Extraterritorial Application of Antitrust Law, International Comity, and Scope of Remedies: Considering the Nature of the Product and Service in Addition to the Effect in the Relevant Market

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ABSTRACT

This Article proposes that the nature of the product and service, including the importance to the country's industry and consumers and the level of government regulation, should be closely considered for analyzing international comity and deciding the scope of remedies in antitrust cases. These factors should be considered in addition to the effect in the relevant market when determining whether there is an extraterritorial application of antitrust law under the Foreign Trade Antitrust Improvements Act. Specifically, the nature of the product and service, including the importance to the country's industry and consumers and the level of government regulation, should be considered for analyzing international comity and deciding the scope of remedies in antitrust cases by observing the following: (1) how the product and service are produced or introduced in the country, (2) how the product and service are supplied to consumers in the country, and (3) how the product and service contribute to the country's economy and employment rate. For the analysis of international comity, the relevant countries should include the country where the antitrust proceeding at issue is taking place, which could result in the extraterritorial application of antitrust law, and the other countries whose interests may be affected by the extraterritorial application. The level of government regulation and antitrust exemptions in other countries

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should also be considered in analyzing international comity and deciding the scope of remedies in antitrust cases. The proposals in this Article would help achieve antitrust law's goals to promote competition and protect consumers.

TABLE OF CONTENTS

INTRODUCTION

When Samsung sought preliminary and permanent injunctions for its standard essential patents ("SEPs")[1] covering Universal Mobile Telecommunications Service ("UMTS") technology[2] against Apple in the European Economic Area ("EEA"),[3] the European Commission raised concerns in a Statement of Objections[4] on December 21, 2012 that Samsung's conduct constituted an abuse of a dominant position in a market.[5] While a patent holder generally may seek injunctions to exercise its intellectual property rights, the European Commission expressed concerns that Samsung abused its dominant market position by seeking the injunctions due to the special circumstances in this case: Samsung had committed to a standard-setting organization ("SSO") to license its SEPs on fair, reasonable and non-discriminatory ("FRAND") terms in exchange for inclusion of its patents in the UMTS standard, and the European Commission believed that Apple was willing to enter into a license agreement on FRAND terms.[6] Samsung disagreed with the European Commission's assessment but offered commitments to address the concerns.[7] Specifically, Samsung committed to not seek injunctive relief *in the EEA* for infringement of its SEPs implemented in smartphones and tablets ("Mobile SEPs") against a potential licensee that

1. *See* Case AT.39939, Samsung, Commission Decision of Apr. 29, 2014, ¶ 2. Patents essential to a standard, known as SEPs, "cover technology to which a standard makes reference and that implementers of the standard cannot avoid using in standard-compliance products." *Id.* ¶ 27.

2. *See id.* ¶ 2. The patents at issue covered "the air interface of the UMTS standard (the so-called W-CDMA technology), which is an integral part of UMTS." *Id.* ¶ 2 n.2.

3. *See generally Glossary: European Economic Area (EEA)*, EUROSTAT: STATISTICS EXPLAINED, https:////ec.europa.eu//eurostat//statistics-explained//index.php?title=Glossary:European_Economic_ Area_(EEA) (last visited July 7, 2021) ("The European Economic Area, abbreviated as EEA, consists of the Member States of the European Union (EU) and three countries of the European Free Trade Association (EFTA) (Iceland, Liechtenstein and Norway; excluding Switzerland).").

4. *See generally* Commission Regulation 773//2004, art. 10, 2004 O.J. (L123) 18, *amended by* Commission Regulation 622//2008, 2008 O.J. (L 171), 3 ("The Commission shall inform the parties concerned of the objections raised against them.").

5. Case AT.39939, Samsung, Commission Decision of Apr. 29, 2014, ¶¶ 2–3.

6. *Id.* ¶¶ 55–57, 62, 68. The European Commission said that, because the industry is locked into the widely used UMTS standard, there is a risk that holders of UMTS SEPs will engage in anticompetitive conduct, such as holding up implementers of the standard by refusing to license its SEPs or demanding excessive royalties. *Id.* ¶¶ 57–58.

7. *Id.* ¶ 6.

agrees to and complies with a certain licensing framework.[8] The European Commission accepted Samsung's commitments and closed the proceedings.[9]

Some argued that Samsung's commitment not to seek injunctive relief for infringements of its Mobile SEPs should be worldwide in geographic scope.[10] However, the European Commission explained that Samsung's commitments, which the European Commission accepted, do not prevent Samsung from seeking injunctions outside the EEA for its Mobile SEPs.[11] Therefore, in this case, the geographic scope of Samsung's commitments accepted by the European Commission was limited.[12]

In other cases, the geographic scope of commitments accepted by a regulatory authority was broader.[13] For example, the European Commission raised concerns in a Statement of Objections dated July 27, 2007 that Rambus was abusing its dominant position by claiming royalties regarding certain patents for Dynamic Random Access Memory ("DRAM") chips that Rambus would not have been able to charge had it not engaged in an alleged patent ambush.[14] Although Rambus disagreed with the European Commission's Statement of Objections, it offered commitments to address the concerns, which the European Commission accepted: a "five-year worldwide license" for patents related to DRAM products and maximum royalty rates.[15]

Notably, the United States Court of Appeals for the District of Columbia Circuit set aside orders of the Federal Trade Commission ("FTC") against Rambus for not disclosing its patents to the Joint Electron Device Engineering Council ("JEDEC") during the standard-setting process. The court explained that the Commission had not demonstrated that Rambus's conduct was unlawful monopolization.[16] The United States Court of Appeals for the District of Columbia Circuit noted that "the Commission expressly left open the likelihood that JEDEC would have standardized Rambus's technologies *even if Rambus had disclosed* its intellectual property" and that

8. *Id.* ¶ 76.

9. *Id.* ¶ 127.

10. *Id.* ¶ 92.

11. *Id.* ¶¶ 114, 127.

12. *Id.*

13. *See, e.g.*, Case COMP//38.636, Rambus, Commission Decision of Dec. 9, 2009, ¶ 49.

14. *Id.* ¶¶ 1–3, 27–29 (referring to the behavior of intentionally not disclosing patents and patent applications in the standard-setting process and later arguing they are relevant to the adopted standard as a "patent ambush"). "Rambus designs, develops and licenses high bandwidth chip connection technologies for computers, consumer electronic and communication products (including systems memory, PC graphics, multimedia, workstations, video game consoles and network switches)." *Id.* ¶ 4.

15. *Id.* ¶ 10, 49, 77.

16. Rambus Inc. v. FTC, 522 F.3d 456, 459, 463–67, 469 (D.C. Cir. 2008).

"an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition."[17] After the Supreme Court denied the FTC's petition for writ of certiorari, the FTC dismissed the complaint against Rambus in 2009.[18]

When antitrust enforcement agencies and courts apply antitrust law extraterritorially, issues related to international comity and the scope of remedies arise, as demonstrated by the difference in the geographic scope of commitments offered to the European Commission above. Commitments were limited to specified countries in some cases,[19] but applied worldwide in others.[20] In the United States, case law moved from an approach focusing on acts within a territory[21] to a broader approach focusing on effects[22] for determining the extraterritorial application of antitrust law.[23] Congress also enacted the Foreign Trade Antitrust Improvements Act ("FTAIA"), which addressed the extraterritorial application of antitrust law, as Title IV of the Export Trading Company Act of 1982.[24] The FTAIA is codified at 15 U.S.C. § 6a for the Sherman Act and 15 U.S.C. § 45(a)(3) for Section 5 of the Federal Trade Commission Act.[25] If jurisdiction *can be* exercised under the

17. *Id.* at 463–64; *see* Herbert Hovenkamp, *FRAND and Antitrust*, 105 CORNELL L. REV. 1683, 1735 (2020) ("As a result the conduct was deceptive but it was not shown to be exclusionary under the standards required by section 2 of the Sherman Act."). *See generally* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 315 (3d Cir. 2007) (stating that "a firm's deceptive FRAND commitment" to a standard setting organization "may constitute actionable anticompetitive conduct").

18. *Rambus Inc., In the Matter of*, FED. TRADE COMM'N, https:////www.ftc.gov//legal-library//browse//cases-proceedings//011-0017-rambus-inc-matter (last visited Aug. 25, 2022).

19. *See, e.g.*, Case AT.39939, Samsung, Commission Decision of April 29, 2014.

20. *See, e.g.*, Case COMP//38.636, Rambus, Commission Decision of December 9, 2009.

21. *See* American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

22. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

23. *E.g.*, Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What Is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT'L L.J. 11, 11–12 (2003).

24. *E.g.*, John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 351 n.7 (1983). *See generally* Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1316 (2014) ("The Constitution contains a number of lawmaking powers that may authorize the enactment of legislation with extraterritorial reach.").

25. *E.g.*, Shenefield, *supra* note 24, at 351 n. 7; CRS Report for Congress, FTAIA Limits Availability of U.S. Courts to Foreign Antitrust Plaintiffs: F. Hoffman-LaRoche, Ltd. v. Empagran, S.A. 1 n.1 (June 30, 2005), https:////www.everycrsreport.com//reports//RS21877.html; *see also* Eurim-Pharm GmbH v. Pfizer, Inc., 593 F. Supp. 1102, 1105–07 (S.D.N.Y. 1984).

FTAIA, international comity is considered to determine whether jurisdiction *should be* exercised.[26] However, scholars have noted uncertainty in international comity's application.[27] For example, scholars say courts are less likely to give significant weight to concerns about international comity in private-party actions after *Hartford Fire Ins. Co. v. California*,[28] whereas government enforcement agencies still carefully consider international comity.[29] This Article contributes to scholarship related to the extraterritorial application of antitrust law by discussing how to analyze and consider international comity and the scope of remedies in antitrust cases.

This Article proposes that the nature of the product and service, including the importance to the country's industry and consumers and the level of government regulation, should be closely considered for analyzing international comity and deciding the scope of remedies in antitrust cases. These factors should be considered in addition to the effect in the relevant market, which is considered for determining whether there is an extraterritorial application of antitrust law under the FTAIA. Part I introduces the extraterritorial application of antitrust law, the principle of international comity, and remedies in antitrust cases. Part II examines the reasons for considering international comity in antitrust cases, such as respecting countries' sovereignty and policy and avoiding overbroad remedies that may have a chilling effect on business activity. Part III proposes that the nature of the product and service, including the importance to the country's industry and consumers and the level of government regulation, can be considered for analyzing international comity and deciding the scope of remedies in antitrust cases by observing the following: (1) how the product and service are produced or introduced in the country; (2) how the product and service are supplied to consumers in the country; and (3) how the product and service contribute to the country's economy and employment rate. For the analysis of international comity, the relevant countries include the country where the antitrust proceeding at issue is taking place, which could result in the extraterritorial

26. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT'L L. 213, 217, 221 (1993); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797 n.24 (1993) (citations omitted) ("[T]he general understanding [is] that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction.").

