

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2014

5
6 (Argued: January 29, 2015 Decided: September 20, 2016)

7
8 Docket No. 13-4791-cv
9

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11 IN RE: VITAMIN C ANTITRUST LITIGATION

12
13 ANIMAL SCIENCE PRODUCTS, INC., THE RANIS COMPANY, INC.,

14
15 *Plaintiffs-Appellees,*

16
17 - v. -

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19 HEBEI WELCOME PHARMACEUTICAL CO. LTD., NORTH CHINA PHARMACEUTICAL
20 GROUP CORPORATION,

21
22 *Defendants-Appellants.*
23

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26 Before: CABRANES, WESLEY, and HALL, *Circuit Judges.*

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28 Appeal from an order and final judgment of the United States District
29 Court for the Eastern District of New York in favor of Plaintiffs and awarding
30 damages and injunctive relief. Plaintiffs allege that Defendants engaged in price
31 fixing and supply manipulation in violation of U.S. antitrust laws in connection
32 with vitamin C exported from China. Because the Chinese Government filed a
33 formal statement in the district court asserting that Chinese law required
34 Defendants to set prices and reduce quantities of vitamin C sold abroad, and
35 because Defendants could not simultaneously comply with Chinese law and U.S.
36 antitrust laws, we **VACATE** the judgment, **REVERSE** on international comity

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 grounds the district court's denial of Defendants' motion to dismiss, and
2 **REMAND** with instructions to dismiss Plaintiffs' complaint with prejudice. We
3 do not address, except insofar as necessary to explain our rationale under the
4 applicable principles of international comity, Defendants' additional defenses
5 under the foreign sovereign compulsion, act of state, or political question
6 doctrines.

7
8 VACATED, REVERSED, and REMANDED.

9
10 WILLIAM A. ISAACSON, Boies, Schiller & Flexner,
11 LLP, Washington, D.C. (James T. Southwick,
12 Shawn L. Raymond, Katherine Kunz, Susman
13 Godfrey LLP, Houston, TX, Michael D. Hausfeld,
14 Brian A. Ratner, Melinda Coolidge, Hausfeld
15 LLP, Washington D.C., Brent W. Landau,
16 Hausfeld LLP, Philadelphia, PA, *on the brief*), *for*
17 *Plaintiffs-Appellees*.

18
19 JONATHAN M. JACOBSON, (Daniel P. Weick, Justin
20 A. Cohen, *on the brief*), Wilson Sonsini Goodrich &
21 Rosati, P.C., New York, NY (Scott A. Sher,
22 Bradley T. Tennis, *on the brief*), Wilson Sonsini
23 Goodrich & Rosati P.C., Washington, D.C., *for*
24 *Defendants-Appellants*.

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26
27
28 HALL, *Circuit Judge*:

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30 This appeal arises from a multi-district antitrust class action brought
31 against Defendants-Appellants Hebei Welcome Pharmaceutical and North China
32 Pharmaceutical Group Corporation, entities incorporated under the laws of
33 China. Plaintiffs-Appellees, Animal Science Products, Inc. and The Ranis

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 Company, Inc., U.S. vitamin C purchasers, allege that Defendants conspired to
2 fix the price and supply of vitamin C sold to U.S. companies on the international
3 market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4
4 and 16 of the Clayton Act, 15 U.S.C. §§ 4, 16. This appeal follows the district
5 court's denial of Defendants' initial motion to dismiss, *In re Vitamin C Antitrust*
6 *Litig.*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008) (Trager, J.), a subsequent denial of
7 Defendants' motion for summary judgment, *In re Vitamin C Antitrust Litig.*, 810 F.
8 Supp. 2d 522 (E.D.N.Y. 2011) (Cogan, J.),¹ and, after a jury trial, entry of judgment
9 awarding Plaintiffs approximately \$147 million in damages and enjoining the
10 Defendants from engaging in future anti-competitive behavior. For the reasons
11 that follow, we hold that the district court erred in denying Defendants' motion
12 to dismiss.²

13 This case presents the question of what laws and standards control when
14 U.S. antitrust laws are violated by foreign companies that claim to be acting at
15 the express direction or mandate of a foreign government. Specifically, we

¹ District Judge David D. Trager passed away in January 2011, at which point this case was reassigned to District Judge Brian M. Cogan.

² Because we vacate the judgment and reverse the district court's denial of Defendants' motion to dismiss, we do not address the subsequent stages of this litigation nor the related arguments on appeal.

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 address how a federal court should respond when a foreign government,
2 through its official agencies, appears before that court and represents that it has
3 compelled an action that resulted in the violation of U.S. antitrust laws. In so
4 doing we balance the interests in adjudicating antitrust violations alleged to have
5 harmed those within our jurisdiction with the official acts and interests of a
6 foreign sovereign in respect to economic regulation within its borders. When, as
7 in this instance, we receive from a foreign government an official statement
8 explicating its own laws and regulations, we are bound to extend that explication
9 the deference long accorded such proffers received from foreign governments.

10 Here, because the Chinese Government filed a formal statement in the
11 district court asserting that Chinese law required Defendants to set prices and
12 reduce quantities of vitamin C sold abroad, and because Defendants could not
13 simultaneously comply with Chinese law and U.S. antitrust laws, the principles
14 of international comity required the district court to abstain from exercising
15 jurisdiction in this case. Thus, we **VACATE** the judgment, **REVERSE** the district
16 court's order denying Defendants' motion to dismiss, and **REMAND** with
17 instructions to dismiss Plaintiffs' complaint with prejudice.

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13-4791-cv

In Re: Vitamin C Antitrust Litigation

BACKGROUND³

1
2 For more than half a century, China has been a leading producer and
3 exporter of vitamin C. In the 1970s, as China began to transition from a
4 centralized state-run command economy to a market economy, the Chinese
5 Government began to implement various export controls in order to retain a
6 competitive edge over other producers of vitamin C on the world market. In the
7 intervening years, the Government continued to influence the market and
8 develop policies to retain that competitive edge. In the 1990s, for example, as a
9 result of a reduction in vitamin C prices, the Government facilitated industry-
10 wide consolidation and implemented regulations to control the prices of vitamin
11 C exports. By 2001, Chinese suppliers had captured 60% of the worldwide
12 vitamin C market.

13 In 2005, various vitamin C purchasers in the United States, including
14 Plaintiffs Animal Science Products, Inc. and The Ranis Company, filed numerous

³ We set forth here only those facts necessary to resolve the issues on appeal. Unless otherwise noted, the facts have been taken from the allegations in Plaintiffs' Second Amended Complaint, E.D.N.Y. Dkt. No. 1:06-md-1738, Doc. 179, which we accept as true for purposes of resolving a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 109 (2d Cir. 2011). For a more complete recitation of the facts, see the district court's November 6, 2008 Memorandum and Order. See *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008).

