Article

Strategic Comity

Angela Huyue Zhang[†]

INTRODUCTION

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or *with foreign nations*."[1] This broad statutory language has enabled U.S. agencies and courts to apply the Sherman Act extraterritorially, including to cartels organized outside the United States.[2] Recently, the major cross-border cartel investigations initiated by the Department of Justice into price fixing in air cargo, auto parts, liquid crystal display panels, and freight forwarding, as well as investigations into the manipulation of the London Interbank Offered Rate and foreign

---

[†] Associate Professor of Law, University of Hong Kong. I am grateful for comments from Song Alex Yang, Spencer Waller, Yun-Chien Chang and Shitong Qiao. I also thank the editors from *Yale Journal of International Law* for feedback and edits.

1. 15 U.S.C. § 1 (emphasis added).

2. *See* Andrew T. Guzman, *Is International Antitrust Possible*, 73 N.Y.U. L. REV. 1501, 1506-1508 (1998); *see generally* John A. Trenor, *Jurisdiction and the Extraterritorial Application of Antitrust Laws after Hartford Fire*, 62 U. CHI. L. REV. 1583 (1995).

exchange rates, have all focused on foreign cartel conduct.[3]

However, the extraterritorial application of the Sherman Act is not without limits.[4] Indeed, the extent to which U.S. courts should enforce antitrust laws against State-led export cartels has been the subject of intense debate among academics, courts, and policymakers for decades.[5] Defendants in such cartel cases have often argued that their conduct was compelled by foreign governments, and these cases have therefore turned on fact-specific inquiries into the reach and meaning of foreign laws and foreign sovereign involvement in the cartels.[6] The underlying rationale for such a defense is comity, a foundational doctrine applied by U.S. courts to recognize an individual's act under foreign law out of respect for foreign sovereigns.[7] Although comity has been frequently invoked in cases involving conflict of laws with foreign nations, courts and commentators have bemoaned its ambiguity and inconsistent application.[8] Thus far, courts have tried in vain to set a benchmark for determining whether a foreign sovereign's involvement has reached a level that constitutes compulsion.[9] With the growing integration of the world economy and the rise of

---

3. Kirby D. Behre et al., *International Cartel Investigations in the United States*, GLOBAL INVESTIGATION REV. (Aug. 9, 2017), https://globalinvestigationsreview.com/benchmarking/the-investigations-review-of-the-americas-2018/1145426/international-cartel-investigations-in-the-united-states.

4. Guzman, *supra* note 2, at 1508 ("Extraterritoriality is, of course, a question of degree.").

5. *See* Jane Lee, Note, *Vitamin "C" is for Compulsion: Delimiting the Foreign Sovereign Compulsion Defense*, 50 VA. J. INT'L L. 757, 759 (2010); Marek Martyniszyn, *Foreign State's Entanglement in Anticompetitive Conduct*, 40 WORLD COMPETITION 299, 306-07 (2017); Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 564 (2000).

6. Lee notes that courts have used a variety of proxies to determine whether a foreign sovereign's involvement has reached a level that constitutes compulsion, including:

> [T]he existence of a foreign law that mandated the defendant's behavior, the validity of the order or defensibility of the defendant's action under foreign law, and the presence of a foreign sovereign's statements on the issue of compulsion. Courts have looked at one or more of these factors but have reached divergent conclusions, resulting in a lack of clear, instructive guidance on the foreign sovereign compulsion defense.

Lee, *supra* note 5, at 759.

7. *See In re* Vitamin C Antitrust Litig. (*Vitamin C III*), 837 F.3d 175, 183-86 (2d Cir. 2016); Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19, 19 (2008). ("Roughly speaking, courts, according to this doctrine, should apply foreign law or limit domestic jurisdiction out of respect for foreign sovereignty. International comity requires courts to balance competing public and private interests in a manner that takes into account any conflict between the public policies of the domestic and foreign sovereigns." (citation omitted)).

8. *See* Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 13 (2010) ("The doctrine of international comity is one of the most important, and yet least understood, international law cannons employed by U.S. courts in transnational cases." (footnotes omitted)); William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2072 (2015) ("For a principle that plays such a central role in U.S. foreign relations law, international comity is surrounded by a surprising amount of confusion."); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 53 (1991) ("The misleading word 'comity' has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles." (quoting Loucks v. Standard Oil Co., 120 N.E. 198, 201–02 (N.Y. 1918))).

9. *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, 20 (2012) ("But there remains a considerable degree of uncertainty surrounding what defendants must show to satisfy the [foreign sovereign compulsion] defense, as well as how they might show it."); Lee, *supra* note 5, at 790 ("Over the course of several decades, courts have struggled to define the limits of the foreign sovereign compulsion defense, resulting in a lack of clear, consistent guidance on the application of the doctrine.").

state capitalism in emerging countries,[10] the issue has become more prominent than ever.

The *Vitamin C Case*, a recent Supreme Court decision involving a number of Vitamin C exporters from China, highlights these challenges.[11] This case dates back to 2005, when a group of U.S. purchasers of Chinese-manufactured Vitamin C alleged that the Chinese manufacturers' swift rise to dominance in the global Vitamin C market had been facilitated by collusion among the manufacturers (the defendants).[12] The Chinese defendants did not deny the allegations but moved to dismiss the suit on the basis that they should be exempt from antitrust liability since they had been compelled by the Chinese government to fix prices and limit output.[13] In an unprecedented move, the Ministry of Commerce of the People's Republic of China (MOFCOM) filed an amicus brief in support of the Chinese defendants, acknowledging that the Chinese government had compelled the cartel's activities.[14] MOFCOM claimed that the trade association that facilitated the cartel was actually an entity under the government's direct and active supervision.[15] However, after lengthy pre-trial discovery, the district court refused to defer to MOFCOM's interpretation of Chinese law.[16] The Second Circuit reversed the decision of the lower court and afforded conclusive weight to the statements by the Chinese government.[17] The plaintiffs appealed the case to the Supreme Court, which subsequently granted certiorari. On June 14, 2018, the Supreme Court issued its opinion in which it held that although U.S. courts should accord respectful consideration to a foreign government's submissions, they are not bound to such submissions.[18]

On the surface, the Supreme Court appears to have decided the case solely by focusing on whether to treat the statements by a foreign sovereign as conclusive. In doing so, it adopted a legalistic and formalistic approach by heavily relying on a provision in the Federal Rules of Civil Procedure. In this Article, I propose an alternative interpretation: the underlying driver of the Supreme Court's decision was not law, but politics. Indeed, the Supreme Court proactively solicited the opinion of the executive branch before hearing the case and its final ruling was exactly in line with the opinions and suggestions proposed by the government. It is clear that the Supreme Court and the Executive spoke with one voice. The Supreme Court's decision in the *Vitamin C Case* therefore raises a number of interesting questions: why did the Court refuse to treat MOFCOM's statements as conclusive evidence of Chinese law? What explains the high level of deference the Court has accorded to the executive

10. *The Rise of State Capitalism*, THE ECONOMIST (Jan. 21, 2012), https://www.economist.com/leaders/2012/01/21/the-rise-of-state-capitalism.

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

12. *In re* Vitamin C Antitrust Litig., 584 F. Supp. 2d 546, 548-50 (E.D.N.Y. 2008) (addressing plaintiffs' suit under Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act).

13. *Id.* at 550.

14. *Id.* at 552.

15. *Id.*

16. *Id.* at 557.

17. *In re* Vitamin C Antitrust Litig. (*Vitamin C III*), 837 F.3d 175, 194 (2d Cir. 2016).

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

branch? More generally, how should courts apply comity analysis when the factual evidence is ambiguous? What is the implication of the Supreme Court's decision and how might it affect other international comity cases?

In this Article, I seek to answer the above questions by incorporating insights from game theory. To illustrate the dynamics between the importing and exporting countries, I model their interactions as a sequential game. In this game, the optimal strategy of the United States is contingent on the strategy of the exporting country, whose strategy in turn is dependent on both the United States' and the exporting country's own domestic politics and trade policies. Notably, in previous cases, courts have often overlooked such complex dynamics between trade and antitrust. They have instead focused only on the antitrust issue, particularly the factual evidence of foreign sovereign involvement in the export cartel. However, as is often the case, facts are very difficult to obtain and verify, and there has been a lack of consensus among courts about the conditions under which a foreign sovereign's involvement in a cartel would rise to the level of compulsion. More importantly, the judicial focus on facts alone tends to obscure the fundamental question of whether important American interests justify U.S. courts' deference to foreign interests. Comity analysis needs to take place in the specific context of State-led export cartels, where antitrust law issues are intertwined with trade policy and domestic politics in both the exporting and importing countries. Thus, whether a U.S. court should accept the comity defense should depend on the specific circumstances of the particular case, taking into consideration the interests of all players involved and the strategic nature of their decision-making. Since the executive branch is in the best position to consider and balance the competing interests, it makes sense for U.S. courts to accord a high level of deference to the Executive.

This Article is organized as follows. Part I first sets the stage by explaining why the anti-dumping policy of importing countries is often the impetus behind the organization of export cartels by foreign sovereigns. Part II then explains how the U.S. executive branch has weighed trade and antitrust remedies in dealing with export cartels and, in fact, has even encouraged export cartels to facilitate trade policy. To illustrate the challenges faced by courts in dealing with export cartel cases, Part III introduces the background of the *Vitamin C* litigation, the opinions of all three levels of the federal courts, and related trade and antitrust cases. Part IV elaborates on why judicial focus on facts alone could be misguided and contends that courts should instead accord a high degree of deference to the executive branch when factual evidence proves to be ambiguous. The last Part then concludes and draws out the implications of this study.

I. THE IMPETUS FOR EXPORT CARTELS

While cartels are consistently outlawed in established competition law regimes, virtually all jurisdictions tolerate export cartels. For instance, the Webb-Pomerene Act expressly allows export cartels that operate exclusively in foreign

markets.[19] Under the Export Trading Company Act of 1982, U.S. firms can apply in advance for certifications to exempt their export cartels from antitrust laws in the United States.[20] The incentive for exporting countries to exempt export cartels is obvious: consumer welfare loss is borne by consumers from the importing countries, while the producers from the exporting countries reap the gains of monopoly rents. [21] Since export cartels pose a classic externality problem for the open economy, the benefits of international cooperation are substantial. [22] However, industrialized States have tried in vain to reach such an agreement and, hitherto, the World Trade Organization (WTO) does not have a mandate to deal with export cartels.[23]

In cases concerning State-led export cartels, antitrust issues are often entangled with trade policy issues. In particular, anti-dumping law prohibits imports sold at less than fair value if the imports would materially injure a domestic industry.[24] Anti-dumping law condemns low pricing in order to shield domestic industries from foreign competition, while antitrust law protects consumer interests by encouraging low pricing. [25] Thus, anti-dumping not only creates a trading tension but also tension with domestic antitrust policy. [26] As such, the conflict we observe between a foreign exporting country's trade policy and U.S. antitrust law is deeply rooted in the internal tension between U.S. antitrust law and its domestic anti-dumping measures. Indeed, when a foreign government creates a single-country export cartel, profit maximization may be only one of the driving factors. A foreign government might react to the anti-dumping measures of the importing country by imposing export restraints or encouraging domestic firms to agree among themselves to restrict output or raise prices.

