true conflict” narrowly, “accept[ing] as a true conflict those *rare* situations where the foreign government *actually* required what United States law forbade.”<sup>218</sup> The Second Circuit has itself acknowledged that “[a] court’s discretion to abstain is ‘narrowed by the federal court’s obligation to exercise its jurisdiction in all but the most extraordinary cases.’”<sup>219</sup>

In the antitrust context, well-settled precedent dictates that “exceptions from the antitrust laws are to be narrowly construed.”<sup>220</sup> The Second Circuit in *In re Maxwell* made clear that prescriptive comity limits the very reach of a statute,<sup>221</sup> as opposed to the court’s subject-matter jurisdiction.<sup>222</sup> Prescriptive comity abstentions thus establish case-by-case exceptions from the substantive law governing any given dispute.<sup>223</sup> Accordingly, under *Group Life*, the threshold necessary for a court to

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atr/internationalguidelines/download [https://perma.cc/84PC-DRFJ]; see also *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979).

215. *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005).

216. See *Aérospatiale*, 482 U.S. at 555 (1987) (Blackmun, J., concurring in part) (“Comity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill.”).

217. See, e.g., *Khulumani v. Barclay Nat’l Bank*, 504 F.3d 254, 286 (2d Cir. 2007).

218. Spencer W. Waller, *The Twilight of Comity*, 36 COLUM. J. TRANSNAT’L L. 563, 569 (2000).

219. See Reply Brief for the Petitioners at 5, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, No. 21-1283 (July 2022) (quoting *Hachamovitch v. DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998)).

220. *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979).

221. *In re Maxwell Commc’n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996).

222. Comity affecting a court’s subject-matter jurisdiction is adjudicatory comity, or “the comity of courts.” See *Estreicher & Lee*, *supra* note 1, at 178.

223. See *id.*

abstain on prescriptive comity grounds in an antitrust case should be exceedingly demanding.<sup>224</sup>

The *Vitamin C II* majority reached its holding absent any input by the U.S. government regarding the Defendants' international comity defense.<sup>225</sup> The separation of powers tensions bearing on prescriptive comity analysis were thus at their zenith in *In re Vitamin C Antitrust Litigation*.<sup>226</sup> In these circumstances, a deferential interpretation of true conflicts, like that employed by the *Vitamin C II* majority, is troubling.<sup>227</sup> Because it set a demanding threshold for a finding of a true conflict, Judge Wesley's interpretation of *Hartford Fire's* true conflict inquiry was superior to the majority's.

In light of the foregoing analysis, the Second Circuit should adopt the following rule. To justify a finding of a true conflict, courts should find that a foreign defendant's alleged misconduct has been compelled by a specific—as opposed to a merely general—foreign governmental directive to act in a way that violates U.S. law.<sup>228</sup>

It should not have been sufficient that the Chinese government blithely authorized the Manufacturers to “go forth and coordinate” on prices above the fixed minimum export price.<sup>229</sup> The coordination the PVC regime sought to effect was evidently that which implemented the price floors.<sup>230</sup> A true conflict likely did exist with respect to the price

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224. Brief Amici Curiae of Professors Samuel Estreicher and Thomas Lee in Support of Neither Party, *supra* note 211, at 11–12.

225. See *Vitamin C II*, 8 F.4th at 161.

226. Zhang, *supra* note 5, at 313 (setting out a four-scenario framework for how U.S. courts should proceed with varying degrees of executive input).

227. See *Vitamin C II*, 8 F.4th at 166–67 (noting that “[n]othing in the international comity precedents implies a true conflict exists where only part of the defendants’ conduct was required under foreign law”).

228. Brief for the American Antitrust Institute as Amicus Curiae in Support of Petitioners at 14, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (Mar. 5, 2018) (citing *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 607 (9th Cir. 1976)) (“[I]f a foreign sovereign simply directs private companies to engage in price fixing, without mandating any particular prices or providing regulatory supervision, is the setting of supracompetitive prices ‘compelled’? The Second Circuit assumed the answer is yes, but the . . . true conflict [inquiry] requires more.”).

229. *Vitamin C II*, 8 F.4th at 152–53.

230. See *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 560 (E.D.N.Y. 2011) (Cogan, J.).

floors, but not with the prices fixed above that rate.<sup>231</sup> The Manufacturers agreed on and implemented prices above the price floor *at their own discretion*, causing Plaintiffs' antitrust injury and giving rise to their cause of action.<sup>232</sup> To the extent that Plaintiffs' claims were predicated on the above-the-minimum price-fixing, those claims were dismissed without a true conflict existing.<sup>233</sup> Comity and antitrust precedent caution against throwing babies out with the bathwater<sup>234</sup>—dismissal of the Plaintiffs' claim was erroneous.

#### B. POLICY DEFICIENCIES IN THE *VITAMIN C II* HOLDING

The *Vitamin C II* holding sets bad policy in international cartel enforcement by rewarding bad actors—businesses and governments alike. It accordingly fails to realize the goals of comity and U.S. antitrust law.

*Vitamin C II*'s broad true conflict inquiry makes it easier for foreign private actors—particularly those in clientelist states—to manufacture true conflicts and evade U.S. claims. In ruling on pre-trial motions, both Judges Trager and Cogan considered the possibility that “defendants [had made] their own choices and then ask[ed] for the government’s imprimatur.”<sup>235</sup> *Vitamin C II*'s deferential true conflict inquiry incentivizes foreign actors, intending to enter into unlawful price-fixing conspiracies, to obtain that imprimatur and evade the reach of U.S. law. Such actors may ask their governments to issue regulations that, by their terms, “compel” unlawful conduct the actors want to engage in, but which the threat of antitrust enforcement in U.S. courts keeps them from

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231. See *Vitamin C II*, 8 F.4th at 165 (Wesley, J., dissenting) (“[T]he record makes clear that Chinese law did not require the defendants to agree on prices above the minimum of \$3.35/kg, which is what the defendants did.”).

232. See *id.* at 163 (criticizing the majority opinion for “improperly appl[ying] the doctrine of international comity to avoid a finding it cannot contest: that Chinese law did not require the defendants to fix prices above the minimum of \$3.35/kg, which is what [Defendants] did”).

233. See *id.*

234. Brief Amici Curiae of Professors Samuel Estreicher and Thomas Lee in Support of Neither Party, *supra* note 211, at 9.

235. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 559 (E.D.N.Y. 2008) (Trager, J.).

committing. The Second Circuit thus “ced[ed] control over antitrust regulations, [harming] the interests of U.S. consumers.”<sup>236</sup>

Likewise, *Vitamin C II* incentivizes foreign governments to cooperate with private entities seeking government imprimatur, rather than with global enforcement efforts against anticompetitive conduct. “[A] foreign government that has imposed export restraints, either formally or informally, on [its] domestic producers” is now incentivized “to admit that it has imposed export restraints and coordinated the export cartels.”<sup>237</sup> Enabling such conduct may undermine not just U.S. antitrust enforcement abroad but antitrust norms globally, as states realize that they can game the system by twisting international comity doctrine to their own ends. Today, as China’s state-owned enterprise model gains in influence, state-owned enterprises may easily hide true conflicts as a feature, and not a bug, of corporate entities’ commercial conduct.<sup>238</sup>

The incentive structure the Second Circuit set in place in *Vitamin C II* would undermine rather than support international comity doctrine’s roots in notions of mutual respect, reciprocity, and fostering amicable working relationships among sovereign nations.<sup>239</sup> The Chinese government was prepared to chill U.S.-Chinese relations in the event the Second Circuit affirmed the district court’s judgment.<sup>240</sup> This model is easily replicable by trade allies and rivals alike. Accordingly, the Second Circuit should move away from an application of *Hartford Fire* that would make comity inquiries not legal analyses grounded in good will, but exercises in power-political chest-beating.

### III. RECONFIGURING THE SECOND CIRCUIT’S PRESCRIPTIVE COMITY FRAMEWORK

The Second Circuit’s resolution of the Vitamin C Antitrust Litigation begs further questions regarding its approach to prescriptive comity. The next two Sections set forth proposals to modify these frameworks with several basic aims in mind. First, both proposals attempt to alleviate the separation-of-powers tensions which inhere in international comity

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236. Zhang, *supra* note 5, at 312.

237. *Id.* at 309.

238. See Bradshaw, *supra* note 40, at 19.

239. JP Morgan Chase Bank v. Altos Hornos de Mex. S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005).

240. See *Vitamin C II*, 8 F.4th at 161 (“We discern that China has already taken umbrage at the district court’s treatment of its representations.”).

doctrine. Second, in tandem, both will furnish lower courts with a comity test grounded in precedent and commensurate with the antitrust laws currently in place. Third, and most importantly, the proposals aim to provide lower courts with guidance, which will ensure predictability and coherence in comity cases like the Vitamin C Antitrust Litigation.

#### A. EXECUTIVE INPUT ON TRUE CONFLICT QUESTIONS

This Section, as noted above, proposes that a rule be promulgated permitting federal courts to reliably access the executive branch's position on true conflict questions arising in cases like *In re Vitamin C Antitrust Litigation*. This Section will begin by articulating and justifying the rule. Then, this Section will recommend that the rule take the form of a policy statement by the United States Department of Justice and Federal Trade Commission, as opposed to a congressional enactment or mere coordinated judicial practice. Finally, the Section discusses the extent to which courts should defer to executive input on true conflict questions. That subsection concludes that such input merits "substantial," but not absolute or *Chevron* deference. This substantial deference should be coextensive with that which foreign sovereigns' input receives under *Animal Science*.<sup>241</sup>

##### 1. *Separation of Powers Considerations Justify Executive Input Rule*

One support for international comity doctrine is the separation of powers principle that courts should, in some circumstances, decline to exercise jurisdiction where U.S. foreign policy strongly advises against doing so.<sup>242</sup> Accordingly, courts should be wary of contradicting the executive branch's stated positions in cases implicating the executive's

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241. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1868 (2018) (holding that although "a federal court should carefully consider a foreign state's views about the meaning of its own laws[,] [t]he appropriate weight in each case . . . will depend upon the circumstances; a federal court is neither bound to adopt to [] government's characterization nor required to ignore other relevant materials") (emphasis added).

242. See Gardner, *supra* note 4, at 108 (citing *Mujica v. Airscan, Inc.* 771 F.3d 580 (9th Cir. 2014)) (arguing that the holding in *Mujica* really turned on the amount of deference due to the Executive Branch's intervention, as well as to the intervention of a foreign government).

plenary power over foreign affairs.<sup>243</sup> In politically charged proceedings like the Vitamin C Antitrust Litigation, conducted amid political and economic tensions between the U.S. and China, it makes sense that courts should toe the line more carefully.<sup>244</sup>

At no point in the Vitamin C Antitrust Litigation did the United States assert its position on either the true conflict question or the prescriptive comity inquiry writ large.<sup>245</sup> The full extent of the United States' involvement consisted of two briefs submitted to the Supreme Court by the United States acting as *amicus curiae*, confined in scope to the Rule 44.1 issue decided in *Animal Science*.<sup>246</sup>

The executive branch's silence on the true conflict question, sent back to the Second Circuit on remand caused immediate trouble.<sup>247</sup> The *Vitamin C II* majority pointed out that the executive branch's failure to weigh in on the international comity defense had left the court "in the dark."<sup>248</sup> In other cases, too, courts have expressed similar frustrations with the executive branch's silence on comity questions that would be more easily resolved if the executive would state its position on the matter.<sup>249</sup>

The absence of any executive branch input, as in the Vitamin C Antitrust Litigation, where the Chinese Ministry was actively involved on the Manufacturers' behalf, leaves courts applying international comity tests in a difficult position. Courts can (a) define U.S. foreign policy independently; (b) nakedly *create* policy; or (c) refuse categorically to exercise jurisdiction in an attempt to avoid stepping on any toes,

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243. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (noting the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

244. Jun Zhao, *Notes on Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd. in the US Supreme Court*, 17 CHINESE J. INT'L L. 993, 997–98 (2018) (noting the fierce trade war and "tense atmosphere" enveloping the governments of the U.S. and China).

245. See *Vitamin C II*, 8 F.4th at 161 ("As the Department of State has not weighed in or otherwise signaled a view one way or another on this case, we are left somewhat in the dark.").

246. See Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Animal Sci. Prods. Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (Mar. 5, 2018); Brief for the United States as *Amicus Curiae*, *supra* note 39.

247. See *Vitamin C II*, 8 F.4th at 161.

248. *Id.*

249. See, e.g., *A.O.A. v. Rennert*, No. 4:11 CV 44 CDP, 2023 WL 346001, at \*18–19 (E.D. Mo. Jan. 20, 2023).

American or foreign. In *Vitamin C II*, the Court chose option (a), the most appealing (or the least problematic) of the above options.

As this Note has noted, the issues do not end at the resolution of the true conflict question. Once courts conceptualize conflicting foreign policy interests, they face the further task of balancing the two against each other. As Professor Angela Huyue Zhang notes in *Strategic Comity*, “courts are not institutionally well equipped to make such a cost-benefit analysis.”<sup>250</sup> In light of the above, this Note recommends the following rule.