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 suits against Defendants, Chinese vitamin C manufacturer Hebei Welcome
2 Pharmaceutical Co. and its holding company, North China Pharmaceutical
3 Group Corporation. These cases were transferred to the Eastern District of New
4 York by the Judicial Panel on Multidistrict Litigation for coordinated or
5 consolidated pretrial proceedings. The Plaintiffs allege, *inter alia*, that in
6 December 2001 Defendants and their co-conspirators established an illegal cartel
7 with the “purpose and effect of fixing prices, controlling the support of vitamin C
8 to be exported to the United States and worldwide, and committing unlawful
9 practices designed to inflate the prices of vitamin C sold to plaintiffs and other
10 purchasers in the United States and elsewhere.” E.D.N.Y. Dkt. No. 1:06-md-1738,
11 Doc. 179 (Second Amended Complaint (“SAC”)) ¶ 1. Specifically, Plaintiffs assert
12 that Defendants colluded with an entity that has been referred to in this litigation
13 as both the “Western Medicine Department of the Association of Importers and
14 Exporters of Medicines and Health Products of China” and the “China Chamber
15 of Commerce of Medicines & Health Products Importers & Exporters,” (the
16 “Chamber”)⁴ and agreed to “restrict their exports of Vitamin C in order to create

⁴ The parties explicitly disagree over the nature and authority of this entity. Plaintiffs characterize this entity as an “association” much like a trade association in the United States, while Defendants describe this entity as a government-

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 a shortage of supply in the international market.” *Id.* ¶ 49. Plaintiffs allege that,
2 from December 2001 to the time the complaint was filed, Defendants, their
3 representatives, and the Chamber devised and implemented policies to address
4 price cutting by market actors and to limit production levels and increase
5 vitamin C prices with the intent to create a shortage on the world market and
6 maintain China’s position as a leading exporter. *Id.* ¶ 60.

7 Rather than deny the Plaintiffs’ allegations, Defendants instead moved to
8 dismiss on the basis that they acted pursuant to Chinese regulations regarding
9 vitamin C export pricing and were, in essence, required by the Chinese
10 Government, specifically the Ministry of Commerce of the People’s Republic of
11 China (the “Ministry”), to coordinate prices and create a supply shortage.
12 Defendants argued that the district court should dismiss the complaint pursuant
13 to the act of state doctrine, the doctrine of foreign sovereign compulsion, and/or
14 principles of international comity. In an historic act, the Ministry filed an *amicus*
15 *curiae* brief in support of Defendants’ motion to dismiss.⁵

controlled “Chamber” of producers, unique to China’s state-controlled regulatory regime.

⁵ As Judge Trager noted, the Ministry’s appearance in this case is historic because it is the first time any entity of the Chinese Government has appeared *amicus*

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 In its brief to the district court, the Ministry represented that it is the
2 highest authority within the Chinese Government authorized to regulate foreign
3 trade. The Ministry explained that the Chamber, which Plaintiffs refer to as an
4 “association,” is entirely unlike a “trade association” or the “chamber of
5 commerce” in the United States and, consistent with China’s state-run economy,
6 is a “Ministry-supervised entity authorized by the Ministry to regulate vitamin C
7 export prices and output levels.” Joint App’x at 153. The Ministry’s *amicus* brief
8 describes the Chamber as follows:

9 To meet the need of building the *socialist market economy* and
10 *deepening the reform of foreign economic and trade management*
11 *system*, the China Chamber of Commerce of Medicines &
12 Health Products Importers & Exporters was established in
13 May 1989 in an effort to boost the sound development of
14 foreign trade in medicinal products. As a social body formed
15 along business lines and enjoying the status of legal person,
16 the Chamber is composed of economic entities registered in
17 the People’s Republic of China dealing in medicinal items as
18 authorized by the departments under the [S]tate Council
19 responsible for foreign economic relations and trade as well
20 as organizations empowered by them. *It is designated to*
21 *coordinate import and export business in Chinese and Western*
22 *medicines* and provide service for its member enterprises. Its
23 over 1100 members are scattered all over China. The
24 Chamber abides by the state laws and administrative
25 statutes, *implements its policies and regulations governing foreign*
26 *trade, accepts the guidance and supervision of the responsible*

curiae before any U.S. court. On appeal, the Ministry also appears *amicus curiae* before this Court.

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 *departments under the States Council. The very purpose is to*
2 *coordinate and supervise the import and export operations in this*
3 *business, to maintain business order and protect fair competition,*
4 *to safeguard the legitimate rights and interests of the state, the*
5 *trade and the members and to promote the sound development of*
6 *foreign trade in medicinal items.*

7
8 Joint App'x at 157 n.10 (emphasis in original). According to the Ministry, the
9 Chamber was an instrumentality of the State that was required to implement the
10 Ministry's administrative rules and regulations with respect to the vitamin C
11 trade.⁶

12 In support of Defendants' motion to dismiss, the Ministry also provided
13 evidence of two Ministry-backed efforts by the Chamber to regulate the vitamin
14 C industry: (1) a vitamin C Subcommittee ("the Subcommittee") created in 1997
15 and (2) a "price verification and chop" policy ("PVC") implemented in 2002. The
16 Chamber created the Subcommittee to address "intense competition and
17 challenges from the international [vitamin C] market." Joint App'x at 159. Before
18 2002, only companies that were members of the Subcommittee were allowed to
19 export vitamin C. Under this regime, a vitamin C manufacturer qualified for the

⁶ In an annex to its brief to the district court, the Ministry provided the Mitnick Declaration, which contained a copy of all regulations cited by the Ministry. The Ministry noted that all documents were properly authenticated consistent with Rule 902(3) of the Federal Rules of Evidence, which governs the self-authentication of foreign documents.

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 Subcommittee and was granted an “export quota license” if its export price and
2 volume was in compliance with the Subcommittee’s coordinated export price
3 and export quota. In short, the Ministry explained to the district court that it
4 compelled the Subcommittee and its licensed members to set and coordinate
5 vitamin C prices and export volumes.

6 In 2002, the Chamber abandoned the “export quota license” regime and
7 implemented the PVC system, which the Ministry represented was in place
8 during the time of the antitrust violations alleged in this case. To announce the
9 new regime, the Ministry issued an official notice, a copy of which is attached to
10 the Ministry’s brief in support of Defendants’ motion to dismiss. This document,
11 hereinafter “the 2002 Notice,” explains that the Ministry adopted the PVC
12 regime, among other reasons, “in order to accommodate the new situations since
13 China’s entry into [the World Trade Organization], maintain the *order* of market
14 competition, make active efforts to avoid anti-dumping sanctions imposed by
15 foreign countries on China’s exports, promote industry self-discipline and
16 facilitate the healthy development of exports.” Special App’x 301. The 2002
17 Notice, furthermore, refers to “industry-wide negotiated prices” and states that
18 “PVC procedure shall be convenient for exporters while it is conducive for the

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 chambers to coordinate export price and industry self-discipline.” Special App’x
2 302. According to the Ministry, under this system, vitamin C manufacturers were
3 required to submit documentation to the Chamber indicating both the amount
4 and price of vitamin C it intended to export. The Chamber would then “verify”
5 the contract price and affix a “chop,” i.e., a special seal, to the contract, which
6 signaled that the contract had been reviewed and approved by the Chamber. A
7 contract received a chop only if the price of the contract was “at or above the
8 minimum acceptable price set by coordination through the Chamber.” Joint
9 App’x 164. Manufacturers could only export vitamin C if their contracts
10 contained this seal. The Ministry asserted that under the PVC regime,
11 Defendants were required to coordinate with other vitamin C manufacturers and
12 agree on the price that the Chamber would use in the PVC regime. In short, the
13 Ministry represented to the district court that all of the vitamin C that was legally
14 exported during the relevant time was required to be sold at industry-wide
15 coordinated prices.

