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SOVEREIGNTY-BASED DEFENSES IN ANTITRUST CASES AGAINST CHINESE MANUFACTURERS: MAKING ROOM FOR DIPLOMACY

INTRODUCTION

Two-thousand eight was a year of firsts for the Chinese government. China hosted the Olympics for the first time; its first comprehensive competition legislation (the “Anti-Monopoly Law”) took effect; and a U.S. court refused to dismiss the first U.S. antitrust suit against Chinese manufacturers, despite the Chinese government’s first appearance as *amicus curiae* before a U.S. court on the manufacturers’ behalf. These last two “firsts” are particularly important since they may signal an incoming tide of U.S. antitrust suits against Chinese manufacturers in response to China’s increasing dominance in many global industries.

Antitrust suits against Chinese exporters present U.S. courts with special challenges due to China’s continuing transition from a centrally planned to a market economy and the resulting upheavals in the country’s legal, economic, and regulatory systems. Chinese policymakers have recently begun to accept the principle that competition is a necessary engine of economic growth, as evidenced by China’s newly enacted Anti-Monopoly Law (“AML”).¹ Furthermore, as part of an effort to reduce government control over many sectors, China has removed some powerful ministries from direct administration by the state and replaced them with so-called “trade associations” or “chambers of commerce,” groups that play an important role in influencing the pricing decisions of otherwise private entities.²

While China instituted these reforms in the name of increased competition, a deeply embedded economic culture of price coordination and skepticism about the merits of competition is unlikely to be upended so easily. For instance, while the term “trade association” may signify an independent industry-run organization in the United States, the Chinese trade associations retain close ties to the official state apparatus. Thus,

1. See Bruce M. Owen, Su Sun & Wentong Zheng, *China’s Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 232 (2008) [hereinafter Owen, Sun & Zheng, *China’s Competition Policy Reforms*].

2. See *id.* at 240; see also Jonathan Palmer, *China’s Landmark Anti-Trust Law*, LEXISNEXIS EMERGING ISSUES ANALYSIS, July 19, 2008, at 5, available at LEXIS, 2008 Emerging Issues 2558 (noting the common practice of trade associations to become enmeshed in the pricing decisions of their members).

there is potential for much confusion over the nature of the trade associations, and whether pricing decisions of their members, ostensibly private entities, are truly voluntary. Against this complex regulatory backdrop, Chinese manufacturers have steadily gained a stronger foothold in world markets. Perhaps unsurprisingly, this success recently attracted the filing of several prominent U.S. antitrust cases alleging that Chinese manufacturers and their trade associations participated in price-fixing schemes aimed at inflating prices for the U.S. market.³

The ambiguities in China's changing regulatory structure and the state's involvement in pricing decisions open the door for Chinese manufacturers to test the use of special defenses based on respecting the sovereignty of foreign states—namely, the doctrines of Act of State, Comity, and Foreign Sovereign Compulsion. Whether U.S. federal courts will give broad latitude to such defenses in a trial on the merits remains to be seen, but a preliminary decision in a case against vitamin C manufacturers, *In re Vitamin C Antitrust Litigation*, could be an important predictor of the success of a new wave of antitrust cases against Chinese manufacturers. This Note argues that in cases where the Chinese government's role in anti-competitive acts is at least ambiguous, U.S. courts should construe sovereignty-based defenses broadly in order to make room for diplomacy and serve important policy considerations.

Part I of this Note discusses the changing nature of China's antitrust regime from a regulatory and legal standpoint. Part II provides an overview of the Act of State, Foreign Sovereign Compulsion, and Comity doctrines. Part III reviews the assertion of these doctrines as defenses and their treatment by a federal district court in *In re Vitamin C Antitrust Litigation*. Part IV analyzes the various policy considerations that should inform a court's decision about whether to allow such defenses in ambiguous cases. Finally, Part V attempts to highlight lessons learned from the current litigation and suggests best practices for Chinese manufacturers, the Chinese government, and the federal courts going forward.

3. See, e.g., *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008); *Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, 596 F. Supp. 2d 842 (D.N.J. 2008); see also Owen, Sun & Zheng, *China's Competition Policy Reforms*, *supra* note 1, at 250 n.53 ("The antitrust problems associated with [China's] competition-limiting policies [for its export industries] were perhaps first brought to the attention of the Chinese policy makers by three antitrust lawsuits filed in the United States in 2005 and 2006 alleging price fixing by Chinese exporters of vitamin C, magnesite, and bauxite.").

I. CHINA'S CHANGING ANTITRUST REGIME

In the late 1970s, China began a historic transformation from a centrally planned, socialist economy to a more open, market-oriented economy.⁴ Under the centrally planned system, government ministries for each major industry coordinated production schedules and set prices, and no real “competition” occurred since all the industries were comprised of state-owned enterprises (“SOEs”).⁵ During the reform period, the government retained SOEs in certain critical industries, but relinquished ownership of others that were deemed less important for the government to control directly.⁶ In these newly privatized industries, China established “trade associations” or “chambers of commerce” with regulatory and coordination authority to replace the government ministries.⁷ However, this attempt at deregulation was not completely successful in separating the private sector from government control. As one commentator put it, “in reality many of the [trade] associations thus organized are little more than government ministries in disguise,” which “often sanction anticompetitive practices by their members.”⁸ Although confusingly designated as “social organization[s]” under Chinese law, the trade associations did not spring up at the election of private industry, as the term might suggest.⁹ Rather, the trade associations are mandated and largely controlled by the government, making them, in practice, more akin to government instrumentalities.¹⁰

4. See Kevin X. Li & Ming Du, *Does China Need Competition Law?*, J. OF BUS. L., Mar. 2007, at 183, 184.

5. Bruce M. Owen, Su Sun & Wentong Zheng, *Antitrust in China: The Problem of Incentive Compatibility*, 1 J. COMPETITION L. & ECON. 123, 129 (2005) [hereinafter Owen, Sun & Zheng, *Antitrust in China*].

6. Owen, Sun & Zheng, *China's Competition Policy Reforms*, *supra* note 1, at 240 (stating that industries deemed “essential” to the economy and development of the nation include “electricity, petroleum, banking, insurance, railroads, and aviation”).

7. *Id.*

8. Owen, Sun & Zheng, *Antitrust in China*, *supra* note 5, at 130.

9. Brief of Amicus Curiae The Ministry of Commerce of the People's Republic of China in Support of the Defendants' Motion to Dismiss the Complaint at 8, In re Vitamin Antitrust Litig., 584 F.Supp. 2d 546 (E.D.N.Y. 2008) (No. 06-MD-1730) [hereinafter Ministry Amicus Curiae Brief].

10. See *id.* at 9 (“The Ministry's authority over the Chamber [of Commerce] is plenary: covering such aspects as the Chamber's selection of its leaders, its personnel management system, its budget and accounting systems and its salary structure In short, the Chamber is the instrumentality through which the Ministry oversees and regulates the business of importing and exporting medicinal products in China.”).

To accompany this rapid economic restructuring, China soon recognized that laws addressing competition and monopolization would be necessary under a more open system.¹¹ The piecemeal institution of the initial laws and administrative rules, however, failed to have a pervasive effect on curbing anticompetitive practices, due in part to a lack of implementing mechanisms and irregular enforcement dispersed among various government agencies.¹² In the early 1990's, economic reforms really began to gather speed following the Communist Party's official declaration that its "central goal" was to "establish a 'socialist market economy.'"¹³ Thus, the fledgling private sector began rapidly gaining market share in the absence of cohesive antitrust laws or predictable enforcement.¹⁴ In 1994, China sought to remedy the inefficiencies, inconsistencies, and gaps in the existing patchwork of rules by actively pursuing the drafting of its first comprehensive competition law, the AML.¹⁵

Drafting the AML proved a difficult and lengthy task given the highly controversial nature of "competition" as a policy goal in the eyes of many Chinese policymakers.¹⁶ These policymakers and academics believed that the main problem with the economy was "excessive" competition, not a lack of competition.¹⁷ This view was fueled by the experience of several domestic industries in which intense competition led private enterprises to cut prices below costs, sometimes via illegal tactics.¹⁸ Skeptics of competition law feared—perhaps understandably—

11. See Li & Du, *supra* note 4, at 184. Previously, the economy was made up of SOEs whose production was determined by government plan, rather than the rules of supply and demand. *Id.* at 183. Therefore, the "socialist planned economy left no room for the competitive process to operate in general, and competition law was irrelevant." *Id.*

12. See *id.* at 184; see also Owen, Sun & Zheng, *China's Competition Policy Reforms*, *supra* note 1, at 236 ("China's antitrust laws and regulations prior to the AML were fragmented, vague, and repetitive, and the effectiveness of antitrust enforcement was hampered by the existence of multiple enforcement agencies authorized by different laws.").

13. Owen, Sun & Zheng, *China's Competition Policy Reforms*, *supra* note 1, at 239.

14. *Id.*

15. *Id.* at 232.

16. In fact, the drafting process took about thirteen years. Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, THE ANTITRUST SOURCE, Oct. 2007, at 1, available at <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf>.

17. Owen, Sun & Zheng, *China's Competition Policy Reforms*, *supra* note 1, at 249.

18. *Id.* Some examples include travel agencies resorting to paying customers to use their services, maritime shipping companies operating at a loss, and dairy producers using illegal cost-cutting measures that resulted in health risks. *Id.* Arguably though, these acts are not "excessive" competition at all, but rather "competition going awry. Common to

that this type of race to the bottom competition among domestic entities would prevent the new Chinese private sector from being a strong player in the international market.¹⁹ Fears about excessive competition also extended to China's export sector, where excessive competition is often blamed for the fact that recently, "Chinese products have been the number one target of antidumping investigations initiated by members of the WTO."²⁰

To deal with this widely perceived problem of excessive competition, the government imposed "industrial self-discipline" and "advance approval" requirements on private enterprises.²¹ Trade associations helped to introduce "industrial self-discipline" as a way to help achieve their mandate of stabilizing markets in the newly privatized sectors, but in 1998 the practice became "officially sanctioned by the government."²² Industrial self-discipline requires "the major companies in an industry [to] reach price agreements or other agreements to limit competition."²³ This coordination is now achieved "under the direct supervision of the government."²⁴ In 2003, the Chinese government imposed an additional "advance approval" requirement for certain goods in an effort to avoid antidumping investigations and duties imposed on its exporters by foreign governments.²⁵ Under the advance approval system, trade associations must sign off on export contracts before those goods can be released for export.²⁶

Scholars have recognized that "policies such as 'industrial self-discipline' and 'advance approval,' to a large degree, function simply as

almost all is the fact that the competitors have engaged in illegal, or even criminal, acts that violate the existing competition laws, product safety laws, and consumer protection laws or would have violated the AML were it in effect." *Id.* at 251. It is not surprising that a market undergoing such rapid transformation would experience some disarray in pricing as new companies attempt to establish a foothold in the newly formed private sector, particularly since before 1978, "the government . . . set prices for almost all goods and services." Owen, Sun & Zheng, *Antitrust in China*, *supra* note 5, at 126–27.

