No.

In the Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC. AND
THE RANIS COMPANY, INC.,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD. AND
NORTH CHINA PHARMACEUTICAL GROUP
CORPORATION.

ON PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Even though the application of U.S. antitrust laws to foreign conduct "can interfere with a foreign nation's ability independently to regulate its own commercial affairs," this Court has "long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless 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." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004). It is "well established that Congress has exercised [prescriptive] jurisdiction under the Sherman Act" to regulate "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States," *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 & n.22 (1993).

The questions presented are:

1. Whether, despite this Court's "well established" interpretation of the Sherman Act, U.S. courts may reinterpret the same text of that Act case by case using a discretionary ten-factor balancing test under the doctrine of prescriptive comity.

2. Whether a court interpreting the meaning of foreign law under Federal Rule of Civil Procedure 44.1 is limited to the "face" of written legal materials, as the decision below held, or may also consider evidence as to how foreign law is implemented and enforced that would be relevant to the interpretive inquiry in the foreign legal system.

CORPORATE DISCLOSURE STATEMENT

Animal Science Products, Inc. has no parent company, and no publicly-held company holds 10% or more of its shares.

The Ranis Company, Inc. has no parent company, and no publicly-held company holds 10% or more of its shares.

RELATED PROCEEDINGS

This case is directly related to the following proceedings:

Supreme Court of the United States:

Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et al., No. 16-1220 (June 14, 2018) (vacating the Second Circuit's September 20, 2016 judgment and remanding for further proceedings).

United States Court of Appeals for the Second Circuit:

In re Vitamin C Antitrust Litigation., No. 13-4791 (Sept. 20, 2016) (vacating March 14, 2013 district court judgment and remanding with instructions to dismiss), *vacated and remanded*, *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 138 S. Ct. 1865 (2018).

In re Vitamin C Antitrust Litigation, Nos. 14-4375 & 14-4378 (Nov. 29, 2016) (vacating as moot district court's October 23, 2014 post-judgment enforcement order).

In re Vitamin C Antitrust Litigation., No. 13-4791 (Aug. 10, 2021) (reversing March 14, 2013 district court judgment and remanding with instructions to dismiss).

United States District Court for the Eastern District of New York:

In re Vitamin C Antitrust Litigation, No. 1:06-MD-1738 (Mar. 14, 2013) (entering final judgment in favor of Petitioners) (MDL).

United States District Court for the Eastern District of New York (cont'd):

Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et al., No. 1:05-CV-453 (Mar. 14, 2013) (entering final judgment in favor of Petitioners) (MDL member case).

Keane et al. v. Hebei Welcome Pharmaceutical Co. Ltd. et al., No. 1:06-CV-149 (Oct. 24, 2012) (approving settlement with indirect purchaser damages class) (MDL member case).

Philion et al. v. Hebei Welcome Pharmaceutical Co. Ltd., No. 1:06-CV-987 (Oct. 24, 2012) (approving settlement with indirect purchaser damages class) (member case).

Audette v. Hebei Welcome Pharmaceutical Co. Ltd., No. 1:06-CV-988 (Oct. 24, 2012) (approving settlement with indirect purchaser damages class) (member case).

United States District Court for the Northern District of California:

Philion et al. v. Hebei Welcome Pharmaceutical Co. Ltd., No. 3:05-CV-4524 (Apr. 4, 2006) (transferring to E.D.N.Y. pursuant to JPML order).

United States District Court for the District of Massachusetts:

Audette v. Hebei Welcome Pharmaceutical Co. Ltd., No. 1:05-CV-12224 (Apr. 4, 2006) (transferring to the E.D.N.Y. pursuant to JPML order).

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INTRODUCTION

This petition arises from the Second Circuit's divided opinion on remand from this Court's unanimous decision in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865 (2018). As it returns to this Court, this case presents two important questions on which the Second Circuit created a conflict with its sister circuits and this Court.

Petitioners are two American vitamin C importers that brought antitrust claims against a cartel of Chinese companies that conspired to fix vitamin C prices and output for export to the United States. Petitioners filed this action in 2005 and in 2013 won a $147.8 million jury verdict after trebling. In Respondents' first appeal, the Second Circuit reversed (some three years after the verdict), holding that the District Court should have abstained from exercising jurisdiction in light of the Chinese government's representation that Chinese law had required Respondents' conduct, to which, the Second Circuit held, it was "bound to defer." This Court disagreed with that binding-deference standard and remanded for further proceedings, including reconsideration of *all* the evidence the District Court had identified as relevant to the meaning of Chinese law.

Nearly three years after the parties filed letter briefs on remand, the Second Circuit reversed again in a divided opinion. The majority committed two errors worthy of review by this Court.

First, the panel majority discarded the comity-based "abstention" framework that had been the basis of nearly fifteen years of litigation in this case, and

replaced it with a comity-derived statutory-interpretation doctrine of its own creation. According to the decision below—and contrary to this Court's express holdings—the doctrine of "prescriptive comity" allows courts to reinterpret the substantive scope of the Sherman Act in every case involving foreign conduct based upon a multi-factor balancing test. The majority's test invites judges to interpret the text of the Sherman Act based upon discretionary policy judgments such as the litigation's "possible effect upon foreign relations," a foreign government's perception of the case, and speculation about the Executive's expectations of reciprocity. App.49a–51a. Relying on those predictive policy judgments, a panel majority of two judges "decline[d] to construe U.S. antitrust law as reaching [Respondents'] conduct in the circumstances presented here." App.51a–52a.

In addition to being a "drastic[]" departure from "the principle of party presentation," *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020), the panel's "prescriptive comity" holding flies in the face of this Court's repeated holdings that Congress accounted for prescriptive comity principles when it applied the Sherman Act to foreign conduct that harms domestic commerce, and this Court's consistent rejection of proposals to re-weigh comity concerns case by case. As applied by the Second Circuit, "prescriptive comity" is nominally a canon of statutory interpretation, but in effect a delegation to the judiciary of Congress's policy-laden judgments about how and when to exercise its prescriptive jurisdiction. This Court has rejected that approach to international comity and statutory interpretation as "judicial-speculation-made-law—divining what Congress

would have wanted if it had thought of the situation before the court." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 261 (2010). Whatever might be said about the merits the panel majority's policy judgments, they should be left to the political branches.

Second, the panel majority defied this Court's instruction to consider all of the evidence relevant to the meaning of Chinese law, including evidence of oral communications from the relevant authorities and nonexistent enforcement. Instead, the panel majority held that, as a matter of U.S. law, it was limited to considering the "face value" of a limited set of written legal materials in interpreting Chinese law. It did so despite testimony from Respondents' own Chinese-law expert that the Chinese legal system does not interpret legal materials that way. Instead, as Respondents' expert explained, Chinese law is constituted by informal communications from government officials in addition to written regulations. The District Court had accordingly recognized such informal practices as an "essential part of the Chinese law governing vitamin C." App.138a n.36. The majority's holding is a stark outlier among the lower courts, which eschew artificial restrictions on what materials a court may consider when interpreting foreign law.

This Court should grant review.

OPINIONS BELOW

The Second Circuit's opinion (App.1a) is reported at 8 F.4th 136. The District Court's opinion denying Respondents' renewed motion for judgment as a matter of law (App.64a) is unreported but available at 2013 WL 6191945. The District Court's opinion denying summary judgment (App.79a) is reported at 810 F. Supp. 2d 522. The District Court's opinion denying Respondents' motion to dismiss (App.176a) is reported at 584 F. Supp. 2d 546.

JURISDICTION

The Second Circuit entered judgment on August 10, 2021 and denied a timely rehearing petition on October 21, 2021 (App.207a). On December 16, 2021, Justice Sotomayor extended the time to file a petition for certiorari to March 21, 2022 (No. 21A227). This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 44.1, Section 1 of the Sherman Act, 15 U.S.C. §1, and the Foreign Trade Antitrust Improvements Act, 15 U.S.C. §6a, are set forth at App.209a–210a.

STATEMENT

I. China's Pre-2002 Vitamin C Regime

1. In the late 1990s and early 2000s, a group of Chinese vitamin C companies seized control of a global market still recovering from now-infamous predecessor European and Japanese vitamins cartels. By 2002, China's vitamin C industry had consolidated to four companies that accounted for more than 80% of U.S. vitamin C imports. App.81a, 178a. Those four companies and their corporate affiliates were the defendants in this case. App.178a.

In the years immediately preceding the class period, those companies acted at the Chinese government's behest. In late 1997, China's Ministry of Commerce (the "Ministry") issued a regulation known as the "1997 Notice," App.252a–256a, which declared that the "scale of Vitamin C production shall be strictly controlled," and required the China Chamber of Commerce of Medicines & Health Products Importers & Exporters (the "Chamber") to establish a "Coordination Group" of vitamin C producers. App.253a, 254a–255a. That group became known as the "Vitamin C Subcommittee." The 1997 Notice required companies to be Subcommittee members in order to export, and further required the Subcommittee to coordinate prices and output. *Id.* Under the 1997 Notice, the Subcommittee could penalize any "enterprises competing at low price," App.255a, by reducing export quota or revoking the violator's right to export, App.256a. Respondents were members of the Subcommittee during the period relevant to this case.

The Subcommittee passed its first governing charter in late 1997 (the "1997 Charter"). App.257a–264a. The 1997 Charter provided that "[o]nly the members of the Sub-Committee have the right to export Vitamin C," App.259a–260a, and obligated members to "[s]trictly execute" the agreed-upon export price and "keep it confidential." App.261a. The 1997 Charter also authorized penalties if a member violated the Charter, including "revocation of its membership" in the Subcommittee, and "suspen[sion] and even cancel[lation of] the vitamin export right of such violating member." *Id.*

2. Despite the purportedly strict provisions of the 1997 regime, market pressures caused a "price war" among Chinese vitamin C exporters. App.294a. The Chamber learned that the European Union was considering an anti-dumping suit against the Chinese vitamin C exporters as a result of declining prices. App.102a. In November 2001, the Subcommittee responded to these developments by agreeing to fix the export price at $3/kg and to limit supply, beginning in 2002. *Id.* Contemporaneous accounts stated that the Subcommittee reached this agreement voluntarily "because the country had opened up the commercial products business from a free competition aspect." App.172a. The Chamber announced the agreement on its website, stating that the Subcommittee members

> were able to reach a self-regulated agreement successfully, whereby they would *voluntarily* control the quantity and pace of exports, to achieve the goal of stabilization while raising export prices. Such self-restraint measures . . . have been completely implemented by each

> enterprises' own decisions and self-restraint, *without any government intervention*.

App.294a (emphases added).

II. China's Post-2002 Vitamin C Regime

1. In 2002, China fundamentally reshaped the legal regime governing vitamin C exports, including by repealing government-mandated vitamin C export price- and output-restrictions. These changes were part of a larger deregulatory project aimed at advancing China's transition to a market economy and gaining entry into the World Trade Organization.

Among other reforms, the Ministry repealed the 1997 Notice. In its place, the Ministry issued a new "2002 Notice" that abolished the 1997 regime's key mandates, including that (1) "the scale of Vitamin C production shall be strictly controlled," (2) the vitamin C Subcommittee must fix prices and output, (3) all vitamin C exporters participate in and "subject themselves to the coordination of" the Subcommittee, and (4) the Subcommittee penalize any "enterprises competing at low price and reducing price through any disguised means." *Compare* App.252a–256a (1997 Notice), *with* App.265a–268a (2002 Notice).

The 2002 Notice also instituted a new procedure for monitoring vitamin C exports called "price verification and chop" ("PVC"). App.266a. On paper, PVC required exporters to submit vitamin C export contracts to the Chamber, which was then supposed to affix a seal (or "chop") if the contract met or exceeded an industry-determined minimum price. App.287a–289a. The exporter would then present the contract to Customs, which was supposed to permit

only those export contracts with an affixed "chop." App.285a–286a. The 2002 Notice did not prohibit exports in the event that the Subcommittee members declined to reach a price agreement in the first place, nor did it mention output restrictions. Even on its face, the Notice gave the Chamber and its members a legal option to avoid price fixing when doing so was in their interest: "Given the drastically changing international market, the customs and chambers *may suspend export price review for certain products*" with approval of the relevant subcommittee. App.267a (emphasis added).

The Subcommittee, for its part, repealed the 1997 Charter and replaced it with a new "2002 Charter." App.269a–284a. The 2002 Charter differed radically from its predecessor: it declared that the Subcommittee was an "organization jointly established on a voluntary basis," App.269a, eliminated the 1997 Charter's requirement that Subcommittee members "[s]trictly execute" the "coordinated price" set by the Chamber, App.269a–284a, and granted all members an express "[r]ight" to "freely resign from the Subcommittee," App.273a.

2. China's contemporaneous statement to the WTO that, as of January 1, 2002, it "*gave up export administration of . . . vitamin C*" confirmed that the new 2002 regime had repealed the prior regime of price- and output-restrictions for vitamin C exports. C.A.App.468 (emphasis added). China explained that it still "maintained export administration of a small number of products," but vitamin C was not among them. C.A.App.468–69.

3. Other contemporaneous evidence showed that the Chinese Government did not require vitamin C exporters to fix prices or volumes beginning in 2002.

a. Exporters were free to set prices independent of government direction or intervention. In 2003, the Chamber distributed a list of "agreed prices" for certain key exports, requesting that Chamber members "[p]lease abide by the list in implementation." App.290a. While vitamin C was included on the price list, the corresponding space for an "agreed price" was left blank. App.291a. Each of the other "key commodities" had an "agreed price" listed. App.291a–292a.

b. When Respondents reached price agreements, they did so voluntarily. The only minimum price for PVC during the class period was $3.35/kg, App.102a, but Respondents entered voluntary price agreements much higher than that purportedly-mandatory floor. C.A.App.2091–98. Meeting minutes documenting Respondents' price and output agreements showed private agreements with no indicia of government compulsion. C.A.App.2161–62, 2100. Qiao Haili—head of the Vitamin C Subcommittee—admitted that it was "accurate" that "export prices are fixed by enterprises *without government intervention*," and that, "on the whole, the government did not involve itself in price fixing." C.A.App.1811.

c. Respondents' compliance with price agreements was voluntary. At times, exporters sold at prices below the purportedly mandatory $3.35/kg "floor" in response to market conditions. C.A.App.1749–50. Emails showed that co-conspirators also freely offered discounts below $3.35/kg to favored customers. C.A.App.2105–09. When Respondents entered

voluntary price agreements above the purportedly mandatory $3.35 floor, a co-conspirator lamented those agreements' "limited effect," observing that "every manufacturer quoted prices lower" than the agreed price. C.A.App.1968.

d. The PVC process was not treated as mandatory. For example, contracts Respondents produced in discovery revealed that virtually all exports to the U.S. during the class period were shipped without a "chop." C.A.App.2267–2539, 2565–2970, 3020–3375, 3431–3669.

e. Exporters faced no sanctions for exporting at independently determined prices, or for misrepresenting prices in their contracts. C.A.App.1707–08 (co-conspirator witness admitting that "[n]obody's going to force" the exporters to "go along with the common understanding"); C.A.App.1818 (Qiao admitting that "[n]o company was ever punished for charging less than $3.35.").

4. The Chamber's leadership acknowledged in contemporaneous writings that Respondents' cartel behavior was voluntary. In a 2003 memo to the Ministry, C.A.App.2173–75, Qiao bragged that industry "self-regulation" had increased vitamin C exports, but worried that

> the legal standing of chambers of commerce is still not clear. *Regulations and rules formulated by companies in the industry organized by the chambers of commerce lack legal basis* and are difficult to gain support from government departments. These rules and regulations simply become formality and *only "honest fellows will follow."*

C.A.App.2174 (emphases added). Vitamin C exporters described the post-2002 regime of "self-regulation" as a series of "gentlemen's agreements." C.A.App.1920.

5. Respondents' post-filing conduct showed that their anticompetitive conduct was voluntary. After Petitioners filed their complaint, the Subcommittee stopped meeting, despite the supposed legal requirement that they meet to coordinate prices and output. C.A.App.1712. Other evidence suggested that Respondents' arguments about Chinese law were manufactured in response to the litigation. One co-conspirator's employee wrote in a 2005 email: "I believe we should not have any worry since the [Ministry] is a friend of the court in the lawsuit. . . . Even if we lost the case, the government would take foremost part of the responsibility. After all, we need to do many things [in] a more hidden and smart way." App.111a n.19.

III. Procedural History

1. On January 26, 2005, Petitioners filed a complaint against Respondents and several co-conspirators in the Eastern District of New York, where the JPML later consolidated several similar actions. *In re Vitamin C Antitrust Litig.*, No. 1:06-MD-1738 (E.D.N.Y.).

2. Respondents moved to dismiss based on the doctrines of act of state, foreign sovereign compulsion, and international comity. Respondents' international comity defense consisted of a request that the District Court abstain from its concededly valid jurisdiction "as a discretionary matter." ECF No. 67, at 29, *In re Vitamin C Antitrust Litig.*, No. 1:06-MD-1738

(E.D.N.Y. Sept. 22, 2006). Respondents "submit[ted] that it would be an appropriate exercise of [the] Court's discretion to extend comity to the Chinese government by acceding to its request to dismiss these actions," and that the District Court "should . . . exercise its discretion to decline to adjudicate this case under principles of international comity." *Id.* at 33.

The Ministry filed an amicus brief in support of Respondents' motion, asserting that Chinese law had required Respondents' conduct. App.211a–243a. The Ministry attached the repealed 1997 Charter to its brief but did not disclose the existence of the 2002 Charter. The Ministry supported its proposed legal interpretation by citing provisions of the 1997 Charter as though they were still in force, including the repealed requirement that vitamin C companies be Subcommittee members in order to export, and, "[m]ost significantly for purposes of this case," the 1997 Charter's requirement that vitamin C exporters "'[s]trictly execute export coordinated price set by the Chamber and keep it confidential.'" App.224a. The Ministry did not disclose that this "[m]ost significant[]" requirement had been abolished.

3. The District Court denied Respondents' motion to dismiss. App.176a–206a. The court concluded that the Ministry's brief was "entitled to substantial deference, but [would] not be taken as conclusive evidence of compulsion, particularly where, as here, the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position." App.198a. The District Court accordingly denied the motion in favor of "further inquiry into the voluntariness of defendants' actions." App.203a–204a & n.12.

4. Following the close of discovery, Respondents renewed their three defenses in a motion for summary judgment. ECF No. 393, *In re Vitamin C Antitrust Litig.*, No. 1:06-MD-1738 (E.D.N.Y. Nov. 23, 2009). Respondents again argued that the District Court should dismiss on international comity grounds, a "matter committed to [the District] Court's sound discretion, the exercise [of which] is grounded in important considerations of policy." *Id.* at 57.

5. The District Court denied summary judgment. App.79a–175a. Considering Respondents' comity-based abstention defense, the court concluded that under *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), abstention would be inappropriate absent a conflict between Chinese and U.S. law. App.122a–123a. Interpreting Chinese law pursuant to Rule 44.1, the District Court held that the Ministry's statements were entitled to respect, but again found that certain of the Ministry's statements were "directly contradict[ed]" by the documentary evidence before the court. App.142a n.40. As such, the Ministry's statements did "not read like a frank and straightforward explanation of Chinese law," but rather "like a carefully crafted and phrased litigation position." App.141a.

Having declined to treat the Ministry's submissions as conclusive, the District Court conducted its Rule 44.1 analysis based upon "what may be considered the more traditional sources of foreign law—primarily the governmental directives themselves as well as the charter documents of the [Vitamin C] Subcommittee and the Chamber," as well as other evidence in the record. App.138a. The District Court specifically held that it was "appropriate to

consider the factual record concerning how Chinese law was enforced and applied," both as an aid to interpreting the written legal directives themselves, and "because any oral directives by officials of the Ministry and the Chamber appear to be an essential part of the Chinese law governing vitamin C." App.138a & n.36. The District Court noted that, as Respondents' own Chinese-law expert had explained, "it is normal for [regulatory documents promulgated by Chinese authorities] to be expressed at a level of generality that then must be applied and implemented in specific contexts.' This application and implementation 'frequently' occurs through 'oral directions, even including telephone calls.'" App.138a n.36 (quoting Report of Professor Shen Sibao ¶¶ 16–17; *see* C.A.App.306–07).

6. The case was tried to a jury over three weeks in 2013. After the close of evidence, Respondents made an oral Rule 50(a) motion for judgment as a matter of law, in which they pressed their act of state and foreign sovereign compulsion defenses (but omitted their comity defense). App.to Pet. for Cert. 250a–275a, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (No. 16-1220). The District Court denied the motion. *Id.* at 273a-275a.

The jury found for Petitioners and awarded $54.1 million in damages before trebling.[1] ECF No. 675, at 5, *In re Vitamin C Antitrust Litig.*, No. 1:06-MD-1738 (E.D.N.Y. Mar. 14, 2013). In a special verdict, the jury found that Respondents had failed to prove by a preponderance of the evidence that the Chinese

[1] Respondents' co-defendants settled before and during trial. App.8a.

government had "actually compelled" their conduct during the class period. *Id.* at 3.

Respondents renewed their motion for judgment as a matter of law, this time adding that the District Court should exercise its "discretionary" authority to "weigh[] competing interests" and abstain from jurisdiction under the doctrine of international comity. ECF No. 691-1, at 19, *In re Vitamin C Antitrust Litig.*, No. 1:06-MD-1738 (E.D.N.Y. Apr. 11, 2013). The District Court denied the motion. App.64a–78a.

7. Respondents appealed. As relevant here, Respondents contended that a ten-factor balancing test "favor[ed] comity abstention," asserting that "[t]he exercise of jurisdiction by the district court has already inflicted harm on U.S.-China relations." ECF No. 175, at 38, No. 13-4791 (2d Cir. Aug. 11, 2014). Respondents did not suggest that the Second Circuit should reassess the substantive scope of the Sherman Act on international comity grounds.

8. The Second Circuit reversed and remanded with instructions to dismiss. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016). Given that the "2002 Notice does not explicitly mandate price fixing," the panel explained that its "interpretation of the record as to Chinese law thus hinge[d] on the amount of deference that we extend to the Chinese Government's explanation of its own laws." *Id.* at 186. The Second Circuit held that "a U.S. court is bound to defer" to an appearing foreign sovereign's reasonable interpretation of its own laws. *Id.* at 189. The panel added that "if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in

analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate." *Id.* at 191 n.10.

Having found a "true conflict" between Chinese and U.S. law based on its binding deference to the Ministry's statements, the panel quickly balanced the remaining comity factors and concluded that those factors "weigh[ed] in favor of abstention." *Id.* at 194. The Second Circuit therefore held "that the district court abused its discretion by failing to abstain on international comity grounds from asserting jurisdiction." *Id.*

9. Petitioners sought review in this Court, which called for the views of the Solicitor General, 137 S. Ct. 2320 (2018), and then granted certiorari, 138 S. Ct. 734 (2018). This Court vacated the Second Circuit's judgment. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018). The Court rejected the Second Circuit's "binding deference" to the Ministry's statements, holding that a court "should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements." *Id.* at 1869. The Court remanded for further proceedings consistent with its opinion, adding that "the materials identified by the District Court were at least relevant . . . to the question whether Chinese law required the Chinese sellers' conduct." *Id.* at 1875.

10. On remand, the Second Circuit requested ten-page letter briefs. Respondents again urged the Second Circuit to order the case dismissed as a matter of "comity abstention" but did not address the substantive scope of the Sherman Act. ECF No. 284,

at 1, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Aug. 31, 2018).

The Second Circuit then held the case for more than two-and-one-half-years, without comment, until it scheduled argument on March 17, 2021. App.1a. Following argument, the Second Circuit again reversed and remanded with instructions to dismiss Petitioners' claims. App.1a–54a.

First, the majority construed this Court's decision in *Hartford Fire* to limit Rule 44.1 by imposing a requirement to interpret foreign law with "[e]xclusive attention to what foreign law facially requires." App.18a. The Second Circuit accordingly interpreted Chinese law by limiting its analysis to a subset of written governmental materials. App.21a–28a. The panel then turned to other material in the record that it believed corroborated its conclusion, App.28a, but did not conduct a comprehensive review of the materials before the District Court that this Court had unanimously explained were "at least relevant . . . to the question whether Chinese law required the Chinese sellers' conduct," *Animal Sci. Prods.*, 138 S. Ct. at 1875. Among the materials the panel ignored was the testimony of Respondents' own Chinese-law expert Professor Shen Sibao, who explained that Chinese law cannot be understood by the text of legal authorities alone, but instead must be considered in light of the text's "appli[cation]" and "implement[ation]," which often takes place through individual interactions, including "oral directions" and "telephone calls." App.138a n.36. The majority never explained why it was appropriate to consider less than all of the evidence "relevant . . . to the question whether Chinese law required the Chinese

sellers' conduct." *Animal Sci. Prods.*, 138 S. Ct. at 1875. Nor did it explain why international comity would support interpreting foreign law through something other than the foreign legal system's own interpretive methods. Using its freshly-minted procedure for interpreting foreign law, the panel found a "true conflict" between the Chinese legal documents "taken at face value," and U.S. antitrust law. App.27a.

Second, having found a "true conflict," the majority reconceptualized Petitioners' international comity defense as involving "'prescriptive comity'—a form of statutory interpretation—rather than the abstention-based doctrine of 'adjudicatory comity'" that Respondents had pressed through fifteen years of litigation. App.11a–12a n.8; *see supra* at 11–18. Explaining that Respondents' "adjudicative comity"-based abstention defense and the panel's "prescriptive comity" doctrine of statutory interpretation are "two district legal doctrines," *id.* (cleaned up), the panel proceeded to evaluate Respondents' comity defense as though Respondents had raised the latter (even though they had not). *Id.*

According to the panel, "prescriptive comity" operates as "a canon of statutory construction that may serve to shorten the reach of a statute." App.10a n.7 (cleaned up). The panel majority explained that this "canon" functions as a multi-factor balancing test by which a court may weigh as many as ten factors to determine whether statutory language should be "construed" to reach the conduct at issue. App.46a (citing and "condens[ing]" the ten-factor test of *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979)). The majority explained

that this comity-based method of statutory interpretation must be implemented anew in every case involving foreign conduct, regardless of this Court or any other court's prior construction of the statutes at issue—including this Court's unequivocal holding that, as "our courts have long held," "application of our antitrust laws to foreign anticompetitive conduct is . . . consistent with principles of prescriptive comity" where that conduct satisfies the statutory and doctrinal prerequisites for extraterritorial application of U.S. antitrust law. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004).

Applying its doctrine of *ad hoc* statutory interpretation, the majority proceeded to weigh seven factors to determine whether the Sherman Act should apply to Respondents' conduct, including: (1) the nationality of the parties, (2) the site of the anticompetitive conduct, (3) effectiveness of enforcement, (4) alternative remedies, (5) foreseeable harm to American commerce, (6) reciprocity, and (7) the possible effect upon foreign relations. App.46a–51a. In the panel's view, four factors weighed against interpreting the Sherman Act to reach Respondents' conduct: Respondents' Chinese nationality, the fact that the conduct at issue took place in China, the United States' own presumed desire for reciprocity, and the possible effect on foreign relations arising from Sherman Act liability. *Id.* "Balancing these factors," the panel "declin[ed] to construe U.S. antitrust law as reaching defendants' conduct in the circumstances presented here." App.51a–52a. In evaluating these foreign relations concerns, the panel refused to consider the United States' view that the

Second Circuit's 2016 decision had given "too much weight to China's objections to this suit" because, in the majority's view, the Solicitor General's Invitation Brief to this Court had not "claimed to report the views of the Executive Branch . . . in this respect." App.53a n.46.

Judge Wesley dissented. App.55a–63a. Judge Wesley faulted the panel majority for ignoring record evidence that "Chinese law did not require the defendants to agree on prices above the minimum of $3.35/kg, which is what [Respondents] did." App.58a. And, adhering to the abstention-based comity defense that Respondents had actually litigated, Judge Wesley concluded that "this is not the 'rare' case presenting 'extraordinary circumstances' that warrants dismissal on the basis of comity" in light of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." App.62a–63a (quoting Brief for the United States as Amicus Curiae, *Animal Sci. Prods.*, 138 S. Ct. 1865 (No. 16-1220); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

Petitioners filed a timely rehearing petition, which the Second Circuit denied. App.207a.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Case-by-Case Balancing Approach to Statutory Interpretation Conflicts with Decisions of this Court and at Least Five Circuits.

1. Departing from how the parties litigated this matter for fifteen years, the panel majority *sua sponte* held that the doctrine of "prescriptive" international comity authorizes U.S. courts to reinterpret congressional enactments in every case involving foreign conduct based on a discretionary ten-factor balancing test. That holding is wrong, and conflicts with multiple decisions of both this Court and the circuit courts.

Under the interpretive canon of "prescriptive" international comity, courts "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164. Without analyzing the Sherman Act's text, much less identifying any statutory ambiguity in the Act, the majority held that the "prescriptive comity" canon authorized it to supplant this Court's settled interpretation of the Act with a discretionary, good-for-this-case-only judgment that the Act did not apply to Respondents' conduct in light of a seven-factor balancing test.

The majority erred. This Court has *already* interpreted the Sherman Act's text in light of prescriptive comity—in a manner that undisputedly covers Respondents' conduct—and expressly rejected the panel's case-by-case approach to Sherman Act interpretation. In the absence of some additional

unresolved statutory ambiguity, there is no justification for reapplying comity-based canons of construction.

More than 75 years ago, Judge Learned Hand's seminal *Alcoa* opinion interpreted the Sherman Act in light of principles of prescriptive comity, reading its broad language in light of "the limitations customarily observed by nations upon the exercise of their powers. *United States v. Alcoa*, 148 F.2d 416, 443 (2d Cir. 1945). Following those principles, Judge Hand interpreted the Sherman Act's broad language as applying to foreign conduct that produced effects in the United States, a standard which this Court adopted and Congress codified in the FTAIA. *Id.*; *see* 1 Areeda & Hovenkamp, *Antitrust Law* §272 (Sept. 2021). Thus, as is "well established by now," "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire*, 509 U.S. at 796.

Accordingly, in *Hartford Fire*, this Court explained that it is "well established that Congress has exercised [prescriptive] jurisdiction under the Sherman Act." *Id.* at 796 n.22. Justice Scalia's dissent in that case proposed a case-by-case approach to prescriptive comity, but this Court rejected that proposal as "inconsistent with the general understanding 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." *Id.* at 797 n.24.

Empagran reinforced the holding of *Hartford Fire*—not its dissent. *Empagran* cited the *Hartford Fire* dissent for the proposition that courts should assume Congress has followed comity-derived limits on prescriptive jurisdiction, but contrary to the decision below, App.12a n.8, the *Empagran* Court rejected the *Hartford Fire* dissent's proposal that courts should reassess those limits anew in every case. *Empagran*, 542 U.S. at 164. Instead, *Empagran* reaffirmed that in enacting the Sherman Act, Congress exercised prescriptive jurisdiction over foreign conduct causing substantial domestic effects, explaining that the prescriptive-comity derived "rule of statutory construction"

> cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony . . . .

Id. The Court continued:

> No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless 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.

Id. at 165 (emphasis added). In other words, where the Sherman Act has extraterritorial application, such application is necessarily "consistent with principles of prescriptive comity." *Id.*

In *Empagran*, the Court was asked to endorse the case-by-case approach to prescriptive comity, whereby courts would "take . . . account of comity considerations case by case, abstaining where comity considerations so dictate." *Id.* at 168 (citing *Mannington Mills*, 595 F.2d at 1297–98). The Court rejected that approach as "too complex to prove workable," concluding instead that the task of statutory interpretation before it demanded a result that applied "across the board." *Id.*

Revisiting comity concerns case by case would "mean[] lengthier proceedings, appeals, and more proceedings." *Id.* at 168. As this Court presciently inquired: "How could a court seriously interested in resolving so empirical a matter—a matter potentially related to impact on foreign interests—do so simply and expeditiously?" *Id.* at 168, 169. This case perfectly illustrates that point. The parties litigated this case based upon Respondents' *adjudicative* comity defense for over fifteen years before two district court judges, two different Second Circuit panels, and this Court, only to have two panel members decide, based on their subjective assessments of foreign relations concerns, that the text of the Sherman Act did not reach Respondents' conduct.

2. The decision below conflicts with the overwhelming weight of authority, following *Hartford Fire* and *Empagran*, holding that any relevant prescriptive comity considerations are already

encompassed within this Court's interpretations of the Sherman Act.

In the Seventh Circuit's view, this Court has already decided that the Sherman Act's application to foreign conduct having domestic effects "adequately avoided unnecessary interference with other nations' laws, which may tolerate (within their own territories) effects that our antitrust laws condemn, while ensuring that this nation can achieve its own ends within its territory." *United States v. Leija-Sanchez*, 602 F.3d 797, 801 (7th Cir. 2010). "Any international repercussions of [a] decision to prosecute" such foreign conduct, meanwhile, were "for the political branches to resolve with their [foreign] counterparts . . . , rather than matters for the judicial branch." *Id.* And, when the Seventh Circuit interpreted the FTAIA's requirement that foreign anticompetitive conduct must have "direct" effects in the United States to be actionable, the court saw no need to re-apply the canon of prescriptive comity to conduct that, by definition, had "harm[ed] U.S. commerce," in light of "the well-established principle that the U.S. antitrust laws reach [such] foreign conduct." *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 858 (7th Cir. 2012) (en banc) (applying U.S. law to such conduct is "reasonable, and hence consistent with principles of prescriptive comity" (quoting *Empagran*, 542 U.S. at 165)).

The First Circuit has rejected a similar request to reapply comity-based interpretive canons to the Sherman Act, explaining: "In view of the fact that the Supreme Court deems it 'well established' that Section One of the Sherman Act applies to wholly foreign conduct, we effectively are foreclosed from

trying to tease an ambiguity out of Section One relative to its extraterritorial application." *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997) (citation omitted).

Meanwhile, when courts *do* confront unresolved ambiguities in specific statutory text, they employ *Empagran*'s "prescriptive comity" canon to derive an interpretation that will apply "across the board," as *Empagran* requires, leaving no room for do-overs depending on a future court's view of the geopolitical circumstances of a given case.

Applying *Empagran*, the Eighth Circuit interpreted the FTAIA's language providing that foreign conduct is actionable only if its domestic effects "give rise to" a Sherman Act claim as imposing a requirement of proximate rather than but-for causation. *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007). That court explained that "this *standard* is in accord with the principles of prescriptive comity." *Id.* (emphasis added). By interpreting the FTAIA's ambiguous language to create an "across the board" standard, rather than licensing a case-by-case approach to FTAIA causation, the Eighth Circuit properly applied the prescriptive-comity canon.

The Ninth and D.C. Circuits have applied the same analysis to the same language and reached the same "across-the-board" result. *In re DRAM Antitrust Litig.*, 546 F.3d 981, 987 (9th Cir. 2008); *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

3. The Second Circuit's case-by-case approach to Sherman Act interpretation also conflicts with other

analogous precedents of this Court. When asked to determine the extent to which Congress has exercised its prescriptive jurisdiction, this Court has held that courts should interpret statutes categorically based on their text, rather than by engaging in freewheeling case-by-case interest balancing.

In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), the Court rejected "application of the sanctions of the [NLRA] to foreign-flag ships on a purely ad hoc weighing of contacts basis," reasoning that such an approach "would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice." *Id.* at 19. Instead, "[t]he question [was] more basic; namely, whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen." *Id.*

In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), the Court rejected the Second Circuit's case-by-case method of assessing the extraterritorial reach of Section 10(b), and crafted an across-the-board interpretation "[r]ather than guess anew in each case." *Id.* at 261. In the *Morrison* Court's view, interpreting statutes case by case using one-off multi-factor balancing tests amounted to nothing more than "judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court." *Id.*

More recently, in *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325 (2016), this Court rejected the idea that it could inject comity considerations into statutory interpretation case by case. The plaintiff argued that the RICO injury provision should at least permit *its* suit, which "comport[ed] with limitations on

prescriptive jurisdiction under international law." *Id.* at 349. Citing *Empagran*, the Court rejected that approach, explaining that because its interpretation of the statutory provision would "necessarily govern" future suits by other plaintiffs, any such concerns would have to be baked into the Court's generally applicable statutory construction, not revisited anew "based on a case-by-case inquiry." *Id.*

4. The Second Circuit's prescriptive comity doctrine now requires the same approach this Court has rejected in numerous analogous contexts. The panel's balancing test invites courts to reinterpret the Sherman Act in every case based on factors including a judge's personal assessment of the "[p]ossible effect upon foreign relations," the "[r]elative importance of the alleged violation" to the United States and the foreign nation, and the "[d]egree of conflict with foreign law or policy." App.13a–14a n.9. This inquiry invites, and even requires, judicial micromanagement of foreign policy prerogatives that the Constitution reserves to the political branches.

Here, for example, the panel majority assigned dispositive weight to its own concerns regarding diplomatic friction with China, crediting the importance the Ministry "attached" to this case. App.49a. It did so despite the fact that, in its earlier briefing before this Court, the Government argued that the Second Circuit had given "too much weight to China's objections to this suit," and "inadequate weight to the interests of the U.S. victims of the alleged price-fixing cartel and to the interests of the United States in enforcement of its antitrust laws." Brief for the United States as Amicus Curiae at 20, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*,

138 S. Ct. 1865 (2018) (No. 16-1220), 2017 WL 5479477. The Government cautioned that, "[u]nlike a statement from the Executive Branch, a foreign sovereign's objection to a suit does not, in itself, necessarily indicate that the case will harm U.S. foreign relations." *Id.* The panel majority rejected the Government's views in favor of its own, and held that the absence of an Executive Branch statement on remand (notwithstanding that the Second Circuit never invited such a statement), combined with the Ministry's objection, "tip[ped] in favor of dismissal." App.51a. At minimum, this Court should call for the views of the Solicitor General as to whether the panel majority's cavalier rejection of the Executive's stated foreign-relations assessment warrants review.

If it is ever appropriate to dismiss an otherwise valid antitrust claim on freestanding "international comity" grounds, the only framework even arguably left open is "abstention"—that is, an "extraordinary" departure from the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." App.62a–63a (Wesley, J., dissenting) (quoting *Colorado River*, 424 U.S. at 817). Whatever the panel majority's reasons for discarding the abstention framework that had informed the prior fifteen years of litigation, its consequent holding was wrong. The international comity doctrine is not a license for courts to rewrite congressional enactments on the fly, based upon *ad hoc* judicial speculation about foreign relations.

II. The Second Circuit Improperly Limited Its Rule 44.1 Inquiry to what Chinese Law "Facially Required," in Conflict with Decisions of at Least Four Circuits.

1. The panel majority defied this Court's instructions and opened a conflict among lower courts by refusing to consider all the evidence relevant to the meaning of Chinese law. Although this Court left some questions open on remand, *Animal Sci. Prods.*, 138 S. Ct. at 1872, it did decide what evidence should be considered to interpret Chinese law, *id.* at 1869–70. This Court held it was error to disregard "evidence suggesting that the price fixing was voluntary," *id.* at 1871, including "submissions made by the U.S. purchasers casting doubt on the Ministry's account of Chinese law," *id.* at 1872. This Court held that "the materials identified by the District Court were at least relevant . . . to the question whether Chinese law required the Chinese sellers' conduct" and remanded for further consideration of those materials. *Id.* at 1875.

Disregarding this Court's instructions, the panel majority derived from international comity principles a rule limiting Rule 44.1 analyses to "[e]xclusive attention to what foreign law facially requires." App.18a. The panel based this purported rule on its understanding that *Hartford Fire* had focused "entirely on foreign law, taken at face value." *Id.* But nothing in *Hartford Fire* supports interpreting foreign law by looking only at the "face value" of a foreign sovereign's written legal materials. The panel's misreading of *Hartford Fire* invites the misinterpretation of foreign law under Rule 44.1, and threatens to convert hypothetical conflicts into "true

conflicts," blind to the reality of how foreign law operates in foreign countries. Both this Court's prior decision in this case, and the decisions of numerous circuit courts, foreclose such an approach.

Federal Rule of Civil Procedure 44.1 authorizes federal courts to consider "any relevant material or source, including testimony," "[i]n determining foreign law." FED. R. CIV. P. 44.1. In this case, the District Court's interpretation of Chinese law relied on a range of materials, including witness testimony and extrinsic evidence of how Chinese law was applied and implemented. When it last confronted this case, this Court held that "the materials identified by the District Court" were "relevant . . . to the question whether Chinese law required the Chinese sellers' conduct." 138 S. Ct. at 1875. This Court refused to accept Chinese law at "face value," and even quoted from China's statement to the WTO that China had "[given] up export administration . . . of vitamin C" at the end of 2001. *Id.* at 1874.

The panel's "face value" limit is irreconcilable with this settled approach to Rule 44.1. It is also irreconcilable with how the meaning of Chinese law would be discerned *in China*. Respondents' own expert explained that Chinese law cannot be understood by legal texts alone, but instead must be considered in light of the texts' "application and implementation," which takes place through individual interactions, including "oral directions" and "telephone calls." App.138a n.36. In conducting its Rule 44.1 analysis, the District Court recognized those informal practices as "an essential part of the Chinese law governing vitamin C." *Id.* As Respondents' expert explained:

> 16. In China "law," in the sense of obligations that must be obeyed, comes from a variety of different sources. In very general terms, Chinese law begins with the Constitution which is the highest source of legal obligation. There then are laws promulgated by the National People's Congress Standing Committee, administrative rules and regulations formulated by the State Council (which is China's Central Government) and regulatory documents promulgated by individual ministries or departments (such as MOFCOM). It is normal for these types of law to be expressed at a level of generality that then must be applied and implemented in specific contexts.
>
> 17. That process occurs through decisions, notices, official minutes of meetings issued by the State Council. Government Ministries. and the like, that also have binding authority within their scope. Many official requirements are also transmitted through communications that may consist of department documents or oral directions, even including telephone calls. It is not the form of communication that creates its binding character, but the source and authority of the party giving the direction. Regardless of form, to the extent that these directions come from people in superior authority they are no less binding and obligatory on subordinates and companies than any other type of "law."

C.A.App.306–07 (Report of Professor Shen Sibao ¶¶ 16–17). The District Court relied on Professor

Shen's explanation of Chinese law in considering materials beyond the face of the written regulations, recognizing that those materials are "an essential part of the Chinese law governing vitamin C." App.138a n.36. The panel majority ignored Professor Shen's explanation, and its "face value" rule foreclosed the appropriate method for interpreting Chinese law.

2. The Second Circuit's decision constraining its foreign-law interpretation to a subset of written governmental documents is an outlier among the circuits. The courts of appeals routinely consider evidence, including expert testimony and evidence of foreign law's on-the-ground implementation, in analyzing what foreign law means. *See*, *e.g.*, *Sharifi v. United States*, 987 F.3d 1063, 1068 (Fed. Cir. 2021) (holding that the Court of Federal Claims "followed Rule 44.1 when it considered its own research and testimony from both parties about Afghan law and the prevalence of informal customs" in determining the meaning of Afghan law); *Palencia v. Perez*, 921 F.3d 1333, 1339 (11th Cir. 2019) (recognizing the "generally recognized sources of law" in Guatemala as "constitutional provisions, statutes, administrative regulations, and customs"); *Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp.*, 161 F.3d 314, 319 (5th Cir. 1998) (adopting *In re Arb. Between Trans Chem. Ltd. & China Nat. Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 289 (S.D. Tex. 1997) (concluding that the China National Machinery Import and Export Corporation was owned by the Chinese state on the basis of evidence beyond the face of written Chinese legal materials, including extensive expert testimony and documentary evidence regarding the Corporation's own statements and conduct); *Kaho v.*

Ilchert, 765 F.2d 877, 884 (9th Cir. 1985) (rejecting the conclusion that "the lack of a statutory procedure for the adoption of legitimate children compels a determination that customary adoptions are not recognized under Tongan law" after considering the expert testimony of an academic anthropologist and a statement from the Tongan Crown Solicitor as to Tongan customs).

3. The consensus approach is correct. "[O]ne of the policies inherent in Rule 44.1 is that whenever possible issues of foreign law should be resolved on their merits and on the basis of a full presentation and evaluation of the available materials." 9A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE §2444 (3d ed. 2008).

Nothing in *Hartford Fire* justifies the Second Circuit's "face-value only" rule. *Hartford Fire* held that "no conflict exists" for purposes of international comity "where a person subject to regulation by two states can comply with the laws of both." 509 U.S. at 799 (cleaned up). But *Hartford Fire* did not suggest, let alone hold, that the foreign-law side of the equation must be interpreted by taking written legal materials at "face value," or by privileging written governmental directives over other legal authorities without regard for how law is interpreted in the relevant foreign legal system.

It would be perverse to require American courts, in the name of international comity, to interpret foreign law differently than the way it would be in that law's own legal system. Here, Respondents' own expert explained that the meaning of Chinese law turns on evidence of oral directives and context-specific enforcement decisions by Chinese officials, of which

there were *many* in the record before the district court, s*upra*, at 6–11, and which the District Court recognized as "an essential part of the Chinese law governing vitamin C." App.138a n.36. The panel majority used its self-imposed "face value" limit to sidestep that evidence. Contrary to the Second Circuit's holding, federal courts applying Rule 44.1 must respect—and, at a minimum, must *consider*—how foreign legal materials would be interpreted in the foreign legal system in question.

The need for fidelity to a foreign legal system's interpretive methods grows stronger the more that legal regime differs from our own. For example, U.S. courts routinely adopt the interpretive methods of civil-law jurisdictions, such as their differing treatment of judicial precedent, when interpreting those jurisdictions' laws. *See, e.g.*, *Palencia*, 921 F.3d at 1339. The panel's "face-value"-only rule, however, would upset that practice where it is most needed. "[A]uthoritarian legal systems often contain documents that present to the world as 'laws' but are in practice not enforced," while "other norms or commands that lack the hallmarks of legality can nonetheless regulate conduct with the force of law." Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1713, 1715 (2020). As Respondents' own expert testified, similar principles hold in China. C.A.App.307.

The panel majority's rule privileging the "face value" of written legal materials inescapably distorts the meaning of "law" in legal systems like China's. It also may lead American courts to respect—and enforce—"legal" materials that foreign authorities would not. In sum, the decision below presses the

comity doctrine into the service of foreign sovereigns that may be happy to have their written laws say one thing, provided they remain free to do another. The doctrine of international comity, which is not "a matter of absolute obligation," should not be distorted to compel that result. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

III. This Case Is an Excellent Vehicle for Resolving These Important Questions.

1. This case is an excellent vehicle for reviewing both questions presented. This petition arises in an action that has been litigated to final judgment, with a trial record (and jury verdict) that have been stable for nearly a decade. This case has already been to this Court and back without jurisdictional or other vehicle issues that would obstruct the Court's review.

In addition, each question presented is potentially outcome-determinative of Respondents' international comity defense in this case, which was the sole ground for the decision below. The Second Circuit's reframing of Respondents' comity-abstention defense as a doctrine of *ad hoc* statutory interpretation set the bar for reversal much lower than it otherwise would have been: discarding the abstention framework both freed the panel majority from the "virtually unflagging" limits on federal-court abstention, App.62a–63a (Wesley, J., dissenting), and led the panel to review the District Court's comity analysis *de novo* rather than under an abuse-of-discretion standard under which it is the "rare case" where an appellate court "can reverse a district court's balancing" of competing

comity factors. *In re Sealed Case*, 932 F.3d 915, 938 (D.C. Cir. 2019) (cleaned up).[2]

Further, as discussed above, the District Court held that it was "appropriate to consider the factual record concerning how Chinese law was enforced and applied," in part because such informal practices "appear[ed] to be an essential part of the Chinese law governing vitamin C." App.138a & n.36. Five years before fashioning its "face-value"-only rule in the decision below, the Second Circuit had noted that, but for its then-conclusive deference to the Ministry's statements, "the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required . . . would have been entirely appropriate." *In re Vitamin C Antitrust Litig.*, 837 F.3d at 191 n.10. This time, instead of a standard of conclusive deference to the Ministry's statements, it was the panel majority's "face-value" rule that caused it to disturb that "careful," "thorough," and "appropriate" approach to interpreting Chinese law. *Id.*

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[2] The panel majority noted in passing that "[e]ven were [it] to consider this case under the rubric of adjudicative comity," *i.e.*, comity-based abstention, it would apply an "unusually rigorous" abuse-of-discretion standard. App.10a n.7. In addition to being dicta, that observation was incorrect. Precisely because of the federal courts' "virtually unflagging obligation" to exercise jurisdiction, a heightened abuse-of-discretion standard applies *only* where the district court has decided *to abstain* from jurisdiction. *In re Picard*, 917 F.3d 85, 101 (2d Cir. 2019); *Hachamovitch v. DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998). An ordinarily deferential abuse-of-discretion standard applies where, as here, a district court has *declined* to abstain. *Id.*; *see In re Sealed Case*, 932 F.3d at 938.

Finally, the questions presented warrant this Court's attention. U.S. courts confront Chinese law in a staggering number of cases and contexts, to say nothing of foreign law more generally. *See* Jia, 168 U. PA. L. REV. at 1699–1704. The panel majority's "face-value" rule will prevent those courts from accurately interpreting foreign law as Rule 44.1 and this Court's precedents require, and would leave U.S. courts vulnerable to manipulation by authoritarian regimes. The majority's case-by-case statutory interpretation doctrine also threatens to destabilize the federal courts' heretofore consistent application of U.S. antitrust law to foreign conduct that harms American commerce, depriving consumers and market participants of predictability regarding the application of the Sherman Act to future conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2022

APPENDIX

APPENDIX A: Opinion of the United States Court of Appeals for the Second Circuit, Dated August 10, 2021

In the
United States Court of Appeals
for the Second Circuit

August Term, 2020
No. 13-4791-cv

IN RE VITAMIN C ANTITRUST LITIGATION

ANIMAL SCIENCE PRODUCTS, INC., THE RANIS COMPANY, INC.,
Plaintiffs-Appellees,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., NORTH CHINA PHARMACEUTICAL GROUP CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of New York.
No. 1:06-md-1738 – Brian M. Cogan, *Judge*.

ARGUED: MARCH 17, 2021
DECIDED: AUGUST 10, 2021

Appendix A

Before: CABRANES, WESLEY, and NARDINI,
Circuit Judges.