16 Defendants moved to dismiss the complaint based on the act of state
17 doctrine, the defense of foreign sovereign compulsion, and the principle of
18 international comity. The district court (Trager, J.) denied the motion in order to

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 allow for further discovery with respect to whether Defendants' assertion that
2 the actions constituting the basis of the antitrust violations were compelled by
3 the Chinese Government. In the district court's view, the factual record was
4 "simply too ambiguous to foreclose further inquiry into the voluntariness of
5 defendants' actions." *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559.

6 After further discovery, Defendants moved for summary judgment
7 asserting the same three defenses that were the basis for their motion to dismiss.
8 *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 525–26. The district court
9 (Cogan, J.) considered the evidence submitted by Defendants and the Ministry
10 and accepted the Ministry's explanation as to its relationship with the Chamber,
11 but "decline[d] to defer to the Ministry's interpretation of Chinese law" because
12 the Ministry failed "to address critical provisions" of the PVC regime that
13 "undermine[d] [the Ministry's] interpretation of Chinese law." *Id.* at 551. The
14 district court further reasoned that pursuant to Federal Rule of Civil Procedure
15 44.1 ("Rule 44.1"), when interpreting Chinese law it had "substantial discretion
16 to consider different types of evidence" beyond the Ministry's official statements,
17 including, for example, the testimony of Plaintiffs' expert witness, a scholar of
18 Chinese law. *Id.* at 561. The district court denied Defendants' motion for

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 summary judgment because it determined that “Chinese law did not compel
2 Defendants’ anticompetitive conduct” in any of the relevant time periods. *Id.* at
3 567.

4 The case ultimately went to trial. In March 2013, a jury found Defendants
5 liable for violations of Section 1 of the Sherman Act. The district court awarded
6 Plaintiffs approximately \$147 million in damages and issued a permanent
7 injunction barring Defendants from further violating the Sherman Act. This
8 appeal followed.

9 **DISCUSSION**

10 The central issue that we address is whether principles of international
11 comity required the district court to dismiss the suit. As part of our comity
12 analysis we must determine whether Chinese law required Defendants to engage
13 in anticompetitive conduct that violated U.S. antitrust laws. Within that inquiry,
14 we examine the appropriate level of deference to be afforded a foreign
15 sovereign’s interpretation of its own laws. We hold that the district court abused
16 its discretion by not abstaining, on international comity grounds, from asserting
17 jurisdiction because the court erred by concluding that Chinese law did not
18 require Defendants to violate U.S. antitrust law and further erred by not

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 extending adequate deference to the Chinese Government's proffer of the
2 interpretation of its own laws.

3 **A. Standard of Review**

4 We review for abuse of discretion a district court's denial of a motion to
5 dismiss on international comity grounds. *JP Morgan Chase Bank v. Altos Hornos de*
6 *Mexico*, 412 F.3d 418, 422 (2d Cir. 2005). An abuse of discretion "occurs when (1)
7 the court's decision rests on an error of law or clearly erroneous factual finding,
8 or (2) its decision cannot be located within the range of permissible decisions."
9 *CBS Broad. Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 104 (2d Cir. 2016) (alterations and
10 internal quotation omitted). The determination of foreign law is "a question of
11 law, which is subject to *de novo* review." *Karaha Bodas Co. v. Perusahaan*
12 *Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70, 80 (2d Cir.
13 2002) (internal quotation omitted). In determining foreign law, "we may consider
14 any relevant material or source, including the legal authorities supplied by the
15 parties on appeal as well as those authorities presented to the district court
16 below." *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 604
17 (2d Cir. 1999); *see* Fed. R. Civ. P. 44.1.

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13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 B. International Comity

2 Defendants argue that the district court erred by not dismissing Plaintiffs'
3 complaint on international comity grounds. Comity is both a principle guiding
4 relations between foreign governments and a legal doctrine by which U.S. courts
5 recognize an individual's acts under foreign law. *See In re Maxwell Commc'n*
6 *Corp.*, 93 F.3d 1036, 1046 (2d Cir. 1996). "Comity, in the legal sense, is neither a
7 matter of absolute obligation, on the one hand, nor of mere courtesy and good
8 will, upon the other." *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (internal
9 quotations omitted). "[I]t is the recognition which one nation allows within its
10 territory to the legislative, executive or judicial acts of another nation, having due
11 regard both to international duty and convenience, and to the rights of its own
12 citizens or of other persons who are under the protection of its laws." *Id.* This
13 doctrine "is not just a vague political concern favoring international cooperation
14 when it is in our interest to do so [but r]ather it is a principle under which
15 judicial decisions reflect the systemic value of reciprocal tolerance and goodwill."
16 *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court of S. Dist. of Iowa*, 482
17 U.S. 522, 555 (1987). While we approach Defendants' international comity
18 defense from the "legal sense," we do not lose sight of the broader principles

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 underlying the doctrine. *See JP Morgan Chase Bank*, 412 F.3d at 423 (“Whatever its
2 precise contours, international comity is clearly concerned with maintaining
3 amicable working relationships between nations, a shorthand for good
4 neighbourliness, common courtesy and mutual respect between those who
5 labour in adjoining judicial vineyards.” (internal quotation omitted)). Our
6 analysis reflects an obligation to balance “the interests of the United States, the
7 interests of the foreign state, and those mutual interests the family of nations
8 have in just and efficiently functioning rules of international law.” *In re Maxwell*
9 *Comm’n Corp.*, 93 F.3d at 1048.

10 The principles of comity implicate a federal court’s exercise of jurisdiction.
11 *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d
12 Cir. 1987). Defendants do not dispute that the district court had subject matter
13 jurisdiction over Plaintiffs’ claims, *see Hartford Fire Ins. Co. v. California*, 509 U.S.
14 764, 796 (1993) (collecting cases) (“[I]t is well established by now that the
15 Sherman Act applies to foreign conduct that was meant to produce and did in
16 fact produce some substantial effect in the United States.”); rather, Defendants
17 argue that principles of international comity required the district court to abstain
18 from exercising that jurisdiction here, *see O.N.E. Shipping Ltd.*, 830 F.2d at 452

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 (“Congress left it to the courts to decide when to employ notions of abstention
2 from exercising jurisdiction in extraterritorial antitrust cases.”); *see also* H.R. Rep.
3 No. 97-686, at 13 (1982) (“If a court determines that the requirements for subject
4 matter jurisdiction are met, [the Foreign Trade Antitrust Improvements Act]⁷
5 would have no effect on the court[’s] ability to employ notions of comity . . . or
6 otherwise to take account of the international character of the transaction.”).

