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LEGAL MEMORANDUM

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The Supreme Court and *Animal Science Products*: Sovereignty and Export Cartels

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Abstract

Over the past two decades, the United States government has taken the lead in convincing jurisdictions around the world to outlaw "hard core" cartel conduct. Such cartel activity reduces economic welfare by artificially fixing prices and reducing the output of affected goods and services. At the same, the United States has acted to promote international cooperation among government antitrust enforcers to detect, investigate, and punish cartels. In 2017, however, a U.S. federal appeals court (citing concerns of "international comity") held that a Chinese export cartel that artificially raised the price of vitamin imports into the United States should be shielded from U.S. antitrust penalties—based merely on one brief from a Chinese government agency that said it approved of the conduct. The U.S. Supreme Court is set to review that decision. By overturning the appeals court ruling (and disavowing the "comity doctrine" cited by that court), the Supreme Court would reaffirm the general duty of federal courts to apply federal law as written, consistent with the constitutional separation of powers. It would also reaffirm the importance of the global fight against cartels, which has reflected consistent U.S. executive branch policy for decades. Finally, as a matter of economic policy, this case highlights the fact that national governments should not tolerate export cartels that harm economic welfare outside their jurisdictions merely because domestic economic interests are not directly affected. The U.S. government should work to ensure that jurisdictions agree: (1) not to legally defend domestic exporting entities that impose cartel harm in other jurisdictions; and (2) to cooperate more fully in rooting out harmful export-cartel activity, wherever it is found.

This paper, in its entirety, can be found at **http://report.heritage.org/lm226**

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Key Points

- The Supreme Court will soon decide a case that raises the right of American consumers to receive legal redress in U.S. courts for antitrust harm due to export-cartel conduct abroad.
- The Supreme Court should clarify that federal courts are bound to apply laws duly enacted by Congress. It is not the role of federal courts to ignore those laws at the behest of foreign sovereigns by applying "comity balancing" tests.
- The Supreme Court has recognized that it is entirely appropriate (and consistent with principles of comity) for a federal court to apply the Sherman Act to provide redress for domestic antitrust injury due to foreign conduct.
- Independent of this particular case, the Executive Branch of the U.S. government should seek international agreements under which signatories would agree: (1) not to defend their export controls from the reach of other signatories' antitrust laws; and (2) to cooperate with other signatories in investigating anticompetitive export-cartel activity.

I. Introduction

In 2018, the U.S. Supreme Court will decide whether a U.S. federal court is free *not* to apply a federal law that protects Americans from economic harm imposed by a foreign cartel merely because a foreign government claims that its own law "compelled" the harmful conduct. Consistent with the rule of law under our constitutional system and in order to reaffirm American sovereign interests, the Court should strongly hold in favor of the application of U.S. law in this case. More broadly, U.S. courts should recognize that *Congress* establishes federal law under our Constitution, and that the judiciary is *not* empowered to displace federal law in favor of foreign legal principles based merely on notions of "comity." This case also underscores the importance of additional executive branch initiatives to combat export cartels around the world. One key initiative would involve securing foreign nations' agreement not to take any action in defense of cartel activity within their borders that imposes antitrust harm outside their jurisdictions.

II. Factual Background[1]

The Supreme Court will decide a case that raises the right of American consumers to receive legal redress in U.S. courts for harm due to cartel conduct hatched abroad. Specifically, *Animal Science Products, Inc., v. Hebei Welcome Pharmaceutical Co. Ltd.* (*Animal Science Products*)[2] involves a decision by a federal appeals court to *prevent* American Vitamin C importers (petitioners)[3] from obtaining legal redress for harmful price fixing by a cartel[4] comprised of Chinese Vitamin C manufacturers and exporters (respondents) and operating under the auspices of a membership organization known as the China Chamber of Commerce of Medicines and Health Products Importers and Exporters (hereafter "Chamber").

In 2005, petitioners filed suit in federal district court alleging that respondents had conspired to fix Vitamin C export prices in violation of Section 1 of the Sherman Antitrust Act,[5] which the U.S. Supreme Court has called "the Magna Carta of [American] free enterprise."[6] Respondents did not deny that they had fixed the prices and quantities of Vitamin C exports. They moved to dismiss the suit, however, arguing that because respondents' actions had been required by Chinese law, the suit was barred by certain doctrines of judicial deference, including the "act of state" doctrine, the "foreign sovereign compulsion" doctrine, and principles of international comity. The Ministry of Commerce of the People's Republic of Commerce ("Ministry") filed an amicus curiae brief supporting respondents. The brief claimed that the Chamber was a state-supervised entity authorized to regulate Vitamin C exports and that the alleged conspiracy had been "a regulatory pricing regime mandated by the government of China."