Animal Science Products, Inc. and The Ranis Company, Inc. (the "plaintiffs"), American purchasers of bulk Vitamin C, brought this class action alleging that four Chinese exporters of Vitamin C conspired to inflate prices and restrict supply in violation of the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. §§ 4, 16. The United States District Court for the Southern District of New York (Trager, *J*.) denied the defendants' motion to dismiss on the basis of the act of state doctrine, foreign sovereign compulsion, and international comity. The district court (Cogan, *J*.) subsequently denied the defendants' motion for summary judgment on the same grounds, and the case proceeded to trial. All defendants settled other than Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei") and its parent company North China Pharmaceutical Group Corp ("NCPG"). Following a jury verdict of liability, the district court entered a trebled damages award of $147,831,471.03, plus interest, and permanently enjoined Hebei and NCPG from future anti-competitive behavior. The district court then denied Hebei and NCPG's renewed motion for judgment as a matter of law.

In this case's first trip to our Court, we reversed. We held that the district court was bound to defer to the facially reasonable explanation of Chinese law submitted by the Ministry of Commerce of the People's Republic of China (the "Ministry"). According to the Ministry's explanation, Chinese law required the defendants to undertake the anticompetitive conduct at issue, and—accepting this explanation as

reasonable under the circumstances—we concluded that such a "true conflict" between China's regulatory scheme and U.S. antitrust laws, in combination with other international comity factors, mandated dismissal of the plaintiffs' suit. The Supreme Court reversed, holding that we afforded too much deference to the Ministry's submissions, and remanded for us to carefully consider but not conclusively defer to the Ministry's views pursuant to Rule 44.1 of the Federal Rules of Civil Procedure.

Applying the Supreme Court's instructions, we conclude once again that this case should be dismissed on international comity grounds. Giving careful consideration but not conclusive deference to the Ministry's views, we read the relevant Chinese regulations—as illuminated by contemporaneous administrative documents and industry reports—to have required the defendants to collude on Vitamin C export prices and quantities as part and parcel of China's export regime for Vitamin C. Balancing this true conflict between U.S. and Chinese law together with other established principles of international comity, we decline to construe U.S. antitrust law to reach the defendants' conduct. Accordingly, we **REVERSE** and **REMAND** with instructions to dismiss the case. Judge WESLEY dissents in a separate opinion.

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CARTER G. PHILLIPS (Joel M. Mitnick, Kwaku A. Akowuah, *on the brief*), SIDLEY AUSTIN LLP, Washington, DC, *for Amicus Curiae* Ministry of Commerce of the People's Republic of China.

WILLIAM J. NARDINI, *Circuit Judge*:

We consider this appeal, which arises from an antitrust action brought against Defendants-Appellants Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei"), North China Pharmaceutical Group Corporation ("NCPG"), and other entities incorporated under the laws of the People's Republic of China ("PRC" or "China") (together, "Defendants-Appellants"), on remand from the Supreme Court. *See Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018). Plaintiffs-Appellees Animal Science Products, Inc. and The Ranis Company, Inc. (together, "plaintiffs"), are U.S. purchasers of Vitamin C that allege Defendants-Appellants and others conspired to fix the price and supply of Vitamin C sold to U.S. companies on the international market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 4, 16.

This antitrust case is unusual in that the parties before us generally agree that the alleged anticompetitive conduct occurred. The dispute centers instead on "whether Chinese law required the Chinese sellers' conduct." *Animal Sci. Prods.*, 138 S. Ct. at 1875. Thus, we must decide whether Chinese law made it impossible for the Defendants-Appellants to comply with U.S. antitrust law, such that a so-called "true conflict" exists. This determination is critical because the existence of a true conflict, balanced in combination with other principles of international comity, may weigh against construing U.S. antitrust law to reach anticompetitive conduct occurring abroad.

We ultimately conclude that Chinese law required Defendants-Appellants to engage in price-fixing of Vitamin C sold on the international market. Defendants-Appellants thus could not comply with both Chinese law and U.S. antitrust law. In light of this true conflict, we apply the remaining principles of international comity to balance the United States' interest in the enforcement of its antitrust laws abroad against the international comity concerns implicated when those laws conflict with the laws of China. We conclude that principles of international comity required the district court to dismiss this action. We therefore **REVERSE** the judgment and **REMAND** with instructions to **DISMISS** the complaint with prejudice.

I. BACKGROUND

For more than half a century, China has been a leading producer and exporter of Vitamin C.[1] In the 1970s, as China began to move into the competitive international economy under the general direction of the Communist Party of China, the Chinese government implemented various export controls to gain a competitive edge over other producers of Vitamin C on the international market. In the intervening years, the Chinese government continued to develop policies to retain its domestic producers' competitive advantage. In the 1990s, for example, following a price war between producers in China, the Chinese government facilitated industry-wide consolidation and implemented regulations to control the prices of Vitamin C exports. By 2001, Chinese suppliers had captured 60% of the global Vitamin C market. Several years later, in 2005, plaintiffs filed this antitrust action. The original complaint named four defendants, all of which are entities incorporated under the laws of China: Hebei, Jiangsu Jiangshan Pharmaceutical Co. Ltd. ("Jiangshan"), Northeast Pharmaceutical Group Co. Ltd. ("Northeast"), and Weisheng Pharmaceutical Co. Ltd. ("Weisheng")

[1] We set forth here only those facts necessary to resolve the issues on appeal.

(together, "defendants").[2] The plaintiffs later added as a defendant Hebei's holding company, NCPG.[3]

In the district court, the defendants moved to dismiss based on the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity. In an historic act—the first official appearance by the Chinese government in a U.S. court—China's Ministry of Commerce (the "Ministry") filed an *amicus curiae* brief and several other submissions in support of the motion to dismiss.[4] The district court rejected all three grounds for dismissal and denied the motion so as to permit discovery with respect to the defendants' assertion that the Chinese government compelled the actions constituting the basis of the antitrust violations. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 552 (E.D.N.Y. 2008) (David G. Trager, *Judge*). The district court subsequently denied the defendants' motion for summary judgment, or, alternatively, a motion for a determination of foreign law under Federal Rule of Civil Procedure 44.1. *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522 (E.D.N.Y. 2011) (Brian M. Cogan, *Judge*).

In denying the defendants' motion for summary judgment, the district court again rejected application

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[2] The complaint also named Weisheng's affiliates Shijiazhuang Pharmaceutical (USA) Inc. and China Pharmaceutical Group, Ltd.

[3] As explained below, the other defendants settled before or during trial, and therefore only Hebei and NCPG brought this appeal.

[4] We discuss in detail the Ministry's submissions, four in total, later in our analysis. *See* Section III.C.3, *infra*.

of the act of state doctrine and the foreign sovereign compulsion doctrine, *id.* at 548–49,[5] which it appeared to equate with the true conflict inquiry under an international comity analysis, *id.* at 543. The district court also concluded that there was no bar to the exercise of its jurisdiction due to international comity principles. *Id.* at 542–44.

After the district court denied the defendants' motion for summary judgment, Jiangshan settled the claims against it for $10.5 million. Jury trial began on February 25, 2013. On the eve of the jury's deliberations, Weisheng settled for $22.5 million and Northeast for $500,000. On March 14, 2013, the jury returned its verdict, finding the remaining defendants—Hebei and NCPG—liable in the amount of $54.1 million. After accounting for the settlement amounts and attorneys' fees, the district court entered a trebled damages award of $147,831,471.03 plus interest from the date of judgment, as well as a permanent injunction against future anticompetitive behavior.

The district court denied Hebei and NCPG's renewed motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. *In re Vitamin C Antitrust Litig.*, 1:06-md-

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[5] The district court determined that there had been no foreign sovereign compulsion because the defendants' anticompetitive conduct was voluntary, not compelled, and the defendants had not shown that they faced a risk of severe sanctions for noncompliance. *Id.* at 554–58. Further, even if Chinese law did involve some compulsion, it "assuredly did not compel all of defendants' illegal conduct," and therefore the defense did not extend to anticompetitive measures affirmatively adopted by the defendants. *Id.* at 554.

1738, 2013 WL 6191945 (E.D.N.Y. Nov. 26, 2013). In that ruling, the district court stated that it "stands by and reaffirms its prior rulings that Chinese law did not compel defendants to engage in antitrust violations, [and] that the doctrines of act of state and international comity do not bar plaintiffs' suit." *Id.* at *1.

This Court reversed, finding that the district court erred, or "abused its discretion,"[6] by failing to abstain on international comity grounds in light of the Ministry's submissions showing a true conflict between U.S. antitrust law and Chinese export regulations for Vitamin C. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 189 (2d Cir. 2016). In doing so, we held that when a foreign government directly participates in U.S. court proceedings by providing an official representation regarding the proper interpretation of its laws, the U.S. court is bound to defer to that interpretation so long as it is reasonable under the circumstances. *Id.* The Supreme Court then reversed, holding that our Court gave too much deference to the Ministry's submissions, and remanded for us to carefully consider the Ministry's views without giving them dispositive effect. *Animal Sci. Prods.*, 138 S. Ct. at 1873.

II. STANDARD OF REVIEW

We review the district court's denial of a Rule 50 motion *de novo*, *see Legg v. Ulster Cty.*, 979 F.3d 101, 114 (2d Cir. 2020), including its determination of

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[6] *See United States v. Park*, 758 F.3d 193, 199–200 (2d Cir. 2014) (explaining that "abuse of discretion" is a "distinctive term of art that is not meant as a derogatory statement about the district judge whose decision is found wanting").

foreign law under Rule 44.1, *see Animal Sci. Prods.*, 138 S. Ct. at 1873. As to whether the district court erroneously declined to dismiss this action on international comity grounds, we review relevant questions of statutory interpretation *de novo*. *See In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC*, 917 F.3d 85, 101 (2d Cir. 2019), *cert. denied sub nom. HSBC Holdings PLC v. Picard*, 140 S. Ct. 2824 (2020).[7]

III. DISCUSSION

The central issue we address is whether the district court should have dismissed this antitrust action for reasons of international comity. As required by *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 799 (1993), our comity analysis begins by asking whether Chinese law required defendants to engage in anticompetitive conduct that violated U.S. antitrust laws, such that a true conflict exists. As part

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[7] As explained below, *see* Section III.A n.8, *infra*, we understand international comity to apply here as a form of prescriptive comity: "a canon of [statutory] construction" that may serve to "shorten the reach of a statute." *In re Picard, Tr.*, 917 F.3d at 100 (internal quotation marks omitted). In other contexts, international comity functions instead as a type of "adjudicative comity," "the so-called comity among courts," which "may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *Id.* (internal quotation marks omitted). Even were we to consider this case under the rubric of adjudicative comity—which principally applies when a district court has declined to exercise jurisdiction in deference to ongoing proceedings in a foreign court—we would in any event review that decision under an unusually rigorous abuse-of-discretion standard that leaves "little practical distinction between review for abuse of discretion and review *de novo*." *Id.* at 102 (quoting *Hachamovitch v. DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998)).

of that inquiry, and pursuant to the Supreme Court's direction to us on remand, we carefully consider the statements from the Chinese government as to the proper interpretation of its laws and what requirements those laws imposed on the defendants.

We conclude that Chinese law required the defendants to engage in price-fixing of Vitamin C sold on the international market. Because defendants could not comply with both Chinese law and U.S. antitrust law, there is a true conflict for international comity purposes. After balancing the United States' interest in adjudicating antitrust violations alleged to have harmed those within its jurisdiction with the PRC's interest in regulating its economy within its borders, we hold that principles of international comity required the district court to dismiss this action.

We start with the doctrine of international comity, paying particular attention to the true conflict standard established in *Hartford Fire,* 509 U.S. at 799.

A. International Comity

Defendants principally argue that the district court erred, at multiple intervals, in declining to dismiss this action under principles of international comity. Comity is both a principle guiding relations between foreign governments and a legal doctrine by which U.S. courts recognize an individual's acts under foreign law. *See In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1046 (2d Cir. 1996).[8] It is the "recognition which

[8] As noted above, our application of international comity in this case involves "prescriptive comity"—a form of statutory interpretation—rather than the abstention-based doctrine of

"adjudicatory comity." These are "two district legal doctrines," *In re Maxwell*, 93 F.3d at 1047, and although they "sometimes demand similar analysis, each asks a different question and is rooted in a different legal theory," *In re Picard*, 917 F.3d at 101 (internal quotation marks omitted).

In *Hartford Fire,* the Supreme Court seemed to assume that international comity should be treated as an abstention doctrine. *See* 509 U.S. at 798 (considering, but not deciding, "whether a court with Sherman Act jurisdiction should ever *decline to exercise such jurisdiction* on grounds of international comity." (emphasis added)). In dissent, Justice Scalia proposed an alternative analysis based on prescriptive comity: "Congress is generally presumed not to have exceeded . . . customary international-law limits" and therefore "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." 509 U.S. at 815 (Scalia, *J.*, dissenting). The Supreme Court's subsequent decision in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.,* cited Justice Scalia's dissent in *Hartford Fire* with approval, and it relied on this rule of prescriptive comity, based in statutory construction, which "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws [and] thereby helps the potentially conflicting laws of different nations work together in harmony." 542 U.S. 155, 164 (2004).

In keeping with *F. Hoffman-La Roche*, we consider how Congress presumably intended courts to construe U.S. antitrust law "to avoid unreasonable interference with the sovereign authority of other nations." *Id*; *see also In re Maxwell*, 93 F.3d at 1047 ("When construing a statute, the doctrine of international comity is best understood as a guide where the issues to be resolved are entangled in international relations."). That approach to understanding statutes is not of recent vintage—indeed, it has been here all along. As Chief Justice Marshall explained long ago in the case of the *Charming Betsy*, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

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 who are under the protection of its laws." *Hilton v. Guyot,* 159 U.S. 113, 164 (1895). As a general matter, international comity "takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law." *In re Maxwell*, 93 F.3d at 1048. To determine whether international comity principles require dismissal of a lawsuit, we apply a multi–factor balancing test as set forth by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614–15 (9th Cir. 1976), and then revised by the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979). *See O.N.E. Shipping*, 830 F.2d at 451 ("The comity balancing test has been explicitly used [by the Second Circuit].").[9]

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[9] In *Timberlane*, the Ninth Circuit identified seven factors for courts to balance when considering when an extraterritorial assertion of jurisdiction is justified. 549 F.2d at 614. In *Mannington Mills*, the Third Circuit expressed "substantial agreement" with *Timberlane*'s balancing test. 595 F.2d at 1297. The court noted that "foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction" when foreign nations are involved. *Id.* at 1296. It then distilled those concerns into ten factors:

(1) Degree of conflict with foreign law or policy;

(2) Nationality of the parties;

In applying this multi-factor balancing test, we are mindful of the Supreme Court's explanation in *Hartford Fire* that, to warrant dismissal on the basis of international comity, the two countries' legal demands must be irreconcilable. 509 U.S. at 799 (explaining that "[n]o conflict exists . . . where a person subject to regulation by two states can comply with the laws of both." (internal quotation marks omitted).[10] In other words, there must be a "true

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(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;

(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; [and]

(10) Whether a treaty with the affected nations has addressed the issue.

Id. at 1297–98 (internal footnote omitted).

[10] In *Hartford Fire*, certain American insurance companies and their London-based reinsurers allegedly conspired to restrict the sale of reinsurance to the American insurance market unless designated terms more favorable to insurers were incorporated into standard insurance contracts. *Id.* at 775–76. The London reinsurers argued that holding them liable under U.S. antitrust law would "conflict significantly with British law," and the

conflict" between U.S. law and that of the foreign nation to warrant dismissal of a claim pursuant to international comity.

Our analysis centers on the existence of a true conflict, but other international comity factors remain relevant. While the Supreme Court in *Hartford Fire* found "no need . . . to address other considerations" respecting international comity," 509 U.S. at 799, our Circuit has favored the view that *Hartford Fire* did not mean to thereby extinguish the remaining comity factors *sub silentio*.[11] It is for this reason that we have

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British Government, appearing as *amicus curiae*, concurred, asserting that "Parliament ha[d] established a comprehensive regulatory regime over the London reinsurance market and that the conduct alleged . . . was perfectly consistent with British law and policy." *Id.* at 798–99. The Court said this was insufficient to create a true conflict: "The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct." *Id.* at 799 (internal quotation marks and alteration omitted).

[11] In *In re Maxwell*, we noted that "*Hartford Fire* recognized that other concerns might be implicated if the context were different." 93 F.3d at 1050 (internal quotation marks omitted). We then concluded that a dispute over the applicability of the avoidance provision of the Bankruptcy Code was "significantly different from the circumstances confronting the Supreme Court in *Hartford Fire*" such that a full comity analysis was appropriate, even after finding a true conflict. *Id.*

In our prior opinion, we read *Hartford Fire* "narrowly," limiting its singular focus on the existence of a true conflict to that case's facts and considering the "remaining factors in the comity balancing test" even after concluding that a true conflict existed. *In re Vitamin C Antitrust Litig.*, 837 F.3d at 185. The Supreme Court did not disturb this portion of our decision, and we maintain that approach here. *Accord In re Sealed Case*, 932 F.3d 915, 931–32 (D.C. Cir. 2019); *see also United States v.*

described the "conflict between domestic and foreign law" as merely "an important criterion for a comity dismissal." *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 391 (2d Cir. 2011).

B. Distinguishing True Conflicts from Foreign Sovereign Compulsion

The true conflict requirement of *Hartford Fire* shares much in common with the foreign sovereign compulsion ("FSC") doctrine, and some courts (including the district court) have treated the two alike.[12] But we detect important distinctions between the FSC doctrine and the true conflict inquiry for international comity purposes. A defendant invoking FSC must show that a "foreign government's order . . . compelled [its] business to violate American antitrust law." *Mannington Mills,* 595 F.2d at 1293.[13]

Brodie, 174 F. Supp. 2d 294, 305 (E.D. Pa. 2001) ("The Supreme Court did not purport [in *Hartford Fire*] to replace the multi-factor analysis of *Mannington Mills* and other cases.").

[12] *See, e.g.*, *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 546 ("[A]bsent compulsion, dismissal on comity grounds is not warranted."); *Trugman-Nash, Inc. v. New Zealand Dairy Bd., Milk Prods. Holdings (N. Am.) Inc.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997) ("[T]here is an actual and material conflict between American antitrust law and New Zealand law . . . sufficient to entitle defendants to invoke . . . foreign sovereign compulsion[] and international comity.").

[13] Courts have consistently declined to apply FSC absent genuine compulsion by the foreign sovereign. For example, the FSC defense was unavailable to American banks that induced Mexican officials in 1919 to grant them tax preferences and a commercial monopoly over sisal because, while the restraints on trade were "aided by discriminating legislation," the conspirators "by their own deliberate acts . . . brought about forbidden results within the United States." *United States v. Sisal Sales Corp.*, 274

In probing for bona fide compulsion, courts have required defendants asserting FSC to show that non-compliance with foreign law portends a significant risk of substantial sanctions.[14] Some courts have also

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U.S. 268, 276 (1927). Similarly, FSC did not shield from antitrust liability companies who monopolized vanadium supply and fixed prices in Canada and the United States from 1933 to 1949 where there was "no indication that the [Canadian Government Metals] Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from [the plaintiff] be stopped." *Cont'l Ore Co.*, 370 U.S. at 706. The fact that one defendant, appointed by the Canadian government to be exclusive wartime purchasing agent for vanadium, "was acting in a manner permitted by Canadian law" did not establish a basis for FSC, as there was "nothing to indicate that such law in any way compelled discriminatory purchasing." *Id*. at 707.

[14] *See, e.g., Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958) (excusing Swiss party's "failure to satisfy fully the requirements of [a] production order . . . because production of documents in Switzerland pursuant to the order of a United States court might violate Swiss laws" and thus subject the party to "criminal sanctions"); *United States v. First Nat. City Bank*, 396 F.2d 897, 905 (2d Cir. 1968) (refusing to excuse compliance with a grand jury subpoena when "risk of civil damages was slight and speculative"); *Brodie*, 174 F. Supp. at 301 (rejecting FSC defense based on foreign "blocking statutes" designed to counteract U.S. Cuban Assets Control Regulations because it "would be very difficult for the Canadian or U.K. government to mount a prosecution under the blocking statutes" and there was no evidence of past enforcement); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1294 (D. Del. 1970) (granting FSC defense where Venezuelan oil ministry "supervised concessionaires rigorously and conducted regular reviews of their sales policies," "promulgated rules regarding the sale of oil extracted there," and imposed "[s]anctions for violation

required the party asserting the defense to act in good faith by "mak[ing] all efforts to comply with U.S. law," *Brodie*, 174 F. Supp. at 300 & n.5, on the grounds that the foreign party is in the best position to "plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance" with U.S. law, *Société Internationale,* 357 U.S. at 205.[15]

In its discussion of international comity, the Court in *Hartford Fire* made no mention of sovereign compulsion or the coercive nature of sanctions available under foreign law, instead focusing entirely on whether foreign law, taken at face value, "requires [the defendants] to act in some fashion prohibited by the law of the United States." 509 U.S. at 799. Exclusive attention to what foreign law facially requires makes sense in the context of international comity for several reasons. As a matter of first principles, "comity" is characterized by respect for another country's sovereign authority within its borders, not by examination of whether such authority exerts duress-like pressure that leaves defendants little or no choice but to engage in the prohibited conduct.[16] In focusing on the foreign state rather than

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of the rules includ[ing] suspension of the right to ship oil out of the country").

[15] *See also In re Sealed Case*, 932 F.3d at 940 (affirming district court's civil contempt citation of Chinese banks for failure to comply with discovery order—notwithstanding Chinese law forbidding disclosure—because the banks had "not demonstrated good faith" and "the requested records [we]re essential to an investigation into a matter of national security" (internal quotation marks omitted)).

[16] *See F. Hoffmann-La Roche*, 542 U.S. at 165 (recognizing that the application of U.S. antitrust law to foreign conduct

the defendants, we consider primarily what the state as sovereign legislates—not the severity of the penalties the state imposes on non-compliance. Second, a true conflict is present even where the foreign government grants the defendants some discretion in choosing how to carry out the legally mandated conduct, so long as "compliance with the laws of both countries is . . . impossible." *Hartford Fire*, 509 U.S. at 799. FSC, by contrast, applies only to the scope of conduct actually compelled under threat of severe sanctions. *See Continental Ore*, 370 U.S. at 706–07. Third, whereas FSC is a standalone basis for abstention, the finding of a true conflict is only one step—albeit a critical one—in a comity analysis. A false equivalency of FSC and true conflict analysis would convert the "degree of conflict with foreign law" factor into the be-all and end-all of the international comity analysis, rendering mere surplusage much of that longstanding doctrine. Accordingly, our discussion of international comity does not feature consideration of the threat of compulsive sanctions. Instead, we look to the laws of each country in turn to determine whether, taking those laws at face value, a true conflict exists.

C. True Conflict Analysis

The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. While this language has been interpreted to outlaw only unreasonable restraints on trade, *see, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997),

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"creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs").

certain types of anticompetitive conduct are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality," *Nat. Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978). "Price–fixing agreements between two or more competitors, otherwise known as horizontal price–fixing agreements, fall into the category of arrangements that are per se unlawful." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Thus, if Chinese law required defendants to enter into horizontal price–fixing agreements, "compliance with the laws of both countries [would be] impossible," *Hartford Fire*, 509 U.S. at 799, and there would be a true conflict.

We follow the Supreme Court's approach in *Hartford Fire* and begin our inquiry by asking whether Chinese law governing the Vitamin C industry, on its face, required defendants to engage in conduct that violates U.S. antitrust laws. We therefore scrutinize whether defendants *could have* sold and distributed Vitamin C while in compliance with both Chinese and U.S. antitrust law or "whether Chinese law required the Chinese sellers' conduct" in violation of U.S. antitrust law. *Animal Sci. Prods.*, 138 S. Ct. at 1875. As we explain below, it did. To determine what Chinese law required, we consider the "relevant material" and "source[s]." *See* Fed. R. Civ. P. 44.1; *Animal Sci. Prods.*, 138 S. Ct. at 1873.[17]

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[17] Rule 44.1 provides that "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." As the Supreme Court noted, "Rule 44.1 frees courts 'to reexamine and amplify material . . . presented by counsel in partisan fashion or in insufficient detail.'" *Animal Sci. Prods.*, 138 S. Ct. at 1873 (quoting the Advisory Committee's Note on Rule 44.1's adoption in 1966). The

1. Chinese Law Facially Required Vitamin C Price-Fixing

China's regulations for its Vitamin C industry evolved considerably between the founding of the Chamber of Commerce of Medicines & Health Products Importers & Exporters (the "Chamber") in 1989 and the filing of this antitrust action in 2005. In the early 1990s, the Ministry of Foreign Trade and Economic Cooperation (which is now known as the Ministry of Commerce, or the "Ministry") exercised near-total control over the "foreign trade and economic social organizations," also known as "chambers," which were responsible for the administration of export controls.[18] Once the Ministry ratified and registered each chamber, it provided "operation guidance" on matters such as the "development of foreign trade." App'x 3715. The 1991 Regime provided that the chambers "must accept the daily management by [the Ministry] or its authorized departments," and thus, that the Ministry was

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Rule 44.1 materials relevant to this case—which we explore in detail in the remainder of this Section—include the Chinese regulations at issue, the charters of the Chinese agencies responsible for overseeing the export regime, internal industry records and trial testimony describing how that regime actually functioned, the Ministry's statements interpreting Chinese law, and China's representations to the World Trade Organization concerning its export controls on Vitamin C.

[18] Pursuant to the Measures for Administration over Foreign Trade and Economic Social Organizations promulgated in 1991 (the "1991 Regime"), the Ministry oversaw the establishment of chambers dedicated to protecting Chinese national interests, including "the development of foreign trade and economy, the enhancement of the relationship between domestic and foreign enterprises and relevant organizations, and the order of foreign trade and economy." App'x 3713-14.

"directly responsible" for managing each chamber's daily activities and inspecting its records, including leadership candidates, personnel structure, budget, salaries, and meetings of representatives. App'x 3716-17. The Chamber, in its own right a governmental entity with the power to act with the force and effect of law, was one such entity under the Ministry's direct and active supervision.

Beginning in 1996, a price war among Chinese Vitamin C exporters led to industry consolidation among four major manufacturers, the original defendants in this action. *See In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 548. In 1997, the Ministry and the PRC's State Drug Administration promulgated a "Notice Relating to Strengthening the Administration of Vitamin C Production and Export by Ministry of Foreign Trade and Economic Cooperation and State Drug Administration" (the "1997 Notice"). A primary objective of the 1997 Notice was to "promote the healthy development of Vitamin C export and maintain the interest[s] of [China] and [exporting] enterprises." Sp. App'x 298. Accordingly, the 1997 Notice provided that the "scale of Vitamin C production shall be strictly controlled." *Id.* These controls included production quotas set by the Ministry, a licensing system for all exporters, and, within the Chamber, the creation of a "Vitamin C Coordination Group"—later known as the Vitamin C Sub-Committee (the "Sub-Committee")—which was formally established in March 1998.[19]

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[19] Pursuant to the 1997 Notice, the Sub-Committee would hold regular meetings at which the Vitamin C firms would be expected to "timely formulate and adjust export coordination price" using a "specific method for coordination . . . formulated by

The Sub-Committee's function was to "coordinate and administrate market, price, customer and operation order of Vitamin C export." Sp. App'x 318. The Sub-Committee was also required to "hold, periodically or otherwise, working meetings for Vitamin C export to exchange information, summarize and communicate experience, analyze and work out coordinated prices for Vitamin C export, [and] to supervise and inspect the implementation of such coordinated export prices set by the Sub-Committee and relevant business activities related to the enterprises." Sp. App'x 319. At these meetings, members would "discuss and set export coordinated price." Sp. App'x 320. Only Sub-Committee members were entitled to export Vitamin C. Members were obligated to comply with all regulations from the Ministry and the Sub-Committee, to "voluntarily adjust their production outputs according to changes of supplies and demands on international market" and to "[s]trictly execute export coordinate price set by the Chamber and keep it confidential." Sp. App'x 319-20. Violations of these obligations subjected a firm to "warning, open criticism[20] and even revocation of its membership." Sp. App'x 320. Members could withdraw only "subject to approval by the Sub-

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the Chamber, and filed to [the Ministry] for record." Sp. App'x 299. All licensed Vitamin C exporters would be required to participate in the Sub-Committee and "strictly implement" its "coordination" of "Vitamin C export market, price and customers." *Id*. Any exporter selling Vitamin C at a below-coordination price would be penalized by reduction of its export quota or revocation of its export rights.

[20] "Open criticism" was a serious penalty in the Maoist system of governance. *See generally* JONATHAN SPENCE, THE SEARCH FOR MODERN CHINA (2001).

Committee's Council." Sp. App'x 319. And the "Council," an executive body created within the Sub-Committee composed of the four original defendants, was responsible for proposing annual quotas and coordinating prices under "urgent circumstances." Sp. App'x 321. Beginning in 2000, another price war flattened Chinese Vitamin C export prices, and by 2001, the defendants succeeded in capturing about 60% of the global market for Vitamin C. *See In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 548. In late 2001, after importing countries threatened anti-dumping lawsuits against China, the Chamber held a meeting with the Sub-Committee's Council and procured an agreement that "[t]he committed export volume as part of the industry self-discipline shall be strictly implemented." App'x 3880. To further "the self-discipline for Vitamin C export industry in 2002," total export volumes for each manufacturer would be recorded and "export enterprises that [we]re not in strict compliance with this requirement w[ould] be punished by [the] Sub-Committee." *Id.* Violations of "disguised low prices or exporting beyond given volume" would be punishable by a deduction of "five times of the export volume that is in violation . . . from the total allocated export volume of the violating manufacturer." App'x 3881.

In December 2001, China acceded to, or became a member of, the World Trade Organization ("WTO"). Both before and after its WTO accession, China "systematically overhauled existing laws, administrative regulations and department rules to comply with WTO rules and accession

commitments."[21] In particular, China represented to the WTO that, beginning in January 2002, it "gave up export administration of . . . vitamin C."[22]

Thus, in 2002, to "adapt to the new situation of [China's] opening-up to the outside world" and to "earnestly perform the promises of [China's] entry to the WTO," the Ministry abolished the 1997 Notice. App'x 3886. In its place, the Ministry and the PRC's General Administration of Customs ("Customs") together promulgated a "Notice for the Adjustment of the Catalogue of Export Products Subject to Price Review by the Customs" (the "2002 Notice"). Sp. App'x 301. The stated purpose of the 2002 Notice, in replacing the 1997 Notice, was to "maintain the order of market competition, make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports, promote industry self-discipline and facilitate the healthy development of exports." *Id.*

The 2002 Notice implemented a Price Verification and Chop[23] ("PVC") system that made certain export products, including Vitamin C, subject to price review by each import and export chamber rather than

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[21] App'x 468 (quoting World Trade Organization, *Trade Policy Review Report by the People's Republic of China,* WT/TPR/G/161 at 12 (2006)).

[22] *Id.* (quoting World Trade Organization, *Statement by the Head of the Chinese Delegation on the Transitional Review of China by the Council for Trade and Goods,* G/C/W/441 (2002)).

[23] A "chop" is a seal recognized by Chinese customs officials indicating that an export contract or shipment conforms to the relevant rules and regulations.

Customs.[24] Under this PVC regime, each chamber was required to submit "industry-wide negotiated prices" to Customs and the Ministry. Sp. App'x 302. This would make it "conducive for the chambers to coordinate export price and industry self-discipline," thereby "maintaining good export order" and "promoting the development of the industries and exports." *Id*. And, if required by the "drastically changing international market," Customs and the chambers could suspend PVC review for certain products "with the approvals of the [Sub-Committee] and filing with [Customs] and [the Ministry]." *Id.* The Chamber amended its charter in March 2002. Under the new charter, members could "freely quit" the Chamber by written application, with no specified consequence. Sp. App'x 313. To punish violations of its charter or export regulations, the Chamber was authorized to "circulate a notice of criticism, issue a warning or suspend the membership of this member, or in case of fairly serious violation in nature, . . . with

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[24] Later, in a 2003 Announcement, the Ministry explained that the PVC system involved three steps:

1. Exporters deliver contracts to the chambers for verification.

2. The chambers verify based on (i) industry-wide price agreements (filed with the Ministry) and (ii) relevant regulations of the Ministry and Customs. The chambers must affix a chop only to conforming export contracts.

3. Exporters declare to Customs with a chop on export forms and contracts.

SPA. 310-11. According to the 2003 Announcement, the chambers would treat PVC applications from exporters who were not members of the relevant chamber the same as PVC applications from those of chamber members. SPA. 311.

the approval of the board of directors or the standing board of directors, deprive this member of its membership." Sp. App'x 313.

In June 2002, the Chamber delegated authority by administrative rule to the Sub-Committee to "coordinate and guide vitamin C import and export business as well as relevant activities" and "promote healthy development of vitamin C import and export trade" in compliance with all laws and regulations of the Ministry, Customs and the Chamber. Sp. App'x 325. The Sub-Committee also revised its charter, adding 11 non-manufacturer export trading companies and smaller manufacturers as member enterprises and recognizing its members' "[f]reedom to withdraw from the Subcommittee." Sp. App'x 326. The Council continued to serve as the "executive body" of the Sub-Committee, with members of the Council elected to four-year terms. Sp. App'x 328.

In 2003, the Chamber published a notice informing members that "industry agreed export prices [for Vitamin C]. . . have been revised" and that the "agreed prices are the minimum prices." 1:06-md-1738, Doc. 397-22 at 12 (the "2003 Notice"). The Chamber explained: "We put the limit on the floor prices but not the ceiling prices." *Id.*

Taken at face value, the applicable Chinese law during the relevant period—including both the PVC regime and the Chamber's 2002 delegation of price-coordination authority to the Sub-Committee—required the defendants, as Vitamin C manufacturers

and exporters, to fix the price of Vitamin C sold on the international market.[25]

2. Other Records Corroborate Chinese Law's Price-Fixing Requirement

This understanding—that Chinese law on its face required the defendants to fix the price of Vitamin C exports—is consistent with other information in the record, such as materials that showcase the Chamber's role in coordinating the Chinese Vitamin C industry. Indeed, from its inception, the Chinese government created the Chamber to promote "the order of foreign trade and economy." App'x 3713-14. The 1997 Notice and original charter of the "Vitamin C Coordination Group" within the Chamber (which became the Sub-Committee) made explicit what sort of "order" the Chamber served to ensure: the "coordination" of "Vitamin C export . . . price" through regular meetings at which members would "discuss and set export coordinated price." Sp. App'x 299, 320. While the 2002 Notice delegated the Ministry's reviewing authority to the Chamber, its stated goal remained "maintaining good export order." Sp. App'x 302. How did the 2002 Notice accomplish that objective? By requiring the defendants "to coordinate export price and industry self-discipline" under the

[25] While the district court reached the opposite conclusion based on (1) the apparent spottiness of enforcement during a specific period; (2) its surmise that the available sanctions were not sufficiently severe; and (3) the inference that the defendants were acting in their economic interest and thus did not need to be compelled, we find these issues largely beside the point because, as explained in Section III.B, *infra*, our decision is based on the *prima facie* conflict between U.S. law and Chinese law rather than the degree of compulsion defendants faced.

Chamber's auspices. *Id*. The Chamber then had to report these "industry-wide negotiated prices" to Customs and the Ministry. *Id*. Finally, the Chamber was authorized to affix a chop only to contracts that conformed to such "industry wide price agreements." *Id*. at 310-11. The ubiquitous references to "price coordination" in these regulations leave little doubt that the 2002 Notice instituted by the Ministry required the defendants to engage in price-fixing through the Chamber and Sub-Committee.

Administrative documents from the period corroborate this understanding of the Chamber's price-coordination role with respect to the Vitamin C industry. As described in a 2003 administrative publication, one of the Chamber's principal tasks was "[c]oordinating price." App'x 412. In the same publication, the Chamber noted that "the government and charter members" entrusted it with responsibility "to help the government manage the import and export of . . . Vitamin[] C." *Id*. at 418. Indeed, shortly after the promulgation of the 2002 Notice, the Chamber enacted an administrative rule tapping the Sub-Committee to "coordinate and guide Vitamin C import and export business as well as relevant activities." Sp. App'x 325. Then, as noted above, the Chamber published the 2003 Notice, informing member enterprises that "industry agreed export prices . . . have been revised" and that the "agreed prices are the minimum prices." 1:06-md-1738, Doc. 397-22 at 12.

Contemporaneous industry records also strongly suggest that Chinese law, as established by the 2002 Notice and overseen by the Chamber, required price-

fixing.[26] Contemporaneous industry records also strongly suggest that Chinese law, as established by the 2002 Notice and overseen by the Chamber, required price-fixing. The Chamber kept track of each firm's export volume, revenue, and average price, and reminded its members that "agreements reached . . . during the [Vitamin C] coordination meeting . . . still have to be carried out strictly." *Id.*, Doc. 397-23 at 3.[27] The Chamber set minimum prices and deterred members from undercutting those prices with the threat of discipline via chop disqualification or, *in extremis*, loss of membership rights. This system maintained order by preventing price wars, which had devastated the export industry in the past. As Qiao Haili, director of the Chamber's Western Medicine Department and Secretary General of the Sub-Committee, wrote to the Ministry in 2003, the Chamber's "coordination of [Vitamin C] has yielded notable results: through industry self-regulation, prices of [Vitamin C] exports have increased significantly and thus have recovered economic losses for the country." App'x 2173. This success avoided the

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[26] We note that the U.S. Trade Representative reported similar findings to Congress in December 2003, concluding that "China maintains price controls on several products and services . . . in the form of either absolute mandated prices or specific pricing policy guidelines as directed by the government." App'x 1427. The Trade Representative reached the same conclusions in 2004 and 2006.

[27] The 2003 Notice from the Chamber did not include an agreed price for Vitamin C. But the Chamber clearly established minimum prices to which its members adhered. If a contract price term fell below the minimum price, the 2003 Notice instructed firms to "voluntarily convert the price term to be consistent with the agreed price term." 1:06-md-1738, Doc. 397-22 at 13.

ills of "severe low-priced competition in order to sell" and "anti-dumping law suits." *Id.* Sub-Committee meeting records from 2003 and 2004 also show that Vitamin C exporters recognized the minimum prices set by the Chamber as being non-negotiable, even as the Sub-Committee members were able to exercise some discretion in determining actual market prices by consensus. The firms' efforts to "set the floor price" for the market significantly higher—such as $9.20 per kilogram—were not always successful, but market prices generally remained well above the minimum export price of $3.35 per kilogram. *See id.*, Doc. 299-8 at 1-2; Doc. 397-2 at 106. These records also document the Chamber's coordination of export quotas, and internal reports from Jiangshan show that, under the Chamber's direction, representatives from the "four major [Vitamin C] manufacturers in Beijing" agreed to "limit production during the first half of 2004 in order to stabilize the market." App'x 2100.

Our dissenting colleague correctly observes that the Chinese government appears to have been less preoccupied with orchestrating the defendants' coordination of market prices as opposed to minimum prices. *See* Dissent at 5-7. It is true that the Chamber "put the limit on the floor prices but not the ceiling prices," 1:06-md-1738, Doc. 397-22 at 12; that is, the Chinese governmental agencies involved expressly mandated only the minimum price and did not set the actual market price for Vitamin C exports. Yet Chinese law further required the defendants to coordinate—that is, to fix—market prices for Vitamin C exports. The Chamber specifically delegated responsibility to the Sub-Committee to "coordinate and guide Vitamin C . . . export business" such that the Chamber could report "industry-wide negotiated

prices" to Customs and the Ministry. Sp. App'x 302, 325.[28]

Since the Sub-Committee's establishment, its members—the defendants—had been expected to "discuss and set export coordinated price," *id.* at 320, and now they were tapped to "monitor the implementation of self-disciplinary agreements within the industry," including "coordination plans," *id.* at 331. Thus, contrary to the dissent's conjecture, the defendants could not have complied with Chinese law simply by "independently setting their prices at or above the industry-coordinated minimum price . . . ." Dissent at 3. Coordination of *market* prices as well as *minimum* prices was fundamental to the PRC's Vitamin C export system.

In practice, that system appears to have not always worked smoothly. As one defense expert explained, there were "occasions where agreements were not reached" on a market price because defendants "were mandated to engage in self-discipline to achieve basic policies, but had freedom in

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[28] One of Jiangshan's executives, Wang Qi, testified that his company was "free to decide about prices above $3.35 [per kilogram] when that was the minimum price," and that "no one outside" the company "ordered" them to "charge prices higher than $3.35." App'x 1709-10. The dissent concludes from this evidence that colluding on prices above $3.35 per kilogram "was the defendants' choice, not their legal obligation." Dissent at 7. But Qi testified unambiguously that, throughout the relevant period, his company "communicated with other Chinese Vitamin C companies about increasing Vitamin C prices." App'x 1687. No one had to *order* Qi or Jiangshan to charge higher prices. The Chinese government's legal mandate was for Jiangshan and the other defendants, operating through the Chamber and its Sub-Committee, "to coordinate export price." Sp. App'x 302.

deciding the manner in which coordination was to be achieved consistent with national goals." App'x 325. For example, when the Chamber met with the four original defendants in November 2002, "[n]o consensus was reached about price at the meeting," such that while the "minimum price for export remain[ed] unchanged," each company was permitted to "provide price quote[s] based on its own judgment." 1:06-md-1738, Doc. 397-22 at 3. Even when consensus prices were reached, they were not always stable. According to an internal Jiangshan report, the Chamber met in June 2003 with six domestic manufacturers who "all agreed to set the floor price at 9.20 USD/kg, hoping to slow down the speed of market price falling." *Id.*, Doc. 299-8 at 1–2. Yet a few weeks later, "every manufacturer quoted prices lower than the floor price." *Id.* at 2. Future meetings returned to the question of a "[t]argeted price level" that would not "give[] profit room for western producers." *Id.*, Doc. 397-22 at 18. Nevertheless, while implementation may have imperfect, the instructions were clear: the Chinese government expected the defendants to agree on a profit-maximizing market price.

These marching orders came directly from the top. In his 2003 memo to the Ministry, Sub-Committee Secretary General Haili—directly appointed by the Ministry to be the "highest level official at the Chamber responsible for administering export regulation of vitamin C," App'x 685—requested "legislation to define the legal status of the chambers" and "support from relevant government departments to assist chambers of commerce in asserting their authority." App'x 2174. Haili apparently hoped these clarifying changes would ensure that the Chamber's "rules and regulations" for members not "simply

become formality and only honest fellows will follow." *Id.* (internal quotation marks omitted). We understand this report and request to reflect Haili's understanding that the Ministry expected the Chamber to corral its members into participating in and adhering to the legally required coordination of market prices, to an extent not directly, or perhaps adequately, enforced through the PVC regime.

Consideration of all these records therefore supports our conclusion that the defendants faced a true conflict between U.S. antitrust law and the Chinese export regime's twin requirements of maintaining minimum prices and coordinating actual market price.

3. The Ministry's Submissions Regarding Chinese Law

To confirm our understanding about what Chinese law, taken at face value, required of the defendants, we "carefully consider" but do not defer conclusively to the Ministry's statement on the meaning of Chinese law. *Animal Sci. Prods.*, 138 S. Ct. at 1873. In particular, we weigh that explanation's "clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions." *Id.* at 1873–74. We first discuss the contents of the Ministry's submissions, then address the extent of our deference to their articulation of Chinese law under the standards supplied by the Supreme Court.

a. The Ministry's Submissions

The Ministry made four submissions in the district court.[29] The first was an *amicus curiae* brief in support of the defendants' motion to dismiss, submitted in June 2006 (the "Amicus Brief"). The Ministry submitted a subsequent statement in June 2008 (the "2008 Statement") in response to the plaintiff's briefing on the motion to dismiss. During discovery in 2008, the Ministry submitted a letter (the "2008 Letter") opposing a production request for confidential documents one defendant (Northeast) had exchanged with the Ministry and other governmental agencies. Finally, the Ministry submitted a statement in 2009 (the "2009 Statement") responding to statements made in the report issued by the plaintiffs' expert.

The Amicus Brief took the position that Chinese law required the defendants' conduct, such that both foreign sovereign compulsion and principles of international comity mandated dismissal of the

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[29] China's embassy in Washington, DC, also sent a diplomatic note to the U.S. Department of State on April 9, 2014, requesting that it be permitted to join the Ministry in filing an amicus brief in our Court. *See* Diplomatic Note No. CE027/14 from the Embassy of the People's Republic of China to the State Department, Supreme Court J. App'x 782-83. "Diplomatic notes are used for correspondence between the U.S. Government and a foreign government. The Secretary of State corresponds with the diplomatic representatives of foreign governments at Washington, DC, U.S. embassies abroad, and foreign offices or ministries." United States Department of State, 5 Foreign Affairs Handbook 1 H–611(a). The Ministry filed its amicus brief in our Court on April 14, 2014. The Department of State has not filed a corresponding amicus brief.

antitrust action.[30] In explicating Chinese law, the Amicus Brief noted that "China's ongoing transformation from a state-run command economy to a market-driven economy" gave rise to terms and concepts such as "coordination" and "voluntary self-restraint" that a U.S. court would likely misunderstand. App'x 153. One such potential misunderstanding, fostered by the plaintiffs' allegations, was that the Chamber functioned within China's export economy as a mere "trade association" facilitating "the collusive actions of a cartel." App'x 155 (internal quotation marks omitted). Instead, the brief explained that the Chamber served "under the authority and direction of the Ministry and . . . Customs" as part of "a regulatory pricing regime mandated by the government of China" to stabilize its export market, promote profitability, and protect national interests. App'x 156-57.[31]

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[30] The Amicus Brief argued that dismissal was warranted under the foreign sovereign compulsion doctrine because the anticompetitive conduct was compelled and under principles of international comity because of the "irreconcilable conflict between the requirements of U.S. antitrust law and the laws and policies of China." App'x 167–71, 173–75.

[31] To explain how such price coordination worked in practice, the Amicus Brief canvassed the evolution of China's system of export controls, beginning with the 1991 Regime and concluding with the 2003 Announcement. The brief noted that the defendants were compelled to become participating members of the Sub-Committee and to implement its price coordination responsibilities. In describing previous regulatory phases such as the 1991 Regime and the 1997 Notice, the Amicus Brief sometimes used the present tense in ways that conveyed the impression that defunct regulations were still in effect. *See, e.g.*, App'x at 159 ("The Ministry's authority over the Chamber is plenary . . . ." (citing regulation from the 1991 Regime)); *id.* at

The 2008 Statement ratified the Amicus Brief as an accurate representation of the Ministry's official views, which the Ministry had actively participated in drafting and reviewing.[32] The 2008 Letter reiterated this position and explained that the Ministry, the Chamber and the defendants had entered into a written common interest agreement in the class action litigation.

The 2009 Statement recapitulated the Ministry's view that the defendants were "performing their obligations to comply with Chinese laws, rather than conduct on their own initiative." App'x at 650. The 2009 Statement acknowledged that "different regulatory measures may have been implemented in line with changes of circumstances at different times,"

159-60 ("The Sub-Committee . . . is responsible for 'coordinating the Vitamin C export market, price and customers . . . .'" (quoting the Sub-Committee's 1998 Notice of Establishment)); *id.* at 167 ("Government entities policed defendants' compliance with the resulting prices and volume limits, and non-compliance would subject defendants to severe penalties . . . .") (citing the 1997 Notice and the 1998 Sub-Committee Charter alongside the 2002 Notice)). Yet the Amicus Brief stated clearly that the 2002 Notice "changed the way in which compliance with the Chamber's 'coordination' was confirmed by abolishing the [1997 Notice] and establishing a [PVC] system," which the brief identified as governing "throughout the Relevant Period." *Id.* at 164-65.

[32] In particular, the 2008 Statement emphasized that the Ministry authorized and supervised the Chamber in performing the governmental function of "regulating, through consultation, the price of Vitamin C manufactured for export from China so as to maintain an orderly export." *Id.* The 2008 Statement contended that the plaintiffs' claims—which implicated the Ministry's direct administration of Vitamin C exports—should be addressed through diplomatic engagement rather than litigation.

but maintained that "[d]uring the relevant period . . . the Ministry required Vitamin C exporting companies to coordinate among themselves on export price and production volume." *Id.* at 650–51. The 2009 Statement further explained that the Chamber exercised delegated governmental authority over Chinese exporters of Vitamin C, who could neither "ignore these policies" nor "abstain from [mandated] coordination," which constituted "an integral part of the self-discipline process." *Id.* at 651–52. Finally, the 2009 Statement argued that China's statements to the WTO concerning the loosening of price controls on exports including Vitamin C were "irrelevant" because they were "made in a different context" and were "*general descriptions* . . . presented in [that] special context." *Id.* at 652. The 2009 Statement reasserted China's right as a sovereign nation to enact limited export regulations in furtherance of its "national goal of establishing a socialist market economy." *Id.* at 652–53.

b. Deference to the Ministry's Submissions

We carefully consider the Ministry's statement on the meaning of Chinese law as articulated in its submissions, in accord with the Supreme Court's instructions. As to the submissions' "clarity, thoroughness, and support," 138 S. Ct. at 1873, each submission articulated a coherent view of Chinese law based on the relevant supporting regulations. Although in several places the Amicus Brief failed to clearly distinguish between China's prior regulatory regimes and its post-reform export controls under the 2002 Notice, this conflation weakens only the brief's argument for *compulsion* based on licensing restrictions and sanctions that were no longer

applicable after 2001.[33] It does not undermine the Amicus Brief's otherwise reasoned explication of mandatory price coordination, and we find the Ministry's explanation of that aspect of the governing export regime helpful in locating an "irreconcilable conflict between the requirements of U.S. antitrust law and the laws and policies of China." App'x 173. Next, the submissions' "context and purpose" give us some "cause for caution" in evaluating the picture painted of Chinese law. 138 S. Ct. at 1873. All four submissions "offer[] an account in the context of litigation," *id.*, and the Ministry has unambiguously staked out a common interest with defendants. Indeed, the Amicus Brief candidly portrays one of China's objectives in designing export controls as promoting "the profitability of the industry"—a goal that would be severely hampered by enforcement of an approximately $148 million judgment. App'x 156. Yet it is significant that this litigation represents the first official appearance by the Chinese government in a U.S. court, and the Ministry's submissions bespeak broader principles of international comity informing China's interest in this litigation.[34] While we take the

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[33] In particular, the Ministry's position on compulsion appears vulnerable with respect to the framework for the defendants' arrangement of actual market prices, often considerably in excess of the Chamber-mandated minimum price of $3.35 per kilogram. As we have explained, the PVC regime's enforcement scheme appears to have required only the latter price, whereas a consultative process among Chinese exporters yielded the additional price and volume coordination. Such coordination, while still clearly mandated by the Chinese government, does not appear to have been enforced with the "chop" in the same manner as the minimum price.