7 To determine whether to abstain from asserting jurisdiction on comity
8 grounds we apply the multi-factor balancing test set out in *Timberlane Lumber Co.*
9 *v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614–15 (9th Cir. 1976) and *Mannington*
10 *Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979). *See O.N.E.*
11 *Shipping Ltd.*, 830 F.2d at 451–52 (noting that “[t]he comity balancing test has
12 been explicitly used in this Court”). Both *Timberlane Lumber* and *Mannington*
13 *Mills* addressed the unique international concerns that are implicated by
14 exercising jurisdiction over antitrust violations that occur abroad and that
15 involve the laws and regulations of a foreign nation. *See Timberlane Lumber Co.*,

⁷ “Under § 402 of the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), the Sherman Act does not apply to conduct involving foreign trade or commerce, other than import trade or import commerce, unless ‘such conduct has a direct, substantial, and reasonably foreseeable effect’ on domestic or import commerce.” *Hartford Fire*, 509 U.S. at 796 (quoting 15 U.S.C. § 6a(1)(A)) (internal citations omitted).

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 549 F.2d at 613 (“[T]here is the additional question which is unique to the
2 international setting of whether the interests of, and links to, the United States
3 including the magnitude of the effect on American foreign commerce are
4 sufficiently strong, vis-a-vis those of other nations, to justify an assertion of
5 extraterritorial authority.”); *Mannington Mills, Inc.*, 595 F.2d at 1296 (“When
6 foreign nations are involved, however, it is unwise to ignore the fact that foreign
7 policy, reciprocity, comity, and limitations of judicial power are considerations
8 that should have a bearing on the decision to exercise or decline jurisdiction.”).
9 Combined and summarized here, the enumerated factors from *Timberlane Lumber*
10 and *Mannington Mills* (collectively the “comity balancing test”) guiding our
11 analysis of whether to dismiss on international comity grounds include: (1)
12 Degree of conflict with foreign law or policy; (2) Nationality of the parties,
13 locations or principal places of business of corporations; (3) Relative importance
14 of the alleged violation of conduct here as compared with conduct abroad; (4)
15 The extent to which enforcement by either state can be expected to achieve
16 compliance, the availability of a remedy abroad and the pendency of litigation
17 there; (5) Existence of intent to harm or affect American commerce and its
18 foreseeability; (6) Possible effect upon foreign relations if the court exercises

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 jurisdiction and grants relief; (7) If relief is granted, whether a party will be
2 placed in the position of being forced to perform an act illegal in either country
3 or be under conflicting requirements by both countries; (8) Whether the court can
4 make its order effective; (9) Whether an order for relief would be acceptable in
5 this country if made by the foreign nation under similar circumstances; and (10)
6 Whether a treaty with the affected nations has addressed the issue. *Mannington*
7 *Mills, Inc.*, 595 F.2d at 1297–98; *Timberlane Lumber Co.*, 549 F.2d at 614.

8 Since our adoption of the comity balancing test, the Supreme Court, in
9 determining whether international comity cautioned against exercising
10 jurisdiction over antitrust claims premised entirely on foreign conduct, relied
11 solely upon the first factor—the degree of conflict between U.S. and foreign
12 law—to decide that abstention was inappropriate. *Hartford Fire*, 509 U.S. at 798
13 (“The only substantial question in this litigation is whether there is in fact a true
14 conflict between domestic and foreign law.” (internal quotation omitted)). The
15 Court explained that just because “conduct is lawful in the state in which it took
16 place will not, of itself, bar application of the United States antitrust laws.” *Id.*
17 Thus, in that case, the degree of conflict between the laws of the two states had to
18 rise to the level of a true conflict, i.e. “compliance with the laws of both countries

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 [must have been] impossible,” to justify the Court’s abstention on comity
2 grounds. *Id.* at 799. In other words, “[n]o conflict exists . . . ‘where a person
3 subject to regulation by two states can comply with the laws of both.’” *Id.*
4 (quoting Restatement (Third) of Foreign Relations Law § 403, cmt. e). After
5 determining that there was not a true conflict, the Court reflected that there was
6 “no need in this litigation to address other considerations that might inform a
7 decision to refrain from the exercise of jurisdiction on the ground of international
8 comity.” *Id.*

9 We read *Hartford Fire* narrowly and interpret the modifying phrase “in this
10 litigation” in reference to the “other considerations that might inform a decision”
11 as suggesting that the remaining factors in the comity balancing test are still
12 relevant to an abstention analysis. *Id.*; see *Mujica v. AirScan Inc.*, 771 F.3d 580, 600
13 (9th Cir. 2014) (“Since the majority did not address the ‘other considerations’
14 bearing on comity, the Court’s *Hartford Fire* analysis ‘left unclear whether it was
15 saying that the only relevant comity factor *in that case* was conflict with foreign
16 law . . . or whether the Court was more broadly rejecting balancing of comity
17 interests in *any* case where there is no true conflict.” (quoting Harold Hongju
18 Koh, *Transnational Litigation in United States Courts* 80 (2008)). That a true conflict

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 was lacking in *Hartford Fire* does not, in the inverse, lead us to conclude that the
2 presence of such a conflict alone is sufficient to require dismissal and thereby
3 vitiate the need to consider the remaining factors.

4 Some courts, after *Hartford Fire*, have gone further and do not require a
5 true conflict between laws before applying the remaining factors in the comity
6 balancing test. *See, e.g., Mujica*, 771 F.3d at 600 (“We think that *Hartford Fire* does
7 not require proof of a ‘true conflict’ as a prerequisite for invoking the doctrine of
8 comity, at least in a case involving adjudicatory comity.”); *Freund v. Rep. of Fr.*,
9 592 F. Supp. 2d 540, 574 (S.D.N.Y. 2008) (“In post-*Hartford Fire* cases, conflict
10 analysis has not been rigidly invoked to preclude consideration of the full range
11 of principles relating to international comity.” (citation omitted)). Similarly, we
12 have not required a true conflict where a party does not invoke a prescriptive
13 comity defense, “that is, where a party [does not] claim[] that it is subject to
14 conflicting regulatory schemes,” as Defendants do here. *Mujica*, 771 F.3d at 600;
15 *see Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006) (“[T]he only issue of
16 international comity properly raised here is whether adjudication of this case by
17 a United States court would offend ‘amicable working relationships’ with
18 Egypt.” (citation omitted)). We need not, however, determine whether absent a

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 true conflict, the district court could have abstained from asserting jurisdiction
2 on comity grounds because, in our view and as explained below, there is a true
3 conflict between U.S. law and Chinese law in this case.

4 **C. True Conflict Analysis**

5 To determine whether Defendants could have sold and distributed
6 vitamin C while in compliance with both Chinese and U.S. law, and thus
7 whether a “true conflict” exists, we must determine conclusively what the law of
8 each country requires.

9 The Sherman Act prohibits “[e]very contract, combination in the form of
10 trust or otherwise, or conspiracy, in restraint of trade or commerce.” 15 U.S.C.
11 § 1. While this language has been interpreted to outlaw only unreasonable
12 restraints in trade, *see, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997), certain types
13 of anticompetitive conduct are “so plainly anticompetitive that no elaborate
14 study of the industry is needed to establish their illegality,” *Nat. Soc. of Prof'l*
15 *Eng'rs v. United States*, 435 U.S. 679, 692 (1978). “Price-fixing agreements between
16 two or more competitors, otherwise known as horizontal price-fixing
17 agreements, fall into the category of arrangements that are *per se* unlawful.”
18 *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Thus, if Chinese law required

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 Defendants to enter into horizontal price-fixing agreements, “compliance with
2 the laws of both countries is [] impossible,” *Hartford Fire*, 509 U.S. at 799, and
3 there is a true conflict.