The district court refused to dismiss the case. It held that though the Ministry's description of Chinese law was "entitled to substantial deference," it was not "conclusive," because "the plain language of the documentary evidence submitted by [petitioners] contradict[ed] the Ministry's position." That documentary evidence included public statements by the Chamber that the cartel arrangement was a "self-regulated agreement" that was adopted "voluntarily" and "without any government intervention." Petitioners also cited documents in which China had represented to the World Trade Organization (WTO) that it "gave up export administration of...[V]itamin C" in 2002. The court noted that the Ministry had not cited legal authorities "to support its broad assertions" and its brief read like a "carefully crafted and phrased litigation position" rather than a "straightforward explanation of Chinese law." The district court then held that Chinese law did not require respondents to fix the price and quantity of Vitamin C exports.

The case was then tried to a jury, which found that respondents had conspired to fix the price and limit the output of Vitamin C. The district court entered judgment for petitioners, awarding $147 million in damages and permanently enjoining respondents from further violations of the Sherman Act.

Respondents appealed, and the U.S. Court of Appeals for the Second Circuit reversed. The Second Circuit explained that to abstain from asserting jurisdiction on comity grounds, a court should apply a "multi-factor balancing test" set forth in two 1970s appeals court cases.[7] The Second Circuit focused primarily on one factor, whether there was a "true conflict" between U.S. and Chinese law. According to the appeals court, a true conflict "hinges on the amount of deference" that was owed to the Ministry's characterization of Chinese law. The court held that when a foreign sovereign "directly participates in U.S. court proceedings" and "offers an interpretation that is

reasonable under the circumstances," a "U.S. court is bound to defer." The court construed the Ministry's submissions as showing that "Chinese law required [respondents] to engage in activities in China that constituted antitrust violations in the United States." The court ignored the evidence to the contrary identified by the district court. Accordingly, the appeals court found a true conflict, and summarily determined that the remaining comity factors "clearly weigh in favor of U.S. courts abstaining from asserting jurisdiction."[8] Petitioners successfully filed for Supreme Court review of the Second Circuit's decision. The Supreme Court framed the issue for review as whether a federal court is bound to defer to a foreign government's legal statement:

> Whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law (as held by the U.S. Court of Appeals for the 5th, 6th, 7th, 11th and District of Columbia Circuits), or whether a court is "bound to defer" to a foreign government's legal statement, as a matter of international comity, whenever the foreign government appears before the court (as held by the opinion below in accord with the U.S. Court of Appeals for the 9th Circuit).[9]

III. Legal Discussion

The Second Circuit's decision in *Animal Science Products* is wrong, both as a matter of constitutional principle and as a matter of applicable antitrust law.

First, under the U.S. Constitution, it is the role of the federal courts to interpret what federal law means, not to displace federal legal rules, duly enacted by Congress, at the behest of foreign sovereigns.

Article I of the U.S. Constitution plainly states: "*All legislative Powers* herein granted shall be vested in a Congress of the United States."[10] Thus Congress, not the federal judiciary, makes federal law. More specifically, the "role assigned to [federal] judges in our [constitutional] system [i]s to interpret the Constitution and lesser laws, not to make them."[11] As a general matter, a federal judge's *refusal* to apply a congressionally enacted and constitutional federal law in a specific case[12] in effect *unmakes* the law in question and runs afoul of this basic constitutional constraint on the role of the judiciary.

Consistent with the basic constitutional requirement that federal courts apply congressional enactments, the Supreme Court repeatedly has stressed that the federal courts have a "virtually unflagging obligation…to exercise the jurisdiction given them."[13] As Justice Antonin Scalia put it in the *W.S. Kirkpatrick* case, "The short of the matter is this: Courts in the United States have the power, *and ordinarily the obligation,* to decide cases and controversies properly presented to them."[14] Although there are a few very narrow exceptions to the courts' obligation to rule on legal controversies properly before them, none of them applies to this case.[15]

Second, the Second Circuit erred as a matter of statutory antitrust law. It ignored Supreme Court precedent in ruling that the district court was "bound to defer" to the Chinese Ministry's statement and thus refused to apply antitrust law to redress antitrust harm suffered by American parties in the United States. The Supreme Court has specifically recognized that it is entirely appropriate (and consistent with principles of comity) for a federal court to apply the Sherman Act to provide redress for domestic antitrust injury due to foreign conduct[16]—the very set of circumstances presented by the *Animal Science Products* case.