[34] *See* App'x 175 ("Insofar as China's sovereign policy decisions about how best to manage its economic transformation

Ministry's account of compulsive regulation with more than a grain of salt due to China's interest in avoiding the imposition of U.S. antitrust penalties on Chinese companies operating in a "socialist market economy" under the vanguard direction of the Communist Party of China,[35] we nevertheless think it appropriate to give some weight to these invocations of international comity.

Third, we are especially mindful of the Ministry's presentation of China's official views given its "role and authority" in the Chinese legal system. 138 S. Ct. at 1873. The plaintiffs have not challenged the Amicus Brief's identification of the Ministry as "a component of the State Council (the central Chinese government) and . . . the highest administrative authority in China

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conflict with the policies embodied in U.S. antitrust laws, that conflict should be addressed 'through diplomatic channels,' and not through 'the unnecessary irritant of a private antitrust action.'" (quoting *O.N.E. Shipping*, 830 F.2d at 454)); *id.* at 206 ("[T]he Chinese government respectfully submits that, to the extent the plaintiffs take issue with the Chinese government's sovereign actions over the conduct solely of its own citizens, that issue should not be addressed in the courts of the United States but rather through bilateral trade negotiations conducted by the executive branches of the respective sovereign nations involved consistent with recognized norms of international law and diplomacy."); *id.* at 653 ("China understands and believes that virtually all sovereign nations and regions (including the United States), proceeding from their own interests, have exercised various forms of government regulations over part of their private sector and certain industries. China's export regulations of Vitamin C at issue in this case are no different.").

[35] *See* ELIZABETH C. ECONOMY, THE THIRD REVOLUTION (2018); RICHARD MACGREGOR, THE PARTY (2d ed. 2013); *see generally* JOHN K. FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY (2d ed. 2006).

authorized to regulate foreign trade, including export commerce," such that it is the equivalent of "a cabinet level department in the U.S. governmental system." App'x 151. As such, the Ministry was able to convey "the views and understandings of certain PRC government agencies" with the benefit of active participation and line editing by officials in Beijing. App'x 205. We find it significant that a governmental agency in the Ministry's position has "attached great importance" to this litigation, as evident in its unprecedented appearance on behalf of the Chinese government and repeated filings as an amicus in the district court, this Court, and the Supreme Court. App'x 650. In considering the implications for international comity of applying U.S. antitrust law to conduct by Chinese companies forming an integral part of the Chinese export regime, we give considerable weight to this consistently salient presentation of official views by China's highest administrative authority on export commerce.

We find inconclusive "the transparency of the foreign legal system" factor, the next factor the Supreme Court has instructed us to consider. 138 S. Ct. at 1873. While China's legal system is "something of a departure from the concept of 'law' as we know it in this country—that is, a published series of specific conduct-dictating prohibitions or compulsions with an identified sanctions system," *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 550, this ambiguity cuts both ways. On the one hand, a reasonable interpretation offered by the responsible governmental authority is especially helpful in understanding a system that would be difficult for a U.S. court—unversed in Chinese law—to piece together on its own. On the other hand, we are less

inclined to trust the representations of a regime lacking transparency or democratic accountability, especially when the opaque nature of the regulations in question frustrates our ability to check the Ministry's account against an objective standard. We are nonplussed by what we perceive to be a double-edged sword of transparency, so—having addressed why it cuts in both directions—we do not assign it significant weight among the relevant factors when considering the deference due to the Ministry's submissions.

Finally, we are mindful of the Supreme Court's instruction that we consider the Ministry's "statement's consistency with [China's] past positions," given "the submissions made by the U.S. purchasers casting doubt on the Ministry's account of Chinese law." 138 S. Ct. at 1872–74. In particular, we must assess the credibility of the Ministry's account of the 2002 Notice as compulsory in light of China's representation to the WTO in 2002 that it "gave up export administration of vitamin C." *Id.* at 1871 (ellipsis omitted).

As an initial matter, we find that China's statement to the WTO and others like it adduced by plaintiffs—when read alongside the 2002 Notice and 2003 Announcement—are consistent with the notion that China was *loosening* price controls by delegating regulatory authority *from* the Ministry and Customs *to* the Chamber and Sub-Committee, not abandoning export regulations altogether. Thus, we cannot be confident whether China has in fact "ma[de] conflicting statements." *Id.* at 1873. But even assuming a material contradiction, we find it entirely plausible that China sought to exaggerate to the WTO

its compliance with that organization's accession principles in becoming a WTO member. So too, we must consider the prospect that, in this litigation, the Ministry may have an incentive to exaggerate the compulsory nature of its Vitamin C export regime in avoiding application of U.S. antitrust law to the defendants' conduct. After all, the Ministry's 2009 Statement appears to invite such an interpretation by insisting that China's earlier representations to the WTO belonged to an entirely different, "special context." App'x 652.

Yet to the extent there is any contradiction in China's representations, that contradiction undercuts only the Ministry's argument that the 2002 Notice subjected *all* of the defendants' conduct to the kind of coercive control that would potentially implicate considerations of the FSC doctrine. But, as we explained above, our international comity analysis focuses on whether Chinese law, taken at face value, requires the defendants to act in a way that violates U.S. law. We think the persuasiveness of the Ministry's submissions regarding the specific requirement that Chinese export firms coordinate market prices as well as adhere to minimum prices remains intact. Thus, while the Chinese government may not have compelled market price coordination in the same fashion that it enforced minimum prices, our conclusion that the price-fixing feature of the 2002 Notice was nonetheless mandatory remains in place.

We therefore conclude that the Ministry's submissions, when afforded careful consideration, support our determination that Chinese law required the defendants—as members of the executive Council within the Sub-Committee charged with

"coordinat[ing] and guid[ing] vitamin C import and export business," Sp. App'x 325—to be directly responsible for implementing price controls.

c. Chinese Law Required the Defendants to Price-Fix, Making It Impossible for Them to Comply with U.S. Antitrust Law

Taking Chinese law at face value, and having given careful consideration to the Ministry's statements about what the applicable laws required, we conclude that defendants were required to engage in price-fixing conduct violative of U.S. antitrust law. Furthermore, because Chinese law "require[d]" the defendants "to act in [a] fashion prohibited by the law of the United States" in their role as leading Vitamin C export firms, it was impossible for them to "comply with the laws of both" countries. *Hartford Fire*, 509 U.S. at 799.[36]

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[36] Our prior opinion deferred to the Ministry's submissions in finding that (1) vitamin C exporters were required to negotiate and agree upon an "industry-wide negotiated" price; (2) terms like "industry self-discipline" and "voluntary restraint" referred to the Chinese government's expectation that private firms engage in self-regulation with respect to agreed prices and quotas; and (3) such participation was mandatory even for non-members of the Sub-Committee. 837 F.3d at 190 & n.9.

On remand, we have reached the first conclusion on the basis of the regulations themselves, as illuminated by contemporaneous industry records and trial testimony concerning the PVC regime. Because our analysis turns on the existence of a true conflict, we reach this conclusion in light of what Chinese law facially required rather than the Chinese regulatory program's track record of enforcement. Thus, we find a true conflict even though the defendants did not always reach or adhere to a coordinated market price.

The dissent contends, nevertheless, that the defendants could have exercised their "legal right" to "freely resign" from the Sub-Committee, relieving them of their obligation under Chinese law to fix prices, in violation of U.S. antitrust law. Dissent at 4. Affording some deference to the Ministry's submissions, however, we conclude that the 2002 Notice mandated the defendants to engage in price-fixing regardless of whether they remained Sub-Committee members. As the Amicus Brief explained, "while the [Chinese] Government did not, itself, determine specific prices or quantities, it most emphatically did insist on those matters being determined *through industry coordination*." App'x 168. The Ministry originally appointed the defendants to the Sub-Committee as industry leaders responsible for overseeing that coordination. Although the revised Sub- Committee Charter provided its newly expanded membership with the right to "freely resign" through a "formal membership resignation process," App'x 2182- 83, as China's only Vitamin C manufacturers[37] the defendants were key players in an industry which

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On the second point, we find the Ministry's submissions worthy of deference, after careful consideration, insofar as they explain terms of art that are otherwise vague. *See, e.g.,* Sp. App'x 302 (Sub- Committee expected to "coordinate export price and industry self-discipline" to "assist in maintaining good export order"); 1:06-md-1738, Doc. 397-22 at 12 (an entity with contract price term below the minimum agreed export price is expected to "voluntarily convert the price term to be consistent with the agreed price term").

We address the third point next, in the text.

[37] *See* App'x 698 ("By the end of 2001, 21 companies remained in the vitamin C export business, of which four were manufacturers and the remainder were trading companies.").

the Chinese government required to engage in "industry-wide" negotiations to further "industry self-discipline," Sp. App'x 302. As such, the defendants could check out of the Sub-Committee any time they liked, but—vis-à-vis the more general obligation to exchange information and coordinate on price and volume—they could never leave.[38]

In short, as industry leaders tapped for key roles in China's vitamin C export regime, the defendants had no exit from the irreconcilable conflict between Chinese law and U.S. antitrust law.

D. Additional Relevant International Comity Factors

Having found a true conflict between Chinese and U.S. antitrust law, we weigh that factor in combination with the other comity factors. *See Mannington Mills*, 595 F.2d at 1297–98.[39]

1. Nationality of the Parties and Site of the Anticompetitive Conduct

The defendants are companies owned by Chinese nationals, located and headquartered in China and primarily doing business there. The anticompetitive conduct at issue took place among these companies in China. The international comity concerns attending

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[38] *See* THE EAGLES, HOTEL CALIFORNIA (Asylum Records, 1976); *see also* App'x 685, 701 (Sub- Committee Secretary General Haili described in his affidavit how, even after the 2002 reforms, "as a practical matter, no manufacturer could abandon participation in the Sub-Committee or the meetings that the Chamber called.").

[39] We have condensed these factors somewhat and have omitted one factor—regarding the existence of an international treaty on point—which is not relevant here.

extraterritorial enforcement of U.S. antitrust law therefore apply fully in this context. *See In re Maxwell*, 93 F.3d at 1051–52; *Bi v. Union Carbide Chemicals & Plastics Co.*, 984 F.2d 582, 586 (2d Cir. 1993); *Timberlane*, 549 F.2d at 615. Accordingly, that the nationalities of the parties and the location of the anticompetitive conduct are foreign weigh in favor of dismissal under international comity principles.

2. Effectiveness of Enforcement and Alternative Remedies

The judgment entered below would require collection from foreign defendants and enforcement of a permanent injunction abroad, which China may not tolerate.[40] If enforced, the trebled damage award and threat of future sanctions from violating a permanent injunction would be likely to deter defendants from future anticompetitive behavior. Yet it also seems likely that China will continue to set minimum prices. The consequences of enforcing the judgment are therefore uncertain. As to alternative remedies, the parties have not brought to our attention any pending litigation in an international forum related to this

[40] Notably, Article 276 of the Civil Procedure Law of the People's Republic of China (2017) provides that "[i]f any matter in which a foreign court requests assistance would harm the sovereignty, security or public interest of the People's Republic of China, the [Chinese] court shall refuse to comply with the request." Similarly, Article 282 forbids Chinese courts from executing any foreign judgment which "contradicts the basic principles of the law of the People's Republic of China or violates State sovereignty, security or the public interest."

case.[41] Recourse to the WTO or another international forum remains available to the United States.

Accordingly, these aspects of the comity inquiry do not weigh heavily either in favor of or against dismissal.

3. Foreseeable Harms to American Commerce

We find that harm to American commerce from China's export controls was foreseeable. The Ministry's Amicus Brief concedes that one goal of the 2002 Notice was to maximize "the profitability of the industry." App'x 156. The Chambers set price levels so as to "neither incur an anti-dumping lawsuit" nor concede "profit room for western producers." 1:06-md-1738, Doc. 397-22 at 18. Notably, the Chamber assumed that "[d]omestic anti-trust laws generally do not get involved in the foreign trade area." *Id*. Thus, the defendants actively sought to avoid U.S. liability while inflating profits at the expense of consumers, foreseeably including Americans such as the plaintiffs here. Yet the Ministry set that priority for the Chamber; the defendants did not act independently. Thus, because we find that harm to American commerce was foreseeable, even if we do not impute to the defendants any specific intent to harm American consumers, this factor likely weighs against dismissal for reasons of international comity.

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[41] There was litigation of a similar case in the Third Circuit, but that Court of Appeals did not have occasion to reach the issues we address in today's decision. *See Animal Sci. Prods., Inc. v. China Nat. Metals & Mins. Imp. & Exp. Corp.*, 702 F. Supp. 2d 320 (D.N.J. 2010), *vacated and remanded sub nom. Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), *as amended* (Oct. 7, 2011).

4. Reciprocity

The parties have not brought to our attention any circumstances under which the U.S. Government mandates price-fixing by American export companies. Nonetheless, if U.S. companies fixed prices in the United States pursuant to such a policy and a Chinese party sued in China for a violation of Chinese law, the U.S. Government would undoubtedly expect the Chinese court to recognize as a valid defense that U.S. law required the American exporter's conduct. A Chinese court's refusal to consider that irreconcilable legal conflict as a basis for dismissing a civil action would be an affront to the United States, both because of the Chinese court's second-guessing of U.S. sovereignty over the American export industry and because that decision would set a precedent for foreign judgments against American companies acting in accord with requirements of the U.S. Government. This factor, therefore, weighs heavily in favor of dismissal on comity grounds.

5. Possible Effect upon Foreign Relations

The Ministry emphasizes that China "has attached great importance to" this case. App'x 650. In a brief filed in the Supreme Court, the Ministry stated

> The Ministry has been actively involved in this litigation since 2005. It first presented the Chinese government's authoritative interpretation of Chinese law in 2006, when it filed an *amicus* brief in the district court. It reaffirmed its position in supplemental submissions to the district court in 2008 and 2009, and in an *amicus* brief in the court of

> appeals in 2014. As both courts [] observed, this was 'historic.'

Brief of *Amicus Curiae* Ministry of Commerce of the People's Republic of China in Support of Respondents, No. 16-1220 (U.S.) at 1. It appears that China perceives this case as threatening its rights as a sovereign to enact and enforce regulations governing Chinese companies conducting business within China's borders.[42] We discern that China has already taken umbrage at the district court's treatment of its representations about the meaning and operation of its law. In our judgment, the enforcement of a sizeable damages award and permanent injunction against defendants is likely to prove a considerable further "irritant." App'x 175 (quoting *O.N.E. Shipping*, 830 F.2d at 454). On such matters, we generally assign considerable significance to the views of the U.S. Department of State, for the Constitution primarily entrusts foreign relations to the Executive Branch, and we are ill-equipped to assess the numerous, cross-cutting bilateral and multilateral issues properly informing such decisions. As the Department of State has not weighed in or otherwise signaled a view one way or another on this case, we are left somewhat in the dark.[43] Nonetheless, we remain cognizant of the

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[42] *See* App'x 175 (respecting "China's sovereign policy decisions about how best to manage its economic transformation"); *id.* at 206–07 (respecting "Chinese government's sovereign actions over the conduct solely of its own citizens"); *id.* at 653 (respecting "China's export regulations of Vitamin C at issue in this case").

[43] This should come as no surprise, as the Department of State generally "adheres to a policy that it does not take positions regarding, or participate in, litigation between private parties, unless required to do so by applicable law." *Société Nationale*

Supreme Court's general observation—raised in the context of the presumption against extraterritoriality—that the Judiciary is understandably cautious not to "erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013). This presumption "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2100 (2016). After all, "[t]he Judiciary does not have the institutional capacity to consider all factors relevant to creating a cause of action that will inherently affect foreign policy." *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1940 (2021). Consequently, to the extent the record reflects protestations of the Chinese government at the application of U.S. antitrust law to Chinese companies implementing export policy in China, and no contrary view of the Executive Branch is expressed, this factor tips in favor of dismissal for reasons of international comity.

E. International Comity Principles Favor Dismissal[44]

Balancing these factors, we decline to construe U.S. antitrust law as reaching defendants' conduct in

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Industrielle Aérospatiale, 482 U.S. at 554 n.5 (Blackmun, *J.*, concurring in part and dissenting in part).

[44] Defendants relied on two other closely related doctrines in defense of their conduct abroad, act of state and foreign sovereign compulsion, but we find it unnecessary to reach a decision as to the applicability of either doctrine in light of our international comity holding.

the circumstances presented here, and we conclude that principles of international comity warrant

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As to the act of state doctrine, because our analysis is centered on whether defendants were required under Chinese law to engage in anticompetitive conduct, we are concerned with whether China's regulatory regime was responsible for that conduct, not whether such a Chinese governmental mandate (if there was one) would itself be legal or valid. Accordingly, "the factual predicate for application of the act of state doctrine does not exist" here because "[n]othing in the present 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*, 493 U.S. at 405 (internal quotation marks and citation omitted). We are thus not called upon to express any view about the legality – under Chinese or international law – of the vitamin C export regime that the Chinese government implemented. Nor, by taking into account the Ministry's submissions to the district court, this Court, and the Supreme Court concerning the nature of Chinese law, do we sit in judgment of any official act of the Chinese government in formulating or transmitting those submissions. We merely afford those submissions careful consideration (but not conclusive deference) as we reach our conclusions about the reach of the U.S. antitrust law.

As to foreign sovereign compulsion, we might be inclined to the view that Chinese law compelled at least part of the defendants' anticompetitive conduct with sufficient coercive force to trigger this doctrine. But there is good reason to proceed with caution in such a high-stakes arena fraught with uncertainty. To conclude that this action merits dismissal on foreign sovereign compulsion grounds, we would be required to predict the severity of sanctions defendants might have faced in China for noncompliance, as well as pass on whether the defendants acted in bad faith—or simply had no alternative—given that they did not petition Chinese authorities to harmonize their vitamin C export regime with U.S. antitrust law. Yet we need not reach these vexed questions because international comity provides ample basis for declining to apply U.S. antitrust law to defendants' conduct in this case.

dismissal. The existence of a true conflict between Chinese and U.S. antitrust law, Chinese nationality of all of the defendants, extraterritorial nature of the anticompetitive conduct, and potential impact upon foreign relations together strongly favor dismissal.[45] While the efficacy of enforcing a judgment is unclear, we acknowledge that enforcement could be salutary for the international Vitamin C market, especially given that economic harm to American consumers was foreseeable. The United States undoubtedly has a substantial interest in the uniform enforcement of its antitrust laws, including the deterrence value of treble damages against foreign companies whose anticompetitive conduct causes substantial and foreseeable economic injury to American consumers. Yet the U.S. Department of Justice has not brought criminal antitrust enforcement actions against these defendants, and the Department of State has not weighed in as an *amicus curiae* on either side of the issue.[46] There are also alternate means for the United

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[45] *See O.N.E. Shipping*, 830 F.2d at 453 (affirming dismissal of complaint for reasons of international comity where foreign sovereign's cargo reservation laws "were alleged to be at the core of" the anticompetitive harm).

[46] While the Office of the Solicitor General filed a brief in support of plaintiffs' petition for certiorari in the Supreme Court, that brief primarily addressed the question of what level of deference U.S. courts should extend to a foreign sovereign's statement of its own law. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, 138 S. Ct. 1865 (No. 16-1220), at 12-29. As the dissent observes, *see* Dissent at 9 n.4, the Solicitor General criticized our prior opinion in passing for giving "inadequate weight to the interests of the U.S. victims of the alleged price-fixing cartel and to the interests of the United States in enforcement of its antitrust laws," and "too much weight to China's objections to this suit," Brief for the United States at 20. But it is the Legal Adviser of the Department of

States to vindicate those interests, such as through bilateral diplomatic efforts, multilateral discussions, trade proceedings in the WTO, or dispute resolution in another international forum. While the stakes are high for both countries, we conclude that the United States' concern with extraterritorial enforcement of a private civil judgment under its antitrust laws is substantially diminished in these circumstances. In light of these considerations of international comity, we do not construe the Sherman and Clayton Acts to reach the present controversy.

IV. CONCLUSION

We therefore **REVERSE** the judgment of the district court, and **REMAND** with instructions to **DISMISS** the complaint with prejudice.

State who expresses the Executive Branch's view on internationally significant cases and their ramifications for foreign relations. *See, e.g., Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 296 (2d Cir. 2007) (Korman, *J.*, concurring in part and dissenting in part). The Solicitor General's brief neither claimed to report the views of the Executive Branch or the Department of State in this respect, nor otherwise purported to represent that a decision one way or the other in this case might have any particular effect on foreign relations.

WESLEY, *Circuit Judge*, dissenting:

Did "Chinese law require[] the Chinese sellers' conduct[?]" *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1875 (2018). The majority never really answers. Instead, it improperly applies the doctrine of international comity to avoid a finding it cannot contest: that Chinese law did not require the defendants to fix prices above the minimum of $3.35/kg, which is what Hebei and NCPG (the "defendants") did. Because it was not impossible for the defendants to comply with both Chinese and U.S. law, this case should not be dismissed on international comity grounds. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993).

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations." 15 U.S.C. § 1. "[P]rice-fixing agreements are unlawful *per se* under the Sherman Act." *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 345 (1982). It is well established that § 1 proscribes only concerted, not unilateral, action. *See Fisher v. City of Berkeley, Cal.*, 475 U.S. 260, 266 (1986). "Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement [with another, separate entity]." *Id.*

As a threshold matter, the plain text of the regulations and agency charter demonstrates Chinese law did not *require* the defendants to *coordinate* vitamin C prices and quantities at all. The 2002 Notice establishing the Price Verification and Chop ("PVC") system stated "the relevant chambers must .

. . submit to [Customs] information on industry-wide negotiated prices." Sp. App'x 302. The 2003 Announcement explained "the Chambers shall . . . affix the . . . chop . . . to the export contracts at the blocks where the prices and quantities are specified" and "verify the submissions by the exporters based on the industry agreements." *Id.* at 310. The Vitamin C Subcommittee, "a self-disciplinary trade organization jointly established on [a] voluntary basis" to, *inter alia*, "coordinate and guide vitamin C import and export business," expressly gave members "[f]reedom to withdraw from the Subcommittee" in its amended 2002 Charter. *Id.* at 325–26. The 2003 Announcement acknowledged membership was optional, instructing the Chambers to "give [non-member exporters] the same treatment as to member exporters." *Id.* at 311. In other words, under the PVC regime, the defendants were not legally required to engage in any concerted action. They could have complied with Chinese law without violating the Sherman Act by resigning from the Subcommittee and thereby independently setting their prices at or above the industry-coordinated minimum price, abstaining from any "meeting of the minds" to agree on price.[47] *See Fisher*, 475 U.S. at 267.

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[47] The majority concludes that "[a]ffording some deference to the Ministry's submissions . . . the 2002 Notice mandated the defendants to engage in price-fixing regardless of whether they remained [Subcommittee] members." Maj. Op. at 54–55. However, the Ministry did not argue vitamin C exporters who were not members of the Subcommittee still needed to *coordinate* prices. In fact, both the Ministry and the majority emphasize that price coordination occurred through the Vitamin C Subcommittee. *See, e.g.*, App'x 159 (Ministry's 2006 amicus brief) ("Throughout the [r]elevant [p]eriod, the Chamber exercised its regulatory authority with respect to vitamin C exports through its Vitamin C [Subcommittee]."); Maj. Op. at 31 ("[T]he Chamber

The Ministry and defendants do not dispute this conclusion. The Ministry explicitly agreed that "[u]nder the [Vitamin C Subcommittee's] 2002 Charter . . . [Subcommittee] membership was no longer necessary to export vitamin C." Ministry's Letter Br. at 5. Its argument that "through the PVC system . . . the Chamber . . . ensured that each manufacturer complied with the industry's price and volume restrictions," *id.*, does not amount to a violation of the Sherman Act. *See Fisher*, 475 U.S. at 267 (holding that "the mere fact that all competing property owners must comply with the same provisions of the [city's rent control] [o]rdinance is not enough to establish a conspiracy among landlords"). The defendants concede members were able to freely resign, but contend they could not because they were members of the executive "Council" elected to four-year terms. *See* Appellants' Letter Br. at 3. However, there is no indication their status impeded their legal right to resign. Their argument they could not as "a practical matter," *id.*, is inapposite; we are concerned only with what Chinese law required.

Despite recognizing that members could resign from the Subcommittee, the Ministry avers that the PVC regime required the defendants to violate the Sherman Act. I do not think the Ministry's submissions merit deference under the Supreme Court's five-factor test. *See Animal Sci. Prods.*, 138 S. Ct. at 1873. They lack sufficient "clarity, thoroughness, and support," *id.*, as they conflate

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delegated authority by administrative rule to the [Subcommittee] to 'coordinate and guide vitamin C import and export business as well as relevant activities.'") (citation omitted).

China's 2002 PVC regime with its 1997 regime and fail to address salient issues such as the "suspension provision" of the 2002 Notice permitting "the customs and chambers [to] suspend export price review," Sp. App'x 302, and the right under the 2002 Charter to freely resign from the Vitamin C Subcommittee. The "context and purpose" factor, *Animal Sci. Prods.*, 138 S. Ct. at 1873, cuts strongly against the Ministry; I do not see how this being the Chinese government's first official appearance in a U.S. court mitigates the fact that the Ministry has only taken this —as the majority recognizes—self-serving position for the first time in the context of this litigation. *See* Maj. Op. at 47–48. Its view conflicts with China's public representation to the World Trade Organization ("WTO") in 2002 that it "gave up export administration of . . . vitamin C," noted under the heading "any restrictions on exports through non-automatic licensing *or other means* . . . ." World Trade Organization, *Transitional Review under Art. 18 of the Protocol of Accession of the People's Republic of China*, G/C/W/438, at 2–3 (2002) (some emphasis omitted). Upon careful and respectful consideration, these deficiencies prevent me from finding the submissions worthy of deference.

Moreover, the record makes clear that Chinese law did not require the defendants to agree on prices above the minimum of $3.35/kg, which is what the defendants did. In a 2003 Notice informing "member enterprises" of the "industry[-]agreed export prices," the Chamber asserted "[t]he agreed prices are the *minimum prices*. We put the limit on the *floor prices* but not the *ceiling prices*." App'x 1934 (emphases added). Wang Qi, an executive of one of the original defendants that settled before trial, testified:

> Question: And when the minimum price for verification and chop was $3.35, the Chamber of Commerce did not care if your company sold Vitamin C at a price higher than $3.35; isn't that right?
>
> Answer (Qi): Correct. That is like a minimum price.
>
> Question: *You were free to decide about prices above $3.35 when that was the minimum price*?
>
> Answer (Qi): *Yes, when it's over they don't care.*
>
> . . .
>
> Question: And no one ordered you outside of your company to charge prices higher than $3.35 when that was the minimum price?
>
> . . . [(Qi asks to clarify question)]
>
> Answer (Qi): No.

Id. at 1709–10 (emphases added). Qi's testimony is consistent with the Ministry's and defendants' accounts. The Ministry described the PVC regime as "the minimum export price rule," explaining that "Chinese law imposed *minimum price thresholds* via PVC," Ministry's Letter Br. at 2, 4 (emphasis added), and "[i]f the price was at or above *the minimum acceptable price set by coordination* through the Chamber, the Chamber affixed a . . . 'chop,' on the contract," App'x 164 (emphasis added). This accords with the Ministry's consistent contention that China adopted the PVC system to "avoid anti-dumping sanctions imposed by foreign countries on China's exports," *id.*, also identified as a goal in the 2002 Notice. *See also* Appellants' Letter Br. at 4 ("The prices agreed on were up to the companies so long as

they exceeded anti-dumping minima."). As a result, even if Chinese law required vitamin C exporters to coordinate in setting a price, it was only a minimum price; to collude on prices above that was the defendants' choice, not their legal obligation.

The majority acknowledges that "the [Subcommittee] members were able to exercise some discretion in determining actual market prices by consensus," Maj. Op. at 36, and that "the PVC regime's enforcement scheme appears to have required only the [minimum price of $3.35/kg]," *id.* at 47 n.33. Yet it surmises that "the additional price and volume coordination" above the minimum was "still clearly mandated by the Chinese government," without any support.[48] *Id.* Neither the defendants nor the majority proffer any evidence suggesting vitamin C exporters needed to agree on *every* price rather than just the minimum price. Instead, the defendants argue that "the price level established does not matter" because the Sherman Act prohibits price fixing *per se*. Appellants' Letter Br. at 6. However, international comity does not work that way. International comity is a careful balancing act.[49] It

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[48] Indeed, if not for the PVC regime—instituted by the 2002 Notice and equated with "Chinese law" during the relevant period by the Ministry and defendants—it is unclear what "material or source" establishes that Chinese law required the defendants to fix prices above the minimum. *See* Fed. R. Civ. P. 44.1.

[49] Some scholars have raised concerns regarding the ten-factor balancing test applied by the majority to determine the extraterritorial reach of a federal statue, arguing that the Supreme Court has rejected this approach as unworkable. *See* Brief for Professors of International Litigation as Amici Curiae Supporting Neither Party, *Animal Sci. Prods.*, 138 S. Ct. 1865

requires "tak[ing] into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law." *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1048 (2d Cir. 1996). Accordingly, "[w]hen there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, *J.*, concurring). China's purpose in enacting the PVC regime, as characterized by the Ministry, was to "transition from a State-controlled economy" as it entered the WTO and to avoid anti-dumping sanctions. Ministry's Letter Br. at 3. Even accepting for argument's sake that Chinese law required the defendants to coordinate on a minimum price to achieve its concern about anti-dumping claims, applying comity for agreements above the minimum goes above and beyond accommodating the central interests of the foreign state. Nothing in the international comity precedents implies a true conflict exists where only part of the defendants' conduct was required under foreign law. As the Supreme Court held in *Hartford Fire*, there is no true conflict if foreign law did not "require[] [defendants] to act in some fashion prohibited by the law of the United States" or if the defendants' "compliance with the laws of both countries" was possible. 509 U.S. at 799. The phrase "act in some fashion" does not direct courts to ignore

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(No. 16-1220), at 11–13. For my purpose here, I do not address whether the multi-factor balancing test should not be applied at all.

whether there exists a true conflict as to the defendants' actual conduct at issue. Indeed, as the majority recites repeatedly, the comity analysis looks to the "*degree* of conflict with foreign law," not simply whether there is any conflict period. *See Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976) (emphasis added).[50] Accordingly, even if the PVC regime required the defendants to agree on a minimum price and the defendants could not have complied with the Sherman Act because it prohibits price fixing *per se*, comity does not demand that we set aside examining if their actual price-fixing conduct was required under Chinese law. The defendants could have complied with Chinese law and the Sherman Act by: (1) exercising their legal right to resign from the Subcommittee and not participating in any conspiracy to set prices, or (2) not colluding on prices above the minimum, the only price needed to receive a chop. Given the "virtually unflagging

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[50] Because I find there is no true conflict, I do not address the remaining comity factors. However, I note that the majority's analysis, which is very similar to our 2016 decision, was criticized by the Solicitor General "express[ing] the views of the United States" in its amicus brief in support of the second question presented in the plaintiffs' petition for a writ of certiorari to the Supreme Court. Brief for U.S. Gov't as Amicus Curiae, *Animal Sci. Prods.*, 138 S. Ct. 1865 (No. 16-1220), at 1. The government remarked that we "gave inadequate weight to the interests of the U.S. victims of the alleged price-fixing cartel and to the interests of the United States in enforcement of its antitrust laws" and "gave too much weight to China's objections to this suit." *Id.* at 20. Instead, the government suggested "under the circumstances presented here, [defendants'] argument that Chinese law required them to engage in the challenged conduct might have been better analyzed under the rubric of the foreign sovereign compulsion doctrine rather than through a comity analysis." *Id.*

obligation of the federal courts to exercise the jurisdiction given them," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), this is not the "rare" case presenting "extraordinary circumstances" that warrants dismissal on the basis of comity, *see* Brief for U.S. Gov't as Amicus Curiae, *Animal Sci. Prods.*, 138 S. Ct. 1865 (No. 16-1220), at 19. I would affirm the judgment of the district court.[51]

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[51] Even if Chinese law required the defendants to agree on a minimum price, which I do not find, comity would not demand dismissal of the entire case. At the very least, I would vacate and remand for the district court to calculate damages based on prices that were above the minimum. *See* Appellees' Br. at 10 n.9 (explaining that "[p]laintiffs' damages expert 'calculated damages under the assumption that the Chinese government would have enforced a rigid price floor of $3.35 per kilogram'") (citation omitted).

APPENDIX B: Opinion of the United States District Court for the Eastern District of New York Denying Defendants' Post-Verdict Motion for Judgment as a Matter Of Law, Dated November 26, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-MD-1738 (BMC) (JO); 05-CV-0453

IN RE VITAMIN C ANTITRUST LITIGATION.

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

Plaintiffs,

v.

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

Defendants.

November 25, 2013, Decided
November 26, 2013, Filed

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

On March 14, 2013, a jury reached found defendants Hebei Welcome Pharmaceutical Co., Ltd. ("Hebei") and North China Pharmaceutical Group

Corp. ("NCPGC")[1] liable to plaintiffs[2] for violating the Sherman Act. Currently before the Court are two post-trial motions. First, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, defendants have renewed their motion for judgment as a matter of law on three grounds. Second, the Injunction Class has moved for an order permanently enjoining defendants from entering into any agreements to fix the price or limit the supply of vitamin C. Familiarity with the facts and procedural history of this action is presumed. For the reasons set forth below, defendants' motion is denied and the Injunction Class's motion is granted.

I. Defendants' Renewed Motion for Judgment as a Matter of Law

In order to succeed on their renewed motion for judgment as a matter of law, defendants must bear "a heavy burden." *Cash v. Cnty. of Erie*, 654 F.3d 324, 333 (2d Cir. 2011). A movant can be "awarded judgment as a matter of law only when 'a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.'" *Id.* (quoting Fed. R. Civ. P. 50(a)(1)). "[T]he district court must draw all reasonable inferences in favor of the nonmoving party,

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[1] All other defendants in this action settled either prior to or during trial. The jury's verdict only addressed the liability of Hebei and NCPGC.The Court certified two plaintiff classes in this action, the Director Purchaser Damages Class and the Injunction Class.

[2] The Court certified two plaintiff classes in this action, the Director Purchaser Damages Class and the Injunction Class.

and it may not make credibility determinations or weigh the evidence." *Zellner v. Summerlin*, 494 F.3d 344, 370 (2d Cir. 2007) (internal quotations and alterations omitted). Therefore, where, as here, a "jury has deliberated in the case and actually returned its verdict," the "court may set aside the verdict only if there exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the movant is so overwhelming that reasonable and fair minded persons could not arrive at a verdict against it." *Cash*, 654 F.3d at 333 (internal quotation marks omitted). Here, defendants have sought judgment as a matter of law on three grounds. I will address each ground in turn.

A. Act of State, Foreign Sovereign Compulsion, and International Comity

First, defendants argue that the jury's verdict against them is barred as a matter of law by the doctrines of act of state, foreign sovereign compulsion, and international comity.[3] In essence, defendants contend that the Court's prior rulings that Chinese law did not compel defendants' actions were erroneous and that plaintiffs' claims never should have been brought before a jury. Alternatively defendants argue that even if it was proper to submit this matter to a jury, the trial was "fatally flawed" by my decision to exclude from the jury copies of Chinese laws and

[3] Defendants previously raised these arguments in a motion to dismiss, which was denied by the late Judge Trager, and in a motion for summary judgment, or, alternatively, a motion for a determination of foreign law under Fed. R. Civ. P. 44.1, which I denied.

regulations and witness testimony about the meaning and content of those laws. The Court stands by and reaffirms its prior rulings that Chinese law did not compel defendants to engage in antitrust violations, that the doctrines of act of state and international comity do not bar plaintiffs' suit, and that it was inappropriate to present evidence about the meaning of Chinese laws to the jury. Nothing has changed from these pretrial rulings and defendants have stated no additional grounds to revisit them.

Moreover, defendants ignore that one purpose of the trial in this matter was to determine whether, regardless of what Chinese law authorized, defendants' conduct was actually compelled by the Chinese government as a matter of a fact.[4] Therefore, the Court instructed the jury that it was required to return a defense verdict if defendants proved, by a preponderance of the evidence, that the Chinese government actually compelled them to fix the price or limit the supply of vitamin C and defendants have not challenged this instruction.

There was ample evidence presented at trial from which the jury could have found that the Chinese government did not actually compel defendants' decisions to fix the price and limit the supply of vitamin C — including evidence suggesting that the "verification and chop" mechanism did not actually compel defendants to enter into anticompetitive agreements and that the Vitamin C Subcommittee of

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[4] The need for a jury to determine whether factual compulsion became even clearer during the trial when several witnesses testified that contemporaneous documents offered as evidence on the compulsion issue — including memoranda addressed to China's Ministry of Commerce — were inaccurate.

the Chamber of Commerce of Medicines and Health Products Importers and Exporters (the "Chamber") was a voluntary trade association. Moreover, in rejecting the compulsion defense, the jury necessarily assessed the credibility of witnesses' testimony and, on a Rule 50(b) motion, the Court may not second-guess those determinations. *See Zellner*, 494 F.3d at 370. Chinese laws themselves were not placed on trial. Rather, the jury was only required to determine whether the Chinese government acted, not the propriety of its actions.

Nor, despite defendants' suggestion, was it error for the Court to exclude from the jury copies of Chinese laws and regulations and witness testimony about the meaning and content of those laws.[5] Pursuant to Fed. R. Civ. P. 44.1, the determination of foreign law is a question of law. It is for the Court, not for the jury, to decide questions of law and the Court did so when it ruled that, as a matter of law, Chinese law did not compel defendants' conduct. Accordingly, defendants' renewed motion for judgment as a matter of law based on the act of state, foreign sovereign compulsion, and international comity doctrines is denied.

B. NCPGC's Liability

Second, NCPGC seeks judgment as a matter of law dismissing plaintiffs' claims and vacating the jury's verdict against it on the ground that there was insufficient evidence for the jury to find that NCPGC was a member of the anticompetitive conspiracy at issue. NCPGC contends that the overwhelming

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[5] Defendants have not sought a new trial because of the Court's exclusion of this supposed evidence.

weight of the evidence demonstrates that it was Hebei, its indirect subsidiary, which participated in the Chamber's vitamin C subcommittee meetings and entered into the relevant agreements, not NCPGC. It points to numerous memoranda summarizing meetings of the Vitamin C Subcommittee which provide no evidence that any NCPGC agents entered into anticompetitive agreements on behalf of NCPGC and it characterizes the evidence on which plaintiffs rely as "limited" and "marginal."

I previously expressed my doubts concerning the sufficiency of plaintiffs' proof of NCPGC's participation in the conspiracy in the context of defendants' Rule 50(a) motion, but nonetheless denied the motion. Although the evidence adduced by plaintiffs on this issue is hardly overpowering, I cannot conclude that there was a "complete absence of evidence" suggesting NCPGC's participation such that "the jury's findings could only have been the result of sheer surmise and conjecture." *Cash*, 654 F.3d at 333.

NCPGC attacks several categories of evidence relied on by plaintiffs but, in order to deny NCPGC's motion, I need look no further than the evidence relating to Huang Pinqi. The record shows that Mr. Huang served as Hebei's general manager and later board chairman. In 2003, while Mr. Huang was still serving as Hebei's general manager, he also became the deputy general manager at NCPGC and remained in that position through the relevant time period. It is undisputed that Mr. Huang participated in defendants entered into anticompetitive agreements. But, according to defendants, the evidence shows that Mr. Huang participated in those meetings as a

representative of Hebei, not NCPGC. Indeed, Qaio Haili, a former Chamber official, testified that Mr. Huang always attended Subcommittee meetings as a Hebei representative and numerous documents regarding Subcommittee meetings describe Mr. Huang as a Hebei representative.

To demonstrate that Mr. Huang also participated in these meetings on behalf of NCPGC, plaintiffs rely on PX 124 — a November 2004 Chamber website announcement of Mr. Huang's election as the chair of the Vitamin C Subcommittee. PX 124 refers to Mr. Huang by his NCPGC title. Both Mr. Huang and Qaio Haili, a former Chamber official, testified that this reference was merely an honorific that does not suggest that Mr. Huang participated in the Chamber on behalf of NCPGC. The persuasiveness of this explanation obviously depends on the credibility of Mr. Huang and Mr. Qaio and, given the fact that these witnesses repeatedly questioned the accuracy of certain contemporaneously created documents, there were ample grounds for the jury to question their credibility.[6] The jury had every right to credit the documentary evidence over the conflicting testimony from defense witnesses and, in the context of a motion for judgment as a matter of law, it is not appropriate for the Court to second-guess this determination.

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[6] For similar reasons, the jury properly could have discounted Mr. Qiao's testimony that NCPGC was not a member of the Vitamin C Subcommittee and was not eligible to be a member, especially in light of evidence showing that NCPGC participated in an agreement to fix penicillin prices despite being neither a member of the Penicillin Subcommittee nor a penicillin manufacturer.

Additionally, Mr. Huang never denied attending Subcommittee meetings on behalf of NCPGC and never testified that he only attended these meetings on behalf of Hebei. Although NCPGC was, of course, not required to disprove its participation, such testimony might have suggested that PX 124 could not support an inference that NCPGC participated in the conspiracy. Further, Mr. Huang testified that, prior to this election as chair of the Subcommittee, he moved his office from Hebei to NCPGC and, from that point forward, was "seldom" present at Hebei. The jury reasonably could have inferred that NCPGC participated in Subcommittee meetings at which anticompetitive agreements were entered since, when he participated in those meetings, Mr. Huang was working primarily from NCPGC. Lastly, plaintiffs produced other evidence, including NCPGC's descriptions of its activities on its website, Hebei reports concerning vitamin C manufacturing sent to NCPGC during the relevant period, and memoranda from a co-conspirator describing NCPGC's support for coordinated termination of vitamin C production. Although NCPGC criticizes each of these pieces of evidence individually, they were all put before the jury and their cumulative effect cannot be discounted. In light of PX 124, possible questions about defense witness credibility, and this other supporting evidence, I hold that there was a sufficient evidentiary basis for the jury to conclude that NCPGC participated in the conspiracy and therefore deny NCPGC's motion.

C. Reduction of Damages

Third, defendants seek a reduction of the damages award due to the Direct Purchaser Damages Class by

$7.5 million ($22.5 million after trebling). According to defendants, this amount corresponds to purchases from two non-defendants alleged to be co-conspirators, Shandong Zibo Hualong Co., Ltd ("Hualong") and Anhui Tiger Biotech Co. ("Tiger"). Defendants contend that plaintiffs failed to prove that the contracts with Hualong and Tiger lacked arbitration clauses, and that if those contracts did have arbitration clauses, then plaintiffs would be relegated to arbitration, and cannot recover damages in this action.[7] Defendants argue that, because of this lack of evidence, the Direct Purchaser Damages Class did not carry its burden of proving this portion of its damages, that the Court improperly shifted the burden of proof on to defendants, and that the jury's award is speculative.

As I said when I denied defendants' Rule 50(a) motion, I think they have this precisely backwards. One can theorize all kinds of contractual provisions that might limit or eliminate the Hualong and Tiger contracts from the calculation of damages — *e.g.*, foreign selection clauses, liability caps, or shortened statutes of limitations. Defendants have seized on the possibility of an arbitration clause in these contracts, but whatever the basis for excluding them from the calculation of damages, it was defendants' burden, not plaintiffs', to show the jury what that basis was. Any provision in those contracts that might have reduced plaintiffs' damage claim was analogous to an affirmative response to plaintiffs' damage theory, and

[7] Pursuant the definition of the certified Direct Purchaser Damages Class, only purchasers who bought vitamin C under contracts without arbitration clauses could recover damages.

like an affirmative defense, defendants had to point to such provisions. They failed to do so.

The Direct Purchaser Damages Class presented expert testimony from Dr. Bernheim estimating the amount of vitamin C purchases falling within the class definition based on U.S. International Trade Commission data and documents produced by the conspirators — documents which demonstrated that Hualong and Tiger were members of the Vitamin C Subcommittee and that their representatives attended meetings with the other conspirators. This evidence satisfied the Class's *prima facie* burden. If defendants wanted to dispute the Class's damages estimate, it was incumbent upon them to present evidence that the Class's *prima facie* showing was inaccurate and that certain contracts should have been excluded from the damages award. Defendants attempted to do that through the testimony of their expert, Dr. Wu, who testified that Dr. Bernheim's analysis was flawed.[8] But the jury rejected Dr. Wu's testimony, as evidenced by the award of damages in its verdict, and defendants never offered evidence showing that any contracts with Hualong and Tiger actually contained arbitration clauses. Therefore, I am not convinced that the damages award is impermissibly speculative and I deny defendants' motion to reduce the damages award (or alter or amend the judgment) by $7.5 million ($22.5 million after trebling).

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[8] Defendants, however, never cross-examined Dr. Bernheim concerning his decision to include Tiger and Hualong sales in his damages estimate.

II. The Motion for a Permanent Injunction

Finally, the Injunction Class seeks a permanent injunction, lasting ten years, against defendants under Section 16 of the Clayton Act, which authorizes the district courts to issue "injunctive relief . . . against threatened loss or damages by a violation of the antitrust laws." 15 U.S.C. § 26. The parties agree that the determination of whether to issue an injunction is governed by the four-part test set forth in *eBay Inc. v. MerchExchange, L.L.C.*, 547 U.S. 388, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006). Under that test, "a plaintiff seeking a permanent injunction must . . . . demonstrate (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.* at 391, 126 S. Ct. at 1839. I address each requirement in turn.

First, with regard to irreparable injury, in order to obtain a Section 16 injunction, a plaintiff "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129 (1969). Here, the Injunction Class has already proven injury, as demonstrated by the jury verdict. Defendants argue that the jury verdict only applies to the class period — December 2001 through June 2006 — and that there is no evidence that the anticompetitive conspiracy is continuing. But that

argument is unpersuasive. *See In re Data Gen. Corp. Antitrust Litig.*, MDL Dkt. No. 369, 1986 U.S. Dist. LEXIS 22076, 1986 WL 10899, at * (N.D. Cal. July 30, 1986) (imposing an injunction despite the observation that "a permanent injunction almost by definition must rest on outdated facts").

Moreover, there is evidence that anticompetitive conduct is likely to recur if not enjoined. Documentary evidence indicates that the conspirators discussed performing future actions "in a more hidden and smart way" and testimony established that, after this lawsuit was filed, conspirators stopped keeping notes of their meetings. Defendants have not renounced their conduct and they continue to contest their liability. *See Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1472 (M.D. Ala. 1993) (issuing a permanent injunction in an antitrust case where, among other things, defendants "failed to acknowledge their wrong-doing").

For the indirect purchasers, who comprise the vast majority of Injunction Class members, the injury they already suffered and any similar injury they are likely to suffer in the future is irreparable. Indirect purchasers of vitamin C cannot bring a federal claim for damages, *see generally Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), and many also lack a state law-based cause of action for damages. Further, "[h]arm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to . . . measure, or that it is a loss that one should not be expected to suffer." *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010). It undoubtedly would be difficult to measure the injury that anticompetitive conduct would cause indirect vitamin C purchasers

and no Injunction Class member should be expected to suffer injury as a result of illegal anticompetitive conduct. Accordingly, I conclude that the first *eBay* factor is satisfied.

For many of the same reasons, I conclude that the Injunction Class does not have an adequate remedy at law and the second *eBay* factor is satisfied. As noted, many indirect vitamin C purchasers cannot bring any claim for damages if defendants engage in further anticompetitive conduct. Further, even direct purchasers are only entitled to damages equal to the overcharge paid for vitamin C as a result of illegal conduct. As the eight-year (and still ongoing) history of this action attests, prosecuting international antitrust claims are difficult, costly, and time-consuming. Should defendants recommence their anticompetitive conduct, the Injunction Class will have to incur considerable expense in order to vindicate its rights.

With regard to the third *eBay* factor, the balance of hardships, contrary to defendants' contention, the injunction sought is neither "drastic" nor "extraordinary." It prohibits agreements "to fix the price or limit the supply of vitamin C sold in the United States in violation of Section 1 of the Sherman Act." In other words, all the injunction does is prohibit defendants from committing what, independently, would constitute an illegal act. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 60 S. Ct. 811, 841, 84 L. Ed. 1129 (1940) ("[T]his Court has consistently and without deviation adhered to the principle that price-fixing arrangements are unlawful per se under the Sherman Act."). Mandating compliance with the law can hardly be considered

burdensome. And, as discussed, the Injunction Class would have to incur considerable expense if it had to vindicate its rights through another litigation. Thus, I conclude that the balance of hardships favors the injunction.

Finally, the fourth *eBay* factor concerns the public interest. Civil damages suits to enforce the antitrust laws are unquestionably in the public interest. *See Zenith*, 395 U.S. at 133, 89 S. Ct. at 1582 ("[T]reble-damage cases, which are brought for private ends, . . . also serve the public interest in that they effectively pry open to competition a market that has been closed by defendants' illegal restraints.") (internal quotation marks omitted). Defendants contend that a permanent injunction "would interfere with the Chinese government's sovereign authority and its ability to regulate its own domestic affairs." This argument ignores the fact that the jury found defendants liable based on voluntary, uncompelled conduct. If, in the future, the operation of the permanent injunction comes into conflict with China's sovereign regulatory authority, defendants, or any other enjoined party, may seek to have the injunction vacated or limited on that basis. However, the Court will not deny the Injunctive Class relief to which it is otherwise entitled on the basis of speculative and uncertain future interference with the regulatory authority of another nation. Therefore, I conclude that a permanent injunction is in the public interest and that the Injunction Class is entitled to the permanent injunction it seeks.

CONCLUSION

Defendants' renewed motion for judgment as a matter of law [688] is denied and the Injunction

Class's motion for a permanent injunction [693] is granted. An Amended Judgment and Decree will issue by separate order.

SO ORDERED.