In private antitrust actions brought by American plaintiffs against foreign actors, where the defendants assert that a true conflict exists between the laws of their jurisdiction and the laws of the United States, courts may require that the executive branch clearly state whether it interprets U.S. law to create such a conflict, disproves of such an interpretation, is neutral on the issue, or prefers not to take an affirmative stance one way or the other.<sup>251</sup>

The above rule is tailored to the facts of *In re Vitamin C Antitrust Litigation* and similar cases.<sup>252</sup> However, it could easily be expanded to encompass adjudicative comity cases as well.<sup>253</sup> Moreover, this Note readily acknowledges that actions other than antitrust suits could be well served by a rule enabling the courts to ask the executive branch for its policy positions. Bankruptcy law and human rights law, for example, have

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250. Zhang, *supra* note 5, at 311 (citations omitted):

In her remarks at an antitrust conference, Judge Diane Wood, Chief Justice of the Seventh Circuit, acknowledged that it is extremely difficult to ask a court to administer comity as the court’s hands are often tied. This implies that U.S. courts should generally defer to the position of the executive branch, which possesses the foreign expertise and is in the best position to balance competing interests.

251. In the event that the executive branch is ambivalent or neutral on the true conflict question, the court should conduct the inquiry independently, though still with reference to the test proposed *infra* at 68.

252. See *Vitamin C II*, 8 F.4th 136.

253. Cf. *In re Picard*, 917 F.3d 85, 101 (2d Cir. 2019) (noting that adjudicative and prescriptive comity “sometimes demand similar analysis, [but that] each asks a different question and is rooted in a different legal theory”).

often required complicated international comity abstention analyses.<sup>254</sup> Courts would surely appreciate executive candor, even if such candor would not, by itself, resolve true conflict questions or end prescriptive comity tests.

The executive branch is the “appropriate decisional actor” in transnational cases implicating the foreign policy interests of the United States and foreign sovereigns.<sup>255</sup> Supreme Court case law supports the proposition that executive input in comity and comity-adjacent cases merit deference.<sup>256</sup> Furthermore, applying such a rule would go a long way towards resolving the separation of powers friction between international comity and the executive branch’s authority over foreign policy.<sup>257</sup>

## 2. *Means of Rule Implementation: Congressional Act, Policy Statement, or Judicial Practice?*

This subsection claims that the optimal means of enacting the rule outlined above would be by way of an addition to the DOJ and FTC’s Antitrust Guidelines for International Enforcement and Cooperation (the “Guidelines”).<sup>258</sup> Instantiating the rule through the Guidelines would furnish the rule with the force and flexibility necessary to realize its goals while minimizing potential pitfalls in its application. Accordingly, this Note takes the position that enabling courts to obtain executive input on

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254. See, e.g., *In re Arcapita Bank B.S.C.(C)*, 640 B.R. 604, 618 (S.D.N.Y. 2022) (“In the context of transnational insolvencies, prescriptive comity is an appropriate and often invoked doctrine.”).

255. *Childress III*, *supra* note 44, at 64.

256. See, e.g., *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (concluding that “where the Executive Branch . . . expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the court”); *Republic of Austria v. Altmann*, 541 U.S. 677, 701–02 (2004) (noting that “should the State Department choose to express its opinion on the implications of exercising jurisdiction over [parties] in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy”).

257. *Childress III*, *supra* note 44, at 69 (noting that requiring executive input on comity abstention defenses “balance[s] a court’s general obligation to exercise jurisdiction with important separation of powers concerns raised in the comity analysis . . . [C]ourts will respect the separation of powers under the Constitution and the primary responsibility of the Executive Branch in conducting foreign affairs”).

258. See Antitrust Guidelines, *supra* note 214, at 27–36.



true conflict inquiries would be less well accomplished via two alternative routes. This subsection will begin with the two alternative routes before justifying the conclusion that a policy statement is the best option available.

a. Against Implementation via Statute

The first of the two means of implementation, which this Note recommends against, is an act of Congress (whether standalone or as an amendment to the FTAIA). Implementing the rule via statute would be undesirable for two main reasons.

First, it would essentially freeze the true conflict inquiry as a requirement for an international comity abstention defense to succeed. Given that *Hartford Fire* has its fair share of detractors,<sup>259</sup> permanently codifying the inquiry could prevent courts and other sources of authority from developing comity doctrine over time.<sup>260</sup> With constantly shifting global political and economic paradigms, comity doctrine's malleability should be considered a strength, not a weakness.<sup>261</sup>

Second, resolving this issue through statute, solely in the antitrust context, could make a mountain out of a molehill. While the interplay between international comity and the U.S. antitrust laws is important, it could be that the particular facts of *In re Vitamin C Antitrust Litigation* will not be repeated frequently enough in the near future.<sup>262</sup> Congressional

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259. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 821 (1993) (Scalia, J., dissenting) (arguing that the Court has completely misinterpreted Section 403 of the Restatement (Third) of Foreign Relations Law of the United States, Comment e, "literally the *only* support that the Court adduces" for its definition of "true conflict"); Gardner, *supra* note 4, at 107–08 (discussing *Mujica*'s insistence on applying adjudicative comity principles to a prescriptive comity case, thus avoiding the true conflict inquiry) (citing *Mujica v. Airscan Inc.*, 771 F.3d 580 (9th Cir. 2014)).

260. See *Mujica*, 771 F.3d at 598 ("Comity is a 'rule of 'practice, convenience, and expediency' rather than of law" that courts have embraced "to promote cooperation and reciprocity with foreign lands."). Post-*Hartford Fire*, courts have developed comity on a case-specific basis rather than embrace a rigid framework. See *id.* at 599–602.

261. Estreicher & Lee, *supra* note 1, at 215 (concluding that the judicial duty to make "case-by-case international comity calls . . . endures and remains as important as ever"); cf. Gardner, *supra* note 4, at 67 (criticizing international comity abstention's malleability as "inviting uncertainty and inconsistency" and generating tension both with the judicial obligation for the courts to exercise jurisdiction granted them and with other constitutional branches).

262. See *Vitamin C II*, 8 F.4th at 140.

resources may be better spent on enacting legislation affecting other issues in antitrust law.

b. Against Implementation via Coordinated Judicial Practice

This Note recommends against implementing the proposed rule merely through court practice. In most respects, having lower court judges formally request that the executive branch weigh in on true conflict questions would fail to resolve the current problems, since the executive Branch could simply refuse to comply. The rule this Section puts forward requires executive buy-in. Left to their own devices, judges would only be able to move the executive branch to state its position on true conflict questions where it would have done so anyway.

c. For Implementation via the Antitrust Guidelines

Setting forth the rule in the Guidelines would be the optimal means of achieving executive input in cases where a true conflict question arises. For one thing, the Guidelines already speak to issues of comity and the DOJ and FTC's stances thereupon.<sup>263</sup> The Guidelines also can be applied and amended with a degree of flexibility that is lacking in the legislative context.<sup>264</sup> Most importantly, the executive is the party best equipped to conduct prescriptive comity analysis.<sup>265</sup> Its pronounced commitment to assist courts in undertaking comity analyses would thus ensure that comity defenses are evaluated capably and consistently across courts.

i. Flexibility in Application

Through the DOJ and FTC, the executive branch is the party best situated to discriminate between prescriptive comity cases and adjudicative comity cases, the former class of cases raises true conflict questions and the latter does not.<sup>266</sup> Having the DOJ and FTC enshrine the

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263. See Antitrust Guidelines, *supra* note 214, at 27–28.