The Chinese vitamin C industry offers a good example. Anti-dumping is one of the major risks that China faces in participating in the world trade system.[27] Since China's entry into the WTO in 2001, China has become one of the most important players in world trade.[28] But the exponential growth in

---

19. 15 U.S.C. §§ 61–66 (1982); *see also* John F. McDermid, *The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*, 37 WASH. & LEE L. REV. 105 (1980) (elaborating on the exemption).

20. 15 U.S.C. § 6a (1994).

21. Alan O. Sykes, *Externalities in Open Economy Antitrust and Their Implications for International Competition Policy*, 23 HARV. J.L. & PUB. POL'Y 89, 92 (1999).

22. *Id.* at 94.

23. *See generally* Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA J. INT'L L. 911 (2003); Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142 (2001); D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37 (2007).

24. *See, e.g.*, Wentong Zheng, *Trade Law's Response to the Rise of China*, 34 BERKELEY J. INT'L L. 109, 115 (2016) ("Article VI of GATT 1947 defines dumping as the introduction of one country's products into the commerce of another country at 'less than its normal value' of the products." (citation omitted)).

25. Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1, 24 (1995).

26. *Id.* at 24-25.

27. Chad P. Brown, *China's WTO Entry: Antidumping, Safeguards, and Dispute Settlement*, *in* CHINA'S GROWING ROLE IN FREE TRADE 281, 286-87 (Robert C. Feenstra & Shang-Jin Wei eds., 2010).

28. Zheng, *supra* note 24, at 110.

Chinese exports has also dealt a blow to the world trade system, causing massive job losses for importing countries.[29] Meanwhile, excess capacity is a perennial challenge facing the Chinese economy.[30] Since the mid-1990s, there has been excess capacity in sixty-one of China's ninety-four major categories of industrial products and the capacity utilization rate has been below fifty percent in thirty-five of them. [31] A natural consequence of the excess capacity is "excessive competition." [32] The intense price competition among Chinese exporters has sparked accusations from foreign counties that Chinese companies are dumping their goods into foreign markets. [33] This has led to a spate of foreign anti-dumping actions against Chinese exporters.[34] From 2002 to June 2011, China had been the target of twenty-one W.T.O. complaints. [35] To tackle the problem of overcapacity, the Chinese government has implemented a number of industrial policy measures.[36] Most of these measures have taken the form of "industrial self-discipline," whereby major companies in a specific industry reach agreements to limit competition in order to stabilize the economy.[37] Trade associations, many of which are converted from government ministries, play a pivotal role in facilitating such cartels.[38]

In 2003, the Chinese government imposed a requirement that obliged exporters of thirty-six goods to submit their export contracts to their respective trade associations for approval before export.[39] According to MOFCOM, the main reason for imposing this new requirement was to "make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports."[40] Vitamin C is one of these goods.[41] According to the judicial record in the *Vitamin C Case*, China's share of vitamin exports to the United States rose from sixty percent in 1997 to eighty percent by 2002.[42] And the defendants in the *Vitamin C Case* themselves achieved more than a sixty percent share in the

29. *Id.* at 111.

30. Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT'L L. 643, 675-77 (2010).

31. *Id.*

32. Bruce M. Owen et al., *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 247-49 (2008).

33. *Id.*

34. Dingding Tina Wang, *When Antitrust Met WTO: Why U.S. Courts Should Consider U.S.-China WTO Disputes in Deciding Antitrust Cases Involving Chinese Exporters*, 1121 COLUM. L. REV. 1096, 1100–01 (2012).

35. *Id.* at 1111.

36. *See Fagaiwei: Wu Da Cuoshi Ezhi Weishengsu C Channeng Guosheng* [*Development and Reform Commission: Five Measures to Curb Excess Capacity of Vitamin C*], CHINA NEWS NET (Dec. 30, 2009), http://finance.ifeng.com/news/industry/20091230/1648112.shtml (noting excess capacity in the vitamin C industry); *see also* Owen et al., *supra* note 32, at 249 (describing government-supervised price agreements among key industry players to avoid anti-dumping investigations).

37. *See* Owen et al., *supra* note 32, at 248-49; *see also* Zheng, *supra* note 30, at 687-91.

38. *See* Owen et al., *supra* note 32, at 249.

39. *Id.* (citing MOFCOM and Customs Authority Circular 36 of 2003, *Advance Approval Requirement for the Export of Thirty-Six Goods,* Nov. 29, 2003, http://www1.customs.gov.cn/Default.aspx?TabID=433&InfoID=1070&SettingModuleID=1427).

40. *In re* Vitamin C Antitrust Litig. (*Vitamin C III*), 837 F.3d 175, 181 (2d Cir. 2016).

41. *See Fagaiwei*, *supra* note 36.

42. *In re* Vitamin C Antitrust Litig. (*Vitamin C II*), 810 F. Supp. 2d 522, 525 (E.D.N.Y. 2011).

worldwide market in 2001.[43] At that time, there was growing concern within the Chinese government that Western countries would soon adopt anti-dumping measures against Chinese Vitamin C products.[44] Thus, the Chinese government faced a dilemma: if it regulated the exports of Chinese products, it risked both exposing Chinese exporters to antitrust suits for price fixing in the United States and violating the GATT commitments by imposing such export restraints. If, on the other hand, the Chinese government did not regulate the exports, there would likely be excessive competition among domestic exporters, thus exposing the Chinese exporters to potential anti-dumping allegations from the United States.

As the *Vitamin C Case* ultimately revealed, the Chinese government decided to take actions to coordinate the Vitamin C exports.[45] However, the potential trade violations that China might be mired in may explain why the Chinese government did not impose any mandatory rules or regulations.[46] Rather, MOFCOM delegated some of its regulatory authority to a chamber of commerce with an ambiguous legal status.[47] This seems to be a deliberate tactic by China to conceal its role in coordinating the export cartels. The chamber publicly promoted itself as an independent and non-governmental organization. By contrast, in its amicus brief defending the Vitamin C producers, MOFCOM described the chamber as an instrument through which it oversaw and regulated the export business.[48]

Notably, China is not the first country to use export cartels to address overcapacity problems. In the late 1970s, the Japanese government adopted a program of adjustment assistance for its distressed industries. One of its primary tools for adjustment—in use since 1953—remains the cartelization of such industries.[49] At that time, Japanese exports were heavily cartelized. In 1977, there were eighty-six officially registered export cartels, accounting for twenty to thirty percent of all exports from Japan.[50] By the mid-1980s, the Japanese government had established sixty-four separate cartel systems authorized by forty-six separate cartel exemption statutes.[51] Like the Chinese government, the Japanese government believed that cartels were an effective way to eliminate excess capacity by allowing troubled companies to collaborate in solving their mutual problems.[52]

As the anti-dumping measures imposed by the importing countries are often the impetus for the foreign sovereign to coordinate export cartels, the importing country will need to carefully consider whether to launch antitrust

43. *Id.*
44. *Id.* at 527.
45. *See infra* Part III.
46. *Vitamin C II*, 810 F. Supp. 2d at 527.
47. *Id.*
48. *Id.*
49. Akinori Uesugi, *Japan's Cartel System and Its Impact on International Trade*, 27 HARV. INT'L L.J. 389, 389-390 (1986).
50. *See* Marek Martyniszyn, *Export Cartel: Is it Legal to Target Your Neighbour?: Analysis In Light of Recent Case Law*, 15 J. INT'L ECON. L. 181, 217 (2012).
51. Uesugi, *supra* note 49, at 401.
52. *Id.* at 391.

actions against such cartels in the first place since they can potentially conflict with the domestic trade policy. These political dynamics behind State-led export cartels are examined in the next Part.

II. THE POLITICS BEHIND EXPORT CARTELS

The United States has considered both antitrust and trade remedies when dealing with export cartels, especially in its litigation with China. This Part explores how the U.S. government has used antitrust as a strategic tool for trade policy, focusing on the Japanese export cartel cases in the 1980s.

A. Weighing Trade and Antitrust

When dealing with export cartels, the United States generally has two options: it can seek help via a multilateral treaty network such as the WTO or through direct diplomatic negotiations with the foreign sovereign or, alternatively, it can bring antitrust actions against the foreign producers. The former is arguably a more efficient mechanism for resolution. First, although antitrust litigation in the United States can be initiated by both public and private actors, it can produce inefficient results. Private enforcement of antitrust litigation will likely involve piecemeal, decentralized, and uncoordinated efforts that aim to maximize plaintiffs' gains from litigation rather than the social welfare of the United States. Second, antitrust cases often involve lengthy discovery, thus heavily straining judicial resources. In comparison, the management of trade cases is coordinated and centralized by the U.S. executive branch, and these cases are usually resolved much more quickly through the WTO proceedings than through antitrust lawsuits.

At the same time, trade and antitrust are mutually exclusive remedies. The success of a WTO proceeding hinges on proving China's imposition of export restraints, whereas the success of an antitrust proceeding hinges on proving the absence of any government restraint (i.e., that the cartel is voluntary). In the *Vitamin C Case*, the United States did not directly challenge China's trading practice. Instead, the U.S. government filed a complaint with the WTO in 2009 alleging that the Chinese government had imposed export restraints on a number of raw materials.[53] In its WTO case, the U.S. Trade Representative used MOFCOM's amicus brief in the Vitamin C litigation as evidence of the latter's trade violations. Therefore, a U.S. court holding that the Vitamin C cartel was voluntary would contradict the position of the U.S. Trade Representative and risk undermining the United States' case at the WTO. As it turned out, the United States won the raw materials case in the WTO proceeding even though the appellate panel voided the findings about MOFCOM's amicus brief and decided the case based upon other evidence.[54] With the trade claims settled, the U.S. courts did not have to worry about the spillover effects of this antitrust decision

53. *See infra* Section III(B).

54. *See* Appellate Body Report, China-Measures Related to the Exportation of Various Raw Materials, ¶¶ 226-35, 362-63, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2011).

on the United States' trade claims.

Further, as China abandoned its export restraints on Vitamin C products in 2008, the United States no longer had an interest in going after China via trade remedies. Nor did the United States have an interest in raising Vitamin C prices to protect domestic producers from foreign competition, as the market was already dominated by Chinese producers.[55] Nonetheless, domestic antitrust litigation is not free from controversy as U.S. courts denying immunity to Chinese vitamin manufacturers may have serious implications for foreign relations.

After the district court in the *Vitamin C Case* refused to defer to the MOFCOM statements, the Chinese government made several official statements to the U.S. government and U.S. courts, reiterating that the U.S. government should respect comity.[56] In 2013, Shang Ming, the Director General of the Anti-Monopoly Bureau of MOFCOM, expressed "deep dissatisfaction" with the district court's ruling, which he believed "show[ed] disrespect for China."[57] Shang Ming termed the verdict "unfair," "inappropriate," and "wrong," and reportedly stated that if the verdict stands, "the international community will have concerns, and eventually rising disputes may in turn hurt the interests of the United States."[58] These comments sent a message to the United States that a refusal to defer to MOFCOM's statements could lead to more disputes between the two nations, which could have adverse consequences on their relationship.

Indeed, the Second Circuit appeared to believe that refusing to defer to the Chinese government could have provoked retaliation and resulted in a worse outcome for the United States.[59] Thus, by deciding to defer to the Chinese government, the appellate court dispensed with the need to adopt an intensive, fact-specific approach. Deference to the Chinese government's interpretation of its own law became a shortcut for the court to reach its preferred outcome. Yet the U.S. government held a different view. In its amicus brief submitted to the U.S. Supreme Court, the Solicitor General and the U.S. Department of Justice argued that "unlike a statement from the [e]xecutive [b]ranch, a foreign sovereign's objection to a suit does not, in itself, necessarily indicate that the case will harm U.S. foreign relations."[60] This suggests that the U.S. executive branch did not believe that MOFCOM's protest to the previous Vitamin C

55. Annie Harrison-Dunn, *Made in China: DSM Talks Vitamin C Price Pressures*, NUTRA INGREDIANTS.COM (Feb. 18, 2016), https://www.nutraingredients.com/Article/2016/02/17/Made-in-China-DSM-talks-vitamin-C-price-pressures (explaining that eighty-five to ninety-five percent of the vitamin C was produced in China).