The Second Circuit's effort to avoid the Supreme Court's teachings regarding the applicability of the Sherman Act was based solely on two 1970s cases—*Mannington Mills* and *Timberlane Lumber*.[17] Those cases invented out of whole cloth multi-factor balancing tests to assess whether comity considerations could justify a failure to apply otherwise applicable antitrust law. The Supreme Court implicitly rejected such open-ended tests in its 2004 *Empagran* decision, which described their case-by-case balancing approach as "too complex to prove workable."[18] In ignoring this clarification, the Second Circuit rejected clear Supreme Court guidance.

In sum, the Second Circuit's *Animal Science Products* decision ignores Supreme Court teachings and, even more fundamentally, is at odds with the general constitutional command that federal courts apply federal statutes and decide cases and controversies properly brought before them. Indeed, the Second Circuit's repudiation of statutory antitrust redress based merely on one statement by a foreign government's ministry—a statement that is at odds with other evidence of that government's position—is a travesty. It places one foreign pronouncement regarding particular commercial conduct above the substantive interests of American citizens to have

their rights vindicated in federal court, consistent with the U.S. Constitution.

It follows that, in deciding this case, the U.S. Supreme Court should do more than merely state that a lower court is not "bound" to defer to a foreign government's legal statement in court. In addition, the Court should take the opportunity to state that "foreign comity balancing tests" are entirely inappropriate and must be rejected, with respect to all applicable federal statutory schemes that come before a federal court. Such a holding, which would be fully in line with recent Supreme Court pronouncements regarding various statutes,[19] would clarify that it is the constitutional role of the federal courts to say what the law is, *not* to avoid applying it.[20] It would also reaffirm the constitutional principle, recognized by the Supreme Court, that foreign policy authority is committed to the federal government's political branches, not to the judiciary.[21] International law scholar, Professor Joel R. Paul, put it thus: "Courts, out of respect for the separation of powers, as well as respect for foreign sovereigns, should apply jurisdiction as the lawmakers intended it to be applied and leave the interest-balancing [of comity analysis] to the political process."[22]

IV. Economic Policy Assessment: Cracking Down on Harmful Export-Cartel Actions—A Pathway to Possible Reform

In addition to raising provocative legal issues, *Animal Science Products* tees up a question of key economic policy importance: how to better combat harmful hard-core cartel conduct, which (as the U.S. Supreme Court has stated) is regarded as "the supreme evil of antitrust."[23] The proliferation of antitrust laws around the world in recent decades has been accompanied by general support for cooperative efforts to crack down on cartels, promoted by prominent international economic institutions such as the Organization for Economic Co-operation and Development (OECD, a multinational economic research organization),[24] the International Competition Network (ICN, a network of national antitrust enforcement agencies and expert nongovernmental advisers that supports convergence toward best practices),[25] and the World Bank (an international financial institution that seeks to combat poverty by providing financial and technical assistance to developing countries around the world).[26] As recognition of the severity of the harm due to cartel conduct has grown, national antitrust agencies around the world have made cartel detection and prosecution a top priority. Indeed, consistent with other nations' antitrust laws, Section 13 of China's antitrust statute, the Antimonopoly Law, strictly forbids cartel conduct that fixes prices and restricts the sale of products.[27]

Despite antitrust authorities' increased emphasis on combating cartels, including international cartels—and despite growing cooperation among national antitrust enforcers directed to that end[28]—export-cartel conduct, such as that highlighted in *Animal Science Products,* remains a bit of an outlier. Because hard-core cartel conduct (price fixing and output reduction) by exporters imposes harm on *foreign* parties, national governments have far less incentive to be concerned about them than about those other cartels that cause harm *within* their borders.

A nation's toleration of its own export cartels, however, should not justify its imposition of serious antitrust harm on its trading partners.[29] Indeed, the U.S. government has made it clear that the two federal statutes (the Export Trading Company Act and the Webb–Pomerene Act) that limit the scope of U.S. antitrust liability for certain export-related joint conduct by American entities provide no shield for antitrust liability imposed by other countries.[30]

In short, the substantial reduction (if not total elimination) of anticompetitive harm due to export cartels would bestow substantial benefits on the economy of the United States and other nations as well. However, achieving international cooperation toward this end may prove difficult, because exporting coalitions within each country that benefit from the anticompetitive status quo may be expected to interpose objections to reform.[31] What, then, should be done?