264. This point may be threatened should the Supreme Court weaken agency independence in the upcoming *Loper Bright Enterprises v. Raimondo* case. See *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429, 2429 (May 1, 2023) (mem.).

265. See Childress III, *supra* note 44, at 68 (“[T]he Executive Branch is better situated to deal with the important international relations concerns presented in transnational cases impacting foreign sovereign interests.”).

266. In *Empagran*, the Supreme Court hinted that cross-border antitrust suits brought by the Government are backed by a stronger presumption of extraterritorial applicability

proposed rule within the Guidelines would direct the executive to bring its expertise and experience with international comity doctrine to bear across a variety of federal courts with differing comity abstention analyses.

ii. Ease of Amendment

It is important to bear in mind that comity has and will likely continue to develop in response to global paradigm shifts. The doctrine is malleable by design, having originated in the judiciary's hands.<sup>267</sup> This fact also justifies placing the proposed rule in the Guidelines, which can be amended in response to future changes in comity doctrine. By contrast, a congressional act codifying *Hartford Fire*'s true conflict requirement in prescriptive comity cases, might freeze comity's development, making the doctrine unresponsive to future exigencies.<sup>268</sup>

Of the three options, then, issuing the rule proposed in subsection A by way of a rule in the Guidelines would afford the rule (1) the teeth it needs to engender increased executive candor in true conflict cases; (2) the flexibility in application essential to making executive input as useful to courts in need as possible; and (3) the ease in repealing the rule should comity doctrine or other circumstances require as much in the future.

3. *Deference: What Degree of Deference Should Courts Give Executive Branch Input on True Conflict Questions?*

At present, the “question of deference due to executive branch intervention on questions of comity is important yet unsettled.”<sup>269</sup> Given the Supreme Court's holdings in *Animal Science* and *Empagran*, it seems clear that executive assertions on true conflict questions ought to be

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than are private suits. See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). Private plaintiffs may not exercise the “self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government.” *Id.* at 170–71 (citing Joseph P. Griffin, *Extraterritoriality in U.S. & EU Antitrust Enforcement*, 67 ANTITRUST L. J. 159, 194 (1999)).

267. See Estreicher & Lee, *supra* note 1, at 191 (“In the sphere of balancing national and foreign governmental interests in cases or controversies in the U.S. courts, it is congressional action—not judicial decisions—that are *arriviste*.”).

268. See *supra* at pp. 59–60.

269. Gardner, *supra* note 4, at 106.

afforded at least substantial deference.<sup>270</sup> Under Justice Ginsburg’s majority opinion in *Animal Science*, foreign governments’ proffered interpretations of their own law receive deference in view of “[the interpretations] clarity, thoroughness, and support; [] context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the state; and [their] consistency with the foreign government’s past positions.”<sup>271</sup>

Courts should afford the executive branch’s input on true conflict questions the same degree of deference as it accords foreign governments’ input on the same questions. To accord the United States a higher presumptive degree of deference than its peer nations are entitled to would fall short of comity’s goals to foster amicable working relations among nations.<sup>272</sup>

a. Calls for Chevron Deference Towards Executive Input in Prescriptive Comity Cases

Several scholars have argued that courts should go further, effectively providing *Chevron* deference to executive branch interpretations of American law in comity cases.<sup>273</sup> The Chinese

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270. *Empagran* distinguishes respondent’s proffered cases by noting that

[i]n all three cases . . . the plaintiff was the [United States]. A Government plaintiff . . . has legal authority broad enough to allow it to carry out this mission . . . Private plaintiffs, by way of contrast, are far less likely to be able to secure broad relief.

*Empagran*, 542 U.S. at 170; see Antitrust Guidelines, *supra* note 214, at 28 (“A [government] decision to take an investigative step or to prosecute an antitrust action . . . represents a determination that the importance of antitrust enforcement outweighs any relevant foreign policy concerns. That determination is entitled to deference.”).

271. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1875 (2018).

272. *Aérospatiale*, 482 U.S. at 555 (1987) (Blackmun, J., dissenting):

[A] court should seek a reasonable accommodation that reconciles the central concerns of both [conflicting] sets of laws. In doing so, it should perform a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime.

273. Posner & Sunstein, *supra* note 49, at 1227–28 (“[C]ourts should defer to executive interpretations of ambiguous enactments. Deference of this kind would greatly

Government essentially demanded *Chevron* deference—“binding if reasonable”—in the early stages of *In re Vitamin C Antitrust Litigation*.<sup>274</sup> While these scholars’ frameworks are technically workable and carry some appeal, in practice they would dilute comity and undermine the judiciary’s authority to apply it as a legal doctrine.

Professors Eric Posner and Cass Sunstein provide the basic argument in favor of extending *Chevron* deference to foreign relations law and thus questions of comity.<sup>275</sup> This Note will consider Professor Zhang’s approach—which not only advocates *Chevron* deference in the prescriptive comity context but is primarily concerned with international cartel enforcement—as representative of Posner and Sunstein’s core contention.<sup>276</sup>

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simplify the relevant inquiries; it would also ensure that the relevant judgments are made by those who are best suited to make them.”); accord Zhang, *supra* note 5, at 312.

274. See *Vitamin C I*, 837 F.3d at 199:

[W]hile on their face the terms ‘industry self-discipline,’ ‘coordination,’ and ‘voluntary restraint’ may suggest that the Defendants were not required to agree to ‘industry-wide negotiated’ prices, we defer to the Ministry’s reasonable explanation that these are terms of art within Chinese law[,]” consistent with the compulsion-in-terms indicative of a true conflict.

275. Posner & Sunstein, *supra* note 49, at 1228; cf. Derek Jinks & Neal K. Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1234–35 (2007) (advocating against Posner & Sunstein’s position in a contemporary response; Jinks & Katyal describe Posner & Sunstein as pushing for “substantial deference”).

We distinguish between the *Chevron* deference of Posner & Sunstein and the “substantial deference” which Judge Cogan extended to the Chinese government’s proffered interpretations of Chinese law. As Professor Dodge rightly points out, Sunstein and Posner may not actually argue for an extension of *Chevron* deference to applications of prescriptive comity.

See Dodge, *supra* note 10, at 2132 n.363 (Posner and Sunstein discuss only a limited number of international comity doctrines, including “the presumption against extraterritoriality, act of state doctrine, foreign sovereign immunity, and (mistakenly) Charming Betsy canon”); see also *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 541 (E.D.N.Y. 2011) (giving the Chinese government’s stated interpretation of its own law substantial, not *Chevron* deference).