19. Owen, Sun & Zheng, *China's Competition Policy Reforms*, *supra* note 1, at 249 ("What China needs, they believe, is to consolidate the smaller companies into bigger and stronger ones that can compete in the international markets.").

20. *Id.* at 248.

21. *Id.* at 249.

22. *Id.*

23. *Id.*

24. *Id.* at 248.

25. *Id.* at 249.

26. *Id.*

government-sponsored price cartels.”²⁷ Consequently, these practices form the basis of the U.S. antitrust suit *In re Vitamin C Antitrust Litigation*, discussed, *infra*, in Section III. The irony, of course, is that while U.S. antitrust plaintiffs now claim that Chinese manufacturers are conspiring to keep prices *artificially high*, it seems that this coordinated pricing grew largely out of a desire to avoid U.S. antidumping suits where the complaint was that Chinese export prices were *artificially low*. Thus, while coordinating and enforcing a floor for export prices under these policies might have helped exporters to avoid dumping allegations, it also exposed Chinese exporters to U.S. antitrust suits based on the anti-competitive act of price-fixing.

Although practices like industrial self-discipline and advance approval show China's enduring impulse to intervene in the market, the passage of the AML represented a significant coup for pro-competition policymakers. After thirteen years of drafting, negotiations, and revisions, the National People's Congress (“NPC”) finally adopted the AML on August 30, 2007.²⁸ The law took effect on August 1, 2008.²⁹ While it is certainly a big step toward modernizing China's approach to curbing anticompetitive practices, the AML is considerably less nuanced than the advanced antitrust regimes it ostensibly sought to emulate, perhaps reflecting China's continuing ambivalence toward Western conceptions of “competition.”³⁰ Thus, many of the key decisions regarding implementation and enforcement of the AML are only now beginning to come to light

27. *Id.* The authors note that “in implementing those policies, the government apparently was unconcerned about their antitrust implication in domestic markets” until lawsuits were actually filed in the U.S. in 2005 and 2006. *Id.* This perhaps shows how strongly the government was focusing on avoiding dumping investigations by ensuring export prices were not lower than home market prices, even if it meant getting the government involved in pricing. Prior to the privatization of some SOEs, the government had little reason to become adept at anticipating antitrust enforcement in the U.S. because the government and its SOEs would likely be entitled to immunity from suit under the Foreign Sovereign Immunities Act (“FSIA”).

28. Bush, *supra* note 16, at 1. The process was infused with new urgency upon China's accession to the WTO in 2001, since many experts felt that China would need a comprehensive law in order to meet its WTO obligations. *Id.*

29. *See id.*

30. *Id.* at 2 (noting that the vagueness of the law as written “provid[es] ample textual hooks for serving alternate policy goals.”). Indeed, the enunciated aims in the AML vary from “promoting ‘efficiency’ and ‘consumer interests’ to advancing ‘fair market competition,’ ‘the public interest,’ and ‘the healthy development of the socialist market economy.’” *Id.* These goals can hardly be considered an unambiguous endorsement of Western-style antitrust goals.

through implementing regulations and the case-by-case decisions of judicial or administrative authorities interpreting AML provisions.³¹

The AML covers the three basic areas of competition law common to modern jurisdictions: merger control, monopoly agreements, and abuse of dominance.³² Prohibited horizontal monopoly agreements among peer firms include “price fixing, market division, bid-rigging, joint boycotts, technology restrictions, and other restrictive agreements.”³³ However, Article 15 of the AML provides for broad exemptions from these restrictions, including potentially worrisome “exemptions for crisis cartels, export cartels, and unspecified ‘public interests’” that could leave room for some anticompetitive practices to continue uninhibited.³⁴

In addition to these typical antitrust provisions, the AML deals with several contentious competition issues that are specific to the Chinese context, including the role played by the trade associations.³⁵ The sections covering trade associations were last-minute additions to the AML aimed at addressing concerns over recent price-fixing and market division scandals.³⁶ Article 11 specifically calls upon trade associations to “strengthen the self-discipline of industries and to lead undertakings within their respective industries to carry out lawful competition and to protect the market competition order.”³⁷ This provision seems to envision the continuation of the trade associations as market stabilizers, but throws in the word “lawful” to temper what those stabilization efforts may encompass. Even more explicitly, Article 16 provides that “industry associations shall not organize undertakings within their industries” in a

31. *Id.* at 2. See also Owen, Sun & Zheng, *Antitrust in China*, *supra* note 5, at 127 (noting that vagueness in initial antitrust statutes is not uncommon, and allows for the interpretation of the law to develop over time). In the U.S., the Sherman Act became nuanced through the development of the common law in accordance with economic theory over half a century. In China, it is possible that “administrative agenc[ies] can develop policies and procedures which, if made public and followed consistently, can provide guidance equivalent to case law.” *Id.*

32. Palmer, *supra* note 2, at 1. With regard to agreements, the AML prohibits private enterprises from engaging in three types of conduct: “anticompetitive ‘monopoly agreements,’ abuses of dominant market positions, and concentrations that are likely to eliminate or restrict competition.” Bush, *supra* note 16, at 2.

33. Palmer, *supra* note 2, at 1.

34. Bush, *supra* note 16, at 7.

35. Palmer, *supra* note 2, at 1. (“[I]ssues of specific concern in China [covered in the AML include]: (1) the abuse of administrative power; (2) protection of the state-owned sector; (3) protection of intellectual property rights; and (4) the role of trade associations.”).

36. Bush, *supra* note 16, at 10.

37. *Id.* (internal quotation marks omitted).

way that would violate the AML provisions on monopoly agreements.³⁸ The AML thus seems to acknowledge that although “China’s policymakers see a positive role of the government-agencies-turned-trade associations in regulating market order,” there remains the “risk . . . that the trade associations may cross the line and impose undue restrictions on competition or, in some cases, function as outright price cartels.”³⁹

Penalties authorized by the AML “for entering monopoly agreements and abuses of dominance include confiscation of illegal gains, fines of one percent to ten percent of the offenders’ total turnover from the preceding year, and orders to cease the offending conduct.”⁴⁰ Enterprises have some incentive to self-report misconduct and provide evidence in exchange for a reduction in or immunity from the imposition of penalties by administrative enforcement agencies.⁴¹

In sum, the AML contains many of the features one would expect from a modern competition statute, as well as some promising attempts to address problems unique to the Chinese economy and system of government, but the ultimate test of its efficacy will be in its implementation and enforcement. Thus far, enforcement under the AML has focused almost solely on merger clearance, and already the main critique is a tendency to use the AML to protect domestic competitors.⁴² It remains to be seen how the Chinese enforcement agencies and courts will treat price-fixing and other horizontal restraints on trade that may involve questioning the role of the government ministries and the trade associations in market activity.⁴³ It will certainly take time for the Chinese economy and private sector to adjust to the recent constraints imposed by China’s first comprehensive competition law.

38. *Id.* (internal quotation marks omitted).

39. Owen, Sun & Zheng, *China’s Competition Policy Reforms*, *supra* note 1, at 250.

40. Bush, *supra* note 16, at 11.

41. *Id.* Depending on how it is utilized, this provision may be similar to the highly successful leniency programs in the U.S. and elsewhere, which have facilitated many antitrust prosecutions. *Id.*

42. Oliver Antoine & Jonathan Zhou, *Chinese Enforcement Evolves*, N.Y. L.J., May 11, 2009, at 10, available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202430560684&slreturn=1&hbxlogin=1>.

43. One commentator has called the failure to enforce the AML against cartels the “elephant in the room.” *Id.*

II. OVERVIEW OF SOVEREIGNTY-BASED DEFENSES: ACT OF STATE, FOREIGN SOVEREIGN COMPULSION, AND COMITY DOCTRINES

The common thread tying together the Act of State, Foreign Sovereign Compulsion, and Comity doctrines is reluctance for the U.S. Judicial Branch to impinge on the sovereignty of other independent states.⁴⁴ When used as a defense in federal antitrust cases, each of these doctrines requires the court to engage in some type of threshold analysis aimed at determining how far it may venture into the area of international affairs while maintaining the utmost respect for the sovereign acts of other states. Thus, for the purposes of this Note, the three doctrines are referred to as the “sovereignty-based defenses.” Each doctrine, and its role as a defense in U.S. federal litigation, is considered in turn.

A. Act of State Doctrine

The common law Act of State doctrine provides grounds for dismissal of a private antitrust action if the “claim for injury . . . results directly from acts or decisions of a foreign sovereign and only indirectly from the defendant’s unlawful anticompetitive activities.”⁴⁵ The effect of asserting the doctrine as a defense is that it “generally precludes federal courts from inquiring into the validity of public acts which a recognized foreign sovereign power commits within its own territory and consequently prohibits federal antitrust suits predicated on the acts of a foreign sovereign, even where the acts are procured by private parties.”⁴⁶

The most important aspect of the doctrine is the focus on “validity”—U.S. courts avoid deciding any case that turns on questioning the validity

44. WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 8:10 (2008).

45. 48 C.J.S. *International Law* § 31 (2009). Note however, that the Act of State doctrine, like the other doctrines discussed in this Note, is a generally applicable defense and therefore is not confined to use in antitrust cases.