56. *In re* Vitamin C Antitrust Litig. (*Vitamin C III*), 837 F.3d 175, 193–94 (2d Cir. 2016).

57. Client Memorandum, Davis Polk, Chinese Vitamin C Producers Price-Fixing Verdict Raises Questions of Comity and Conflict with Executive Branch Views (Mar. 27, 2013), https://www.davispolk.com/files/files/Publication/2d3d31c8-75b6-47be-8ef1-02074549087e/Preview/PublicationAttachment/337beb4c-724d-48b2-9a7f-11a26184cdcf/032713.Vitamin.C.pdf (internal quotations omitted).

58. *Id.* (internal quotations omitted).

59. *Vitamin C III*, 837 F.3d at 193-94.

60. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, Petition for Writ of Certiorari at 20, *In re* Vitamin C Antitrust Litig. (*Vitamin C III*), 837 F.3d 175 (2d Cir. 2016) (No. 16-1220) [hereinafter United States' Amicus Brief in *Vitamin C Case*].

decisions was a credible threat to the foreign relations between the two countries.

In the late 1990s, U.S. federal agencies cracked down on a large global vitamin cartel, ending a decade-long conspiracy among major vitamin producers,[61] and demonstrating that the United States has long endorsed a vigorous antitrust policy in the vitamin industry. In light of its previous law enforcement efforts, it is not surprising that the U.S. executive branch criticized the Second Circuit for giving "inadequate weight to the interests of the U.S. victims of the alleged price-fixing cartel and to the interests of the United States in enforcement of its antitrust law."[62]

As the analysis above reveals, the executive branch's plea that the Supreme Court not grant conclusive deference to MOFCOM's statements is firmly grounded in the specific circumstances of the *Vitamin C Case*. Since trade remedies were not desirable in the *Vitamin C Case*, it is natural that the United States leaned on antitrust remedies. But if the Executive were to decide that it was in the United States' best interest to resolve the conflict via the trade route, then it would seem best to refrain from suing the Chinese manufacturers on the basis of conflicting antitrust grounds. In fact, it would make sense for the U.S. federal courts to stay the antitrust action, pending the resolution of the trade dispute, as was done in *Resco Products*. [63] Under such circumstances, the executive branch would have greater incentive to nudge the court towards granting immunity to the Chinese exporters, regardless of whether the Chinese government had filed an amicus brief in the litigation. Thus, contrary to the Second Circuit's decision in the Vitamin C litigation, a foreign government's appearance in court is neither necessary nor sufficient for affording a comity-based defense to the foreign exporters, since such a defense ultimately turns on the specific circumstances of a case. As the U.S. response to the Japanese export cartel in the 1980s will illustrate, under certain circumstances, the executive branch may even encourage foreign export cartels into the United States to address intractable trade problems.

B. Using Antitrust as a Tool for Trade Policy

Export cartels in general act as an externality for importing countries and harm their consumers. All else being equal, the importing country will be better off imposing import restraints (such as tariffs or import quotas) on the goods rather than allowing the export cartels.[64] This is because in the case of export

---

61. The largest vitamin C producers were all severely sanctioned in a crackdown on the global cartel by U.S. regulators in the late 1990s. *See* David Barboza, *Tearing Down the Façade of 'Vitamins Inc.'*, N.Y. TIMES (Oct. 10, 1999), http://www.nytimes.com/1999/10/10/business/tearing-down-the-facade-of-vitamins-inc.html; *see also* John M. Connor, *The Great Global Vitamins Conspiracy: Sanctions and Deterrence* 43-44 (Am. Antitrust Inst., Working Paper No. 06-02, 2006) (suggesting that at that time the largest vitamin C producers were European firms).

62. *See* United States' Amicus Brief in *Vitamin C Case*, *supra* note 60, at 20.

63. Resco Prod., Inc. v. Bosai Minerals Grp., No. CIV.A. 06-235, 2010 WL 2331069, at *3, 6 (W.D. Pa. June 4, 2010).

64. Michael William Lochmann, *The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of Free Trade Principles of GATT and the Free Market Principles of United States Antitrust Laws*, 27 HARV. INT'L L.J. 99, 113-14 (1986).

cartels, the increased rent accrues to the foreign producers, whereas the importing country can recoup some of the loss of consumer welfare from the revenue of tariffs or duties levied on foreign producers.[65] Despite their harm to consumers, export cartels can potentially benefit domestic producers. During a trade crisis, the government may feel the pressure to protect domestic producers from foreign competition. Since the 1960s, the U.S. executive branch has negotiated a number of voluntary restraint agreements as a means of resolving certain complicated trade problems, which have the effect of encouraging foreign export cartels.[66] In fact, such tactics were used very widely in the 1980s, during the trade war between Japan and the United States, as elaborated below.

1. The Japanese Export Cartel

In the 1980s, the U.S. automobile industry faced severe challenges from Japanese imports.[67] The Japanese auto manufacturers quickly expanded into the U.S. market, gaining a nearly twenty-four percent market share by early 1981.[68] Meanwhile, the three largest U.S. auto makers all experienced financial hardships, with production and sales declining dramatically.[69] Unemployment in the auto industry soared—over 300,000 auto workers became jobless, as did another 500,000 working in the auto supply industries.[70] The economic threat posed by the rising tide of Japanese imports led to intensive lobbying from the auto manufacturers and their unions, who petitioned for relief from Japanese imports.[71]

However, the U.S. International Trade Commission (ITC), which serves as an advisory body to the President and Congress on trade issues, denied the industry's petition.[72] In a close decision (three to two), the majority found that although foreign imports had significantly injured the domestic industry, they were not the primary cause of the industry's problems.[73] Rather, they attributed the industry's failures to other factors, such as economic recession and the shift in consumer demand for smaller cars.[74] At the same time, Congress threatened to impose a legislative quota on Japanese auto imports, a move that would have violated the United States' obligations under GATT.[75] President Reagan, who had publicly endorsed free trade and the free market, succumbed to the pressures of Congress to protect domestic industries from Japanese competition at the expense of U.S. consumers.[76] Yet without a positive ITC decision, President

65. *Id.*
66. Spencer Weber Waller, *The Ambivalence of United States Antitrust Policy Towards Single-Country Export Cartel*, 10 NW. J. INT'L L. & BUS. 98, 106-09 (1999).
67. Lochmann, *supra* note 64, at 100–04.
68. *Id.* at 101.
69. *Id.* at 100.
70. *Id.* at 101.
71. *Id.* at 101.
72. *Id.* at 102-03.
73. *Id.*
74. *Id.*
75. *Id.* at 103.
76. *Id.* at 104.

Reagan lacked the statutory authority to impose trade restraints.[77] The Reagan Administration came up with an awkward solution: to convince the Japanese government to voluntarily limit their exports.[78] Such a solution would satisfy the domestic political demand without violating the GATT obligations.[79]

The Japanese government, on the other hand, was faced with a dilemma. It could either choose to impose export restraints and extract more profits from U.S. consumers, or it could choose to take no action and let the Japanese manufacturers continue to compete and expand into the U.S. market, in which case Congress would likely impose stringent quotas on Japanese imports.[80] The former option was obviously more desirable to Japan, except that with voluntary export restraints (VER), Japan risked violating its obligations under GATT and could also face antitrust lawsuits in the United States.[81] But since it was the U.S. government that requested the VER from Japan, the United States would not challenge Japan under GATT.[82] Thus, the only remaining concern for the Japanese government was the risk of antitrust violations. During rounds of discussion, the Japanese government sought assurance from the Reagan Administration that their VER system would not amount to violations of U.S. antitrust law.[83] In a response to a letter from the Japanese Ambassador in May 1981, then-U.S. Attorney General William French Smith replied that the Department of Justice believed that the VER system would be "viewed as having been compelled by the Japanese government" and thus "would not give rise to violations of United States antitrust laws."[84] Moreover, Smith gave assurances that the Department of Justice believed that American courts' interpretation of the antitrust laws would likely persist in exempting the VER system from antitrust violations.[85]

From a game theory perspective, the negotiation between the United States and Japan could be modeled as a Nash bargaining problem.[86] A key determinant of a Nash bargaining solution is the outside option—that is, the payoffs for the parties in the event that the negotiation breaks down.[87] To illustrate the two parties' outside options, Figure 1 models the two countries' interaction outside of bargaining as a sequential game. This game has two players: the importing country (the United States) and the exporting country (Japan). In this game, the two countries take turns in making their moves, and each country can observe the move of the other country before making its next move. Thus, each country must consider how the other country will respond if it makes a particular move,

77. *Id.*

78. *Id* at 104-05.

79. *Id.* at 104, 130.

80. *See id.* at 104-07.

81. *Id.* at 130. Although the European Union could have potentially challenged Japan under GATT as well, that did not happen.

82. *Id.*

83. *Id.* at 104-07.

84. *Id.* at 107 n. 65.

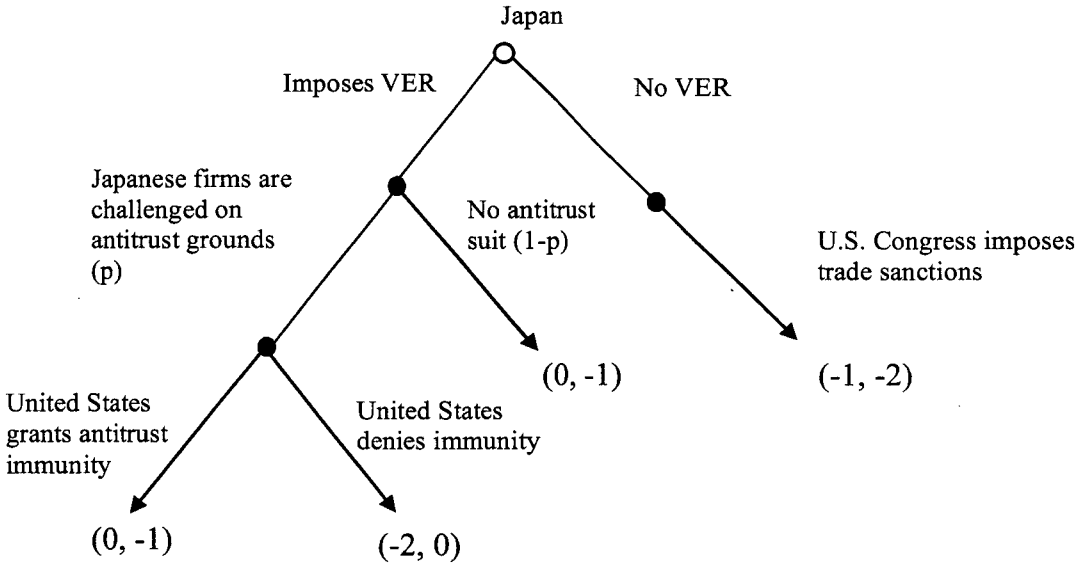
85. *Id.*

86. John F. Nash, *The Bargaining Problem*, 18 ECONOMETRICA 155 (1950); *see also* AVINASH DIXIT ET AL., GAMES OF STRATEGY 666–72 (2015).