276. Zhang, *supra* note 5, at 312.

Zhang lays out several basic principles supporting her proposal.<sup>277</sup> First, she cautions that courts should appreciate the effects, their exercise of or abstention from jurisdiction on comity grounds, may have on international relations.<sup>278</sup> Second, she notes that courts should accept that the executive branch “possesses the foreign expertise and is in the best position to balance competing interests.”<sup>279</sup> This Note agrees with both of these propositions.<sup>280</sup>

Third, Zhang asserts that comity is best framed as a simple interest-balancing calculus.<sup>281</sup> This calculus weighs (a) the harm that a court’s exercising jurisdiction over a claim against a foreign export cartel would cause U.S. relations with the alleged cartel’s home state, against (b) the American interest in the prosecution of its antitrust laws.<sup>282</sup> While Zhang is correct that executive input in prescriptive comity cases is desirable, she oversimplifies prevailing frameworks for evaluating comity abstention defenses by presenting them as, at bottom, a cost-benefit analysis.<sup>283</sup>

b. Substantial, not Chevron Deference Better Realizes Comity’s Core Aspirations

Our proposal differs from Zhang’s on several fronts. First, this Note argues for a lesser degree of deference than the *Chevron* standard Zhang, Sunstein, and Posner suggest. This Note takes the position that courts should treat U.S. executive input on true conflict questions the same way

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277. *Id.*

278. *Id.* at 311.

279. *Id.*

280. *Accord* Childress III, *supra* note 44, at 15 (identifying concerns that judicial discretion in applying comity threatens the separation of powers); *see also id.* at 68 (citation omitted) (“Indeed, it is axiomatic that the Executive Branch is the branch of government in our separation of powers scheme to resolve such issues.”).

281. *See* Zhang, *supra* note 5, at 312.

282. *See id.* at 313.

283. *See id.* Comity’s embedded principles of reciprocity, good will, and mutual respect among nations thus carry little weight in Zhang’s argument. *See id.*; *cf.* JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005) (citation omitted) (“Whatever its precise contours, international comity is clearly concerned with maintaining amicable working relationships between nations, a ‘shorthand for good neighbourliness, common courtesy, and mutual respect between those who labour in adjoining judicial vineyards.’”).

they treat foreign governments' input under *Animal Science*.<sup>284</sup> That is, even a reasonable statement of the executive branch's position on a true conflict question should not be given dispositive effect where it fails to persuade the court that abstention is or is not warranted.<sup>285</sup> Comity doctrine incorporates, and arguably serves primarily to facilitate, notions of goodwill and reciprocity among nations.<sup>286</sup> It would hardly exemplify those notions for American courts to place *a priori* the pronouncements of the U.S. executive branch on higher ground than the equivalent pronouncements of peer sovereigns.

Second, as the United States noted in its Brief to the Supreme Court in *Animal Science*, the executive branch has never claimed that its interpretations of American law are entitled to binding or even *Chevron* deference before a foreign court.<sup>287</sup> Rather, according to the Solicitor General's brief, upon which Justice Ginsburg relied in her majority opinion in *Animal Science*, the United States has sought only "substantial deference."<sup>288</sup>

It may be true that proposals like Zhang's would resolve the separation of powers tensions arising from comity doctrine's application by handing the reins of the true conflict inquiry to the executive branch.<sup>289</sup> However, they would do so by diminishing, if not eliminating altogether, the foundational and firmly rooted role of comity doctrine in cross-border

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284. See *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1868 ("[T]he Second Circuit's unyielding rule is inconsistent with Rule 44.1 and, tellingly, with this Court's treatment of analogous submissions from States of the United States . . . . [V]iews of [a] State's attorney general, [for example], while attracting 'respectful consideration,' do not garner controlling weight . . .").

285. See *id.* at 1869 ("[T]he United States has not historically argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant sources. International practice is . . . inconsistent with the Second Circuit's rigid rule [in *Vitamin C I*].").

286. See *Aérospatiale*, 482 U.S. at 555 ("[Comity] is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill.").

287. Brief for the United States as Amicus Curiae Supporting Petitioners, *Animal Sci. Prods. Inc.*, *supra* note 246, at 29 ("When the United States litigates questions of U.S. law in foreign tribunals, it expects . . . substantial deference.").

288. *Id.*; see also *Animal Science*, 138 S. Ct. at 1868 ("A federal court determining foreign law under Federal Rule of Civil Procedure 44.1 should accord respectful consideration to a foreign government's submission, but the court is not bound to accord conclusive effect" to those statements.).

289. See *Zhang*, *supra* note 5, at 311–12.

cases like *In re Vitamin C Antitrust Litigation*.<sup>290</sup> This would constitute an “[invasion] of the province of the judiciary and may harm, rather than advance, U.S. foreign relations.”<sup>291</sup>

Finally, because Zhang’s framework views comity as simple interest-balancing of U.S. interests, it does not account for the two-step framework employed by the Second Circuit.<sup>292</sup> While this Note argues that executive input should be sought, it argues that deference to such input should only be extended to the executive’s position on the true conflict question. The additional comity factors, which the next section of this Note will attend to, are derived from judicial precedent and historically entrusted to the courts’ domain.<sup>293</sup> Comity analysis should remain, at bottom, a judicial function.

## B. RECONFIGURING THE MULTI-FACTOR COMITY TESTS

In *Vitamin C II*, the Second Circuit adopted the following ten-factor test, drawn from the Third Circuit’s *Mannington Mills* opinion, for evaluating comity abstention defenses:

- (1) Degree of conflict with foreign law or policy;
- (2) Nationality of the parties;
- (3) Relative importance of the alleged violation of conduct here compared to that abroad;
- (4) Availability of a remedy abroad and the pendency of litigation there;
- (5) Existence of intent to harm or affect American commerce and its foreseeability;
- (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

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290. See *Vitamin C II*, 8 F.4th at 143 (“Comity is both a principle guiding relations between foreign governments *and a legal doctrine by which U.S. courts recognize an individual’s acts under foreign law.*”) (emphasis added).

291. Dodge, *supra* note 10, at 2113 (“[O]ne should be skeptical of doctrines that allow the executive branch to dictate the outcomes of particular cases on foreign policy grounds.”).

292. See *Vitamin C II*, 8 F.4th at 144–45.

293. See Estreicher & Lee, *supra* note 1, at 191.



(7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;

(8) Whether the court can make its order effective;

(9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; [and]

(10) Whether a treaty with the affected nations has addressed the issue.<sup>294</sup>

The *Mannington Mills* test, consisting of ten factors, is one of several multi-factor comity tests employed across the various federal circuits.<sup>295</sup> The Ninth Circuit employs a seven-factor test derived from the seminal *Timberlane* case, which overlaps substantially with the Third Circuit's own.<sup>296</sup> The *Timberlane* multi-factor test has been adopted and incorporated into the Restatement (Third) of United States Foreign Relations Law Section 403.<sup>297</sup> All such tests aim to arrive at a "jurisdictional rule of reason"—a term and goal originally coined by the influential Professor Kingman Brewster, Jr.<sup>298</sup>

Multi-factor tests like the above have been widely criticized as over-flexible for purposes of comity analysis.<sup>299</sup> With so many discrete factors, not presented in any analytical hierarchy, district court and appellate

294. See *Vitamin C II*, 8 F.4th at 144 n.9 (2d Cir. 2021), *cert denied*, 143 S. Ct. 85 (mem.) (citing *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979)). For ease of explication, the Second Circuit "condensed" the ten *Mannington Mills* factors down to five. *Id.*

295. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979).