46. 23 FED. PROC., L. ED. § 54:140 (2009). However, there are some exceptional circumstances under which the doctrine is inapplicable as a defense, i.e. where the government allegedly acted in a purely commercial capacity. *Id.* The non-invoking party may also question whether the challenged act should qualify under the doctrine. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 (1987) (“The act of state doctrine applies to acts such as constitutional amendments, statutes, decrees and proclamations, and in certain circumstances to physical acts An official pronouncement by a foreign government describing a certain act as governmental is ordinarily conclusive evidence of its official character. An action or declaration by an official may qualify as an act of state, but only upon a showing (ordinarily by the party raising the issue) that the official had authority to act for and bind the state.”).

of a state action.⁴⁷ As traditionally stated in American law, the Act of State doctrine is rooted in the principle that:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.⁴⁸

Thus, the doctrine is rooted in both respect for the sovereignty of independent nations and in the notion of separation of powers that is at the core of the American system of government.⁴⁹

The leading modern case in this area of the law is *Banco Nacional de Cuba v. Sabbatino*, which recognized that the judge-made Act of State doctrine developed, at least in part, out of a “strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.”⁵⁰ The case, dealing with the expropriation of private property resulting from a Cuban decree, established that the Act of State doctrine applies even when the state act involved would constitute a violation of international law.⁵¹ The Court reasoned that the Executive Branch has at its disposal numerous diplomatic channels through which to address grievances on behalf of all its citizens in response to the acts of another sovereign, while the Judicial Branch can only afford piecemeal relief based on the individual facts and actors that happen to be before it.⁵² The Court concluded that decisions declaring a foreign sovereign’s acts invalid would be “likely to give offense . . . since the concept

47. See *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) (“To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.” (internal quotation marks omitted)).

48. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

49. See THOMAS V. VAKERICS, *ANTITRUST BASICS* § 12.05 (2009); *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 550 (E.D.N.Y. 2008); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421–23 (1964) (noting that “historic notions of sovereign authority” show the wisdom of the Act of State doctrine, while the separation of powers system gives rise to the doctrine).

50. *Sabbatino*, 376 U.S. at 423. However, the Court also notes, without elaborating, that some scholars disagree about the scope of the rule and the policy considerations that underpin it. *Id.* at 424.

51. *Id.* at 431.

52. See *id.*

of territorial sovereignty is so deep seated [that] any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders.”⁵³

Any judicial disposition on the validity of an act of state would undoubtedly, in the Court’s view, impinge on the ability of the Executive Branch to negotiate optimal relations and agreements with other states.⁵⁴ If the court declares a sovereign state’s act invalid, this could undermine a carefully calibrated response (or non-response) by the Executive Branch.⁵⁵ If the court declares the act valid, this approval may give the sovereign state leverage in negotiations with the Executive Branch, or may undermine the authority of the Executive Branch if it has already officially expressed disapproval.⁵⁶

Thus, in order to effectively assert the Act of State doctrine as a defense, a defendant must allege that the outcome of the case requires the court “to declare as invalid the official act of a foreign sovereign where that act was performed within that sovereign’s own territory.”⁵⁷ Unlike the doctrine of sovereign immunity, the Act of State defense may be raised whether or not the foreign government has been named as a defendant in the case, and is a “policy of judicial abstention” rather than one of exception or immunity from the court’s jurisdiction.⁵⁸ This means that a defendant need not be a state actor or agent to raise the defense, and the court may dismiss the case despite having one or more valid grounds for exercising jurisdiction.

As clarified by the U.S. Supreme Court in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, the proper procedure is to first determine the availability of the Act of State doctrine and only then to consider whether the circumstances in the case warrant its appli-

53. *Id.* at 432.

54. *See id.* at 432–33.

55. *See id.* at 432.

56. *See id.*

57. VAKERICS, *supra* note 49, § 12.05.

58. HOLMES, *supra* note 44, § 8:10; *see also* VAKERICS, *supra* note 49, § 12.05; *Int’l Ass’n of Machinists & Aerospace Workers v. Org. of the Petrol. Exporting Countries*, 649 F.2d 1354, 1359 (9th Cir. 1981) (Noting that while foreign sovereign immunity is a jurisdictional principle of international law, the Act of State doctrine is a “prudential” American legal principle arising out of the separation of powers system. Rather than going to jurisdiction, therefore, the doctrine allows courts to avoid acting in a politically sensitive area of foreign relations that is better suited to the political branches of government.).

cation.⁵⁹ The Act of State doctrine is not technically available to the court as a ground for dismissal until it becomes unavoidably necessary to rule on the validity of a state action.⁶⁰ The court must then decide whether to apply the doctrine based on the degree to which the case implicates the policies underlying the doctrine, including “international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations.”⁶¹ While a high probability of embarrassment or insult to a foreign state provides support to an argument in favor of applying the Act of State doctrine, it is not an element the defendant is required to prove in order to assert the defense, nor is it sufficient on its own to warrant dismissal of a case on Act of State grounds.⁶² After *Kirkpatrick*, it appears that the court may decide not to apply the Act of State doctrine, even where it is technically available, if the balance of considerations weighs against deferral to the political branches.⁶³ However, the only example the Court provided to illustrate when the balance might weigh against invoking the doctrine was when the sovereign act was that of a now defunct government.⁶⁴

B. Foreign Sovereign Compulsion Doctrine

The Foreign Sovereign Compulsion doctrine may be considered an adaptation of the Act of State doctrine, in that it also operates as a shield for private defendants where the acts of a foreign sovereign are directly

59. *W.S. Kirkpatrick & Co., Inc. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990).

60. *Id.* at 406.

61. *Id.* at 408.

62. *Id.* at 409.

63. *Id.* (citing with approval the Court's suggested balancing approach as outlined in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)). In *Sabbatino*, the Court suggested that the balance might shift against application of the doctrine if: (1) the case does not involve important implications for the nation's foreign relations, (2) “the government which perpetrated the challenged act is no longer in existence[.]” or (3) there is a great “degree of codification or consensus concerning [the] particular area of international law.” *Sabbatino*, 376 U.S. at 428.

64. *W.S. Kirkpatrick & Co., Inc. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. at 409. Presumably, the rationale is that deciding the validity of such an act would have no chance of interfering with the Executive Branch's role in foreign affairs. However, it is possible to imagine many situations in which ruling on the validity of a former government's acts would still impinge on current relations among sovereigns. For instance, key figures from a former regime may also be part of a current government; or there may be similar ideologies underlying both governments; or the act of the former government may be one that carries particular significance to an ongoing national or international conflict.

involved in the claim of injury.⁶⁵ However, the Foreign Sovereign Compulsion defense only becomes available to the defendant in an antitrust suit if the “record demonstrates that the actions alleged to constitute the antitrust violations were in fact compelled by a foreign sovereign.”⁶⁶ The underlying theory is that “where conduct is compelled by a foreign government, the corporate conduct, in effect, is the same as if it were the act of the foreign government itself. As a result, conduct compelled by a foreign sovereign is immune from antitrust prosecution.”⁶⁷

U.S. courts first recognized Foreign Sovereign Compulsion as a separate defense in the context of an antitrust suit, *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*⁶⁸ In that case, which involved boycotting the sale of Venezuelan crude oil, the U.S. District Court for the District of Delaware granted the defendant supplier’s motion for summary judgment on the basis that the Venezuelan government had prohibited all oil suppliers and traders doing business in Venezuela from providing the

65. See 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 334 (2009); see also VAKERICS, *supra* note 49, § 12.05; HOLMES, *supra* note 44, § 8:10 (noting that while “articulated as a separate defense, [foreign sovereign compulsion] has probably been subsumed within the act of state doctrine” given the Supreme Court’s construction of the defense in *W.S. Kirkpatrick & Co., Inc.*).

66. 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 334 (2009).

67. VAKERICS, *supra* note 49, § 12.05. As set forth by the American Law Institute, the defense of Foreign Sovereign Compulsion encompasses the following:

- (1) In general, a state may not require a person
 - (a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or
 - (b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.
- (2) In general, a state may require a person of foreign nationality
 - (a) to do an act in that state even if it is prohibited by the law of the state of which he is a national; or
 - (b) to refrain from doing an act in that state even if it is required by the law of the state of which he is a national.

John W. Boscardiol, *An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States*, 30 LAW & POL’Y INT’L BUS. 439, 480 (1999) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 (1986)).

68. See *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

plaintiff with crude oil.⁶⁹ In allowing Foreign Sovereign Compulsion, the court recognized that:

Anticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce. . . . Commerce may exist at the will of the government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact business in foreign lands. Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far.⁷⁰

Relying on the Act of State doctrine, the court in *Interamerican Refining Corp.* also explicitly held that it would be irrelevant and improper for the court to explore whether or not the compulsion itself was a valid or legal action under Venezuelan law.⁷¹

Thus, the Foreign Sovereign Compulsion defense provides relief for the rare situation when a defendant is caught between a rock and a hard place, in that the laws of one state obliged the defendant to take the action that is illegal in the United States.⁷² It applies only narrowly, however, because the foreign law must be “obligatory” rather than only “permissive” of the defendant’s actions.⁷³ Thus, a defendant is not automatically able to assert the defense just because the foreign government somehow was involved in or approved of the conduct.⁷⁴

Furthermore, the U.S. Supreme Court made clear in *Hartford Fire Insurance Co. v. California* that the defendant must do more than claim that the foreign law conflicted with U.S. law to obtain the Foreign Sovereign Compulsion shield.⁷⁵ In that case, the London-based defendant reinsurers argued that although U.S. law prohibited its conduct in fixing commercial insurance policy terms, the same acts were “perfectly consis-

69. *See id.* at 1296.

70. *Id.* at 1298 (citations omitted).

71. *See id.* at 1298–99.

72. HOLMES, *supra* note 44, § 8:10. *See generally* Boscariol, *supra* note 67 (highlighting the difficulties faced by Canadian companies where U.S. law restricted trade with Cuba, while Canadian law prohibited compliance with the U.S. restrictions). One politician memorably characterized the conflicting laws situation as giving companies a “choice between being hit with a bat or a brick.” *Id.* at 484 (internal quotation marks omitted).

73. VAKERICS, *supra* note 49, § 12.05.

74. *Id.*

75. HOLMES, *supra* note 44, § 8:10 n.15.

tent” with British laws.⁷⁶ The Supreme Court held that the compulsion defense does not apply merely upon a showing of a facial conflict in the laws; rather, the defendant had to show that the foreign law required it to violate U.S. law, and that it *could not possibly have complied with both laws*.⁷⁷

A defendant in a U.S. antitrust action may thus assert a Foreign Sovereign Compulsion defense only if “the foreign sovereign has compelled the very conduct that the U.S. antitrust law prohibits.”⁷⁸ According to U.S. enforcement agencies, the defense only applies when three criteria are fulfilled:⁷⁹

First, the foreign government must have compelled the anticompetitive conduct under circumstances in which a refusal to comply with the foreign government’s command would give rise to the imposition of penal or other severe sanctions . . . Second, . . . the defense normally applies only when the foreign government compels conduct which can be accomplished entirely within its own territory. . . . Third . . . the order must come from the foreign government acting in its governmental capacity.⁸⁰

76. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–99 (1993).

