No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

RICHARD M. BRUNELL
Counsel of Record
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 600-9640
rbrunell@antitrustinstitute.org

March 5, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1]

AAI submits this brief to inform the Court of the serious adverse implications for antitrust enforcement and U.S. consumers if the Court follows the Second Circuit's rule of affording conclusive deference to a foreign government's statement that its laws compelled price fixing of exports to the United States.

---

[1] All parties have provided written consent or blanket consent for the filing of this brief. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain members of AAI's Advisory Board or their law firms represent petitioners, but they played no role in AAI's deliberations with respect to filing of the brief. No counsel for a party has authored this brief in whole or in part, and no person other than amicus curiae has made a monetary contribution to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this antitrust class action U.S. purchasers allege that Chinese companies fixed the price and limited the supply of vitamin C exported to the United States and elsewhere. The Ministry of Commerce of the People's Republic of China ("MOFCOM" or "Ministry") appeared as amicus curiae in support of defendants' motion to dismiss and sought to explain that the price fixing of vitamin C exports was compelled by Chinese law and therefore dismissal was mandated by the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity. Pet. App. 189a. The government "regulation" of vitamin C did not purport to apply to Chinese domestic sales.

The district court refused to dismiss the case, finding sufficient contradictory evidence of compulsion to warrant further factual development. Pet. App. 186a. Another district judge ruled against the defendants on summary judgment and concluded that Chinese law did not compel defendants to fix prices or restrict output. *Id.* at 56a. Moreover, the court found, to the extent Chinese law compelled any price fixing, the companies were only directed to establish minimum prices to avoid international dumping violations, and hence agreements to engage in supracompetitive pricing or to restrict output would go beyond any defense based on compulsion. *Id.* at 106a, 139a-142a.

A jury found unlawful price fixing and awarded $54.1 million in damages before trebling. Pet. App.

276a-279a. In its special verdict, the jury found that defendants had failed to prove they were "actually compelled" to fix prices or limit output by the Chinese government. *Id.* at 278a. On appeal, the Second Circuit reversed the judgment and held that the district court should have granted defendants' motion to dismiss in the first instance under principles of international comity. *Id.* at 3a. It concluded there was a "true conflict" between U.S. and Chinese law based on statements in MOFCOM's brief, to which the court held it was "bound to defer." *Id.* at 25a, 33a. The court emphasized that "deference in this case is particularly important because of the unique and complex nature of the Chinese . . . economic-regulatory system" and "ambiguity surrounding China's laws." *Id.* at 29a.

The Second Circuit recognized that, in considering the weight to be given a foreign government's statement that "it has compelled an action that results in the violation of U.S. antitrust laws," the court must "balance the interests in adjudicating antitrust violations alleged to have harmed those within our jurisdiction with the official acts and interests of a foreign sovereign in respect to economic regulation within its borders." Pet. App. 3a. The court found "China's strong interest in its protectionist economic policies . . . outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law." *Id.* at 37a (internal quotation marks omitted).

As the Solicitor General observed, the court "gave inadequate weight to the interests of the U.S. victims of the alleged price-fixing cartel and to the interests of the United States in enforcement of its antitrust laws." U.S. Cert. Amicus Br. 20. "Conversely, the court gave too much weight to China's objections to this suit." *Id.* Indeed, it is not clear why comity demands that *any* deference be given to a foreign government's sheltering of a protectionist export cartel that harms U.S. consumers.

In any event, a rule requiring conclusive deference[2] to a foreign government's statement that its laws required fixing the price of exports would weaken the standard of proof for establishing the strict requirements of a compulsion defense or a "true conflict." The effect would be to substantially impair antitrust enforcement and impose significant costs on U.S. consumers.