27. *See* Alford, *supra* note 26, at 220–22 ("[T]he Court declined to speak to the weight of comity considerations in cases covered by the Sherman Act."); *cf.* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2072–76 (2015) (explaining uncertainty in the definition of international comity).

28. *Hartford Fire*, 509 U.S. 764.

29. Alford, *supra* note 26, at 229.

application of the country's antitrust law, and the other countries whose interests may be affected by the extraterritorial application. Part III also suggests considering the level of government regulation and antitrust exemptions in other countries in analyzing international comity and deciding the scope of remedies in antitrust cases. The proposals in this Article seek to help achieve the goals of antitrust law to promote competition and protect consumers.

I. EXTRATERRITORIAL APPLICATION OF ANTITRUST LAW AND THE PRINCIPLE OF INTERNATIONAL COMITY

This Part introduces the extraterritorial application of antitrust law, the principle of international comity, and remedies in antitrust cases. First, Section A describes the case law in the United States, which considers effects for determining the extraterritorial application of antitrust law. Section A also explains the FTAIA, which addresses the extraterritorial application of antitrust law and is codified in the Sherman Act and the Federal Trade Commission Act. Next, Section B considers the principle of international comity, including international comity's definition, factors for analysis, and application. Section C discusses remedies in antitrust cases.

A. Effects-based Approach for Extraterritorial Application of Antitrust Law and Enactment of the FTAIA

In *American Banana Co. v. United Fruit Co.* in 1909, the Supreme Court analyzed the extraterritorial application of the Sherman Act based on the principle of territoriality that there is jurisdiction over acts within a territory.[30] However, as seen in *United States v. Aluminum Co. of America* in 1945, courts in the United States began to analyze the extraterritorial application of the Sherman Act based on a broader interpretation of the principle

30. *See* American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909); CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 49 (Catherine Redgwell et al. eds., 2d ed. 2015). *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 402(1) (AM. L. INST. 1987) (stating as one of the "bases of jurisdiction to prescribe," the principle of territoriality that a state has prescriptive jurisdiction regarding "(a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory").

of territoriality considering effects.[31] In 1982, Congress enacted the FTAIA,[32] which addresses the extraterritorial application of antitrust law.

1. Principle of Territoriality in American Banana Co. v. United Fruit Co.

In *American Banana Co. v. United Fruit Co*.,[33] the Supreme Court considered the principle of territoriality for determining the reach of the Sherman Act.[34] Plaintiff, an Alabama corporation, alleged that defendant, a New Jersey corporation, monopolized and restrained trade by instigating Costa Rican soldiers and officials to seize a part of plaintiff's banana plantation in Panama and a cargo of supplies to stop the operation of plaintiff's plantation.[35] Plaintiff sued defendant for threefold damages under the Sherman Act.[36] The complaint was dismissed for failure to state a cause of action, affirmed by the court of appeals, and brought to the Supreme Court by writ of error.[37]

In *American Banana*, the Supreme Court noted that the acts causing the damage were carried out outside the jurisdiction of the United States.[38] The

31. Dodge, *supra* note 27, at 2093; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 402 cmt. d (AM. L. INST. 1987) ("Jurisdiction with respect to activity outside the state, but having or intended to have substantial effect within the state's territory, is an aspect of jurisdiction based on territoriality, although it is sometimes viewed as a distinct category."); Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1126–27 (1982) ("Thus, the basis for the expansion of jurisdiction over actions in violation of United States antitrust laws has usually been the objective territoriality principle, in so much as the effect of such violations occurs within United States territory."). *See generally* Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 148 (2010) ("Judges over time have departed from principles of strict territoriality to broad principles of extraterritoriality, although recurring tension remains between judges' invocations of a presumption against extraterritoriality and their application of extraterritoriality doctrines such as the effects principle.").

32. Export Trading Company Act of 1982, Pub. L. No. 97-290, § 402, 96 Stat. 1233, 1246 (1982) (codified at 15 U.S.C. §§ 6a, 45(a)(3) (1982)); Shenefield, *supra* note 24, at 351 n. 7; CRS Report for Congress, *supra* note 25, at 1 n.1.

33. *American Banana*, 213 U.S. 347, *superseded by statute*, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233, *as recognized in* W.S. Kirkpatrick & Co. v. Environmental Tectronics Corp., 493 U.S. 400 (1990).

34. *Id.* at 356.

35. *Id.* at 354–55.

36. *Id.* at 353.

37. *Id. See generally* FED. R. CIV. P. 60(e) ("The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.").

38. *American Banana*, 213 U.S. at 355.

Supreme Court then stated, "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[39] The Supreme Court also stated that it would be "unjust," "an interference with the authority of another sovereign," and "contrary to the comity of nations" for a jurisdiction that has hold of an actor to apply its own law rather than the law of the place where the act was done.[40] The Supreme Court held that defendant's acts in Panama or Costa Rica were not within reach of the Sherman Act.[41]

2. Effects-based Approach in United States v. Aluminum Co. of America

However, courts in the United States began to determine the extraterritorial application of antitrust law based on its effects.[42] In *United States v. Aluminum Co. of America*,[43] Aluminum Company of America ("Alcoa") obtained a patent allowing for the commercially practicable manufacture of aluminum[44] and an exclusive license to a patent resulting in an economy in manufacture.[45] As a result, Alcoa had a monopoly on manufacturing pure aluminum until the expiration of the patents.[46] Aluminum Limited ("Limited") was incorporated in Canada to take over Alcoa's properties outside the United States.[47]

One of the issues in the case that the Second Circuit considered was whether Limited conspired with foreign producers in violation of Section 1 of the Sherman Act.[48] Regarding the Section 1 issue, Limited signed an agreement on July 3, 1931 that created a Swiss corporation called Alliance, and signatories included Limited, a French company, two German

39. *Id.* at 356 (citing Slater v. Mexican Nat. R. Co., 194 U.S. 120, 126 (1904)).

40. *Id.* (citation omitted).

41. *Id.* at 357.

42. Dodge, *supra* note 27, at 2093.

43. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

44. *Id.* at 422 (patent for process discovered by "Hall").

45. *Id.* (patent for process invented by "Bradley").

46. *Id.*

47. *Id.* at 439.

48. *Id.* (also discussing whether Alcoa had monopolized the aluminum ingot market in violation of Section 2 of the Sherman Act). *See generally* 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

companies, one Swiss company, and a British company.[49] Signatories of the 1931 agreement were issued shares of the Swiss corporation Alliance.[50] The corporation fixed a production quota for each share and fixed a price every year for taking off shareholders' hands the part of the quota not sold.[51] A new agreement executed by the shareholders in 1936 used a royalty system under which each shareholder had to pay a royalty in proportion to production exceeding its quota.[52]

The Second Circuit considered whether the 1931 or 1936 agreement violated Section 1 of the Sherman Act.[53] The Second Circuit stated, "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[54] The Second Circuit then stated that both agreements, even if made abroad, would be unlawful "if they were intended to affect imports and did affect them."[55] However, the Second Circuit said it would limit its discussion to the agreement of 1936 because the shareholders agreed that the agreement of 1931 should not cover imports, and the agreement of 1936 superseded the earlier agreement.[56]

The Second Circuit held that the 1936 agreement indicated an intent to include imports in the quota and that, after proof of intent to affect imports, the burden of proof shifted to Limited to prove the quota system's restriction on production did not restrict imports of aluminum ingot into the United States.[57] The Second Circuit also said that the proof of the restriction's influence upon prices was not necessary for a finding a violation under Section 1 because an agreement to remove a substantial amount of supply from the market would influence prices and was unlawful.[58] Therefore, the Second Circuit held that the 1936 agreement violated Section 1 of the Sherman Act.[59]

49. *Aluminum Co*., 148 F.2d at 442.
50. *Id.*
51. *Id.*
52. *Id.* at 443.
53. *Id.*
54. *Id.*
55. *Id.* at 444.
56. *Id.*
57. *Id.* at 443–44.
58. *Id.* at 445 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)).
59. *Id.*

Subsequently, the Supreme Court applied this approach in *Alcoa*, focusing on effects.[60]

3. Enactment of the FTAIA and Codification in the Sherman Act and the Federal Trade Commission Act

Then in 1982, Congress enacted the FTAIA, codified in 15 U.S.C. § 6a under the Sherman Act and in 15 U.S.C. § 45(a)(3) under the Federal Trade Commission Act.[61] The Supreme Court explained that the FTAIA's general rule places non-import activity involving foreign commerce outside the Sherman Act's reach[62] and excludes from the Sherman Act's reach "much anticompetitive conduct that causes only foreign injury."[63] The Supreme Court also explained that the FTAIA's *exception* to the general rule brings such conduct back within the Sherman Act's reach if it (1) has a "'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce" and (2) gives rise to a Sherman Act claim.[64]

Section 6a of the Sherman Act, added to the Sherman Act by the FTAIA, is provided below.

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60. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 415 reporters' note 2 (AM. L. INST. 1987) ("In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962), an allegation of conspiracy to deprive a United States exporter of a market in Canada was held to state a cause of action under the Sherman Act.").

61. Export Trading Company Act of 1982, Pub. L. No. 97-290, § 402, 96 Stat. 1233, 1246 (1982); Shenefield, *supra* note 24, at 351 n.7 ("This legislation was enacted near the end of 1982 as Title IV of the Export Trading Company Act of 1982, Pub. L. No. 97-290, § 402, 96 Stat. 1233, 1246 (1982) (codified at 15 U.S.C. §§ 6a, 45(a) (1982))."); Congressional Research Service, *supra* note 27, at 1 n.1. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 401 (AM. L. INST. 1987) (describing prescriptive jurisdiction as the jurisdiction of a state "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court," describing adjudicative jurisdiction as the jurisdiction of a state "to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings," and describing enforcement jurisdiction as the jurisdiction "to induce or compel compliance or punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.").

62. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 162 (2004).

63. *Id.* at 158.

64. *Id.* at 162.

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
> (2) such effect gives rise to a claim under the provisions of section 1 to 7 of this title, other than this section.
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.[65]

Section 5(a)(3) of the Federal Trade Commission Act regarding unfair methods of competition, added to the Federal Trade Commission Act by the FTAIA as well, contains similar language to Section 6a of the Sherman Act above.[66]

Congress enacted the FTAIA as Title IV of the Export Trading Company Act of 1982.[67] According to the FTAIA's legislative history, by

65. 15 U.S.C. § 6a.