77. *Id.* at 799. The arguments in *Hartford* were couched in terms of the comity doctrine. *Id.* However, given the focus on conflict of laws and the overlap between the two doctrines, commentators have recognized the importance of the case in identifying a limit to the foreign sovereign compulsion doctrine as well. HOLMES, *supra* note 44, § 8:10 n.15.

78. U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Enforcement Guidelines for International Operations § 3.32 (1995), available at <http://www.justice.gov/atr/public/guidelines/internat.htm> [hereinafter ANTITRUST ENFORCEMENT GUIDELINES].

79. *Id.* The enforcement agencies use these criteria to determine, *before* instituting a public antitrust suit, whether the facts of the case support a foreign sovereign compulsion defense. If the criteria are fulfilled so that the defense is implicated, the “[a]gencies will refrain from enforcement actions on the ground of foreign sovereign compulsion.” *Id.* Thus the Executive Branch has built deference to foreign sovereign decision-making into its enforcement policies as a threshold matter, so that a colorable foreign sovereign compulsion claim is probably far less likely to show up in a public antitrust litigation. As an expression of Executive Branch policy, therefore, the guidelines should be instructive, although not binding, for courts hearing antitrust cases brought by private plaintiffs, who have absolutely no obligation to consider these factors prior to instituting a suit. In a private suit, the court would be wise to look to these guidelines and related jurisprudence (*sua sponte*, if necessary) so as to ensure that the court’s exercise of jurisdiction does not impede on the Executive Branch’s domain.

80. *Id.*

If the facts indicate that all three criteria are met, the Foreign Sovereign Compulsion doctrine applies so as to provide defendants with a “predictable rule of decision,” and foreign governments with “due deference to [their] official acts” as equal sovereigns.⁸¹ Thus, the doctrine is based on fairness to corporate actors who make business decisions under the laws of a foreign sovereign but who are subject to U.S. jurisdiction and antitrust laws based on the effects of that business decision or conduct.⁸²

C. Comity Doctrine

As the U.S. Supreme Court characterized it over 100 years ago, the doctrine of Comity⁸³ is

neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.⁸⁴

Like the Act of State doctrine, Comity is a doctrine of judicial abstention based on respect for sovereignty.⁸⁵ Rather than requiring automatic dismissal whenever the facts of a case implicate significant interests of a

81. *Id.*

82. While an in-depth discussion of extraterritorial antitrust jurisdiction is beyond the scope of this Note, the general idea is that “[a]nticompetitive conduct that [substantially] affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.” *Id.* § 3.1. Chinese manufacturers, for example, may conduct all of their business in Chinese territory subject to Chinese law but become subject to U.S. jurisdiction based on significant exports to or market effect in the United States.

83. The doctrine is interchangeably referred to by courts and scholars as “comity,” “international comity,” or “comity of nations.” *See, e.g.,* *Hilton v. Guyot*, 159 U.S. 113, 165 (1895) (referring to the debate over whether “comity” or “comity of nations” are appropriate or adequate terms for the doctrine); 44B AM. JUR. 2D *International Law* § 8 (2009). The notion of comity can also be used to refer to the mutual respect for the sovereignty of the domestic states of the United States, in that the courts of the forum state will usually apply the substantive law of another state to claims that arise in that state. 44B AM. JUR. 2D *International Law* § 8 (2009). International Comity encompasses this same conflict of laws approach, but may be “best understood as a guide for the court, in construing a statute, where the issues to be resolved are entangled in international relations.” *Id.*

84. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

85. *See* 44B AM. JUR. 2D *International Law* § 8 (2009).

foreign sovereign, however, the Comity doctrine allows the court to analyze and weigh all relevant factors to determine whether it should “defer to the laws or interests of a foreign country and decline to exercise the jurisdiction [it] otherwise [has].”⁸⁶

According to U.S. antitrust enforcement agency guidelines on Comity,⁸⁷ which closely mirror the factors established by the Ninth Circuit in the landmark case *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, relevant factors to the Comity analysis in the antitrust context include:

1. the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad;
2. the nationality of the persons involved in or affected by the conduct;
3. the presence or absence of a purpose to affect U.S. consumers, markets, or exporters;
4. the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
5. the existence of reasonable expectations that would be furthered or defeated by the action;
6. the degree of conflict with foreign law or articulated foreign economic policies;

86. *Id.*; see also *Animal Sci. Prods., Inc. v. China Nat’l Metals & Minerals Imp. & Exp. Corp.*, 596 F. Supp. 2d 842, 864 n.17 (D.N.J. 2008) (“[T]he legal doctrine of international comity is . . . a judicial tradition based on respect for sovereignty, a discretionary power of the court to decline jurisdiction in international cases out of respect for the actions and laws of another nation, which are weighed against United States international convenience and duties.”).

87. These factors are considered as a matter of course in international antitrust enforcement activities by agencies of the Executive Branch, and thus, a suit brought by a public enforcement agency is usually taken as an indication that U.S. interests in enforcement outweighed comity concerns. See ANTITRUST ENFORCEMENT GUIDELINES, *supra* note 78, § 3.2. In private antitrust disputes involving international issues the U.S. courts must engage in a very similar analysis to determine whether to exercise Sherman Act jurisdiction. See, e.g., *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) (noting that in private suits the court’s comity analysis becomes even more important because “there is no opportunity for the executive Branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed.”).

7. the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and
8. the effectiveness of foreign enforcement as compared to U.S. enforcement action.⁸⁸

Thus, Comity is clearly at issue whenever there is a direct conflict between U.S. law and the laws of a foreign sovereign, and thereby overlaps with the doctrine of Foreign Sovereign Compulsion, discussed *supra* in Section II.B.⁸⁹ More importantly, however, Comity under the *Timberlane* balancing approach encompasses broader considerations of respect for the sovereignty of independent nations that allow the court to consider dismissal even in the absence of a direct conflict of laws.⁹⁰ Conversely, the balancing analysis also gives the court discretion to exercise jurisdiction despite the presence of significant Comity considerations “if it finds that the extension of comity would be contrary or prejudicial to the interest of the United States.”⁹¹ Courts using this balancing approach are thus essentially asking whether asserting jurisdiction would be *reasonable* given the specific circumstances in the case.

The decision in *Hartford Fire*, discussed *supra*, could be construed as rejecting the balancing approach and limiting the Comity defense to situations where there is a “true conflict” between U.S. and foreign law such that Comity and Foreign Sovereign Compulsion would become indistinguishable.⁹² However, many scholars have criticized the decision, noting that the modern trend seems to be moving in the direction of the more

88. ANTITRUST ENFORCEMENT GUIDELINES, *supra* note 78.

89. *See id.* (noting that direct conflicts are defined according to the Supreme Court’s decision in *Hartford Fire*, 509 U.S. at 799, and that these direct conflicts occur increasingly less frequently in the antitrust context as nations continue to coordinate in the design of their respective competition laws).

90. *Id.*

91. 44B AM. JUR. 2D *International Law* § 8 (2009); *see also* *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) (indicating that a weighing of comity concerns is one required part of a tripartite test to determine whether the court should exercise extraterritorial jurisdiction in an international antitrust case, but that comity may be outweighed by other factors), *superseded by statute*, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246, *as recognized in* *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 814 n.8 (9th Cir. 1988) (noting that while the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”) now governs the reach of extraterritorial jurisdiction in cases brought under the Sherman Act, Congress specifically expressed that the passage of the FTAIA would not change the ability of the courts to exercise principles of international comity).

92. Spencer Weber Waller, *Antitrust and American Business Abroad* § 6:21 (2009).

robust interpretation of comity supported by Justice Scalia's dissent in *Hartford Fire*.⁹³ Even the majority opinion in *Hartford Fire* explicitly refused to address "other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity."⁹⁴ The decision can therefore be construed more expansively to indicate that "litigants are free to make comity arguments relying on the other factors outlined in the cases and the Restatements, but may not rely upon the conflict between national policies, unless the conflict rises to the level of outright compulsion."⁹⁵ Additionally, the Supreme Court's strong emphasis on Comity considerations in refusing to exercise jurisdiction over a foreign plaintiff's antitrust claims in a more recent case, *F. Hoffman-Laroche, Ltd. v. Empagran*, supports this interpretation and signals a return to the balancing approach embodied in *Timberlane* and Justice Scalia's dissent in *Hartford Fire*.⁹⁶

III. RECENT APPLICATION OF SOVEREIGNTY-BASED DEFENSES IN A FEDERAL ANTITRUST CASE: *IN RE VITAMIN C ANTITRUST LITIGATION*

In late 2008, the U.S. District Court for the Eastern District of New York denied a motion to dismiss on grounds of the three sovereignty-

93. See *id.* ("The Court ignored any requirement of reasonableness in the exercise of jurisdiction and then quoted the Third Restatement out of context to support a flawed argument that only foreign compulsion can create a true conflict justifying abstention on comity grounds."); Joseph P. Griffin, *E.C. and U.S. Extraterritoriality: Activism and Cooperation*, 17 *FORDHAM INT'L L.J.* 353, 367-68 (1994) (Scalia, writing for four dissenters, "stated that 'rarely would [the factors set forth in the Restatement (Third) of Foreign Relations] point more clearly against application of United States law. The activity . . . took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business . . . outside the United States. . . . I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable'" in such circumstances (quoting *Hartford Fire Ins. Co.*, 509 U.S. at 818).); Siddharth Fernandes & F. Hoffman-Laroche, *LTD. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: Where Comity and Deterrence Collide*, 20 *CONN. J. INT'L L.* 267, 279 (2005) (noting that "though *Hartford Fire* still stands, it seems to have been severely cabined by the [subsequent enactment of the] FTAIA and subsequent decisions" such as *Empagran* that give comity considerable weight in interpreting the reach of U.S. extraterritorial antitrust jurisdiction).

94. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993).