A pragmatic multilateral approach to diminishing the harm of export cartels would be to avoid focusing (at least initially) on the elimination of national statutes that appear to promote or facilitate such cartels. Instead, the U.S. government might seek to achieve international cooperation through a multilateral agreement or through bilateral accords under which each signatory nation would agree *not* to seek to have its exporters shielded from cartel-related antitrust enforcement actions, brought under the law and within the jurisdiction of another signatory. Under such an agreement, each signatory would be precluded from intervening on behalf of its export cartelists before the courts or agencies of other signatories

(whether on the grounds of "comity," "act of state," "sovereign compulsion," or any other legal defense).

If new, freestanding agreements proved too complicated, existing bilateral antitrust cooperation agreements between the U.S. federal antitrust agencies (the Justice Department and the Federal Trade Commission) and foreign antitrust authorities could serve as a vehicle for reform.[32] In a related vein, the Justice Department and Federal Trade Commission should work to "deepen" cooperative agreements with other jurisdictions to ensure that they extend to export cartels as well—and to enter new agreements, where necessary, to advance this objective.

Agreements by exporting nations not to defend their exporters' cartel conduct that causes harm overseas would lift serious roadblocks to recoveries for cartel-related harm. Such agreements, combined with enhanced international enforcement cooperation directed against export cartels, would also predictably reduce the incentives for forming and running such cartels. This would diminish the incidence and baleful effects of export cartel conduct—a "win-win" for competitive forces and economic welfare in the United States and abroad.

V. Conclusion

In deciding the *Animal Science Products* case, the U.S. Supreme Court will have the opportunity to reject the notion that a court should accede to a foreign government's effort to nullify the invocation of clearly applicable constitutional federal law, based on vague notions of "international comity." Such a ruling would vindicate the rule of law and reaffirm that it is the role of the federal courts to apply the law, not to decline to apply it.

In addition, *Animal Science Products*, which involves China's effort to shield an anticompetitive Chinese export cartel from American antitrust liability, raises broad economic policy concerns which justify federal government action. Specifically, the executive branch of the U.S. government should seek international agreements under which signatories would agree: (1) not to defend their export controls from the reach of other signatories' antitrust laws; and (2) to cooperate with other signatories in investigating anticompetitive export cartel activity. Successful implementation of these policy initiatives would reduce the anticompetitive harm attributable to export cartels and redound to the benefit of the United States and world economies.