4 The Ministry, as *amicus*, has proclaimed on behalf of the Chinese
5 Government that Chinese law, specifically the PVC regime during the relevant
6 period, required Defendants, as manufacturers of vitamin C, to fix the price and
7 quantity of vitamin C sold abroad. The Ministry mainly relies on the reference to
8 “industry-wide negotiated prices” contained in the 2002 Notice to support its
9 position. Plaintiffs, however, argue that the Ministry’s statements are not
10 conclusive and that because the 2002 Notice does not explicitly mandate price
11 fixing, adherence to both Chinese law and U.S. antitrust law is possible. Our
12 interpretation of the record as to Chinese law thus hinges on the amount of
13 deference that we extend to the Chinese Government’s explanation of its own
14 laws.

15 **1. Standard of Deference**

16 There is competing authority on the level of deference owed by U.S. courts
17 to a foreign government’s official statement regarding its own laws and
18 regulations. In the seminal case *United States v. Pink*, 315 U.S. 203 (1942), the

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 Supreme Court considered, *inter alia*, the extraterritorial reach of a 1918 decree
2 nationalizing Russia's insurance business. The record before the *Pink* Court
3 included expert testimony and "voluminous" other evidence bearing on the
4 proper interpretation of the 1918 decree and its extraterritorial effect. *Id.* at 218.
5 This evidence included an official declaration of the Russian Government
6 explaining the intended extraterritorial effect of the decree. *See id.* at 219–20. The
7 Court "d[id] not stop to review" the whole body of evidence, however, *id.* at 218,
8 because it determined that the official declaration was "conclusive" as to the
9 extraterritorial effect of the decree, *id.* at 220.

10 Since 1942, several courts have cited *Pink* for the proposition that an
11 official statement or declaration from a foreign government clarifying its laws
12 must be accepted as "conclusive." *See, e.g., D'Angelo v. Petroleos Mexicanos*, 422 F.
13 Supp. 1280, 1284 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977) ("The principle of
14 *Pink* requires this Court to accept the opinion of the attorney general of Mexico as
15 an official declaration by that government that the effect of the expropriation
16 decree was to extinguish Papantla's royalty and participating rights in the
17 expropriated oil."); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1363 (S.D. Tex.
18 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000) (accepting as conclusive an opinion issued

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 by the Department of Justice of the Republic of the Philippines and presented to
2 the court articulating the scope and effect of a law of the Philippines); *but see*
3 *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999), *cert.*
4 *denied*, 531 U.S. 917 (2000) (holding, without citation to *Pink*, that “[t]he fact that
5 U.S. courts routinely give deference to U.S. agencies empowered to interpret U.S.
6 law and U.S. courts may give deference to foreign governments before the court
7 does not entail that U.S. courts must give deference to all agency determinations
8 made by all foreign agencies not before the court.”).

9 Other courts, however, have intimated that while the official statements of
10 a foreign government interpreting its laws are entitled to deference, U.S. courts
11 need not accept such statements as conclusive. For example, in *Amoco Cadiz*,
12 presented with conflicting interpretations of a French law, the Seventh Circuit
13 held that “[a] court of the United States owes substantial deference to the
14 construction France places upon its domestic law. . . . Giving the conclusions of a
15 sovereign nation less respect than those of [a United States] administrative
16 agency is unacceptable.” *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th
17 Cir. 1992) (internal citations omitted).

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 The district court below, at the motion to dismiss stage, relied on three
2 authorities—Rule 44.1, *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142 (2d Cir.
3 2008), and *Karaha Bodas*, 313 F.3d 70—for the proposition that the Second Circuit,
4 in particular, has “adopted a softer view toward the submissions of foreign
5 governments.” *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 557. We disagree
6 with this conclusion.

7 Contrary to the district court’s reasoning, we find no support for the
8 argument that Rule 44.1, adopted in 1966 long after *Pink* was decided, modified
9 the level of deference that a U.S. court must extend to a foreign government’s
10 interpretation of its own laws. Rule 44.1 provides that, when determining foreign
11 law, a court “may consider any relevant material or source, including testimony,
12 whether or not submitted by a party or admissible under the Federal Rules of
13 Evidence.” Fed. R. Civ. P. 44.1. According to the advisory committee notes, the
14 rule has two purposes: (1) to make a court’s determination of foreign law a
15 matter of law rather than fact, and (2) to relax the evidentiary standard and to
16 create a uniform procedure for interpreting foreign law. Fed. R. Civ. P. 44.1
17 advisory committee’s notes to 1966 adoption. The advisory committee notes
18 suggest that Rule 44.1 was meant to address some of the challenges facing

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 litigants whose claims and defenses depended upon foreign law and to provide
2 courts with a greater array of tools for understanding and interpreting those
3 laws. *Id.* Rule 44.1 explicitly focuses on *what* a court may consider when
4 determining foreign law, but it is silent as to *how* a court should analyze the
5 relevant material or sources. Thus, courts must still evaluate the relevant source
6 material within the context of each case. *See, e.g., Curley v. AMR Corp.*, 153 F.3d 5,
7 14–15 (2d Cir. 1998) (explaining that because “Mexican law is much different”
8 than New York state law and “its sources do not lie in precedent cases” the court
9 must “consider the text of the constitution, civil code and statutory
10 provisions . . . and give them preponderant consideration” when analyzing
11 Mexican law). Finding no authority to the contrary, we conclude that Rule 44.1
12 does not alter the legal standards by which courts analyze foreign law, and thus,
13 the rule does not abrogate or “soften” the level of deference owed by U.S. courts
14 to statements of foreign governments appearing in U.S. courts.

15 The district court looked to our decision in *Villegas Duran* to bolster its
16 conclusion that this court has adopted a softer view toward submissions of
17 foreign governments. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 557. In
18 *Villegas Duran* we declined to credit an affidavit from the Chilean Government

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 that clarified the appellant’s child custody rights under Chilean law. 534 F.3d at
2 148 (“Reasons existed for the district court to refrain from giving the affidavit
3 absolute deference.”). We consider *Villegas Duran* inapplicable to the present case
4 for two reasons. First, because the Chilean Government did not appear before the
5 court in that case, either as a party or as an *amicus*, the level of deference the
6 court afforded the Chilean affidavit does not guide our application here. Second,
7 *Villegas Duran* was overturned by the Supreme Court, *Duran v. Beaumont*, 560
8 U.S. 921 (2010), in light of *Abbott v. Abbott*, 560 U.S. 1 (2010). In *Abbott*, the Court
9 analyzed the same Chilean custody law at issue in *Villegas Duran* but found the
10 very same affidavit from the Chilean Government that was submitted in *Villegas*
11 *Duran* “notable” in its analysis of Chilean law and adopted Chile’s interpretation
12 of that law. *Abbott*, 560 U.S. at 10–11 (“[I]t is notable that a Chilean agency has
13 explained that [the Chilean law] is a ‘right to authorize the minors’ exit’ from
14 Chile and that this provision means that neither parent can ‘unilaterally’
15 ‘establish the [child’s] place of residence.’” (internal quotation omitted)). To the
16 extent that the majority’s analysis in *Villegas Duran* suggests that a foreign
17 sovereign’s interpretation of its own laws warrants a lesser degree of deference,
18 the Supreme Court’s approach in interpreting Chilean law—relying, in part, on

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 the Chilean Government's affidavit—requires us to question, if not reject, *Villegas*
2 *Duran* as precedent bearing on that issue.