95. Waller, *supra* note 92, § 6:21.

96. See Fernandes, *supra* note 93, at 279-84.

based defenses the consolidated private antitrust claims⁹⁷ brought against four Chinese manufacturers of vitamin C by U.S. purchasers.⁹⁸ The plaintiffs' claims stem from the defendant manufacturers' swift rise to dominance of the world market for vitamin C in recent years—a situation plaintiffs allege was aided by collusive, anticompetitive horizontal price-fixing among the defendants.⁹⁹ Chinese vitamin manufacturers started to gain control of the vitamin C market after a European manufacturer price cartel (which had until then controlled the market) broke up in 1995.¹⁰⁰ Plaintiffs allege that in December 2001, the defendant manufacturers formed their own cartel with the help of their trade association, the Chamber of Commerce of Medicines and Health Products Importers & Exporters¹⁰¹ (“the Chamber”), and agreed “to control prices and the volume of exports for vitamin C.”¹⁰² This collusion allegedly caused an 84 percent increase in the average price per kilogram for vitamin C in 2002, with prices “in the United States [increasing] from approximately \$2.50 per kilogram . . . to as high as \$7 per kilogram.”¹⁰³ Prices spiked as high as \$15 per kilogram in 2003, a result of “the combination of the cartel’s supply restrictions and increases in world demand . . . attributable . . . to

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

98. *See generally id.*

99. *See id.* at 549 (“[D]efendants’ sales constitute approximately 60 percent of the worldwide vitamin C market and virtually 100 percent of the manufacturers who can produce vitamin C for a cost below \$4.50 to \$5 per kilogram.”) (internal quotation marks omitted).

100. *See id.* at 548 (noting that the European cartel disbanded after being sued for conspiring to “suppress competition and fix prices”); Kate Fazzini, *Antitrust Suit Proceeds Against Chinese Vitamin C Makers*, LAW.COM (Nov. 13, 2008), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202425997056> (“In the late 1990s and early 2000s, vitamin price-fixing cases were brought against European manufacturers, leading to multi-billion dollar settlements with the U.S. government, European Commission and other entities, including businesses and retailers.”).

101. Plaintiffs’ complaint apparently calls this group the “Western Medicine Department of the Association of Importers and Exporters of Medicines and Health Products of China.” *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 549. However, in its amicus brief, the Chinese Ministry of Commerce asserts that the correct name is the “Chamber of Commerce of Medicines and Health Products Importers & Exporters.” *Id.* at 552. Given the difficulties with translation in complex international litigation and the lack of transparency in the Chinese system, for consistency’s sake this Note will defer to the Chinese government’s name for the group.

102. *Id.* at 549.

103. *Id.*

the outbreak of SARS.”¹⁰⁴ Subsequent cuts in prices by individual cartel members were allegedly reined in at an “emergency meeting” called by the Chamber in late 2003, where Chamber members, including defendants, “devised plans to rationalize the market and limit production levels and increase prices.”¹⁰⁵ Defendants purportedly dealt with 2004 price declines by agreeing to “shut down production for equipment maintenance in order to boost prices back toward their 2003 high, [and to] restrict exports to the United States to further stabilize prices.”¹⁰⁶

In response to these allegations, defendants moved to dismiss the complaint by invoking the Act of State, Foreign Sovereign Compulsion, and Comity doctrines, insisting that “their actions were compelled by the Chinese Ministry of Commerce” (“the Ministry”).¹⁰⁷ In its first ever *amicus curiae* appearance before a U.S. court, the Chinese government (through the Ministry) submitted and argued an *amicus* brief in support of defendants’ position.¹⁰⁸ The Ministry asserted that the Chamber was established in 1991 “as an entity under the Ministry’s direct and active supervision [and] plays a central role in regulating China’s vitamin C industry” as a social organization “imbu[ed] . . . with governmental regulatory authority.”¹⁰⁹ Essentially, once Chinese market-oriented reforms reduced the number of directly regulated SOEs in the early 1990s, the state handed over the regulatory reins for many industries to the Ministry, which in turn created entities such as the Chamber to “[step] into the shoes of the state-owned national exporting entities.”¹¹⁰ In this way, “chambers of commerce in China have played a central role in China’s shift from a command economy to a market economy.”¹¹¹

According to the Ministry, in 1997 the Ministry and the State Drug Administration (“SDA”) responded to tough competition on the global market for vitamin C by ordering the Chamber to establish a group “to coordinate with respect to [the] vitamin C export market, price and customers, and to organize the enterprises in contacting foreign entities.”¹¹²

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 550.

108. *See id.* at 552. The Ministry represents the Chinese government in its capacity as “the highest administrative authority in China authorized to regulate foreign trade, . . . the equivalent . . . of a cabinet level department in the U.S. governmental system.” *Id.* (internal quotations omitted).

109. *Id.* at 552–53.

110. *Id.* at 552.

111. *Id.*

112. *Id.* at 553 (internal quotation marks omitted).

The Ministry left it to the Chamber to determine “the specific method for coordination” and to file that method with the Ministry.¹¹³

Subsequently, and presumably to comply with the order, the Chamber formed and received Ministry approval for a “Vitamin C Sub-Committee” made up of major vitamin C exporters.¹¹⁴ According to the charter for the sub-committee, only its members would “have the right to export [v]itamin C and are simultaneously qualified to have [v]itamin C export quota.” Members of the sub-committee were required to “voluntarily adjust their production outputs according to changes of supplies and demands on international markets . . . and strictly execute [the] export coordinated price set by the Chamber and keep it confidential.”¹¹⁵ The penalties for non-compliance included “warning, open criticism and even revocation of . . . membership,” and ultimately a suggestion “to the competent governmental department, through the Chamber, to suspend and even cancel the [v]itamin C export right of such violating member.”¹¹⁶

The regulatory framework for Chinese exports changed to a “price verification and chop” method in 2002 in response to China’s accession to the World Trade Organization (“WTO”).¹¹⁷ Under the new system, chambers of commerce have to verify all export contracts and approve the specific price and quantity before shipments can be released by Customs.¹¹⁸

In response to the defendants’ and Ministry’s contentions, the plaintiffs argued that (1) none of these facts “pointed to a single law or regulation compelling a price or price agreement,” (2) the claimed collusion did not occur until years after the establishment of the sub-committee that supposedly compelled price-fixing, and (3) records of the Chamber and sub-committee referring to self-restraint measures and hand voting evidenced the voluntary nature of the agreements to fix prices.¹¹⁹

In ruling on the motion to dismiss, the court held that the Ministry’s brief, while “entitled to substantial deference, [was] not conclusive evidence of compulsion, particularly where, as here, the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry’s position.”¹²⁰ The court then denied the motion in order to al-

113. *Id.* (internal quotation marks omitted).

114. *Id.* (internal quotation marks omitted).

115. *Id.* (internal quotation marks omitted).

116. *Id.* (internal quotation marks omitted).

117. *Id.* at 553–54.

118. *Id.* at 554.

119. *Id.*

120. *Id.* at 557.

low further factual development on the issue of compulsion.¹²¹ The court hoped further discovery would resolve ambiguity in the record as to “whether defendants were performing government function, whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens.”¹²²

IV. REEXAMINING *IN RE VITAMIN C ANTITRUST LITIGATION*: WHY U.S. COURTS SHOULD CONSTRUE SOVEREIGNTY-BASED DEFENSES BROADLY WHERE CHINA’S ROLE IS AMBIGUOUS

The district court in *In re Vitamin C Antitrust Litigation* took a conservative, wait-and-see approach to the assertion of sovereignty-based defenses due to a record it deemed “simply too ambiguous to foreclose further inquiry into the voluntariness of defendants’ actions.”¹²³ However, reexamination of the court’s reasoning and the facts of the case reveals a strong argument rooted in both policy and case law for construing sovereignty-based defenses broadly at the pre-trial stage in ambiguous cases. An expansive construction is especially prudent where a foreign sovereign like the Chinese Ministry of Commerce makes an official statement expressing its interest or explaining its role in the subject of the litigation.

The court’s reasoning in *In re Vitamin C Antitrust Litigation* masks the strength of the sovereignty-based defenses by failing to examine each of them in turn, even though they are conceptually distinct and successful establishment of any one of them could warrant dismissal. While the court delineated the rules of each of the three doctrines asserted by the Chinese manufacturers, it focused its analysis on the authority of the Ministry’s brief and the Foreign Sovereign Compulsion defense, arguably the narrowest of the three.¹²⁴ Therefore, the following Sections reexamine the applicability of the three sovereignty-based defenses in turn and suggest why a broad construction may be warranted by the factual circumstances of this litigation.

121. *Id.* at 559.

122. *Id.*

123. *Id.*

124. *See id.* at 557–59. The court begins its legal analysis by stating that “the issue at this stage of the case is whether there is a factual dispute as to the alleged compulsion,” which seems to gloss over the more nuanced analysis warranted by the Act of State and Comity defenses raised in the case. *Id.* at 557.

A. Act of State Doctrine

Pursuant to the two-step Act of State analysis established in *Kirkpatrick*, the court should have initially examined whether the success of the plaintiffs' complaint would require a ruling on the validity of a Chinese state action.¹²⁵ The court seemed to accept that any involvement by the Chinese government in price-fixing constituted a public, rather than commercial, state act, thereby removing any speculation that a commercial activity exception may apply where export regulation is concerned.¹²⁶ Therefore, the denial of the motion to dismiss implies that some doubt remained as to whether it was *necessary* to rule on the validity of a state action.

In *Hunt v. Mobil Oil Corp.*, the Second Circuit made clear that plaintiffs cannot escape the application of the doctrine through skillful pleading that avoids explicitly questioning the validity or legality of the government's acts. Rather, the doctrine still applies as long as a nexus with the state action is at the heart of the plaintiff's claim, such that the court has to look at the act and the government motivation behind it.¹²⁷ In so deciding, the *Hunt* court indicated that pleadings *do* raise issues of the legality or validity of state acts if they characterize government actors as "co-conspirators."¹²⁸

Here, the allegations in the complaint implicitly required the court to look at the Chinese government's export policies for vitamin C and determine whether the government's motivation was to fix prices in restraint of trade. The plaintiffs characterized the Chamber as a "co-conspirator" in the complaint and referred numerous times to the role the Chamber played, under Ministry direction, in instigating and coordinating the price-fixing meetings that form the crux of the complaint.¹²⁹ Plaintiffs alleged that they were harmed by an increase in prices for vi-

125. *W.S. Kirkpatrick & Co., Inc. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990).