87. Nash, *supra* note 86 at 158.

which will in turn affect their own future actions. Each country decides its current move based on the calculation of future consequences.

Figure 1: The Game Between the United States and Japan



Upon the threat of trade sanctions from the United States, the Japanese government is confronted with two choices: it can impose an export VER (equivalent to organizing an export cartel), or it can impose no restraint on exports and let the free market run its course. If Japan imposes a VER, Japanese firms become vulnerable to antitrust allegations from the United States. To keep things simple, the model assumes that if the Japanese government imposes a VER, the likelihood of the Japanese firms being challenged in the United States for antitrust violations is p (assuming $p > 0.5$). [88] The United States then itself has two options: the government could either grant antitrust immunity on comity grounds or deny such immunity.[89] On the other hand, if the Japanese government does not impose a VER, the model assumes that Japanese firms will continue to compete fiercely and expand into the U.S. market, and that Congress will impose trade sanctions on Japanese auto imports. For the sake of simplicity, the model also assumes the payoffs to the parties based on the factual circumstances at the time.[90]

To determine its optimal strategy, the United States will presumably look

88. The Japanese firms could be challenged by private or public enforcers in the United States. There is, of course, a possibility that the Japanese firms' collusive conduct is never caught. We assume here that the firms are more likely to be challenged for antitrust violations than not.

89. To make things simple we assume both the U.S. courts and the U.S. public enforcement agencies will share the same view as to whether to grant immunity to the Japanese firms.

90. The payoff to Japan is listed on the left and the payoff to the United States is listed on the right.

ahead and reason back to anticipate the Japanese government's reactions in this game. If the United States denies immunity, the total expected payoff to Japan will be (p * -2) + ((1-p) * 0) = -2p. As p > 0.5, the total expected payoff to Japan will be less than -1. In that circumstance, the Japanese government would be better off not imposing a VER in the first place. On the other hand, if the United States grants immunity, the payoff to Japan is higher if it imposes a VER, as it will be able to obtain higher profits from trade and avoid potential trade sanctions from the U.S. Congress. The Japanese government would choose to impose a VER in this circumstance.

Now that we know how Japan will move if given the chance, we can truncate the decision tree and eliminate the strategy that we know Japan will not adopt—that is, Japan will not impose a VER if the United States denies immunity. The consequences for the United States, of granting or not granting immunity, is then quite apparent. Clearly, the United States would prefer to grant immunity, as it will receive a higher payoff than if Congress imposes sanctions on Japanese firms. Note that such a choice is valid regardless of the United States' payoff if it denies immunity. Even if the United States' payoffs are higher if it denies immunity than if it grants immunity, the United States would still be better off granting immunity because otherwise, the Japanese firms would not impose a VER in the first place.

As shown in Figure 1, if both the United States and Japan do rollback analysis to choose their optimal strategies, the equilibrium entails the Japanese government imposing a VER and the United States granting immunity to the Japanese government. While this strategy will yield the best payoffs for both countries under this sequential game, they both have an interest in avoiding the cost and uncertainties of engaging in protracted and costly antitrust disputes further down the road. In other words, there is an excess value to be gained from the bargaining between these two countries, and the surplus from cooperation is obvious. To reach an agreement, Japan needed to receive an assurance from the Reagan Administration that the U.S. government would grant immunity and that U.S. courts would follow suit. The letter from the Department of Justice to the Japanese government served this exact purpose; without this commitment, the two countries would not have been able to reach a cooperative outcome.

With the blessings of the Reagan Administration, the Japanese auto VER lasted almost four years from 1981 until 1985.[91] Partly due to the restrictions of the Japanese imports, the United States auto industry experienced a dramatic recovery and quickly returned to profitability.[92] As imports shrank, U.S. auto manufacturers also regained their market shares, significantly increasing their production in the United States.[93] This generated record profits for the domestic auto industry.[94] As the VER restricted the number of imports and reduced the competition among domestic and foreign auto manufacturers, both domestic and

91. Lochmann, *supra* note 64, at 108.
92. *Id.*
93. *Id.*
94. *Id.* at 112.

foreign automakers were able to substantially increase prices. [95] But the successful recovery of the auto industry also came at a dear price for U.S. consumers.[96] At the same time, even though the outcome was not one that maximizes total social welfare for the United States, it was arguably the best response the Reagan Administration could have made given the political and economic circumstances at the time.

The above analysis demonstrates that when the interests of the exporting country and the importing country are in harmony, whether the exporting country has actually compelled the cartel or whether the foreign sovereign is involved in the cartel becomes irrelevant. The optimal strategy for the United States not only depends on the payoffs to the United States but also on the strategy of the exporting country responsible for making the first move in this game. The strategy of the exporting country in turn depends on its payoffs, which vary according to the trade policy of the United States as well as many other factors, including the exporting country's chances of getting challenged for antitrust violations in the United States, the expected antitrust litigation cost, and the expected trade loss should the United States impose sanctions. Thus, the optimal strategy for the United States is by no means fixed. Rather, it is a complicated assessment of various factors including antitrust, trade, and domestic politics. As a sequential game, it requires players to consider the future consequences of their current moves before choosing their actions. Thus, the comity analysis needs to anticipate these changing circumstances in politics and accommodate such flexibility.

The United States' response to the Japanese automobile cartel in the 1980s is not the first time that the United States has used antitrust as a strategic tool for trade policy. In the 1960s, in anticipation of hostile congressional action that would have established stringent quotas for steel imports, the U.S. executive negotiated directly with European steel producers and concluded a series of voluntary restraint agreements.[97] The executive branch bypassed its governmental counterparts and directly encouraged the European producers to organize export cartels.[98] The government's action was subsequently challenged in court in *Consumers Union of United States, Inc. v. Rogers*.[99] The plaintiff argued that the agreements constituted a violation of the Sherman Act and that the existing congressional trade legislation preempted the President's power in the field.[100] The district court upheld the steel agreements but noted that the President had no authority to grant immunity to the foreign exporters participating in the voluntary agreement.[101]

The U.S. executive branch learned its lesson from *Consumers Union* and changed its approach when dealing with trade crises. This explains why the

95. *Id.* at 109.
96. *Id.* at 112.
97. Waller, *supra* note 66, at 107.
98. *Id.*
99. Consumers Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319, 1322–23 (D.D.C. 1973).
100. *Id.*
101. *Id.* at 1323.

Reagan Administration later encouraged the Japanese government to impose VER on Japanese automobiles.[102] Subsequently, the U.S. government issued similar assurances to the Japanese government in connection with the imposition of a VER on semiconductors exported from Japan.[103] President Reagan again used these tactics when negotiating with a number of exporting countries on steel imports, effectuating a trade agreement with Australia in 1985 by allowing the latter to impose restraints on its steel exports.[104] In 2005, the United States and China signed an agreement in which China promised to place a VER on Chinese textiles and apparel goods in order to avoid U.S. import duties following a surge of those Chinese imports to the United States.[105]

2. *The Executive's Contrasting Stance*

The executive branch's preference for using export cartels as a policy tool has also been reflected in private antitrust litigation on some occasions. In *Matsushita Electric*, two U.S. TV manufacturers brought a case against Japanese TV manufacturers for creating a cartel in order to drive U.S. competitors out of the market.[106] The defendants argued that their conduct should be immune from antitrust liability because the Ministry of International Trade and Industry (MITI) had "mandated agreements fixing minimum export prices" to avoid anti-dumping liability and retaliatory trade barriers against Japanese goods.[107] In a statement submitted to court, the MITI admitted that it had directed the Japanese cartel.[108] Moreover, the agency claimed that it could penalize firms for failing to comply with its directives by using its authority to allocate foreign exchange under certain foreign trade control laws.[109] This position was supported by the U.S. Solicitor General and the Department of Justice, who urged the court to give the MITI's statements conclusive weight.[110]

In its amicus brief, the executive branch strongly endorsed a position of conclusive deference to the Japanese government:

> [C]laims of compulsion are most appropriately entertained when the foreign government, either directly or through the State Department, informs the court that the conduct at issue was compelled. It is in such instances the depth of the foreign government's concern and the possibility of diplomatic friction following from

---

102. Waller, *supra* note 66, at 108.

103. *Id.*

104. Brief for the United States as Amicus Curiae Supporting Petitioners at 19 & n.17, Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574 (1986) (No. 83-2004), 1985 WL 669667 [hereinafter United States' Amicus Brief in *Matsushita Electric*] (citing Letter from J. Paul McGrath, Assistant Att'y Gen., to Kenneth McDonald, Austl. Charge d'Affaires (Jan. 18, 1985)).

105. *See* Brown, *supra* note 27, at 311 & n.27 ("A common resolution to these U.S. and EU textile and apparel investigations is China frequently agreeing to *voluntarily* restrain exports and undertake other grey-area measures—a practice that has been explicitly *discouraged* in other WTO Agreements.").

106. *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 251 (1983), *rev'd sub nom.* Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574 (1986).

107. *Id.* at 315

108. Brief for the Government of Japan as Amicus Curiae in Support of Petitioners at 4, Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574 (1986) (No. 83-2004).

109. *Id.* at 14a.

110. United States' Amicus Brief in *Matsushita Electric*, *supra* note 104, at 22.

> further court proceedings will be most clearly expressed . . . . Once a foreign government presents a statement dealing with subjects within its area of sovereign authority, however, American courts are obligated to accept that statement at face value; the government's assertions concerning the existence and meaning of its domestic law generally should be deemed "conclusive."[111]

The U.S. government's advocacy for deference to a foreign government's statements in *Matsushita Electric* contrasts sharply with its staunch objection to doing so in the *Vitamin C Case*.[112] While this legal inconsistency and logical incoherence may seem puzzling, it becomes understandable once the underlying political and economic circumstances are elucidated. The executive branch explicitly acknowledged these forces in *Matsushita Electric*: "In a system of international trade where the United States can be found negotiating *for* certain export restraints, failure to recognize a limited sovereign compulsion exception to the Sherman Act necessarily would 'interfere with delicate foreign relations conducted by the political branches.'"[113]

Yet the Third Circuit plainly ignored the executive branch's request and got bogged down in the complicated factual inquiry of whether compulsion existed in this case, ultimately refusing to grant immunity to the Japanese producers.[114] The court appears to have overlooked the fact that the Japanese imposition of export restraints was not a static decision; rather, it was a dynamic decision involving the trade policy and domestic politics of the United States. The United States did not act in a vacuum—its judicial decision making an impact on the Japanese government's actions in the future. Thus, simply focusing on the antitrust case at issue risks missing the bigger picture of the dynamics between the United States and Japan.

Indeed, the U.S. government has taken a fluid stance with regard to export cartels. When a trade remedy is no longer desirable, the executive branch has tried to persuade U.S. courts to refuse to grant conclusive deference to a foreign government's statement, as in the *Vitamin C Case*. Meanwhile, when the executive branch prioritizes the protection of domestic industries from foreign competition, it has tried to persuade U.S. courts to treat a foreign government's statement as conclusive, as in *Matsushita Electric*. This shows that the basis of the executive branch's position has not been the law; rather, it has been politics. Ultimately, the decision on which approach to pursue comes down to assessing the cost and benefits of using either trade or antitrust remedies—which are mutually exclusive—in dealing with the conflict.

---

111. *Id.* at 23.

112. *Id.* at 8.