3 Finally, the district court also relied on our decision in *Karaha Bodas*, 313
4 F.3d 70, to support its conclusion. In that case, a judgment creditor of an oil and
5 gas company owned and controlled by the Republic of Indonesia sought to
6 execute upon funds held in New York trust accounts. *Id.* at 71. The Republic of
7 Indonesia joined the appeal as a party with an affected interest, and in so doing,
8 sought to clarify the applicable Indonesian law as well as the Indonesian
9 Government's relationship with the gas company. *Id.* Citing to our sister circuits
10 in *Amoco Cadiz* and *Access Telecom*, we credited the Republic of Indonesia's
11 interpretation and explained that “a foreign sovereign's views regarding its own
12 laws merit—although they do not command—some degree of deference.” *Id.* at
13 92. We clarified that, “where a choice between two interpretations of ambiguous
14 foreign law rests finely balanced, the support of a foreign sovereign for one
15 interpretation furnishes legitimate assistance in the resolution of interpretive
16 dilemmas.” *Id.*

17 It is noteworthy that, while we suggested in *Karaha Bodas* that deference to
18 a foreign sovereign's interpretation need not be “conclusive” in every case, we

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 ultimately adopted the Republic of Indonesia’s interpretation of its own
2 regulation.⁸ Indeed, we have yet to identify a case where a foreign sovereign
3 appeared before a U.S. tribunal and the U.S. tribunal adopted a reading of that
4 sovereign’s laws contrary to that sovereign’s interpretation of them.

5 Consistent with our holding in *Karaha Bodas* and the Supreme Court’s
6 pronouncements in *Pink*, we reaffirm the principle that when a foreign
7 government, acting through counsel or otherwise, directly participates in U.S.
8 court proceedings by providing a sworn evidentiary proffer regarding the
9 construction and effect of its laws and regulations, which is reasonable under the
10 circumstances presented, a U.S. court is bound to defer to those statements. If
11 deference by any measure is to mean anything, it must mean that a U.S. court not
12 embark on a challenge to a foreign government’s official representation to the
13 court regarding its laws or regulations, even if that representation is inconsistent
14 with how those laws might be interpreted under the principles of our legal
15 system. *Cf. Abbott*, 560 U.S. at 20 (“Judges must strive always to avoid a common

⁸ Although we adopted the Republic of Indonesia’s “reading of the relevant Indonesian law,” we declined to accept fully Indonesia’s argument on appeal because it had “not identified any Indonesian statute or regulation” in support of its position. *Karaha Bodas*, 313 F.3d at 92. To the extent there is no documentary evidence or reference of law proffered to support a foreign sovereign’s interpretation of its own laws, deference may be inappropriate.

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 tendency to prefer their own society and culture, a tendency that ought not
2 interfere with objective consideration"); *Banco Nacional de Cuba v. Sabbatino*,
3 376 U.S. 398, 430 (1964) (recognizing, among other things, that the "basic
4 divergence between the national interests of capital importing and capital
5 exporting nations and between the social ideologies of those countries that favor
6 state control of a considerable portion of the means of production and those that
7 adhere to a free enterprise system" creates "disagreements as to [the] relevant
8 international legal standards" such that inquiring into the validity of a foreign
9 sovereign's actions is barred by the state action doctrine). Not extending
10 deference in these circumstances disregards and unravels the tradition of
11 according respect to a foreign government's explication of its own laws, the same
12 respect and treatment that we would expect our government to receive in
13 comparable matters before a foreign court. *Cf. Hilton v. Guyot*, 159 U.S. 113, 191
14 (1895) (explaining that the rule of reciprocity should "work itself firmly into the
15 structure of our international jurisprudence"); *Fed. Treasury Enter.*
16 *Sojuzplodoimport v. Spirits Int-l B.V.*, 809 F.3d 737, 743 (2d Cir. 2016) ("The
17 declaration of a United States court that the executive branch of the Russian
18 government violated its own law . . . would be an affront to the government of a

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 foreign sovereign.”); *Villegas Duran*, 534 F.3d at 153 (Wesley, J., dissenting)
2 (explaining that “this Court’s practice of giving some deference to a foreign
3 sovereign’s view of its own law” and “careful attention” to the interpretation of
4 foreign law is exactly what “we would expect . . . of a [foreign] court” in a
5 reciprocal situation).

6 **2. Applying Deference to the Ministry’s Brief**

7 The official statements of the Ministry should be credited and accorded
8 deference. On that basis, we conclude, as Defendants and the Ministry proffer,
9 that Chinese law required Defendants to engage in activities in China that
10 constituted antitrust violations here in the United States.

11 The 2002 Notice, *inter alia*, demonstrates that from 2002 to 2005, the
12 relevant time period alleged in the complaint, Chinese law required Defendants
13 to participate in the PVC regime in order to export vitamin C. This regulatory
14 regime allowed vitamin C manufacturers the export only of vitamin C subject to
15 contracts that complied with the “industry-wide negotiated” price. Although the
16 2002 Notice does not specify how the “industry-wide negotiated” price was set,
17 we defer to the Ministry’s reasonable interpretation that the term means what it
18 suggests—that members of the regulated industry were required to negotiate

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 and agree upon a price. It would be nonsensical to incorporate into a government
2 policy the concept of an “industry-wide negotiated” price and require vitamin C
3 manufacturers to comply with that minimum price point if there were no
4 directive to agree upon such a price. Moreover, while on their face the terms
5 “industry self-discipline,” “coordination,” and “voluntary restraint” may suggest
6 that the Defendants were not required to agree to “industry-wide negotiated”
7 prices, we defer to the Ministry’s reasonable explanation that these are terms of
8 art within Chinese law connoting the government’s expectation that private
9 actors actively self-regulate to achieve the government’s policy goals in order to
10 minimize the need for the government to resort to stronger enforcement
11 methods.⁹ In this context, we find it reasonable to view the entire PVC regime as
12 a decentralized means by which the Ministry, through the Chamber, regulated
13 the export of vitamin C by deferring to the manufacturers and adopting their
14 agreed upon price as the minimum export price. In short, by directing vitamin C
15 manufacturers to coordinate export prices and quantities and adopting those

⁹ Similarly, while the documentary evidence shows that when China transitioned from the export quota regime to the PVC regime the role of the Subcommittee within China’s regulatory framework changed from a governmental group whose membership was mandatory to a non-governmental trade organization whose membership was voluntary, we again defer to the Ministry’s reasonable interpretation that the PVC regime required industry-wide coordination of prices regardless of whether membership in the Subcommittee was required.