126. *See In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 550 n.4 ("[D]efendants and the Ministry have made a compelling argument for why the Chinese government's involvement—to the extent it exists—in defendants' price-fixing scheme amounts to a public, rather than commercial, act.").

127. *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 76–77 (2d Cir. 1977).

128. *Id.* at 76.

129. *See In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 549 ("According to the complaints . . . defendants and their *co-conspirators* formed a cartel;" "At a meeting of the [Association, a.k.a. the Chamber,] . . . defendants and the Association . . . reached an agreement;" "The complaints further allege that the agreements of the cartel members were facilitated by the efforts of their trade association;" "Plaintiffs allege that the Association called an 'emergency meeting' . . . to rationalize the market." (emphasis added)).

tamin C that was caused “as a result of the meetings and other efforts by cartel members,” which they took pains to point out were accomplished at each step under the auspices of the Chamber.¹³⁰ The acts of the Chamber and the defendant manufacturers were inextricably intertwined in the allegations to the extent that ruling on defendants’ liability would amount to passing judgment on the Chamber’s actions as well.

The court’s focus on the factual dispute over compulsion failed to acknowledge the broader scope of the Act of State doctrine, which is not necessarily dependent on government compulsion. The parties strongly disputed the voluntariness of the defendants’ specific pricing decisions, but did not challenge the Ministry’s detailed explanation, in its *amicus* brief, of China’s overall export control system, fear of excessive competition and antidumping duties, and delegation of regulatory authority to the Chamber as a key facet in its transition to a market-oriented economy.¹³¹ The *amicus* brief submitted by the Ministry outlined these practices (including serious penalties for noncompliance) in great detail and represented the Chinese government’s official characterization of the Chamber as a “government-mandated price and output control regime.”¹³² Regardless of whether the Ministry and Chamber actually *compelled* price-fixing in this instance, the causal link alleged by plaintiffs between defendants’ and the Chamber’s acts necessarily required the Court to examine the motivations and actions of the Chinese government in setting up such a system.

Furthermore, to rule on plaintiff’s request for an injunction (whether granting or denying it) would be tantamount to either sanctioning China’s means of regulating its domestic industry, or instructing the government that it must “alter its chosen means of regulating domestic conduct.”¹³³ China’s status as a non-market economy and major U.S. trading partner further exacerbate the potential impact of such a ruling on political relations between the two countries. This is precisely the situation of judicial overreaching into foreign affairs that the Act of State doctrine is intended to avoid. Thus the Act of State doctrine is, at a minimum, technically available to the court in this case.

Under *Kirkpatrick*, technical availability does not ensure dismissal but merely indicates that the court may exercise discretion in deciding whether to apply the doctrine based on the policies that underlie it, such

130. *Id.*

131. *See generally* Ministry Amicus Curiae Brief, *supra* note 9.

132. *Id.* at 3.

133. *Id.* at 22–23 (citing Int’l Ass’n of Machinists & Aerospace Workers v. Org. of Petrol. Exporting Countries, 649 F.2d 1354, 1361 (9th Cir. 1981)).

as comity, the location of the acts, and potential conflict with the Executive Branch.¹³⁴ In this case, comity considerations are strongly implicated, as is discussed *infra* in Section IV.C. All acts which could be attributed to Chinese sovereign entities took place in China's territory. Finally, there is a high possibility for conflict with, or embarrassment to, the Executive Branch in its conduct of foreign relations.

This last factor is supported by the depth of the Chinese government's interest in the outcome of the case and its willingness to come forward and unambiguously state—for the first time in a U.S. court—that it is responsible for the price-fixing that occurred here.¹³⁵ Clearly, such a statement suggests that China views this price control system for exports as a necessary part of its shift to a market-oriented system. Additionally, the acts at issue occurred during a time of great transition in China's economy—it acceded to the World Trade Organization in 2001, a momentous event but one that made the government's concerns over excessive competition and foreign anti-dumping suits all the more acute.¹³⁶ Furthermore, China has since taken steps to curb such activities through the enactment of the AML with its specific prohibitions against illegal price-fixing through trade associations.

The U.S. Executive Branch has a considerable interest in cooperating with other nations in antitrust enforcement against global cartels. However, there is a significant possibility that these cooperation efforts could be hampered by the exercise of U.S. jurisdiction over Chinese manufacturers despite a *mea culpa* from the Chinese government.¹³⁷ This is the

134. *W.S. Kirkpatrick & Co., Inc. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 408 (1990).

135. *In re Vitamin C. Antitrust Litig.*, 584 F. Supp. 2d at 552 (“The Chinese government's appearance as *amicus curiae* is unprecedented. It has never before come before the United States as *amicus* to present its views. This fact alone demonstrates the importance the Chinese government places on this case.”).

136. *See* Ministry *Amicus Curiae* Brief, *supra* note 9, at 14 (The Ministry introduced the price “verification and chop” system for exports in 2002 “in order to accommodate the new situations since China's entry into WTO, maintain the *order* of market competition, make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports, *promote industry self-discipline* and facilitate the healthy development of exports.” (internal quotation marks omitted)).

137. *See id.* at 22 (“[T]he conduct alleged to have been violative here was compelled by the Chinese government . . . in its oversight of its foreign trade regulation. Any determination by this Court into the conduct . . . will necessarily invoke an inquiry into the legitimacy of China's foreign policy concerning the manufacture and export of vitamin C. To permit the validity of the policy-making decisions of China to be reexamined and perhaps condemned by this court would very certainly imperil the amicable relations between the two governments and vex the peace of nations. It cannot be denied that the

first time U.S. plaintiffs have subjected Chinese manufacturers to a U.S. antitrust suit¹³⁸ and the possibility of treble damages that go along with it. A zealous application of extraterritorial jurisdiction in the face of the Ministry's admission of state responsibility could prompt China to enact clawback or blocking legislation to protect its domestic manufacturers from such suits in the future.¹³⁹ Since the price control system at issue here was enacted partly as a protective measure in response to foreign anti-dumping suits, it seems likely that China would react just as strongly to the possibility that this case would set off a deluge of antitrust suits targeting Chinese industry leaders, this time carrying the possibility of treble damages. Therefore, deeming these acts to be invalid or illegal could significantly interfere with the Executive's ability to decide how to calibrate cooperation with China on antitrust enforcement and could significantly hamper foreign relations with China, one of the United States' most important trading partners. If the Executive Branch wants to challenge the legitimacy of China's policy, it can do so in a carefully calculated fashion through diplomatic channels or the WTO dispute resolution system.¹⁴⁰ Indeed, the United States Trade Representative has since initiated dispute proceedings at the WTO to challenge China's "export restrictions applied to nine raw materials used as inputs for the steel, alu-

possibility of insult to China is significant—the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of regulating domestic conduct.” (internal citations omitted)).

138. *China's Vitamin C Makers Ready for Anti-trust Battle*, DECISIONNEWSMEDIA, (June 7, 2005), <http://www.nutraingredients.com/content/view/print/34566>.

139. See VAKERICS, *supra* note 49, § 12.04 (“Efforts to obtain evidence located in foreign countries may be frustrated by the invocation of blocking statutes. Blocking statutes have been enacted in countries such as the United Kingdom, France, Canada, and Australia. As the name implies, blocking statutes are designed to prevent plaintiffs in the United States from obtaining evidence located in foreign countries. . . . Satisfaction of a treble damage award may be further complicated by the government of the foreign based defendant's home country having enacted a 'clawback' statute. Pursuant to a clawback statute, a foreign defendant may file suit against a plaintiff that has obtained a treble damage award in order to recover from the plaintiff all damages paid by the defendant beyond actual or compensatory damages.”).

140. For instance, the quota and export licensing system and the price verification and chop procedure were likely violative of Article XI of the WTO Agreement, which provides that “[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.” General Agreement on Tariffs and Trade, art. XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

minum and chemicals industries [as violative of] China's 2001 WTO accession agreement."¹⁴¹ Since WTO disputes address only state actions, this is a critical sign that the U.S. Executive Branch considers China's export constraints a matter controlled by Chinese government and law. Thus the balance of considerations warrants dismissal on Act of State grounds, even without adopting a "broad" construction of the doctrine.

B. Foreign Sovereign Compulsion Doctrine

The Foreign Sovereign Compulsion doctrine is the narrowest of the three defenses, but it is at the heart of the defendant's and the Ministry's arguments for dismissal in this case. In the United States, horizontal price-fixing is a *per se* violation of the Sherman Act, so it is clear that, barring jurisdictional constraints, fixing export prices for vitamin C constitutes a violation of U.S. law. The alleged conduct occurred wholly on Chinese territory. Furthermore, Chinese regulations make severe penalties, including revocation of the export license for vitamin C, impossible on manufacturers that fail to comply with price coordination.¹⁴² Therefore, the key consideration remaining in the compulsion analysis is whether the defendants' acts in fixing prices were just permitted or truly compelled by the Chinese government.

Arguably, the establishment of penalties itself should be sufficient evidence that the government compelled price coordination. The court's focus on voluntariness seems misplaced if Chinese policy made severe sanctions possible. For example, the court indicated that the plaintiffs' voluntariness argument would be stronger if discovery showed that Chinese manufacturers actually adhered to a pricing scheme only after they achieved market power, despite an earlier mandate to do so by the Chamber and subcommittee.¹⁴³ However, once a governmental mandate is issued, it should hardly matter whether or not the defendants managed to avoid sanction for previous noncompliance. A failure to penalize does not dilute the legal force of the mandate itself.¹⁴⁴ The court seems to ac-

141. Daniel Pruzin, *U.S., EU Take China to Task at WTO Over Slowdown in Trade, FDI Reforms*, 27 INT'L TRADE REPORTER 808, June 2, 2010, available at http://news.bna.com/itln/display/no_alpha.adp?mode=si&frag_id=17264918&item=country%3acn&cat=country. The U.S. ambassador to the WTO recently expressed concern over what the U.S. sees as China's use of increasingly protectionist policies as well as a slowdown in Chinese economic reforms since 2008. *Id.*

142. See Ministry Amicus Curiae Brief, *supra* note 9, at 10–11.

143. In re Vitamin C Antitrust Litig., 584 F. Supp. 2d 546, 559 n.12 (E.D.N.Y. 2008).

144. For instance, a person may cheat on or fail to pay their taxes over a period of years and not be audited, but ignoring the law and getting away with it does not mean that

knowledge as much earlier in its decision, where it cites *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.* as a clearer case for dismissal where the Colombian government suddenly “began enforcing a series of cargo reservation laws it had passed years before.”¹⁴⁵ Even though the defendants in that case allegedly *engineered* the renewed enforcement of the protectionist laws, the court dismissed on Act of State grounds.¹⁴⁶ Similarly here, the fact that implementation, enforcement, and penalties for failure to conform pricing may have been unevenly applied early on should not negate the compulsory nature of the state regulation. Nonetheless the court found *O.N.E. Shipping Ltd.*, where laws had gone completely unenforced for years, to present a clearer case of compulsion.