113. *Id.* at 19–20. The United States further contended:

> Conversely, the litigation of private antitrust actions could well impede diplomatic efforts to undo foreign compulsion of anticompetitive conduct. In these circumstances, it is evident that the problems posed by compelled anticompetitive activity can, as a general matter, better be addressed through the exercise of executive discretion than by means of the "'[p]iecemeal dispositions' that courts could make" in the course of private litigation.

Id. (citing First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 786 (1972) (Brennan, J., dissenting)).

114. *See infra* Part IV(A).

III. THE VITAMIN C SAGA

After exploring the political dynamics behind export cartels, I now turn to the vitamin C litigation, which spanned over a decade and reached all the way to the U.S. Supreme Court. The drastically different approaches adopted by the different courts involved in the *Vitamin C Case* provides a perfect illustration of the difficulties U.S. courts have faced in dealing with export cartels.

In January 2005, a group of U.S. purchasers filed claims against Chinese manufacturers of vitamin C, accusing them of fixing prices and limiting the quantity of sales to the United States.[115] The cases were subsequently consolidated in a New York federal court.[116] The plaintiffs asserted that the defendants had colluded with the Chamber of Commerce of Medicines and Health Products Importers and Exporters (Chamber) and agreed to limit the production of vitamin C and increase its prices to create a supply shortage in the international market.[117] The defendants did not deny that they had fixed prices.[118] However, they contended that they had acted pursuant to Chinese regulations regarding export pricing and that the Chamber was a government-supervised entity through which the Chinese government had compelled their collusion.[119] The defendants then moved to dismiss the claims on account of three defenses based on comity: (1) the act of state doctrine, under which courts should refrain from judging the acts of a foreign state; (2) the foreign sovereign compulsion defense, under which courts should abstain from exercising jurisdiction in cases in which the defendants' conduct is compelled by the government; and (3) the international comity doctrine, under which courts should decline from exercising jurisdiction in cases that might influence the working relationships among nations.[120]

A. The District Court's Decision

At the heart of the district court's analysis in applying the above comity-based doctrines is the factual inquiry of "whether the Chinese government required defendants to fix prices in violation of the Sherman Act."[121] That is, was the defendants' behavior *actually* compelled by a foreign sovereign?[122] In an unusual move, MOFCOM filed an amicus brief in 2006 in support of the Chinese defendants and acknowledged that the challenged conduct was directed by a regulatory pricing scheme.[123] As the highest central ministry in charge of overseeing international trade in China, MOFCOM's appearance in a U.S. court was unprecedented.[124]

---

115. *In re* Vitamin C Antitrust Litig. (*Vitamin C III*), 837 F.3d 175, 179 (2d Cir. 2016).
116. *Id.*
117. *Id.* at 180.
118. *In re* Vitamin C Antitrust Litig., 584 F. Supp. 2d 546, 550 (E.D.N.Y. 2008).
119. *Id.*
120. *Id.* at 550–52.
121. *Id.* at 552.
122. *Monopolies and Restraints of Trade*, 54 AM. JUR. § 334 (2d ed. 2009).
123. *In re* Vitamin C Antitrust Litig., 584 F. Supp. 2d at 552.
124. *Id.* It should be noted, however, that it is common practice for other foreign States to submit

In its submission, MOFCOM declared that it had created the Chamber in order to exercise its authority to cut prices and limit the production of vitamin C.[125] MOFCOM explained that the Chamber was a government-supervised entity, unlike trade associations in the United States.[126] The ministry further claimed that the penalty for non-compliance with the Chamber's mandate is severe—the Chamber could provide "warning, open criticism and even revocation of . . . membership," and may even advise the relevant government department to suspend or cancel the producers' export rights.[127] The district court asserted that MOFCOM's statements were entitled to substantial deference, but it found conflicting evidence regarding the compulsion by the Chinese government.[128] The court pointed to the Chamber's statements on its website which portrayed the exporters as reaching a "self-regulated" agreement to voluntarily restrict the prices and quantity of exports.[129] The court then denied the defendants' motion to dismiss in order to allow further factual development on the issue of compulsion.[130]

In 2009, MOFCOM submitted a new statement to the district court, clarifying that "[s]elf-discipline does not mean complete voluntariness or self-conduct" and that such language needs to be read in the context of China's regulatory culture.[131] Nonetheless, the district court accepted the plain language of the Chamber's documents and refused to defer to MOFCOM's interpretation.[132] After lengthy and detailed discovery, the court found that the Chinese government merely encouraged the cartel as a policy preference, and that MOFCOM's conduct did not rise to the level of compelling the vitamin C manufacturers to fix prices.[133] The court also held that even if some compulsion existed, the defendants went beyond the requirements of the Chinese government and set prices above those necessary to achieve the government's goals.[134] The case then went to trial and the jury subsequently decided that the Chinese defendants had violated U.S. antitrust law and awarded to the plaintiff $54.1 million in damages.[135]

---

amicus curiae briefs in antitrust cases before the U.S. courts. *See* Marek Martyniszyn, *Foreign States' Amicus Curiae Participation in U.S. Antitrust Cases*, 61 ANTITRUST BULL. 611 (2016).

125. *In re* Vitamin C Antitrust Litig., 584 F. Supp. 2d at 552–53. According to MOFCOM's amicus brief, MOFCOM and the State Drug Administration issued a notice mandating strict control of vitamin C products in 1997 in response to tough competition on the global market.

126. *Id.* at 552.

127. *Id.* at 552–54. MOFCOM further explained that the Chamber adopted a new system of mandatory "advance approval" in 2002, whereby trade associations must sign off on export contracts before goods can be released for export.

128. *Id.* at 557.

129. *Id.* at 554–55.

130. *Id.* at 559.

131. *In re* Vitamin C Antitrust Litig. (*Vitamin C II*), 810 F. Supp. 2d 522, 532–33 (citing statement of the Ministry of Commerce of the People's Republic of China).

132. *Id.* at 542.

133. *Id.* at 525, 550, 552.

134. *Id.* at 560–61, 566.

135. *In re* Vitamin C Antitrust Litig. (*Vitamin C III*), 837 F.3d 175, 178 (2d Cir. 2016).

B. The W.T.O. Case and Other Chinese Export Cartels

As the antitrust case against the Chinese vitamin C producers was progressing in U.S. district court, China received another blow on the trade front. In 2009, the United States launched a W.T.O. suit against China for violation of its W.T.O. commitments in imposing export restraints on certain raw materials.[136] Although the W.T.O. proceedings involved different export goods and a different trade association, the U.S. Trade Representative used MOFCOM's statements in the *Vitamin C Case* as evidence that the Chinese government imposed "minimum export price requirements."[137] The United States argued that such export restraints violate China's W.T.O. obligations under the GATT, as well as China's Accession Protocol.[138] These arguments were upheld by the W.T.O. panel, which ruled in July 2011 that China's export restraints violated its W.T.O. commitment.[139]

During the trial, the district court considered the W.T.O. proceedings, but paid little heed to the position of the U.S. Trade Representative. The district court emphasized that vitamin C was not an export at issue in the W.T.O. proceeding and that the executive branch had not requested that the court accord MOFCOM's statements heightened deference.[140] While noting the findings of the W.T.O. panel, the district court held that the panel's conclusion did "not alter [its] interpretation of Chinese law" because the W.T.O. findings did not show China's denial of the existence of the price restraint, nor did the W.T.O. discuss whether the trade association membership had been voluntary or not.[141] The district court also observed that the W.T.O. panel failed to address the deficiencies with MOFCOM's filings while deferring to its 2009 statements.[142]

When the *Vitamin C Case* was pending in front of the district court, several Chinese manufacturers of magnesite and bauxite faced similar antitrust litigation for conducting export cartels in the United States.[143] Similar to the *Vitamin C Case*, the defendants in two cases did not deny the charges but sought to dismiss the suits on the basis of various doctrines addressing actions by foreign

---

136. Request for the Establishment of a Panel by the United States, *China—Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/7 (Nov. 9, 2009).

137. First Written Submission of the United States of America, China—Measures Related to the Exportation of Various Raw Materials, ¶¶ 207, 208, 216, 229, 352, WT/DS394, WT/DS395, WT/DS398 June 1, 2010) [hereinafter U.S. First Written Submission], http://www.ustr.gov/webfm-send/1948.

138. *Id.* ¶¶ 10–17.

139. *See* Panel Report, China—Measures Related to the Exportation of Various Raw Materials, ¶¶ 7.185, WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011) [hereinafter Panel Report], http://www.wto.org/english/tratop-e/dispue/394 395_398re.pdf. However, on appeal from the parties, the WTO's Appellate Body vacated some of the panel's rulings on the grounds of due process, thus voiding the panel's findings that the Chinese government had imposed export price restraints. *See* Appellate Body Report, *supra* note 54.

140. *In re* Vitamin C Antitrust Litig. (*Vitamin C II*), 810 F. Supp. 2d 522, 551-60 (E.D.N.Y. 2011).

141. *Id.* at 555–60.

142. *Id.* at 559–60 & 559 n.49.

143. Animal Sci. Prods., Inc. v. China Nat. Metals & Minerals Imp. & Exp. Corp., 702 F. Supp. 2d 320 (D.N.J. 2010), *vacated sub nom.* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, (3d Cir. 2011); Resco Prods., Inc. v. Bosai Minerals Grp., No. 06-235, 2010 WL 2331069, at *3 (W.D. Pa. June 4, 2010).

governments.[144] In the *Resco Products* case relating to bauxite materials, the court stayed the proceedings, pending the resolution of the U.S.-initiated W.T.O. proceedings against China on export constraints for bauxite.[145] The court highlighted the striking similarity of factual and legal inquiries between its case and the W.T.O. proceedings, and exhibited considerable deference to separation of powers and sovereignty considerations.[146] Meanwhile, in the *Animal Science* case relating to magnesite, the district court in New Jersey afforded "a nearly binding-degree of deference" to MOFCOM's statements.[147] The court also actively researched evidence from other proceedings that might bear on the compulsion defense raised by the defendants, including *Resco Products* and the *Vitamin C Case*.[148] In the end, the court was convinced by the totality of the evidence that the trade association involved was a government entity, and that the Chinese government had indeed compelled the defendants' conduct.[149]

Thus, the district court's decision in the *Vitamin C Case* represents a clear departure from the more deferential approach taken by the courts in the raw material cases, giving rise to confusion about the standards that courts apply in deciding how to deal with comity-related defense. Indeed, the district court's decision in the *Vitamin C Case* generated controversy, as many commentators criticized the court for its failure to consider the decision's implications on American trade policy.[150]

C. The Second Circuit's Decision

On appeal, the Second Circuit applied a ten-factor balancing test in evaluating whether the district court should abstain from exercising its jurisdiction on international comity grounds.[151] Citing the U.S. Supreme Court's ruling in *Hartford Fire Insurance Co. v. California*, the Second Circuit focused primarily on the first factor, that is, the degree of conflict between the U.S. and foreign law.[152] Instead of focusing its analysis on a factual inquiry into the existence of compulsion by the Chinese government, the Second Circuit gave

144. *Resco Prods.*, 2010 WL 2331069, at *3. *See also Animal Sci. Prods.*, 702 F. Supp. 2d at 429–37; Wang, *supra* note 34, at 1121–24.

145. *Resco Prods.*, 2010 WL 2331069, at *3, *6.

146. *Id.* at *6.