66. *Compare id.* (regarding "conduct involving trade or commerce . . . with foreign nations"), *with* 15 U.S.C. § 45(a)(3) (regarding "unfair methods of competition involving commerce with foreign nations"). As for the Clayton Act, section 1(a) of the Clayton Act defines "commerce" as including "trade or commerce among the several States and with foreign nations." 15 U.S.C. § 12. Section 7 of the Clayton Act on acquisitions was amended to allow jurisdiction over persons "engaged in commerce or in any activity affecting commerce," and "the amendment was designed to and has had the effect of making antitrust jurisdiction over mergers and acquisitions co-extensive with the reach of the Sherman Act under its more lenient 'effects' test." ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 1027 (2d ed. 2008). However, section 2 of the Clayton Act, as amended by the Robinson-Patman Act on price discrimination, and section 3 of the Clayton Act, on exclusionary vertical agreements, apply "only to persons operating 'in' interstate commerce," and this "has been interpreted as requiring more than a mere effect on commerce, but actual movement of commerce across state lines." *Id.*

67. Shenefield, *supra* note 24, at 351 n.7. *See generally* INT'L TRADE ADMIN., EXPORT TRADING COMPANY ACT, https:////legacy.trade.gov//mas//ian//etca//index.asp (last updated June 21, 2018) ("The Export Trading Company Act (ETCA) was created by Congress to enable U.S. firms to collaborate with each other to reduce their exports costs, become more efficient at exporting, and, in turn, compete more effectively in the export market.").

enacting the FTAIA, "Congress sought to place American-owned companies operating entirely abroad or in United States export trade on equal footing with their foreign-owned competitors by freeing them from the possibility of dual and conflicting antitrust regulation."[68] Through the FTAIA, Congress also sought to "eliminate the uncertainty that had arisen from the confusing array of standards employed by federal courts for determining when United States antitrust jurisdiction attaches to international business transactions."[69]

The Supreme Court applied the FTAIA in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*[70] In this case, plaintiffs filed a class action on behalf of foreign and domestic purchasers of vitamins alleging that defendants, vitamin manufacturers and distributors, fixed prices of vitamin products to customers in the United States and foreign countries.[71] The defendants moved to dismiss with respect to foreign purchasers in Australia, Ecuador, Panama, and Ukraine.[72]

The Supreme Court noted that this case involved price-fixing that caused some domestic antitrust injury of higher vitamin prices in the United States and independently caused a separate foreign injury of higher vitamin prices in foreign countries.[73] The Supreme Court held that the FTAIA's exception to the general rule—which puts conduct that has a "'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce" within reach of Sherman Act claims[74]—is not applicable where the plaintiff's claim is based solely on "independent foreign harm."[75] Therefore, the Supreme Court held that, under the FTAIA, purchasers in the United States could bring a Sherman Act claim for domestic injury, but purchasers in foreign countries could not bring a Sherman Act claim for foreign injury.[76]

68. Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102, 1105 (S.D.N.Y. 1984) (citing H.R. REP. NO. 97-686, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495).

69. *Id.* (citing H.R. REP. NO. 97-686, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487).

70. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 162 (2004). *See generally* Dodge, *supra* note 27, at 2094 ("[T]he Court looked to 'principles of prescriptive comity' to limit the extraterritorial reach of American antitrust law in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*").

71. F. Hoffmann-La Roche Ltd., 542 U.S. at 159.

72. *Id.* at 159–60.

73. *Id.*

74. *Id.* at 162.

75. *Id.* at 159.

76. *Id.* In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, the Supreme Court noted that respondents argued in the alternative that foreign injury was not independent and was linked to the anticompetitive conduct's domestic effects "because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.*, higher prices in the United States), the

B. International Comity's Definition, Factors for Analysis, and Application

If jurisdiction *can be* exercised under the FTAIA, international comity is considered to determine whether jurisdiction *should be* exercised.[77] A definition of international comity was provided in *Hilton v. Guyot* as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation."[78] Courts have also listed factors for analyzing international comity, including the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America* and the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.* which are discussed below.[79] Section 403(2) of the Restatement (Third) of the Foreign Relations Law of the United States also provides a list of relevant factors for determining whether exercising jurisdiction is reasonable or unreasonable.[80]

1. Definition and Categorization of International Comity

The Supreme Court defined international comity in *Hilton v. Guyot*, a case where the issue was whether a foreign judgment in France had force and effect in the United States.[81] The Supreme Court first noted that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived" and that whether the law of one country will be given effect in the territory of another country depends on "the comity

sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury." *Id.* at 175. The Supreme Court said it would not address the argument because the Court of Appeals did not consider the argument and said that respondents were free to ask the Court of Appeals to consider it. *Id.* Section 415 of the Restatement (Third) of the Foreign Relations Law of the United States further explains the extraterritorial application of antitrust law. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 415 (AM. L. INST. 1987).

77. Alford, *supra* note 26, at 217, 221 ("Thus, lower courts addressing this issue should continue to utilize a two-tiered approach, considering both statutory jurisdiction and considerations of comity."); Dodge, *supra* note 27, at 2093 ("The question, the Ninth Circuit wrote in *Timberlane*, was 'whether American authority *should* be asserted in a given case as a matter of international comity and fairness.' Section 403 of the Restatement (Third) of Foreign Relations Law adopted *Timberlane*'s interest balancing approach."); *See also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797 n.24 (1993).

78. Hilton v. Guyot, 159 U.S. 113, 164 (1895).

79. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976).

80. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 403 (AM. L. INST. 1987).

81. Hilton v. Guyot, 159 U.S. 113, 162–63 (1895).

of nations."[82] The Supreme Court then said that comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill" and that, instead, it is a "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or other persons was are under the protection of its laws."[83] In *Hilton*, the Supreme Court held that, due to lack of reciprocity, international comity did not require giving conclusive effect to the judgment of the court of France.[84] Since a judgment in the United States was reviewable upon the merits under the law of France, the Supreme Court held that a judgment in France was not entitled to full credit and conclusive effect.[85]

Scholars have also provided definitions of international comity. Professor William S. Dodge defines international comity as "deference to foreign government actors that is not required by international law but is incorporated in domestic law."[86] Professor Dodge explains that international comity can be categorized according to "the foreign government actor to whom deference is given" as follows: prescriptive comity, which is deference given to foreign lawmakers; adjudicative comity, which is deference given to foreign tribunals; and sovereign party comity, which is deference given to foreign governments when they are litigants.[87] Professor Dodge also explains that prescriptive comity, adjudicative comity, and sovereign party comity can operate to recognize foreign law and judgments as a "principle of recognition" or restrain American law's reach and American court's jurisdiction, including over foreign sovereign defendants, as a "principle of restraint."[88]

2. Factors for Analyzing International Comity in Timberlane Lumber Co. v. Bank of America, Mannington Mills, Inc. v. Congoleum

82. *Id.* at 163.

83. *Id.* at 163–64.

84. *Id.* at 210.

85. *Id.* at 227.

86. Dodge, *supra* note 27, at 2078.

87. *E.g.*, *id.* at 2078–79.

88. *Id.* at 2099. *See generally* OECD, COMPETITION CO-OPERATION AND ENFORCEMENT INVENTORY OF CO-OPERATION AGREEMENTS: PROVISIONS ON POSITIVE COMITY 1 (2021) ("'Positive comity' allows one party (requesting) to request the other party (requested) to take appropriate enforcement actions with respect to anti-competitive activities occurring in the territory of the requested party that adversely affect important interests of the requesting party."); OECD, COMPETITION CO-OPERATION AND ENFORCEMENT INVENTORY OF INTERNATIONAL CO-OPERATION MOUS BETWEEN COMPETITION AGENCIES: PROVISIONS ON NEGATIVE COMITY 1 (2021) ("Negative comity, also called 'traditional comity', involves a country's consideration of how to prevent its laws and law enforcement actions from harming another country's important interest, and avoid conflicts.").

Corp.*, and Section 403(2) of the Restatement (Third) of the Foreign Relations Law of the United States*

Factors for analyzing international comity can be found in the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America*[89] and the Third Circuit's decision in *Mannington Mills, Inc. v. Congoleum Corp*.[90] In *Timberlane*, plaintiff Timberlane Lumber Company (Timberlane), an Oregon partnership, purchased and distributed lumber in the United States and imported lumber into the United States.[91] The general partners of Timberlane principally owned two Honduran corporations: Danli Industrial, with contracts to purchase timber in Honduras, and Maya Lumber Company, to conduct milling to produce lumber for export.[92] Timberlane began negotiations to acquire a milling plant in Honduras.[93] Defendants, including Bank of America, which had significant financial interests in Honduran corporations competing with Timberlane, realized they would face competition and tried to disrupt Timberlane's business and efforts to acquire the milling plant. To this end, defendants refused to sell their claims in the milling plant despite a substantial cash offer.[94]

Plaintiffs sued defendants for violation of Sections 1 and 2 of the Sherman Act, alleging that defendants conspired to prevent plaintiffs from milling lumber in Honduras to export to the United States.[95] The Ninth Circuit listed the following factors for analyzing international comity:

The elements to be weighed include the degree of conflict with foreign laws or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative

89. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613–15 (9th Cir. 1976).

90. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d. Cir. 1979). *See generally* Dodge, *supra* note 27, at 2079, 2109–10 (categorizing "Interest Balancing Under Restatement (Third) Section 403" as a doctrine of prescriptive comity and as a principle of restraint, categorizing forum non conveniens as a doctrine of adjudicative comity and as a principle of restraint, and categorizing foreign sovereign immunity as a doctrine of sovereign party comity and as a principle of restraint); John Byron Sandage, Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693, 1707 (1985) ("A grant of a motion of *forum non conveniens* results in the dismissal of an action brought in one court, allowing the plaintiff to take the case to another forum where greater availability of witnesses and evidence suggests that the case can be heard more effectively, efficiently, and conveniently.").

91. *Timberlane*, 549 F.2d at 603.

92. *Id.*

93. *Id.* at 604.

94. *Id.* at 604–05.