Dated: Brooklyn, New York

November 25, 2013

APPENDIX C: Opinion of the United States District Court for the Eastern District of New York Denying Respondents' Motion For Summary Judgment, Dated September 6, 2011

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 06-MD-1738 (BMC)(JO)

IN RE VITAMIN C ANTITRUST LITIGATION

This document refers to: All Actions.

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

Plaintiffs have filed suit against Chinese vitamin C manufacturers, alleging that they engaged in an illegal cartel to fix prices and limit supply for exports, including those to the United States.[1] The four main defendants are Hebei Welcome Pharmaceutical Co.

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[1] Two similar price-fixing suits are currently pending against Chinese producers of magnesite and bauxite. *See Animal Science Prods., Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320 (D.N.J. 2010), vacated, 654 F.3d 462, 2011 U.S. App. LEXIS 17046, 2011 WL 3606995 (3d Cir. Aug. 17, 2011); *Resco Prods., Inc. v. Bosai Minerals Group Co., Ltd.*, No. 06-235, 2010 U.S. Dist. LEXIS 54949, 2010 WL 2331069 (W.D. Pa. June 4, 2010).

Ltd. ("Hebei Welcome" or "Welcome"), Aland (Jiangsu) Nutraceutical Co., Ltd. ("Jiangsu Jiangshan" or "JJPC"), Northeast Pharmaceutical Co. Ltd. ("NEPG" or "Northeast") and Weisheng Pharmaceutical Co. Ltd. ("Weisheng") (collectively "defendants").[2]

Plaintiffs bring this putative class action under Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 4, 16. Plaintiffs seek treble damages and injunctive relief against all defendants except for Northeast, against whom only injunctive relief is sought. Defendants do not dispute that the cartel agreements at issue violate the antitrust laws save for one primary defense: that they were compelled by the Chinese government to fix prices. They have filed a motion for summary judgment based upon that defense and the related doctrines of comity and act of state. The three doctrines upon which defendants rely recognize that a foreign national should not be placed between the rock of its own local law and the hard place of U.S. law. However, that concern is insufficient to protect

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[2] There are also other defendants that do not manufacture vitamin C, including JSPC America, Inc. ("JSPCA"), a subsidiary of JJPC, Shijiazhuang Pharmaceutical (USA) ("Shijiazhuang"), Inc., an affiliate of Weisheng, and China Pharmaceutical Group Ltd. ("China Pharmaceutical"), the owner of Weisheng and Shijiazhuang. The complaint also names North China Pharmaceutical Group ("NCPC Group Corp."), North China Pharmaceutical Group Co. Ltd., ("NCPC Ltd.") and North China Pharmaceutical Group Corporation Import and Export Trade Co., Ltd. ("NCPC I&E") (collectively "North China defendants"). Welcome, is a partially-owned subsidiary of NCPC Ltd., which is, in turn, a partially-owned subsidiary of NCPC Group Corp. NCPC I&E is an indirectly owned subsidiary of NCPC Group Corp. that purchases vitamin C from Chinese companies including Welcome.

defendants from their acknowledged violation of the antitrust laws because, here, there is no rock and no hard place. The Chinese law relied upon by defendants did not compel their illegal conduct. Although defendants and the Chinese government argue to the contrary, the provisions of Chinese law before me do not support their position, which is also belied by the factual record. I decline to defer to the Chinese government's statements to the court regarding Chinese law.

Accordingly, defendants' motion for summary judgment is denied.

(1)

BACKGROUND

By November 2001, defendants, who faced much lower manufacturing costs than their foreign competitors, had captured over 60% of the worldwide market for vitamin C. China's share of vitamin C imports to the United States rose from 60% in 1997 to over 80% by 2002. Around this time, a number of foreign competitors discontinued or reduced production.

It is not disputed that defendants fixed prices and agreed on output restrictions. Defendants are members of the Chamber of Commerce of Medicines and Health Products Importers and Exporters ("the Chamber"). Many of the agreements at issue were reached at meetings of the Chamber and appear to have been, at the very least, facilitated by the Chamber. Defendants, however, contend that the Chamber is a government-supervised entity through which the Chinese government exercises its regulatory authority over vitamin C exports and that

all of the agreements at issue were compelled by the Chinese government.

After plaintiffs filed suit, defendants moved to dismiss the complaint, invoking the foreign sovereign compulsion defense, the act of state doctrine and the doctrine of international comity. The Ministry of Commerce of the People's Republic of China ("The Ministry"), which is the highest authority in China authorized to regulate foreign trade,[3] filed an amicus brief in support of defendants' motion, explaining the Chinese government's regulation of vitamin C exports. The Ministry "formulates strategies, guidelines and policies concerning domestic and foreign trade and international economic cooperation, drafts and enforces laws and regulations governing domestic and foreign trade, and regulates market operation to achieve an integrated, competitive and orderly market system." The Ministry is equivalent to a cabinet level department in the United States. According to the Ministry, defendants' actions were compelled by the Chinese government.

Judge David G. Trager denied defendants' motion to dismiss, finding the record, at that time, to be "simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions."[4] *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 559 (E.D.N.Y. 2008). With the benefit of some discovery, plaintiffs had offered evidence suggesting that

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[3] The Ministry was originally known as the Ministry of Foreign Trade and Economic Cooperation (or "MOFTEC"). For ease of reference, "the Ministry" is used to refer to both entities.

[4] This case was reassigned to me in January 2011 following the death of my dear colleague, Judge Trager.

defendants' agreements may have been voluntary. In addition, Judge Trager was concerned with the possibility that the cartel and purportedly compulsive governmental regulations at issue had been established at the behest of defendants and the Chinese government had simply given its "imprimatur."

Defendants now move for summary judgment on their three related defenses. Although the initial complaint in this suit was filed in January 2005, the operative complaint for the purposes of the instant motion covers the time period from December 1, 2001 through December 2, 2008.

(2)

CHINESE LAW

I. China's Economic Transition and the Establishment of the Chambers

In 1978, China began to transition from a planned economy to a "socialist market economy." During the planned economy era, the control of foreign trade was centralized under the Ministry and all foreign trade was conducted through state-owned import and trade companies according to state trade plans. After some reforms in the mid-1980's led to aggressive forms of competition, the government imposed new administrative controls, which involved the establishment of the various China Chambers of Commerce for Import and Export ("Chambers"), including the Chamber. According to defendants' Chinese law expert, Professor Shen Sibao,[5] the

[5] Plaintiffs do not have a Chinese law expert and, instead, attempt to make their case by relying on the plain language of:

formation of the Chambers was part of China's "important national policy which requires Chinese exporting companies to 'unite and act in unison in foreign trade.'"

The authority to regulate import and export commerce was eventually transferred from the state-owned trading companies to these Chambers. When the Chambers were created, they were staffed with personnel transferred directly from the government.

The Chambers were given both governmental functions, which had previously been performed by the Ministry, and private functions. The governmental functions included, inter alia, responding to foreign anti-dumping charges and industry "coordination." The private functions of the Chambers included organizing trade fairs, conducting market research and "mediating" trade disputes.

II. 1996 Interim Regulations

The first governmental directive cited in the Ministry's brief is the Interim Regulations of the Ministry on Punishment for Conduct of Exporting at Lower-than-Normal Price ("1996 Interim Regulations"), which were promulgated on March 20, 1996.[6] The 1996 Interim Regulations, which applied

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(1) directives issued by the Ministry; (2) charter documents of the Chamber and its sub-committee that dealt with the vitamin C; and (3) public statements made by the Chinese government and various Chambers to the World Trade Organization ("WTO") and the United States government.

[6] The record includes various regulatory documents issued by the Ministry that have various titles such as "Regulations," "Decision" and "Notice." These types of documents are collectively referred to herein as "governmental directives."

to all export products produced in China, address the Ministry's power to punish enterprises for exporting at "lower-than-normal" prices. Potential punishments include "a notice of criticism" and monetary fines. According to the regulations, a normal price includes the costs for producing the product as well as "reasonable profit." The Ministry could request the Chambers to investigate alleged violations of the regulations. The 1996 Interim Regulations also note that "[a]ll export enterprises shall . . . follow the coordination by various chambers of commerce for import and export trade, and set export prices which are suitable in countries to which the goods are exported."

Although not raised by either party, according to a recent decision by the World Trade Organization ("WTO"), the 1996 Interim Regulations were formally repealed on September 12, 2010. WTO, Panel Report, WT/DS394/R, WT/DS395/R, WT/DS398/R, *China-Measures Related to the Exportation of Various Raw Materials* (July 5, 2011) ("WTO Panel Report"), ¶ 7.1029 (citing Order No. 2 of 2010 (promulgated by the Ministry on Sept. 12, 2010)). However, in this proceeding before the WTO ("WTO Proceeding"), China asserted that it "ceased to impose . . . penalties [under the 1996 Interim Regulations]" as of May 28, 2008 when "verification and chop," which required export contracts to receive an official seal, was repealed.[7] *Id.* ¶ 7.1031.

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[7] In the WTO Proceeding, the United States and other countries challenged Chinese export restrictions on certain raw materials. Although vitamin C is not at issue in the WTO Proceeding, one of the raw materials in dispute was, like vitamin C, also subject to verification and chop.

III. 1996 Conference and Report

In early 1996, the Ministry held a conference and issued a report addressing problems in the vitamin C industry. Although China's vitamin C industry had rapidly expanded, the industry faced a number of problems including: (1) "violations of export administration regulations" and "the lack of strong administration and coordination of exports"; (2) a glut of capacity and Chinese vitamin C producers; (3) "disorderly" and fierce export competition that resulted in companies "blindly cutting prices"; and (4) threats of foreign anti-dumping suits. To combat these problems, the report recommended restricting production in order to "preserve price," barring expansion of production capacity and consolidating the numerous vitamin C producers.

IV. 1997 Notice and 1997 Charter

In November 1997, the Ministry and the State Drug Administration ("SDA") promulgated the Notice Relating to Strengthening the Administration of Vitamin C Production and Export by [the Ministry] and [SDA] (the "1997 Notice"). The purpose of the 1997 Notice was "to rectify the operational order and optimize the operational team of Vitamin C export, realize the scale-operation on export, improve the competitiveness of our Vitamin C products in the international market, promote the healthy development of Vitamin C export and maintain the interest of our country and enterprises . . . ."

The regulatory scheme under the 1997 Notice had three primary components. First, the 1997 Notice required export licenses, which were granted by the government based on certain qualifications, including

prior production output. Second, the Ministry set export quotas for the total volume of vitamin C that could be exported and export quotas for each individual company. Third, the 1997 Notice generally directed the Chamber to "improve the coordination on Vitamin C export [,]... supervise [the implementation of the 1997 Notice], and timely report to [the Ministry] about the relevant issues and problems." To meet these goals, the Chamber was required to establish the Vitamin C Subcommittee (the "Subcommittee"). All exporting enterprises were required to participate in the Subcommittee and to "subject themselves to the coordination of the [the Subcommittee]." The Subcommittee was directed to, *inter alia*, establish a mandatory minimum export price. Under the 1997 Notice, "the Ministry itself did not decide what specific prices should be," leaving that to the Subcommittee.

Only enterprises that followed the coordinated price and volume quotas would receive export licenses. For violations of the "relevant provisions" of the 1997 Notice, including "competing at low price and reducing price through any disguised means," enterprises could be punished through a reduction of their export quotas and even complete revocation of their export licenses.

In October 1997, the Subcommittee enacted a charter (the "1997 Charter") in accordance with the charter of the Chamber and the 1997 Notice.[8] According to the 1997 Charter, the Subcommittee was

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[8] The 1997 Charter was enacted on October 11, 1997, which is prior to the promulgation of the 1997 Notice (November 27, 1997), the effective date of the 1997 Notice (January 1, 1998) and the Ministry's approval of the Subcommittee (March 28, 1998).

organized around certain tenets, including "complying with laws of the country, implementing and executing the state policies and regulations on foreign trade [and] maintaining orderly export of Vitamin C products . . . ." The Subcommittee was to perform "coordination, direction, consultation, service and supervision & inspection functions over its members. It bridges and ties the enterprises and the government." Under the 1997 charter, the Subcommittee was supposed to, *inter alia*, supervise the implementation of export licenses, advise the Ministry on export quotas and "coordinate and administrate market, price, customer and operation order of Vitamin C export."

According to the 1997 Charter, "[o]nly the members of the Sub-Committee have the right to export Vitamin C" and to obtain a "Vitamin C export quota." In return, members of the Subcommittee were obligated to "comply with various directives, policies and regulations with respect to foreign trade, comply with the Charter and regulations of [the Subcommittee] and to implement Sub-Committee's resolution." Specifically, the members were required to "[s]trictly execute export coordinated price set by the Chamber and keep it confidential."

For violations of the 1997 Charter or any resolution issued by the Subcommittee, a member could be punished through a warning, open criticism and even revocation of its membership. In addition, the Sub-Committee would "suggest to the competent governmental department, through the Chamber, to suspend and even cancel the Vitamin C export right of such violating member."

On March 21, 2002, the Ministry abolished the 1997 Notice and other regulations,

> [i]n order to adapt to the new situation of our country's opening-up to the outside world, to further establish and improve the legal system of the socialist market economy, to earnestly perform the promises of our country's entry to the WTO, to accelerate the transformation of the functions of the government and to improve the level of administration . . . .

Only a few months earlier, the Ministry had issued regulations ("the 2002 Regulations"), which repealed, as of January 1, 2002, another directive that had subjected vitamin C and other products to export licensing and export quotas beginning on December 29, 1992 (the "1992 Interim Regulations").

V. 2002 PVC Notice and the Institution of Verification and Chop

Shortly after abolition of the 1997 Notice, the Ministry and the General Administration of Customs ("Customs") issued a notice on March 29, 2002 establishing an export regime referred to as "Price Verification and Chop" (the "2002 PVC Notice"). The 2002 PVC Notice became effective on May 1, 2002. Thirty categories of products, including Vitamin C, were now subject to "Price Verification and Chop . . . by the chambers, and [were] no longer subject to supervision and review by customs." "Following the adjustment made under [the 2002 PVC Notice], the relevant chambers" were required to submit to Customs, by April 20, 2002, "information on industry-wide negotiated prices." According to the Ministry, under verification and chop, Customs would only

permit export if the relevant contract was reviewed by the Chamber and received a "chop," which is a special seal that the Chamber would affix to the contract indicating its legality (and, more importantly, the absence of which would indicate its illegality.)

The 2002 PVC Notice explains that:

> [the Ministry] and [Customs] have made the decision to adjust the catalogue of export products subject to price review by customs for year 2002, in order to accommodate the new situations since China's entry into WTO, maintain the order of market competition, make active efforts to avoid anti-dumping sanctions imposed . . ., promote industry self-discipline and facilitate the healthy development of exports.

According to the 2002 PVC Notice, "[t]he adoption of PVC procedure shall be convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline."

The 2002 PVC Notice also provides that "[g]iven the drastically changing international market, the customs and chambers may suspend export price review for certain products with the approvals of the general members' meetings of the sub-chamber (coordination group) and filing with [Customs]" (hereinafter "Suspension Provision").

VI. 2003 Announcement

On November 29, 2003, the Ministry issued a new directive, effective January 1, 2004, that continued the verification and chop system (the "2003 Announcement"). This was done "[i]n order to

maintain the order of foreign trade and create a fair trade environment and in response to the demands of the industries engaging in export and import, as well as on the basis of the coordination by relevant industrial associations . . . ."

According to the 2003 Announcement, "[e]ach [Chamber] shall . . . strictly observe the Procedures for Implementing the Verification and Chop System on Export Commodities" ("2003 Procedures"), which are attached to the 2003 Announcement. The 2003 Procedures, which explain the verification and chop process in greater detail,[9] state:

> exporters shall deliver . . . the export contracts . . . to the relevant Chambers for verification before Customs declaration. If it is verified that the contracts are correct, the Chambers shall fill in the Verification and Chop Form of [the relevant Chamber] and affix the counter-forgery V&C chop at the designated block of the V&C Form and to the export contacts at the blocks *where prices and quantities are specified*, and then deliver them back to the exporters.
>
> ****
>
> The Chambers shall verify the submissions by the exporters based on the industry agreements and in accordance with the relevant regulations promulgated by [the Ministry] and [Customs]. . . . The relevant Chambers shall file the industry agreements with [the Ministry] and

[9] Although the 2002 PVC Notice indicates that there were similar explanatory regulations related to the 2002 PVC Notice, those regulations are not part of the record.

> [Customs] within 10 days after the public announcements [for such industry agreements] are made . . . .

(Emphasis added). If a contract did not have a chop, Customs would not accept the contract and the goods could not be exported. Enterprises that forged the chop were to "be punished by the [Chambers] according to relevant rules."

The 2003 Procedures also contain a provision addressing non-members, which provides that "[f]or V&C Applications made by non-member exporters, the Chambers shall give them the same treatment as to member exporters."

VII. 2002 Charter

On June 7, 2002, after the 2002 Notice became effective, the Subcommittee approved a revised charter (the "2002 Charter"). The 2002 Charter describes the Subcommittee as "a self-disciplinary industry organization jointly established on a voluntary basis by those [Chamber] members which conduct import and export of vitamin C." According to the 2002 Charter, the purposes of the Subcommittee are:

> to observe the state laws, regulations and the Articles of Association for [the Chamber], to coordinate and guide the Vitamin C import and export business as well as related activities, to provide consultation and services to its members and relevant governmental departments, to maintain the normal working order of vitamin C import and export operations, to ensure fair competition, to protect the national interest and the legal

> rights and interests of its members, and to promote the healthy development of the vitamin C import and export trade.

The 2002 Charter also provides that: " The Subcommittee shall coordinate and guide vitamin C import and export business activities, promote self-discipline in the industry, maintain the normal order for vitamin C import and export operations, and protect the interests of the state, the industry and its members" According to the 2002 Charter, "obligations" of members include "[i]mplement[ing] the resolutions and agreements of the Subcommittee" and "[a]ccept[ing] the coordination of the Subcommittee."

Although the 2002 Charter is, in many respects, similar to the 1997 Charter, there are some differences. Most notably, the 1997 Charter never states that the Subcommittee was established on a "voluntary basis." In addition, unlike the 2002 Charter, the 1997 Charter provides that "[o]nly the members of the Sub-Committee have the right to export Vitamin C" and to obtain a "Vitamin C export quota." These differences between the two charters make sense given that, under the 2002 PVC Notice and 2003 Announcement (collectively the "2002 Regime"), membership in the Subcommittee was no longer required in order to export vitamin C.

The penalty provisions in the two charters also differ. Although the 1997 Charter provided that "[t]he Sub-Committee will suggest to the competent governmental department, through the Chamber, to suspend and even cancel the Vitamin C export right of such violating member," this provision is absent from the 2002 charter. In addition, although the 1997

Charter and the 2002 Charter both provide that the Subcommittee can discipline members through public criticism, a warning or termination of membership, because non-members can export under the 2002 Regime, revocation of membership would not necessarily have the same effect under the 2002 Regime. The 2002 Charter also includes an enforcement provision that is not included in the 1997 Charter. The 2002 Charter provides that "[i]n order to monitor the implementation of industry self-disciplinary agreements, coordination plans, or industry resolutions, upon approval by relevant members, the Subcommittee can collect a security deposit in the specified amount for breach of agreement."

Finally, although the Subcommittee includes both representatives from the Chamber and representatives from the members, the 2002 Charter appears to require majority voting by the members alone to take any action.

VIII. May 2002 Agreement

On May 25, 2002, less than two weeks before the 2002 Charter was passed, the Subcommittee met to discuss revising the 1997 Charter. At this meeting, the Subcommittee agreed that that "[a] company, without being a member of the VC Chapter, can export VC (but the export quantity needs to be confirmed by other companies)" (hereinafter the "May 2002 agreement"). The May 2002 agreement, however, is not reflected, in any way, in the 2002 Charter.

IX. Repeal of Verification and Chop

Although not raised by either party, according to the WTO Panel Report, it appears that the 2003

Announcement was formally repealed on May 26, 2008. WTO Panel Report, ¶¶ 7.1013, 7.1056-1057 (citing Communication ([Ministry] and [Customs] (2008) No. 33, May 26, 2008)).

X. Charter of the Chamber

The Chamber's own charter (the "2003 Chamber Charter") contains language similar to that found in the Subcommittee's 2002 Charter. The Chamber describes itself as "a national-wide and self-disciplined social entity voluntarily organized by [importers and exporters of] medicines and health products." According to the 2003 Chamber Charter, the objectives of the Chamber are [inter alia] to "coordinate and guide the import and export of medicines and health products . . . maintain the order of foreign trade, defend fair competition, secure interests of the state and the trade [and] safeguard lawful rights and interests of member organizations." Potential penalties for violations of the 2003 Chamber Charter, "coordination regulations or the Chamber's directives" mirror those found in the 2002 Charter.

With regard to vitamin C, other literature issued by the Chamber along with the 2003 Chamber Charter indicates that the Chamber's Pharmaceutical Department has a number of responsibilities, including "help[ing] the government to manage the import and export of some products, such as Vitamin C . . . ." and "coordinat[ing] and manag[ing]" various sub-chambers, including the Vitamin C sub-chamber.

XI. Relationship between the Ministry and the Chamber

Three sources address the relationship between the Ministry and the Chamber: (1) "[The Ministry]

Measures for Social Organizations, Measure for Administration over Foreign Trade and Economic Social Organizations," dated Feb. 26, 1991 ("1991 Measures"); (2) the "Notice of [the Ministry] regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters," dated September 23, 1994 ("1994 Notice"); and (3) the 2003 Chamber Charter.

Pursuant to the 1991 Measures, the Ministry has a supervisory role over organizations "established with coordination and industry regulation functions." This supervisory role includes responsibility for the "daily management" of the organizations, which the 1991 Measures define to include examining the structure, personnel and budget of the organizations and formulating the salaries and benefit plans for the organizations. The 1991 Measures also state that "[s]ocial organizations established with coordination and industry regulation functions as authorized by the [the Ministry] must implement the administrative rules and regulations relating to foreign trade and the economy."

The 1994 Notice, and the regulations annexed thereto, specify that: (1) "[t]he candidates for the senior positions of the chamber are recommended by [the Ministry] (or recommended by over 1/3 of the chamber's member companies and approved by [the Ministry]) and then elected or dismissed by the general meeting of members"; (2) the Chamber's employees are to be chosen primarily from member organizations or the competent authorities in charge of foreign trade; (3) the Chamber's headcount of employees must be verified and approved by the Ministry and then by the Ministry of Civil Affairs; and

(4) the Ministry must verify and approve the Chamber's budget for total employee salaries.

The 2003 Chamber Charter and accompanying literature also address this relationship, stating that the Chamber implements the government's policies, regulations and "authorization," and "accepts the guidance and supervision of the responsible departments under the State Council." In addition, mirroring the requirements set out in the 1994 Notice, the 2003 Chamber Charter provides that "the candidates for the president, vice-presidents and secretary-general [of the Chamber] may be recommended by the competent authorities, or be recommended jointly by more than one third of members and approved by the competent authorities."

XII. WTO and Public Trade Documents

In public statements to the WTO and the United States government, the Chinese government has made representations regarding its regulation of exports generally as well as its specific regulation of vitamin C exports. *See* Report of Dr. Paula Stern ("Stern Report") (identifying such statements).

In certain documents, China represented that, as of January 1, 2002, it gave up "export administration . . . of vitamin C." In one document, under the heading "any restrictions on exports through non-automatic licensing or other means justified by specific product under the WTO Agreement or the Protocol," China represented that "[f]rom 1 January 2002, China gave up export administration of . . . vitamin C." WTO, Transitional Review under Art. 18 of the Protocol of Accession of the People's Republic of China,

G/C/W/438 (2002)[10]; see also Stern Report at 7 (citing WTO, Statement by the Head of the Chinese Delegation on the Transitional Review of China by the Council for Trade and Goods, G/C/W/441 (2002), which states, under the heading "[n]on-automatic export licensing requirements under WTO agreement and accession commitments," that "[f]rom January 1, 2002, China gave up export administration of . . . vitamin C."). These WTO documents were not before Judge Trager at the motion to dismiss stage.

XIII. The Ministry's Statements in the Instant Litigation Concerning "Self-Discipline"

In an additional statement submitted on summary judgment (the "2009 Statement"), the Ministry describes the Chinese "system of self-discipline." According to the 2009 Statement:

> [The system of 'self-discipline'] has a long history in China and has been well known to, and complied with by, Chinese companies. Self-discipline does not mean complete voluntariness or self-conduct. In effect, self-discipline refers to a system of regulation under the supervision of a designated agency acting on behalf of the Chinese government. Under

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[10] This document is not directly cited in the Stern Report, on which plaintiff rely. The Stern Report cites to a "Trade Policy Review" conducted by the WTO, which states that "[o]n January 1, 2002, China abolished export quotas and licenses for, inter alia, . . . Vitamin C." Stern Report at 8 (citing WTO, Trade Policy Review, WT/TPR/S/161Rev.1 (2006)). In support of this proposition, the "Trade Policy Review" cites to WTO, Transitional Review under Art. 18 of the Protocol of Accession of the People's Republic of China, G/C/W/438 (2002).

> this regulatory system, the parties involved consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies. Persons engaged in such required self-discipline are well aware that they are subject to penalties for failure to participate in such coordination, or for non-compliance with self-discipline, including forfeiting their export right.

According to the Ministry, vitamin C exporters were governed by self-discipline regulation, the objectives of which were "to maintain orderly export, safeguard the interests of the country as a whole and avoid self-destructive competition." The 2009 Statement also discusses the Ministry's delegation of authority to the Chamber regarding self-discipline.

XIV. 1998 Opinions

In discussing the notion of "self-discipline prices," Professor Shen and a number of commentators cite to an August 1998 directive issued by the State Economic and Trade Commission ("SETC") entitled "Opinions On Self-Discipline Pricing For Certain Industrial Products" ("1998 Opinions"). Wang Xiaoye, The Prospect of Anti-Monopoly Legislation in China, 2002 Wash. U. Glob. Stud. L. Rev. 201, 208-09; Shen Report ¶ 70. The 1998 Opinions, which only involved domestic prices, "demanded that the producers of certain industrial products observe the minimum price limits set by their respective trade associations." Wang Xiaoye, 2002 Wash. U. Glob. Stud. L. Rev. at 208; *see also* Scott Kennedy, The Price of Competition: Pricing Policies and the Struggle to Define China's

Economic System, The China Journal No. 49, 19 (Jan. 2003). The minimum prices were based on a product's average costs in the industry. Kennedy, The China Journal No. 49, 19; *see also* Wang Xiaoye, 2002 Wash. U. Glob. Stud. L. Rev. at 209.

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ACTIONS OF CHINESE MARKET PARTICIPANTS

I. The 1997 Regime

Between the promulgation of the 1997 Regime and April 2001, the Subcommittee held a number of meetings where defendants reached agreements on price and export quotas. These meetings were attended by officials from both the Chamber and the Ministry.

In 1997, the price of vitamin C was $4.4/kg. At some point, defendants set the minimum price at $5.3/kg and the price rose to at least $5/kg. However, between May 2000 and December 2001, there was a "price war," which resulted in export prices dropping to less than $2.8/kg. This appears to have been caused by an expansion in China's production capacity that stemmed from an apparent "misunderstanding" at a 1999 Subcommittee meeting.

In December 2000, the minimum export price was $5.1/kg. However, as it appears that none of the defendants were following that price, defendants agreed to "nullify" that price and submitted this agreement to the Ministry "for approval."[11]

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[11] Although the Ministry's counsel suggested at oral argument that, under both the 1997 Regime and the 2002 Regime, the Ministry had "plenary authority" over prices and the

At a Subcommittee meeting in April 2001, the attendees discussed a drop in the price and the recent expansion in China's production capacity. At one point during the meeting, the representative from the Ministry informed the members that:

> Even though VC is not a resource product, it has been strictly regulated since 1997. Regarding the effects of current regulations, generally speaking, the regulation has not been very successful. [The Ministry] attaches importance to the establishment and development of the Chamber, and requires sub-committees to act proactively. Enterprises need to obey the industry agreements and industry rules. When enterprises are maximizing their profits, they also need to consider the interest of the state as a whole.

At the meeting, the manufacturers agreed to reduce the minimum export price from $5.10/kg to $3.20/kg, presumably in accordance with the agreement at the December 2000 meeting. The minutes go on to state that: "However, because the manufacturers have not agreed on the enforcement mechanisms of the verification and chop system, it remains a major question whether this price limit can be enforced effectively."

II. Transition to the 2002 Regime

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power to accept or reject a price, there is no evidence of any industry agreements reached under the 2002 Regime being submitted to the Ministry "for approval." The 2002 PVC Notice, however, does require the Chamber to file an "annual price review report" with the Ministry and Customs.

In September and November 2001, the Ministry learned that the European Union was considering bringing an anti-dumping suit against the Chinese vitamin C manufacturers. This information was forwarded to the Chamber. On one document, handwritten notes, apparently from Ministry officials, state: (1) "[p]lease review and get prepared"; (2) "please review and address it"; and (3) "[p]lease investigate this matter."[12]

On November 16, 2001, the Chamber held a meeting with defendants.[13] At the meeting, defendants, "by way of hand voting," agreed to raise the "coordinated export price" to $3/kg starting on January 1, 2002. Defendants also agreed to limit the total export volume for 2002 to 35,500 tons (with each company receiving individual export volume allocations) and to not expand their production capacity. Defendants' agreement was "aimed at enhancing the self-discipline of the industry." In December 2001, the Chamber convened another

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[12] Defendants' 56.1 Statement does not discuss any of the events that occurred after this information was forwarded to the Chamber. Although defendants' briefs discuss a few of those events in a handful of scattered passages, defendants contend that all of the facts relied on by plaintiffs are "either irrelevant or, in any event, do not prevent entry of judgment in Defendants' favor" because the instant motion should be decided strictly as a matter of a law.

[13] The meeting was presided over by Qiao Haili, a Chamber official and Secretary-General of the Subcommittee, who appears to have attended all of the formal Subcommittee meetings held under the 2002 Regime. Although no representative from the Ministry was present at the November 16, 2001 meeting, minutes of the meeting and a copy of the agreement reached at the meeting were forwarded to the Ministry.

meeting amongst defendants to discuss implementing this agreement.

Not only is there no affirmative evidence of compulsion in the documents discussing this agreement, but these documents also suggest, on their face, that this agreement was voluntary.[14] One states, for example, that the participants "concluded that Chinese Vitamin C manufacturers are absolutely capable of realizing the self-discipline of the industry" because (1) China has lower gross costs; (2) "production of Vitamin C in China is highly centralized in four manufacturers and thus, it is relatively easy to reach unison within the industry"; (3) supply is in balance with demand and price declines are psychological; and (4) there is strong growth in demand for Vitamin C as an "irreplaceable product." Another states:

> [a]nalysis from persons within the industry was that the enterprises were able to sit down together at this particular time because VC prices had reached rock bottom, and no one could sustain a further slide; the next reason was, because the country had opened up the commercial products business from a free competition aspect the enterprises were impelled and had no choice but to seek industry self-regulation.

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[14] Defendants do not contest the admissibility of any of the documents relied on by plaintiffs. In addition, not only have plaintiffs offered evidence establishing the admissibility of many of the documents, but, in some instances, witnesses explicitly confirmed at their depositions that the documents accurately reflected what occurred.

Similarly, a summary of the December 2001 meeting from Chamber's website notes that:

> through efforts by the Vitamin C Sub-Committee of [the Chamber]. . . domestic manufacturers were able to reach a self-regulated agreement successfully, whereby they would voluntarily control the quantity and pace of exports to achieve the goal of stabilization while raising export prices. Such self-restraint measures, mainly based on 'restricting quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically' have been completely implemented by each enterprises' own decisions and self-restraint, without any government intervention. Beginning on May 1, 2002, vitamin C was listed as a product requiring price reviews by China's Customs and a seal of pre-approval by the [Chamber], which has provided powerful oversight and safeguards for the implementation of self-restraint agreements among domestic manufacturers.

(Emphasis added).[15]

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[15] This is the only factual evidence in the record that the Ministry's submissions explicitly address. In its amicus brief, the Ministry asserted that:

> in the context of the Ministry's regulation of the vitamin C industry through the Chamber[,] . . . the characterizations by the Chamber of the conduct as 'self-restraint' and 'voluntary' are unremarkable. The vitamin C industry was under a direct Ministry order to reach a 'coordinated' agreement in order to stabilize export pricing. Thus, it is understandable that the Chamber

Some documents discussing the November and December 2001 meetings imply that verification and chop was used to enforce the parties' agreement. However, none of these documents clearly state that defendants' agreements restricting output were enforced through verification and chop. In fact, the document quoted above explicitly refers to "price reviews."

III. The 2002 Regime

A. Meetings and Agreements

Between the beginning of 2002 and the filing of the initial complaint on January 26, 2005, the Subcommittee held numerous "coordination" meetings where defendants reached agreements regarding price and output. There were also a number of Subcommittee meetings where no agreements were reached.[16]

B. Evidence of Voluntariness

Similar to the record regarding the November 2001 agreement, the relevant documents contain no affirmative evidence of compulsion and, a number of

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would express its pleasure publicly that the parties were able to comply with the Ministry' order to coordinate pricing and quantities on their own (i.e., 'voluntarily' and in 'self-restraint') as opposed to requiring more direct Ministerial intervention.

[16] During the pre-filing period, a representative of the Ministry only attended one Subcommittee meeting, which addressed dumping concerns.

these documents, on their face, suggest voluntariness.[17] For example, one documents notes:

> In 2003, it is expected that the export quota management system will be kept and continue to play a positive role. But, because the international market has turned for the better considerably when compared with the situation in early 2002, *the willingness and actual effectiveness of various manufacturers to cooperate will be lower than the days when the market had a difficult time.*

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[17] The relevant documents make numerous references to "coordination" and "self-discipline." According to the Ministry and Professor Shen, terms such as "coordination," "industry self-discipline" and "voluntary self-restraint" have particular meanings in the context of China's regulatory regime. Thus, the use of such terms may not, in and of themselves, necessarily indicate voluntariness. However, beyond the use of such terms, there is independent factual evidence in the record indicating voluntariness. For example, irrespective of what "industry self-discipline" may mean, there is evidence in the factual record, discussed infra, indicating that, in June 2004, Weisheng violated a shutdown agreement without penalty and that its decision to agree to a new shutdown agreement stemmed solely from problems that Weisheng had with its production line (and not, as defendants' employees now claim, from any compulsion by the Chamber). Furthermore, there does not appear to be any compulsion inherent in "self-discipline" and related terms. Rather, any compulsion is dependent on the specifics of the governmental directives in effect at the time. According to the 2009 Statement, self-discipline regulation required vitamin C exporters to "to coordinate among themselves on export price and production volume in compliance with China's relevant rules and regulations." Therefore, references to "self-discipline" would appear to imply compulsion only if the specific governmental directives underlying the 2002 Regime involved compulsion.

(Emphasis added). Similarly, a speech made two days after the instant suit was filed states:

> These VC enterprises, mediated by the [Chamber], took measures [in 2004] to limit production to protect price and to ensure a 'soft-landing' of the price plunge, but in the long run, such allegiance is vulnerable and will easily succumb to the temptation of profit and before the test of time.

C. Minimum Price

According to defendants' interrogatory answers and the deposition testimony of Wang Qi, a JJPC executive, beginning in May 2002, the minimum price was $3.35/kg throughout the relevant period. However, there is other evidence indicating that, at certain times, higher minimum prices were in effect or no minimum price was in place. An official notice issued by the Chamber in early 2003 indicates that, at the time, there was no minimum price in effect for Vitamin C (or, possibly, that verification and chop had been suspended). Although the notice lists minimum prices for two other products subject to verification and chop, the minimum price field for vitamin C is blank.

Later in the spring of 2003, defendants set a minimum price above $3.35/kg and violated it without punishment. After the price of vitamin C rose in the spring of 2003 to around $15/kg, the price began to rapidly drop. Although defendants agreed at a June 2003 Subcommittee meeting to set a "floor price" of $9.20/kg, this price was not followed; within a few weeks, every manufacturer was quoting prices below this "floor" price. At a meeting in July 2003, the

$9.20/kg price was cancelled and the verification and chop price was restored to $3/kg.

It should also be noted that Ning Hong, the primary person at NEPG responsible for negotiating vitamin C prices with American customers, made a number of statements at his deposition suggesting that defendants were rarely, if ever, required to follow the minimum price under verification and chop. Additionally, there is other evidence indicating that NEPG made sales below the minimum price in May and June 2002 and that defendants consistently sold below the minimum price during substantial portions of 2005 and 2006.

D. Weisheng's Violation of June 2004 Shutdown Agreement

On May 12, 2004, the Subcommittee held a meeting to coordinate an upcoming June production stoppage that defendants had previously agreed to undertake. However, at the meeting, Weisheng announced that it would not participate in the production stoppage. According to Kong Tai, the general manager of JJPC, Weisheng "unilaterally tore up the agreement" for the planned June shutdown. "[U]sing the pretext of conducting a trial run," Weisheng announced it would stop production on an old production line, but not on its "new 15,000-ton production line, where . . . a trial run had been formally launched" four days earlier. "As a result, the agreement fell apart and plans for ceasing production in June were canceled."

On May 24, 2004, Welcome, Northeast and JJPC met and decided on a new shutdown agreement, which appears to have hinged on whether Weisheng would

also participate. At a May 28, 2004 internal JJPC meeting, Kong Tai suggested that the possibility of Weisheng participating "was not great." Similarly, an undated NEPG document doubted whether defendants could execute the agreed June shutdown as planned and noted that if the agreement were not followed "the impact on the market will be very serious."[18]

On June 15, 2004, defendants attended a "VC regulation meeting." According to a monthly report prepared by Wang Qi, "[a]t this meeting, Weisheng . . . re-proposed the agenda for quoting while stopping production, because their production line had problems." (Emphasis added).

Defendants' employees asserted, at their depositions, that the Chamber called this meeting, penalized Weisheng for its actions and required Weisheng to agree to the shutdown plan reached at the June 15 meeting. According to Feng Zhen Ying, an employee of Weisheng, when Weisheng initially refused to participate in the shutdown, Weisheng was "penalized by the [Chamber]," which did not allow Weisheng to run its new production lines, even for dry trial runs. According to Wang Qi, when Weisheng failed to follow the original agreement, "the allocation

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[18] This document's additional prediction that if the shutdown agreement could be "executed as scheduled . . . . it will have a profound significance for the confidence in forming a continuous mechanism similar to the 'price control mechanism' in the future," is further evidence of the voluntariness of defendants' agreements, particularly regarding output restrictions. Moreover, this document indicates that defendants viewed the mechanism for controlling prices as distinct from the mechanism for restricting output.

of their quotas were delayed." Feng Zhen Ying also testified that although "Weisheng had a different opinion about the proposed production shutdown" "under the mandatory requirement of the [Chamber, Weisheng] eventually went along" and shut down production. He asserted that "it was mandated by the government that all manufacturers have to shut down together." Similarly, Wang Qi testified that, "the [Chamber] forced Weisheng to come up with a new plan, with a plan for stoppage . . . . [a]nd forced Weisheng to express . . . consent to this stoppage of production." None of the documentary evidence, however, supports this testimony.

It should also be noted that, at his deposition, Wang Qi admitted that the original shutdown agreement that Weisheng breached did not contain "any clear provisions for penalty." This apparently led someone (perhaps Wang Qi himself) to conclude that subsequent production shutdown agreements should include "very clear cut [penalty] conditions." Relatedly, Wang Qi also testified that, at the time of Weisheng's breach, the Chamber had never considered how to address violations of its "mandatory instructions."

Even after defendants agreed to the new shutdown agreement following Weisheng's breach, defendants were still predicting fierce price competition and even thought that it was possible that prices would fall below costs.

IV. Post-Filing Evidence

There are numerous documents in the record created by defendants after the initial complaint in this case was filed on January 26, 2005. These

documents indicate that defendants continued to reach agreements in the post-filing period. According to minutes from an April 19, 2005 meeting, at the meeting, Qiao Haili stated that: "[t]he recent antitrust lawsuit is unprecedented, but we shall not suspend the coordination mechanism of the VC industry in our country. If we fail to coordinate, the price will drop and we will face more fearful consequences: the falling price will further trigger antidumping lawsuits . . . ."

Plaintiffs suggest that a fact-finder could conclude that the post-filing documents were crafted (or, at the very least, that the actions described in the documents were taken) to support defendants' litigation position. Both the timing of these documents and the substance of certain documents could support such an inference.[19] The above notwithstanding, some evidence from this period still warrants brief discussion.

A. Potential Change in Chinese Law

Although the record does not contain any governmental directives issued after the 2003

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[19] In a November 2005 e-mail, Wang Qi's writes:

> This act of deciding production or prices based on coordination is a kind of monopoly whatever the reasons. However, I believe we should not have any worry since the [Ministry] is a friend of the court in the lawsuit. If we won the lawsuit, it would be hard for foreigners to make more trouble. Even if we lost the case, the government would take the foremost part of responsibility. After all, *we need to do many things a more hidden and smart way*.

(Emphasis added). Also, a December 2005 NEPG report states "must avoid strategies that would appear counter to sales growth *and thus speak not further about the antitrust lawsuit*. (Emphasis added).

Announcement, one post-filing document suggests that the Chinese law governing vitamin C exports changed after the filing of the instant suit. According to the minutes of a November 16, 2005 Subcommittee meeting, at the meeting, Qiao Haili stated that: "Recently Premier Wen Jiabao had an instruction on the enhancement of industrial self-regulation. The Secretary 2d Bureau under the State Council had conducted an analysis aiming at VC, which also asked for resolving the legal status issue of the industrial self-regulation."[20] Neither Premier Wen Jiabao's "instruction" nor the Secretary's analysis is part of the record.

B. Evidence of Voluntariness

Despite the credibility questions surrounding all of the post-filing documents, it should be noted that certain post-filing documents continue to suggest voluntariness. For example, after defendants set a minimum price and agreed to a production shutdown at a May 2005 meeting, Wang Qi's notes remark that, "due to the damage caused by Weisheng last year, it is still an open question as to what extent the consensus made at the meeting will be implemented. We should have a sober estimate of the situation." Also, a December 2005 NEPG report concerning marketing and sales strategy states: "Strengthen self-regulation in the VC industry, but don't rely completely on the 'gentlemen's agreements' of the [Chamber]."

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[20] The copy of these minutes in the record includes redacted content both directly before and directly after this quotation.

C. Evidence Regarding the Chamber Compelling Agreements in the First Instance

Defendants contend that two post-filing documents evidence the Chamber directing the parties to agree on coordinated production shutdowns. Neither document, however, clearly supports that proposition.

First, defendants point to the minutes of a November 16, 2005 meeting, which defendants assert indicate that "that Qiao Haili of the Chamber was to follow up and determine with the 'Chairman of the Chamber' '[w]hether we should have a production shutdown.'" Although the minutes note that, at the meeting, Qiao Haili stated that the question of whether to conduct a shutdown should be discussed at a follow-up meeting, the minutes do not clearly state that the Chairman of the Chamber would decide this question. Moreover, a November 16, 2005 document authored by Wang Qi discussing the meeting casts doubt on defendants' interpretation of the minutes. This document suggests that JJPC had the ability not to join proposed shutdown if it so desired and explicitly states that the Chamber "once again put forward the *suggestion* of coordinated termination of production."[21] (Emphasis added).

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[21] This document also includes the following cryptic passage, discussing "government relations":

We are reluctant to admit the fact that the [Chamber] will continue to be a major force in coordinating companies of this industry, particularly in a difficult situation. The role of the [Chamber] as the industrial association will be intensified rather than weakened in the future. Therefore, there is no need for us to go beyond [the] coordination of the [Chamber], which will do

Second, defendants cite to a September 2006 internal NEPG report, which states that "various VC manufacturers in China will successively suspend production." This document, however, does not address what, if any, role the Chamber played in the formation of this shutdown agreement.

D. Minimum Price

As noted earlier, there is evidence of defendants making substantial sales below the minimum price during 2005 and 2006.

E. Use of Verification and Chop to Enforce Output Restrictions

Defendants cite to minutes from a December 2005 meeting indicating that defendants would inspect each other to ensure compliance with a production shutdown agreement and that "[i]f production is not suspended in accordance with the schedule, the Chamber of Commerce will stop issuing export verification and approval seals until the enterprise suspends its production."

There is also other post-filing evidence indicating that verification and chop was used to enforce output restrictions. Ning Hong testified that the Chamber would allocate a certain number of chops to each company and that the company could not exceed that

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no good to our current or future work. The work of the [Chamber] will be supported by the Ministry of Commerce. We should not regard the coordination simply as authoritarianism of the [Chamber]. Not only does this passage raise questions about the voluntariness of defendants' post-filing agreements, but it also suggests, consistent with Qiao Haili's statement, that Chinese law governing vitamin C exports was in flux after the filing of the initial complaint in this case.

amount. There are also post-filing documents that discuss using "the method of issuing export pre-authorization stamps in order to restrict the export volume."

V. Export Quotas

According to their interrogatory answers, defendants were subject to export quotas at various times since 1997.[22] However, defendants' answers are not entirely consistent as to when such quotas were imposed. Although no export quotas appear to have been in place in 2003, 2004 or 2005, export quotas were apparently re-instituted in June 2006.

(4)

INTERPRETING FOREIGN LAW AND DEFERENCE TO STATEMENTS BY FOREIGN GOVERNMENTS

Under Federal Rule of Civil Procedure 44.1, "[d]etermination of a foreign country's law is an issue of law." *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998); *see also Kim v. Co-op. Centrale Raiffeisen-Boerenleenbank B.A.*, 364 F. Supp. 2d 346, 349 (S.D.N.Y. 2005). In determining foreign law, courts "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P.

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[22] Although the time period covered by defendants' answers regarding export quotas includes the 1997 Regime, the pre-filing period under the 2002 Regime and the post-filing period under that regime, defendants make no effort to explain, for example, the difference between quotas set under the 1997 Regime and those set during the post-filing period under the 2002 Regime.

44.1. Disputes among experts regarding foreign law do not create issues of fact. *Rutgerswerke AG and Frendo S.p.A. v. Abex Corp.*, No. 93-cv-2914, 2002 U.S. Dist. LEXIS 9965, 2002 WL 1203836, at *16 (S.D.N.Y. June 4, 2002).

When a foreign government submits a statement regarding its law, courts have taken different approaches as to the weight that should be afforded to such statements.

Prior to the enactment of Rule 44.1, the Supreme Court held that such statements should be considered "conclusive." *United States v. Pink*, 315 U.S. 203, 220, 62 S. Ct. 552, 86 L. Ed. 796 (1942) (accepting as conclusive declaration from Russian government that nationalization decree was intended to have extraterritorial effect); *see also Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919) (finding statement from Russian government that individual was authorized to act on behalf of government in entering assignment and release was "binding and conclusive in the courts of the United States against that government").

However, more recent authorities, including the Second Circuit and the Justice Department, have moved away from the view that a foreign government's position on its own law is conclusive and precludes any further inquiry.

The Justice Department's current position on this issue is that:

> As a general matter, the Agencies regard the foreign government's formal representation that refusal to comply with its command would [give rise to the imposition of penal or other

> severe sanctions] as being sufficient to establish that the conduct in question has been compelled, as long as that representation contains sufficient detail to enable the Agencies to see precisely how the compulsion would be accomplished under local law.
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The Agencies may inquire into the circumstances underlying the statement and they may also request further information if the source of the power to compel is unclear.

1995 Antitrust Enforcement Guidelines for International Operations (promulgated by the Dept. of Justice, April 5, 1995)("Antitrust Guidelines"), at § 3.32 & n.94, available at http://www.justice.gov/atr/public/guidelines/internat.htm (last visited Sept. 1, 2011).

More importantly, in a recent decision, the Second Circuit held "that a foreign sovereign's views regarding its own laws merit-although they do not command-some degree of deference." *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70, 92 (2d Cir. 2002) (adopting the Indonesian's government's position regarding the ownership, under Indonesian law, of majority of funds in dispute, but reaching a contrary position regarding a portion of the funds). In denying defendants' motion to dismiss, Judge Trager, relying on *Karaha Bodas*, concluded that the Ministry's amicus brief was "entitled to substantial deference, but would not be taken as conclusive evidence of compulsion," particularly given that the plain language of the documentary evidence

submitted by plaintiffs directly contradicted the Ministry's position. Judge Trager also noted that, unlike *Karaha Bodas*, both Pink and *American C*an were decided prior to the promulgation of Rule 44.1.

Defendants contend that I should not follow *Karaha Bodas* because it did not discuss *Pink* or *American Can*. Defendants also point out that the defendant's brief in *Karaha Bodas* did not cite to either case and never even argued that "conclusive" deference was required. I disagree.

Karaha Bodas is the law of the Circuit, particularly given that, as Judge Trager noted, one subsequent panel has explicitly relied on *Karaha Bodas* on this issue. *See Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 148 (2d Cir. 2008), *vacated on other grounds*, 130 S. Ct. 3318, 176 L. Ed. 2d 1216 (2010). Also, as Judge Trager noted, *Karaha Bodas* was decided after the promulgation of Rule 44.1. *Cf. Riggs Nat. Corp. & Subsidiaries v. C.I.R.*, 163 F.3d 1363, 1368, 333 U.S. App. D.C. 371 (D.C. Cir. 1999)(citing Rule 44.1 and analogous Tax Court rule and noting the court's "hesitant[ance] to treat an interpretation of law as an act of state [under the act of state doctrine], for such a view might be in tension with rules of procedure directing U.S. courts to conduct a de novo review of foreign law when an issue of foreign law is raised").[23] Furthermore, although

[23] One district court decision post-dating Rule 44.1 continued to apply *Pink*'s conclusive deference standard. *D'Angelo v. Petroleos Mexicanos*, 422 F. Supp. 1280, 1285-86 (D. Del. 1976), aff'd, 564 F.2d 89 (3d Cir. 1977) (table case). However, that decision, which viewed the relevant inquiry as an "act of state" question, *id.* at 1281, did not discuss the potential impact of the Rule 44.1. *Compare Riggs*, 163 F.3d at 1368.