Strict compliance with the requirements for proving compulsion or a "true conflict" is dictated by the Sherman Act's explicit prohibition of agreements restraining "trade or commerce with foreign nations." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273c1, at 362 (4th ed. 2013) (noting that this language is borrowed from the Constitution's Foreign Commerce Clause). It is also consistent with international antitrust norms. A rule of conclusive deference

---

[2] We use the term "conclusive deference" to refer to the Second Circuit's standard whereby courts are obliged as a matter of law to defer to the foreign government's statement if it is reasonable on its face, without weighing other relevant evidence. *See* U.S. Cert. Amicus Br. 9-10 (court's inquiry limited "to the four corners of the [foreign government's] brief and the sources cited therein"); Pet. Br. 23 ("legal standard . . . turned on the bare fact of the Ministry's appearance in the litigation.").

would effectively lower those strict standards by making it easier to prove compulsion or conflict when either or both may be dubious.

Moreover, ambiguity and a lack of transparency in the exporting country's "regulatory" regime should count against deferring to the government's post hoc statement that it required its companies to cartelize export trade. Protectionist export cartels are condemned internationally. It follows that a foreign government's claim to have mandated such a cartel is less credible when it has failed to do so clearly and forthrightly.

Finally, it would be particularly unwise to lower the standard of proving compulsion or conflict at a time when we need more, not less, deterrence of international cartels. International cartels cost American consumers billions of dollars and continue to proliferate despite stepped up enforcement in the U.S. and around the world.

ARGUMENT

A CONCLUSIVE DEFERENCE STANDARD WOULD IMPAIR ANTITRUST ENFORCEMENT AND HARM AMERICAN CONSUMERS

"Should China be able to immunize its firms from US antitrust law by saying in court: I ordered them to do it?" Eleanor M. Fox & Daniel A. Crane, *Global Issues in Antitrust and Competition Law* 55 (2d ed. 2017). To be sure, the answer this Court gives should afford "the same respect and treatment that we would expect our government to receive in comparable matters before a foreign court." Pet. App. 26a. But no principle of comity, including reciprocity, justifies giving conclusive deference to a foreign government's post hoc statement that its laws compelled price fixing. *See* U.S. Cert. Amicus Br. 11 (Department of Justice expects its characterizations of U.S. law will be accepted when "accurate and well-supported" and does not expect foreign courts to be precluded "from considering other relevant material").

The Second Circuit's conclusive deference standard obviously has implications that go well beyond antitrust cases. But the fact that such a standard of deference has important adverse implications for antitrust enforcement and protecting U.S. consumers from foreign export cartels should weigh heavily against adopting it. Whether the rubric is the foreign sovereign compulsion doctrine or the "true conflict" required by *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), a conclusive deference standard makes it too easy to exempt international price-fixing cartels from U.S. law.

A. Strict Compliance with the Requirements of a Compulsion Defense or a "True Conflict" Is Required by the Sherman Act and Is Consistent with International Antitrust Norms

The requirements of a foreign sovereign compulsion defense are strict. *See* Herbert Hovenkamp, *Federal Antitrust Policy* 1030 (5th ed. 2016) ("courts have construed the doctrine rather strictly").[3] As the U.S. antitrust enforcement agencies have pointed out, "the scope of the defense" is "limited" and does not apply unless "a refusal to comply with the foreign government's command would give rise to the imposition of penal or other severe sanctions." U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for International Enforcement and Cooperation* § 4.1, at 33 (2017) (hereinafter *Int'l Guidelines*).

Assuming, *arguendo*, that a court may abstain from exercising jurisdiction under principles of international comity when the exacting standard for the foreign sovereign compulsion defense is not met,[4] this

---

[3] The compulsion doctrine has been described as a "corollary to the act of state doctrine." *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976). The rationale is that, "'[w]hen a nation compels a trade practice, firms there have no choice but to obey,'" and thus "'[a]cts of business become effectively acts of the sovereign.'" *Id.* (quoting *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970)) (first alteration in original); *see* Areeda & Hovenkamp ¶ 274c, at 400. But the foreign sovereign compulsion defense is limited because otherwise it "would permit foreign governments, operating perhaps at the instigation of private parties, to carve out large exceptions to the application of antitrust to American foreign and even domestic commerce." 1 Spencer Weber Waller & Andre Fiebig, *Antitrust and American Business Abroad* § 9:23, at 9-83-84 (4th ed. 2017).