147. *Animal Sci. Prods.*, 702 F. Supp. 2d at 426. (The court considered that "a foreign sovereign's admission of legal compulsion of its subjects could warrant a nearly binding-degree of deference, even if the admitted compulsion was based on what might be deemed, in American jurisprudence, a form of 'unwritten law.'")

148. *Id.* at 403–18.

149. *Id.* at 437.

150. *See* Michael N. Sohn & Jesse Solomon, *Lingering Questions on Foreign Sovereignty and Separation of Powers After the Vitamin C Price-Fixing Verdict*, 28 ANTITRUST 78, 83 (2013). *See generally* Wang, *supra* note 34.

151. *In re* Vitamin C Antitrust Litig. (*Vitamin C III*), 837 F.3d 175, 184–85 (2d Cir. 2016) (relying upon the balancing test set out by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of Am.*, 749 F.2d 1378 (1984), and the Third Circuit in *Mannington Mills Inc. v. Congoleum Corp.*, 610 F. 2d 1059, 1979, the courts in both of which weighed the interests of the United States against the countervailing interests of the foreign entity when determining whether to exert jurisdiction over extraterritorial conduct affecting U.S. commerce).

152. *Id.* at 192–95.

conclusive deference to the official statements by MOFCOM.[153] The Second Circuit asserted that it was unable to identify a single case "where a foreign sovereign appeared before a U.S. tribunal and the U.S. tribunal adopted a reading of that sovereign's law contrary to that sovereign's interpretation of them."[154] The appellate court continued: "Not extending deference in these circumstances disregards and unravels the tradition of according respect to a foreign government's explication of its own laws, the same respect and treatment that we would expect our government to receive in comparable matters before a foreign court."[155] In a footnote, the court also mentioned the counterfactual—had the Chinese government not chosen to appear in the litigation, the district court's fact-specific approach would have been entirely appropriate.[156] Thus, it appears that the Chinese government's appearance in this case played a decisive role in influencing the outcome.

Notably, the Second Circuit's decision also included a lengthy recitation of the adverse consequences that had resulted from the district court's disregard of MOFCOM's statements.[157] Thus, it appears that the Chinese government's reaction was one of the important components of the court's comity analysis. Ultimately, the Second Circuit reversed the decision of the lower court.[158]

D. The Supreme Court Decision

In April 2017, the plaintiffs filed a petition for certiorari to the Supreme Court, asking the Court to clarify, among others, two important issues.[159] The first issue presented concerned the level of deference given to a foreign government's interpretation of its own law—specifically, whether a U.S. court should give conclusive deference to a foreign government's interpretation of its own law if the government has appeared in court.[160] The second issue presented concerned the longstanding split among circuit courts in how to apply the international comity doctrine. In this case, the Second Circuit applied the balancing test adopted by the Ninth and Third Circuits, selecting the test over

153. *Id.* at 186–94 (noting that U.S. courts are bound to defer to such official statements when a foreign government directly participates in a U.S. court proceeding and there is reasonable evidence presented under the circumstances).

154. *Id.*

155. *Id.*

156. *Id.* at 191 n.10 ("We note that if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate.").

157. *Id.* at 193–94.

158. *Id.* (arguing that the court should abstain from exercising its jurisdiction in this case because the Chinese government had filed a formal statement admitting the compulsion and because the defendants could not simultaneously comply with Chinese law and U.S. antitrust law).

159. Petition for Writ of Certiorari, Animal Sci. Prods. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018) (No. 16-1220), 2017 WL 1353281 [hereinafter Petition for Certiorari]; *see also* Reply to Brief in Opposition, Animal Sci. Prods., Inc. v. Hebei Welcome Pharmaceutical Co., 138 S. Ct. 1865 (2018) (No. 16-1220), 2017 WL 2610072 [hereinafter Reply to Brief in Opposition].

160. Petition for Writ of Certiorari, *supra* note 159, at 29–34; *see also* Reply to Brief in Opposition, *supra* note 159, at 11–12.

different versions employed in other circuits.[161] On June 26, 2017, the Supreme Court invited Acting Solicitor General Jeffery Wall to file a brief expressing the views of the United States in the *Vitamin C Case*.[162] The U.S. Solicitor General and the Department of Justice subsequently submitted their amicus brief to the Supreme Court in November 2017, arguing that the Second Circuit had erred by treating MOFCOM's statements as conclusive.[163]

In its brief, the U.S. government relied heavily on Federal Rule of Civil Procedure 44.1, which was adopted in 1966 to assist courts in determining issues concerning foreign law.[164] The government highlighted two aspects of Rule 44.1. First, the determination of foreign law is a "question of law" for the courts rather than a question of fact.[165] Second, the Court may consider any relevant material or sources in determining foreign law.[166] This affords federal courts great flexibility.[167] In addition, the U.S. government argued that federal courts should not treat foreign governments' characterizations as conclusive in all circumstances.[168] The executive branch enumerated a list of factors that courts should consider when weighing a foreign government's statements, including "the statement's clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency with past statements; and any other corroborating or contradictory evidence."[169] The brief then noted that the Second Circuit disregarded other relevant materials, including China's representation to the W.T.O. that it had given up export administration of vitamin C.[170] Further, the brief disagreed with the Second Circuit's interpretation of the previous case law, arguing that not "every submission by a foreign government is entitled to the same weight."[171] Last but not least, the brief disputed the Second Circuit's concerns about reciprocity, stating that the United States has never argued before foreign courts that they are bound to accept its characterizations of U.S. law.[172]

The final decision of the U.S. Supreme Court was exactly in line with that proposed by the executive branch. In fact, the reasoning and arguments in the Court's final ruling were strikingly similar to those proposed in the government's amicus brief, and in some places it seems to be copied verbatim.[173] Such strong

161. Reply to Brief in Opposition, *supra* note 159, at 12 ("Five circuits each employ five distinct versions of such a 'balancing test,' each considering anywhere from three to ten factors.").

162. Shepard Goldfein & James Keyte, *Vitamin C Litigation: Window into Trump White House International Relations?* N.Y.L.J. (July 18, 2017), http://www.law.com/newyorklawjournal/almID/1202793176725/?slreturn=20170931015948.

163. *See* United States' Amicus Brief in *Vitamin C Case*, *supra* note 60, at 9.

164. *Id.* at 6.

165. *Id.*

166. *Id.* at 6–7.

167. *Id.* at 7.

168. *Id.* at 8.

169. *Id.*

170. *Id.* at 10.

171. *Id.* at 11.

172. *Id.* at 11–12.

173. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1867–75 (2018). Just as the government did, the Court first referred to Rule 44.1, arguing that federal courts should treat foreign law as a question of law rather than a question of fact, and that courts are entitled to consider other

resemblance between the Supreme Court's decision and the amicus brief shows that the Court adopted a highly deferential approach to the executive branch in deciding this case. This represents a fundamental shift from the previous case law, in which courts tended to focus on the factual issue of whether a foreign sovereign had compelled the cartel. As will be illustrated in Part IV, facts are often messy and difficult to ascertain. Even when a foreign government has appeared in U.S. courts to offer its interpretation of its own law, courts still struggle to define a limit for determining whether the foreign sovereign's involvement constituted compulsion.

IV. THE JUDICIAL CHALLENGE WITH EXPORT CARTELS

Against the backdrop of the *Vitamin C Case*, I now explain why the focus on factual evidence of a foreign sovereign's involvement in export cartels has posed a perennial challenge to U.S. courts deciding such cases. To cope with such challenges, I propose a legal framework of comity analysis for courts to optimally respond to export cartel cases, particularly when the facts are uncertain and difficult to discern.

A. Judicial Frustrations with Facts

In export cartel cases, a focal point of the litigation is the issue of whether foreign sovereign compulsion exists. This problem frequently poses a significant challenge for courts, since the information gap between the exporting country and the importing country is often very wide. Cartels are often conducted secretly and it is difficult to obtain evidence of the cartel's formation. Moreover, because export cartels are organized extraterritorially, it is even more difficult for the importing countries to detect the existence of such cartels. When defendants attempt to invoke a comity-related defense, U.S. courts and agencies face the additional task of understanding foreign laws and legal practices. The Second Circuit highlighted some of these challenges in its opinion on the *Vitamin C Case*. For instance, the court observed that Chinese law is less transparent than that in the United States and other countries.[174] Moreover, the court also noted that the Chinese legal system is distinct from the U.S. system, and that it has a vast regime of administrative regulation.[175] It found that the plain language of

materials or sources in ascertaining foreign law. The Court also outlined a number of considerations in evaluating the foreign government's submission, and they are almost the same as those outlined in the government's amicus brief. The Court similarly was persuaded by the goverenment's observation that the Second Circuit had improperly disregarded other evidence, noting China's submission to the WTO that it had given up export administration of vitamin C at the end of 2001. The Court further noted that the Second Circuit had misperceived its decision in *United States v. Pink*, stating that the outcome of *Pink* was grounded on the specific circumstances of that case. Additionally, the Court pointed out that the United States had never demanded that foreign courts be bound to treat its characterizations of U.S. laws as conclusive so reciprocity should not be a concern. In the end, the Court referred to two international treaties—the European Convention on Information on Foreign Law and the Inter-American Convention on Proof of and Information on Foreign Law, both of which were also quoted in the amicus brief of the executive branch.

174. *In re* Vitamin C Antitrust Litig. (*Vitamin C III*), 837 F.3d 175, 190 (2d Cir. 2016) (quoting *In re* Vitamin C Antitrust Litig., 584 F. Supp. 2d 546, 559 (E.D.N.Y. 2008)).

175. *Id.*

the government's directive may not accurately reflect Chinese law, especially considering the need for translation and the understanding of the term of arts in the Chinese system.[176] When the foreign government has not imposed any mandatory law, there is further ambiguity as to whether the government has actually compelled the action.

In practice, there have been two means through which courts have tried to fill the information gap. One is through trial discovery. However, factual evidence is often ambiguous due to the covertness of the cartels and, sometimes, the foreign state's deliberate attempt to disguise its imposition of export restraints to avoid potential trade violations. When foreign sovereigns appear in court to provide their own characterization of their law, judges also differ significantly in deciding the degree of deference to afford such foreign statements.

1. The Difficulty of a Fact-Specific Approach

Trial discovery is the essential means for a fact-specific approach. But trial discovery is a costly and lengthy process. Moreover, ambiguities abound as to the authority of the government's directive and the severity of the sanctions. As Spencer Weber Waller acutely observed: "[t]he interaction between governments and private firms can be understood as a spectrum, ranging from sanctions to purely voluntary requests with no sanctions at all."[177] In practice, U.S. courts have been unclear about the required threshold for a foreign sovereign's involvement in the cartels and have taken divergent approaches to deciding these cases.[178]

The complex factual circumstances of the Chinese *Vitamin C Case* offer a good illustration of the difficulties faced by courts in trying to uncover the conditions of compulsion. There is no doubt that the Chamber was closely involved and facilitated the formation of the cartel, but it is not entirely clear whether the government had compelled the cartel. MOFCOM claimed that the Chamber was government-supervised and that the appointment of its staff was government-controlled.[179] It described the Chamber as "the instrumentality through which the Ministry oversees and regulates the business of importing and exporting medicinal products in China."[180] However, plaintiffs challenged the Ministry's position, arguing that the Chamber was only a non-governmental organization independent from the government.[181] To buttress their claims, the plaintiffs submitted evidence of the Chinese government's previous public

176. *Id.* at 190–91 (quoting *In re* Vitamin C Antitrust Litig. (*Vitamin C II*), 810 F. Supp. 2d 522, 542 (E.D.N.Y. 2011)).