Karaha Bodas may accord less deference to a foreign government's statement than the Justice Department's position, this is merely a question of degree. *Karaha Bodas* and the Justice Department's position, which explicitly takes Pink into account, *see* Brief for the United States as Amicus Curiae Supporting Petitioners, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, (No. 83-2004), 1985 WL 669667, at *23 ("*Matsushita* Amicus Br.") ("the [foreign] government's assertions concerning the existence and meaning of its domestic law generally should be deemed 'conclusive.' *United States v. Pink*, 315 U.S. 203, 220, 62 S. Ct. 552, 86 L. Ed. 796 (1942)") (emphasis added), both acknowledge that a foreign government's statement is not entitled to absolute and conclusive deference in all circumstances and that further inquiry behind that statement is permissible.

It must be noted that, for certain issues, the governmental directives contain language that contradicts the position taken by the Ministry and neither the Ministry nor Professor Shen address the problematic language. In such circumstances, I must consider the plain language of the governmental directives. Although I would consider the notion that an interpretation suggested by the plain language of a governmental directive may not accurately reflect Chinese law, I cannot ignore such plain language without some explanation as to why it should be disregarded.[24]

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[24] In different circumstances, I may have requested that the parties and the Ministry further address these provisions. However, defendants and the Ministry have had more than ample opportunity to explain the relevant Chinese law. Notably, in the 2009 Statement, the Ministry's most recent submission,

(5)

DEFENDANTS' DEFENSES

I. Comity

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

Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S. Ct. 139, 40 L. Ed. 95(1895).

As Judge Trager's opinion noted, often-cited decisions by the Ninth and the Third Circuits adopted various factors for courts to consider in determining whether to assert extraterritorial jurisdiction in an antitrust suit.[25] *Timberlane Lumber Co. v. Bank of*

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the Ministry elected not to discuss, or cite to, any specific governmental directives or Chamber documents.

[25] The *Timberlane* factors are:

(1) Degree of conflict with foreign law or policy,

(2) Nationality or allegiance of the parties and the locations or principal places of businesses or corporations,

(3) Extent to which enforcement by either state can be expected to achieve compliance,

(4) Relative significance of effects on the United States as compared with those elsewhere,

America, N.T. and S.A., 549 F.2d 597, 614 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979).

However, the Supreme Court has not adopted these tests and their continuing validity (or at the

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(5) Extent to which there is explicit purpose to harm or affect American commerce,

(6) Foreseeability of such effect, and

(7) Relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

The *Mannington Mills* factors are:

(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;

(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.

very least their proper application) is unclear after the Supreme Court's decision addressing comity in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993), an antitrust suit against British reinsurers. "The only substantial question in [*Hartford Fire* was] whether 'there [was] in fact a true conflict between domestic and foreign law.'" *Id.* at 798 (citation omitted). The Court concluded that no such conflict exists when a defendant can comply with both United States and foreign law, "even where the foreign state has a strong policy to permit or encourage [the conduct that violates American law]." *Id.* at 799. The Court found no such conflict with British law as the defendants were not "required . . . to act in some fashion prohibited by the law of the United States" and there was no claim "that their compliance with the laws of both countries is otherwise impossible." *Id.* The Court declined "to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.*

It is thus not clear that a comity analysis is still permitted in the absence of the type of true conflict envisioned by *Hartford Fire*. *See Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 464, 478 (S.D.N.Y. 1997) (holding, in antitrust suit, that a true conflict under *Hartford Fire* is a threshold requirement for any comity analysis), vacated on other grounds, 157 F.3d 922 (2d Cir. 1998). However, even assuming that it were, any such analysis would focus exclusively on *Timberlane*'s other factors and would not consider China's encouragement and approval of defendants' price-fixing. As one commenter who strongly supports *Timberlane*'s expansive comity analysis has conceded,

after *Hartford Fire*, "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."[26] Spencer Weber Waller, Antitrust and American Business Abroad (2009) § 6:21; *see also Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996) (limiting comity analysis to remaining *Timberlane* factors after finding no conflict with foreign law or policy because the Korean design registration system at issue was not compelled by the Korean government).

Unless defendants' price-fixing was compelled by the Chinese government, dismissal on comity grounds would not be justified. Once *Timberlane*'s first factor is excluded from consideration, the instant case essentially becomes no different than any other worldwide price-fixing conspiracy by foreign defendants that includes the United States as one of its primary targets. Although this case could affect foreign relations, these foreign policy concerns stem

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[26] Defendants' only response to *Hartford Fire* is a citation to the Justice Department's antitrust enforcement guidelines, which state that "[i]n deciding whether or not to challenge an alleged antitrust violation, the Agencies would, as part of a comity analysis, consider whether one country encourages a certain course of conduct, leaves parties free to choose among different strategies, or prohibits some of those strategies." Antitrust Guidelines § 3.2. The unsurprising fact that the Justice Department still considers these factors in exercising its prosecutorial discretion does not indicate that courts may, in direct contradiction to *Hartford Fire*, consider a foreign government's encouragement of conduct in a comity analysis.

directly from the degree of conflict between Chinese and American laws and policies.

II. Foreign Sovereign Compulsion

A. Overview

The defense of foreign sovereign compulsion . . . focuses on the plight of a defendant who is subject to conflicting legal obligations under two sovereign states . . . [and] recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's. 584 F. Supp. 2d at 551. Although the Supreme Court in *Hartford Fire* did not explicitly discuss the foreign sovereign compulsion defense ("FSC defense") as a distinct doctrine or absolute bar to antitrust liability, the Court recognized that abstention on comity grounds may be warranted where compulsion creates a true conflict. Other courts have recognized compulsion as a distinct defense or as a "[a] corollary to the act of state doctrine," *Timberlane*, 549 F.2d at 606 (reasoning that "corporate conduct which is compelled by a foreign sovereign" is treated as "if it were an act of the state itself.").

In addition to fairness concerns, the FSC defense also acknowledges comity principles by accommodating the interests of equal sovereigns and giving due deference to the official acts of foreign governments. Antitrust Guidelines § 3.32. The fact that a foreign government compels certain activity ordinarily indicates that the activity implicates its "most significant interests." *Matsushita* Amicus Br. at *21. Relatedly, the FSC defense also recognizes "that

compelled conduct often raises foreign policy concerns that are primarily the province for the Executive Branch." Brief for the United States as Amicus Curiae Supporting Appellants, *Matsushita*, 1985 WL 669663, at *14-15; *see also Matsushita* Amicus Br. at *19.

The burden of proof for the FSC defense is on defendants. *Matsushita* Amicus Br. at 22; *cf. Bigio v. Coca-Cola Co.*, 239 F.3d 440, 453 (2d Cir. 2000) (addressing act of state doctrine).

According to the Justice Department, for the FSC defense to apply, the defendant must face "the imposition of penal or other severe sanctions" for refusing to comply with the foreign government's command. Antitrust Guidelines § 3.32. The Justice Department has also recognized the FSC defense to be applicable where refusal to comply with the command of a foreign sovereign would be futile.[27]

"Of course, the [FSC] defense is not available for conduct going beyond what the foreign sovereign compelled." Weber Waller, Antitrust and American Business Abroad § 8:23 n.6; see also *Mannington Mills*, 595 F.2d at 1293 ("One asserting the defense

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[27] In *Matsushita*, a predatory pricing case that went up to the Supreme Court, the Japanese government represented that if the defendants had failed to follow the government's direction to enter into minimum price agreements and a customer division regulation, the government would have invoked its power to unilaterally impose those export restrictions. Brief for the Government of Japan as Amicus Curiae in Support of Petitioners, *Matsushita*, 1985 WL 669665, at 13a-14a. The United States' amicus brief found this sufficient to establish the FSC defense. *Matsushita* Brief at *24-25. The Supreme Court, however, did not reach the FSC defense. 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

must establish that the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct"); *cf. United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231, 259 (N.M. 1980) (explaining that even if defendant was compelled to participate in cartel by the Canadian government, the act of state doctrine would not bar inquiry into whether defendant "went beyond the scope of the cartel as the Canadian Government defined it").

B. Animal Science and the FSC Defense

In *Animal Science*, the court addressed the FSC defense, concluding that the only pertinent question in determining the applicability of the FSC defense was whether the defendants were compelled to abide by the minimum prices set through the relevant Chamber.[28] 702 F. Supp. 2d 320, *vacated on other grounds*, 654 F.3d 462, 2011 U.S. App. LEXIS 17046, 2011 WL 3606995 (3d Cir. Aug. 17, 2011). The court considered the question of "how the minimum prices came about" to be irrelevant. *Id.* at 438 & n. 119. According to the court, the plaintiffs were challenging the defendants' decision to follow the minimum price and the defendants' "coining" of that minimum price

[28] The defendants in *Animal Science*, Chinese magnesite producers, were not governed by verification and chop. However, they were still subject to export quotas, which were set by the Ministry, and a minimum price. The court's compulsion analysis focused on the minimum price, which was determined through meetings of the producers convened by the relevant Chamber and then registered with, and enforced by, the Ministry. Selling below the minimum price could result in penalties, including fines, loss of quota allotment and revocation of export license.

was "a ministerial task entirely different from the challenged conduct." *Id.* at 438. The court also reasoned that a person (be they a legislator, agency official or company in a regulated industry) who participates in "coining" a law or regulation is not exempted from the compulsion of the resulting law or regulation. *Id.* at 424-25, 438.

I disagree with the approach taken in *Animal Science*. If the defendants in *Animal Science* were not compelled to reach minimum price agreements in the first instance, the fact that such agreements were enforced would not appear sufficient to establish the FSC defense. It should be noted that, in a footnote, the court in *Animal Science* went on to explain that even if the question of "how the minimum price came about" was relevant, based on the Ministry's statements in the instant case, the defendants in Animal Science had a mandatory obligation to engage in deliberations about the minimum price and that "an attempt to filibuster would cause a substantial punishment." *Id.* at 438 n. 119. However, as explained below, I disagree with the Ministry's position. Furthermore, the court in *Animal Science* did not address whether, given the discretion that the defendants had to set the level of the price, prices set above the minimum level necessary to avoid anti-dumping suits and below-cost pricing would be beyond the scope of any potential compulsion.

III. The State Action Doctrine

Where a state enacts programs regulating domestic commerce, the state action doctrine provides antitrust immunity for the regulated private parties who participate in such programs. *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48,

105 S.Ct. 1721, 1726, 85 L. Ed. 2d 36 (1985). To qualify for immunity under the state action doctrine, the anticompetitive restraint must be "clearly articulated and affirmatively expressed as state policy" and "the State must actively supervise any private anticompetitive conduct." *Id.* at 1727. The state action defense applies to state policies that "permit, but do not compel, anticompetitive conduct by regulated parties." *Id.* at 1728; *see also Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943).

Defendants argue that even if they fail to qualify for the FSC defense, the state action doctrine should be applied to regulatory programs enacted by foreign governments. One recent decision has rejected this argument. *In re Transpacific Passenger. Air Transp. Antitrust Litig.*, No. C 07-5634, 2011 U.S. Dist. LEXIS 49853, 2011 WL 1753738, at *16 (N.D. Cal. May 9, 2011). Also, in its amicus brief to the Supreme Court in *Matsushita*, the Solicitor General distinguished the FSC defense from the state action defense and suggested that the state action defense should not apply in the foreign context. *Matsushita* Amicus Br. at 20-22.

It is unnecessary to determine whether the state action doctrine should be available to defendants because they have not even attempted to establish the active supervision prong. After plaintiffs raised this issue in their opposition brief, defendants responded that, as matter of comity, they should not have to meet the strict requirements of the state action doctrine. As

discussed previously, absent compulsion, dismissal on comity grounds is not warranted.[29]

IV. Act of State Doctrine

A. Overview

The act of state doctrine is a judge-made rule of federal common law. Antitrust Guidelines § 3.33. The "doctrine directs United States courts to refrain from deciding a case when the outcome turns upon the legality or illegality (whether as a matter of U.S., foreign, or international law) of official action by a foreign sovereign performed within its own territory." *Riggs Nat. Corp. & Subsidiaries v. C.I.R.*, 163 F.3d 1363, 1367, 333 U.S. App. D.C. 371 (D.C. Cir. 1999). Although the doctrine was originally based on considerations of international comity, more recent

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[29] One commentator has suggested that a defendant exercising authority delegated by a foreign government should be entitled to an even broader defense than is available under the state action doctrine. Weber Waller, Antitrust and American Business Abroad § 8:20. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, a subsidiary of the defendant was delegated authority by the Canadian government to act as the exclusive purchasing agent for the Canadian vanadium market. 370 U.S. 690, 706-07, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962). The subsidiary used that authority to exclude a seller, which competed with the defendant, from the Canadian market. In refusing to apply the act of state doctrine, the Supreme Court explained that the subsidiary's exclusion of the competing seller was neither compelled nor approved by the Canadian government. *Continental Ore* "leaves open the possibility that delegated conduct shown to have been consistent with the standards and purposes of the foreign regulatory program will not be treated as harshly as purely private conduct." Antitrust and American Business Abroad § 8:20. However, the Supreme Court and the Second Circuit have yet to recognize such a far-reaching defense and I decline to do so here.

decisions have focused on the doctrine "as a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 110 S. Ct. 701, 107 L. Ed. 2d 816 (1990) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964)). "The act of state doctrine is not some vague doctrine of abstention but a 'principle of decision binding on federal and state courts alike.'" *Id.* at 406 (quoting *Sabbatino*, 376 U.S. at 427). Defendants bear the burden of proof to justify application of the act of state doctrine. *Bigio*, 239 F.3d at 453.

The factual predicate for application of the act of state doctrine only exists where the 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*, 493 U.S. at 405 (citation and internal marks omitted). Thus, "[a]ct of state issues only arise when a court must decide–that is, when the outcome of the case turns upon the effect of official action by a foreign sovereign." *Id.* at 406. However, even where the factual predicate for the act of state doctrine is met, courts, applying a balancing approach, can refuse to apply the doctrine if the policies underlying the doctrine do not justify its application. *Id.* at 409.

B. Act of State Doctrine and Compulsion

Defendants argue that the act of state doctrine is applicable to the instant case based on the following logic: because defendants' actions were compelled by

the Ministry, defendants' acts are "effectively" the acts of the Ministry—thus, any challenge to defendants' conduct is, in essence, a challenge to official actions taken by the Ministry. Although this makes sense—assuming defendants' conduct was compelled—it is not clear how proceeding under the act of state doctrine, as opposed to the related FSC defense, adds anything to defendants' case. There are, however, two other ways in which the act of state doctrine may be applicable to instant suit.

C. Inquiry into the Motivation of Foreign Governments and Officials

Defendants argue that the act of state doctrine does not require compulsion, citing the Antitrust Guidelines. Antitrust Guidelines § 3.33 ("[a]lthough in some cases the sovereign act in question may compel private behavior, such compulsion is not required by the doctrine"). This section of the Antitrust Guidelines suggests that the relevant agencies consider the act of state doctrine to be applicable to certain suits where a court would be required to inquire into the motivation of the foreign state for taking an action.[30]

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[30] In asserting that the act of state *doctrine* does not require compulsion, the Antitrust Guidelines cite to Timberlane, 549 F.2d at 606-08. In *Timberlane*, the plaintiff alleged that, as part of a scheme to put the plaintiff out of business, the defendants filed suit in Honduran courts and foreclosed on security interests that they held on the plaintiffs' assets. Invoking the act of state doctrine, the defendants relied on an earlier decision that had applied the doctrine to bar a suit alleging that the defendants induced a foreign government to assert fraudulent claims over the scope of its territorial waters in order to interfere with the plaintiff's oil concession. *Timberlane*, 549 F.2d at 608 (discussing *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972)). These

The Second Circuit has held that the act-of-state doctrine bars inquiry into a foreign government's motivations for taking a specific action. *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977) (dismissing suit that could not be resolved without determining that, but for defendants' actions, the Libyan government would not have seized and nationalized plaintiff's assets); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d Cir. 1987) (citing Hunt and dismissing suit where defendants allegedly manipulated the Colombian government into implementing discriminatory cargo laws that injured plaintiff).

However, I believe that these decisions have been overruled by *W.S. Kirkpatrick*. See Antitrust and American Business Abroad § 8:11 ("The reasoning of [*Buttes*] and *Hunt* regarding the motivations of the foreign states has not survived [*W.S. Kirkpatrick*]."); *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990) (post-*W.S. Kirkpatrick* decision refusing to apply act of state doctrine where defendants allegedly agreed to make payments in exchange for price controls on Venezuelan tobacco that injured domestic tobacco growers).[31]

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appear to be the type of non-compelled scenarios envisioned by the Antitrust Guidelines, which indicate that "Agencies may refrain from bringing an enforcement action based on the act of state doctrine" where the "restraint on competition arises directly from the act of a foreign sovereign, such as the grant of a license, award of a contract, expropriation of property, or the like." Antitrust Guidelines § 3.33.

[31] Given *W.S. Kirkpatrick*, it is not clear why the Antitrust Guidelines take the position that inquiries into the motivations of a foreign state are still barred by the act of state doctrine. The explanation may be that, for purposes of making enforcement

In any event, in the instant case, no inquiry into the motivation of the Ministry in promulgating the relevant governmental directives is necessary. This is because plaintiffs have not pursued the potential argument that the FSC defense is inapplicable because defendants procured those directives.[32] Rather than contending that *Hunt* and *O.N.E. Shipping* were overruled by *W.S. Kirkpatrick*, plaintiffs simply distinguish those decisions on the ground that they both involved situations where the foreign government took an action that harmed the plaintiff. Because plaintiffs argue that verification and chop did not involve any compulsion, they reason that it was defendants' voluntary actions, rather than the sovereign acts of the Chinese government, that harmed them.[33]

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decisions, the Antitrust Guidelines take a more expansive view of the act-of-state doctrine than the one adopted by the Court in *W.S. Kirkpatrick*. Notably, in *W.S. Kirkpatrick*, the Justice Department, as an amicus, advocated such a position, which was ultimately rejected by the Court. 493 U.S. at 408-09.

[32] Although plaintiffs do not pursue this argument, in their 56.1 statement and the facts section of their brief, plaintiffs contend that the verification and chop system "was adopted by agreement among [d]efendants," citing to the statement from the April 2001 Subcommittee meeting that "because the manufacturers have not agreed on the enforcement mechanisms of the verification and chop system, it remains a major question whether this price limit can be enforced effectively." This and other evidence in the record suggests that defendants and Chinese officials were co-equal players in the regime governing vitamin C, and indeed, it may be that defendants were the leaders, in designing that regime.

[33] The act of state doctrine would not have prevented plaintiffs from arguing that the FSC defense should be inapplicable because defendants procured the alleged

D. Inquiry into Foreign Officials' Compliance with and Enforcement of Foreign Law

Courts have invoked the act of state doctrine to preclude inquiry "behind" sovereign acts. This can occur where a party contends that a sovereign act is in derogation of the sovereign's own laws. The doctrine has also been applied where a party seeks to establish that a foreign government has failed to comply with and enforce its own laws.

Defendants rely on *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970), where the plaintiff, in an attempt to rebut an assertion of the FSC defense, sought to establish that an oral order given by a Venezuelan official was not binding and compulsive because, under Venezuelan law, the official had no authority to issue the order and such oral orders were not binding. Through the affidavit of a Venezuelan attorney, the plaintiff sought

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compulsion. The court in *Interamerican Refining Corp. v. Texaco Maracaibo. Inc.*, 307 F. Supp. 1291, 1297 (D. Del. 1970), suggested that the FSC defense should not be recognized in such circumstances. I am sympathetic to this view. Certainly, the fairness concerns behind the FSC defense would no longer be applicable where the compulsion was procured by the defendant. Moreover, where, as in the instant case, defendants enthusiastically embrace a legal regime that encourages, or even "compels," a lucrative cartel that is in their self-interest, any inquiry into the applicability of the FSC defense is artificial. In such circumstances, the presence or absence of compulsory measures is seemingly irrelevant, for they are never going to be needed. To borrow a metaphor used by Mao Tse-Tung, the concept of "coercion" in this context is a paper tiger. Ultimately, it is unnecessary to rely on the above points to resolve this motion because I conclude that the 2002 Regime did not involve any compulsion.

to establish this both, as a legal matter, and, somewhat confusingly, as a factual matter at trial, *id.* at 1301 ("[the plaintiff] urges that it be permitted to show at trial that the order was not binding because oral and without legal authority"). Although the court explained that "whether or not [the Venezuelan] official 'ordered' certain conduct is an evidentiary question," the court rejected plaintiff's arguments based on the act of state doctrine, which precluded the court from examining the validity of the order under Venezuelan law.[34] *Id.* The court added that whether the act was legal or "compulsive" under the laws of Venezuela is not a proper inquiry for either a court or a jury and that "[o]nce governmental action is shown, further examination is neither necessary nor proper. *Id.* Because plaintiffs here do not argue that the governmental directives establishing the 2002 Regime are invalid under Chinese law, *Interamerican* is largely irrelevant to the instant motion.

West v. Multibanco Comermex, S.A., 807 F.2d 820 (9th Cir. 1987), is arguably more relevant to the instant motion. In *West*, the Ninth Circuit held that the act of state doctrine bars inquiry into whether foreign officials are failing to enforce their own laws. In order to resolve a securities suit involving certificates of deposit issued by a Mexican bank, the

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[34] The plaintiff in *Interamerican* argued that its evidence of Venezuelan law, as well as other facts, "refute[d] the existence of [the alleged] order." Pl.'s Br. in Opp. to Def.'s Motions for Summ. Judg., *Interamerican*, No. 2808 (May 28, 1969). However, the plaintiff addressed this argument in a single, brief, paragraph and made no effort to explicitly explain how its evidence of Venezuelan law should have been considered in making this factual determination.

court had to determine whether the Mexican banking regulatory scheme (which included supervision by the government, capital and reserve requirements, and other safeguards) "virtually guaranteed repayment in full." *Id.* at 827. The plaintiffs argued the regulatory regime only met this standard "on paper" because, in practice, Mexican officials neither complied with nor enforced these laws. *Id.* Invoking the act of state doctrine, the Ninth Circuit rejected this argument, holding that courts "may not examine the actual operations of the regulatory system to the extent that such inquiry would directly implicate the failure (whether willful or negligent) of officers of the foreign state to enforce their own laws." *Id.* at 828. The court went on to note that "[a]s a matter of comity, we presume that Mexican officials are acting in a manner consistent with the requirements of Mexican law."[35] *Id.*

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[35] The viability of *West* after *W.S. Kirkpatrick* is questionable. Although West's rationale for invoking the act of state doctrine is not entirely clear, its primary justification appears to have been that a challenge to the effectiveness of Mexican officials would embarrass the Mexican government and "intrude upon [Mexico's] coequal status." *Id.* at 827-828. However, *W.S. Kirkpatrick* made clear that "[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding [a case], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." 493 U.S. at 409. The court in West also relied on *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 406-07 (9th Cir. 1983). However, as noted earlier, "motivation" decisions such as *Clayco*, which invoked *Buttes* to bar inquiry into whether bribes paid to a foreign government resulted in the plaintiff losing an oil concession, appear to no longer be viable after *W.S. Kirkpatrick*. Given the above concerns about *West*, I also question the continuing viability of the Second Circuit's broad dicta in *O.N.E.*

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ANALYSIS

To resolve defendants' motion for summary judgment, I must: (1) determine what deference, if any, should ultimately be accorded to the Ministry's interpretation of Chinese law; (2) determine what, if any, consideration should be given to the factual record, which defendants contend is irrelevant to the instant motion; (3) interpret Chinese law. These three inquiries are, to a certain degree, interrelated.

At the outset, I am compelled to note that the Chinese law and regulatory regime that defendants rely on is something of a departure from the concept of "law" as we know it in this country—that is, a published series of specific conduct-dictating prohibitions or compulsions with an identified sanctions system. To give but one example, the regulatory system governing vitamin C not only relies on consensus-based decision making, but also accords defendants wide, and possibly unbounded, discretion in setting the price and output levels for vitamin C.

In addition, defendants' own expert asserts that oral directives are an important component of Chinese regulatory law and admits that "Chinese governmental control is a quite different process from what takes place in other countries." Of course, foreign legal regimes that are markedly different from

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Shipping, asserting that "[i]n essence, the act of state doctrine is a principle of law designed primarily to avoid judicial inquiry into *the acts and conduct of the officials of the foreign state*, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government." 830 F.2d at 452 (emphasis added).

our own can still, in their own unique ways, compel a defendant's conduct. However, in some circumstances, asserting a claim of compulsion under a foreign regime that so differs from our own concept of law can be akin to trying to fit a round peg into a square hole. Close ties and cooperation between government and industry does necessarily equal compulsion, particularly in situations where compulsion appears unnecessary.

For the reasons explained below, I respectfully decline to defer to the Ministry' interpretation of Chinese law and conclude, based on what may be considered the more traditional sources of foreign law—primarily the governmental directives themselves as well as the charter documents of the Subcommittee and the Chamber—that the 2002 Regime did not compel defendants' conduct. This interpretation is further supported by the factual record. In interpreting Chinese law, I find it appropriate to consider the factual record concerning how Chinese law was enforced and applied.[36] In

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[36] I have concluded that it is appropriate to look to the factual record to help interpret the governmental directives at issue. There is also a strong argument that consideration of the factual record is necessary because any oral directives by officials of the Ministry and the Chamber appear to be an essential part of the Chinese law governing vitamin C. According to Professor Shen, "it is normal for [regulatory documents promulgated by the Ministry] to be expressed at a level of generality that then must be applied and implemented in specific contexts." This application and implementation "frequently" occurs through "oral directions, even including telephone calls." I also note that defendants themselves suggest that coordination was only required when the Chamber "direct[ed] the manufacturers to cooperate as to prices or output." If that were the case, an inquiry into what the representatives of the Chamber communicated to

addition, as explained below, to the extent that the factual record contains any disputed issues of fact that are relevant to the task of interpreting Chinese law, such disputes are for the Court to resolve.

I. Deference to the Ministry's Statements

Except for the Ministry's explanation of the relationship between the Ministry and the Chamber,[37] I respectfully decline to defer to the Ministry's interpretation of Chinese law. As explained below, the Ministry fails to address critical provisions of the 2002 Regime that, on their face, undermine its interpretation of Chinese law. "[T] he support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas" "[w]here a choice between two interpretations of ambiguous foreign law rests finely balanced." *Karaha Bodas*, 313 F.3d at 90. However,

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the defendants would be necessary to resolve the FSC defense. Of course, the above discussion assumes that the act of the state doctrine would be equally applicable to both oral directives and written law, a conclusion as to which I harbor some doubt.

[37] According to the Ministry, "specific chambers of commerce, when authorized by the Ministry to regulate, act in the name, with the authority, and under the active supervision, of the Ministry." In sum, the Ministry asserts that the Chamber is "the instrumentality through which the Ministry oversees and regulates the business of importing and exporting medicinal products in China," including vitamin C.

Plaintiffs challenge the Ministry's position arguing that: (1) the 1991 Measures granting the Ministry supervisory authority over the Chamber were abolished and, under subsequent laws, the Chamber was treated no differently than other social organizations in China; and (2) representations made by other Chambers indicate that the Chamber is a non-governmental organization that is independent of the government.

that is not the case here, particularly given the Ministry's failure to address key provisions of the 2002 Regime.[38]

I note that three significant flaws in the Ministry's 2009 Statement render it particularly undeserving of deference. First, in contrast to the Ministry's amicus brief, which at least attempted to explain the regulatory system governing vitamin C exports by citing to, and discussing, specific governmental directives and Chamber documents, the 2009 Statement does not cite to any of those sources to support its broad assertions about the regulatory system governing vitamin C exports. This omission is compounded by the 2009 Statement's declaration that self-discipline regulation required vitamin C exporters "to coordinate among themselves on export price and production volume in compliance with China's relevant rules and regulations." Of course, this simply begs the question of what did the relevant rules and regulations require—an issue that the 2009 Statement conspicuously avoids by not citing to any governmental directives or Chamber documents.[39]

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[38] The United States' submissions in the WTO proceeding relied on the amicus brief and statements submitted by the Ministry in the instant litigation. The Executive Branch, however, has not communicated to this Court that the Ministry's statements should be accorded heightened deference based on the Executive Branch's reliance on those statements in the WTO proceeding.

[39] Professor Shen's attempt to define "self-discipline" is also circular and unhelpful. He asserts that "'[s]elf-discipline' means that all industries shall maintain import and export order in accordance with laws, regulations and rules and shall not conduct operation in violation of regulations regardless of national interest."

Second, as discussed infra, the 2009 Statement contains numerous ambiguous terms and phrases, particularly with regard to the penalties under self-discipline. Third, although there are clearly some differences between the 1997 Regime and 2002 Regime, the 2009 Statement makes no attempt to distinguish between the two regimes. The 2009 Statement does not read like a frank and straightforward explanation of Chinese law. Rather, it reads like a carefully crafted and phrased litigation position.

China's representation to the WTO that it gave up "export administration . . . of vitamin C" as of January 1, 2002 is further reason not to defer to the Ministry's position. Although many of the public statements cited by the Stern Report are, as the Ministry asserts, simply general descriptions of the current status of China's economy and China's transition toward a market economy, the Ministry makes no attempt to explain China's representations that it gave up export administration of vitamin C, which appear to contradict the Ministry's position in the instant litigation.

Moreover, although not dispositive on the question of the appropriate deference to be afforded to statements by foreign governments, when the alleged compulsion is in the defendants' own self-interest, a more careful scrutiny of a foreign government's statement is warranted. Similarly, in interpreting Chinese law, I cannot ignore the obvious fact that a compulsory regime is unlikely to be present where the defendants' economic interest is in accordance with the allegedly compelled conduct.

Finally, the factual record contradicts the Ministry's position.[40] In sum, all of the points above suggest that the Ministry's assertion of compulsion is a post-hoc attempt to shield defendants' conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period in question. Although the Ministry encouraged defendants' cartel and now fervently desires that defendants be dismissed from this suit, those policy preferences do not establish that Chinese law "required" defendants to follow their anti-competitive predilections.

Like the Ministry, Professor Shen also fails to address important provisions of the 2002 Regime that contradict his interpretation of Chinese law. I therefore cannot accept his conclusion that "the implementation of the verification and chop mechanism . . . did not in any way change the level of control that the government maintained over the vitamin C industry." Not only does Professor Shen fail to address key provisions of the 2002 Regime, he maintains that "[t]he mechanism through which

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[40] As defendants correctly point out, some of the documentary evidence in the record is consistent with the Ministry's interpretation of Chinese law and explanation of compulsion. This includes evidence documenting that: (1) defendants voted on proposals and reached agreements through consensus; (2) such agreements were reached at meetings with the Chamber and "under the coordination of [the Chamber],"; and (3) defendants failed to reach consensus on certain occasions. However, not only is the above evidence also consistent with an absence of compulsion, but, as explained infra, there are other facts in the record, such as those surrounding Weisheng's violation of the shutdown agreement in 2004, that directly contradict the Ministry's position.

[China's policy requiring coordination] was to be accomplished was not the key point," which suggests that he views the details of the 2002 Regime as essentially irrelevant.

II. Interpretation of Chinese Law Based on the Traditional Sources of Foreign Law

A. Applicability of the 1997 Regime to Defendants' November 2001 Agreement

Once the 2002 PVC Notice took effect on May 1, 2001, all of defendants' subsequent conduct (including their continuing compliance with the agreement reached in November 2001) was governed by the 2002 Regime. Moreover, although the 2002 PVC Notice did not formally take effect until May 1, 2002, I will assume that the 2002 PVC Notice governed defendants' conduct in the interim period between the abolishment of the 1997 Regime on March 21, 2002 and the formal institution of the 2002 PVC Notice.

There is, however, a question as to what directives governed the remainder of defendants' conduct regarding the agreement they reached in November 2001. That agreement concerned the coordinated export price that was to take effect on January 1, 2002 and total export volumes for 2002. The 1997 Notice was still formally in effect from January 1, 2002 through March 21, 2002. However, China represented to the WTO that as of January 1, 2002, it gave up "export administration . . . of vitamin C." This representation coincides with the repeal, on January 1, 2002, of the 1992 Interim Regulations, which appear to have established the foundation of the

export licensing and quota regime in place at the time. Notably, like the 1997 Regime, the 1992 Interim Regulations also subjected vitamin C to export licensing and quotas. Given the above, I conclude that the 1997 Regime did not govern defendants' compliance with the November 2001 agreement. Thus, the 1997 Regime is irrelevant to the instant motion, except to give context to the 2002 Regime.

B. Suspension Provision

The Suspension Provision in the 2002 PVC Notice provides that "[g]iven the drastically changing international market, the customs and chambers may suspend export price review for certain products with the approvals of the general members' meetings of the sub-chamber (coordination group) and filing with [Customs]." Neither the Ministry nor Professor Shen address this provision, which I interpret as granting defendants the unilateral authority to suspend verification and chop.[41]

The Suspension Provision is open to two potential interpretations. Under either interpretation, it is clear that the Chamber and Customs could not suspend verification and chop without the approval of the members of the Subcommittee (i.e., the defendants). However, this provision is ambiguous as to whether defendants had the unilateral power to suspend verification and chop. The term "may" could be read to indicate that even if the members agreed to suspend verification and chop, the Chambers and Customs could, but were not required to, suspend it.

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[41] There is no evidence that the 1998 Opinions, the text of which is not in the record, contained a similar suspension provision.

The most plausible interpretation of this provision is that the Subcommittee had the unilateral power to suspend verification and chop. It would make little sense if the Subcommittee was granted the power to veto a decision of the Chamber and Customs regarding the suspension of verification and chop, but did not have the unilateral power to decide whether to suspend verification and chop in the first instance.

Although the 2003 Announcement does not contain a similar explicit suspension provision, I construe the 2003 Announcement as granting defendants the same power under the 2003 Announcement. Nothing in the record indicates that the 2003 Announcement's extension of verification and chop was intended to alter the substance of the regime in any way. In fact, both the Ministry and Professor Shen appear to view the 2002 PVC Notice and the 2003 Announcement as essentially interchangeable.

Moreover, even if the absence of an explicit suspension provision in the 2003 Announcement were material, under the 2003 Announcement defendants had the power to effectively suspend verification and chop simply by not reaching any agreements in the first instance. Although the 2003 Procedure's requirement that the Chambers "verify the submissions based on the industry agreements [and relevant regulations]" indicates that the contracts must comply with the relevant industry agreements, neither the 2003 Announcement nor the 2003 Procedures explicitly direct defendants to reach any agreements in the first instance. During any period in which no industry agreements were in effect, it can be assumed that either a chop would be granted to any contract submitted to the Chamber irrespective of the

contract price or that the requirement for chops would simply be abandoned.

The interpretation above is, standing alone, sufficient reason to deny summary judgment.[42] Moreover, this interpretation renders moot any potential act of state concerns because, under this interpretation, inquiries into the enforcement of the 2002 Regime and defendants' role in promulgating the 2002 Regime are unnecessary to resolve the instant motion.

Although I could end my analysis here, there are further reasons why denial of summary judgment is warranted. For one thing, as certain points below illustrate, even if Chinese law did involve some compulsion, summary judgment would still be denied because Chinese law assuredly did not compel all of defendant's illegal conduct.

C. Applicability of Verification and Chop to Industry-Agreed Output Restrictions

I conclude that, as a matter of Chinese law, in order to receive a chop under the 2002 PVC Notice and 2003 Announcement, an export contract was only required to comply with the industry-agreed minimum price ("Price Interpretation"). Compliance with industry-agreed output restrictions was not required to receive a chop. Because verification and chop did not require compliance with industry agreements regarding output, it can also be assumed

[42] Given this interpretation, it is not clear what would be left for the jury to determine at trial, particularly in regards to the pre-filing period.

that the 2002 Regime did not compel such agreements in the first instance.

Nothing on the face of the governmental directives indicates that compliance with output restrictions was required to receive a chop. The 2002 PVC Notice explicitly focuses on price and the 2003 Announcement is ambiguous regarding the applicability of verification and chop to output restrictions.

The 2002 PVC Notice explicitly states that "the relevant chambers" were required to submit to Customs "information on industry-wide negotiated prices" and repeatedly refers to "price review." By contrast, the 2002 PVC Notice makes no mention of industry-agreed output restrictions.[43] Moreover, if all agreements, including agreements regarding output restrictions, were to be enforced through verification and chop, it is not clear why the 2002 Charter includes a provision for "security deposit[s]" to ensure compliance with industry agreements. Furthermore, because the apparent purpose of the 2002 Regime was to avoid dumping suits and below cost-pricing, see discussion infra, it is not surprising that the 2002 Regime was limited to compliance with a minimum price.

Although the term "industry agreements" in the 2003 Procedures is broad enough to also include agreements on output restrictions, this ambiguity does not favor either potential interpretation. In addition, as noted earlier, nothing in the record indicates that the substance of verification and chop

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[43] Similarly, the 1998 Opinions cited by Professor Shen only appear to have required compliance with a minimum price.

differed between the 2002 PVC Notice and the 2003 Announcement. The only provision in the 2003 Announcement that could be read to suggest that compliance with output restrictions was also required to receive chops is the 2003 Procedures' direction that chops be affixed on the contract "where the prices and quantities are specified." However, in light of the plain language of the 2002 PVC Notice, this ambiguous provision is insufficient to establish that verification and chop required compliance with output restrictions.

Moreover, some of the Ministry's own statements support the Price Interpretation. According to the Ministry, under the 2002 PVC Notice, "[i]f the [contract] price was at or above the minimum acceptable price set by coordination through the Chamber, the Chamber affixed . . . a 'chop.'" The Ministry similarly has acknowledged that the "basis" of the verification and chop system "was a process of 'industry-wide negotiated prices.'"

Neither the Ministry nor Professor Shen offers any compelling explanation undermining the Price Interpretation. First, I recognize that, in addition to stating that the Chamber would affix a chop "[i]f the [contract] price was at or above the minimum acceptable price set by coordination through the Chamber," the Ministry's amicus brief also states that, under the 2002 PVC Notice, the Chamber "'verified,' i.e., approved, the contract price and volume." The Ministry, however, provides no citation to support this assertion. Perhaps the Ministry is referring to the 2003 Procedures' requirement that chops be affixed on the contract "where the prices and quantities are specified." Yet, even if the Ministry had

explicitly cited to the 2003 Procedures as support, that ambiguous provision is insufficient in light of the other evidence in the record outlined above.

Second, the 2009 Statement, which does not discuss any of the specific governmental directives, fails to address any of the issues raised above. Third, although Professor Shen suggests that the 2003 Procedures require compliance with both a minimum price and output restrictions in order to receive a chop, Professor Shen never addresses the limited language of the 2002 PVC Notice that refers only to "industry-wide negotiated prices" and "price review." Moreover, as discussed infra, both Professor Shen and the Ministry completely ignore the 2002 Charter

D. Potential Penalties for Non-Compliance with Self-Discipline

In arguing that the FSC defense is applicable, the Ministry's amicus brief, citing to the 1997 Notice and 1997 Charter, relies, *inter alia*, on the fact that defendants: (1) were required to be members of the Subcommittee; and (2) would not have been able to export vitamin C if they failed to participate in "price-setting" activities. The Ministry, however, does not explain how Subcommittee membership was required under the 2002 Regime and 2002 Charter or how defendants' export right would be affected if they failed to participate in price-setting and output-setting activities under the 2002 Regime. Thus, even assuming that, under "self-discipline," defendants were supposed to "consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies," there was no penalty for failing to do so.

Preliminarily, I note that the absence of potential penalties or other mechanisms to compel defendants to reach price and output agreements is not surprising. As I mentioned earlier, there is no need to compel defendants to do what makes them the most money.[44] It would actually be somewhat surprising to see a compulsory regime where the defendants' interests and the government's goals are aligned. Although the FSC defense would presumably still be applicable in such circumstances provided that a compulsory framework were, in fact, present, as a matter of common sense, such a regime is simply much less likely when the alleged compulsion is in the defendants' economic self-interest. *Cf.* Mitsuo Matshushita & Lawrence Repeta, Restricting the Supply of Japanese Automobiles, Sovereign Compulsion or Sovereign Collusion?, 14 Case W. Res. J. Int'l L. 47, 63 (1982) ("[T]he defendant's decision to act in a manner contrary to its monetary interests should be accorded great weight in determination whether that act was compelled.").

Turning to the instant record, certain governmental directives and Chamber documents state, on their face, that membership was no longer required under the 2002 Regime. The 2003 Procedures provide that "[f]or V&C Applications

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[44] Although it may have been unnecessary to compel defendants to reach price and output restriction agreements, a government-backed mechanism for ensuring compliance with those agreements would not be superfluous. Such an enforcement mechanism would attempt to counteract each defendant's individual incentive to cheat, which is a problem in almost any cartel. However, the presence of a compulsory enforcement mechanism would not establish that defendants' agreements were compelled in the first instance.

made by non-member exporters, the Chambers shall give them the same treatment as to member exporters." Similarly, the May 2002 Agreement indicates that "[a] company, without being a member of the VC Chapter, can export VC (but the export quantity needs to be confirmed by other companies)." Moreover, none of the governmental directives and Chamber documents requiring membership remained in force under the 2002 Regime. The 1997 Notice was abolished and the 1997 Charter was replaced by the 2002 Charter, which describes the Subcommittee as a "a self-disciplinary industry organization jointly established on a voluntary basis by those Chamber of Commerce members which conduct import and export of vitamin C." (Emphasis added). In addition, the 2002 Charter does not include the provision in the 1997 Charter providing that "[t]he Sub-Committee will suggest to the competent governmental department, through the Chamber, to suspend and even cancel the Vitamin C export right of such violating member."

The Ministry ignores the above provisions, which, on their face, contradict the Ministry's position and the Ministry's argument as to why the FSC defense is applicable.

The Ministry's submissions only briefly address the specific governmental directives underlying the 2002 Regime. In discussing the applicability of the FSC defense, the amicus brief's only reference to the 2002 Regime is in relationship to the enforcement of industry agreements. Similarly, the amicus brief's discussion of the 2002 Regime indicates that the 2002 Regime "changed the way in which compliance with the Chamber's 'coordination' was confirmed by

abolishing [export licenses] and establishing [verification and chop]." (Emphasis added).

The Ministry does not address the fact that membership in the Subcommittee was no longer required and never discusses the 2002 Charter.[45] The 2009 Statement, which does not cite to any specific governmental directives, does not address these issues. Although Professor Shen asserts that membership was required under the 2002 Regime, he does not provide any citation to support that proposition and never addresses the contrary provisions in the governmental directives and Chamber documents. Similar to the Ministry's amicus brief, Professor Shen cites only to the 1997 Charter and never discusses the 2002 Charter.

Given the above, it is clear that even if a company's membership in the Subcommittee was revoked (or the company was never a member), that company could still export vitamin C.

Neither the Ministry nor defendants make any effort to explain how defendants' participation in price-setting and output-setting is compelled given that membership in the Subcommittee is no longer required. Although the 2009 Statement conclusorily asserts that persons engaged in self-discipline are

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[45] The Ministry's amicus brief was less than straightforward in its presentation of the 1997 Charter. The amicus brief did not mention the 2002 Charter and implied that the 1997 Charter was still controlling under the 2002 Regime. Notably, Judge Trager's decision appears to have assumed that the 1997 Charter was still operative throughout the relevant period. At oral argument on the motion to dismiss, the Ministry's counsel conceded that the "whole regulatory regime" under the 1997 Notice was superseded by the 2002 PVC Notice, but never mentioned the 2002 Charter.

"well aware that they are subject to penalties" for "noncompliance with self-discipline," including "forfeiting their export right," the Ministry never explains: (1) why such persons are "well aware" of this fact; (2) what "forfeiting their export right" means in the context of the 2002 Regime; (3) how a forfeiture of export rights would be accomplished under the 2002 Regime; or (4) what the other potential penalties are.[46] The 2009 Statement also indicates that the Chamber was delegated "necessary enforcement measures" and that the Chamber had the power to "penalize," but the Ministry never identifies those "enforcement measures" or explains the Chamber's power to "penalize" under the 2002 Regime. Similarly, Professor Shen also maintains, without any explanation, that under the 2002 Regime, "[d]efendants' right to export will be forfeited if they refuse to participate in . . . coordination."[47] All of the

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[46] On its face, the 2002 Regime would only appear to deny a defendant its "right" to export if the defendant submitted a contract that failed to abide by the relevant industry agreements and was, thus, ineligible to receive a chop. However, nothing in the governmental directives indicates that chops were to be denied if defendants failed to reach agreements in the first instance.

[47] At one point, Professor Shen suggests that compulsion arises from the fact that regulated companies "still have significant state ownership, the national and regional governments play an ongoing role, and top managers and executives generally owe their business positions to political appointment." However, defendants do not rely on this specific assertion and the Ministry does not advance a similar argument. Moreover, not only do I doubt, as a general matter, that this would be sufficient to trigger the FSC defense, but Professor Shen's sweeping assertion is clearly insufficient to establish that these specific defendants faced the possibility of coercion through these informal channels. Not only would this require a fact-

above assertions are insufficient to establish the FSC defense. See Antitrust Guidelines § 3.32 (explaining that the FSC defense requires "penal or other severe sanctions" and that the Agencies will regard a foreign government's statement regarding compulsion to be conclusive if "that representation contains sufficient detail to enable the Agencies to see precisely how the compulsion would be accomplished under local law").

The only provision in the 2002 Regime that could potentially establish compulsion is the 2003 Procedures' "same treatment" provision, which states that "[f]or V&C Applications made by non-member exporters, the Chambers shall give them the same treatment as to member exporters." (Emphasis added). This provision suggests that although non-members could export under the 2002 Regime, non-members may have still been required to abide by the minimum price (and possibly also the output restrictions) set by the Subcommittee. Moreover, non-members would not appear to have any input into the restrictions that they would be required to follow—no defendant would want the amount of vitamin C it could export to be determined, unilaterally, by its competitors.

However, neither the Ministry nor Professor Shen nor defendants rely on the "same treatment" provision to establish compulsion. In any event, the above

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intensive inquiry, but the factual record indicates that the type of compulsion suggested by Professor Shen was utterly absent here. As discussed infra, with regard to Weisheng's breach of a June 2004 shutdown agreement, there is no documentary evidence suggesting even the possibility that the informal levers of control noted by Professor Shen would be employed.

concerns notwithstanding, this provision is insufficient to establish compulsion.

First, non-members did not have to abide by output restrictions imposed by the Subcommittee. As discussed earlier, the 2002 Regime only requires compliance with the minimum price in order to receive a chop. As such, the "same treatment" provision would not have compelled defendants to reach agreements regarding output restrictions. In addition, although the May 2002 Agreement states that the "export quantity [of non-members] needs to be confirmed by other companies," this provision was never incorporated into the final 2002 Charter.

Second, even if non-members were required to abide by both price and output restrictions imposed by the Subcommittee, the absence of a membership requirement still leaves open the question of what would happen if all the members simply resigned from the Subcommittee. If this occurred, the non-members could still export and there would be no price or output restrictions that they would be required to follow. The only way the FSC defense would still be applicable in such circumstances is if I were to simply assume that the Ministry would directly impose restrictions that the non-members would be required to follow. However, the notion that the threat of the Ministry's direct intervention was hanging over the 2002 Regime appears to conflict with China's representations to the WTO that it gave up "export administration . . . of vitamin C." Moreover, neither defendants nor the Ministry focus their compulsion argument on the possibility of the Ministry intervening and directly imposing price and output restrictions. Instead, the

Ministry and defendants focus on the Chamber's power to penalize.

Given the above, I conclude that none of the provisions in the 2002 Regime, including the "same treatment" clause, would compel defendants to reach agreements in the first instance.

E. Relevance of the WTO Proceeding and the 1996 Interim Regulations

In the WTO Proceeding, the WTO panel concluded that China imposed minimum export price requirements on all of the raw materials at issue. Those raw materials were under the auspices of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters ("CCCMC"). The WTO panel found that the CCCMC's charter "authorized" and "directed the CCCMC to set and coordinate export prices" for those raw materials and that the resulting minimum prices were enforced through two governmental directives: (1) a licensing provision that is irrelevant to the instant suit; and (2) the 1996 Interim Regulations, which "imposed penalties on exporters that fail to set prices in accordance with the coordinated export prices.[48] WTO Panel Report ¶¶ 7.1026, 7.1063. The WTO panel concluded that these provisions "amount[] to a requirement to coordinate export prices for the raw materials at issue." Id. ¶ 7.1064. The WTO panel also

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[48] Although the complainants in the WTO Proceeding also argued that verification and chop was used to enforce the minimum price for one of the raw materials at issue, the WTO panel declined to address verification and chop because its repeal in May 2008 put it beyond the scope of the WTO panel's inquiry. WTO Panel Report ¶ 7.1054.

determined that "actions undertaken by the CCCMC with respect to minimum export price requirements . . . are attributable to China." Id. ¶ 7.1096.

The WTO panel's conclusions do not alter my interpretation of Chinese law. Notably, none of the parties in the WTO Proceeding ever argued that the measures in dispute did not impose a minimum price. Rather, China, the only party that had an incentive to take such a position, argued that: (1) all of the measures at issue relevant to a minimum price requirement were repealed prior to the panel's establishment on December 21, 2009; and (2) even if it did impose minimum prices, that would not constitute a violation for the purposes of the WTO.

In addition, the WTO panel did not discuss whether any of the CCCMC documents that it cited included provisions stating that membership in the CCCMC or its product-specific subcommittees were voluntary and that companies could export without holding such membership. As explained earlier, those provisions in the governmental directives and Chamber documents at issue here are critical to the question of whether defendants' agreements were compelled in the first instance.

Also, although the 1996 Interim Regulations appear to have been in effect during both the 1997 Regime and the 2002 Regime, neither the Ministry nor Professor Shen rely on those regulations to establish compulsion.[49] Professor Shen's report never

[49] The complainants in the WTO Proceeding also relied on the Ministry's 2009 statement discussing self-discipline as well as two CCCMC "coordination measures," which are irrelevant to the instant suit. The WTO panel did not base its decision on these additional documents, finding them outside of "the Panel's terms

even mentions the 1996 Interim Regulations.[50] In its amicus brief, the Ministry cites to the 1996 Interim Regulations merely as background in attempting to explain the goals of the 1997 Regime. In fact, the Ministry's counsel asserted at oral argument that there was no compulsion under the 1996 Interim Regulations: "[The 1997 Notice] is what establishes the license. So what you have in [the 1996 Interim Regulations] is the beginning of a, 'you shall,' but there is no mechanism yet. There is no hammer. There is no compulsion yet really."