[4] This Court declined to grant certiorari on the question whether comity provides an independent basis upon which courts may assert discretionary authority to abstain from exercising Sherman Act jurisdiction. At a minimum, as the Solicitor General has pointed out, "Comity-based dismissals should be rare, because Congress unambiguously intended the Sherman Act to reach for-

Court still requires a defendant to establish a "true conflict" between the laws of a foreign state and the antitrust laws. *Hartford Fire*, 509 U.S. at 798. That means "compliance with the laws of both countries [must have been] impossible." *Id.* at 799; *Int'l Guidelines* § 4.1, at 29 ("no conflict of law exists if a person . . . can comply with both"); *see* Pet. App. 16a-18a (court of appeals assumed, but did not decide, that a true conflict is required).[5]

The necessity for strict compliance with the requirements of the foreign sovereign compulsion defense or a "true conflict" not only reflects the wide scope of Sherman Act jurisdiction and our national policy favoring competition, but it also is consistent with the worldwide trend to favor open markets and punish price fixing. "As more jurisdictions have adopted and enforce antitrust laws that are compatible with those of the United States, it has become increasingly common that no conflict exists between U.S. antitrust enforcement interests and the laws or policies of a foreign sovereign." *Int'l Guidelines* § 4.1, at 28-29; *id.* at 28 ("conflicts of law are rare"). Indeed,

---

eign conduct and because federal courts 'have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.'" U.S. Cert. Amicus Br. 19 (quoting *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990)); *see also* Areeda & Hovenkamp ¶ 273c1, at 367 ("[T]o the extent the antitrust laws represent the *public* economic policy of the United States, there may be little room for considerations of comity at all.").

[5] While adopting a comity balancing test, the Second Circuit recognized that a true conflict is a necessary but not sufficient condition for satisfying the test. Other comity factors would still have to be considered. *See* Pet. App. 17a.

"over 130 jurisdictions have enacted antitrust laws as a means to ensure open and free markets, promote consumer welfare, and prevent conduct that impedes competition." *Id.* § 1, at 2. The proliferation of antitrust regimes around the world has been described by scholars as "astonishing." *E.g.,* William E. Kovacic & Marianela Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, 79 Law & Contemp. Probs. 85, 86 (2016).[6]

Among the countries to adopt robust antitrust laws is China, which enacted its Anti-Monopoly Law in 2007. Even before then, "[i]mportant laws and administrative regulations involving anti-monopoly issues were adopted in the 1990s" in pursuit of establishing a "socialist market economy." Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 Antitrust L.J. 73, 74 (2008); *see also* World Trade Org., Report of the Working Party on the Accession of China ¶ 65, at 12, WT/ACC/CHN/49 (Oct. 1, 2001) (hereinafter 2001 WTO Report) (Chinese government represented that it "encouraged fair competition and was against acts of unfair competition of all kinds").

---

[6] The world has changed dramatically since the mid-1980s when the Justice Department offered an arguably more deferential standard toward foreign government statements concerning compulsion. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 18, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (No. 83-2004), 1985 WL 669667 (filed June 17, 1985) ("United States' trading partners often manage their domestic economic systems and international affairs in ways that differ from ours" and "sometimes cartelize important segments of their economies").

Price fixing in particular is universally condemned and increasingly subject to harsh penalties around the globe. *See* DLA Piper, Cartel Enforcement Global Review–June 2017. To be sure, government price regulation of some markets is not uncommon in the United States and elsewhere. However, it is a basic principle in the United States that a state may not "simply authorize[] price setting and enforce[] the prices established by private parties." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("a state does not give immunity to those who violate the [antitrust law] by authorizing them to violate it, or by declaring that their action is lawful").