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Endnotes

1. This factual summary draws upon Brief for the United States as Amicus Curiae Supporting Certiorari, Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Company Ltd., Nov. 14, 2017 (No. 16-1220), https://www.supremecourt.gov/DocketPDF/16/16-1220/20062/20171114160440437_16-1220%20Brief%20as%20A.C..pdf.
2. In Re: Vitamin C Antitrust Litigation; Animal Science Products, Inc., The Ranis Company, Inc., v. Hebei Welcome Pharmaceutical Co. Ltd., North China Pharmaceutical Group Corp. (No. 13-4791-cv, 2nd Cir. Sept. 20, 2016), http://www.scotusblog.com/wp-content/uploads/2017/04/16-1220-cert-petition.pdf, *cert granted sub nom.* Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd. (No. 16-1220, Jan. 11, 2018), https://www.supremecourt.gov/qp/16-01220qp.pdf. Both U.S. importers and the American clients they serve fall into the broad category of American consumers.
3. The companies that filed suit in this case included Animal Science Products and other U.S. importers.
4. The cartel consisted of Hebei Welcome and other Chinese companies, which organized a cartel under the auspices of a membership entity known as the China Chamber of Commerce of Medicines and Health Products Importers and Exporters.
5. 15 U.S.C. § 1.
6. United States v. Topco Assocs., 405 U.S. 596, 610 (1972).
7. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 594 F.2d 597, 614-15 (9th Cir. 1976).
8. Other key balancing factors cited by the court included the fact that respondents were Chinese companies, that their conduct had occurred in China, and that (according to the Ministry) this suit had "negatively affected U.S.–China relations."
9. *Animal Science Products*, *cert. granted*, https://www.supremecourt.gov/qp/16-01220qp.pdf.
10. U.S. Const., Art. I, Sec. 1 (emphasis added).
11. Elizabeth H. Slattery, *How to Spot Judicial Activism: Three Recent Examples*, Heritage Found. Legal Memo No. 96, at 1 (June 13, 2013), http://thf_media.s3.amazonaws.com/2013/pdf/lm96.pdf.
12. There is no question that the Sherman Act is constitutional and is applicable in the *Animal Science Products* case.
13. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); *see also* Mata v. Lynch, 135 S. Ct. 2150. 2156 (quoting Colorado River); Lexmark Int'l, Inc., v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (same); Sprint Communications, Inc., v. Jacobs, 134 S. Ct. 584, 591 (2013) (same).
14. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990) (emphasis added).
15. Those exceptions relate to claims that are "equitable" rather than "legal" in nature (petitioners' antitrust claim in *Animal Science Products* involves a "legal" dispute), decisions to stay proceedings in deference to other federal courts, and deference to state court jurisdiction under special circumstances. See Brief of Professors William S. Dodge and Paul B. Stephan as Amici Curiae Supporting Petitioners, Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Company Ltd., Apr. 27, 2017 (No. 16-1220), at 5–6, http://www.scotusblog.com/wp-content/uploads/2017/05/16-1220-amicus-brief-Dodge-and-Stephan.pdf.
16. *See*, *e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."); F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004) ("[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is…reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.").
17. Note 7, *supra*.
18. Empagran, note 15, *supra*, 542 U.S. at 168 (2004) (citing *Mannington Mills* in referring to the unworkability of a case-by-case balancing approach).
19. *See* Morrison v. National Australia Bank, Ltd., 561 U.S. 247, 259–60, 269–70 (criticizing lower courts' "methodology of balancing interests," which had led to "the unpredictable and inconsistent application of § 10(b) [of the Securities Exchange Act] to transnational cases," and adopting a "clear test" that simply asks "whether the purchase or sale [of a security] is made in the United States, or involves a security listed on a domestic exchange"); RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2108 (2016) (rejecting the European Community's request that the Supreme Court consider the absence of international friction in civil RICO cases where foreign governments themselves were plaintiffs, and refusing to "permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign").
20. There are two narrowly targeted judicial doctrines, the foreign sovereign compulsion and the act of state doctrines, that have been invoked by federal courts to avoid applying federal law in particular matters, but these doctrines are inapplicable to the *Animal Science Products* case.

    Courts that have recognized the doctrine of foreign sovereign compulsion as a defense to the applicability of U.S. law generally have required: (1) that "the person in question appears likely to suffer sanctions for failing to comply with foreign law"; and (2) that "the person in question has acted in good faith to avoid the conflict." Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction § 222 (Am. Law Inst., Tentative Draft No. 2, 2016) (Restatement 2016 Jurisdiction). In *Animal Science*, the Second Circuit did not require a showing

that the defendants' conduct will likely lead to sanctions for failing to comply with a foreign law or that defendants had acted in good faith, thereby avoiding the possible invocation of foreign sovereign compulsion. (Indeed, the strong independent evidence cited by the district court that Chinese law did not authorize, let alone require, the cartel conduct at issue would have rendered absurd the invocation of foreign sovereign compulsion.)

The act of state doctrine provides that "[i]n the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will assume the validity of the official act of a foreign sovereign performed within its own territory." Restatement 2016 Jurisdiction § 221(1). The Supreme Court has held that the act of state doctrine applies only when a suit "requires the Court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." W.S. Kirkpatrick, note 13 *supra*, 493 U.S. at 405 (1990) (quoting Ricaud v. American Metal Co., 246 U.S 304, 319 (1918)). The Kilpatrick Court also stressed that the act of state doctrine is not "some vague doctrine of abstention," 493 U.S. at 406, and that "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Id.* at 409. The Second Circuit did not have to declare invalid the application of an official Chinese law in deciding the *Animal Science* case, and thus, the act of state doctrine did not apply (the Second Circuit instead applied the very sort of "vague doctrine of abstention" frowned upon by the Kilpatrick Court).

Although they are narrower and less vague than "comity balancing," the foreign sovereign compulsion and act of state doctrines nevertheless give federal courts a certain amount of flexibility to intrude into foreign policy questions that may be beyond their appropriate constitutional remit. Some scholars have argued that the act of state doctrine lacks a solid legal basis and should be abandoned. *See* Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325, 398 ("[c]ourts are hopelessly confused about the meaning and scope of the [act of] state doctrine [and]…it…should be abandoned"). And recent scholarship points out that "U.S. courts routinely sit in judgment on foreign judgments, laws, legal systems, and interests." *See* Zachary D. Clopton, *Judging Foreign States*, 94 Wash U. L. Rev. 1, 47 (2016). Although the matter is beyond the scope of this legal memorandum, further limitation of the act of state and foreign sovereign compulsion doctrines (for example, by allowing courts to invoke them only upon a statement by the U.S. government that application of federal law in the matter at hand would undermine American foreign policy) may warrant serious consideration.