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 standards into the regulatory regime, the Chinese Government required
2 Defendants to violate the Sherman Act. *See United States v. Socony-Vacuum Oil*
3 *Co.*, 310 U.S. 150, 224 n.59 (1940) (“[I]t is [] well settled that conspiracies under the
4 Sherman Act are not dependent on any overt act other than the act of
5 conspiring.”).

6 We reiterate that deference in this case is particularly important because of
7 the unique and complex nature of the Chinese legal- and economic-regulatory
8 system and the stark differences between the Chinese system and ours. As the
9 district court recognized, “Chinese law is not as transparent as that of the United
10 States or other constitutional or parliamentary governments.” *In re Vitamin C*
11 *Antitrust Litig.*, 584 F. Supp. 2d at 559. China’s legal system is distinct from ours
12 in that “[r]ather than codifying its statutes, the Chinese government [] frequently
13 governs by regulations promulgated by various ministries . . . [and] private
14 citizens or companies may be authorized under Chinese regulations to act in
15 certain circumstances as government agents.” *Id.* Moreover, the danger that “an
16 interpretation suggested by the plain language of a governmental directive may
17 not accurately reflect Chinese law” is all the more plausible where the documents
18 the district court relied upon are translations and use terms of art which are

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 unique to the Chinese system. *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at
2 542. Deferring to the Ministry's explanation of what is legally required under its
3 system is all the more important where, as here, the record evidence shows a
4 clear disparity between China's economic regulatory regime and our own.

5 Instead of viewing the ambiguity surrounding China's laws as a reason to
6 defer to the Ministry's reasonable interpretation, the district court, recognizing
7 generally the unique features of China's system, attempted to parse out
8 Defendants' precise legal role within China's complex vitamin C market
9 regulatory framework.¹⁰ Noting the discrepancies between China's
10 interpretations of its laws and Plaintiffs' contrary reading of the underlying
11 regulations, the district court determined that, because "[i]t is not clear from the
12 record at this stage of the case whether defendants were performing [a]
13 government function, whether they were acting as private citizens pursuant to
14 governmental directives or whether they were acting as unrestrained private
15 citizens[,]'" further inquiry into the voluntariness of Defendants' actions was
16 warranted. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559. Specifically, the

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

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 district court found problematic the possibility that the “defendants [made] their
2 own choices and then ask[ed] for the government’s imprimatur.” *Id.*

3 The problems with the district court’s approach were threefold. First, it
4 determined that whether Chinese law compelled Defendants’ anticompetitive
5 conduct depended in part on whether Defendants petitioned the Chinese
6 Government to approve and sanction such conduct. Second, it relied on evidence
7 that China’s price-fixing laws were not enforced to conclude that China’s price
8 fixing laws did not exist. And third, it determined that if Chinese law did not
9 compel the exact anticompetitive conduct alleged in the complaint, then there
10 was no true conflict.

11 Whether Defendants had a hand in the Chinese government’s decision to
12 mandate some level of price-fixing is irrelevant to whether Chinese law actually
13 required Defendants to act in a way that violated U.S antitrust laws.¹¹ Moreover,
14 inquiring into the motives behind the Chinese Government’s decision to regulate
15 the vitamin C market in the way it did is barred by the act of state doctrine. “In
16 essence, the act of state doctrine is a principle of law designed primarily to avoid

¹¹ To use a domestic example, it would be equally inappropriate for a U.S. court, when analyzing U.S. insurance law, to inquire into the lobbying efforts of U.S. insurance companies for the purposes of determining whether U.S. insurance law applied to those companies.

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 judicial inquiry into the acts and conduct of the officials of the foreign state, its
2 affairs and its policies and the underlying reasons and motivations for the actions
3 of the foreign government." *O.N.E. Shipping Ltd.*, 830 F.2d at 452. The act of state
4 doctrine precludes us from discrediting the Subcommittee or the PVC process as
5 ad hoc protectionist regimes that were intended to provide governmental
6 sanction to an otherwise privately formed cartel. By focusing on the Defendants'
7 role in the regulatory regime, as opposed to the regime itself, the district court
8 erroneously required Defendants to show that the government essentially forced
9 Defendants to price-fix against their will in order to show that there was a true
10 conflict between U.S. antitrust law and Chinese law. This demands too much. It
11 is enough that Chinese law actually mandated such action, regardless of whether
12 Defendants benefited from, complied with, or orchestrated the mandate. Thus,
13 we decline to analyze why China regulated vitamin C in the manner it did and
14 instead focus on what Chinese law required. *See id.* at 453.

15 Similarly, inquiring into whether the Chinese Government actually
16 enforced the PVC regime as applied to vitamin C exports confuses the question
17 of what Chinese law required with whether the vitamin C regulations were

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 enforced.¹² Plaintiffs argue that because there was extensive evidence that
2 Defendants exported vitamin C without first obtaining the required chop and
3 that Defendants sold vitamin C below the government floor price of \$3.35/kg, the
4 Chinese Government did not actually require compliance with the PVC regime.
5 We are disinclined to view this factual evidence of China's unwillingness or
6 inability to enforce the PVC regime as relevant to the PVC regime's legal
7 mandate.

8 Finally, the district court made a conceptual error about the potential
9 difference between foreign compulsion and a true conflict. The district court
10 credited Plaintiffs' argument that because there was evidence that Defendants
11 routinely agreed to export vitamin C at a price well above the agreed upon price
12 of \$3.35/kg, the Defendants alleged anticompetitive conduct was not compelled.
13 But this conclusion misses the mark. Even if Defendants' specific conduct was
14 not compelled by the 2002 Notice, that type of compulsion is not required for us
15 to find a true conflict between the laws of the two sovereigns. It is sufficient "if
16 compliance with the laws of both countries is impossible." *Hartford Fire*, 509 U.S.

¹² To use another domestic example, it would be inappropriate for a U.S. court, when analyzing whether U.S. labor laws required factory workers to wear safety masks, to examine evidence of how often factory owners were punished for such violations or how many factory owners actually complied with the safety mask regulations.

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 at 799. Whether Defendants, in fact, charged prices in excess of those mandated
2 by the 2002 Notice does not weigh heavily into our consideration of whether the
3 PVC regime, on its face, required Defendants to violate U.S. antitrust laws in the
4 first instance.

5 Because we hold that Defendants could not comply with both U.S.
6 antitrust laws and Chinese law regulating the foreign export of vitamin C, a true
7 conflict exists between the applicable laws of China and those of the United
8 States.

9 **D. Applying the Remaining Comity Factors**

10 Having determined that Chinese law required Defendants to violate U.S.
11 antitrust law, we now consider whether the remaining factors weigh in favor of
12 dismissal based on principles of international comity. The district court, both at
13 the motion to dismiss and the summary judgment stages, did not apply the
14 remaining factors because it determined that Chinese law did not require price
15 fixing. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559; *In re Vitamin C*
16 *Antitrust Litig.*, 810 F. Supp. 2d at 525–26. We need not remand the case to the
17 district court for consideration of these factors in the first instance because the
18 factors clearly weigh in favor of U.S. courts abstaining from asserting

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 jurisdiction. *See, e.g., Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 132 (2d Cir.
2 2013) (while “[i]t is ordinarily appropriate for us to vacate the judgment of a
3 district court and remand the” case, “where a record is fully developed and it
4 discloses that, in our judgment, only one possible resolution” of the remaining
5 issue would be permissible “there is no reason to remand”).