A similar principle against delegating "regulatory" authority to companies to fix prices applies in many countries. *See, e.g.,* Org. for Econ. Co-operation and Dev., Directorate for Fin. & Ent. Affairs Comp. Comm., *The Regulated Conduct Defence* at 38, DAF/COMP(2011)3 (Sep. 1, 2011) ("regulated conduct defense" applies "only restrictively" and does not permit "private actors to determine when marketplace outcomes are unacceptable or not"). Moreover, protectionist, state-sponsored export cartels are afforded little respect among the community of nations. *See, e.g.,* Org. for Econ. Co-operation and Dev., *OECD Business and Finance Outlook 2017* § 4.5, at 155-57 (2017) (calling for "elimination of explicit export cartel exemptions in competition laws," competition authorities "sharing information and collaborating in investigations" of export cartels, and "positive comity" whereby "exporting competition authorities alert[] importing country authorities about potential harmful export cartel conduct").[7]

B. Conclusive Deference to a Foreign Government's Contention that Its Laws Compelled Price Fixing Undermines the Strict Requirements for Proving a Compulsion Defense or a "True Conflict"

Giving conclusive deference to a foreign government's post hoc statement that its laws compelled price fixing necessarily weakens antitrust enforcement by making it easier to prove a compulsion defense or "true conflict" when the foreign law is unclear. Under a conclusive deference standard, courts would be unable to look behind such a statement even when a plaintiff offers good reason to do so. *See* U.S. Cert. Amicus Br. 9-10. A foreign government's statement may be less accurate or persuasive than other inter-

---

[7] Even the United States has certain protectionist exemptions to the Sherman Act, such as the Webb-Pomerene Act of 1918 and the Export Trading Company Act of 1982, which exempt export cartels that meet certain requirements. *See* 15 U.S.C. §§ 61 *et seq.*; 15 U.S.C. §§ 4001 *et seq*. Importantly, however, the United States recognizes that exemption from U.S. antitrust laws under the Webb-Pomerene Act does not "provide any immunity from prosecution under foreign antitrust laws." *Int'l Guidelines* § 2.8, at 12 & n.55 (noting foreign actions brought against Webb-Pomerene cartels for violating foreign antitrust laws). Even specific authorization by the Secretary of Commerce under the Export Trading Company Act "does not constitute, explicitly or implicitly, an endorsement or opinion . . . concerning the legality of such business plans under the laws of any foreign country" nor "insulate conduct from investigation or enforcement by a foreign antitrust authority." *Id.* § 2.9, at 14.

pretations. And the risk that a country will manufacture such a statement to immunize its nationals from U.S. antitrust law seems ever present. The risk may be particularly pronounced when a foreign government has a proprietary interest at stake as the owner of an enterprise that is a defendant. *Cf. Amalgamated Sugar Co. v. Vilsack*, 563 F.3d 822, 834 (9th Cir. 2009) (less deference may be owed to agency interpretation where it has self-serving or pecuniary interest); *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1114 (2015) ("not question[ing] the good faith of state officers" to recognize "structural risk of market participants' confusing their own interests with the State's policy goals").

Moreover, conclusive deference distorts and undermines the limitations on a compulsion or true conflict defense. For example, the Second Circuit in this case, by affording conclusive deference to MOFCOM's statement that "the defendants were required by the laws of China to engage in the [challenged] conduct," Pet. App. 190a, elided three important questions about the scope of a compulsion or true conflict defense.

First, if a foreign sovereign sets a price floor, is a conspiracy to price in excess of that floor or to restrict output "compelled"? Without citing any authority, the Second Circuit answered yes, and hence evidence that suggested defendants "in fact charged prices in excess of those mandated," and that their "specific conduct was not compelled," was irrelevant. Pet. App. 32a, 33a. But the answer is obviously no under the compulsion doctrine. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962) (private foreign subsidiary serving as agent of Canadian Government's Metals Controller was not "compelled" where it used import-control authority to exclude rival alloy in furtherance of a conspiracy to monopolize U.S. market); *see Int'l Guidelines* § 4.2.2, at 33, n.123 ("Discretionary conduct is . . . outside the protections afforded by this defense." (citing *Continental Ore*)); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 315 (3d Cir. 1983) (American firms' challenge to Japanese competitors' alleged conspiracy to engage in predatory pricing in the United States was not "compelled" insofar as agreement mandated by the Japanese government involved higher prices), *rev'd on other grounds*, *Matsushita*, 475 U.S. 574.