177. *See* Spencer Weber Waller, *Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond*, 14 LAW & POL'Y INT'L BUS. 747, 795 (1982).

178. *See* Bradshaw et al., *supra* note 9.

179. *In re* Vitamin C Antitrust Litig. (*Vitamin C II*), 810 F. Supp. 2d 522, 551 n.37 (E.D.N.Y. 2011).

180. *Id.*

181. *Id.*

statements extolling the independence of the Chamber.[182]

Another vexing issue is the difficulty for a court in drawing the line between voluntary and compulsive conduct. For instance, upon learning that the EU was contemplating anti-dumping actions against the Chinese producers of vitamin C in the fall of 2011, MOFCOM gave specific instructions to the Chamber to organize firms to take active steps to avoid potential anti-dumping challenges.[183] The Chamber subsequently coordinated a meeting with the defendants.[184] However, there is no indication in the minutes of the meetings that the Chamber had compelled these defendants to abide by a minimum export price.[185] Rather, according to the court's findings, the minutes suggest that the agreement among them was voluntary.[186]

Further, there was confusion as to whether the Chamber was able to successfully enforce the price scheme, as claimed by MOFCOM in its brief submitted to the district court, given the lack of clear penalties and sanctions for non-compliance. The district court pointed out several ambiguities in MOFCOM's official statements that raised doubts about the government's compulsion.[187] For instance, the briefings and discovery revealed that firms were entitled to export vitamin C even if they were not members of a subcommittee of the Chamber.[188] During a meeting held by the Chamber, a representative from MOFCOM admitted that the government's regulation of the vitamin C industry "ha[d] not been very successful."[189] In addition to "maximizing their profits," he urged the companies to also "consider the interest of the state as a whole." [190] There was also evidence showing that those manufacturers who deviated from the agreed minimum price did not incur any punishment.[191]

Additionally, there was confusion as to whether the parties actually went significantly above the quoted price.[192] 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, and the Ministry in practice did not intervene.[193] Therefore, the court believed that any compulsion was limited to avoiding anti-dumping and below-cost pricing.[194] The district court noted that the Chinese government had asserted in the W.T.O. proceedings that it had repealed the price restraint system and ceased to impose penalty as of

182. *Id.*
183. *Id.* at 534.
184. *Id.*
185. *Id.* at 533 n.11.
186. *Id.* at 534.
187. *Id.* at 557.
188. *Id.*
189. *Id.* at 534.
190. *Id.*
191. *Id.* at 536.
192. *Id.* at 560-561.
193. *Id.* at 561.
194. *Id.* at 560–61.

May 28, 2008.[195] The Chinese government also asserted in the W.T.O. proceedings that it had given up the "export administration" of vitamin C as of January 1, 2002.[196] This apparently contradicts MOFCOM's position in the vitamin C litigation.[197] All these factual inconsistencies ultimately led the district court to refuse to defer to MOFCOM's statements.[198] In its denial of summary judgment, the court described MOFCOM's 2009 statement as "a carefully crafted and phrased litigation position."[199] The district court even portrayed MOFCOM's assertion of compulsion as "a post-hoc attempt to shield defendants' conduct from antitrust scrutiny."[200]

The difficulty of a factual inquiry into compulsion is not unique to cases involving Chinese exporters. Since the 1980s, the Japanese government has used administrative guidance, a common administrative scheme applied by the MITI, to actively encourage the formation of export cartels.[201] Administrative guidance per se is not government regulation, the enforcement of which does not necessitate legal authority.[202] Rather, it refers to the function of an administrative agency to persuade and guide a party to conduct its business in a certain way.[203] According to Japanese trade specialists, administrative guidance is "the core around which all the legal measures for export control revolve."[204] Administrative guidance has worked well in Japan, and the MITI has been very successful in achieving compliance with its administrative requests.[205]

At least two factors have contributed to its success. First, Japanese culture places an emphasis on cooperation and avoidance of direct conflicts.[206] Moreover, Japanese industries usually comply with such informal requests and guidance.[207] Second, some Japanese administrative agencies enjoy a wide range of statutory powers.[208] For example, during the 1980s, the MITI, the agency in charge of overseeing international trade in Japan, was responsible for enforcing about 130 statutes encompassing a wide variety of administrative matters from trade to safety standards to pollution control.[209] Businesses thus feared retaliation

195. *Id.* at 527.

196. *Id.* at 532.

197. *Id.* at 552 ("China's representation to the WTO that it gave up 'export administration . . . of vitamin C' as of January 1, 2002 is further reason not to defer to the Ministry's position. Although many of the public statements cited by the Stern Report are, as the Ministry asserts, simply general descriptions of the current status of China's economy and China's transition toward a market economy, the Ministry makes no attempt to explain China's representations that it gave up export administration of vitamin C, which appear to contradict the Ministry's position in the instant litigation.").

198. *Id.* at 552.

199. *Id.*

200. *Id.*

201. Lochmann, *supra* note 64, at 146.

202. *Id. See also* Mitsuo Matsushita, *The Legal Framework of Trade and Investment in Japan*, 27 HARV. INT'L L.J. 361, 376 (1986).

203. Lochmann, *supra* note 64, at 146.

204. Matsushita, *supra* note 202, at 375.

205. Lochmann, *supra* note 64, at 146.

206. *Id.*

207. *Id.* at 146–47.

208. Matsushita, *supra* note 202, at 377.

209. *Id.*

from the MITI should they fail to comply with its directives.[210] According to Japanese scholars, a refusal to comply with administrative guidance may provoke the government to establish formal requests or even cause businesses to face unfavorable treatments in various ways.[211] This poses difficulties even for Japanese courts in deciding whether such compliance with administrative guidance is a valid defense for violations of Japanese antitrust laws.[212]

Matsushita Electric offers another example of the challenges that courts have faced in trying to define the boundary between voluntary and compulsive conduct.[213] In this case, a group of U.S. television producers attacked a number of Japanese companies, alleging that they had conspired with one another to monopolize the U.S. market by selling televisions at artificially low prices. However, after an eight-year discovery period, during which the parties produced thousands of documents and took hundreds of depositions, the Third Circuit was still unable to determine whether the cartel was compelled by the Japanese government or initiated by the companies of their own accord.[214] Since the Third Circuit was unable to find that the MITI had imposed a mandatory price restraint on the exporters, it held that the Japanese regulatory scheme "merely provide[d] an umbrella" that allowed for the domestic antitrust exemption.[215] The court found ample evidence demonstrating that the defendants departed from the agreed prices in an attempt to conceal their actions from the MITI.[216] Yet the court was unable to identify any evidence showing that the defendants' collusion had originated with the compulsion of the Japanese government; in fact, it concluded that the defendants' conduct had violated Japanese domestic law.[217] The case was appealed to the U.S. Supreme Court.[218] However, the Supreme Court reversed and remanded the case, and bypassed the opportunity to address the issue of compulsion in its final ruling.[219]

As illustrated in the *Vitamin C Case* and *Matsushita Electric*, the challenges for courts in taking the fact-specific approach lie in the inherent difficulty of identifying the extent of State control over domestic companies.[220] On the one hand, even if the State imposes a mandatory export restraint over its own companies, it may fail to coordinate an export cartel. After all, firms that participate in a cartel may have incentives to cheat in order to line their pockets. Thus, the effectiveness of the State's policing system directly impacts the success of the State-led cartel. On the other hand, the State is no ordinary legal

210. *Id.*
211. Lochmann, *supra* note 64, at 147–48
212. *Id.*
213. *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 315 (3d Cir. 1983).
214. United States' Amicus Brief in *Matsushita Electric*, *supra* note 104.
215. *In re* Japanese Elec., 723 F.2d at 315.
216. *Id.*
217. *Id.*
218. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 471 U.S. 1002 (1985).
219. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 598 (1985).
220. *See* Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and Chinese Firms*, 103 GEO. L.J. 665 (2015). *See generally* Angela Huyue Zhang, *The Antitrust Paradox of China Inc.*, 50 NYU J. INT'L L. & POL. 159 (2017) (discussing the European Commission's treatment of common ownership in Chinese SOEs in the energy sector).

actor. Even if the State does not issue any binding administrative law or order, it can threaten to penalize a firm if the firm does not voluntarily comply with the State's request. In other words, the State could have de facto control over the firms, even without clear de jure control. In the *Vitamin C Case*, neither MOFCOM nor any other government department imposed a mandatory requirement on the Chinese manufacturers to coordinate prices, but the Chinese government may have been able to obtain de facto control over these exporters via other administrative means. However, the extent of such de facto control is very difficult for a court to discern through discovery.

2. *The Shortcut of Deference*

The other means by which the U.S. courts can fill in the information gap is to rely on the foreign sovereign's interpretation of its own law. The simplest way for the exporting country to convey information to the United States is by directly communicating with it. But in a game of strategy, players may be concerned that the other is mendacious or may not take them at their words. If the exporting country and the United States have perfectly aligned interests, then direct communication can be successful. If the exporting country confesses to having compelled the export cartel, then the United States should grant immunity to the exporters. If, on the other hand, the exporting country denies compulsion, the United States should deny immunity to the exporters accordingly. In most circumstances, however, the exporting country and the United States may not have perfectly aligned interests; they may have only partially aligned interests or even completely conflicting interests. Moreover, in the game between the exporting country and the United States, the former may have an incentive to protect its domestic manufacturers who have solicited government statements in the hope of receiving immunity from antitrust liabilities. This is especially true if the direct communication from the exporting country has zero or negligible direct cost, which is known as "cheap talk" in economics.[221] The United States is aware of such incentives for foreign governments to lie and, thus, will not fully trust the words of the exporting country.

At the same time, a foreign government that has imposed export restraints, either formally or informally, on domestic producers would have the incentive to admit that it has imposed export restraints and coordinated the export cartels. The Chinese *Vitamin C Case* offers a case in point. Without question, such an admission carries some cost for China; however, it can potentially also help Chinese exporters evade antitrust violations. The Chinese government and Chinese exporters are engaged in a repeated game. As such, the players will interact with each other in the future, and they will need to consider the impact of their current action on the future actions of other players. If the Chinese government refuses to defend its domestic firms in U.S. courts, it would lose its credibility among Chinese exporters. Knowing that the government would not bail them out from antitrust liabilities, the exporters would be less likely to

221. *See generally* Joseph Farrell & Matthew Rabin, *Cheap Talk*, 10 J. ECON. PERSPS. 103 (1996) (describing the goals and outcomes of communications that do not directly affect payoffs).

comply with the government's instructions in the future. To appear credible and reliable, the Chinese government is disposed to defend Chinese manufacturers. This is not to say that the Chinese government may not have an incentive to shield its domestic manufacturers from antitrust liabilities even if it has not really imposed such export restraints.[222] However, other things being equal, the Chinese government is strongly inclined to defend its own firms in cases of genuine State-led export cartels, as the failure to do so will hurt its credibility among domestic exporters.