296. Compare *id.* (ten-factor test), with *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976) (seven-factor test).

297. See RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 403 (AM L. INST. 1987); see also *Timberlane*, 549 F.2d at 614.

298. Spencer W. Waller, *Antitrust & American Business Abroad Today*, 44 DEPAUL L. REV. 1251, 1266 (1995) ("With respect to the assertion of jurisdiction to prescribe . . . Brewster recommended the adoption of a jurisdictional rule of reason by which jurisdiction is tested . . . through a weighing of [multiple] factors . . ."); see also Kingman Brewster, Jr., *ANTITRUST AND AMERICAN BUSINESS ABROAD* (1958).

299. See, e.g., Brief Amici Curiae of Professors Samuel Estreicher and Thomas Lee in Support of Neither Party, *supra* note 211, at 4 ("Should the Court [] reach th[e] [comity issue], it might use this case as a vehicle for providing much needed guidance to the lower courts, which have developed an unpredictable, malleable 10-factor balancing test.").

judges receive little guidance in already fraught comity cases.<sup>300</sup> Lee and Estreicher observe that the comity tests bizarrely incorporate principles relevant to adjudicative comity into a test designed to resolve prescriptive comity issues, blurring the lines between the two distinct sub-doctrines.<sup>301</sup> Comity analysis is in effect reduced to an unwieldy totality of the circumstances inquiry.<sup>302</sup>

In light of the tests' defects, this Section proposes that order be introduced to the "jurisdictional rule of reason."<sup>303</sup> Specifically, two of the factors appearing in *Timberlane* and *Mannington Mills* tests should be accorded greater weight, and the remaining factors should be rendered subordinate, so as to streamline courts' applications of prescriptive comity.<sup>304</sup> The factors which deserved increased weight are *Mannington Mills* Factor (5)—the "[e]xistence of intent to harm or affect American commerce and its foreseeability"—and Factor (3)—the "[r]elative importance of the alleged violation of conduct here compared to that abroad."<sup>305</sup>

### 1. Factor (5) – Elevating Alcoa's Place in Comity

Factor (5) anchors the Second Circuit's seminal holding in *United States v. Aluminum Co. of America* ("*Alcoa*") to the multi-factor comity tests.<sup>306</sup> In *Alcoa*, Judge Learned Hand stated a clear test for applying the

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300. *Id.*

301. Estreicher & Lee, *supra* note 1, at 176 ("The [multi-factor comity tests] mix up prescriptive or regulatory comity concerns (for example, nationality of the parties) with considerations of adjudicative comity (such as reciprocal practice).").

302. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting) (a nation having some "basis" for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."); see also *Timberlane*, 549 F.2d at 613 (claiming that multi-factor balancing test institutes a "jurisdictional rule of reason").

303. See *Timberlane*, 549 F.2d at 613.

304. This Section thus represents an attempt to do as Professors Estreicher & Lee recommended in their *Animal Science* brief: to "emphasize the most important factors in international comity analysis and require courts to engage in a principled application of those factors." See Brief Amici Curiae of Professors Samuel Estreicher and Thomas Lee in Support of Neither Party, *supra* note 211, at 9.

305. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979).

306. See *Hartford Fire*, 509 U.S. at 796 ("[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.") (citing *Alcoa*, 148 F.2d 416, 444 (2d Cir.

antitrust laws extraterritorially: anticompetitive agreements made abroad “were unlawful . . . if they were *intended to affect imports and did affect them*.”<sup>307</sup> While some characterize *Alcoa* as coining an “effects” test for prescriptive comity,<sup>308</sup> it is clear from the quote above that Learned Hand’s prescriptive comity test boasts two elements: an “intent” prong and an “effects” prong. Construing *Alcoa* in this way makes sense: requiring that a foreign defendant harm American commerce *and have intended to do so* aligns with basic notions of what makes foreign conduct culpable, justifying legal intervention against it.<sup>309</sup>

It is true that the Ninth Circuit in *Timberlane* announced its seven-factor test as a reaction against the rigid *Alcoa* rule that preceded it.<sup>310</sup> Reaction and rejection, however, are two different things. In moving away from *Alcoa*, the *Timberlane* majority accepted *Alcoa*’s assertion that the antitrust laws should extend to conduct that justifies the antitrust laws’

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1945) (Learned Hand, J.) (additional internal citations omitted) (holding that agreements in restraint of trade “were unlawful, though made abroad, if they were intended to affect imports and did affect them”).

307. *Alcoa*, 148 F.2d at 444 (“Where both conditions are satisfied,” the Sherman Act applies to foreign anticompetitive conduct.). In construing the reach of the Sherman Act, the *Alcoa* holding clearly sets forth a prescriptive, as opposed to an adjudicative test. See *Hartford Fire*, 509 U.S. at 796. Factor (5) is thus a prescriptive factor.

308. See, e.g., *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (discussing *Alcoa*’s bearing on the “effects test” embedded in the FTAIA). While the Seventh Circuit’s emphasis on the “effects” prong makes sense under the circumstances of that case, this Note argues that Congress’s codification of the effects prong merely makes an effect on import commerce a necessary condition for the Sherman Act to apply extraterritorially. Because *Empagran* teaches that prescriptive comity should bear upon constructions of the FTAIA, the “intent” prong still has a role to play once the FTAIA’s requirements have been met. See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004). Additionally, Congress’s insertion of foreseeability into the effects calculus could be read to require at least a general intent to affect U.S. commerce for a defendant to be subject to the Sherman Act’s extraterritorial reach. See 15 U.S.C. § 6a.

309. See generally *Empagran*, 542 U.S. 155 (fusing principles of international comity with extraterritoriality analysis under the FTAIA). *Alcoa* has featured, in some shape or form, in every test governing the antitrust laws’ application to conduct occurring abroad since it was decided.

310. See *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 609–13 (discussing the weaknesses of the effects test as, in isolation, “fail[ing] to consider other nations’ interests”).

extraterritorial application.<sup>311</sup> For that reason, *Alcoa* appears in the *Timberlane* and other multi-factor comity tests.<sup>312</sup>

The *Hartford Fire* majority expressly endorsed *Alcoa*'s "intent-plus-effects" rule and was silent on the multi-factor comity tests that by 1993 had been used for over a decade.<sup>313</sup> This endorsement of *Alcoa*'s test indicates two things. First, that *Alcoa* continued to be useful in the international comity context even after Congress's enactment and codification of *Alcoa* in the FTAIA.<sup>314</sup> Second, when *Hartford Fire* was decided, and the true conflict question accorded enhanced weight, *Alcoa*'s "intent-plus-effects" test was nevertheless treated as a significant factor in the Supreme Court's comity analysis.<sup>315</sup>

The Supreme Court's endorsement of *Alcoa* is not limited to the majority opinion in *Hartford Fire*. In *Empagran*, as well, the Court cited to *Alcoa*, noting that "courts have long held that application of [U.S.] antitrust laws to foreign anticompetitive conduct is [] 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."<sup>316</sup> Because Factor (5), incorporating *Alcoa*'s "intent-plus-effects" test in the *Mannington Mills* multi-factor framework, effectively captures culpable conduct; is easily applied in the courts; and received the Supreme Court's explicit endorsement in *Hartford Fire* and *Empagran*, it merits elevated status in the *Mannington Mills* and like tests.