95. *Id.* at 601.

significance of effects on the United States as compared with those elsewhere, the extent to which there is explicitly purposes to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted.[96]

After applying these factors to the case, the Ninth Circuit said there was no indication of conflict with the law or policy of Honduras or any analysis of the interests of the United States and Honduras.[97] The Ninth Circuit then vacated the dismissal by the district court and remanded the case.[98] Although the part of the *Timberlane* decision regarding the Sherman Act's extraterritorial reach has been superseded by the FTAIA,[99] the section of *Timberlane* regarding the international comity factors is still used by the courts.[100] In considering the international comity factors, courts often cite to the FTAIA's legislative history stating, "[T]his bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane* . . . or otherwise to take account of the international character of the transaction."[101]

In addition to the balancing of factors, which Professor Dodge categorizes as the doctrine of prescriptive comity and the principle of restraint, some other doctrines related to international comity include the act of state doctrine, the foreign state compulsion doctrine, and foreign sovereign immunity.[102] Under the act of state doctrine, U.S. courts do not consider "the validity of sovereign acts by foreign governments where such acts occur in the foreign state."[103] The foreign state compulsion doctrine, also called the foreign sovereign compulsion doctrine,[104] has been described as a "corollary

96. *Id.* at 613–15.

97. *Id.* at 615.

98. *Id.*

99. McGlinchy v. Shell Chemical Co., 845 F.2d 802, 813 n.8 (9th Cir. 1988) ("Despite the peculiar procedural history of *Timberlane*—section 6a was enacted between the remand and subsequent appeal—we are bound to apply section 6a.").

100. *Id.* (citations omitted).

101. H.R. REP. NO. 97-686, 97th Cong., 2d Sess. 2, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498.

102. Dodge, *supra* note 27, at 2079; *see also* GAVIL, KOVACIC & BAKER, *supra* note 66, at 1047–50.

103. GAVIL, KOVACIC & BAKER, *supra* note 66, at 1047; *See also* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("[C]ourts of one country will not sit in judgment on the acts of the government of another, done within its own territory."). The act of state doctrine is said to derive "from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the government." *Timberlane*, 549 F.2d at 605 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)).

104. *See* GAVIL, KOVACIC & BAKER, *supra* note 66, at 1047–50.

to the act of state doctrine in the foreign trade antitrust field."[105] Under the foreign state compulsion doctrine, "corporate conduct which is compelled by a foreign sovereign is also protected from antitrust liability, as if it were an act of the state itself."[106] Foreign sovereign immunity is based on the Foreign Sovereign Immunities Act,[107] which "immunizes foreign governments from suits challenging the acts of the sovereign" subject to certain exceptions, including the exception to immunity for commercial activity.[108]

Returning to the international comity factors, later in *Mannington Mills Inc. v. Congoleum Corp.*, the Third Circuit provided a list of similar factors to be considered in analyzing international comity.[109] In *Mannington Mills*, plaintiff Mannington Mills sued defendant Congoleum in New Jersey for allegedly violating Section 2 of the Sherman Act. Plaintiff alleged defendant intended to monopolize foreign trade related to chemically embossed vinyl floor coverings. According to plaintiff, defendant fraudulently secured patents for the manufacture of the flooring in foreign countries and enforced them in foreign countries to restrict plaintiff's foreign business.[110]

The Third Circuit stated that plaintiff's request for treble damages and to enjoin defendant from enforcing the patents raised a potential for conflict with the policies of foreign countries.[111] The Third Circuit then listed factors to consider in determining whether extraterritorial jurisdiction should be exercised:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;

105. *Timberlane*, 549 F.2d at 606.

106. *Id.*

107. 28 U.S.C. § 1602.

108. GAVIL, KOVACIC & BAKER, *supra* note 66, at 1047 ("Such immunity may be lost when the sovereign's acts are purely 'commercial' in nature."); *See also* 28 U.S.C. § 1605(a)(2) (providing the exception to immunity for commercial activity); 28 U.S.C. § 1603(d) ("The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.").

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

110. *Id.* at 1290, 1299–1300.

111. *Id.* at 1296.

> 6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
> 7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
> 8. Whether the court can make its order effective;
> 9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
> 10. Whether a treaty with the affected nations has addressed the issue.[112]

The Third Circuit decided that it was an error to dismiss plaintiff's complaint without the preparation of a record that would allow the consideration of these factors and remanded the case.[113]

Section 403(2) of the Restatement (Third) of the Foreign Relations Law of the United States also provides a list of factors for determining whether exercising jurisdiction is reasonable:

> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
> (d) the existence of justified expectations that might be protected or hurt by the regulation;

112. *Id.* at 1297–98.
113. *Id.* at 1298–99.

> (e) the importance of the regulation to the international political, legal, or economic system;
> (f) the extent to which the regulation is consistent with the traditions of the international system;
> (g) the extent to which another state may have an interest in regulating the activity; and
> (h) the likelihood of conflict with regulation by another state.[114]

While the factors for analyzing international comity in *Timberlane*, *Mannington*, and the Restatement (Third) of the Foreign Relations Law of the United States are similar, there are some differences.[115] For example, *Timberlane* and *Mannington* do not expressly mention factors such as "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities" or "the extent to which another state may have an interest in regulating the activity." But the Restatement (Third) of the Foreign Relations Law of the United States mentions these factors in Section 403(2)(c) and Section 403(2)(g).[116] However, the Restatement (Third) of the Foreign Relations Law of the United States does not specifically explain how to analyze and apply the factors in connection with international comity. This is discussed in Part III of this Article.

3. Application of the Principle of International Comity in Antitrust Government Enforcement Proceedings and Private-Party Actions

According to some scholars, the Supreme Court's decision in *Hartford Fire Insurance Co. v. California* significantly curtailed the application of the principle of international comity in private-party actions, despite the factors listed by the courts and the Restatement. [117] In *Harford Fire*, the plaintiff alleged that defendants, who included domestic primary insurers

114. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 403(2) (1987); *See also id.* § 403(1) ("Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.").

115. *See* Mannington Mills Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d. Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613–15 (9th Cir. 1976); RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 403 (1987).

116. *Id.* § 403(2)(c), (2)(g).

117. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); Alford, *supra* 26, at 229; Dodge, *supra* 27, at 2093–94.

and domestic and foreign reinsurers, conspired to restrict insurance coverage terms available in the United States in violation of Section 1 of the Sherman Act.[118] The Court considered whether claims against London reinsurers should have been dismissed as an inappropriate application of the Sherman Act to conduct abroad.[119]

The Supreme Court said that "[t]he only substantial question in this litigation is whether 'there is in fact a true conflict between domestic and foreign law.'"[120] The Court then stated, "No conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'"[121] The Court thus held that international comity did not preclude the exercise of jurisdiction under the circumstances because the London reinsurers did not claim "that British law requires them to act in some fashion prohibited by the law of the United States" or "that their compliance with the laws of both countries is otherwise impossible."[122] Scholars have noted that, in *Hartford Fire*, the Court "refused to consider dismissal on grounds of 'international comity' unless the conduct prohibited by U.S. law was required by foreign law."[123] These scholars assert that, under this approach, courts will increasingly assert jurisdiction, and international comity will rarely be a factor in checking the extraterritorial application of antitrust law.[124]

However, Professor Roger P. Alford says that, in contrast to private-party actions, there is still careful consideration of international comity in "government-initiated enforcement proceedings" brought by the United States Department of Justice ("DOJ") and the FTC.[125] Scholars also observed that, after the *Hartford Fire* decision, "litigants are free to make comity arguments relying on the other factors outlined in the cases and the Restatements, but may not rely upon the conflict between national policies, unless the conflict rises to the level of outright compulsion."[126] Other scholars have said *Hartford Fire* "leaves open the question of, absent an alleged 'true

118. *See Hartford Fire*, 509 U.S. at 770–74.

119. *Id.* at 794–95.

120. *Id.* at 798 (citing Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 555 (1987)).

121. *Id.* at 799.

122. *Id.*

123. Dodge, *supra* note 27, at 2094.

124. Alford, *supra* note 26, at 228.

125. *Id.* at 229.

126. *In re* Vitamin C Antitrust Litig., 810 F. Supp. 2d 522 (E.D.N.Y. 2011) (citing Spencer Weber Waller, ANTITRUST AND AMERICAN BUSINESS ABROAD (2009) § 6:21); *cf.* Alford, *supra* note 26, at 221 ("However, in instances presenting a 'true conflict,' *Hartford Fire* provides little guidance as to how much deference, if any, should be accorded to the principle of international comity.").

conflict,' whether, and if so, under what circumstances, international comity requires a U.S. court to consider abstaining from exercising jurisdiction."[127]

C. Remedies in Antitrust Cases

Remedies for violation of antitrust law include criminal sanctions and civil remedies.[128] Criminal sanctions in antitrust cases include imprisonment, fines, asset forfeitures, and injunctive relief.[129] Civil remedies in antitrust cases include damages, injunctive relief, and attorney's fees.[130] International comity should be considered in deciding the scope of sanctions[131] and remedies in antitrust cases. The DOJ's and the FTC's Antitrust Guidelines for International Enforcement and Cooperation provide as follows: "An Agency will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency's international comity analysis."[132]

The Supreme Court reviews a district court's remedial order under the standard of "whether the relief represents a reasonable method of eliminating the *consequences* of the illegal conduct."[133] The agreement between the Government of the United States and the European Communities regarding the application of their competition laws ("U.S.-Eur. Cooperation Agreement") specifies, "Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or

127. Joseph P. Griffin, *EC and U.S. Extraterritoriality: Activism and Cooperation*, 17 FORDHAM INT'L L.J. 353, 386 (1994); *see Hartford Fire*, 509 U.S. at 770–74 ("We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.").

128. GAVIL, KOVACIC & BAKER, *supra* note 66, at 62.

129. *Id.*

130. *Id.*

131. *See generally* OECD, GLOBAL FORUM ON COMPETITION: SANCTIONS IN ANTITRUST CASES, DAF//COMP//GF(2016)14, at 3 (2016) [hereinafter OECD, GLOBAL FORUM ON COMPETITION: SANCTIONS IN ANTITRUST CASES] ("A more difficult question is co-ordination of antitrust fines.").

132. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION 47 (Jan. 13, 2017) [hereinafter ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION]. *See generally* Maureen K. Ohlhausen, Chairman, Fed. Trade Comm'n, Guidelines for Global Antitrust: The Three Cs – Cooperation, Comity, and Constraints (Sept. 8, 2017) ("A new statement in the Guidelines identifies important limits on the Agencies' pursuit of extraterritorial remedies.").

133. Nat'l Soc'y of Pro. Eng'rs. v. United States, 435 U.S. 679, 698 (1978).

penalties sought, and in other ways, as appropriate."[134] Part III of this Article proposes and explains factors to consider in analyzing international comity and designing appropriate remedies.