Furthermore, because the 1996 Interim Regulations cover all export products and the 2002 PVC Notice and 2003 Announcement address a limited number of specific products, one can assume in the event of any conflict the more specific directives would govern. For example, if defendants invoked the Suspension Provision in the 2002 PVC Notice, it is doubtful that they would have still been subject to potential penalties under the 1996 Interim

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of reference." WTO Panel Report ¶ 7.1028. The panel, however, still considered these documents in "assessing the operation of China's alleged [minimum price] requirement" and interpreting the 1996 Interim Regulations. *Id.* ¶ 7.1032. According to the panel, the 2009 Statement "reveal[s] that . . . parties would be subject to penalties for failure to participate in price coordination." *Id.* ¶ 7.1035. The panel, however, did not address the various deficiencies in the 2009 Statement that I identified earlier.

[50] The fact that Professor Shen does not rely on the 1996 Interim Regulations is particularly noteworthy given that he wrote an article entitled "A Rational Read of the '(Interim) Provisions of the Investigation and Punishment of Improper Low-price Export Conduct,'" which appears to be about the 1996 Interim Regulations.

Regulations. Moreover, China's assertion to the WTO panel that it ceased enforcing the 1996 Interim Regulations at the same time that it repealed verification and chop indicates that these directives should all be interpreted in light of each other.

Even if I were to conclude that the 1996 Interim Regulations involved compulsion and required defendants to set, and abide by, a minimum price, summary judgment would still be denied. The 1996 Interim Regulations only concern a minimum price and are irrelevant to the defendants' agreements regarding output restrictions. Moreover, as discussed below, the 1996 Interim Regulations only address concerns of below-cost pricing and anti-dumping.

F. Any Potential Compulsion was Limited to Avoiding Anti-dumping and Below-Cost Pricing

Even assuming that the 2002 Regime and the 1996 Interim Regulations provided potential sanctions and required defendants to agree on and abide by a minimum price (and possibly also output restrictions), I am not convinced that the Chamber or the Ministry would have intervened through compulsory measures if defendants, in exercising their discretion, had simply set the minimum price and output levels at a point that would have avoided anti-dumping suits and below-cost pricing. Setting prices above that level exceeded the scope of any compulsion and, therefore, would not be immunized by the FSC defense.

On their face, the relevant directives do not indicate that defendants were required to set prices above a level that would have avoided anti-dumping suits and below-cost pricing. The 1996 Interim

Regulations explicitly discuss below-cost pricing and appear to have been intended to avoid anti-dumping suits. Moreover, the directives underlying the 2002 Regime are vague regarding objectives other than avoiding dumping suits.

In addition, the "self-destructive competition" that the Ministry and Professor Shen claim concerned the government also appears to refer to below-cost pricing and avoiding anti-dumping. The 1998 Opinions cited by Professor Shen addressed below-cost pricing by instituting prices for certain domestic products based on average costs in the industry. Similarly, a law review article cited in Professor Shen's discussion of self-discipline indicates that the notion of "vicious competition" in the export context also refers to below-cost pricing. In discussing China's Anti-Monopoly Law, which directs trade associations to "strengthen the self-discipline of industries . . . [and] protect[] the order of market competition," the article explains that:

> In the legislators' eyes, there are two kinds of competition: the good and the bad. 'Good competition' refers to competing on quality and variety of product/services; 'bad competition' ('vicious competition') refers to below-cost pricing. The legislators believe the latter type is a race to the bottom and harms Chinese enterprises, especially those in the business of exporting raw materials; and they further believe trade associations ought to promote 'self-discipline' among competitors and avoid such price wars.

Yong Huan, Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-

Monopoly Law, 75 Antitrust L.J. 117, 129-30 (2008-2009) (emphasis added). In addition, before the WTO panel, China asserted that "it designated [the Ministry] to coordinate export prices [for the raw materials at issue] to minimize the possibility of injurious dumping of Chinese exports by individual exporters." Panel Report ¶ 7.998.

Finally, neither the Ministry nor Professor Shen explicitly state that the Chamber or the Ministry would have intervened if defendants had set restrictions at the minimum levels necessary to avoid anti-dumping suits and below-cost pricing. In fact, the Ministry's counsel represented that, although the Ministry was concerned with dumping and wanted the companies to achieve "sufficient profit margins" in order to ensure the "stable development of the industry" and "full employment," the relevant profit margins were determined by the companies themselves and the Ministry "really didn't care" what those margins were.

III. The Factual Record and Interpreting Chinese Law

A. Legal Standard

Under Rule 44.1, courts have substantial discretion to consider different types of evidence in determining foreign law. Fed. R. Civ. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."). Although courts often rely on sources such as expert testimony and treatises in determining foreign law, Rule 44.1 does not limit courts to such evidence. See *United*

States v. First National Bank of Chicago, 699 F.2d 341, 344 (7th Cir. 1983) (holding that there was "no doubt" that it was appropriate for district court to consider, inter alia, affidavit of bank manager in determining that Greek statute at issue was in effect during the relevant period and applied to foreign banks). In one recent decision, a court, in interpreting an ambiguous Brazilian regulation, relied on the fact that the plaintiff "offered no evidence that . . . Brazilian authorities ever prosecuted, or expressed an intent to prosecute, civilly or criminally, any person or institution for the conduct [the plaintiff asserted] was illegal in Brazil."[51] *Gusmao v. GMT Group, Inc.*, No. 06-cv-5113, 2009 U.S. Dist. LEXIS 37092, 2009 WL 1174741, at *23 (S.D.N.Y. May 1, 2009).

A difficult question, however, arises when this type of evidence involves disputed facts. This was not an issue in Gusamo and no decisions appear to have addressed this question. Because courts are tasked with determining foreign law as a question of law,[52]

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[51] Even if West were still good law and barred inquiry into whether foreign officials failed to enforce their own laws, West would not prevent consideration of the type of evidence considered in Gusamo. A court can presume that foreign officials were acting in a manner consistent with the requirements of foreign law and construe ambiguous foreign law accordingly. In such circumstances, the type of evidence considered in Gusamo would not directly implicate a failure by foreign officials to enforce their own law.

[52] Although no courts appear to have directly addressed the issue, determination of foreign law by judges does not appear to violate the Seventh Amendment. *See* Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 613, 684 (1967) ("When the federal experience is examined against the backdrop of the early English and state court decisions, the

courts, rather than juries, should resolve any disputed facts relevant to interpreting foreign law.

A determination of foreign law is, like choice of law analysis, a preliminary matter to be resolved by the court. Therefore, any disputed facts underlying that determination must also be resolved by the court. *See Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 742-43 (7th Cir. 2008) (holding, in the context of choice of law analysis, that district court should resolve the factual issue of whether defendant was a legitimate corporation operating out of Illinois); Cf. Fed. R. Evid. 104 advisory committee's note, 1972 Proposed Rule ("To the extent that [inquiries into admissibility] are factual, the judge acts as a trier of fact."). Courts first determine the applicable law before cases can be given to the jury.[53]

Admittedly, in contrast to the Seventh Circuit, the Second Circuit held forty years ago that the jury, rather than the court, should make factual findings

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irresistible conclusion is that there is no historic tradition of submitting foreign-law issues to the jury that is of sufficient clarity to warrant a present-day federal judge to hold that he is bound to do so as a constitutional matter.").

[53] The fact that, in the instant case, it may ultimately be unnecessary to instruct the jury regarding foreign law does not alter the analysis. As a general matter, the resolution of foreign law is a preliminary determination that must first be decided by the court before the case can go to trial before a jury. Notably, in the choice of law context, there can be situations where resolution of the critical facts underlying the choice of law analysis would be outcome determinative and, irrespective of how those facts are resolved, a grant of summary judgment would necessarily follow. Yet, the appropriate fact-finder for choice of law issues would surely not vary depending on the specifics of individual cases.

necessary to resolve choice of law questions. *See Marra v. Bushee*, 447 F.2d 1282 (2d Cir. 1971). However, that decision has been criticized, *see Chance v. E. I. Du Pont De Nemours & Co., Inc.*, 57 F.R.D. 165, 168-69 (E.D.N.Y. 1972), and I do not believe that the Second Circuit would extend it beyond its facts. As Judge Weisheng explained in *Chance*, because judges determine what the substantive law is, "[t]heory suggests that the facts predicate to a choice of law decision are generally for the judge rather than the jury." *Id.* at 168. That rationale is equally applicable to determinations of foreign law. Even assuming that the Second Circuit would continue to adhere to the holding of *Marra* in the choice of law context, for the reasons persuasively outlined by Judge Weisheng in Chance, it is doubtful that the Second Circuit would extend the rationale of Marra beyond that case.

Finally, it cannot be overlooked that in this case I am not merely tasked with interpreting Chinese law, but also with determining the appropriate deference to be accorded to the statements of the Ministry. I do not think that the two can be separated as a practical matter, and the latter is clearly inappropriate for resolution by a jury. The resolution of factual disputes relevant to that inquiry is assuredly a function of the court and not the jury.

B. Preliminary Issues

1. Change in Chinese Law

I conclude, as a question of foreign law under Rule 44.1, that all evidence regarding post-filing conduct must, given the current record, be deemed irrelevant to the task of interpreting the Chinese law that was applicable during the pre-filing period. At a November

16, 2005 meeting, Qiao Haili referenced an instruction by "Premier Wen Jiabao" regarding "the enhancement of industrial self-regulation" as well as "an analysis" conducted by the "Secretary 2d Bureau under the State Council" that focused on vitamin C and "asked for resolving the legal status issue of the industrial self-regulation."[54] Because neither the Ministry nor defendants have offered this "instruction" or "analysis" into the record, I am unable to determine the specific impact this "instruction" or "analysis" had on Chinese law. However, I infer that that these changes were made in response to the instant suit — such an inference is particularly appropriate in light of the redactions surrounding these statements in the meeting minutes. Given this gap in the record, which defendants and the Ministry have failed to fill, I decline to rely on any post-filing conduct in interpreting the Chinese law that governed during the pre-filing period. In addition, the fact that, in November 2005, the Chinese government was attempting to "resolv[e] the legal status . . . of the industrial self-regulation," a concept upon which defendants and the Ministry place great reliance, further suggests that Chinese law did not compel

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[54] Qiao Haili's statement is arguably hearsay. However, in making a determination of foreign law under Rule 44.1, I am not bound by the Rules of Evidence. Fed. R. Civ. P. 44.1; *see also Exxon Corp. and Affiliated Companies v. C.I.R.*, 63 T.C.M. (CCH) 2067 (T.C. 1992) (finding witness' testimony regarding telephone conversation in which Saudi Arabian Minister clarified scope of government price restriction to be "admissible under [tax court analogue to Rule 44.1] in ascertaining the scope of the restriction, for which its contents may be used in support of the truth thereof").

defendants' conduct, particularly in the pre-filing period.

In addition to the minutes of the November 2005 meeting, there is also other evidence in the record indicating that Chinese law fluctuated during the post-filing period. An e-mail authored by Wang Qi that discusses the November 2005 meeting indicates an evolving role for the Chamber. Also, the re-institution of export quotas in 2006 indicates a further potential change in Chinese law.

2. Miscellaneous Factual Findings

As an initial matter, I find it appropriate to address three statements in the pre-filing documentary record that could potentially be construed as affirmative evidence of compulsion. First, I find that the Ministry's statements in the fall of 2001 to the Chamber regarding the threatened anti-dumping suits do not indicate that defendants were compelled to reach agreement in November 2001 and to abide by that agreement. Second, I find that the summary of the December 2001 meeting from the Chamber's website does not constitute evidence of compulsion. Although this document may be susceptible to multiple interpretations, I interpret it to mean that the Chamber was announcing that defendants were able to reach, and implement, an agreement without the government's intervention because the government was no longer involved under the 2002 Regime and the Chamber was expressing its pleasure that defendants, freed from any constraints imposed by the 1997 regime (including the government imposed licenses and export quotas), were able to reach, and abide by, this agreement on their own. In making this finding, I note the absence

of any testimony from the Chamber employee who drafted the summary at issue explaining its meaning. Third, I find that the statement by the representative of the Ministry at the April 2001 Subcommittee was not a compulsory order and, more importantly, even if it was, it is insufficient to indicate compulsion under the 2002 Regime given that the Ministry was clearly playing a different role under the 2002 regime. Moreover, even if this statement did indicate compulsion under the 2002 Regime, it does not speak to the question of whether restrictions limited to combating below-cost pricing and anti-dumping would have been sufficient to satisfy the Ministry.

Although these factual findings and the additional findings below support my interpretation of Chinese law, I note that, based solely on the more traditional evidence of foreign law discussed earlier, I would reach the same conclusions even if I did not consider the factual record.[55]

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[55] Plaintiffs cite to a decision from the European Court of First Instance addressing anti-dumping duties imposed by the European Union ("EU") against an exporter of Chinese glyphosate. Case T-498/04, *Zhejiang Xinan Chemical Industrial Group Co. Ltd v. Council of the European Union* ("Zhejiang Xinan"), 2009 ECJ EUR-Lex LEXIS 529 (June 17, 2009). Glyphosate is also subject to verification and chop under the 2002 PVC Notice and 2003 Announcement. In order to decide whether China should be treated as a market economy under the relevant dumping laws, the court in *Zhejiang Xinan* had to determine whether there was significant state interference in export prices. In arguing that no such interference existed, the Chinese exporter offered evidence showing, inter alia, that: (1) the "floor price" under verification and chop was merely a non-binding "guide" price established on the initiative of the exporters to combat anti-dumping concerns; and (2) after the guide price system was abandoned at a meeting in 2003, contracts were still

C. Factual Findings and Specific Interpretations of Chinese Law

1. Applicability of Verification and Chop to Industry-Agreed Output Restrictions

The Price Interpretation outlined earlier is strongly supported by the factual record. First, it is undisputed that, in early 2003, the Chamber distributed an official notice listing the "export prices of commodities reviewed by Customs and agreed by the industry for obtaining an export pre-authorization stamp from the Chamber." (Emphasis added). The notice does not refer to (and includes no field for) any type of output or quantity restrictions for vitamin C or any of the other commodities subject to verification and chop. Notably, Professor Shen makes no attempt to explain this notice.

Second, the circumstances surrounding Weisheng's violation of a shutdown agreement in 2004 also indicate that verification and chop was not intended to enforce production shutdown agreements. This incident is highly probative as it is the only

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subject to the "stamping procedure" by the relevant chamber so that it "could collect annual statistical information." The EU did not challenge the exporter's evidence on these points and based its case almost exclusively on the fact that, under verification and chop, the Chinese government granted the relevant chamber the power to refuse to grant a chop for contracts that were lower than the floor price. Although I do not rely on *Zhejiang Xinan* in interpreting Chinese law, I note that the position taken by the Chinese exporter and the evidence it apparently offered in support of its position are generally consistent with my interpretation of Chinese law and similar to the factual record here.

breach of output restrictions during the pre-filing period. I find, as a factual matter, that: (1) this shutdown agreement was not enforced through verification and chop; (2) Weisheng was not punished, in any way, for its breach; and (3) the only reason Weisheng proposed a new shutdown agreement was, as Wang Qi's report explicitly states, "because their production line had problems." Not only is there a complete absence of any statements in the documentary evidence suggesting that the shutdown agreement would be enforced through verification and chop, but, after Weisheng's violation, Kong Tai stated that he believed that the possibly of Weisheng participating in the new shutdown agreement "was not great." Wang Qi's deposition testimony regarding the absence of any penalty provisions for breaches in the shutdown agreement also indicates that the production shutdown was not enforced through verification and chop—if it had been, specific penalty provisions in the shutdown agreement would not have been necessary. The Price Interpretation is further supported by an NEPG document that discusses the June 2004 shutdown agreement and indicates that defendants viewed the mechanism for controlling prices as distinct from the mechanism for restricting output.

Weisheng's breach also indicates that production shutdown agreements were not compelled in the first instance. Even if there were some explanation as to why the shutdown agreement was not enforced, Kong Tai's statement that the possibility of Weisheng agreeing to participate in the new shutdown agreement "was not great" indicates that neither the Chamber nor the Ministry would have intervened if

Weisheng had simply refused to agree to the revised shutdown agreement.

In light of the evidence above, I reject, as incredible and conclusory, the deposition testimony of defendants' employees asserting that Weisheng was penalized by the Chamber and that the Chamber required Weisheng to agree to the revised shutdown agreement.[56]

The evidence discussing the use of verification and chop to enforce defendants' November 2001 agreement does not alter my conclusion that verification and chop was not used to enforce output restrictions. This evidence refers to "price reviews" and never explicitly states that the industry-agreed output restrictions would be enforced through verification and chop.

Finally, I note that the post-filing re-institution of export quotas in 2006 further supports the Price Interpretation. The re-institution of export quotas

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[56] Although defendants cite to only limited portions of the factual record, even if defendants had relied on all of the deposition testimony of their employees, I would reject that testimony. For example, I would reject the deposition testimony of defendants' employees to the extent that they suggest that verification and chop was used to enforce any output restrictions in the pre-filing period. Moreover, based on the evidence concerning Weisheng's breach, the other evidence of voluntariness in the pre-filing documentary evidence and the absence of any affirmative evidence of compulsion in those documents, I would also reject the deposition testimony of defendants' employees asserting that the agreements they reached during the pre-filing period stemmed from compulsory orders from the Chamber. In addition, much, if not all, of this testimony is conclusory.

makes little sense if verification and chop was supposed to enforce output restrictions.

2. Potential Penalties for Non-Compliance with Self-Discipline

The factual record also confirms that there were no material penalties under the 2002 Regime for failing to reach agreements in the first instance. If the threat of membership revocation under the 2002 Regime was sufficient to compel defendants' conduct, then Kong Tai would not have stated that it was unlikely that Weisheng would agree to participate in the new shutdown agreement. This incident also indicates that, even when a majority of the members of the Subcommittee wanted to compel one holdout member to reach agreement, they were powerless to do so.

Additionally, it is notable that none of defendants' employees have asserted that the Chamber threatened to revoke Subcommittee membership in order to compel defendants to reach agreements. Rather, defendants' employees claim, in unconvincing testimony, that the Chamber would compel defendants to reach agreement by threatening to withhold chops or export quotas.

In short, "self-discipline" does not involve coercion—as the term "self-discipline" suggests on its face, defendants were engaged in consensual cartelization.

3. Applicability of the 1997 Regime to Defendants' November 2001 Agreement

The factual record supports the conclusion that defendants' compliance with the agreement reached in November 2001 was not governed by the 1997

Regime. One document indicates that when defendants reached agreement in November 2001, they did so under the new legal framework established by the 2002 Regime:

> Analysis from persons within the industry was that the enterprises were able to sit down together at this particular time because VC prices had reached rock bottom, and no one could sustain a further slide; the next reason was, *because the country had opened up the commercial products business from a free competition aspect the enterprises were impelled and had no choice but to seek industry self-regulation.*

(Emphasis added). Moreover, the factual record also suggests that the November 2001 agreement was only enforced under the 2002 Regime. As one documents notes, "[t]he [Ministry] and [Customs] actively supported this effort to pre-verify and sign VC product types, requiring the companies to file with [the Chamber] prior to export."

4. Suspension Provision

None of the underlying facts are directly relevant to interpreting the Suspension Provision. There is no evidence that defendants invoked the Suspension Provision over the objections of the Chamber or that the Chamber prevented defendants from suspending verification and chop when defendants so desired. However, the general evidence of voluntariness in the record is, at the very least, consistent with my interpretation of the Suspension Provision.

5. Potential Compulsion and Avoidance of Anti-dumping and Below-Cost Pricing

There is evidence in the record suggesting that, even if the 2002 Regime involved some compulsion, the Chamber and the Ministry would have only compelled defendants' conduct if anti-dumping suits and below-cost pricing were threatened. One Weisheng document notes that "because the international market has turned for the better considerably when compared with the situation in early 2002, *the willingness and actual effectiveness of various manufacturers to cooperate will be lower than the days when the market had a difficult time*." (Emphasis added). Although I interpret this document as indicating that all of defendants' agreements were voluntary, if the 2002 Regime did, as a matter of Chinese law, involve some compulsion, I would interpret this document to mean that when the market was not "ha[ving] a difficult time" defendants could reach agreements, but were not required to do so.

It is also notable that, during the pre-filing period, the only Subcommittee meeting attended by a representative of the Ministry addressed dumping concerns.

IV. The Post-Filing Period

Although there appear to have been changes to Chinese law during the post-filing period—changes that are a sufficient reason to distinguish it from the pre-filing period—defendants have still failed to establish compulsion, as matter of Chinese law, during this time. Defendants have not provided me with the "instruction" and "analysis" referenced by Qiao Haili at the November 2005 meeting. Defendants have also not provided any explanation for the re-institution of export quotas in 2006. In addition, the

factual record does not indicate that Chinese law compelled defendants' conduct during the post-filing period. Although I question the credibility of much of defendants' post-filing evidence, the November 16, 2005 document authored by Wang Qi, which suggests that the Chamber's role was evolving along with the changes in Chinese law, does not appear to have been crafted to serve defendants' litigation position. However, my interpretation of the ambiguous phrases in this document lead me to conclude that, even in November 2005, defendants were still not compelled to reach agreement, particularly regarding output restrictions. Much of this document suggests voluntariness, not compulsion. Even Wang Qi's discussion of "government relations" does not indicate the compulsion necessary to trigger the FSC defense. Rather, this discussion suggests a complex relationship between defendants, the Chamber and the Ministry that, given the evolving changes in Chinese law, was still being sorted out. Although Wang Qi notes that the Chamber "will continue to be a major force in coordinating companies" and that "go[ing] beyond [the] coordination of the [Chamber]" could have some negative consequences, his e-mail suggests that the latter action was, nonetheless, still a potential option. Moreover, it is not clear that the potential negative repercussions of such action would rise to the level necessary to constitute compulsion.

I conclude that Chinese law did not compel defendants' conduct in the post-filing period. Therefore, summary judgment must also be denied as to the post-filing period.

CONCLUSION

For the reasons explained above, defendants' motion for summary judgment is denied.

SO ORDERED

/s/

Brian M. Cogan
U.S.D.J.

Dated: Brooklyn, New York

September 1, 2011

APPENDIX D: Opinion of the United States District Court for the Eastern District of New York Denying Respondents' Motion to Dismiss, Dated November 6, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW Y ORK

06-MDL-1738 (DGT)

IN RE VITAMIN C ANTITRUST LITIGATION

November 6, 2008, Decided

November 6, 2008, Filed

MEMORANDUM AND ORDER

TRAGER, J.

Plaintiffs in this case allege that defendants, Chinese corporations that manufacture and sell vitamin C, [1]formed an illegal cartel to fix prices and limit supply for exports of vitamin C, including those to the United States. Plaintiffs bring this action under Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 4, 16. Defendants now

[1] Plaintiffs have filed a second amended complaint adding two defendants that do not manufacture vitamin C. Defendants have moved to dismiss the second amended complaint.

move to dismiss, on the grounds that their price-fixing activities were compelled by the Chinese government.

The following facts, which are drawn from the complaints,[2] are assumed to be true for purposes of this motion to dismiss.

China began producing vitamin C in the late 1950s, and by 1969 its scientists had developed a two-stage fermentation process to manufacture vitamin C, resulting in a significant cost advantage compared to European producers. China began employing this technology commercially in the 1980s. Chinese vitamin C manufacturers were able to overcome an early reputation for poor product quality, and now supply a full range of vitamin C products at premium prices. Most sales of vitamin C are of bulk ascorbic acid.

In the early 1990s, European manufacturers F. Hoffmann LaRoche, Ltd., Merck KgaA, and BASF AG and the Japanese company Takeda Chemical Industries, Ltd. dominated the worldwide vitamin C market. From 1990 to 1995, these companies conspired to suppress competition and fix prices for vitamin C. They were sued in *In re Vitamins Antitrust Litigation*, MDL No. 1285, Misc. No. 99-0197 (D.D.C.) (Hon. Thomas F. Hogan). Competition from Chinese manufacturers of vitamin C undermined this early conspiracy during the 1990s, until it reportedly disbanded in late 1995.

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[2] There are multiple complaints in this consolidated multi-district litigation action, but all recite essentially the same background facts.

During 1995, it was reported that thirteen Chinese manufacturers of vitamin C met and agreed to form their own cartel to limit production of vitamin C to stabilize prices. This attempt at market control reportedly failed. From the end of 1995, world vitamin C prices slumped and were cut in half by early 1996. By 1997, there were as many as 22 competitors in the Chinese vitamin C manufacturing market. Strong competition by Chinese competitors during this period allowed the Chinese to drive European manufacturers from the market. By the end of the 1990s, the reduction in vitamin C prices and other factors resulted in industry consolidation in China to four major manufacturers, all of which are defendants in this case - Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei Welcome"), Jiangsu Jiangshan Pharmaceutical Co. Ltd. ("Jiangsu Jiangshan"), Northeast Pharmaceutical Group Co. Ltd. ("NEPG") and Weisheng Pharmaceutical Co. Ltd. ("Weisheng") (collectively, the "defendant manufacturers").

The price of vitamin C remained relatively low in 2001, by which time Takeda had withdrawn from the market and sold its manufacturing capacity to BASF. Merck and Roche also announced their intention to withdraw from the vitamin C market. BASF announced that it would halt its new production line in Takeda, Japan. By 2001, defendants had captured approximately 60 percent of the worldwide market for vitamin C. Currently, defendants control 82 thousand metric tons, or approximately 68 percent, of the worldwide production capacity for vitamin C.

According to the complaints, beginning in December 2001, defendants and their co-conspirators formed a cartel to control prices and the volume of

exports for vitamin C. At a meeting of the Western Medicine Department of the Association of Importers and Exporters of Medicines and Health Products of China (the "Association") in December 2001, defendants and the Association reached an agreement for Chinese manufacturers of vitamin C in which they agreed to control export quantities and raise prices. The cartel members agreed to restrict their exports of vitamin C in order to create a shortage of supply in the international market. Specifically, the cartel members agreed to "restrict quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically." The complaints further allege that the agreements of the cartel members were facilitated by the efforts of their trade association.

According to the complaints, the formation of the cartel in December 2001 led to price increases of vitamin C in the United States from approximately $2.50 per kilogram in December 2001 to as high as $7 per kilogram in December 2002. Defendant China Pharmaceutical reported in its 2003 annual report that average prices during 2002 rose from $3.20 per kilogram to $5.90 per kilogram, an 84 percent increase. China Pharmaceutical also allegedly reported that gross profit margins for its vitamin C production were 60.2 percent in 2002, an increase of 28.1 percent.

Plaintiffs allege that together, defendants' sales constitute approximately 60 percent of the worldwide vitamin C market and "virtually 100 percent of the manufacturers who can produce vitamin C for a cost below $4.50 to $5 per kilogram." Plaintiffs acknowledge that non-cartel members BASF and DSM control 30 to 40 percent of the worldwide market

for vitamin C, but note that the European manufacturers have higher manufacturing costs for vitamin C than Chinese manufacturers.

The complaints allege that following the collusive price increases in 2002, during 2003 the combination of the cartel's supply restrictions and increases in world demand for vitamin C - attributable in part to the outbreak of SARS in Spring and Summer of 2003 - allowed the cartel to achieve prices as high as $15 per kilogram in April 2003. By the third quarter of 2003, however, cartel members began reducing prices to increase their sales. According to the complaints, despite the price cuts, prices remained substantially above competitive levels.

Plaintiffs allege that the Association called an "emergency meeting" in late November or December 2003 to address the price cutting, which was attended by representatives of each of the defendants. At the meeting, the Association discussed with defendants how they would rationalize the market and limit the production of vitamin C to increase prices.

In December 2003, defendants and members of the Association also met at the annual China Exhibition of World Pharmaceutical Ingredients, where they devised plans to rationalize the market and limit production levels and increase prices. The Association warned defendants that it was impossible for any of them to monopolize the market to the detriment of the others. As a result of the meetings and other efforts by cartel members, prices for vitamin C in December 2003 increased from $4.20 per kilogram at the beginning of the month to over $9 per kilogram by the end of the month.

In June 2004, following some price declines, defendants agreed to shut down production for equipment maintenance in order to boost prices back toward their December 2003 highs. Defendants also agreed to restrict exports to the United States to further stabilize prices. Plaintiffs allege that defendants' anticompetitive activities are ongoing.

Defendants move to dismiss on grounds of act of state, foreign sovereign compulsion and international comity. In addition, plaintiffs have filed a second amended complaint adding a direct purchaser plaintiff and two defendants. The two newly added defendants and, separately, the original defendants, move to dismiss the second amended complaint for failure to include any factual allegations regarding the newly added defendants or to explain how their addition affects the conspiracy alleged in the second amended complaint.

Discussion

(1)

Motion to dismiss under act of state, foreign sovereign compulsion and international comity doctrines

Defendants do not deny the allegations in the complaints for purposes of their motion to dismiss. Rather, they argue that their actions were compelled by the Chinese Ministry of Commerce ("Ministry").[3] They invoke the doctrines of act of state, foreign sovereign compulsion and international comity as

[3] The Ministry was formerly known as the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC"). Both entities will be referred to as the Ministry herein.

defenses to suit. Each of these defenses rests on different doctrinal underpinnings, but they are all premised on an act by a foreign government.

The act of state doctrine derives from both separation of powers and respect for the sovereignty of other nations. It holds that the courts of one nation may not sit in judgment of the public acts of another sovereign within its own borders. *See Republic of Austria v. Altmann*, 541 U.S. 677, 700, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004). The reasons for the doctrine were outlined by the Supreme Court over a century ago:

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

Underhill v. Hernandez, 168 U.S. 250, 252, 18 S. Ct. 83, 42 L. Ed. 456 (1897). Thus, any censure of another country's acts within its own territory is reserved to diplomatic channels and does not come within the purview of the courts. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 304, 38 S. Ct. 309, 62 L. Ed. 726 (1918) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." (internal quotation marks omitted)). The Supreme Court has built upon the foundations of the act of state doctrine to note that, in the context of adjudicating the legality

of expropriations by a foreign state, "[p]iecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964). Thus, the act of state doctrine is aimed at reserving for the executive branch decisions that may significantly affect international relations.[4]

The defense of foreign sovereign compulsion, on the other hand, focuses on the plight of a defendant who is subject to conflicting legal obligations under two sovereign states. Rather than being concerned

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[4] A plurality of the Supreme Court has recognized a commercial exception to the act of state doctrine, pursuant to which "the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities." *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 425 U.S. 682, 695, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976). The Second Circuit, however, has not adopted this exception. *See Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) ("We leave for another day consideration of the possible existence in this Circuit of a commercial exception to the act of state doctrine under *Dunhill*."). Even if the exception were recognized within this Circuit, defendants and the Ministry have made a compelling argument for why the Chinese government's involvement - to the extent it exists - in defendants' price-fixing scheme amounts to a public, rather than commercial, act. Namely, they argue that the government was working to guide the vitamin C industry in China's transition from a command to a market economy. If so, and if - as defendants and the Ministry argue - defendants were acting in a governmental capacity when they fixed prices, it is not even clear that the Sherman Act would apply, as it is directed at private actors.

with the diplomatic implications of condemning another country's official acts, the foreign sovereign compulsion doctrine recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's.

Finally, international comity

> is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895). The Ninth and Third Circuits have each set forth a list of factors to be weighed in determining whether to assert jurisdiction,[5] but in any event,

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[5] The factors given by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976) are:

[1] the degree of conflict with foreign law or policy,

[2] the nationality or allegiance of the parties and the locations or principal places of businesses or corporations,

[3] the extent to which enforcement by either state can be expected to achieve compliance,

[4] the relative significance of effects on the United States as compared with those elsewhere,

[5] the extent to which there is explicit purpose to harm or affect American commerce,

abstention from exercising jurisdiction for reasons of international comity depends on the existence of a "true conflict between domestic and foreign law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993). No conflict exists for this purpose unless Chinese law requires defendants "to act in some fashion prohibited by the

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[6] the foreseeability of such effect, and

[7] the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

The factors listed by the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) are:

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;
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.

law of the United States," or unless defendants "claim that their compliance with the laws of both countries is otherwise impossible." *Id.* at 799.

These defenses rest on facts that are not found within the complaints - namely, whether the Chinese government required defendants to fix prices in violation of the Sherman Act. Nevertheless, defendants insist that this case may be properly dismissed at the pleadings stage[6] because the Ministry has submitted an amicus brief detailing the Ministry's role in orchestrating and maintaining the vitamin C cartel. According to defendants, the Ministry's brief must be accepted as true, because it is the official position of the government of China.

a. The Ministry's amicus brief

The Chinese government's appearance as amicus curiae is unprecedented. It has never before come before the United States as amicus to present its views. This fact alone demonstrates the importance the Chinese government places on this case.

The Ministry is the "highest administrative authority in China authorized to regulate foreign trade," and is "the equivalent in the Chinese

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[6] Defendants assert that courts "routinely consider, and often grant, dismissal of [similar] cases … at the Rule 12 motion stage," but they cite only four cases, all of which were decided between 1971 and 1983. Of those four, one was decided after discovery was completed, *Van Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977), and three were dismissed based on the allegations in the complaint, *see Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1975); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.,* 712 F.2d 404 (9th Cir. 1983); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971).

governmental system of a cabinet level department in the U.S. governmental system." Ministry Br. at 1. The Ministry argues that the body plaintiffs have characterized as a "trade association" that facilitated the actions of the alleged cartel is in fact the Chamber of Commerce of Medicines and Health Products Importers & Exporters ("Chamber"). The Chamber is "an entity under the Ministry's direct and active supervision that plays a central role in regulating China's vitamin C industry." Ministry Br. at 5. In contrast to the voluntary, non-governmental chambers of commerce that exist in the United States, chambers of commerce in China have played a central role in China's shift from a command economy to a market economy. *Id.* at 7. In particular, the Ministry asserts that the Chamber stepped into the shoes of stated-owned national exporting entities when those entities stopped regulating exports of pharmaceutical products, including vitamin C. *Id.*

The Chamber had its origins in 1991, when the Ministry promulgated Measures for Administration over Foreign Trade and Economic Social Organizations. Mitnick Decl. Ex. D ("Ministry Measures"). Article 14 of the Ministry Measures dictates that "Social organizations established with coordination and industry regulation functions as authorized by [the Ministry] must implement the administrative rules and regulations relating to foreign trade and economy." *Id.* at 5 (emphasis added). The Ministry represents that the Chamber was one of those social organizations authorized to implement rules and regulations, thus imbuing it with governmental regulatory authority. Indeed, the Ministry asserts that the Chamber "act[s] in the

name, with the authority, and under active supervision, of the Ministry," thus performing "a governmental function so authorized under Chinese law." Statement in *In re Vitamin C Antitrust Litigation*, June 9, 2008. The Ministry Measures further provide in Article 17 that the Ministry "shall be directly responsible for the daily management of social organizations established with coordination and industry regulation functions." Ministry Measures, at 5.

In 1997, the Ministry and State Drug Administration ("SDA") issued a notice ("the notice") requiring strict control of vitamin C production, in light of "intense competitions and challenges from the international market." 1997 MOFTEC & SDA Notice, Mitnick Decl. Ex. H at 1. The notice required the Chamber to establish a Vitamin C Coordination Group (later known as the Vitamin C Sub-Committee), which was to "coordinate with respect to Vitamin C export market, price and customers, and to organize the enterprises in contacting foreign entities." *Id.* ¶ 6. The notice further explained that "[t]he specific method for coordination shall be formulated by the Chamber, and filed to [the Ministry] for record." *Id.*

In 1998, the Ministry acknowledged and approved a request (apparently from the Chamber) to establish a Vitamin C Sub-Committee within the Chamber. Approval for Establishing VC Sub-Committee of China Chamber of Commerce of Medicines & Health Products Importers & Exporters, Mitnick Decl. Ex. F. The Ministry declared that "[t]he major responsibilities of VC Sub-Committee are: to be responsible for coordinating the Vitamin C export

market, price and customers of China, to improve the competitiveness of Chinese Vitamin C produce in the world market and promote the healthy development of Vitamin C export to China." *Id.* The Sub-Committee charter ("the charter"), which predated the formal establishment of the Sub-Committee by several months, provides that the Sub-Committee "shall coordinate and administrate market, price, customer and operation order of Vitamin C export." Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters, Mitnick Decl. Ex. G, Art. 7.

The charter limits membership in the Sub-Committee to vitamin C exporters whose export volume in any year from 1994 to 1996 exceeded 200 tons, and specifies that "[o]nly members of the Sub-Committee have the right to export Vitamin C and are simultaneously qualified to have Vitamin C export quota." *Id.*, Arts. 11, 12. The charter goes on to list among members' obligations that members "shall voluntarily adjust their production outputs according to changes of supplies and demands on international market." *Id.*, Art. 15(3). The charter also requires members to "strictly execute export coordinated price set by the Chamber and keep it confidential." *Id.*, Art. 15(6).

The charter provides for sanctions for "failure to perform any member's obligation," including "warning, open criticism and even revocation of its membership." *Id.*, Art. 16. In describing the ultimate penalty for non-compliance, the charter notes that the Sub-Committee "will suggest to the competent governmental department, through the Chamber, to

suspend and even cancel the Vitamin C export right of such violating member." *Id.*

In 2002, the Ministry changed the method of price review "in order to accommodate the new situations since China's entry into WTO." 2002 MOFTEC & Customs Notice, Mitnick Decl. Ex. J at 1. The new regulation subjected 30 categories of export products (including vitamin C) to "Price Verification and Chop" by their respective chambers, and no longer subjected them to supervision and review by customs. *Id.* ¶ 1. The procedure for Price Verification and Chop calls for exporters to send the export contracts to the relevant chambers for verification before Customs declaration. Announcement of Ministry of Commerce of the People's Republic of China, General Administration of Customs of the People's Republic of China (No. 36,2003) ("Announcement No. 36,2003"), Exhibit 2: Procedures for Implementing the Verification and Chop System on Export Commodities ¶ A, Mitnick Decl. Ex. K. "If it is verified that the contracts comply, the Chamber shall fill in the Verification and Chop Form of China Chamber of Commerce for the relevant chamber and affix the counter-forgery V&C chop to the V&C Form and to the export contracts at the blocks where the prices and quantities are specified, and then deliver them back to the exporters." Id. Customs will only allow for export those shipments that are accompanied by export contracts with the required chop. Announcement No. 36,2003.

Based on this regulatory framework for the Chamber and Vitamin C Sub-Committee, defendants and the Ministry argue that defendants were compelled under Chinese law to collectively set a price for vitamin C exports. Although they are careful to

note that "the Ministry itself did not decide what specific prices should be," Ministry Br. at 13, defendants and the Ministry assert that defendants could not have exported vitamin C that did not conform to the agreed-upon price.

b. The underlying documents

Plaintiffs attack the exhibits attached to the Ministry's brief as mere notices and charter documents of a nongovernmental organization. They allege that the Ministry has not pointed to a single law or regulation compelling a price or price agreement at issue in the Complaint. They note, furthermore, that the price collusion complained of in the Complaint began in December 2001, long after the Chamber and Vitamin C Sub-Committee were established and purportedly compelled to set prices, and only after defendants had achieved the market power necessary to sustain above-market prices.

Plaintiffs point to publicly available records of the Chamber and its Vitamin C Subcommittee in support of their position that defendants' price agreements were voluntary:

> In December 2001, efforts by the Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters, each *domestic manufacturers were able to reach a self-regulated agreement successfully*, whereby they would voluntarily control the quantity and pace of exports, to achieve the goal of stabilization while raising export prices. Such *self-restraint measures*, mainly based on "restricting quantity to safeguard prices, export in a

> balanced and orderly manner and adjust dynamically" *have been completely implemented by each enterprises' own decisions and self-restraint, without any government intervention.*[7]

Printout from website of China Chamber of Commerce of Medicines and Health Products Importers and Exporters Information, Pls.' Mem. in Opp'n to Defs' Mot. to Dismiss ("Pls.' Opp'n"), Ex. D (emphasis added).

Plaintiffs also rely on an expert in Chinese law, Professor James V. Feinerman, who concludes based on a review of the Ministry's brief and its exhibits that defendants' conduct was not compelled by Chinese law. Pls.' Opp'n Ex. K ("Feinerman Decl."). As an initial matter, Professor Feinerman disputes the authenticity of many of the Ministry's exhibits, on the basis that they do not contain a chop, that they are not governmental laws or regulations, that they are not specific to vitamin C, or that they are mis-translated. Regarding the Ministry's 1998 approval of a request to establish the Vitamin C Sub-Committee, Professor Feinerman notes that the document merely "authorizes the creation of the entity." *Id.*, ¶ 16. He points out that this "reflects the reality in China that an organization not expressly allowed would be

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[7] The Ministry argues that such documents should not be taken at face value. The Ministry argues that many of the terms appearing in defendants' and the Chamber's documents have meanings in the context of China's government and economic policy that are quite different from their literal translations. Among the controversial terms are "social organization," "voluntary self-restraint," "coordination," "industry self-discipline," and "verification."

prohibited, in contrast to the long-standing Western norm that anything not expressly prohibited is allowed." *Id.* Accepting Professor Feinerman's characterization leads to the conclusion that a cartel in China could only exist with governmental sanction. At that point it becomes difficult to differentiate between a cartel that was voluntarily formed by its members, who then had to seek governmental approval, and a cartel that was mandated by governmental fiat.

With the benefit of discovery, plaintiffs submitted a supplemental memorandum and exhibits which, they contend, demonstrate that defendants voluntarily restricted export volume and fixed prices for vitamin C. For example, the minutes from a November 16, 2001 meeting of defendants held under the auspices of the Chamber show that the defendants agreed by hand voting to restrict output and fix prices at CIF 3.00/kg effective January 1, 2001. Minutes of Meeting by Officials of Vitamin C Manufacturers, Pls.' Supp. Mem. in Opp'n to Defs.' Mot. to Dismiss ("Pls.' Supp. Mem.") Ex. 14 at 3-4.

Defendants admit that the minimum export price subject to verification and chop has been $3.35 per kilogram since May 2002. Northeast Pharma. Group Co.'s Third Amended Response to Pls.' Second Set of Interrogatories, Pls.' Supp. Mem. Ex. 2 at 18. Notwithstanding this mandated price, defendants have sold vitamin C above that price since its implementation. Dep. of Ning Hong, Pls.' Supp. Mem. Ex. 5 at 68-70. For example, according to documents produced by defendant Jiangsu Jiangshan, in June 2003

> [O]ur company organized a meeting on market analysis among the six domestic manufacturers and the China Chamber of Commerce of Medicines & Health Products in Qing Dao. *We all agreed to set the floor price at 9.20 USD/kg*, hoping to slow down the speed of market price falling, also hoping to strengthen the confidence of middle suppliers and customers. Looking at the effect a couple of weeks later of this month, the effect of this price limitation is very limited, every manufacturer quoted prices lower than the floor price.

Import/Export Department June Work Summary ¶ 5, Pls.' Supp. Mem. Ex. 8 (emphasis added).

In addition, the person responsible for negotiating export contracts for one of defendants testified in his deposition that he was aware of some price having been mandated by the government, but he could not remember what it was. Dep. of Ning Hong, at 68.[8] This

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[8] 8. The deponent testified as follows:

> Q. Does the Chamber review the contracts to determine whether a minimum export price has been met?
>
> A. They might, I think they should.
>
> * * *
>
> Q. Are you the main person responsible for negotiating prices of vitamin C with U.S. customers?
>
> A. Yes, I handled the very specific processes. I do that.
>
> Q. Are you aware of any minimum export price today for vitamin C?

testimony suggests that the hand of government was not weighing as heavily on defendants as defendants and the Ministry would have this court believe.

Several of the documents plaintiffs attach as exhibits to their supplemental brief appear to be notes from meetings or the musings of defendants' employees. As such, it is unclear whether they would qualify as business records or otherwise be admissible as evidence. Although their provenance is unclear, these documents do provide glimpses into what may have been defendants' thinking regarding price-fixing. For example, plaintiffs have procured a document entitled "Thought on Coordinated Production Termination," in which the author writes:

> We are reluctant to admit the fact that the chamber of commerce will continue to be a major force in coordinating companies of this industry, particularly in a difficult situation. The role of the chamber of commerce as the industrial association will be intensified rather than weakened in the future. Therefore, there is no need for us to go beyond coordination of the chamber of commerce, which will do no good

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A. I think so. I feel that it might be.

Q. Do you know what it is?

A. I can't recall.

* * *

Q. No one has ever told you that the Chamber won't approve a contract with a price below $335 cents, have they?

A. I cannot recall.

Dep. of Ning Hong, at 68-70.

> to our current or future work. The work of the chamber of commerce will be supported by the Ministry of Commerce. We should not regard the coordination simply as authoritarianism of the chamber of commerce.

Thought on Coordinated Production Termination, Pls.' Supp. Mem., Ex. 12.[9] The author continues:

> The act of deciding production or prices based on coordination is a kind of monopoly whatever the reasons. However, I believe we should not have any worry since the Ministry of Commerce is a friend of the court in the lawsuit. If we won the lawsuit, it would be hard for foreigners to make more trouble. Even if we lost the case, the government would take the foremost part of responsibility. After all, we need to do many things in a more hidden and smart way.

Id.

Documents such as these – if they are to be credited – suggest a complex interplay between the Chamber and defendants that makes it difficult at this stage to determine the degree of defendants' independence in making pricing decisions.

c. Authority of the brief

The authority of the Ministry's brief is critical to defendants' motion, because, as noted above, the documents on which defendants rely to demonstrate governmental compulsion of their anti-competitive acts suggest on their face that defendants' acts were

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[9] Plaintiffs do not describe the source of this document. It bears Bates number JJBA11-1.

voluntary rather than compelled. Defendants contend that the Ministry's brief must be taken as conclusive on the issue of Chinese law - and particularly on the question of whether defendants' conduct was mandated by Chinese law, citing *United States v. Pink*, 315 U.S. 203, 218-21, 62 S. Ct. 552, 86 L. Ed. 796 (1942), and *Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919). In Pink, the Court was determining the intended extraterritorial effect of a Russian decree, and was presented with an official declaration from the Russian official charged with interpreting existing Russian law. 315 U.S. at 220. The Court held that the declaration was "conclusive" on the issue of the Russian decree's intended extraterritorial effect. *Id.* Similarly, the Second Circuit in *American Can* had before it a certificate from the Russian ambassador to the United States, which it accepted as "binding and conclusive . . . on the matters to which it relates." 258 F. at 368-69.

Plaintiffs counter that Fed. R. Civ. P. 44.1, which was first adopted in 1966, permits a court to "consider any relevant material or source, including testimony," when determining foreign law. Plaintiffs assert that Rule 44.1 allows courts wide discretion to determine foreign law, and that they are not bound to accept the assertions of foreign sovereigns.

Indeed, post-Rule 44.1 decisions from the Second Circuit have adopted a softer view toward the submissions of foreign governments. In *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70 (2d Cir. 2002), the Ministry of Finance of the Republic of Indonesia asserted that under Indonesian law, certain

funds belonged to the Republic of Indonesia. The Second Circuit agreed that "a foreign sovereign's views regarding its own laws merit - although they do not command - some degree of deference." *Karaha Bodas*, 313 F.3d at 92. After independently analyzing the relevant Indonesian law, the court accepted the Republic of Indonesia's interpretation, noting: "Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas." *Id.*

More recently, the Second Circuit opted not to follow an affidavit from the Chilean Corporation of Judicial Assistance of the Region Metropolitana ("Central Authority") regarding a child custody matter under the Hague Convention. *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 148 (2d Cir. 2008). There was a question of whether the Central Authority had all the relevant information at the time it made its affidavit, but the court held that "even if [the affidavit] is authoritative, the district court was not bound to follow it." *Id.* (citing *Karaha Bodas*, 313 F.3d at 92).

The Ministry's Brief is, therefore, entitled to substantial deference, but will not be taken as conclusive evidence of compulsion, particularly where, as here, the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position.

d. Role of the Chinese government in defendants' agreement to fix prices

All three of defendants' defenses rest on the proposition that their collusion on prices for vitamin C was due to acts of the Chinese government. Although the parties argue whether the defenses raised by defendants are jurisdictional, the issue at this stage of the case is whether there is a factual dispute as to the alleged compulsion.[10]

Many of the cases defendants rely upon in support of their motion to dismiss involved much clearer examples of government compulsion. For example, the court in *Trugman-Nash, Inc. v. New Zealand Diary Board*, 954 F. Supp. 733 (S.D.N.Y. 1997), was charged with considering the effect of the New Zealand Dairy Board Act of 1961, a formally codified New Zealand law. In that case the court interpreted the language of the statute as "mandat[ing] Board disapproval of sales price competition among New Zealand dairy

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[10] The Ministry asserts that if the court exercises jurisdiction over this action "[i]t cannot be denied that the possibility of insult to China is significant." Ministry Br. at 22. Not every court agrees with this basis for abstention. The Ninth Circuit has noted:

> Federal judges cannot dismiss a case because a foreign government finds it irksome, nor can they tailor their rulings to accommodate a non-party . . . . If a foreign government finds the litigation offensive, it may lodge a protest with our government; our political branches can then respond in whatever way they deem appropriate - up to and including passing legislation. . . . If courts were to take the interests of foreign governments into account, they would be conducting foreign policy by deciding whether it serves our national interests to continue with the litigation. . . ."

Patrickson v. Dole Food Co., Inc., 251 F.3d 795, 803-05 (9th Cir. 2001) (Kozinski, J.).

producers in respect of exports to nations like the United States that restrict import quantities." *Id.* at 736. Accordingly, the court held that there was "an actual and material conflict between American antitrust law and New Zealand law in respect of the marketing of dairy export produce," entitling defendants "to invoke the doctrines of act of state, foreign sovereign compulsion, and international comity." *Id.*

Similarly, the Second Circuit has applied the act of state doctrine to affirm dismissal of an antitrust case brought by a liquid bulk cargo tanker service that was shut out from importing and exporting Colombian liquid gas that challenged Colombia's cargo reservation laws. *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 450 (2d Cir. 1987). Colombia began enforcing a series of cargo reservation laws it had passed years before which required that imports and exports of certain types of cargo be transported exclusively by Colombian carriers, and the plaintiff sued the beneficiaries of these laws for violations of the Sherman Act, including conspiracy to fix prices. *Id.* at 450-51. Although the plaintiff alleged that the defendants manipulated the Colombian government into implementing the cargo reservation laws, the court held that the plaintiff's allegations "make clear that its antitrust suit is premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the district court would be called on to examine and pass judgment on." *Id.* at 452-53. The court refused to investigate the motives of the Colombian government, stating: "When the causal chain between a defendant's alleged conduct and

plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government, claims made under the antitrust laws are dismissed." *Id.* at 453.