Before the Supreme Court's decision in the *Vitamin C Case*, case law was unclear as to the legal weight of a characterization of foreign laws by their governments. In its *United States v. Pink* decision in 1942, the Court considered a case regarding the extraterritorial reach of a decree nationalizing Russia's insurance business.[223] The Court regarded the Russian government's declaration as conclusive evidence of the effects of the decree and did not stop to review other evidence.[224] Several courts, including the Third Circuit and the Fifth Circuit, applied *Pink* to declare that official declarations from foreign governments must be accepted as "conclusive."[225] Meanwhile, the Department of Justice and the Federal Trade Commission held that such foreign statements are sufficient to establish compulsion, stating that "the representation must contain enough detail to enable the Agencies to see precisely how the compulsion would be accomplished under foreign law."[226]

On the other hand, many lower courts continued to hold that such statements need not be accepted as conclusive. For instance, the Sixth Circuit[227] and D.C. Circuit[228] have performed independent analyses of foreign law, regardless of a foreign sovereign's contrary arguments.[229] The Eleventh Circuit held that while a foreign government's amicus brief is a logical place to look for reliable and accurate information, it is not entitled to conclusive deference.[230]

---

222. *See* Martyniszyn, *supra* note 5, at 307 (observing that foreign export firms may lobby their home States to secure an ex post statement to the effect that they were compelled by the government to fix prices).

223. United States v. Pink, 315 U.S. 203 (1942).

224. *Id.* at 218–20.

225. D'Angelo v. Petroleos Mexicanos, 422 F. Supp. 1280, 1284 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977) ("The principle of *Pink* requires this Court to accept the opinion of the attorney general of Mexico as an official declaration by that government that the effect of the expropriation decree was to extinguish Papantla's royalty and participating rights in the expropriated oil."); *see also* Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1363 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000) (explaining that the Department of Justice of the Republic of the Philippines submitted an opinion articulating the scope and effect of a law of the Philippines and such statements were accepted as conclusive).

226. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION § 4.2.2 (Jan. 13, 2017).

227. Chavez v. Carranza, 559 F.3d 486, 495–96 (6th Cir. 2009) (rejecting the argument that the Sixth Circuit was bound to defer to the arguments filed in the Republic of El Salvador's amicus brief).

228. McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F.3d 1101, 1108–09 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 941 (2002), *vacated in part on other grounds*, 320 F.3d 280 (D.C. Cir. 2003) (rejecting Iran's contention that its corporate law requires shareholders to physically appear at the firm's office to collect dividends).

229. Reply to Brief in Opposition at 6, *In re* Vitamin C Litig., 584 F. Supp. 2d 546, 550 (E.D.N.Y. 2008) (No. 16-1220).

230. United States v. McNab, 331 F.3d 1228, 1241 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004).

The Seventh Circuit has also applied a flexible standard of deference. In *In re Oil Spill by the Amoco Cadiz*, the court deferred to a foreign sovereign's proffered interpretation of its own law only because the foreign government had appeared in federal court and its interpretation was both plausible and consistent with its stated views throughout many years of domestic and international litigation on the subject. [231] Similarly, in a previous decision relating to statements by the Indonesian government, the Second Circuit concluded that the government's amicus brief was entitled to substantial deference but did not take it as conclusive evidence of compulsion.[232] Notably, this ruling contrasts with its reasoning in the *Vitamin C Case*, in which the Second Circuit firmly held that a U.S. court is bound to defer to the statements of a foreign government when it "directly participates in a U.S. court proceeding," and its interpretation is "reasonable under the circumstances presented."[233]

Even though the Supreme Court's decision in the *Vitamin C Case* has clarified that U.S. courts are not bound to treat such statements as conclusive, the question remains: when the factual evidence is ambiguous, how should courts set the benchmark for determining whether a foreign sovereign's involvement in the cartel has risen to the level of compulsion? As explained below, the judicial focus on facts tends to obscure the fundamental question of whether granting a comity-based defense to the foreign exporters is in fact in the best interest of the United States.

B. The Optimal Judicial Response

As illustrated by the U.S. government's contrasting stance in regard to Japanese export cartels in the 1980s and in the recent *Vitamin C Case*, the optimal response to export cartels is not fixed as a specific formula. Rather, it is contingent upon the changing political and economic conditions. Thus, U.S. courts should be aware of the risks that their judgments in State-led export cartel cases could create for international relations, especially when the underlying factual circumstances are unclear. However, courts are not institutionally well equipped to make such a cost-benefit analysis. 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.[234] 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.

Indeed, in cases involving foreign relations, U.S. courts have traditionally

---

231. *In re* Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1312–13 (7th Cir. 1992).

232. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 92 (2d Cir. 2002).

233. *In re* Vitamin C Antitrust Litig. (*Vitamin C III*), 837 F.3d 175, 189 (2d Cir. 2016).

234. Chief Justice Diane P. Wood, Keynote Speech: What's the Role of Comity in the International Antitrust Enforcement?, *in* CONCURRENCES REVIEW & GW LAW, EXTRATERRITORIALITY OF ANTITRUST LAW IN THE UNITED STATES AND ABROAD: A HOT ISSUE 4 (Sep. 28, 2015), https://www.ropesgray.com/-/media/Files/articles/2015/December/20151201_GW_Brouchure_Antitrust.pdf?la=en&hash=BCF6099DDDE0613C06963EA535658E4AF7B9AF6C.

accorded a high level of deference to the executive branch, which is in a superior position to determine strategies for the United States in such cases.[235] Prominent legal scholars including Eric Posner and Cass Sunstein have proposed extending the *Chevron* deference doctrine to executive actions related to international affairs.[236] In a seminal article, they argue that U.S. courts should only defer to foreign sovereigns' interests after a careful assessment of the consequences.[237] More specifically, they observe that the cost of deference is the loss of American control over certain regulatory activities.[238] In the context of export cartels, granting immunity to foreign producers on the basis of comity implies that the United States would cede control over antitrust regulations, compromising the interests of U.S. consumers. On the other hand, Posner and Sunstein also suggest that the benefits of deference include reciprocal gains from the foreign government's deference to American regulations and the reduction of potential tension with the foreign country.[239] In the context of export cartels, there could be other benefits, such as the bailing out of failing domestic producers and the sheltering of them from foreign competition, as illustrated in the Japanese export cartel cases.

This approach of deferring to the executive branch would greatly simplify the current case law, which has focused too narrowly on the foreign sovereign compulsion issue. As shown in the Japanese export cartel cases, a foreign sovereign's involvement in the cartels may not even be relevant. Indeed, in certain political and economic circumstances, it might be in the best interest of the United States to encourage export cartels. In fact, the U.S. government concluded a number of VER agreements directly with foreign steel producers in the 1960s, bypassing their governmental counterparts. Nor is the appearance of the foreign sovereign in the U.S. court necessarily decisive, as shown in the *Vitamin C Case*. The deference analysis ultimately turns on the government's determination of whether the harm on foreign relations as a result of the refusal to defer to the foreign government will outweigh the harm done to domestic consumers if foreign producers are exempt from antitrust litigation.

In practice, in cases involving State-led export cartels, the executive branch may have already initiated actions against the foreign sovereign or the foreign exporters, either through trade or antitrust. Therefore, U.S. courts' optimal responses should not be static, rather, they must take into account the specific steps the executive branch has undertaken with regard to the export cartels. More specifically, I propose the following legal framework of comity analysis when

---

235. *See* Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law,* 116 YALE L.J. 1170, 1202 (2007) ("[Courts] say that the executive has expertise and flexibility, can keep secrets, can efficiently monitor developments, and can act quickly and decisively; the other branches cannot."); *see also* Daniel Abebe & Eric Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 508 (2011).

236. *See* Posner & Sunstein, *supra* note 235, at 1204–05 (arguing that the executive is well-placed to resolve difficult foreign policy questions requiring judgments of policy and principle, and that the judiciary should defer to the executive based on its foreign policy expertise).

237. *Id.* at 1186.

238. *Id.*

239. *Id.*

courts face inconsistent and ambiguous factual evidence in export cartel cases.

Scenario 1. Has the executive branch brought suit against the foreign exporters for antitrust violations? The executive branch is in a superior position to weigh the costs and benefits of its actions on foreign relations. Therefore, its decision to initiate an antitrust suit sends a strong signal that it deems the challenged conduct to be more harmful to the United States than the corresponding harm to foreign relations from the antitrust lawsuit.[240] If a U.S. court endorses a comity-based defense in such a circumstance, it would directly conflict with the position of the executive branch and undermine the government's efforts to protect domestic consumer welfare.

Scenario 2. Has the executive branch negotiated with the foreign sovereign to impose export restraints to accommodate the desires of the United States? If so, U.S. courts should refrain from reaching a ruling that might undermine the efforts of the U.S. executive branch. Under unique political circumstances, the United States could negotiate for VER agreements to avoid potentially more drastic legislative responses to foreign exports. Foreign governments may not agree to coordinate with the U.S. government unless the latter gives adequate assurances that comity defense would be available, and exporting companies would not be found liable under U.S. antitrust law. In such a circumstance, a comity-based defense such as foreign sovereign compulsion is of critical importance for the United States and the foreign governments to establish the VER agreements.

Scenario 3. Has the U.S. government tried to persuade the foreign sovereign to abandon export restraints via diplomatic means or through other multilateral treaty networks, such as the W.T.O? As diplomacy and trade are nimbler and more efficient than antitrust litigation in resolving conflicts between exporting and importing countries, U.S. courts should refrain from making decisions that might impede such efforts. Indeed, in *Resco Products*, the U.S. district court suspended the antitrust suit to await the resolution of such disputes through diplomatic means or trade remedies.

Scenario 4. If the executive branch has not taken any action through trade or antitrust, U.S. courts are well advised to solicit opinions from the executive branch. In the *Vitamin C Case*, the Second Circuit chose to defer to MOFCOM's statements for fear of creating international tension with the Chinese government. The Second Circuit however, had attempted to make such a judgment on international relations on its own. As the executive branch's amicus brief to the Supreme Court revealed, in this case, the executive branch did not appear to believe that the harms of not granting deference to the Chinese government outweighed American interests in the prosecution of antitrust violations. In this regard, the Supreme Court made exactly the right move by proactively soliciting opinions from the executive branch before making its final decision.

240. United States' Amicus Brief in *Matsushita Electric*, *supra* note 104, at 23.

CONCLUSION AND IMPLICATIONS

In this Article, I attempt to draw upon the insights from game theory to unravel the complicated dynamics between the importing and exporting country in export cartel cases. In deciding on how to respond to State-led export cartels, the United States does not act alone. Its choices closely interact with the decisions of the exporting country, whose conduct implicates the interests of the United States. The optimal strategy of the United States is contingent on the strategy of the exporting country, whose strategy is also dependent on both the United States' and its own domestic politics and trade policy. Accordingly, the United States' best response to a State-led export cartel not only turns on a calculation of its own payoffs from competition, trade, and politics, but also on a careful assessment of the strategic moves of the exporting country. Comity analysis, therefore, needs to be robust enough to accommodate and adapt to changing economic and political circumstances.

However, much of the judicial response to State-led export cartels has been static, and judges have failed to appreciate the dynamic features of these cases. Judges have also tended to fix their attention on the factual issue of compulsion, while giving inadequate consideration to other dimensions, such as trade and politics. But whether a U.S. court should abstain from exercising its jurisdiction and defer to the interests of the foreign sovereign should depend on the specific circumstances of the particular case, taking into consideration the interests of all players involved, while recognizing the strategic nature of their decision-making. Because the executive branch is in the best position to reconcile competing interests, I contend that U.S. courts should accord a high level of deference to the executive branch in cases involving State-led export cartels. The Supreme Court's recent decision in the *Vitamin C Case*, in which the Court appears to have accorded deference to the executive branch, offers a prime example of a pragmatic judicial resolution of such cases. Viewed in this light, the Supreme Court's decision not only represents a major step forward in clarifying the existing case law on export cartels but also signals the judicial trend towards deference with regard to future comity-related cases.