The real difference between the compulsion analyses in these cases, then, seems to be the uncodified nature of much of the Chinese regulatory system. The court likely was not comfortable hanging a dismissal on the circulars and notices typically used in the Chinese system of regulation, as opposed to the codified statutes typical of a U.S. or European style system. Indeed, the court distinguishes this case from others relied upon by defendants by stating that those dismissals “involved much clearer examples of government compulsion,” but the increased clarity seems to be only a function of the U.S.-style codification of the laws in those cases.¹⁴⁷

For instance, the court asserts that while *Trugman-Nash, Inc. v. New Zealand Dairy Board* was dismissed based on sovereignty-based defenses, the case involved “a formally codified New Zealand law” providing guidance to the Dairy Board on the granting of export licenses.¹⁴⁸ However, the facts of *Trugman-Nash* were arguably even less clear-cut on compulsion than those in the *Vitamin C* case. The New Zealand statute, in the *Trugman-Nash* court’s view, was “not a model of clarity” and “cast in permissive terms” that gave the Dairy Board at least facial discretion over whether protectionist factors warranted a denial of an export

the law prescribing payment of taxes was not compulsory during those years, or has ceased to legally bind the person to pay taxes in future.

145. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 558.

146. *Id.* (“[T]he court held that the plaintiff’s allegations ‘make clear that its antitrust suit is premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the district court would be called on to examine and pass judgment on.’” (quoting *O.N.E. Shipping Ltd v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449 (2d Cir. 1987)).

147. *Id.*

148. *Id.*

license.¹⁴⁹ In fact, it was only upon reconsideration of the case after an initial denial of defendants' motion to dismiss that the court was finally convinced that the Act actually *compelled* the denial of export licenses (and thus, price competition) for the United States.¹⁵⁰ The court reasoned that although the "mandate is not cast in the terms of a Biblical commandment, 'Thou shalt not,' . . . the statute's practical effect is the same."¹⁵¹ Contrary to the *Vitamin C* court's assertion, then, it would seem that *Trugman-Nash* provided ample persuasive authority to dismiss on foreign sovereign compulsion grounds based on fair inferences about the practical effects of a regulation lacking transparency.

For reasons described under the Act of State analysis, *supra*, Section IV.A, if the court faced any ambiguity on this front it should have deferred to the Ministry's official statement detailing how defendants were compelled by Chinese regulations to join the subcommittee, coordinate an industry-wide price, and limit production, all under penalty of severe sanctions.¹⁵² The court cited *Karaha Bodas Co., LLC v. Pertamina* for the proposition that "[w]here a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas."¹⁵³ The court then concluded that, while the Ministry's brief was entitled to "substantial deference," it did not constitute "conclusive evidence of compulsion."¹⁵⁴ However, it appears that the court's subsequent analysis failed to accord "substantial deference"—or even any additional weight—to the Ministry's detailed brief characterizing its own law and instead relied on the plaintiffs' expert on Chinese law.¹⁵⁵ This analysis strikes against the "substantial deference" standard the court announced, and a broader construction of the Foreign Sovereign Compulsion doctrine was warranted in this instance of ambiguity regarding a foreign law.

In addition, the court's own compulsion analysis seems to indicate a lack of understanding of the Chinese system of regulation, which is

149. *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997).

150. *Id.*

151. *Id.*

152. See Ministry Amicus Curiae Brief, *supra* note 9, at 17.

153. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 557 (E.D.N.Y. 2008) (internal quotation marks omitted) (quoting *Karaha Bodas Co., LLC v. Pertamina*, 313 F.3d 70, 92 (2d Cir. 2002)).

154. *Id.*

155. *Id.* at 555.

somewhat inexplicable considering the careful explanation provided in the Ministry's brief.¹⁵⁶ For example, the court based its decision against dismissal largely on Ministry records boasting that the price agreements were "self-restraint measures" taken "without any government intervention,"¹⁵⁷ evidence of "hand voting" to decide on specific prices, and the fact that "Chinese law is not as transparent as that of the United States . . . [since] rather than codifying its statutes, the Chinese government apparently frequently governs by regulations promulgated by various ministries."¹⁵⁸ All of these factors are easily explained by the system of government and policy of "industrial self-restraint" employed by the Chinese government, discussed *supra*, and are indicated as such in the Ministry's brief.¹⁵⁹

The court's focus on "hand voting" to decide on specific prices, for instance, seems misplaced. This method is not surprising or ultimately even important, since the Ministry mandated that defendants fix a price *through industry coordination* within the Chamber. Thus, when the Ministry boasted that the export restraints were achieved without intervention, this refers to the fact that the Ministry and Chamber did not have to impose any of the available sanctions in order to achieve compliance. In fact, the defendants' membership in the subcommittee and participation in these "self-restraint" agreements were *prerequisites* to their right to export vitamin C out of China at all. It is unclear how the Chamber would have the right to decide that only its members could export vitamin C if it were not authorized to do as part of a government regulation.

Thus, it would be impossible for the manufacturers to comply with U.S. law and Chinese law at the same time—their home jurisdiction required them to come to an agreement on a price in order to "prevent disorderly competition" and avoid antidumping suits in the U.S. and elsewhere, while the same conduct constitutes a *per se* antitrust violation in the U.S.¹⁶⁰ It seems unsatisfying for the court to indicate that because these measures are not laid down in statutes, they are not transparent, since the implication is that government law applied through coordination with and pressure on the private sector (common in East Asian economies) is somehow less deserving of deference than a western-style

156. See Ministry Amicus Curiae Brief, *supra* note 9, at 5–14.

157. In re Vitamin C Antitrust Litig., 584 F. Supp. 2d at 554.

158. *Id.* at 559.

159. See Ministry Amicus Curiae Brief, *supra* note 9, at 17–18.

160. *Id.* at 20.

codification.¹⁶¹ Moreover, the Ministry's brief should cure any lack of transparency about the practice of governance and industry self-regulation administered through the Ministry/trade association system. Thus the court should have gone further in its analysis of the practical effects of the regulatory system on pricing—even if it ultimately did not agree with the Ministry's final conclusions about whether these practices constituted compulsion.

Although the court reserved decision on the Foreign Sovereign Compulsion defense pending further discovery, prolonging the litigation is itself a kind of penalty for the defendant manufacturers. U.S. antitrust cases, with their expansive discovery rules, are expensive and time-consuming, particularly for foreign defendants who face additional travel and translation costs in order to appear before the court.¹⁶² Thus, in the face of strong evidence of compulsion and an official statement by a foreign sovereign, the court should construe this defense broadly if doing so is necessary to preserve the fairness considerations at the heart of the doctrine. Such a rule would also promote predictability while maintaining respect for the sovereignty of foreign nations, two underlying policies of the Foreign Sovereign Compulsion doctrine.

C. Comity Doctrine

The Comity doctrine provides support for a dismissal under either of the other two doctrines, even in the event the court is unwilling to decide the motion on comity alone. As described by Scalia in the dissent to *Hartford Fire*, a comity analysis in the context of a motion to dismiss requires the court to consider whether exercising jurisdiction would be reasonable in light of several factors.¹⁶³ One important factor is the degree of conflict between the foreign and U.S. law, discussed in the Foreign Sovereign Compulsion analysis *supra* Section IV.B. Other factors, had the court seen fit to examine them in detail, would also militate in favor of abstaining from exercising jurisdiction. For example, all of the acts took place within the territory of China, and the defendants are all of Chinese nationality and have their principal place of business in China. Additionally, the actions appear to have been aimed at avoiding dumping

161. See *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559 (“Chinese law is not as transparent as that of the United States or other constitutional or parliamentary governments.”).

162. See Robert Pietrzak, Joel M. Mitnick & Henry Ding, *Growing Pains: A Road Map for Chinese Companies Learning to Live with Complex US Litigation*, CHINA LAW & PRACTICE, Jan. 2008, at 66.

163. See Griffin, *supra* note 93 and accompanying text.

allegations, and not at harming the U.S. market *per se*. Finally, the Chinese government indicated through its appearance as *amicus* its strong interest in regulating the activity in question.

The sole factor in the comity analysis that might give the court pause is whether China can be considered to have a comprehensive regulation and enforcement scheme for price-fixing, since the AML was not in place at the time of the conduct at issue here and its efficacy is still being tested. Whether courts in future cases against Chinese manufacturers will consider the newly enacted AML as evidence of a strong interest in regulating horizontal price-fixing schemes of this nature remains to be seen.

Regardless of how the court comes out on the enforcement scheme, however, the overall balancing of factors in the Comity analysis point toward an abstention from jurisdiction in order to respect the sovereignty of China.

V. ALTERNATIVE APPROACHES EMERGING IN THE FEDERAL COURTS

While *In re Vitamin C Antitrust Litigation* was a first for U.S. federal courts, pre-trial decisions have since been issued in two nearly identical price-fixing cases against other Chinese manufacturers in the Western District of Pennsylvania, *Animal Science Products, Inc. v. China National Metals & Minerals Import & Export Corp.*, and the District of New Jersey, *Resco Products, Inc. v. Bosai Mineral Group Co., Ltd.*¹⁶⁴ In both cases, the district court considered the Ministry briefs filed in the *In re Vitamin C Antitrust Litigation* case and arrived at a decision favorable to defendant manufacturers. Each of these decisions deserves some attention, as they represent alternative approaches to this factual scenario that exhibit greater deference to sovereignty considerations.