II. REASONS FOR CONSIDERING INTERNATIONAL COMITY IN ANTITRUST CASES

This Part explains the reasons for considering international comity in antitrust cases, including respecting the sovereignty and policies of other countries and avoiding overbroad remedies that may have a chilling effect on business activity.[135] This Part also examines how antitrust enforcement agencies still consider international comity even after *Hartford Fire Insurance Co. v. California* by reviewing antitrust enforcement agencies' cooperation agreements and guidelines, such as the DOJ's and FTC's Antitrust Guidelines for International Enforcement and Cooperation.[136]

A. Respecting the Sovereignty and Policy of Countries

First, considering international comity in antitrust enforcement proceedings is important because countries have the right to regulate their economies.[137] As noted by the Seventh Circuit in *Motorola Mobility LLC v. AU Optronics Corp.*, "[i]t is fair to require foreign subsidiaries of American companies to seek remedy in the courts of the country in which they choose to incorporate. Companies operate overseas facilities to take advantage of

134. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws art. VI, U.S.-Eur., Sept. 23, 1991, 30 I.L.M. 1487 [hereinafter U.S.-Eur. Cooperation Agreement]; *see also* Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Law, art. VI, ¶ 1 (1995). *See generally* Griffin, *supra* note 127, at 361 ("In proceedings under the Merger Regulation, the Commission may attempt to take international comity into account by limiting remedies to EC territory.").

135. *See, e.g.*, Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 820 (7th Cir. 2015); OECD, POLICY ROUNDTABLES: REMEDIES IN CROSS-BORDER MERGER CASES, DAF//COMP(2013)28, at 10 (2013) [hereinafter OECD, POLICY ROUNDTABLES: REMEDIES IN CROSS-BORDER MERGER CASES].

136. ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION, *supra* note 132, at 27; *see* Alford, *supra* note 26, at 229.

137. Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 820 (7th Cir. 2015) ("Motorola's foreign subsidiaries were injured in foreign commerce . . . and to give Motorola rights to take the place of its foreign companies and sue on their behalf under U.S. antitrust law would be an unjustified interference with the right of foreign nations to regulate their own economies.").

many legal provisions of that country: labor law, environmental law, and tax law."[138]

Specifically, in *Motorola Mobility LLC v. AU Optronics Corp*., Motorola and its foreign subsidiaries bought liquid-crystal display panels and incorporated them into cellphones that Motorola or its subsidiaries manufactured.[139] Motorola sued foreign manufacturers of the panels for price fixing in violation of Section 1 of the Sherman Act.[140] Specifically at issue in the case were 42%[141] of the panels that Motorola's foreign subsidiaries bought, incorporated into cellphones, and sold and shipped to Motorola to be resold in the United States.[142]

The Seventh Circuit said that Motorola's lawsuit was a derivative injury case and that derivate victims usually lack antitrust standing.[143] Regarding panels brought by Motorola's foreign subsidiaries, the Seventh Circuit explained that if the remedies in the countries where Motorola's foreign subsidiaries are domiciled are inadequate, that is the "consequences that Motorola committed to accept by deciding to create subsidiaries that would be governed by the laws of those countries."[144] As such, the Seventh Circuit recognized the importance of respecting the right of countries to regulate their economies.[145]

Furthermore, consideration of international comity in antitrust enforcement proceedings is important because the sovereignty of countries means countries can promote policies that they determine are desirable, such as promoting innovation and competition.[146] In antitrust cases involving patents,

138. *Id.* at 827.

139. *Id.* at 817.

140. *Id.*

141. As for the other panels, about 1% were bought by Motorola in the United States to be assembled into cellphones which the court said were not involved in the appeal. *Id.* at 817–18. The remaining 57% of the panels were bought by Motorola's foreign subsidiaries which incorporated the panels into cellphones and sold abroad. *Id.* at 817. The court noted that the 57% of the panels cannot support filing of a Sherman Act claim saying, "As neither those cellphones nor their panel components entered the United States, they never became a part of domestic U.S. commerce." *Id.* at 817–18.

142. *Id.*

143. *Id.* at 820–21.

144. *Id.* at 821.

145. *See id.* at 820–21.

146. *See id.* at 820. *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 2 (Jan. 12, 2017) ("The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare."); OECD, POLICY ROUNDTABLES: INTELLECTUAL PROPERTY RIGHTS, DAF//COMP(2004)24, at 7 (2004) ("Overzealous enforcement of competition laws against IP owners can damage the incentives to innovate that IP

both the policy of promoting innovation and competition may be relevant.[147] In *United States v. General Electric Co.*, the government alleged that so-called agents of General Electric Company who distributed lamps were actually purchasers under resale price agreements. According to the government, this practice constituted illegal resale price maintenance.[148] In *General Electric*, the Supreme Court noted the relationship between antitrust law and patent law, saying that the patentee would be subject to the Sherman Act's regulation "when he adopts a combination with others, by which he steps out of the scope of his patent rights and seeks to control and restrain those be whom he has sold his patented articles in their subsequent disposition of what is theirs."[149] Therefore, the Supreme Court said genuine contracts of agency, such as those involved in the case, did not constitute illegal resale price maintenance in violation of antitrust law.[150]

United States v. Line Material Co. also involved both the policy of promoting innovation and competition.[151] In *Line Material*, the United States brought a Sherman Act Section 1 claim, challenging patent owners' cross-license arrangement to fix the sale price of certain patented electrical devices.[152] The Supreme Court noted that "a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly"[153] and that it is called "to make an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act."[154] The Supreme Court explained that "no case of this Court has construed the patent and anti-monopoly statutes to permit separate owners of separate patents by cross-licenses or other arrangements to fix the prices to be charged by them and

systems are designed to foster. On the other hand, when IP is excessively easy to obtain, it may lead to market power, to the detriment of competition and consumers.").

147. *See, e.g.*, Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 24 (1964) ("The patent laws . . . are in pari materia with the antitrust laws and modify them pro tanto."); *see also* FTC v. Actavis, Inc., 570 U.S. 136, 149 (2013) ("For another thing, this court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws."). *See generally In Pari Materia*, MERRIAM-WEBSTER, https:////www.merriam-webster.com//legal//in%20pari%20materia (last visited Aug. 7, 2022) ("It is a doctrine in statutory construction that statutes that are *in pari materia* must be construed together.).

148. United States v. Gen. Elec. Co., 272 U.S. 476, 479 (1926).

149. *Id.* at 485.

150. *Id.* at 488.

151. United States v. Line Material Co., 333 U.S. 287, 308–11 (1948).

152. *Id.* at 288–89.

153. *Id.* at 308.

154. *Id.* at 310.

their licensees for their respective products."[155] Therefore, the Supreme Court reversed the dismissal of the complaint and remanded the case.[156]

Given the various policy goals that may be involved in antitrust cases, antitrust enforcement agencies and courts should respect the right of countries to regulate their economies and to promote the policies they desire when determining the scope of antitrust remedies.[157] Extraterritorial remedies raise concerns related to respecting the sovereignty and policy of countries because "[w]hen extraterritorial remedies are adopted, it is the jurisdiction that has the strictest standard that will ultimately regulate corporate behaviour by imposing remedies that may affect business conduct in jurisdictions where that same conduct will be found lawful, or at least less harmful."[158] As such, when antitrust enforcement agencies and courts decide the remedies to impose, they should analyze whether the remedies would interfere with other countries' right to regulate their economies and to promote policies.[159] This is discussed further in Part III.

B. Avoiding Overbroad Remedies that May Have a Chilling Effect on Business Activity

Considering international comity in antitrust cases would help avoid overbroad remedies that may have a chilling effect on business activity.[160] Remedies for violation of antitrust law in criminal cases include imprisonment, fines, asset forfeiture, and injunctive relief.[161] Remedies for violation of antitrust law in civil cases include damages, injunctive relief, and attorney's fees.[162] A remedy that is proportional "means that the scope, form and intensity of the remedy must correspond to the seriousness of the violation

155. *Id.* at 311.

156. *Id.* at 315.

157. *See* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 820 (7th Cir. 2015).

158. OECD, ROUNDTABLE ON THE EXTRATERRITORIAL REACH OF COMPETITION REMEDIES: ISSUES PAPER BY THE SECRETARIAT, DAF//COMP//WP3(2017)4, at 9 (2017) [hereinafter OECD, ROUNDTABLE ON EXTRATERRITORIAL REACH] (citing COOPERATION, COMITY, AND COMPETITION POLICY Chapter 17 (Andrew T. Guzman ed., 2010).

159. *See id.*

160. *See, e.g.*, OECD, POLICY ROUNDTABLES: REMEDIES IN CROSS-BORDER MERGER CASES, *supra* note 135, at 10. *See generally* OECD, GLOBAL FORUM ON COMPETITION: SANCTIONS IN ANTITRUST CASES, *supra* note 131, at 2 ("Many competition authorities adopt several steps in setting fines: first, determination of the basic fine; second, adjustments (including aggravating and mitigating circumstances); third, comparisons to limits; and fourth, considerations related to leniency programmes.").

161. GAVIL, KOVACIC & BAKER, *supra* note 66, at 62.

162. *Id.*

and the identified competitive harm."[163] Proportional antitrust remedies are said to be less arbitrary and more predictable.[164]

A much-debated remedy is an injunction.[165] An injunction in antitrust cases usually terminates unlawful conduct; it restricts the defendant's conduct to "prevent the conduct from re-occurring and to restore competitive conditions that may have been altered by the conduct."[166] In *National Society of Professional Engineers v. United States*, the Supreme Court stated that it reviews a district court's remedial order under the standard of "whether the relief represents a reasonable method of eliminating the *consequences* of the illegal conduct."[167] This standard of review in *National Society of Professional Engineers* [168] gives the district court considerable discretion regarding remedies[169] and is a subject of debate by scholars.[170] Some, including defendants, would argue that remedies that are limited in geographic scope are the "reasonable method of eliminating the *consequences* of the illegal

163. OECD, ROUNDTABLE ON EXTRATERRITORIAL REACH, *supra* note 158, at 13.

164. OECD, POLICY ROUNDTABLES: REMEDIES AND SANCTIONS IN ABUSE OF DOMINANCE CASES, DAF//COMP(2006)19, at 8 (May 15, 2007) [hereinafter OECD, POLICY ROUNDTABLES ON ABUSE OF DOMINANCE] ("A proportional *remedy* is one whose scope and form does not exceed what is necessary to achieve the competition law's objectives; a proportional *sanction* is one that neither over-deters nor under-deters.").

165. GAVIL, KOVACIC & BAKER, *supra* note 66, at 1115. S*ee generally* Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147 189–90 (2005) ("A conduct order will generally include affirmative duties because real-world markets operate in real time, and a court cannot simply enjoin conduct and then wait for markets to correct themselves. . . . Structural remedies are more radical than conduct remedies . . . .").