Nor would a true conflict exist if defendants could comply with both a Chinese mandate to agree to a price floor to avoid dumping charges and a requirement of the Sherman Act not to conspire to charge supracompetitive prices or restrict output. Such a mandate certainly should not be "construed as an implied repeal of all antitrust regulation" in the vitamin C export market. *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 217 (1966); *see United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 509-10 (4th Cir. 2005) (exemption for certain segment of through-transportation market under Shipping Act does not extend to entire through-transportation market); *In re Blue Cross Blue Shield Antitrust Litig.*, 238 F.Supp.3d 1313, 1328 (N.D. Ala. 2017) (exemption for insurance ratemaking activity under filed-rate doctrine does not extend to rates in excess of those that were filed).

Second, is conduct "compelled" if the foreign law is not enforced and may be safely ignored? The Second Circuit simply assumed as much insofar as evidence of non-enforcement was not "relevant to the . . . regime's legal mandate." Pet. App. 32a; *see also id.* at 31a (irrelevant whether defendants "complied with . . . mandate"). However, the compulsion defense would not apply if the mandate is not enforced. *See Int'l Guidelines* § 4.2.2, at 33. And non-enforcement would suggest the absence of a true conflict because compliance with U.S. law would not be "impossible."

Third, if a foreign sovereign simply directs private companies to engage in price fixing, without mandating any particular prices or providing regulatory supervision, is the setting of supracompetitive prices "compelled"? The Second Circuit assumed the answer is yes,[8] but the compulsion defense or a true conflict requires more. *See Timberlane*, 549 F.2d at 607 (fact that the government "'may, as a practical matter, approve of the effects of . . . private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate'" (quoting *United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cases ¶ 70,600 (S.D.N.Y. 1962)); *see also Int'l Guidelines* § 4.2.2, at

[8] The Second Circuit accepted that the "Ministry, through the Chamber, regulated the export of vitamin C by deferring to the manufacturers and adopting their agreed upon price as the minimum export price." Pet. App. 28a. The Ministry had acknowledged that it "did not decide what specific prices should be. Instead, this governmental function was delegated to the market participants and the Chamber." *Id.* at 207a.

32-33 ("[T]hat conduct may be lawful, approved or encouraged in a foreign jurisdiction does not, in and of itself, bar application of the U.S. antitrust laws—even when the foreign jurisdiction has a strong policy in favor of the conduct in question." (citing *Hartford Fire*)).

Such conduct certainly would not be immunized under the state-action doctrine, which addresses conflicts between the Sherman Act and state law. *See* Areeda & Hovenkamp ¶ 274c, at 401 (discussing analogy in context of conflict with foreign law). The Sherman Act does not permit "unsupervised delegations to active market participants" to "regulate their own markets." *Dental Exam'rs*, 135 S. Ct. at 1111; *see* Areeda & Hovenkamp ¶ 226a, at 179 (*Parker* does not allow states to "authorize (or even compel) private parties to displace market competition with their own unsupervised preferences").

In short, conclusively deferring to a foreign sovereign's statement about compulsion can lead a court (as it did the Second Circuit) to avoid delving into the details and actual facts of implementation that may call into question whether a price-fixing regime involved merely a "gauzy cloak" of government involvement, *Midcal*, 445 U.S. at 106, or whether it satisfied the demanding requirements of a compulsion defense or comity abstention based on a "true conflict."

C. The Lack of Transparency of a Foreign Government's Law is Grounds for Less, Not More, Deference

The Second Circuit thought the fact that "'Chinese law is not as transparent as that of the United States'" made it particularly important to defer to the Ministry's interpretation. Pet. App. 29a (quoting district court). But the opposite is true. A lack of transparency should be grounds to call into question a post hoc statement that price fixing of exports has been compelled.