## 2. Factor (3) – Interest-Balancing as a Tie-Breaker

Factor (3) posits a balancing test between (a) a foreign government's interest in seeing its laws enforced absent interference from enforcers of

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311. See *Timberlane*, 549 F.2d at 613.

312. *Id.* ("[T]he antitrust laws require in the first instance that there be some effect actual or intended on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes."); see also *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (including in its test "[e]xistence of intent to harm or affect American commerce and its foreseeability").

313. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

314. See 15 U.S.C. § 6a(1) (incorporating *Alcoa*'s "intent-plus-effects" test into statutory requirement for extraterritorial application of U.S. antitrust laws). *Alcoa*'s "intent-plus-effects" test for the antitrust laws' extraterritorial application was replaced with a statutory requirement of "direct, substantial, and foreseeable" effects. *Id.*

315. See *Hartford Fire*, 509 U.S. at 796.

316. *Empagran*, 542 U.S. at 165.

U.S. law, and (b) the presumptively high American interest in seeing U.S. (here antitrust) laws enforced for the benefit of American private plaintiffs.<sup>317</sup>

Factor (3) could alternatively be construed as asking courts to weigh the *harms* suffered by citizens in the foreign country as a result of the foreign defendant's conduct against the harms suffered by American citizens. While it would weigh in favor of the American plaintiffs in the Vitamin C Antitrust Litigation, this alternative reading would make Factor (3) an exercise of adjudicative, rather than prescriptive comity.<sup>318</sup> It would be asking which state's courts have a stronger interest in hearing the dispute. The proper framing of the interest-balancing grapples with the "substantive reach" of the two statutes alleged to be in conflict.<sup>319</sup>

Adopting the first of the two constructions described above, elevating Factor (3) is desirable for several reasons. First, the test directly relates to international comity's interest-balancing foundations.<sup>320</sup> Second, Factor (3)'s elevated weight would incentivize the U.S. and foreign governments to clearly state their respective interests, where such interests exist, in seeing a given suit litigated or dismissed. Elevating Factor (3) would thereby incentivize the executive branch to participate in prescriptive comity cases. Such participation, as this Note touched on in Part I, Section I, would alleviate some separation of powers tensions created by applications of international comity and allow courts to base their comity abstention decisions on sturdier ground.<sup>321</sup>

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317. See *Mannington Mills*, 595 F.2d at 1297 (Factor (3) considers the "importance" of the alleged violation of conduct "here," i.e. in the United States, compared to the "importance" of the alleged violation abroad, i.e. in the foreign state.).

318. *Estreicher & Lee*, *supra* note 1, at 176 (criticizing the multi-factor comity tests' conflation of factors relevant to prescriptive comity, on the one hand, and to adjudicative comity, on the other).

319. See *Hartford Fire*, 509 U.S. at 813–14. For Scalia, prescriptive comity is instrumental to determining "the extraterritorial reach of the Sherman Act." *Id.* This determination is not jurisdictional in nature. *Id.* Rather, "it is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct." *Id.*

320. *In re Maxwell Comm'n Corp.*, 93 F.3d 1036, 1048 (2d Cir. 1996) (international comity "takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law").

321. See Sean Murray, *With a Little Help from My Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Private Redress*, 41 FORDHAM INT'L L.J. 227, 273 (2017) (Professor Dodge "points out that the judiciary

Factor (3) requires courts to exercise some discretion in asserting the importance of a foreign government's interest in seeing its law enforced. However, the high presumptive value of the American interest in seeing private enforcement of the U.S. antitrust laws should erect an outer boundary to such discretion.

### 3. *Order of Operations*

Factor (5) analyses should come analytically prior to Factor (3) analyses, given the former's firm roots in extraterritoriality doctrine and endorsement by *Hartford Fire*.<sup>322</sup> Factor (3), meanwhile, is best viewed as a final step in the prescriptive comity framework, following the true conflict inquiry and, if that inquiry so demands, the Factor (5) analysis.<sup>323</sup>

Factor (5) represents a clear, articulable standard, first introduced in *Alcoa* and remaining relevant—as a rule of extraterritoriality and as a component of international comity doctrine—ever since.<sup>324</sup> Factor (5) has long been applied by the courts and appeared toward the front end of the Supreme Court's comity analyses in both *Hartford Fire* and *Empagran*.<sup>325</sup> Factor (3), meanwhile, is more likely to give rise to controversy than Factor (5), as it requires an American court to articulate competing government interests and weigh them against each other.<sup>326</sup> To the extent that the true conflict inquiry and Factor (5) analysis might prevent Factor (3) analysis from becoming necessary at all, it makes sense to place those less risky tests first.

### 4. *Subordinating the Remaining Factors*

The remaining *Mannington Mills* factors—all except Factors (5) and (3)—should continue to inform the multi-factor comity test, albeit with diminished force. Most of the factors are either redundant—capable of

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plays an important complementary role to a country's political branches by encouraging dialogue and negotiation among sovereigns.”).

322. See *Hartford Fire*, 509 U.S. at 796.

323. Childress III, *supra* note 44, at 51–52.

324. See *Hartford Fire*, 509 U.S. at 796.

325. See discussion *supra* at pp. 72–75.

326. Cf. Gardner, *supra* note 4, at 72 (“On the one hand, if overextended as an absolute rule, the presumption of jurisdictional obligation risks undermining the very separation-of-powers interests it is meant to promote. Some flexibility is needed.”).

being subsumed into one of Factors (5) or (3)—or bear upon adjudicative rather than prescriptive comity considerations.<sup>327</sup>

This Note proposes that the remaining factors survive mainly to keep judges on alert for extraordinary circumstances justifying abstention even where Factor (5) and/or (3) weigh against it. One can imagine situations where the force of a subordinate factor outweighs the combined force of the two factors that merit increased weight.

For example, if the United States were to enter a treaty with a foreign sovereign, expressly authorizing the latter to impose temporary price controls on its domestic companies, this would cause anticompetitive harm to U.S. import commerce. On the one hand, courts could conceive of Factor (10)—“[w]hether a treaty with the affected nations has addressed the issue”—as subsumed into, because communicable within the language of, Factor (3).<sup>328</sup> A treaty on point may, after all, speak to one government’s interest in favor of or against seeing its laws enforced against the other if a private lawsuit arises. On the other hand, it is useful to keep Factor (10) distinct from Factor (3) to remind judges to keep an eye out for it during comity analysis.