166. GAVIL, KOVACIC & BAKER, *supra* note 66, at 1113. S*ee generally* FED. R. CIV. P. 65(d)(1) ("Every order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (stating that under the four-factor test for a permanent injunction, a plaintiff must show (1) irreparable injury, (2) inadequacy of remedies available at law, (3) "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted" and (4) "the public interest would not be disserved by a permanent injunction"); John J. Flynn, *A Survey of Injunctive Relief Under State and Federal Antitrust Laws*, 1967 UTAH L. REV. 344, 344 (1967) ("Equitable relief in an antitrust case may well extend beyond the point of economic correction to become, in effect, economic regulation of an entire industry or segment thereof for several generations.").

167. Nat'l Soc'y of Pro. Eng'rs. v. United States, 435 U.S. 679, 698 (1978). *See generally* Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2142 (2017) (noting the importance of "reasoned decisionmaking process when determining the geographic scope of injunctions").

168. Nat'l Soc'y of Pro. Eng'rs, 435 U.S. at 698.

169. GAVIL, KOVACIC & BAKER, *supra* note 66, at 1115. S*ee generally eBay Inc.*, 547 U.S. at 391 ("The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.").

170. GAVIL, KOVACIC & BAKER, *supra* note 66, at 1115.

conduct."[171] Others, including plaintiffs, would say that broad remedies are necessary to remedy the harm.[172]

However, overbroad remedies may have a chilling effect on business activity.[173] For example, take the case of a merger challenged and under review in multiple countries. If reviewing enforcement agencies do not cooperate and communicate, this "might lead businesses to restrict their merger activity to transactions that will be acceptable to all jurisdictions in which they are likely to be notified, potentially creating a chilling effect as procompetitive and other efficient mergers are not proposed."[174] A proportional remedy means there should be a connection between the remedy and the territory where the remedy applies, but this connection is "often more remote" in the case of extraterritorial remedies.[175]

Also, scholars say it is important to apply the principle of international comity and limit extra-jurisdictional remedies in antitrust cases because countries' antitrust laws differ in the goals they seek to achieve.[176] For example, the antitrust law of some countries focuses on "economic or consumer welfare" factors, whereas the antitrust law of other countries considers "noncompetition" factors such as "fairness" and "national economy."[177] In the United States, federal courts and antitrust enforcement agencies apply a consumer welfare standard, which evaluates conduct based on the economic surplus for consumers.[178]

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171. *See id.*

172. *See id.*

173. *See, e.g.*, OECD, POLICY ROUNDTABLES: REMEDIES IN CROSS-BORDER MERGER CASES, *supra* note 135, at 10.

174. *Id.*; *See also* OECD, ROUNDTABLE ON EXTRATERRITORIAL REACH, *supra* note 158, at 9 ("For example, when examining a multijurisdictional merger, agencies in jurisdictions which account for only a small part of the transaction may find that the merging parties may choose to exit its market if they place significant restrictions on the merger. This departure could reduce competition in the domestic market.").

175. OECD, ROUNDTABLE ON EXTRATERRITORIAL REACH, *supra* note 158, at 13.

176. *See* Koren W. Wong-Ervin, Bruce H. Kobayashi, Douglas H. Ginsburg & Joshua D. Wright, *Extra-Jurisdictional Remedies Involving Patent Licensing*, GEO. MASON UNIV. L. & ECON. RSCH. PAPER SERIES 16-46 1, 7–8.

177. *Id.*

178. Christine S. Wilson, *Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get* (Feb. 15, 2019), https:////www.ftc.gov//system//files//documents//public_statements//1455663//welfare_standard_speech_-_cmr-wilson.pdf (explaining various standards for antitrust analysis suggested by scholars including the "consumer welfare standard," the "total welfare standard," the "consumer choice standard," the "multiple goals standard," and the "protection of the competitive process standard"); *See also* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (citing ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978))); *cf.* Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in*

The consumer welfare standard considers the economic surplus for consumers, which is "technically, the difference between what each consumer actually pays and what he or she would be willing to pay."[179] However, scholars explain that the consumer welfare standard also considers "reduced product quality, reduced product variety, reduced service, or diminished innovation."[180] Supporters of the consumer welfare standard claim that an approach focusing on economic welfare benefits consumers.[181]

The courts and antitrust enforcement agencies of different countries also vary in the degree of their intervention with an intellectual property right holder's right to exclude.[182] For example, an antitrust enforcement agency's remedy that requires a dominant company to supply to its competitors might increase the competitors' ability to compete in the short run.[183] However, this

Practice, J. COMP. POL'Y Int'l 1, 9 (2018) (explaining the protection of the competitive process standard). *See generally* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 717 (2017) (arguing that the structure of markets should be reviewed to analyze competition in the case of online platforms which would "examine the competitive process itself").

179. Wilson, *supra* note 178, at 4.

180. *Id.* at 5–6 (explaining that "price" can mean "quality-adjusted price"). *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1, 2 (Aug. 19, 2010) ("Enhancement of market power by sellers often elevates the prices charged to customers. . . . Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation.").

181. Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406, 2416 (2013).

182. Wong-Ervin, Kobayashi, Ginsburg & Wright, *supra* note 176, at 8; *See also* OECD, EXECUTIVE SUMMARY OF THE ROUNDTABLE ON THE LICENSING OF IP RIGHTS AND COMPETITION LAW: ANNEX TO THE SUMMARY RECORD OF THE 131TH MEETING OF THE COMPETITION COMMITTEE HELD IN 5-7 JUNE 2019, DAF//COMPM(2019)1//ANN6//FINAL, at 3–4 (2019) [hereinafter OECD, EXECUTIVE SUMMARY OF THE ROUNDTABLE ON THE LICENSING OF IP RIGHTS AND COMPETITION LAW] (noting similarities and differences in antitrust enforcement around the world regarding IP licensing). S*ee generally* Cavanagh, *supra* note 165, at 189 ("Nevertheless, commentators are divided as to whether the net effect of compulsory licensing is to promote competition."); William H. Page & Seldon J. Childers, *Software Development as an Antitrust Remedy: Lessons from the Enforcement of the* Microsoft *Communications Protocol Licensing Requirement*, 14 MICH. TELECOMM. & TECH. L. REV. 77, 79 (2007) ("Thus, wherever possible, antitrust remedies should rely on the market's self-correcting forces rather than replace them with governmental mandates."); Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 27 (2009) ("[A]ccess to networks, platforms, and other forms of infrastructure is already the focus of the debate in antitrust, telecommunications, and most regulated industries.").

183. OECD, POLICY ROUNDTABLES ON ABUSE OF DOMINANCE, *supra* note 164, at 177. *See generally* Waller, *supra* note 182, at 29 ("Most importantly, questions of access, information disclosure, and virtual divestiture will grow in importance as monopolization cases focus on intellectual property and information-related industries.").

might decrease competitors' incentive to "self-provide or design around" the need for the supply from the dominant company.[184]

In the United States, in *United States v. Colgate & Co*., at issue was whether Colgate, the manufacturer, violated the Sherman Act by refusing to sell its products to dealers who would not sell at stipulated prices.[185] In *Colgate*, the Supreme Court said the Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell."[186] In *Verizon Communications v. Inc. v. Law Offices of Curtis V. Trinko, LLP*, which involved Section 2 of the Sherman Act, the Supreme Court said that compelling companies which have obtained monopoly power to share the source of their advantage "may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities," "may facilitate the supreme evil of antitrust: collusion," and "requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited."[187] The Supreme Court also said that, although the right to refuse to deal is "not unqualified,"[188] the Supreme Court is "very cautious in recognizing exceptions" to the right to refuse to deal explained in *Colgate*.[189]

184. OECD, POLICY ROUNDTABLES ON ABUSE OF DOMINANCE, *supra* note 164, at 177.

185. United States v. Colgate & Co., 250 U.S. 300, 304–06 (1919) ("No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. . . .There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually.").

186. *Id.* at 307.

187. Verizon Commc'ns v. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004).

188. *Trinko*, 540 U.S. at 408 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985) ("The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.")).

189. *Id.* (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985)). *See generally* OECD, EXECUTIVE SUMMARY OF THE ROUNDTABLE ON THE LICENSING OF IP RIGHTS AND COMPETITION LAW, *supra* note 182, at 4 ("An area of particularly intense controversy concerns whether (threats of) patent injunctions as regards standard essential patents can amount to competition harms."). Professor Herbert Hovenkamp explains that whether there has been a violation of antitrust law "does not depend on whether the conduct breached a particular agreement but rather on whether it caused competitive harm" and that the issue is whether there is a practice that harms competition and injures consumers. Hovenkamp, *supra* note 17, at 1686, 1743 ("This can happen because the conduct restrained trade under section 1 of the Sherman Act, was unreasonably exclusionary under section 2 of the Sherman Act, or amounted to an anticompetitive condition or understanding as defined by

In addition, when antitrust enforcement proceedings take place in many countries, there is the possibility of "duplication of enforcement, inconsistencies, conflicts, costs, and inefficiencies."[190] These antitrust enforcement proceedings also raise concerns about "protecting the interests of potential defendants."[191] Accordingly, overbroad remedies and possible unfairness for defendants in antitrust enforcement proceedings are another reason why it is important to consider international comity in antitrust enforcement proceedings.[192]

C. Consideration of International Comity in Cooperation Agreements and Guidelines of Antitrust Enforcement Agencies

The DOJ and the FTC consider international comity in antitrust enforcement proceedings.[193] Consideration of international comity can be seen in the cooperation agreements of various countries' antitrust enforcement agencies, such as the U.S.-Eur. Cooperation Agreement.[194] The cooperation agreements of various countries' antitrust enforcement agencies reflect a concern for international comity.[195]

The U.S.-Eur. Cooperation Agreement was signed in 1991 to promote competition and reduce differences in the application of competition laws between the United States and the European Communities.[196] The U.S.-Eur. Cooperation Agreement first defines enforcement activities as "any application of competition law by way of investigation or proceeding conducted by

section 3 of the Clayton Act."); *see also* OECD, EXECUTIVE SUMMARY OF THE ROUNDTABLE ON THE LICENSING OF IP RIGHTS AND COMPETITION LAW, *supra* note 182, at 5 ("When competition law does apply, it is important to balance the risk of competitive injury that can arise as a result of refusals to license on the part of standard essential patent holders against the legitimate interests of IP right holders.").

190. Dorsey D. Ellis Jr., *Projecting the Long Arm of the Law: Extraterritorial Criminal Enforcement of U.S. Antitrust Laws in the Global Economy*, 1 WASH. U. GLOBAL STUD. L. REV. 477, 502–03 (2002).

191. *See id.*

192. *See id.*

193. ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION, *supra* note 132, at 27. *See generally* Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19, 20 (2008) ("Comity is no longer merely a doctrine for deciding when to apply foreign law; it has become a justification for deference in a wide range of cases concerning prescriptive, adjudicatory, and enforcement jurisdiction.").