After considering essentially the exact same allegations and sovereignty-based defenses as those explored in *In re Vitamin C Antitrust Litigation*, the court in *Animal Science Products, Inc. v. China National Metals & Minerals Import & Export Corp.* arrived at an opposite conclusion. Plaintiff consumers of magnesite-based products brought a price-fixing putative class action against seventeen “Chinese business entities involved in the sale of magnesite-based products.”¹⁶⁵ The magnesite manufacturers allegedly fixed prices and engaged in other anticompetitive ac-

164. See *Resco Prods., Inc. v. Bosai Minerals Group Co., Ltd.*, No. 06-235, 2010 WL 2331069 (W.D. Pa. June 4, 2010); *Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, No. 05-4376, 2010 WL 1324918 (D.N.J. Apr. 1, 2010).

165. *Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, No. 05-4376, 2010 WL 1324918, at *3 (D.N.J. Apr. 1, 2010).

tions through the auspices of their trade association, the “Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters” (“CCCMC”).¹⁶⁶ Rather than rely only on the parties’ submissions on these claims and the sovereignty-based defenses, however, the court actively researched evidence from four other proceedings that might bear on the foreign sovereign compulsion doctrine.¹⁶⁷

The first such proceeding, a decision in the European Union, “set aside a prior EU determination refusing market economy treatment” and hence lower antidumping duties, to an individual Chinese exporter that established it successfully avoided substantial government intervention in its pricing decisions.¹⁶⁸ However, due to the degree of difference in the proceedings and the lack of clarity in the EU decision, the *Animal Science Products, Inc.* court found it would be improper to accord judicial notice to this proceeding.¹⁶⁹

Second, the *Animal Science Products, Inc.* court considered statements made by one of the plaintiffs in a countervailing duty petition on Chinese magnesite before the International Trade Administration, and found these statements amenable to judicial notice.¹⁷⁰ Specifically, plaintiff Resco Products, Inc. alleged that the Chinese government subsidizes magnesite products via preferential loans, export quotas, and imposition of a “minimum acceptable export sales price,” in addition to a bidding system that awarded export licenses to those manufacturers with the highest export prices.¹⁷¹ Essentially, in its countervailing duty petition Resco blamed the Chinese government for the same conduct for which Resco’s antitrust complaint now alleges the defendants *alone* were responsible.

Third, the *Animal Science Products, Inc.* court took judicial notice of the proceedings against bauxite manufacturers in the Western District of Pennsylvania, which it noted contains plaintiffs’ arguments that are nearly a substantive carbon copy of the magnesite case, only featuring a different product.¹⁷² Given that court’s decision to stay proceedings pending the outcome of a U.S.-initiated WTO proceeding against China on export constraints for bauxite, the *Animal Science Products, Inc.* court found it “logical to . . . consider the CCCMC’s treatment of its *entire bauxite sec-*

166. *Id.* at *50.

167. *Id.* at *53.

168. *Id.* at *56–57.

169. *Id.* at *58.

170. *Id.*

171. *Id.*

172. *Id.* at *59–61.

tion as an indication of the CCCMC's general *modi operandi* with regard to all members of the CCCMC, including Defendants."¹⁷³

Finally, the court in *Animal Science Products, Inc.* took judicial notice—and quoted and discussed at considerable length—the court's decision and Ministry briefs submitted in the “strikingly similar” *In re Vitamin C Antitrust Litigation* case.¹⁷⁴

The *Animal Science Products, Inc.* court construed defendants' act of state argument as “a mislabeled argument seeking abstention on the basis of government compulsion,” and went on to consider each element of the compulsion defense in considerable detail.¹⁷⁵ At each step of the analysis, the court used the evidence it had taken the initiative to gather from other proceedings to inform its decision-making process.¹⁷⁶ Significantly, the court considered that “a foreign sovereign's admission of legal compulsion of its subjects might warrant a high—often, 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.’”¹⁷⁷ The court considered “the MOFCOM's interpretations [of its own directives] the final authority unless the Court detects a Chinese legal provision or an alternative MOFCOM's [sic] statement that clearly and convincingly establishes the incorrectness of these interpretations.”¹⁷⁸ Ultimately, the court was convinced by the totality of the evidence that the CCCMC constitutes a government entity, and that “the Chinese government indeed compelled compliance with ‘a’ minimum price, which—in turn—means that defendants' conduct prompted by *that particular* compulsion warrants this Court's abstention.”¹⁷⁹

The decision in *Resco Products, Inc. v. Bosai Mineral Group Co., Ltd.* exhibits considerable deference to separation of powers and sovereignty considerations, while maintaining at least temporary jurisdiction over the case. Plaintiff purchasers in this case alleged that Chinese manufacturers of bauxite fixed prices on bauxite exported to the U.S.¹⁸⁰ Defendants as-

173. *Id.* at *61.

174. *Id.* at *61–64.

175. *Id.* at *66, 67–96.

176. *See id.* at 67–96.

177. *Id.* at *70.

178. *Id.* at *72.

179. *Id.* at *95. The complaint was dismissed although the court reserved decision on abstention on government compulsion grounds to allow plaintiffs to submit evidence establishing subject matter jurisdiction. *Id.* at *97.

180. *Resco Prods., Inc. v. Bosai Minerals Group Co., Ltd.*, No. 06-235, 2010 WL 2331069, at *1 (W.D. Pa. June 4, 2010)

sented the three sovereignty-based defenses in a motion to dismiss, pointing to the Ministry brief in the *In re Vitamin C Antitrust Litigation* case and arguing that “price coordination and supply limits were mandated by China’s export control regulations and policies” through the CCCMC.¹⁸¹ Rather than consider the merits of these arguments, however, the court decided to stay the proceedings to await the results of a WTO dispute proceeding initiated by the USTR “concerning China’s export restrictions on various raw materials, including bauxite.”¹⁸² The court noted that the issues in the two proceedings were very similar in their allegations, but only differed over “what entity is responsible for the price arrangements—the Chinese government or defendants.”¹⁸³ Thus, the result of the panel has the potential to provide strong persuasive support for the act of state allegations brought by the defendants.¹⁸⁴ Over plaintiffs’ objections, the court found that

To advance discovery now without a final determination in the pending WTO proceeding could lead the court to resolve the pending motion to dismiss or future dispositive motions in a manner that may be inconsistent with the position of the USTR and the eventual decision rendered by the WTO panel. While not dispositive, the WTO panel’s report may implicate separation of powers concerns, which would be appropriate for this court to consider in determining whether a decision by this court would interfere with the [E]xecutive [B]ranch’s conduct of foreign policy.¹⁸⁵

Based on these considerations and a careful weighing of judicial economy, prejudice to plaintiffs, and potential alleviation of discovery burdens on defendants, the court stayed antitrust proceedings “until a final report is released by the WTO panel” and denied the motions to dismiss without prejudice to renew them after the lifting of the stay.¹⁸⁶

Together, these two decisions indicate that perhaps the federal districts, and eventually circuits, will adopt conflicting approaches to sovereignty-based defenses as applied to Chinese manufacturers accused of price-fixing through trade associations. As more of these cases make their way through U.S. courts, it will be important to monitor and evaluate the different approaches that emerge in order to see which best serves private

181. *Id.* at *2–4.

182. *Id.* at *1.

183. *Id.* at *6.

184. *Id.*

185. *Id.*

186. *Id.* at *8.

interests in competition while maintaining respect for the sovereignty of other nations.

CONCLUSION

The *In re Vitamin C Antitrust Litigation* decision is an important indicator of the special challenges that courts, governments, and Chinese exporters alike will face in what is likely to be a rising tide of antitrust suits against Chinese enterprises as they come to prominence on the world economic stage. The case illustrates several key lessons for the treatment of sovereignty-based defenses by U.S. courts.

First, courts should not shy away from a nuanced analysis of sovereignty-based defenses applying the facts of the case and considering the context of the regulatory system employed by the foreign sovereign, even if (and perhaps especially if) the system is markedly different from an American-style, traditionally market-oriented structure. Decisions should be based on rigorous analysis of the underlying policy considerations at stake rather than over-reliance on rhetoric. Well-reasoned, thoughtful analysis will help avoid stepping on the toes of important trading partners and inviting backlash against harsh or unexpected impositions of U.S. jurisdiction, particularly when these steps become increasingly likely due to a crisis or downturn in the global economy. The court in *In re Vitamin C Antitrust Litigation* can hardly be faulted for adopting a wait-and-see approach in light of the complex factual and policy considerations involved and the fact that this was the first such suit against Chinese manufacturers. However, a broader construction of sovereignty-based defenses is available to courts at the motion to dismiss stage. Adoption of a broad construction may be particularly favorable where a foreign sovereign accepts responsibility for the disputed behavior, where the Executive Branch is actively pursuing diplomatic avenues to address the alleged conduct, and where further discovery would saddle a defending party with unusually high costs.

Second, Chinese manufacturers should take note of the expense and rules of U.S. antitrust lawsuits when structuring their international business transactions. The more they achieve dominance in the private sector, the more likely they are to become the object of complex antitrust suits,¹⁸⁷ rather than the blunter and legally straightforward antidumping

187. See Pietrzak, Mitnick & Ding, *supra* note 162, at 66 (“China’s economic growth has turned Chinese industries into attractive U.S. litigation targets, both because these industries are finding themselves in a thicket of unfamiliar Western commercial rules and because they have increasingly deep pockets.”).

suits to which they are more accustomed. Therefore, these manufacturers should take advantage of the newly enacted AML and its prohibitions against price-fixing through trade associations to advocate with the Chinese government for clearer policies and implementing regulations to enforce these restrictions. Pushing for a more transparent regulatory framework will help them to avoid becoming ensnared between conflicting competition laws in the future. Manufacturers should take note that after the imposition of the AML, it will become harder to argue that they were compelled by their government to fix prices—even if this is *de facto* occurring behind the scenes.

Finally, the Chinese government should continue to express strong opinions through an *amicus* role in order to educate U.S. courts about its transitioning system and its different views on the role and importance of “competition” to its socialist market economy. At the same time, it should seek more cooperation with the U.S. and other countries on anti-trust enforcement in order to head off future clashes that may negatively impact its burgeoning private sector. If the AML proves an effective framework for enforcement, possibilities for coordination with advanced antitrust regimes may even include signing bilateral agreements on “positive comity” that allow enforcement and prosecution of ambiguous cases in home jurisdictions. Only through more experience regulating and enforcing its new AML will China be able to take its place among the top competition law authorities in the global economic sphere.

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