21. *See*, *e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) (stating that courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs").

22. Joel R. Paul, *The Transformation of International Comity*, 71 Law & Contemp. Probs. 19, 38 (2008).

23. Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004).

24. *See* OECD, Cartels and anti-competitive agreements (2018) ("Hard core cartel prosecution is a priority policy objective for the OECD. Increasingly, prohibition against hard core cartels is now considered to be an indispensable part of a domestic competition law."), http://www.oecd.org/competition/cartels/.

25. *See* ICN, Cartel (2018) ("The mandate of the [ICN] Cartel Working Group is to address the challenges of anti-cartel enforcement, including the prevention, detection, investigation and punishment of cartel conduct [around the world]. At the heart of antitrust enforcement is the battle against hard core cartels directed at price fixing, bid rigging, market allocation and output restriction."), http://www.internationalcompetitionnetwork.org/working-groups/current/cartel.aspx.

26. World Bank, Competition Policy (2018) ("Anticompetitive business practices have been detected in various markets that are important for a country's overall competitiveness and poverty alleviation. Cartels, which increase prices in affected goods and services by at least 20 percent, have been found in markets such as fertilizer, cement, and transportation services. Staple consumer products such as bread and sugar, and critical financial services ranging from electronic payment systems to insurance, cost consumers more due to cartels."), http://www.worldbank.org/en/topic/competition-policy.

27. The AML delineates the legal framework for the prohibition of cartels. Global Legal Insights (2017), https://www.globallegalinsights.com/practice-areas/cartels/global-legal-insights---cartels-5th-ed./china#chaptercontent1.

28. *See generally* U.S. Dep't of Just., Antitrust Division, International Program Update 2017 (2017), https://www.justice.gov/atr/division-operations/division-update-spring-2017/international-program-update-2017.

29. Export cartels, like other hard-core cartels, unquestionably are the source of serious antitrust harm, in rich and poor countries alike, as confirmed by a recently published OECD analysis:

> Export cartels that fix prices or share markets are akin in objective and effect to any cartel agreement, with the notable exception being that export cartels only harm foreign consumers. If this type of co-operation were among firms operating in a domestic market, it would generally be considered a per se violation of competition law (a practice that is automatically considered a violation of the law.")… [Published research] illustrates the significant impact that export cartels can have for some of the world's poorest populations.

OECD, OECD Business and Finance Outlook 2017 (OECD 2017), at 155–56 (2017), https://books.google.com/books?id=3OYlDwAAQBAJ&pg=PA158&lpg=PA158&dq=export+cartels+law+review+2017&source=bl&ots=-zpsm39Z7k&sig=TUQhBqMmgI0Wq-FHDt3siXP-CVU&hl=en&sa=X&ved=0ahUKEwjnx9eejOzYAhUQRN8KHYiUCUAQ6AEIQDAE#v=onepage&q=export%20cartels%20law%20review%202017&f=false.

30. *See* U.S. Dep't of Justice and Fed. Trade Comm., Antitrust Guidelines for International Enforcement and Cooperation 12-15 (2017) (the Webb-Pomerene Act "does [not]…provide any immunity from prosecution under foreign antitrust laws" and the Export Trading Company Act "does not insulate conduct from investigation or enforcement by a foreign antitrust authority"). These special statutes are not intended to

promote anticompetitive hard-core cartel activity by U.S. exporters, but, rather, to encourage "more efficient provision of export trade services to U.S. producers and suppliers by reducing restrictions on trade financing provided by financial institutions." *Id.* at 12–13 (footnote citation omitted).

31. This does not mean, however, that domestic reforms cannot be achieved. Indeed, in recent decades various nations, including economically significant jurisdictions such as Korea and Japan, have eliminated explicit antitrust exemptions for export cartels. See Valerie Y. Suslow, *The Changing International Status of Export Cartel Exemptions*, 20 Am. U. Int'l L. Rev. 785 (2005).

32. For the status and content of those agreements, see U.S. Dep't of Justice, Antitrust Cooperation Agreements (2018), https://www.justice.gov/atr/antitrust-cooperation-agreements.