194. *See* U.S.-Eur. Cooperation Agreement, *supra* note 134, art. I.

195. *See id.*

196. *Id.* art. I(1).

the competition authorities"[197] and then expressly includes analysis of international comity when "it appears that one Party's enforcement activities may adversely affect important interests of the other Party."[198] The U.S.-Eur. Cooperation Agreement contains factors that are considered for analyzing international comity, including "the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests"[199] and "the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies" among others.[200] Professor Alford says that while the Supreme Court and the European Court of Justice "have disavowed any notion of comity save in instances of foreign sovereign compulsion," the U.S. antitrust enforcement agencies and the European Commission "have adopted, with great ceremony" the U.S.-Eur. Cooperation Agreement.[201]

Many other cooperation agreements of antitrust enforcement agencies worldwide consider international comity.[202] For example, there is the "Memorandum of Understanding on Antitrust Cooperation Between the United States Department of Justice and the United States Federal Trade Commission, of the One Part, and the Korea Fair Trade Commission, of the Other Part" on September 8, 2015.[203] This memorandum of understanding provides that the competition authorities will carefully consider the objectives and interests of the other country's enforcement activities.[204]

Often, antitrust enforcement agencies' cooperation agreements will mention in the Recitals that, in entering into the cooperation agreements, the enforcement agencies considered the Recommendation of the Council of the Organisation for Economic Co-operation and Development ("OECD").[205]

197. *Id.* art. I(2)C.

198. *Id.* art. VI(3).

199. *Id.* art. VI(3)(c).

200. *Id.* art. VI(3)(e).

201. Alford, *supra* note 26, at 228.

202. *See, e.g.*, Griffin, *supra* note 127, at 374.

203. Memorandum of Understanding on Antitrust Cooperation Between the United States Department of Justice and the United States Federal Trade Commission, of the One Part, and the Korea Fair Trade Commission, of the Other Part, at 2 (Sept. 8, 2015).

204. *Id. See generally* Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Law, art. VI, ¶ 1 (1995) ("[E]ach Party shall . . . give careful consideration to the other Party's important interests throughout all phases of its enforcement activities, including decisions regarding . . . the nature of the remedies or penalties sought in each case.").

205. *See, e.g.*, U.S.-Eur. Cooperation Agreement, *supra* note 134, at Recitals ("Having regard to the Recommendation of the Council of the Organization for Economic Cooperation and Development Concerning Cooperation Between member Countries on Restrictive

The OECD is an organization that helps governments build and shape policies to address economic, social, and environmental issues.[206] The OECD's Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings ("OECD Recommendation") provides that when antitrust enforcement agencies adhering to the OECD Recommendation investigate or proceed against the same or related conduct, agencies should try to "(i) avoid possible conflicting approaches and outcomes among Adherents, including remedies; and (ii) reduce duplication of enforcement costs and make the best use of the enforcement resources of Adherents involved."[207]

Furthermore, the Antitrust Guidelines for International Enforcement and Cooperation of the DOJ and the FTC show that international comity is carefully considered in government enforcement proceedings.[208] The Antitrust Guidelines for International Enforcement and Cooperation state that the DOJ and the FTC consider international comity in "determining whether to investigate or bring an action, or to seek particular remedies in a given case."[209] The Antitrust Guidelines for International Enforcement and Cooperation also list factors that the DOJ and the FTC consider in analyzing international comity. These factors include "the degree of conflict with a foreign jurisdiction's law or articulated policy" and "the extent to which the enforcement activities of another jurisdiction, including remedies resulting from those enforcement activities may be affected."[210] As can be seen in the cooperation agreements and guidelines, antitrust enforcement agencies' consideration of international comity can occur in many stages of the enforcement proceeding, which may include cooperation and communication with

Business Practices Affecting International Trade, adopted on June 5, 1986"). *See generally* OECD, RECOMMENDATION OF THE COUNCIL CONCERNING INTERNATIONAL CO-OPERATION ON COMPETITION INVESTIGATIONS AND PROCEEDINGS, OECD//LEGAL//0408, at 5 (Sept. 16, 2014) [hereinafter OECD, RECOMMENDATION] ("[W]hen Adherents enter into bilateral or multilateral arrangements for co-operation in the enforcement of national competition laws, they should take into consideration the present Recommendation.").

206. OECD, RECOMMENDATION, *supra* note 205, at 12; *See also Who We Are*, OECD, https:////www.oecd.org//about// (last visited Dec. 28, 2021).

207. OECD, RECOMMENDATION, *supra* note 205, at 7. "The Recommendation replaces the former 1995 OECD Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade and is a step forward in the fight against anticompetitive practices." *Id.* at 3.

208. *See* Alford, *supra* note 26, at 228–29; Dodge, *supra* note 27, at 2078 n.40.

209. ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION, *supra* note 132, at 27.

210. *Id.* at 28.

competition authorities in other countries.[211] Indeed, international comity can be considered in deciding the scope of remedies. This is discussed further in Part III of this Article.

III. CONSIDERING THE NATURE OF THE PRODUCT AND SERVICE, INCLUDING THE IMPORTANCE TO THE COUNTRY'S INDUSTRY AND CONSUMERS AND THE LEVEL OF GOVERNMENT REGULATION, FOR ANALYZING INTERNATIONAL COMITY AND DECIDING THE SCOPE OF REMEDIES IN ANTITRUST CASES

Part III proposes that the nature of the product and service, including the importance to the country's industry and consumers and the level of government regulation, should be closely considered for analyzing international comity and deciding the scope of remedies in antitrust cases. These factors should be considered in addition to the effect in the relevant market, which is considered for determining whether there is an extraterritorial application of antitrust law under the FTAIA. Specifically, Section A suggests that the importance of the product and service to the country's industry and consumers can be considered for analyzing international comity and deciding the scope of remedies in antitrust cases by observing (1) how the product and service are produced or introduced in the country, (2) how the product and service are supplied to consumers in the country, and (3) how the product and service contribute to the country's economy and employment rate. For the analysis of international comity, the relevant countries would include the country where the antitrust proceeding at issue is taking place, which could result in the extraterritorial application of the country's antitrust law, and the other countries whose interests may be affected by the extraterritorial application. Section B explains how the level of government regulation and antitrust exemptions in other countries can also signify the importance of the product and service to that country's industry and consumers.

A. Importance to the Country's Industry and Consumers and Contribution to the Economy and Employment Rate

Section A suggests that the nature of the product and service, including the importance to the country's industry and consumers, should be closely considered for analyzing international comity and deciding the scope of

211. *See* OECD, ROUNDTABLE ON EXTRATERRITORIAL REACH, *supra* note 158, at 17 (noting cooperation can help to "address common issues" and "reduce the risk of conflicting decisions").

remedies in antitrust cases. Antitrust enforcement agencies and courts already consider many important factors for analyzing international comity, such as effect, and expressly list them in their guidelines[212] and decisions.[213] However, although cases such as *Timberlane* and *Mannington* list factors for analyzing international comity, they do not expressly mention the "nature of the product and service" as a factor.[214] The Restatement (Third) of the Foreign Relations Law of the United States mentions "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities" and "the extent to which another state may have an interest in regulating the activity" as factors for analyzing international comity in Section 403(2)(c) and Section 403(2)(g).[215] However, the Restatement (Third) of the Foreign Relations Law of the United States does not describe in detail how to analyze and apply the factors above in connection with international comity.

This Article contributes to scholarship related to the extraterritorial application of antitrust law by discussing how to consider the nature of the product and service as a factor in analyzing international comity and deciding the scope of remedies in antitrust cases. Thinking about the nature of the product and service in antitrust cases may sound familiar because the relevant product and geographic market are also discussed when analyzing the anticompetitive effect. The nature of the product and service should be closely considered for analyzing international comity and deciding the scope of remedies.

Specifically, this Article proposes that the importance of the product and service to the country's industry and consumers could be considered for analyzing international comity and deciding the scope of remedies in antitrust cases by observing (1) how the product and service are produced or introduced in the country, (2) how the product and service are supplied to consumers in the country, and (3) how the product and service contribute to the country's economy and employment rate.[216] The level of government

212. ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION, *supra* note 132, at 28.

213. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d. Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613–15 (9th Cir. 1976).

214. *See Mannington Mills*, 595 F.2d at 1297–98; *Timberlane*, 549 F.2d at 613–15.

215. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. §§ 403(2)(c), 403(2)(g) (1987).

216. *Cf.* Annie Soo Yeon Ahn, *Clarifying the Standards for Personal Jurisdiction in Light of Growing Transactions on the Internet: The* Zippo *Test and Pleading of Personal Jurisdiction*, 99 MINN. L. REV. 2325, 2351–53 (2015) (explaining the importance of considering the level of interactivity of a website and the nature and quality of commercial activity for analyzing personal jurisdiction in cases involving commercial transactions on the Internet).

regulation of the product and service and the industry can also signify the importance of the product and service to the country's industry and consumers. For the analysis of international comity, the relevant countries would include the country where the antitrust proceeding at issue is taking place, which could result in the extraterritorial application of the country's antitrust law, and the other countries whose interests may be affected by the extraterritorial application. This Article proposes and explains detailed factors for analyzing international comity *in addition to*—and not instead of—the "direct, substantial, and reasonably foreseeable effect" element of the FTAIA[217] for the extraterritorial application of the Sherman Act.

This Article also suggests several questions that could be asked when considering the importance of the product and service to the country's industry and consumers in the international comity analysis.

First, relevant questions for observing (1) how the product and service are produced or introduced in the country may include the following:

a. Is the product and/or service produced inside the country or introduced into the country from abroad?
b. Is the product a rare natural resource found mainly in the country?
c. Is the country associated with a particular level of skill or knowledge needed to produce the product and/or service?
d. What is the history related to the production or introduction of the product and/or service in the country?
e. Is there a tradition related to the production and use of the product and/or service in the country?

Second, relevant questions for observing (2) how the product and service are supplied to consumers in the country may include the following:

a. How much interaction is there between the producer or the supplier and consumers when consumers purchase the product and/or service?
b. Do consumers feel a connection to the product and/or service?

217. 15 U.S.C. §§ 6a, 45(a)(3)(1982).

Third, relevant questions for observing (3) how the product and service contribute to the country's economy and employment rate may include the following:

a. Is the country associated with a particular level of skill or knowledge needed to produce the product and/or service?[218]
b. How much does the product and/or service contribute to the country's economy and employment rate?
c. Is the product and/or service popular with consumers in the country?
d. Does the country export the product and/or service to other countries?
e. Due to the contribution to the country's employment rate, exports, and other relevant reasons, is the product and/or service particularly important to the country?