##### 5. *Applying the Test to In re Vitamin C Antitrust Litigation*

This Note will now test the reworked comity test on the facts of *In re Vitamin C Antitrust Litigation*. Assuming that a true conflict did make the Manufacturers’ compliance with both Chinese and U.S. antitrust law impossible, the *Mannington Mills* factors<sup>329</sup>, as configured here, should nevertheless counsel against abstention.

Under Factor (5), the Manufacturers clearly intended to harm or affect American commerce.<sup>330</sup> Even if the intent was [verb] to minimum export price fixing in 2003, the Manufacturers’ illicit coordination above that minimum export price would lean in favor of, not against, holding the Manufacturers responsible. Also relevant is the fact that the Vitamin

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327. The *Vitamin C II* majority, for example, declined to consider Factor (10) because it was irrelevant under the circumstances of the case. See *Vitamin C II*, 8 F.4th at 159 n.39. It condensed the remaining factors. *Id.*

328. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979).

329. See *id.* at 1297–98.

330. *Vitamin C II*, 8 F.4th at 160–61 (“The Ministry’s Amicus Brief concedes that one goal of the 2002 Notice was to maximize ‘the profitability of the industry.’ . . . [T]he defendants actively sought to avoid U.S. liability while inflating profits at the expense of consumers, foreseeably including Americans such as the plaintiffs here.”).

C Antitrust Litigation affected solely consumers of vitamin C in the export market.<sup>331</sup> There was no horizontal price or output coordination with respect to the Chinese Manufacturers' domestic sales of vitamin C.<sup>332</sup> If this state of affairs does not reveal intent satisfying Factor (5), it is hard to imagine what would.

Under Factor (3), it is unlikely that China's interest in maintaining vitamin C and other export cartels outweighed the American interest in seeing the antitrust laws enforced by Americans injured in import commerce. If the Chinese interest were as strong as it claimed, one would expect the Chinese government to have imposed and enforced a more rigid sanctions regime when Sub-Committee members reneged on price coordination agreements.<sup>333</sup> Moreover, to the extent China can claim an interest in seeing its directives to coordinate prices enforced, those directives were issued with an eye towards fixing a minimum export price of vitamin C (to evade Europe's anti-dumping laws),<sup>334</sup> and not to fix the higher export price that actually gave rise to the American plaintiffs' claims.<sup>335</sup>

During the Vitamin C Antitrust Litigation, China justified its compulsion of the vitamin C cartel as part of a massive transformation of the Chinese national economy from a socialist to a more capitalist model.<sup>336</sup> There is some dissonance in this proposed justification for the

331. *Vitamin C I*, 837 F.3d at 181 (“The 2002 Notice . . . refers to ‘industry-wide negotiated prices’ and states that ‘PVC procedure shall be convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline.’”).

332. *Id.* at 179–80.

333. *See In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 550 (E.D.N.Y. 2011) (Cogan, J.).

334. *Id.* at 550:

[T]he relevant directives do not indicate that defendants were required to set prices above a level that would have avoided anti-dumping suits and below-cost pricing. The 1996 Interim Regulations . . . appear to have been intended to avoid anti-dumping suits. Moreover, the directives underlying the 2002 Regime are vague regarding objectives other than avoiding dumping suits.

335. *Vitamin C II*, 8 F.4th at 163; *accord* Gardner, *supra* note 4, at 70 (Exceptions to the strong default rule that federal courts should exercise Congressionally granted jurisdiction “should be narrow and defined with particularity.”).

336. *See Vitamin C II*, 8 F.4th at 154–55 (“In explicating Chinese law, the Amicus Brief noted that ‘China’s ongoing transformation from a state-run command economy to



cartel. If China exerted enough regulatory control over its economy to undertake such a liberalization of its national economy, then surely it could have tailored directives pursuant to that transformation in a way that actually complied with the liberal international norms which universally condemn horizontal price-fixing cartels.<sup>337</sup> By instead issuing its general directive to “go forth and coordinate,” China compelled “the supreme evil of antitrust law.”<sup>338</sup>

## CONCLUSION

This Note has analyzed the Second Circuit’s recent, and final, holding in *In re Vitamin C Antitrust Litigation*. This Note has analyzed the majority and dissenting opinions in *Vitamin C II*, identifying flaws in the majority’s rationale for dismissing the suit and articulating why the dissent’s reasoning ought to have won the day.

This Note then suggested two means by which prescriptive comity doctrine post-*Hartford Fire* might be improved upon. These include (1) amending the Guidelines for International Enforcement and Cooperation, to enable courts to access the executive branch’s input on true conflict questions, in at least some circumstances; and (2) reworking multi-factor prescriptive comity tests, adopted from *Mannington Mills*, to accord increased weight to the *Alcoa* and interest-balancing factors embedded therein.

This Note argues that the above changes would alleviate some of the separation of powers tensions inherent in prescriptive comity doctrine. In making these suggestions, this Note also seeks to make it easier for courts to apply prescriptive comity, given both their stated frustrations at being “left somewhat in the dark”<sup>339</sup> as to executive policy in prescriptive

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a market-driven economy’ gave rise to terms and concepts such as ‘coordination’ and ‘voluntary self-restraint’ that a U.S. court would likely misunderstand.”).

337. See Eleanor M. Fox & Deborah Healey, *When the State Harms Competition—The Role for Competition Law*, 79 ANTITRUST L. J. 769, 811 (“The state can almost always carry out its desired state policy efficiently without enlisting private firms in otherwise illegal conduct.”); see generally Or Brook, *Lawful Cartels*, in PETER WHELAN, RESEARCH HANDBOOK ON CARTELS (Edward Elgar Pub. 2023).

338. See *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (“[C]ompelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.”).

339. *Vitamin C II*, 8 F.4th at 161.

comity cases; and, as to this Note's second suggested change, given the unwieldiness and ambiguities of the multi-factor comity tests.

By employing one or both suggestions, future courts might achieve more sensible and consistent outcomes in their international comity analyses. Such improvements, one hopes, may enable private American plaintiffs to receive damages for the antitrust harms they have suffered, absent the rare and extraordinary circumstances in which courts should abstain from exercising their rightful jurisdiction. In this Note's opinion, "rare and extraordinary" means "rare and extraordinary."<sup>340</sup> Having undergone widespread convergence in antitrust law and enforcement policy, the globalized economy ought to provide mechanisms not only for private business entities to create value and reap profit, but for consumers harmed by such entities' unlawful anticompetitive conduct to secure redress.

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340. See Brief for the United States as Amicus Curiae, *supra* note 246, at 18 (emphasis added) ("Comity-based dismissals [in Sherman Act cases] should be rare . . . [but] federal courts may, in extraordinary circumstances, dismiss private Sherman Act claims based on principles of comity.").