Other cases relied upon by defendants were decided on a fuller record. For example, defendants rely heavily on *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970), as a case supporting their argument of foreign sovereign compulsion. That case was decided on summary judgment, however, after discovery was complete. *Id.* at 1302. The case involved a boycott against an oil refiner by suppliers of Venezuelan crude oil which held concessions from the Venezuelan government. The defendants argued that their boycott was ordered by the Venezuelan government, and the court granted summary judgment based on its conclusion that the defendants had, indeed, been compelled by their government to boycott the plaintiff.

The court refused to consider whether the order to boycott was "legal or 'compulsive' under the laws of Venezuela," holding that "[o]nce governmental action is shown, further examination is neither necessary nor proper." *Id.* at 1301. Nevertheless, the court explicitly noted in that case that "[n]othing in the materials before the Court indicates that defendants either procured the Venezuelan order or that they acted voluntarily pursuant to a delegation of authority to control the oil industry." *Id.* at 1297. In this case, on the other hand, the parties vigorously dispute whether defendants instigated formation of the Vitamin C Sub-Committee and whether defendants' actions in fixing prices were voluntary.

Thus, although both *Trugman-Nash* and *O.N.E. Shipping* involved dismissals of antitrust suits due to the involvement of foreign governments in anticompetitive activities, they differ from the present case in that there was no dispute in those cases as to the effect of the respective governmental acts. Here, on the other hand, the parties hotly contest both the origin and even existence of government compulsion. The Ministry has been forthright in its admission that Chinese law is not as transparent as that of the United States or other constitutional or parliamentary governments.[11] Rather than codifying its statutes, the Chinese government apparently frequently governs by regulations promulgated by various ministries. In addition, according to the Ministry, private citizens or companies may be authorized under Chinese regulations to act in certain circumstances as government agents. June 9, 2008

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[11] At oral argument, counsel for the Ministry explained:

> [T]he laws of the government of China do not have . . . quite the same transparency as the laws of the United States, in the sense that there are statute books that are available, that there are lengthy Congressional statements of intent, where you can read what the debates were all about.
>
> The way the Chinese system operates is that you have the state council and the state council is then composed of a number of key ministries. The Ministry of Commerce is not some backwater regulator in a small city in China. The Ministry of Commerce is the preeminent regulator of the economy, export economy of the People's Republic.

Tr. of Mot., June 5, 2007, at 46-47.

Statement in *In Re Vitamin C Antitrust Litigation* at 2.

It is this last circumstance that so complicates the question of compulsion in this case. It is not clear from the record at this stage of the case whether defendants were performing government function, whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens. Indeed, even the formation of the Vitamin C Sub-Committee is shrouded in mystery, as it was apparently authorized in response to a request by unidentified applicants who were, quite likely, defendants here.

If defendants wished to form a cartel, they would have had to ask for government sanction, at least according to plaintiffs' expert, who opined that in China "an organization not expressly allowed would be prohibited." Feinerman Decl. ¶ 16. It is not clear that this scenario of defendants making their own choices and then asking for the government's imprimatur - which may or may not have occurred in this case - would qualify as the type of governmental act or compulsion contemplated by the defenses raised by defendants.

In support of their motion, defendants and the Ministry stress the importance to China of being able to manage the transition from a command to a market economy. The court does not question that goal or even China's methods of doing so. But the record as it stands is simply too ambiguous to foreclose further inquiry into the voluntariness of defendants'

actions.[12] Accordingly, defendants' motion to dismiss is denied.

(2)

Motions to dismiss second amended complaint

Plaintiffs filed a second amended complaint ("SAC") adding Magno-Humphries Laboratories, Inc. ("MHL") as a direct purchaser class representative and adding JSPC America, Inc. ("JSPC") and Legend Ingredients Group, Inc. ("Legend") as defendants. The SAC explains that MHL directly purchased vitamin C and vitamin C products from JSPC and Legend. SAC ¶ 9. JSPC and Legend are described as California corporations that were (in the case of JSPC) or are (in the case of Legend) subsidiaries or affiliates of Jiangsu Jiangshan during the class period. Id. ¶ 12, 13. Other than these identifications of MHL, JSPC and Legend, the SAC copies verbatim the allegations of the first amended complaint, which are summarized above.

JSPC and Legend move to dismiss the SAC as to themselves because the SAC does not make any allegations against them personally. The original defendants move to dismiss the SAC in its entirety because, they contend, the addition of JSPC and Legend fundamentally changes the conspiracy that

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[12] One area that appears to be ripe for discovery is the degree to which defendants coordinated pricing before and after December 2001. If the apparatus and mandate for price-fixing was in place as of 1991 (when the Chamber was formed) or 1997 (when the Vitamin C Sub-Committee was formed), but no price-fixing occurred until market power was achieved, plaintiffs would have a stronger argument that defendants' actions were voluntary.

had been alleged in the earlier complaints. Specifically, the earlier complaints alleged a horizontal conspiracy among Chinese vitamin C manufacturers. According to defendants, however, JSPC and Legend are, or were, California corporations that never manufactured vitamin C. Thus, their addition changes the conspiracy charged from a horizontal conspiracy to a hybrid horizontal/vertical conspiracy, the details of which are not disclosed in the SAC. All defendants argue that the SAC falls short of the pleading standards set forth by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007), and by the Second Circuit in *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007).

Plaintiffs respond that the SAC is remarkably detailed in its description of the conspiracy, and that it goes above and beyond the requirements of *Twombly* and *In re Elevator Antitrust Litig.* Plaintiffs further argue that those cases do not establish heightened pleading standards for antitrust cases. That may be true, but even Fed. R. Civ. P. 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." The SAC is indeed quite detailed in its pleading of a conspiracy among Chinese vitamin C manufacturers, but it does not explain how two California resellers could have been part of the manufacturer cartel. Thus, the SAC both fails to provide notice to JSPC and Legend as to what they are alleged to have done wrong and changes the nature of the originally-charged conspiracy.

Accordingly, the SAC is dismissed with leave to replead within 30 days to allege what actions JSPC and Legend have taken that have harmed plaintiffs.

Conclusion

For the foregoing reasons, defendants' motion to dismiss the complaints under the act of state doctrine, foreign sovereign compulsion and international comity is denied. Defendants' motions to dismiss the SAC are granted. Plaintiffs have 30 days to replead the SAC to make allegations against JSPC and Legend.

Dated: November 6, 2008

Brooklyn, New York

SO ORDERED

/s/

David G. Trager
United States District Judge

APPENDIX E: Order of the United States Court of Appeals for the Second Circuit Denying Panel Rehearing and Rehearing *En Banc*, Dated October 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of October, two thousand twenty-one.

In re: Vitamin C Antitrust Litigation

****

Animal Science Products, Inc., The Ranis Company, Inc.

Plaintiffs – Appellees,

v.

Hebei Welcome Pharmaceutical Co. Ltd., North China Pharmaceutical Group Corporation,

Defendants – Appellants.

ORDER
Docket No. 13-4791

Appellees, Animal Science Products, Inc. and The Ranis Company, Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX F: Relevant Statutory Provisions and Federal Rules of Civil Procedure

Section 1 of the Sherman Antitrust Act of 1890, codified as amended at 15 U.S.C. § 1, provides:

> 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (2000).

* * *

The Foreign Trade and Antitrust Improvements Act of 1982 provides:

> 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 sections 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.

15 U.S.C. § 6a (2000).

* * *

Federal Rule of Civil Procedure 44.1 provides:

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Fed. R. Civ. P. 44.1.

APPENDIX G: Brief of Amicus Curiae the Ministry of Commerce of the People's Republic of China in Support of the Defendants' Motion to Dismiss, Dated June 29, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MASTER FILE 06-MD-1738 (DGT) (JO)

IN RE VITAMIN C ANTITRUST LITIGATION

This document relates to:

ALL CASES

BRIEF OF *AMICUS CURIAE* THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA IN SUPPORT OF THE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Sidley Austin LLP

ATTORNEYS FOR *AMICUS CURIAE* THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA

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[TABLES INTENTIONALLY OMITTED]

INTEREST OF THE AMICI

In this lawsuit, plaintiffs seek to recover treble damages from four Chinese manufacturers of vitamin C, and the affiliates of one of these manufacturers, based on conduct that was compelled by Chinese law. Because the conduct that allegedly violated U.S. antitrust law occurred entirely in the territory of China, and because the defendants were required by the laws of China to engage in that conduct, this lawsuit cannot be resolved without interfering with Chinese industrial policy respecting the operation of domestic firms within China and without impermissible inquiry into the motives of the Chinese government. Accordingly, three closely related doctrines, the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity, mandate dismissal of this action.

Amicus the Ministry of Commerce of the People's Republic of China (hereinafter "the Ministry")[1] is deeply interested in the prompt and proper resolution of this lawsuit. The Ministry is a component of the State Council (the central Chinese government) and is the highest administrative authority in China authorized to regulate foreign trade, including export commerce. It is the equivalent in the Chinese governmental system of a cabinet level department in the U.S. governmental system. The Ministry formulates strategies, guidelines and policies

[1] he Ministry was initially known as the Ministry of Foreign Trade and Economic Cooperation. This brief uses the term "Ministry" to refer to both this predecessor entity and the current Ministry of Commerce.

concerning domestic and foreign trade and international economic cooperation, drafts and enforces laws and regulations governing domestic and foreign trade, and regulates market operation to achieve an integrated, competitive and orderly market system.

If this Court were to find the defendants' conduct violated U.S. antitrust laws, it would improperly penalize defendants for the sovereign acts of their government and would adversely affect implementation of China's trade policy. The Ministry therefore files this brief to inform the Court of the regulatory scheme that governed defendants during the period encompassed by the Complaint[2] and that dictated the conduct alleged to violate U.S. antitrust laws. The Ministry accordingly supports the defendants' request that this action be dismissed.

The information the Ministry is providing is properly considered in connection with a motion to dismiss under Rule 12(b) because each of the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity implicate this Court's subject matter jurisdiction. *See Robinson v. Gov't of Malaysia*, 269 F.3d 133, 141 n.6 (2d Cir. 2001) (a district court "must" consider materials outside complaint if they "may result in the dismissal of the complaint for want of jurisdiction"). Indeed, both the United States Supreme Court and the Second Circuit have recognized that the statements of a foreign government about the scope and meaning of its laws are to be given binding and

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[2] The "Relevant Period" referenced in the Complaint is December, 2001 through the present.

conclusive effect by U.S. courts. See U.S. v. Pink, 315 U.S. 203, 218-21 (1942) (statement of Soviet Commissariat for Justice concerning extraterritorial effect of nationalization decree deemed "conclusive"); Agency of Canadian Car & Foundry Co. v. American Can Co., 258 F. 363, 368-69 (2d Cir. 1919) (authoritative representation by Russian government is "binding and conclusive in the courts of the United States"). Since 1978, the U.S. government has encouraged foreign governments to present their views concerning pending judicial proceedings directly to the U.S. courts,[3] and the U.S. Solicitor General has taken the position that a foreign government's submission of its views in the form of an amicus curiae brief should be "dispositive."[4]

It is particularly appropriate to accord the views of the Ministry dispositive weight here because the Complaint employs terms that have very different

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[3] *See* Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), *reprinted in* U.S. Dep't of State, 1978 Digest of United States Practice in International Law 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 125 (1979); Department of State Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), *reprinted in* U.S. Dep't of State, 1978 Digest of United States Practice in International Law 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 124 (1979); *see also* Letter from Deputy Legal Adviser Marks (June 15, 1979) (described in 73 Am. J. Int'l L. 669, 678-79 (1979)). A copy of the foregoing is submitted herewith as Exhibit A to the declaration of Joel M. Mitnick, dated June 29, 2006 ("Mitnick Decl.").

[4] *See* Brief for United States as Amicus Curiae Supporting Appellants, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1985) (No. 83-2004) at 17 (explicit and detailed statement by foreign government should be "given dispositive weight"), Mitnick Decl., Ex. B.

meanings under Chinese law, and within the Chinese regulatory system, than those same terms have in the United States. Plaintiffs allege that a Chinese "trade association" facilitated an illegal cartel, which "coordinated" vitamin C export pricing as part of a series of "voluntary" or "self-restraint" agreements. In fact, the "association," or "social organization," is a Ministry-supervised entity authorized by the Ministry to regulate vitamin C export prices and output levels, and the price "coordination," or so-called "voluntary self-restraint," it facilitated is a government-mandated price and output control regime. Because China's ongoing transition from a state-run command economy to a market-driven economy is utterly foreign to the economic history and traditions of the United States, there is a very significant risk of misunderstanding by U.S. lawyers and judges of the regulatory concepts China has adopted to manage this transition. Accordingly, the Ministry files this amicus brief to explain those very different concepts as well as to emphasize that the conduct alleged in the complaints here is mandated by Chinese law. Properly understood, China's regulation of vitamin C exports mandates dismissal of this lawsuit.

BACKGROUND

I. Allegations of the Complaint

In January 2005, Plaintiffs Animal Science Products Inc. and the Ranis Company ("plaintiffs") filed the first omplaint in this action (the "Complaint")[5] in which they allege that defendants,

[5] Subsequent complaints have not been consolidated into a single complaint, but all of the complaints make substantially identical allegations.

four Chinese manufacturers and exporters of raw vitamin C products, and affiliates of one of these manufacturers,[6] violated Section I of the Sherman Act by agreeing on the price and volume of vitamin C products exported from China to the United States.

Specifically, plaintiffs allege that the defendants formed "a cartel to control prices and the volume of exports for vitamin C . . . . [and] successfully reached an autonomy agreement" in which they allegedly agreed "to control export quantities and achieve stable and enhanced price goals," "to restrict their exports of vitamin C in order to create a shortage of supply in the international market," and "to 'restrict quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically.'" Compl. ¶ 43. Plaintiffs allege that, as a result of the cartel, the prices of vitamin C products exported from China to the United States increased from $2.50 per kilogram in December, 2001, to as high as $7 per kilogram in December, 2002, and that they, as purchasers of vitamin C products, were forced to pay higher prices as a result. Compl. ¶ 45.

Plaintiffs further allege that in 2003, defendants met and agreed to limit production levels further and increase prices (Compl. ¶ 52), and that in 2004, defendants agreed to suspend production in an effort to stabilize prices (Compl. ¶ 56).

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[6] The Chinese defendants are: Hebei Welcome Pharmaceutical Co. Ltd., Jiangsu Jiangshan Pharmaceutical Co. Ltd., Northeast Pharmaceutical Group Co. Ltd., Weisheng Pharmaceutical Co. Ltd., and China Pharmaceutical Group, Ltd. In addition, the Ministry is informed that a defunct U.S. affiliate of one of these defendants was also named in the Complaint.

Plaintiffs claim that the meetings held by defendants, and the agreements to which defendants were party, were "facilitated by the efforts of their trade association," the Western Medicine Department of the Association of Importers and Exporters of Medicines and Health Products of China.[7] Compl. ¶ 43. This "association," it is alleged, also "coordinated" the meetings at which defendants agreed to the limitations of sales and exports to the United States (Compl. ¶ 46), called a late 2003 "emergency meeting" attended by the defendants in which the "association" discussed how the defendants were to "rationalize the market and restrain and limit the production levels of vitamin C to increase prices" (Compl. ¶ 53), and met with the defendants at the "China Exhibition of World Pharmaceutical Ingredients," during which they "devised plans to rationalize the market and to limit production levels and increase prices" (Compl. ¶ 54).

II. The Regulation of the Vitamin C Export Industry in China

A. The Nature and Regulatory Role of the Chamber of Commerce of Medicines and Health Products Importers & Exporters

As an initial matter, the allegations of the Complaint rest on a fundamental misunderstanding concerning the nature of the Chamber of Commerce of

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[7] The official Chinese name of this entity translates as the "Chamber of Commerce of Medicines and Health Products Importers and Exporters." As described infra, this entity, among other things, regulates China's import and export of pharmaceuticals (or "Western medicines") and health care products, including vitamin C.

Medicines and Health Products Importers & Exporters ("Chamber") and its role in the vitamin C industry in China. The Complaint characterizes the Chamber as a mere "trade association" that has facilitated the collusive actions of a "cartel." Compl. ¶ 43. In fact, the Chamber is vastly different from a U.S. trade association, or private Chamber of Commerce. Rather, it is an entity under the Ministry's direct and active supervision that plays a central role in regulating China's vitamin C industry. What the Complaint describes as a "cartel,"[8] and an "ongoing combination and conspiracy to suppress competition" through price-fixing (Compl. ¶¶ 43-44), is a regulatory pricing regime mandated by the government of China— a regime instituted to ensure orderly markets during China's transition to a market-driven economy and to promote, in this transitional period, the profitability of the industry through coordination of pricing and control of export volumes. Most importantly, this regime was established to safeguard the national interests of China.[9]

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[8] In their Complaint, and before Magistrate Judge Orenstein, plaintiffs sound a simplistic but very misleading theme: defendants here have "stepped into the shoes" of a defunct cartel of European and Japanese vitamin manufacturers, many of whom pleaded guilty to criminal price fixing charges. Hr'g Tr. 48:2-3, May 3, 2006. This theme is a blatant attempt to "poison the well" before the Court has an opportunity to understand the fundamentally different conditions under which the Chinese vitamin C export industry operated from its European and Japanese counterparts. Other than that both industries involved vitamin C, the circumstances of how those industries priced their export products could not have been more different.

[9] As China carried out its economic reform beginning in 1978, namely through decentralizing Government control over, and direct management of, economic activities by permitting state-

The United States has never had a state-run command economy with state-owned industries. In the years following the Civil War, chambers of commerce and other trade associations sprang up voluntarily throughout the country as a means of gathering and providing information to members of particular industries. *See Maple Flooring Mfrs. Ass'n v. U.S.*, 268 U.S. 563 (1925). The proliferation of numerous voluntary commercial and trade organizations led President Taft to note the need for a central organization in touch with such groups throughout the United States. President William Howard Taft, Third Annual Message to Congress (Dec. 5, 1911). This, in turn, led to the creation the following year of the U.S. Chamber of Commerce, an entirely voluntary, non-governmental organization created to, among other things, represent business interests before the federal government.

The origins and purposes of that institution stand in stark contrast to those of the similarly-named, but functionally very different, Chamber here. Prior to the advent of any free market system in China, the government itself participated in and controlled the manufacturing and exporting of goods. Only a number of state-owned national exporting entities were allowed to engage in exporting, and no private

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owned entities to have decision-making power and by encouraging wide private ownership in the economic sector, China was concerned about the possible effects (as it saw them) of unfettered competition between and among enterprises, including that it could retard the orderly development of a stable domestic vitamin C industry and adversely effect levels of employment in that industry. The Government attempted to temper the effects of economic reform in its regulation of domestic and foreign commerce.

enterprises or manufacturing enterprises were allowed to export directly. These designated state-owned national exporting enterprises functioned to regulate exports under the Ministry's direction. Subsequently, however, when other types of enterprises (both private and state-owned) were allowed to obtain export licenses, the function of regulating export had to be stripped away from these state-owned national exporting entities so that they were not in the position of regulating the exports of their competitors. The Chamber was established, in part, to serve that role with respect to imports and exports of pharmaceutical products, including vitamin C; it regulates the export of those products under the authority and direction of the Ministry and the General Administration of Customs ("Customs").[10]

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[10] The Chamber described its role in Chinese foreign commerce during the Relevant Period as:

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

Although the Chamber is denominated a "social organization," this term also has a very different meaning under Chinese law than it has in the United States. The Chinese notion of a "social organization" includes within its scope the various "chambers" that exist under Chinese law for the purpose, when authorized, of regulating specific industries (e.g., the Chamber regulates certain pharmaceutical

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> the guidance and supervision of the responsible departments under the States Council. The very purpose is to coordinate and supervise the import and export operations in this business, to maintain business order and protect fair competition, to safeguard the legitimate rights and interests of the state, the trade and the members and to promote the sound development of foreign trade in medicinal items.

China Chamber of Commerce of Medicines & Health Products Importers & Exporters, Publication of Administration and Regulation (2003), at 3 (emphasis added), Mitnick Decl., Ex. C. This document, along with all Ministry rules or regulations cited herein and attached to the Mitnick Declaration, have been authenticated under the procedures of Federal Rule of Evidence 902(3), which governs self-authentication of foreign public documents. First, an authorized official of the Ministry or the Chamber, as applicable, attested in the presence of a P.R.C. notary public to the authenticity of each document. (In the case of the Chamber, the attestation was also in the presence of a Ministry official who further authenticated the Chamber attestation.) Next, the attestation was further certified by the Consular Department of the P.R.C. Ministry of Foreign Affairs and the U.S. Embassy in Beijing. See Mitnick Decl., document index, for a summary of the attestation(s) and certification(s) applicable to each such document. Translations of all Chinese language documents attached to the Mitnick Declaration are certified by a qualified translation agency and further notarized by a P.R.C. notary public.

industries, including the vitamin C industry).[11] See the Ministry's implementing regulation for the administration of "social organizations" (including "chambers") in foreign trade, Measures for Administration over Foreign Trade and Economic Social Organizations (February 26, 1991) Arts. 2 and 14 ("Measures for Administration"), Mitnick Decl., Ex. D (emphasis added) ("Social organizations established with *coordination and industry regulation functions as authorized by [the Ministry]* must implement the administrative rules and regulations relating to foreign trade and economy."). As discussed, infra, regulation over export pricing and output levels was a specific vitamin C "industry regulation function" delegated by the Ministry to the Chamber.

The Ministry's authority over the Chamber is plenary: covering such aspects as the Chamber's selection of its leaders, its personnel management system, its budget and accounting systems and its salary structure. *Id.* Art. 16. *See also*, Notice Regarding Chamber Personnel Management, Annex II, 4 (Ministry shall verify and approve Chamber's authorized number of personnel); Annex III, 8 (Chamber's general working staff "shall be chosen primarily from the employees in service of their membership organizations or the competent authorities in charge of foreign trade and economics and the public institutions directly under their

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[11] "Chambers [defined as 'chambers of commerce of importers and exports'] are social organizations." Notice of [Ministry] Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters (Sept. 23, 1994) ("Notice Regarding Chamber Personnel Management") at 1, Mitnick Decl., Ex. E.

leadership"); Annex IV, 13 (candidates for senior positions within the Chamber "are recommended by [the Ministry] or recommended by over l/3 of the [C]hamber's member companies and approved by [the Ministry]"); and Annex V, 17 (Ministry shall "verify and approve the total amount of salary of the [C]hamber"). The Chamber, in turn, must submit to the Ministry its "annual working plan and arrangements of major events," including all "important meetings and activities." Measures for Administration, Art. 21. Similarly, the Chamber "must implement the administrative rules and regulations relating to foreign trade and economy." *Id.* Art. 14. In short, the Chamber is the instrumentality through which the Ministry oversees and regulates the business of importing and exporting medicinal products in China.

B. The Vitamin C Sub-Committee

Throughout the Relevant Period, the Chamber exercised its regulatory authority with respect to vitamin C exports through its Vitamin C Sub-Committee. The Sub-Committee was established in 1997, at the Ministry's order, against a backdrop of "intense competition and challenges from the international [vitamin C) market." Approval for Establishing VC Sub-Committee of China Chamber of Commerce of Medicines & Health Products Importers & Exporters (issued March 23, 1998), Mitnick Decl., Ex. F. The Sub-Committee, operated under the Chamber's direction and administration, is responsible for "coordinating the Vitamin C export market, price and customers of China, to improve the competitiveness of Chinese Vitamin C produce in the

world market and promote the healthy development of Vitamin C export of China." *Id.* ¶ 2.

Only companies that exported vitamin C in certain specified volumes were eligible to be members of the Sub-Committee. Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters (October 11, 1997) Art. 11 ("Vitamin C Sub-Committee Charter"), Mitnick Decl., Ex. G. Pursuant to the Vitamin C Sub-Committee Charter, only Sub-Committee members "have the right to export Vitamin C and are simultaneously qualified to have Vitamin C export quota." *Id.* Art. 12. With this right come a series of "obligations," including the duty to "comply with the . . . regulations of the Vitamin C Sub-Committee and implement [its] resolution," and to export and supply vitamin C "only to those foreign trade enterprises verified by the Sub-Committee." *Id.* Art. 15(1)&(2). Most significantly for purposes of this case, members are obligated *to "[s]trictly execute export coordinated price set by the Chamber and keep it confidential." Id.* Art. 15(6) (emphasis added). The Charter further provides that any "failure to implement any resolution or regulation of the Sub-Committee and failure to perform any member's obligation shall be punished by the Sub-Committee." *Id.* Art. 16. Authorized punishments include "warning, open criticism and even revocation of . . . membership," and imposition of monetary penalties. Id. In addition, the Sub-Committee may recommend, through the Chamber, that the Ministry "suspend and even cancel the Vitamin C export right of such violating member," *id.*, resulting in a total ban on participation in exporting altogether.

1. Initial Regulations Mandating Coordination (So-Called "Voluntary Self-Restraint") in Establishing Export Price and Quantity

Shortly after it mandated the establishment of the Vitamin C Sub-Committee, the Ministry, acting in conjunction with the State Drug Administration, promulgated a new regulation authorizing and requiring the Chamber and Sub-Committee to limit the production of vitamin C for export and to set export prices. Notice Relating to Strengthening the Administration of Vitamin C Production and Export ("1997 Ministry & SDA Notice"), Mitnick Decl., Ex. H. The regulation limited participation in the vitamin C export industry to those companies qualified to be members of the Sub-Committee, then required all such eligible entities to "participate in such [Sub-Committee] and subject themselves to the coordination of the [Sub-Committee]." *Id.* at 2. The Sub-Committee, in turn, was required to "formulate and adjust [the] export coordination price, which the Vitamin C export enterprises must strictly implement." *Id.* (emphasis added).

Under this regulation, qualified vitamin C manufacturers and import and export companies were able to receive a Vitamin C export quota license. The issuance of Vitamin C export licenses was subject to two criteria. First, the export volume was required to be in compliance with the export quota. Second, the export price was required to be no lower than the price established by the Vitamin C Subcommittee's coordinated price agreements. See id. ("The organizations that [are] authorized by [the Ministry] to issue export licenses [were to] strictly verify the

qualification of Vitamin C export and operation of the enterprises, and verify their export contracts and issue export license according to the Vitamin C coordinated price and volume quotas."). In addition, the volume to be exported by each qualified entity under this "Production and Export Licensing System" was determined by the Ministry, in conjunction with the State Drug Administration and "relevant departments." *Id.* at 1-2. Attempts to circumvent the verification process were subject to penalties, including a reduction in an entity's export quota or the revocation of its exporting license. *Id.* para. 7 ("Vitamin C Export Coordination Group shall timely organize meetings for the major Vitamin C export enterprises . . . to . . . formulate and adjust export coordination price, which the Vitamin C export enterprises must strictly implement in accordance with. With respect to enterprises competing at low price and reducing price through any disguised means, a penalty shall be imposed . . . . and para. 10 (" . . . penalties [for violating provisions of Paragraph 7] shall be . . . the Vitamin C export quota may be reduced, in the worst case their Vitamin C export right shall be revoked").

As the foregoing makes clear, price "coordination" within this regulatory system does not mean that prices are established independently or, even, by "voluntary" agreement among manufacturers, as that term is normally understood in the West. Rather, the decisions to limit the volume of exports and to set export prices were made by the Ministry. The Ministry chose to implement these policies by limiting vitamin C exporting rights to certain qualified entities, compelling those entities to participate in a

subcommittee of a Ministry-approved and supervised regulatory body, and requiring that subcommittee to set export prices that exporters were then required to implement, subject to a verification system that included severe penalties for non-compliance. Within this system, therefore, "coordination" refers to the government mandated multilateral process in which prices were set—as opposed to a unilateral process in which the Ministry alone set prices. (Indeed, the Sub-Committee was originally designated the "Vitamin C *Coordination* Group," and was referred to by that name in the 1997 Ministry & SDA Notice. see id. at 2.) The industry participants in this multilateral process, thus, acted pursuant to governmental compulsion; when establishing price controls, they were exercising governmental regulatory power; and the price controls developed through this multilateral process were legally binding and governmentally-enforced.[12]

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[12] Plaintiffs rely heavily on a document from the Chamber's website that states:

> In December 2001, through efforts by the Vitamin C Chapter of the China Chamber of Commerce of Medicines and Health Products Importers and Exporters, the manufacturers were able to successfully reach a self-restraint agreement, whereby they would voluntarily control the quantity and pace of exports, so as to achieve the goal of stabilizing and raising export prices.

Letter from William Isaacson and Alana Rutherford to Honorable James Orenstein (May 12, 2006) at 3 and Exhibit C (emphasis added); see also Hr'g Tr. 47-48, May 3, 2006; Pretrial Order (JO), May 4, 2006, 2-3. In the context of the Ministry's regulation of the vitamin C industry through the Chamber, however, the characterizations by the Chamber of the conduct as "self-restraint" and "voluntary" are unremarkable. The vitamin C industry was under a direct Ministry order to reach a

This system of Ministry-mandated and Chamber-administered "coordination" was adopted to forestall potential market disorders that might have limited the development of a healthy vitamin C export industry during China's transition from a command economy to a market-driven economy. *See* Interim Regulations of the Ministry of Foreign Trade and Economic Cooperation on Punishment for Conduct at Exporting at Lower-Than-Normal Price (March 20, 1996), Mitnick Decl., Ex. I (explaining that the Ministry promulgated interim regulations to "ensure orderly development of the country's export trade, safeguard the legitimate rights and interests of the State and enterprises and prevent conduct of exporting at lower-than-normal price"). A system of government-mandated "coordination" among industry participants served the Ministry's goal of transitioning to a healthy market-based economy: it established mandatory coordinated export price and output levels (thereby forestalling what the government feared could be destructive export competition before the foundation for a healthy industry could be laid) by vitamin C manufacturers, although the Ministry itself did not decide what specific prices should be. Instead, this governmental function was delegated to market participants and the

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"coordinated" agreement in order to stabilize export pricing. Thus, it is understandable that the Chamber would express its pleasure publicly that the parties were able to comply with the Ministry's order to coordinate pricing and quantities on their own (i.e., "voluntarily" and in "self-restraint") as opposed to requiring more direct Ministerial intervention to reach that result. Indeed, as discussed in Point II.B.2., *infra*, this regulatory system was expressly enacted "to promote [among other things] industry self-discipline."

Chamber, in their capacities as Vitamin C Sub-Committee members, acting in a coordinated fashion.

2. Revised Regulation of Export Pricing and Quantity: Verification and Chop

In 2002, the Ministry changed the way in which compliance with the Chamber's "coordination" was confirmed by abolishing the Export Licensing System and establishing a so-called "verification and chop" system. *See* Notice Issued by the Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs for the Adjustment of the Catalogue of Export Products Subject to Price Review by the Customs ("2002 Ministry & Customs Notice"), Mitnick Decl., Ex. J. The Ministry adopted this new system "in order to accommodate the new situations since China's entry into WTO, maintain the order of market competition, make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports, promote industry self-discipline and facilitate the healthy development of exports." *Id.* at 1, Preamble (emphasis added). The Ministry explained that this new system would be both "convenient for exporters while it is conducive for the Chambers to coordinate export price and industry self-discipline." *Id.* at 2, para. 4. The basis of the new system was a process of "industry-wide negotiated prices." *Id.* at 2, para. 3 (emphasis added).

Under this system, the Chamber reported the "coordinated," or "industry-wide negotiated," prices for vitamin C exports to Customs. *Id.* Manufacturers were required to submit documentation to the Chamber which indicated both the amount and price of vitamin C to be exported. The Chamber "verified," *i.e.*, approved, the contract price and volume. If the

price was at or above the minimum acceptable price set by coordination through the Chamber, the Chamber affixed a special seal, known as a "chop," on the contract and returned it to the manufacturer. Upon export, the contract was reviewed by Customs and allowed to go through only if the contract bore the Chamber's "chop." *Id.* The penalty for violating the system was draconian: withholding of the Chamber's "chop" meant complete denial by Customs of the ability to export.

In 2003, the "verification and chop" system was continued with respect to several commodities industries, including the vitamin C industry. Vitamin C exporters were required to submit contracts to the Chamber, which "verified" the exporters' submissions "*based on the industry agreements* and in accordance with the relevant regulations promulgated by the Ministry of Commerce . . . and the General Administration of Customs." Announcement of Ministry of Commerce of the People's Republic of China, General Administration of Customs of the People's Republic of China (November 29, 2003) (Exhibit 2, para. C) (emphasis added), Mitnick Decl., Ex. K. "Enterprises exporting by forging the [Verification & Chop] on the contracts will be punished by the Customs and Chambers of Commerce according to relevant rules." *Id.* at 1. Through its 2003 announcement, in conjunction with the General Administration of Customs, the Ministry extended this system throughout the Relevant Period.

ARGUMENT

I. Dismissal Is Mandated By The Foreign Sovereign Compulsion Doctrine

"Under the foreign sovereign compulsion doctrine the courts will immunize private defendants from antitrust liability for conduct that is actually compelled, not merely permitted by a foreign sovereign acting within its jurisdiction. In that case, the acts of the private party 'become effectively acts of the sovereign.'" P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶ 274c at 406-07 (2d ed. 2000), *quoting Interamerican Refining Corp. v. Texaco Maracaibo. Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1980) (other citations omitted).[13]

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[13] In their Antitrust Enforcement Guidelines for International Operations, the U.S. Department of Justice and the Federal Trade Commission provide the following illustration of conduct that they acknowledge cannot be challenged under U.S. antitrust law:

> Assume for the purpose of this example that the overseas production cutbacks have the necessary effects on U.S. commerce to support jurisdiction. As for the participants from the two countries that did not impose any penalty for a failure to reduce production, the Agencies would not find that sovereign compulsion precluded prosecution of this agreement. As for participants from the country that did compel production cut-backs through the imposition of severe penalties, the Agencies would acknowledge a defense of sovereign compulsion.
>
> Greatly increased quantities of commodity X have flooded into the world market over the last two or three years, including substantial amounts indirectly coming into the United States. Because they are unsure whether they would prevail in an antidumping and countervailing duty case, U.S. industry participants have refrained from filing trade law petitions. The officials of three foreign countries meet with their respective domestic firms and urge them to "rationalize" production by cooperatively cutting back. Going one step further, one of the interested governments orders cutbacks from its firms,

U.S. courts, including the Second Circuit, have recognized that they lack subject matter jurisdiction over antitrust actions that challenge private conduct that is compelled by a foreign government. *Certified O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987) *cert. denied* 488 U.S. 923, (1988); *Mannington Mills, Inc. v. Congoleum Com.*, 595 F.2d 1287, 1293 (3d Cir. 1979*); Timberlane Lumber Co. v. Bank of America, N.T. and S.A*, 549 F.2d 597, 606-07 (9th Cir. 1976); *Trugman-Nash, Inc. v. New Zealand Dairy Bd., Milk Prod. Holdings (North America), Inc.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997); *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F. Supp. 1071, 1080 (S.D.N.Y. 1988); *cf. Interamerican*, 307 F. Supp. at 1296-98 (granting summary judgment on the merits based on the defense).

The foreign sovereign compulsion doctrine is "[a] corollary to the act of state doctrine"; it recognizes "that corporate conduct which is compelled by a foreign sovereign is . . . protected from antitrust liability, as if it were an act of the state itself." *Timberlane*, 549 F.2d at 606. "When the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government, claims under the antitrust laws are dismissed" for lack of subject

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> subject to substantial penalties for non-compliance. Producers from the other two countries agree among themselves to institute comparable cutbacks, but their governments do not require them to do so.

Antitrust Enforcement Guidelines for International Operations, issued by the U.S. Department of Justice and the Federal Trade Commission (April, 2005), Illustrative Example K, Section 3.32.

matter jurisdiction. *O.N.E. Shipping*, 830 F.2d at 453 (affirming jurisdictional dismissal based on the defense); see also *McElderry*, 678 F. Supp. at 1 080 (same). The doctrine is applicable where "the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct." *Mannington Mills*, 595 F.2d at 1293.

The foreign sovereign compulsion doctrine is fully applicable — and dispositive — here. Chinese law, promulgated by the Ministry and administered through the Chamber, compelled defendants, as members of the Vitamin C Sub-Committee, to coordinate export prices and maximum export volumes and to abide by those requirements. Under the Ministry's regulations, defendants were compelled to become participating members of the Vitamin C Sub-Committee, 1997 Ministry & SDA Notice at 2 Ex. H, and Vitamin C Sub-Committee Charter, Art. 12, Ex. G, they were compelled to "*formulate and adjust [the] export coordination price*," 1997 Ministry & SDA Notice at 2 (emphasis added), Ex. H, and they were compelled to abide by and implement that "coordinated" price, id., and Vitamin C Sub-Committee Charter, Art. 15(6), Ex. G. Defendants would not have been eligible to export vitamin C at all if they failed to participate in these price-setting and production-limiting activities. 1997 Ministry & SDA Notice, Ex. H; Vitamin C Sub-Committee Charter, Art. 12, Ex. G. Government entities policed defendants' compliance with the resulting prices and volume limits, and non-compliance would subject defendants to severe penalties, including, among other things, reduction in export quotas (resulting in

further economic loss), and, possibly, loss of export rights. 1997 Ministry & SDA Notice at 2, Ex. H; Vitamin C Sub-Committee Charter, Art. 16, Ex. G; 2002 Ministry & Customs Notice at 2, Ex. J.

As noted above, while China is in the process of moving actively from its former state-run command economy to a market economy more of a type familiar to the United States, the current economic system is transitional and there remains a level of active state direction and coordination that has no analogue in the United States. Thus, for example, one would not find in the United States a government mandate to "maintain order in market competition," to "promote industry self-discipline," or to mandate export pricing and output levels "based on the *industry agreements*"; nor would one find a governmentally-directed organization, such as the Chamber, directing parties to attend meetings, such as those referred to in the complaints, to discuss prices or export quotas, with a view to maximizing industry profitability in export commerce.

That, however, is precisely the transitional framework under which the vitamin C industry functioned throughout the Relevant Period. Thus, while the Government did not, itself, determine specific prices or quantities, it most emphatically did insist on those matters being determined *through industry coordination*. That, of course, is all that is alleged in the complaints here and that is conduct that was compelled by the Chinese government in the interests of insuring "order in market competition."

It is thus clear that these mandates of Chinese law were "basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the

overall illegal course of conduct." *Mannington Mills*, 595 F.2d at 1293. The central allegations of the Complaint are that defendants "agreed to control export quantities and achieve stable and enhanced price goals," and that plaintiffs were injured because the price of vitamin C products "has been fixed, raised, maintained and stabilized at artificial and non-competitive levels." Compl. ¶¶ 43 and 62. The decision to control export quantities and require coordinated export prices was made by the Ministry. Defendants were compelled to implement these decisions through participation in the Vitamin C Sub-Committee. Similarly, the Complaint alleges that the allegedly unlawful prices and production limits were established through defendants' "participat[ion] in meetings and conversations in China and elsewhere in which the prices, volume of sales and exports to the United States, and markets for vitamins were discussed and agreed upon." Compl. ¶ 46. Again, contrary to the allegations of the complaint, defendants were compelled by the Ministry to engage in these very activities. The government-supervised Chamber facilitated and coordinated those meetings, and was required to advise the Ministry of such meetings.

Accordingly, the price "coordination" alleged in the complaint cannot serve as a basis for the imposition of antitrust liability. Indeed, just as in *O.N.E. Shipping*, this "antitrust suit represents a direct challenge to [the Ministry's medicinal product export] laws and to the legality of [defendants'] agreements under those laws." 830 F.2d at 451. Those "laws were designed to promote the development of a strong [Chinese medicinal products industry] and to assist [China's]

economic development." *Id.* Accordingly, here, as in *O.N.E. Shipping*, "the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the [Ministry]." Id. at 453. *See also Trugman-Nash, Inc.*, 954 F. Supp. at 736 (New Zealand dairy producers entitled to defense of foreign sovereign compulsion where New Zealand law required export licensing board to disapprove "of sales price competition among New Zealand dairy producers in respect of exports to nations like the United States that restrict import quantities")[14]

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[14] The arguments of the United States in its amicus brief in Matsushita (see footnote 4, supra) apply here with equal force:

> [T]he court of appeals should have given dispositive weight to the statement submitted to the district court by the Japanese Government, which indicated explicitly that part of petitioners' conduct was compelled. The court's rejection of petitioners' sovereign compulsion defense has caused deep concern to the Government of Japan and to the governments of other countries that are significant trading partners of the United States and threatens to affect adversely the foreign policy of the United States. Mitnick Decl., Ex. B at 6.
>
> The court of appeals erred in rejecting petitioners' sovereign compulsion defense. The Government of Japan explained in the MITI [Ministry of International Trade] Statement that it "directed" petitioners "to enter into" the check price agreement. . . . [T]hat explicit and detailed statement by a foreign sovereign that it mandated the check price agreement in accordance with its laws ... should have been given dispositive weight. It follows that the foreign sovereign compulsion defense precluded use of the check price

in establishing export limits and price coordination, it compelled that very conduct.

Similarly, plaintiffs do not-and cannot—allege that defendants entered into a price—fixing conspiracy, then worked to secure laws or regulations that blessed their arrangements. *Cf. U.S. v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (conspiracy formed in the United States for the purpose of monopolizing sales to the United States was not immunized simply because one element of the conspiracy involved securing laws that recognized the conspirators as exclusive traders and imposed discriminatory sales taxes on rivals). Here, the Ministry imposed the relevant laws on defendants. Indeed, the impetus for these and other price coordination measures was not to endorse existing price-fixing conspiracies, but to prevent disorderly competition.

In sum, Chinese Law mandated the participation of entities engaged in vitamin C export to coordinate with respect to export pricing and volume quotas and to adhere to such limits. Each defendant conducted itself as Chinese law required when it participated in Sub-Committee meetings at which agreements were reached with respect to pricing and volume controls. Refusal to subject oneself to the coordination of the Sub-Committee and the Chamber is unlawful under relevant regulations and would result in severe punishment, either through monetary penalty or loss

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agreement as a basis for liability under the Sherman Act. *Id.* at 12.

The MITI Statement also explained that MITI had directed the regulations [through] the Japan Machinery Exporters Association . . . . *Id.*

of ability to participate in the industry altogether. Because all of the elements of the foreign sovereign compulsion doctrine are satisfied, this lawsuit should therefore be dismissed.

II. The Act of State Doctrine Also Mandates Dismissal

The act of state doctrine also forbids judicial inquiry into China's motives in regulating its foreign commerce. The act of state doctrine differs from the foreign sovereign compulsion defense in that the act of state doctrine is grounded in principles of federalism and reflects the view that the courts, in deciding whether to accord recognition to certain foreign acts of state, might hinder the conduct of foreign affairs by the Executive Branch. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990). The Supreme Court has acknowledged "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). *See also Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434,448-49 (1979) and *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981). "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative— 'the political'— departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

The act of state doctrine, in essence, is "designed primarily to avoid judicial inquiry into the acts and

conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government. Such an inquiry is foreclosed under the act of state doctrine." *O.N.E. Shipping*, 830 F.2d at 452 (citing *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977), *cert. denied*, 434 U.S. 984, 98 S.Ct. 508 (1977)). *See also W.S. Kirkpatrick*, 493 U.S. at 404.

The burden of proving an act of state rests on the party asserting the applicability of the doctrine. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 684-85, (1976), *cert. denied, Saksand Company v. Republic of Cuba*, 425 U.S. 991 (1976). "[T]his burden requires that a party offer some evidence that the government acted in its sovereign capacity and some indication of the depth and nature of the government's interest." *Liu v. Republic of China*, 892 F.2d. 1419, 1432 (9th Cir. 1989) (citing *Timberlane*, 549 F.2d at 607-08).

The act of state doctrine mandates that this Court decline to exercise jurisdiction over this action. As set forth above, the conduct alleged to have been violative here was compelled by the Chinese government. The Chinese government compelled such conduct in its oversight of its foreign trade regulation. Any determination by this Court into the conduct as alleged by the plaintiffs will necessarily invoke an inquiry into the legitimacy of China's foreign policy concerning the manufacture and export of vitamin C. To permit the validity of the policymaking decisions of China "to be reexamined and perhaps condemned by [this] court[] would very certain[ly] 'imperil the amicable relations between [the two) governments and vex the peace of nations." *Oetjen*, 246 U.S. at 304.

It cannot be denied that the possibility of insult to China is significant — "the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means" of regulating domestic conduct. *See Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981) *cert. denied*, 454 U.S. 1163 (1982). Such an inquiry is prohibited by the act of state doctrine — if China's regulation of its foreign policy implicates U.S. interests as alleged, then the proper forum for such discussions between the United States and China is not in this Court.

III. This Suit Should Be Dismissed Based on Principles of International Comity

Principles of international comity also render the exercise of jurisdiction over the Complaint inappropriate. Comity

> is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

O.N.E. Shipping, 830 F.2d at 451 n.3 (quoting *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)). The Second Circuit has adopted the multi-factor test set forth in *Timberlane* for determining when comity principles require courts to decline to exercise jurisdiction over the conduct of foreign actors. *See U.S. v. Javino*, 960 F.2d 1137, 1142-43 (2d Cir. 1992) *cert. denied, Javino v. U.S.*, 506 U.S. 979 (1992); O.N.E. Shipping, 830

F.2d at 451. Here, virtually all of these factors militate in favor of dismissal.

First, for all of the reasons discussed above, there is an irreconcilable conflict between the requirements of U.S. antitrust law and the laws and policies of China. See *Timberlane*, 549 F.2d at 614 (courts must examine "the degree of conflict with foreign law or policy"). Simply put, Chinese law mandates conduct that U.S. antitrust law proscribes. *See Trugman-Nash, Inc.*, 954 F. Supp. at 736 (dismissing on comity grounds after finding "actual and material conflict between American antitrust law and New Zealand law in respect of the marketing of dairy export produce"); *McElderry*, 678 F. Supp. at 1079 (dismissing on comity grounds based on "direct conflict between" U.S. antitrust law and the law of the United Kingdom). And that Ministry-mandated conduct, all of which occurs in China, is far more "importan[t] to the violations charged" than any "conduct within the United States." *Timberlane*, 549 F.2d at 614.

Accordingly, an exercise of jurisdiction cannot achieve "compliance" with U.S. antitrust law: as Chinese entities with their principal places of business in China, defendants cannot export vitamin Cat all if they do not comply with the laws of China. *See id.* (courts must consider the nationality of the parties and their principal places of business and the extent to which enforcement by either state can be expected to achieve compliance). This lawsuit, therefore, cannot compel defendants to conform their future conduct to the requirements of U.S. antitrust law, because they will remain subject to the Ministry's price-coordination requirements.

Those requirements of Chinese law, moreover, were not adopted with "the explicit purpose to harm or effect American commerce," nor were any such harms or effects reasonably foreseeable. *See id.* To the contrary, the Ministry adopted these requirements to prevent self-destructive price competition during China's transition from a state-run to a market driven economy. As a consequence, the "significance of effects on the United States" is far smaller than the significance of the effects in China. *Id.* The price coordination and production limits plaintiffs challenge lie at the very heart of the Ministry's efforts to oversee and facilitate a sweeping transformation of China's entire economic system. Whatever effects defendants' compliance with the Ministry's requirements has allegedly caused in the United States, those effects plainly do not implicate an historic transformation of the U.S. economy.

Finally, and as a consequence, punishing defendants (through an award of treble damages) for their compliance with mandates that the Ministry has deemed essential for the development of a stable market-driven economy can only adversely affect relations between the United States and China. *See id.* at 609 (noting that nations "have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts"); *Mannington Mills*, 595 F.2d at 1297 (warning against a "provincial approach" to the exercise of antitrust jurisdiction over foreign conduct and noting examples of hostile reactions by British and Canadian authorities to such exercises). Insofar as China's sovereign policy decisions about how best to manage its economic transformation conflict with

the policies embodied in U.S. antitrust laws, that conflict should be addressed "through diplomatic channels," and not through "the unnecessary irritant of a private antitrust action." *O.N.E. Shipping*, 830 F.2d at 454.

CONCLUSION

For all of the foregoing reasons, this Court should decline to exercise jurisdiction and should dismiss the Complaint.

Dated: SIDLEY AUSTIN LLP

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APPENDIX H: 2008 Statement of the Ministry of Commerce of the People's Republic of China, Dated June 9, 2008 (District Court Docket No. 306-3)

Authorized Translation

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA

2 DONG CHANG'AN STREET, BEIJING, CHINA 100731

STATEMENT IN *IN RE* VITAMIN C ANTITRUST LITIGATION

June 9, 2008

Introduction

Amicus The Ministry of Commerce of the People's Republic of China (the "Ministry") authorizes its Department of Treaty and Law to respectfully submit this Statement (together with an authorized English translation) in response to plaintiffs' April 24, 2008 Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss ("Supplemental Opposition"). At the outset, the Ministry would like to express its continuing appreciation to this Court for permitting the Ministry to submit to the Court the official views of the People's Republic of China.

The Ministry would also like to take this opportunity to ratify the *amicus* filing that was submitted previously on its behalf. Although in filing that brief the Ministry followed the procedures advised by the U.S. State Department with respect to the preferred method by which a foreign government

should make its views known to a U.S. court, the Ministry wants the Court to know that it participated actively in the drafting of that brief, which was reviewed and edited word-for-word in Beijing by officials of the Ministry and U.S. counsel engaged by the Ministry. That brief accurately sets for the views and understandings of certain PRC government agencies, serving as an official view on behalf of the Ministry. The Ministry's U.S. counsel, acting within the scope of its authorization, submitted relevant documents to this Court on behalf of the Ministry in line with U.S. law and applicable procedures. The Ministry will assume the Court's familiarity with the contents of its *amicus* brief and will not repeat the facts or arguments it contains.

The Regulatory Regime

The Supplemental Opposition reflects a misunderstanding of the nature of the PRC government's regulation of the vitamin C industry that the Ministry's initial amicus brief was intended to dispel. Throughout their submission, plaintiffs trivialize China's organs of regulation where those organs differ in structure or function from ones more familiar to the plaintiffs.