The questions above help analyze the importance of the product and service to the country's industry and consumers. If the answers to the questions above show that product and service are important for a country's economy and consumers so that the country's interests may be affected by another country's extraterritorial application of antitrust law, enforcement agencies, and courts from the other country should take care so that the sovereignty and policy of the affected countries are respected and that the scope of remedies is not overbroad.[219] Therefore, the questions help analyze international comity and decide the scope of remedies in antitrust cases.

In the case of patents, for example, patent laws in the United States emphasize the territorial nature of patents, as can be seen in the words "throughout the United States" and "into the United States" in 35 U.S.C. § 154(a)(1) addressing the content of a patent: "Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States . . . ."[220] The territorial nature of patents under patent law in the United States can also be seen from the focus on "within the United States" and

218. This question is also included in the list of relevant questions for observing (1) how the product and service are produced or introduced in the country.

219. *See supra* Part II.

220. 35 U.S.C. § 154(a)(1).

"into the United States" in 35 U.S.C. § 271(a) that address the infringement of a patent: "Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent."[221] Comment *i* on "foreign patents" in Section 415 of the Restatement (Third) of the Foreign Relations Law of the United States notes that due to the territorial nature of patents, "the United States has no jurisdiction to apply its law to validate or invalidate a foreign patent."[222]

However, comment *i* in Section 415 of the Restatement (Third) of the Foreign Relations Law of the United States also states that U.S. antitrust enforcement agencies and courts have jurisdiction to apply United States law if a foreign patent is involved in anticompetitive conduct and certain other criteria are met.[223] If there is an extraterritorial application of antitrust law, international comity should be considered to decide the scope of remedies.[224] In antitrust cases related to patents, considering the nature of the product and service would involve observing how the patent is issued by asking, for instance, "What is the history related to production or introduction of the product and/or service in the country?"

In antitrust cases related to patents, other questions that could be asked to consider the importance of the product and service to the country's industry and consumers would include the following. For observing (1) how the product and service are produced or introduced in the country, relevant questions for patents would include "Is the country associated with a particular level of skill or knowledge needed to produce the product and/or service?" For observing (2) how the product and service are supplied to consumers in the country, relevant questions for patents would include "Do consumers feel

221. 35 U.S.C. § 271(a); Timothy R. Holbrook, *Extraterritoriality in U.S. Patent Law*, 49 WM. & MARY L. REV. 2119, 2130 (2008) ("The Supreme Court has long adhered to the view that patent rights are strictly territorial in nature."); *see also* Microsoft Corp. v. AT &T Corp., 550 U.S. 437 (2007) (applying the presumption against extraterritoriality in determining whether defendant's conduct falls within the scope of Section 271(f) of the Patent Act).

222. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 415 cmt. i (1987); *see* 35 U.S.C. § 154(a)(1); 35 U.S.C. § 271(a); Paris Convention for the Protection of Industrial Property, art. 4bis (1), Mar. 20, 1883 (as amended on Sept. 28, 1979) ("Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not."). *See generally* Holbrook, *supra* note 221, at 2137 ("Acts of infringement often implicate foreign conduct; as such, courts may need to wrestle with the appropriate scope of injunctive relief when dealing with acts that might have implications for the U.S. patent holder.").

223. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 415 cmt. i (1987).

224. Alford, *supra* note 26, at 217, 221; *See also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797 n.24 (1993).

a connection to the product and/or service?" For observing (3) how the product and service contribute to the country's economy and employment rate, relevant questions would include "Is the country associated with a particular level of skill or knowledge needed to produce the product and/or service?," "How much does the product and/or service contribute to the country's economy and employment rate?," "Is the product and/or service popular with consumers in the country?," "Does the country export the product and/or service to other countries?," and "Due to the contribution to the country's employment rate, exports, and other relevant reasons, is the product and/or service particularly important to the country?"

The nature of the product and service should be closely considered for analyzing international comity and deciding the scope of remedies in antitrust cases involving various products and services. Analysis of international comity could be improved by considering what makes various products, services, and industries unique and important to a country. Types of products and services analyzed for their nature and characteristics may include, for example, patents, agricultural food products and vitamins, insurance, and pharmaceutical products, natural resources such as gas, and transportation.

Thinking about the nature of the product and service in connection with international comity can lead to a better understanding of the industry and consumers. A better understanding of the industry and consumers can result in remedies that are "a reasonable method of eliminating the *consequences* of the illegal conduct"[225] and respect the sovereignty and policy of countries, and are not overbroad.[226] Therefore, considering the nature of the product and service can help decide the appropriate scope of remedies because products and services in cases involving extraterritorial application of antitrust law may be part of a global economy.

B. Level of Government Regulation and Antitrust Exemptions in Other Countries

Furthermore, the level of government regulation of the product and service can shed light on the nature of the product and service for analyzing international comity in antitrust cases.[227] Examining the level of government regulation of the product and service for analyzing international comity could involve considering antitrust exemptions in other countries. In the United States, antitrust exemptions due to the federal regulation of the

225. Nat'l Soc'y of Pro. Eng'rs. v. United States, 435 U.S. 679, 698 (1978).

226. *See supra* Part II.

227. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 403(2)(c) (1987).

market may be expressly based on federal statutory exemptions, or they may be implied in rare cases based on a "pervasive regulatory scheme" created by Congress.[228]

Express antitrust exemptions in the United States can be found, for example, in the Capper-Volstead Act,[229] the Fishermen's Collective Marketing Act,[230] and several other statutes.[231] Under the Capper-Volstead Act, "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise . . . in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged."[232] The Capper-Volstead Act helps farmers who lack bargaining power in dealing with a few large buyers.[233] Supporters of the Capper-Volstead Act explain that Congress has granted antitrust exemptions for the agricultural industry because food production is highly important to a country's security and economy.[234]

Therefore, the existence of antitrust exemptions in another country can signify the importance of the product and service to that country's industry and consumers. Regarding the relationship to international comity analysis, the dissenting opinion in *Hartford Fire Ins. Co. v. California* mentioned that "Great Britain has established a comprehensive regulatory scheme governing the London reinsurance markets, and clearly has a heavy 'interest in

228. GAVIL, KOVACIC & BAKER, *supra* note 66, at 1062. However, implied exemptions are "strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *Id.* at 1062–63 (citing United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350–51 (1963)).

229. 7 U.S.C. §§ 291–92.

230. 15 U.S.C. §§ 521–22 ("Persons engaged in the fishery industry, as fishermen . . . may act together in associations, corporate or otherwise . . . in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.").

231. GAVIL, KOVACIC & BAKER, *supra* note 66, at 1009 (listing "Statutory Exemptions from the Antitrust Laws," "Statutory Exemptions Created as Part of a Regulatory Regime," and "Judicially Created Exemptions").

232. 7 U.S.C. §§ 291–92.

233. NCFC, CAPPER-VOLSTEAD ACT, http:////ncfc.org//2019//04//capper-volstead-act// (last visited Aug. 6, 2022); *see also* Andrew J. Frackman & Kenneth R. O'Rourke, The Capper-Volstead Act Exemption and Supply Restraints in Agricultural Antitrust Actions (Feb. 16, 2011), https:////nysba.org//NYSBA//Sections//Antitrust%20Law//Resources//Resource%20PDFs//TheCapper-VolsteadActpresentation.pdf (explaining that the Capper-Volstead Act gives farmers "the same right to bargain collectively that is already enjoyed by corporations").

234. Donald M. Barnes & Jay L. Levine, *Farmer Cooperatives "Take Cover:" The Capper-Volstead Exemption is Under Siege*, 74 ARK. L. REV. 1, 1 (2021).

regulating the activity.'"[235] The dissenting opinion in *Hartford Fire* also mentioned that "§ 2(b) of the McCarran-Ferguson Act allows state regulatory statutes to override the Sherman Act in the insurance field, subject only to the narrow 'boycott' exception outlined in § 3(b)—suggesting that 'the importance of regulation to the [United States],' Restatement (Third) § 403(2)(c), is slight."[236]

However, government-created exemptions from antitrust law could mean that the exempted product and service are *important* to the country—and that the importance of regulating in a certain way or overseeing the industry is *high*. In fact, the McCarran-Ferguson Act states that "[S]ilence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [the business of insurance] by the several States."[237] The McCarran-Ferguson Act also states that the Sherman Act and the Federal Trade Commission Act are "applicable to the business of insurance to the extent that such business is not regulated by State Law."[238] The National Association of Insurance Commissioners even claims that "[t]hrough their coordinated national effort, state insurance regulators were able to impose stronger price regulations that the industry would have otherwise accepted."[239]

Therefore, antitrust exemptions granted by the government of a country can mean that a country has a high interest in regulating in a certain way or overseeing the product and service. Also, antitrust exemptions can signify the importance of the product and service to a country's industry, consumers, and the country as a whole.[240] Other countries should consider a country's antitrust exemptions when analyzing international comity and deciding the scope of remedies.

235. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 819 (1993) (Scalia, J., dissenting) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 403(2)(c) (1987)).

236. *Id.*

237. 15 U.S.C. § 1011.

238. 15 U.S.C. § 1012.

239. National Association of Insurance Commissioners, MCCARRAN-FERGUSON ACT, https:////content.naic.org//cipr-topics//mccarran-ferguson-act (last visited Aug. 19, 2022).

240. *See generally* Philip J. Weiser, Goldwasser*, the Telecom Act, and Reflections on Antitrust Remedies*, 55 ADMIN. L. REV. 1 (2003) ("[W]hen a plaintiff establishes a case for liability, courts should consider carefully how to craft a remedy that coheres with the regulatory regime, avoiding, except for the most exceptional situations, regulating the price of access.").

CONCLUSION

This Article proposes that the nature of the product and service, including the importance of that product and service to a country's industry and consumers and the level of government regulation of that product and service, should be closely considered when analyzing international comity and deciding the scope of remedies in antitrust cases, in addition to factors such as the effect in the relevant market. Specifically, for the analysis of international comity in antitrust cases, the importance of the product and service to the country's industry and consumers could be considered by observing (1) how the product and service are produced or introduced in the country; (2) how the product and service are supplied to consumers in the country; and (3) how the product and service contribute to the country's economy and employment rate. The relevant countries in such an analysis would include the country where the antitrust proceeding at issue is taking place, which could result in the extraterritorial application of the country's antitrust law, and the other countries whose interests may be affected by the extraterritorial application. The level of government regulation and the presence of antitrust exemptions in other countries can also signify the importance of the product and service to that country's industry and consumers. The proposals in this Article would help achieve antitrust law's goals to promote competition and protect consumers.

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