To facilitate its entry into the WTO, China made representations to the world trading body that it "gave up export administration" of vitamin C and many other products. JA 319; *see also* 2001 WTO Report ¶¶ 50, 56, 62, at 10-12 (China represented that it had sharply reduced the number of products subject to government price control—identifying those products in an annex—and that "price controls would not be used for purposes of affording protection to domestic industries"). Then, in this case, MOFCOM claimed to have directed its exporters to fix prices and restrict the supply of vitamin C. The district court concluded that China's representations to the WTO "appear to contradict the Ministry's position in the instant litigation," which was a further reason not to defer to the Ministry's position. Pet. App. 120a-121a. More generally, the very fact that China's minimum export price system is "largely opaque" and "highly non-transparent," according to the U.S. Trade Representative,[9] is itself grounds for affording less deference. *Cf. Int'l Guidelines* § 4.2.2 n.124 (ambiguous statements regarding compulsion not given dispositive weight).

As in the state-action context, it is important that foreign sovereigns that mandate anticompetitive export restraints "accept political responsibility for actions they intend to undertake" in the worldwide trading arena. *Fed. Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). A foreign government should "make clear that [it] is responsible for the price fixing it has sanctioned and undertaken to control." *Id.* at 633. Its failure to do so militates against affording conclusive deference to its post hoc statements.

D. Weakening Deterrence Is Unwise in an Era of Rampant International Cartels

International cartels are a scourge of the global economy. *Known* international cartels have been estimated to cost consumers around the globe more than

---

[9] First Written Submission of the United States, China—Measures Related to the Exportation of Various Raw Materials 91, 100, WTO Nos. DS394, DS395, DS396 (June 1, 2010) (challenging export restraints involving products other than vitamin C based in part on submissions by MOFCOM in this case), https://ustr.gov/sites/default/files/uploads/ziptest/WTO Dispute/New_Folder/Pending/DS394.US_.Sub1_.fin_.pdf.

$1.5 trillion since 1990, with North American consumers paying more than $400 billion.[10] The Justice Department has prosecuted dozens of international cartels, obtaining fines of over $12 billion, and jail time for over 88 foreign nationals.[11] *See generally Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 860 (7th Cir. 2012) ("Foreign cartels . . . have often been the target of either governmental or private litigation.").

But despite stepped up U.S. and foreign anti-cartel enforcement, international cartels continue to proliferate. *See* Connor at 22-23 (75 discovered per year); Scott D. Hammond, Deputy Ass't Attorney General, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades 1, 3 (Feb. 25, 2010) (50 DOJ investigations open at a time). Deterrence remains insufficient. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427, 429 (2012).

Conclusive deference, by making it easier to prove a foreign sovereign compulsion or "true conflict" defense, will only undercut deterrence, making cartels that harm U.S. consumers more likely. "The host

---

[10] *See* John M. Connor, The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-July 2016 at 1, 42 (Rev. 2d ed. 2016), https://ssrn.com/abstract=2821254.

[11] *See* U.S. Dep't of Justice, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More (Jan. 17, 2018) https://www.justice.gov/atr/page/file/991706/download; Brent Snyder, Deputy Ass't Attorney General, Individual Accountability for Antitrust Crimes 8 (Feb. 19, 2016), https://www.justice.gov/opa/file/826721/download.

country for the cartel will often have no incentive to prosecute it" and "would logically be pleased to reap the economic rents from other countries . . . [that] their exporters collect." *Minn-Chem*, 683 F.3d at 860. The same incentive may lead foreign governments to lend their support to export cartels when challenged in U.S. courts. And even if such support is not forthcoming, deterrence is lessened if foreign firms *believe* that they can immunize their export cartels under U.S. law by obtaining a statement from their government that their conduct was compelled.

Foreign firms should expect instead that when they export their goods to the United States, they will be subject to the full effect of U.S. antitrust laws.

***

In sum, a general rule of conclusive deference in the antitrust context imposes real costs on antitrust enforcement and U.S. consumers. These effects should weigh heavily against adopting such a rule.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD M. BRUNELL
Counsel of Record
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 600-9640
rbrunell@antitrustinstitute.org

Dated: March 5, 2018