As explained in the Ministry's *amicus* brief, the system of regulation the Ministry imposed on China's vitamin C export industry centered around a process not a price. The Ministry was careful to direct its U.S. counsel to explain to the Court that specific chambers of commerce, *when authorized by the Ministry to regulate*, act in the name, with the authority, and under the active supervision, of the Ministry., When acting in this manner, a chamber performs a governmental function so authorized under Chinese

law. In this case, the Ministry specifically charged the Chamber of Commerce of Medicines and Health Produces Importers and Exporters (the "Chamber") with the authority and responsibility, subject to Ministry oversight, for regulating, through consultation, the price of vitamin C manufactured for export from China so as to maintain an orderly export.

In summary, the Ministry wishes that this Court would continue to trust and adopt the views contained in the *amicus* brief submitted by the Ministry , and support the Defendants' Motion to Dismiss.

Accordingly, the Chinese government respectfully submits that, to the extent the plaintiffs take issue with the Chinese government's sovereign actions over the conduct solely of its own citizens, that issue should not be addressed in the courts of the United States but rather through bilateral trade negotiations conducted by the executive branches of the respective sovereign nations involved consistent with recognized norms of international law and diplomacy.

Respectfully submitted,

Department of Treaty and Law
Ministry of Commerce of the
People's Republic of China

[affixed seal]

APPENDIX I: 2009 Statement of the Ministry of Commerce of the People's Republic of China, Dated August 31, 2009 (District Court Docket No. 399-2)

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA 2, DONG CHANG'AN STREET, BEIJING, CHINA 100731

Statement In *In Re Vitamin C Antitrust Litigation*, 06-MD-1738 (DGT)

August 31, 2009

Amicus The Ministry of Commerce of the People's Republic of China (the "Ministry") authorizes its Department of Treaty and Law to respectfully submit this Statement (together with an authorized English translation).

1. The Ministry has attached great importance to the antirust litigation in the United States brought against Chinese vitamin C exporters. The Ministry submitted to this Court *the Brief of Amicus Curiae of the Ministry of Commerce of the People's Republic of China in support of the Defendants' Motion to Dismiss the Complaint* in June 2006 and its *Statement ln Re Vitamin C Antitrust Litigation* in June 2008. Taking notice of the comments and views made by Your Honor, the plaintiffs, plaintiffs' counsels and the experts, and the relevant documents, the ministry would like to draw the Court's attention to the positions taken by the ministry in the above-mentioned two documents, and would like to reiterate here that the alleged conduct by the defendant Chinese vitamin C exporters is the result of the defendants' performing their obligations to comply

with Chinese laws, rather than conduct on their own initiative.

2. In order to prevent self-destructive competition through distorted pricing by Chinese exporters caught unprepared for the drastic change of China's export policies, and to mitigate potential exposures to antidumping investigations in other countries against Chinese exporters, the Ministry took active measures by exerting export regulation over certain commodities that might encounter or have encountered such problems. Although different regulatory measures may have been implemented in line with changes of circumstances at different times, enterprises in regulated industries were nevertheless compelled to comply with relevant rules and regulations, or they would otherwise be subject to penalties.

3. The actual specific measures taken by China to effect its regulatory policies include what is referred to as a "system of self-discipline". This system has a long history in China and has been well known to, and complied with by, Chinese companies. Self-discipline does not mean complete voluntariness or self-conduct. In effect, self-discipline refers to a system of regulation under the supervision of a designated agency acting on behalf of the Chinese government. Under this regulatory system, the parties involved consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies. Persons engaged in such required self-discipline are well aware that they are subject to penalties for failure to participate in such

coordination, or for non-compliance with self-discipline, including forfeiting their export right.

4. Vitamin C falls into the category of products subject to the above-mentioned regulation. During the relevant period in the present case, the Ministry required vitamin C exporting companies to coordinate among themselves on export price and production volume in compliance with China's relevant rules and regulations in order to maintain orderly export, safeguard the interests of the country as a whole and avoid self-destructive competition.

5. The Ministry authorized and instructed the China Chamber of Commerce of medicines & Health Products Importers & Exporters (the "Chamber") and its Vitamin C Subcommittee to implement relevant policies related to the export of vitamin C products. Embodied in the Ministry's delegation of authority to the Chamber were industry regulatory functions and powers as well as necessary enforcement measures. Vitamin C exporters were thus subject to the regulation by the Chamber, including compliance with the Chamber's requirements of self-discipline, the very purpose of which was to coordinate each exporter's behavior. No vitamin C exporter could ignore these policies, nor could they abstain from such coordination with regard to export price and production volume when asked to by the Chamber.

6. The self-disciplinary system of export coordination also includes meetings and discussions between and among the parties subject to the Chamber's direction and supervision, and reaching agreements among themselves on taking appropriate actions in the interest of the country as a whole. Participation in such discussions, taking a vote and

conducting other similar activities to reach their final consensus constitutes an integral part of the self-discipline process. Vitamin C exporters must comply with the above procedures and the agreements reached in compliance with such procedures; otherwise, the Chamber would be required to exercise its power to penalize those who were in violation of such procedures and agreements.

7. The Ministry has read the report issued by plaintiffs' expert, Dr. Paula Stern. The ministry believes that statements of representatives of the ministry and other government agencies, with regard to China's market economy status, and remarks regarding Chinese companies setting price and production volume according to the principle of market demand, quoted by Dr. Stern were made in a different context -- one that had nothing to do with export price regulations -- and were *general descriptions* of the current status of China's market economy presented in a special context. These general descriptions are irrelevant to the present case and should not be deemed as explicit or implicit statements of China's abandonment of its limited regulatory policies over certain designated industries including the vitamin C industry, or of China's waiver of its power to continue to regulate according to Chinese and international law. The Ministry believes that maintaining its regulation in a limited manner (such as its regulation over vitamin C export) is consistent with China's national goal of establishing a socialist market economy. As stated under Point 2 above, the adoption of government regulations over certain commodities (such as vitamin C) at a given stage in history serves the specific interests of China

and is consistent with the trade policies of importing countries to protect and regulate relevant domestic industries. The regulations are implemented in a manner consistent with international law and custom and, during the process of implementation, have not been subject to challenge from the government of other countries or regions. China understands and believes that virtually all sovereign nations and regions (including the United States), proceeding from their own interests, have exercised various forms of government regulations over part of their private sector and certain industries. China's export regulations of vitamin C at issue in this case are no different.

Respectfully submitted,

Department of Treaty and Law

Minister of Commerce of the People's Republic of China

APPENDIX J: 1997 Notice Relating to Strengthening the Administration of Vitamin C Production and Export By The Ministry of Foreign Trade & Economic Cooperation and State Drug Administration, Issued on November 27, 1997, Effective January 1, 2008 (District Court Docket No. 70-9)

*Note: This Notice has been abolished by *List of 26 Abolished Ministerial Regulations of the Fourth Batch by Ministry of Foreign Trade and Economic Cooperation* (promulgation date: March 21, 2002, effective date: March 21, 2002).

1997 MOFTEC & SDA NOTICE

Notice Relating to Strengthening the Administration of Vitamin C Production and Export by Ministry of Foreign Trade and Economic Cooperation and State Drug Administration

((1997) MOFTEC Guan Fa No. 664)

(Issued on November 27, 1997,
effective from January 1, 1998)

The Foreign Trade & Economic Cooperation Commissions (Departments and Bureaus) of each province, autonomous region and municipality, State Drug Administration (the "SDA") and relevant departments of drug administration, all Companies directly under the MOFTEC and local counterpart of MOFTEC, all representative offices of MOFTEC, China Chamber of Commerce of medicines & Health Products Importers & Exporters (the "Chamber"):

China is one of the biggest countries manufacturing and exporting Vitamin C. At present,

Vitamin C export encounters intense competitions and challenges from the international market. In order to rectify the operational order and optimize the operational team of Vitamin C export, realize the scale-operation on export, improve the competitiveness of our Vitamin C products in the international market, promote the healthy development of Vitamin C export and maintain the interest of our country and enterprises, we hereby set forth the following:

1. The scale of Vitamin C production shall be strictly controlled.

(1) The establishment of Vitamin C manufacturing enterprises (including foreign investment enterprises) shall be strictly controlled, and the existing enterprises shall not expand production capacity any more.

(2) The production licensing system shall apply to those Vitamin C manufacturing enterprises that already started production (not including foreign investment enterprises). The SDA shall issue the production licenses to the Vitamin C manufacturing enterprises, and be responsible for publicizing information of annual production guidance.

(3) For the enterprises that has been in continuous production in recent years and achieved certain scales, the production license can be issued to them.

(4) only the products manufactured by the enterprises that are verified by the SDA and obtained the production license can be supplied for export. SDA shall formulate specific regulations to implement the above principles and circulate such regulations to the enterprises after seeking comments from MOFTEC.

2. MOFTEC shall consult with SDA and relevant departments when determining the total volume of Vitamin C export and the principles for quota allotment.

3. The enterprises qualified to operate Vitamin C export are: the export enterprises whose annual export volume reached 200 tons in any one of the continuous years from 1994 to 1996, which include foreign trading companies, manufacturing enterprises with the right to export their own products, and foreign investment companies (excluding those starting production in 1997). one of the attachments hereof is a list of the authorized enterprises (Please refer to Annex 1).

4. The method for allocating export quota shall be improved, Vitamin C export operation team shall be optimized in order to achieve scale-operation on export. Every local counterpart of MOFTEC shall distribute the export quota set by MOFTEC to the enterprises qualified to operate Vitamin C export in strict accordance with the provisions hereof. It is imperative to follow the principle of fostering the excellent and scrapping the obsolete, distribute the quotas in preference to the enterprises with proper operational capabilities and outstanding profitability.

5. The Chamber shall improve the coordination on Vitamin C export, and shall monitor, supervise and examine how this notice is implemented by Vitamin C export enterprises, and timely report to MOFTEC about the relevant issues and problems.

6. The Chamber shall establish a Vitamin C Coordination Group (which was the temporary name of the Vitamin C Sub-committee before the Vitamin C

Sub-committee is officially approved). The main responsibilities of this Group are to coordinate with respect to Vitamin C export market, price and customers, and to organize the enterprises in contacting foreign entities. All enterprise qualified to operate Vitamin C export shall participate in such Coordination Group and subject themselves to the coordination of the Group. The specific method for coordination shall be formulated by the Chamber, and filed to MOFTEC for record.

7. Vitamin C Export Coordination Group shall timely organize meetings for the major Vitamin C export enterprises according to the domestic and international market development, to conduct studies on marketing strategies, timely formulate and adjust export coordination price, which the Vitamin C export enterprises must strictly implement in accordance with. With respect to the enterprises competing at low price and reducing price through any disguised means, a penalty shall be imposed in strict accordance with Article 10 of this Notice.

8. The organisations that authorized by MOFTEC to issue export licenses shall strictly verify the qualification of Vitamin C export and operation of the enterprises, and verify their export contracts and issue export license according to the Vitamin C coordinated price and volume quotas.

9. Vitamin C export enterprises shall report the export situations to the Chamber at regular intervals (for detailed information, please refer to Annex 2). With respect to the export enterprises that make report beyond time or disguise report, a penalty shall be imposed as applicable.

10. With respect to the export enterprises with violations of relevant provisions hereof, if substantiated, penalties shall be imposed, specifically, the Vitamin C export quota may be reduced, in the worst case their Vitamin C export shall be revoked.

11. Relevant provisions of this Notice shall enter into force as of the date of January 1, 1998.

Ministry of Foreign Trade & Economic Cooperation
of People's Republic of China

State Drug Administration

November 27, 1997

APPENDIX K: 1997 Charter of the Vitamin C Subcommittee of the China Chamber of Commerce of Medicines and Health Products Importers & Exporters, Dated October 11, 1997 (District Court Docket 70-7)

Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters

(passed upon discussions on the founding conference of Vitamin C Coordination Group on October 11, 1997)

Chapter I General Terms

Article 1 This Charter is constituted in accordance with provisions in *Foreign Trade Law of People's Republic of China, Provisional Regulations on Chamber of Commerce of Importers and Exporters of People's Republic of China, Charter of China Chamber of Commerce of Medicines and Health Products Importers and Exporters and Notice Relating to Strengthening the Administration of Vitamin C Production and Export*.

Article 2 Vitamin C Sub-Committee of China Chamber of Commerce of medicines and Health Products Importers and Exporters (the "Sub-Committee") is an industrial organization organized, upon approval by the ministry of Foreign Trade and Economic Cooperation ("MOFTEC") and under leadership of the Chamber, by those member enterprises of China Chamber of Commerce of medicines and Health Products Importers and Exporters (the "Chamber") who have Vitamin C

import and export operation rights and have certain extent of operational scale and ability.

Article 3 The Sub-Committee has the following tenets: complying with laws of the country; implementing and executing the state policies and regulations on foreign trade; maintaining orderly export of Vitamin C products; exploring international market; and serving for an ordered and highly efficient development of Vitamin C foreign trade on the basis of unified coordination.

Article 4 The Sub-Committee is located in Beijing.

Chapter II Functions

Article 5 The Sub-Committee performs coordination, direction, consultation, service and supervision & inspection functions over its members. It bridges and ties the enterprises and the government. The Sub-Committee has certain industrial function. It shall, representing the basic interests and demands of the members, inform certain issues to the relevant government department and to cause such issues to be promptly solved.

Article 6 In accordance with Vitamin C exports and changes on international markets, the Sub-Committee will make proposals on the export development plan and annual export quota allocation, supervise the implementation of export license by member enterprises and advises on allocation and adjustment of expert quota, and issuance of export license.

Article 7 The Sub-Committee shall coordinate and administrate market, price, customer and operation order of Vitamin C export, represent or organize the

members to communicate in unison with foreign parties in accordance with international trade principles to protect the rights and interests of the country and the members.

Article 8 The Sub-Committee shall actively develop connections with domestic and foreign industries, exchange information, broadly build and develop business partnership and represent the industry to participate in relevant international conferences.

Article 9 The Sub-Committee shall collect and organize Vitamin C information and materials with respect to domestic and international market, customers, productions and sales, and provide consulting service to the members.

Article 10 The Sub-Committee shall hold, periodically or otherwise, working meetings for Vitamin C export to exchange information, summarize and communicate experience, analyze and work out coordinated prices for Vitamin C export, to supervise and inspect the implementation of such coordinated export prices set by the Sub-Committee and relevant business activities related to the enterprises.

Chapter III Members

Article 11 Any member of China Chamber of Commerce of medicines and Health Products Importers and Exporters whose Vitamin C export volume in any year from 1994 to 1996 is above 200 tons can apply to join the Sub-Committee.

Article 12 Only the members of the Sub-Committee have the right to export Vitamin C and are

simultaneously qualified to have Vitamin C export quota.

Article 13 Any member who wants to withdraw from the Sub-Committee, shall submit a 3-month prior written application and such withdrawal shall be subject to approval by the Sub-Committee's Council.

Article 14 Member's rights

(1) To elect, to be elected and to vote;

(2) To supervise and give suggestions and comments on the Sub-Committee's work;

(3) To participate in activities organised by the Sub-Committee, enjoy various services including information and consultation provided by the Sub-Committee;

(4) To report and suggest punishment measures on any conduct violating laws and the Charter of the Sub-Committee, harmful to the state and industrial interests, and infringing legitimate rights and interests of the members.

Article 15 Member's obligations

(1) To comply with various directives, policies and regulations with respect to foreign trade, comply with the Charter and regulations of Vitamin C Sub-Committee and implement Sub-Committee's resolution;

(2) To foreign trade enterprises can purchase Vitamin C from or act as Vitamin C export agents only from those manufacturing enterprises verified by the Sub-Committee. A manufacturing enterprise can only export its own products and can supply its products

only to those foreign trade enterprises verified by the Sub-Committee.

(3) The members shall voluntarily adjust their production outputs according to changes of supplies and demands on international market;

(4) Manufacturing enterprise members and foreign trade enterprise members shall establish the cooperation relationship, understand and yield to each other and jointly share benefits and risks;

(5) To report Vitamin C exports of previous two months to the Sub-Committee every odd month;

(6) Strictly execute export coordinated price set by the Chamber and keep it confidential.

Article 16 Any violation of the Charter of the Sub-Committee, failure to implement any resolution or regulation of the Sub-Committee and failure to perform any member's obligation shall be punished by the Sub-Committee by means of, according to gravity of circumstances, warning, open criticism and even revocation of its membership. The Sub-Committee will suggest to the competent governmental department, through the Chamber, to suspend and even cancel the vitamin export right of such violating member.

Chapter IV Organisation

Article 17 The Members Meeting is the highest authority of the Sub-Committee. The Members Meeting will be held once a year and shall only be duly convened when attended by representatives from two thirds of the members. The Members Meeting may be held earlier or later when necessary. The Sub-Committee has a Council. A Council meeting will be

held once every half year and may be earlier or later when necessary. The Council meeting shall not be duly convened unless it is attended by two thirds of the Council's Directors.

Article 18 Functions of Members Meeting are:

(1) to approve and amend the Charter of the Sub-Committee;

(2) to review applications to join or withdraw from the Sub-Committee;

(3) to elect, appoint and dismiss members of the Council of the Sub-Committee;

(4) to review and pass work report of the Council and determine work plans of the Sub-Committee;

(5) to discuss and set export coordinated price;

(6) to inspect Vitamin C export coordination and administration and the implementation of export coordinated prices, and to suggest on punishment measures on violating member;

(7) to review and discuss proposals of the Council and the members.

Article 19 Functions of the Council

(1) Implementing and executing resolution of the Member Meeting and reporting to the Member Meeting;

(2) Stipulating specific regulations and measures of products operation and organising implementation;

(3) Proposing principle of annual export quota allocation;

(4) Calling for regular or temporary Members Meeting;

(5) Electing Chief Director and appointing General Secretary of the Council;

(6) Discussing and determining coordinated prices and other relevant issues under urgent circumstances.

Article 20 The Council of the Sub-Committee has one Chief Director, seven to nine Directors and one General Secretary. members of the Council will be composed with the members of the Chamber and the members of the Sub-Committee. Chief Director, Director and General Secretary will be elected upon nomination by the Chamber.

Article 21 Chief Director, Director and General Secretary have a term of three years, which can be renewed upon re-election. The Sub-Committee does not have any permanent body. General Secretary will be responsible for daily work when the Council is not in session.

Chapter V Funding Sources

Article 22 The Chamber will bear daily expenses of the Sub-Committee, but expenses on meetings and researches shall be collected and expensed by the Sub-Committee itself.

Chapter VI Miscellaneous

Article 23 This Charter will be passed by the Members Meeting and will become effective upon verification and approval by China Chamber of Commerce of medicines and Health Products Importers and Exporters. The Members Meeting has the right to amend this Charter and the Council has

the right to construe this Charter. Any amendment and supplementation to this Charter shall be verified and approved by China Chamber of Commerce of medicines and Health Products Importers and Exporters.

APPENDIX L: 2002 Notice Issued by the Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs for the Adjustment of the Catalogue of Export Produces Subject to Price Review by the Customs, Promulgated March 29, 2002 and Effective May 1, 2002 (District Court Docket No. 170-2)

2002 MOFTEC & Customs Notice

Notice Issued by the Ministry of Foreign Trade and Economic Cooperation of the General Administration of Customs for the Adjustment of the Catalogue of Export Products Subject to Price Review by the Customs

MOFTEC MAO FA [2002] No. 187

Promulgation Date: March 29, 2002

Effective Date: May 1, 2002

Issued by: the Ministry of Foreign Trade and Economic Cooperation (hereinafter "MOFTEC") and the General Administration of Customs (hereinafter "GAC") [tr.]

To: Guangdong Branch, Tianjin and Shanghai Commissioners' Offices of GAC, Directly Subordinated Customs Offices, the Commissions (Offices/Bureaus) of Trade and Economic Cooperation of Every Province, Autonomous Region, Municipality and City Specifically Designated in the State Plan, the Commissioners' Offices of MOFTEC at Various Cities, and the Chambers of Import and Export

MOFTEC and GAC have made the decision to adjust the catalogue of export products subject to price review by the customs for year 2002, in order to accommodate the new situations since China's entry into WTO, maintain the order of market competition, make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports, promote industry self-discipline and facilitate the healthy development of exports. The decision include the following aspects:

1. After adjustment, 30 categories of export products are subject to price review by the customs (see the Attachment of the Table of Export Products). All of the products are subject to Price Verification and Chop ("PVC") by the chambers, and no longer subject to supervision and review by the customs.

2. The relevant chambers of import and export and customs offices shall strengthen communication and cooperation among themselves in accordance with the Rules for Coordination with Respect to Customs Price Review of Export Products issued together with the Notice of the Rules on Price Reviews of Export Products by the Customs ([1997] MOFTEC GUAN ZONG HAN ZI No. 21), promptly report any issues arising from export price review exercise, jointly perform the export price review responsibility and file the annual price review report with MOFTEC and GAC.

3. Following the adjustment made under this Notice, the relevant chambers must, by April 20, 2002, submit to Guangzhou Commodity Price Information Center of GAC information on industry-wide negotiated prices for those export products subject to price review, in both soft copy (in required format) and

hard copy; in addition, each chamber shall file the name of personnel responsible for price review, addresses, telephone and fax numbers with the Foreign Trade Department of MOFTEC, the Duty Collection and Administration Department and Guangzhou Commodity Price Information Center of GAC.

4. The relevant chambers of import and export shall follow the PVC procedures pursuant to the Provisional Rules on Export Price Verification and Chop for Key Products subject to Price Review, which Rules were issued together with the Notice of the Rules on Price Reviews of Export Products by the Customs ([1997] MOFTEC GUAN ZONG HAN ZI No. 21). The adoption of PVC procedure shall be convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline. The PVC procedures shall be performed in a way that it could assist in maintaining good export order on the one hand and effectively reduce the export costs of enterprises, promoting the development of the industries and exports. From 2002, each relevant chamber shall learn from the experience of the Chamber of Machinery and Electronic Products in implementing classified PVC for binoculars, and select at least one of the products with the jurisdiction of its chamber for trial.

5. Given the drastically changing international market, the customs and chambers may suspend export price review for certain products with the approvals of the general members' meetings of the sub-chamber (coordination groups) and filing with GAC and MOFTEC.

6. The adjusted catalogue of export products subject to price review shall become effective from May 1, 2002. The Notice for Adjusting the Catalogue of Export Products Subject to Customs Price Review ([2000] MOFTEC GUAN FA No. 661) jointly issued by MOFTEC and GAC on December 25, 2000 shall become void then.

Attachment: Catalogue of Export Products Subject to Price Review by the Customs for year 2002 (30 categories)

Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China

General Administration of Customs of the People's Republic of China

March 29, 2002

[Attachment Omitted]

APPENDIX M: 2002 Charter of the Vitamin C Subcommittee of the China Chamber of Commerce of Medicines and Health Products Importers and Exporters, Approved June 7, 2002 (District Court Docket No. 394-5, at 172-82)

Appendix 2:

CHARTER OF THE VITAMIN C SUBCOMMITTEE OF THE CHINA CHAMBER OF COMMERCE OF MEDICINES AND HEALTH PRODUCTS IMPORTERS AND EXPORTERS

Section One: General Principles

Article One: This Charter has been formulated in accordance with the relevant state laws and regulations and the *Articles of Association for the China Chamber of Commerce of Importers and Exporters of Medicines and Health Products*.

Article Two: The name of this organization is China Chamber of Commerce of medicines and Health Products Importers and Exporters Vitamin C Subcommittee (hereafter referred to as "the Subcommittee"), and it is registered with the state association administrative authority in accordance with the relevant laws.

Article Three: The Subcommittee is a component of the China Chamber of Commerce of medicines and Health Products Importers and Exporters (hereafter referred to as "the Chamber of Commerce"), and is a self-disciplinary industry organization jointly established on a voluntary basis by those Chamber of Commerce members which conduct import and export of vitamin C. It does not have a legal person status.

Article Four: The purposes of the Subcommittee are to observe the state laws, regulations and the Articles of Association for the Chamber of Commerce, to coordinate and guide the vitamin C import and export business as well as related activities, to provide consultation and services to its members and relevant governmental departments, to maintain the normal working order of vitamin C import and export operations, to ensure fair competition, to protect the national interest and the legal rights and interests of its members, and to promote the healthy development of the vitamin C import and export trade.

Article Five: The Subcommittee accepts guidance and supervision from the Chamber of Commerce.

Section Two: Functions

Article Six: The Subcommittee shall serve as a liaison between the government and its members, between the domestic and overseas markets, and among the relevant industries.

Article Seven: The Subcommittee shall introduce national economic and trade laws, regulations, guidelines and policies to its members, and shall guide and oversee the operations of its members in accordance with the law.

Article Eight: The Subcommittee shall coordinate and guide vitamin C import and export business activities, promote self-discipline in the industry, maintain the normal order for vitamin C import and export operations, and protect the interests of the state, the industry and its members.

Article Nine: The Subcommittee shall study methods and measures for the expansion of the

vitamin C import and export trade, and shall organize discussions of import and export trade strategy and planning. The Subcommittee shall represent the interests of its members, communicate the status, opinions and suggestions of its members to the relevant departments of the government, and make suggestions to the relevant departments of the government in formulation of vitamin C import and export trade policies.

Article Ten: The Subcommittee shall participate in domestic and overseas activities and international exchanges for the promotion of vitamin C import and export, shall establish and develop a cooperative relationship with related domestic and international industrial organizations, and help its members to develop in the international marketplace.

Article Eleven: The Subcommittee shall exchange knowledge and experience in developing vitamin C production, improving commodity quality, improving operations and management, and promoting collaboration between industry and trade; shall collect and organize information regarding the domestic and overseas markets for vitamin C, including clients, production, sales and other relevant information; and shall provide consulting services to its members.

Article Twelve: The Subcommittee shall organize relevant businesses to prepare response to antidumping accusations against vitamin C of our country; shall investigate dumping and unfair competitive activities of foreign products in our country in response to members' complaint, and submit requests to the relevant governmental departments for measures to be taken in accordance with the industry's requests.

Article Thirteen: The Subcommittee shall implement other duties as authorized by the government or the Chamber of Commerce or as requested by the members and necessitated by industry agreements.

Section Three: Membership

Article Fourteen: The following conditions must be met when submitting an application for membership on the Subcommittee:

(1) must be a member of China Chamber of Commerce of medicines and Health Products Importers and Exporters;

(2) must support this charter;

(3) must be willing to engage in the vitamin C import and export business and to operate in accordance with the law;

(4) must indicate an intention to join the Subcommittee.

Article Fifteen: Procedures for joining the Subcommittee:

(1) Submit an application for membership on the Subcommittee;

(2) File registration documents with the relevant administrative departments of the state;

(3) The Subcommittee will review the application in accordance with the above-mentioned requirements, approve those applications that meet the conditions for joining the Subcommittee, and conduct registration.

Article Sixteen: Rights of members:

(1) To elect, to be elected and to vote within the Subcommittee;

(2) To participate in the various activities organized by the Subcommittee;

(3) To enjoy the various services provided by the Subcommittee;

(4) To bring forth comments, suggestions and proposals on relevant issues involving import and export;

(5) To bring forth comments, suggestions and proposals on relevant issues involving the organization of the Subcommittee;

(6) To monitor the work of the Subcommittee, and bring forth comments and suggestions;

(7) To disclose and expose enterprises and individuals who violate the state laws, regulations and policies, who violate this Charter, who disobey resolutions of the Subcommittee, and who harm the interests of the state or its members;

(8) To freely resign from the Subcommittee.

Article Seventeen: Obligations of Members

(1) Comply with the Charter of the Subcommittee;

(2) Implement the resolutions and agreements of the Subcommittee;

(3) Actively participate in the various activities organized by the Subcommittee;

(4) Perform their tasks as required by the Subcommittee;

(5) Report to the Subcommittee and provide relevant information, materials and data to the Subcommittee;

(6) Accept the coordination of the Subcommittee. Article Eighteen: members wishing to resign from the Subcommittee shall inform the Subcommittee in writing, return all relevant documents evidencing its membership, and initiate the formal membership resignation process.

Article Nineteen: The Subcommittee will punish members found to have engaged in the following activities:

(1) Violation of the charter of the Subcommittee;

(2) Failure to implement the resolutions of the Subcommittee;

(3) Failure to implement industry agreements;

(4) Violation of state laws, regulations and rules in business activities;

The disciplinary actions of the Subcommittee include circulating of a notice of public criticism, issuing a warning, temporarily suspending membership, and termination of membership. Punishing a member must be approved by the Council of the Subcommittee (hereafter referred to as "the Council").

Article Twenty: The Subcommittee implements a system of regular membership registration, and the timeframe and procedures for registration is determined by the Council. Failure to register within the specific timeframe will result in an automatic loss of membership.

Section Four: Organizational Structure

Article Twenty-One: The Annual meeting of the members of the Subcommittee (hereafter referred to as "the Annual Meeting") is the organization of ultimate power in the Subcommittee.

Article Twenty-Two: The Annual Meeting exercises the following duties:

(1) make decisions regarding the guidelines and tasks of the Subcommittee;

(2) Formulate, review, and amend the charter of the Subcommittee;

(3) Formulate, review, and amend the important working rules of the Subcommittee;

(4) Review the work reports of the Council;

(5) Elect and dismiss the Subcommittee's Council members;

(6) Elect and dismiss the Subcommittee's Investigative Group members;

(7) Review proposals of the Council and members;

(8) make decisions regarding issues of dissolution;

(9) make decisions regarding other important issues.

Article Twenty-Three: The Annual Meeting is held once a year. In case of any extenuating circumstances, and upon approval by a vote of the Council or upon a proposal brought forth by more than half of the members, the meeting date can be moved up or extended.

Article Twenty-Four: Upon a proposal jointly brought forth by one-third of the members or more than one-half of the Council members, or upon a request brought forth by a supervising governmental agency, an Interim Meeting may be held.

Article Twenty-Five: The Interim Meeting exercises the following duties:

(1) Review proposals of the Council and members; (2) Formulate specific coordination solutions;

(3) Coordinate other issues related to the work of the Subcommittee.

Article Twenty-Six: The Annual Meeting or the Interim Meeting can be held only when two-thirds of the members are present at the meeting. A resolution thereof can go into effect only when it is approved through voting by more than two thirds of the members present at the meeting.

Article Twenty-Seven: A Council is established by the Subcommittee. The Council is the enforcement body of the Annual Meeting, performs the routine work of the Subcommittee when the Annual Meeting is not in session, and is responsible for the Annual Meeting. The Council exercises the following duties:

(1) Implement the resolutions of the Annual meeting and the Interim meeting;

(2) Elect and dismiss the Chairman, the Vice Chairman, the Secretary-General and the Deputy Secretary-General of the Council;

(3) Guide the routine work of the Subcommittee;

(4) Prepare for the convening of the Annual meeting and the Interim meeting;

(5) Submit work reports to the Annual meeting;

(6) Organize and coordinate the specific implementation of resolutions;

(7) Invite businesses to join the Subcommittee;

(8) Receive, review and respond to member proposals;

(9) Accept the recommendations made by the Investigative Group of the Subcommitttee, and punish members found to be in violation of the rules;

(10) Perform other duties authorized by the government and the Chamber of Commerce and entrusted by the Annual meeting.

Article Twenty-Eight: The Council has a fixed term of office. Each term of office is four years, and upon expiration of the term of office of the Council, the Annual Meeting is held to reelect the Council. When the Annual Meeting is moved up or postponed, the term of office of the Council will be modified accordingly.

Article Twenty-Nine: The slate of candidate for Council of the Subcommittee and the method for its determination shall be proposed by the Council, which is responsible for the preparations for the convening of the Member Meeting, after seeking written opinions from all members. The Subcommittee Council is formed through a democratic election at the Annual Meeting. Subcommittee Council members can only be selected from the members of the Subcommittee. Council members can hold office for another term upon being reelected.

Article Thirty: The Council holds two meetings each year, which are to be presided over and called by

the chairman of the Subcommittee Council. When the chairman of the Council thinks it necessary, upon seeking opinions from the Council members, or upon a proposal jointly brought forward by more than one-half of the members, an Interim Council meeting may be held. When there are extenuating circumstances, the meeting can be held by telecommunication.

Article Thirty-one: A council meeting can be held only when more than three-quarters of the Council members are present at the meeting. The resolutions thereof can only take effect when it is approved through a vote by more than two-thirds of the Council members present at the meeting.

Article Thirty-Two: an Investigative Group is set up in the Subcommittee. The Investigative Group of the Subcommittee is the monitoring organization of the Subcommittee, and is responsible for the Annual meeting of the Subcommittee.

Article Thirty-Three: The Investigative Group of the Subcommittee exercises the following functions and powers:

(1) monitor the implementation of the charter and the various resolutions of the Subcommittee;

(2) The position of Chairman of the Investigative Group is concurrently held by the Secretary-General;

(3) Receive reports from the members of the Subcommittee regarding various accusations of violations of the state laws, regulations, or the charter and resolutions of the Subcommittee, and conduct investigations;

(4) organize questioning of members accused of violations of the rules;

(5) Cast votes to arbitrate concerning member conduct to determine whether or not its conduct violates the rules;

(6) Submit work reports to the Annual meeting of the Subcommittee;

(7) Submit determinations of rule violation to the Subcommittee Council;

(8) Perform other duties entrusted by the member meeting of the Subcommittee and through industry agreements.

Article Thirty-Four: The Investigative Group has a fixed term of office, which is the same as that of the Council, and is re-elected concurrently with the Council. The members of the Investigative Group are determined through a democratic election at the Member Meeting. The members of the Investigative Group can only be selected from among the members of the Subcommittee. The members of the Investigative Group can hold office for another term upon being reelected. A member of the Investigative Group cannot concurrently serve as a member of the Council (with the exception of the staff of the Chamber of Commerce).

Article Thirty-Five: The Investigative Group of the Subcommittee does not hold regular meetings; meetings will be convened by the Group's chairman in accordance with actual circumstances and needs.

Section Five: Leadership

Article Thirty-Six: The Subcommittee has one Chairman, one Vice-Chairman, one Investigative Group Chairman, one Secretary-General, and one Deputy Secretary-General.

Article Thirty-Seven: The Chairman and the Vice Chairman are determined through a democratic election by the Council; the term of office is one year, and they can hold office for another term upon being reelected. The president can only be selected from the representatives of the member organizations during that term.

Article Thirty-Eight: The Chairman of the Investigative Group of the Subcommittee has a term of office of one year, and can hold the office for another term upon being reelected.

Article Thirty-Nine: The Vice-Chairman, the Secretary-General, and the Deputy Secretary-General are positions assumed by members of the permanent administrative body of the Chamber of Commerce. The Vice-Chairman, the Secretary-General, and the Deputy Secretary-General are nominated by the Chairman of the Chamber of Commerce, and are determined through election by the Council. The term of office thereof is the same as that of the leadership positions mentioned above. The Secretary-General can hold the office for another term upon being reelected.

Article Forty: Duties of the Council Chairman

(1) Convene and chair Council meetings;

(2) Represent the Subcommittee to the public, and sign important documents on its behalf;

(3) Preside over the work at the Subcommittee and the Council;

(4) Review the status of the implementation of the resolutions of the Annual meeting and the Council;

(5) Assume responsibility for the Annual meeting and the Council, and submit work reports to them.

Article Forty-one: The Vice-Chairman assists the Chairman in his duties, and when the Chairman cannot perform his duties for any reason, those duties will be assumed by the Vice-Chairman.

Article Forty-Two: Duties of the Chairman of the Investigative Group:

(1) Convene and chair Subcommittee Investigative Group meetings;

(2) Preside over the work of the Investigative Group of the Subcommittee;

(3) Review the status of the implementation of the determinations reached by the Investigative Group of the Subcommittee;

(4) Assume responsibility for the Annual meeting, and submit work reports to it.

Article Forty-Three: Duties of the Secretary-General

(1) Implement the resolutions of the Annual meeting and the Council, and organize the implementation of the work plan of the Subcommittee;

(2) Assist the Chairman and Vice-Chairman of the Council;

(3) Take responsibility for the routine secretarial work and communications of the Subcommittee;

(4) Take responsibility for the routine administrative work of the Subcommittee;

(5) Recruit staff for the Subcommittee based on the working needs of the Subcommittee;

(6) Perform other duties as entrusted by the Annual meeting, the Council, the Investigative Group, the Chairman of the Council, and the Chairman of the Investigative Group.

Article Forty-Four: The Deputy Secretary-General assists the Secretary-General, and when the Secretary General cannot perform his duties for any reason, those duties will be assumed by the Deputy Secretary-General.

Section Six: Procedures for Amending this Charter

Article Forty-Five: This Charter can be amended only when a motion for amendment is brought forth by one-half of the members of two-thirds of the Council members.

Article Forty-Six: The amended version of this Charter can be submitted to the Annual meeting for review only when it has been approved through a vote at the Council meeting.

Article Forty-Seven: The amended Charter must be approved at the member meeting, then be submitted to the Chamber of Commerce for review within fifteen days after approval, and takes effect when consent is obtained from the Chamber of Commerce.

Section Seven: Dissolution Process

Article Forty-Eight: When the Subcommittee needs to be dissolved for reasons such as completion of its mission, voluntary dissolution, splitting or merger, the Council needs to bring forth a motion for dissolution.

Article Forty-Nine: The motion for dissolution of the Subcommittee must be approved through a vote at

the member meeting, and submitted to the Chamber and the supervising department at the ministry of Foreign Trade and Economic Cooperation for review and approval.

Article Fifty: The Subcommittee is dissolved after the state social organization administration department completes the formal procedures for its dissolution.

Section Eight: Supplementary Articles

Article Fifty-one: No independent financial department shall be set up for the Subcommittee; its working funds will be collected and spent by the Subcommittee.

Article Fifty-Two: In order to monitor the implementation of industry self-disciplinary agreements, coordination plans, or industry resolutions, upon approval by relevant members, the Subcommittee can collect a security deposit in a specified amount for breach of agreement. The specific collection and expenditure method shall be separately formulated at the Subcommittee Annual meeting, the Interim meeting and the Council.

Article Fifty-Three: This Charter was approved by members through a vote on June 7, 2002.

Article Fifty-Four: The right to interpret this Charter belongs to the Subcommittee Council.

Article Fifty-Five: This Charter takes effect on the date on which it is reviewed and approved by the Chamber of Commerce.

Appendix 3:

I. List of Newly appointed Council members:

1. Northeast Pharmaceutical Group

2. Jiangsu Jiangshan

3. Weisheng (Shijianzhuang) Pharmaceutical

4. Hebei Welcome Pharmaceutical Company

5. Director Qiao Haili, Western medicine Department, China Chamber of Commerce of medicines and Health Products Importers and Exporters

II. List of Subcommittee Investigative Group members:

1. Director: Director Qiao Haili, Western medicine Department, China Chamber of Commerce of medicines and Health Products Importers and Exporters

2. Members: Jiangxi medicines and Health Products Import and Export Corporation China medicines and Health Products Import and Export Corporation

APPENDIX N: 2003 Announcement of the People's Republic of China, General Administration of Customs of the People's Republic of China, Dated November 29, 2003, Effective January 1, 2004 (District Court Docket No. 70-12)

Announcement of Ministry of Commerce of the People's Republic of China, General Administration of Customs of the People's Republic of China (No. 36, 2003)

According to the relevant provisions of *the Foreign Trade Law of the People's Republic of China*, in order to maintain the order of foreign trade and create a fair trade environment and in response to the demands of the industries engaging in export and import, as well as on the basis of the coordination by relevant industrial associations, starting from January 1, 2004, the export of citric acid and 35 other commodities (please refer to Exhibit 1: Catalogue of Export Commodities Subject to the Verification and Chop System, hereinafter the "Catalogue") shall be subject to the Verification and Chop ("V&C") system on an experimental basis. The Catalogue shall be subject to further adjustment and announcement by the ministry of Commerce in consultation with the General Administration of Customs, upon application of the relevant Chambers of Commerce and according to the development of various industries.

With respect to those included in the Catalogue, if the commodities are exported under general trade, processing trade with customer's materials, processing trade with self-sourced materials and processing trade with exported materials, the

exporters shall declare to the Customs with export contracts affixed with the V&C chop by the relevant Chambers of Commerce for Import and Export. The Customs shall not accept any application for export when the export contracts are not affixed with such chop. The commodity number shall be the basis for the Customs to verify export contracts with V&C chop, while the commodity name works only as a reference.

Each Chamber of Commerce for Import and Export shall follow the principle of facilitating export activities and promoting industrial development, and strictly observe the Procedures for Implementing the Verification and Chop System on Export Commodities (Exhibit 2).

Enterprises exporting by forging the V&C chop on the contracts will be punished by the Customs and Chambers of Commerce according to relevant rules. We hereby make this announcement.

Exhibits:

1. Catalogue for Export Commodities Subject to the Verification and Chop System
2. Procedures for Implementing the Verification and Chop System on Export Commodities
3. Contact Persons of the Chambers Responsible for Implementing the Verification and Chop System

Ministry of Commerce of the People's Republic of China

General Administration of Customs of the People's Republic of China

November 29, 2003

Exhibit 1: Catalogue of Export Commodities Subject to the Verification and Chop System

(omitted.)

Exhibit 2: Procedures for Implementing the Verification and Chop System on Export Commodities

China Chamber of Commerce for Import and Export of Light Industrial Products and Arts-Crafts, China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, China Chamber of Commerce for Import and Export of Foodstuffs, Native Produce And Animal By-Products, China Chamber of Commerce for Import & Export of Machinery & Electronic Products, China Chamber of Commerce of medicines & Health Products Importers & Exporters and China Chamber of Commerce for Import & Export of Textiles (collectively "Chambers") shall be responsible for implementing the verification and chop system (hereinafter "V&C") on export commodities. The procedures are set forth as follows:

A. For the commodities included in the Catalogue of Export Commodities Subject to the Verification and Chop System (hereinafter the "Catalogue"), exporters shall deliver or fax (in urgent cases) the export contracts (or copies thereof) to the relevant Chambers for verification before Customs declaration. If it is verified that the contracts comply [with the relevant regulations and industry agreements], the Chambers shall fill in the Verification and Chop Form of China Chamber of Commerce for [*] (hereinafter "V&C Form") and affix the counter-forgery V&C chop at the designated block of the V&C Form and to the export contracts at the blocks where the prices and quantities

are specified, and then deliver them back to the exporters. The exporters shall declare to the Customs with the originals of the V&C Forms and the export contracts that have been verified and affixed with the V&C chop by the Chambers.

B. For contracts where exports will be in several batches, exporters may apply to the Chambers for V&C of the whole contracts. After the Chambers have verified that the quantities and prices of each batch comply with the relevant batch contracts, the Chambers shall use the same serial number on the V&C Forms for all the batches of exports.

C. The Chambers shall verify the submissions by the exporters based on the industry agreements and in accordance with the relevant regulations promulgated by the ministry of Commerce ("MOFCOM") and the General Administration of Customs ("GAC"). For commodities of special standards or brands that are not included in the industry agreements of the relevant Chambers, the Chambers may refer to the same or similar types of commodities manufactured and exported during the same period of time. The relevant Chambers shall file the industry agreements with MOFCOM and GAC within 10 days after the public announcements [for such industry agreements] are made, and any modifications to such industry agreements shall be filed with MOFCOM and GAC within 10 days after such modifications are made.

D. The Chambers shall promptly verify the exporters' submissions, affix V&C chop to the conforming applications and deliver them back to the applicant enterprises via express mail within 3 business days (as per postmark). The Chambers shall

not affix the V&C chop to non-conforming export contracts and shall notify the exporters within 2 business days. In the event that no response is received from the Chambers 10 days after the exporters have submitted the export contracts to the Cambers for V&C, such exporters shall report the same to MOFCOM.

E. The Chambers shall establish a V&C administration system, and report to MOFCOM and GAC every three months the implementation of the V&C system for the commodities included in the Catalogue of the passing quarter.

F. The Chambers shall not charge any fees other than the necessary documentation costs involved in the verification of export contracts that are subject to the V&C system. For V&C applications made by non-member exporters, the Chambers shall give them the same treatment as to member exporters.

G. The Chambers shall keep confidential the exporters' submissions, and shall not willfully disclose such submissions.

H. For V&C related inquiries, the first person being inquired shall be responsible for giving responses. When being inquired by the Customs relating to the V&C, the contact persons of the Chambers (as listed in Exhibit 3) shall reply within 24 hours.

Exhibit 3: Contact Persons of the Chambers Responsible for Implementing the Verification and Chop System

(omitted.)

APPENDIX O: Notice of the China Chamber Of Commerce of Medicines and Health Products Importers and Exporters Regarding Publishing the Industry Agreed Export Prices For the Key Commodities for the Spring Of 2003 (District Court Docket No. 397-22, at 12-15)

China Chamber of Commerce for Import and Export of Medicines and Health Products

(2003) Yi Shang Zi No. 31

Notice regarding publishing the industry agreed export prices for the key commodities for the spring of 2003

To relevant member enterprises:

Pursuant to the opinions of the major enterprises, the industry agreed export prices for the key commodities in the western medicine category have been revised. Now, the new price list has been printed and distributed to you. Please abide by the list in implementation. Please pay attention to the following when carrying out the list:

1. The agreed prices are the minimum prices. We put the limit on the floor prices but not the ceiling prices;

2. When the price term in a contract is not in accordance with the agreed price term, one shall voluntarily convert the price term to be consistent with the agreed price term, so as to facilitate the application for the export license and customs clearance.

3. The agreed price of Saccharin sodium shall take effect on Apr 1, 2003, and the agreed prices for other commodities shall take effect on Apr 15, 2003.

Confidential

List of export prices of commodities reviewed by Customs and agreed by the industry for obtaining an export pre-authorization stamp from the Chamber, for Apr. 2004

Name of the Product	Commodity Code	Agreed price (USD)	Unit	Price Term
Vitamin C	29362700		KG	CIF
Paracetemol	29242920	1.9	KG	FOB
Saccharin Sodium	29251100	2.8	KG	FOB
		2.85	KG	CIF India
		2.83	KG	CIF Asia
		2.88	KG	CIF Europe, South America
		2.92	KG	CIF US

Seal of China Chamber of Commerce for Import and Export of Medicines and Health Products

Appendix O

Name of the Product	Commodity Code	Agreed price (USD)	Unit	Price Term
Heparin Sodium	30019010	600.00	KG	FOB
Penicillin Industrial Salt	29411099	10.00	1 bn (*translators note: the original is not very clear.*)	FOB
Tetracycline Hydrochloride	29413012	11.00	KG	FOB

Seal of China Chamber of Commerce for Import and Export of Medicines and Health Products

APPENDIX P: Excerpt From the China Chamber of Commerce of Medicines and Health Products Importers and Exporters Information Website (District Court Docket No. 71-5)

[See source for logo] www.cccmhpie.org.cn	China Chamber of Commerce of medicines and Health Products Importers and Exporters Information Website

[Website Menus Omitted]

Concerns remain while good news on our country's vitamin C exports

China is the largest vitamin C producer and exporter in the world. Vitamin C is the largest type of western medicine-ingredient produced by China. The two-step fermentation method invented in our country is on par with international level. In recent years, the recovery rate of vitamin C from sorbitol has been improved to over 60% from 48%, thus significantly increase the Chinese market share of vitamin C on the world market. Currently, the annual vitamin C consumption on the international market is around 80,000 tons, and our country exports about 43,000 tons a year.

Currently there is a tripartite confrontation on the international market , with BASF AG of Germany, F.

Hoffmann-La Roche of Switzerland and the four major Chinese vitamin C manufacturers competing against each other.

Between May 2000 and late December 2001, vitamin C in our country experienced the second "price war" since 1995 export prices plummeted from 5.0 US Dollars to less than 2.8 US Dollars; which has caused direct economic losses about 200 million US dollars. Relevant countries are ready to launch their antidumping lawsuits against China soon.

In December 2001, through efforts by the Vitamin C Sub-Committee of China Chamber of Commerce of medicines and Health Products Importers and Exporters, each domestic manufacturers were able to reach a self-regulated agreement successfully, whereby they would voluntarily control the quantity and pace of exports, to achieve the goal of stabilization while raising export prices. Such self-restraint measures, mainly based on "restricting quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically" have been completely implemented by each enterprises' own decisions and self-restraint, without any government intervention. Beginning on May 1, 2002, vitamin C was listed as a product requiring price reviews by China's Customs and a seal of pre-approval by the China Chamber of Commerce, which has provided powerful oversight and safeguards for the implementation of self-restraint agreements among domestic manufacturers.

Through the work of the Vitamin C Sub-Committee of China Chamber of Commerce of medicines and Health Products Importers and Exporters during the past year, and due to products

discontinuation or reduction by foreign multi-national firms such as BASF Takeda, Merck and F. Hoffmann-La Roche of the United States, export prices of vitamin C have increased to over 3.35 US Dollars from 2.80 US Dollars in late 2001. Currently, the actual quotes have reached about 10.00 US Dollars. According to Custom's statistics, our country's vitamin C exports reached 146 million US Dollars in 2002, taking up 4.9% of exports on western medicine-ingredient by our country, which has created an unprecedented good atmosphere for domestic vitamin C business. According to estimates, every 10 cents in US Dollar increases in the vitamin C export will generate earnings of nearly 4 million US Dollars for the entire industry. If the export price of 2.80 US Dollars prior to the industry self-restraint is used as the base number, in 2002, earnings from our domestic vitamin C exports in 2002 increased by about 20 million US Dollars.

The current good situation for the vitamin C exports has been hard-won and is the result of the short-term general intersection of different factors. Currently, abnormal export price increases may stimulate new manufacturing enterprises to join the competition. In the meantime, we expect that the supply of vitamin C will soon exceed demand when foreign multi-national firms resume their production. This will lead to a reduction or precipitous drop in profits from vitamin C, or even negative profits for certain domestic enterprises.

Regarding the current export situation for vitamin C, we must remain clear-minded, as we faced so much experiences and lessons from the past. The manufacturing enterprises must remain cool-headed

and soundly judge the situation of vitamin C on the international market, and make joint efforts with the China Chamber of Commerce of medicines and Health Products, to avoid vicissitudes in the production and exports of vitamin C, for maintaining a stable, health situation for it for the long run.

(Department of Western Medicine)