6 The remaining factors in the comity balancing test are: (1) nationality of the
7 parties, locations or principal places of business of corporations; (2) relative
8 importance of the alleged violation of conduct here compared to that abroad; (3)
9 the extent to which enforcement by either state can be expected to achieve
10 compliance, the availability of a remedy abroad and the pendency of litigation
11 there; (4) existence of intent to harm or affect American commerce and its
12 foreseeability; (5) possible effect upon foreign relations if the court exercises
13 jurisdiction and grants relief; (6) if relief is granted, whether a party will be
14 placed in the position of being forced to perform an act illegal in either country
15 or be under conflicting requirements by both countries; (7) whether the court can
16 make its order effective; (8) whether an order for relief would be acceptable in
17 this country if made by the foreign nation under similar circumstances; and (9)
18 whether a treaty with the affected nations has addressed the issue. *Mannington*

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 *Mills, Inc.*, 595 F.2d at 1297–98; *Timberlane Lumber Co.*, 549 F.2d at 614. Applying
2 the test here, we hold that these remaining factors decidedly weigh in favor of
3 dismissal and counsel against exercising jurisdiction in this case.

4 All Defendants are Chinese vitamin C manufacturers with their principle
5 places of business in China, and all the relevant conduct at issue took place
6 entirely in China. Although Plaintiffs may be unable to obtain a remedy for
7 Sherman Act violations in another forum, complaints as to China’s export
8 policies can adequately be addressed through diplomatic channels and the
9 World Trade Organization’s processes. Both the U.S. and China are members of
10 the World Trade Organization and are subject to the same rules on export
11 restrictions. Moreover, there is no evidence that Defendants acted with the
12 express purpose or intent to affect U.S. commerce or harm U.S. businesses in
13 particular. Rather, according to the Ministry, the regulations at issue governing
14 Defendants’ conduct were intended to assist China in its transition from a state-
15 run command economy to a market-driven economy, and the resulting price-
16 fixing was intended to ensure China remained a competitive participant in the
17 global vitamin C market and to prevent harm to China’s trade relations. While it
18 was reasonably foreseeable that China’s vitamin C policies would generally have

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 a negative effect on Plaintiffs as participants in the international market for
2 vitamin C, as noted above, there is no evidence that Defendants' antitrust
3 activities were specifically directed at Plaintiffs or other U.S. companies.

4 Furthermore, according to the Ministry, the exercise of jurisdiction by the
5 district court has already negatively affected U.S.-China relations. *See* Joint App'x
6 at 1666, U.S. Vitamin Fine "unfair and inappropriate" Says Mofcom, Global
7 Competition Review, Katy Oglethorpe, March 21, 2013 (quoting the Chinese
8 government as stating that the district court's judgment "will cause problems for
9 the international community and international enterprises, and will eventually
10 harm the interests of the United States due to the increase in international
11 disputes"). The Chinese Government has repeatedly made known to the federal
12 courts, as well as to the United States Department of State in an official
13 diplomatic communication relating to this case, that it considers the lack of
14 deference it received in our courts, and the exercise of jurisdiction over this suit,
15 to be disrespectful and that it "has attached great importance to this case."¹³ Doc.
16 No. 111, Diplomatic Correspondence between Embassy for the People's Republic

¹³ We take judicial notice of the diplomatic communication from the Embassy of the People's Republic of China to the United States State Department dated April 9, 2014. *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Café*, 566 F.2d 861, 862 (2d Cir. 1977). The Ministry's motion as to the diplomatic communication is denied as moot.

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 of China and the United States Department of State, April 9, 2014; *cf. Société*
2 *Nationale Industrielle Aérospatiale*, 482 U.S. at 546 (“[W]e have long recognized the
3 demands of comity in suits involving foreign states, either as parties or as
4 sovereigns with a *coordinate interest* in the litigation.” (emphasis added)).

5 Currently, the district court’s judgment orders Defendants to comply with
6 conflicting legal requirements. This is an untenable outcome. It is unlikely,
7 moreover, that the injunctive relief the Plaintiffs obtained would be enforceable
8 in China. If a similar injunction were issued in China against a U.S. company,
9 prohibiting that company from abiding by U.S. economic regulations, we would
10 undoubtedly decline to enforce that order. *See Corporacion Mexicana De*
11 *Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion*, No.
12 13-4022, 2016 WL 4087215 (2d Cir. Aug. 2, 2016) (“[A] final judgment obtained
13 through sound procedures in a foreign country is generally
14 conclusive . . . *unless* . . . enforcement of the judgment would offend the public
15 policy of the state in which enforcement is sought.” (internal quotation omitted)).

16 Simply put, the factors weigh in favor of abstention. Recognizing China’s
17 strong interest in its protectionist economic policies and given the direct conflict
18 between Chinese policy and our antitrust laws, we conclude that China’s

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 “interests outweigh whatever antitrust enforcement interests the United States
2 may have in this case as a matter of law.” *O.N.E. Shipping Ltd.*, 830 F.2d at 450.
3 Accordingly, we hold that the district court abused its discretion by failing to
4 abstain on international comity grounds from asserting jurisdiction, and we
5 reverse the district court’s order denying Defendants’ motion to dismiss.¹⁴

6 We further note that while we abstain from adjudicating Plaintiffs’ claims
7 with respect to the Defendants’ conduct, the Plaintiffs are not without recourse to
8 the executive branch, which is best suited to deal with foreign policy, sanctions,
9 treaties, and bi-lateral negotiations. Because we reverse and remand for dismissal
10 on the basis of international comity, we do not address the act of state, foreign
11 sovereign compulsion, or political question defenses.

12 CONCLUSION

13 According appropriate deference to the Ministry’s official statements to the
14 district court and to this Court on appeal, we hold that Defendants were required

¹⁴ We note that it may not be reasonable in all cases to abstain on comity grounds from asserting jurisdiction at the motion to dismiss stage and that a trial court may need the opportunity to consider the countervailing interests and policies on the record that follows discovery. In this case, however, dismissal is appropriate because, after limited discovery, the record before the court at the motion to dismiss stage was sufficient to determine what Chinese law required and whether abstention was appropriate.

13-4791-cv

In Re: Vitamin C Antitrust Litigation

1 by Chinese law to set prices and reduce quantities of vitamin C sold abroad and
2 doing so posed a true conflict between China's regulatory scheme and U.S.
3 antitrust laws such that this conflict in Defendants' legal obligations, balanced
4 with other factors, mandates dismissal of Plaintiffs' suit on international comity
5 grounds. Accordingly, we **VACATE** the district court's judgment entered
6 November 27, 2013, **REVERSE** the order of November 11, 2008, denying
7 Defendants' motion to dismiss, and **REMAND** with instructions to dismiss
8 Plaintiffs' complaint with prejudice.