

Foreign Sovereign Compulsion: A Widening Split on Chinese Exports

By Christopher B. Hockett, Joel M. Cohen, Jesse Solomon, and Anthony W. Mariano

A team of attorneys from Davis Polk & Wardwell LLP presented the January Monthly Update for In-House Counsel. The following article summarizes one of the recent developments discussed during the program.

Three recent price fixing cases have analyzed the question of whether and to what extent price and output restrictions imposed by the Chinese government can serve as a defense to antitrust claims under U.S. law. In the first case (involving the export of vitamin C from China to the United States), a New York district court rejected the defense on summary judgment and forced a trial, which the defendants lost. In the second case (bauxite), a Pennsylvania district court upheld the defense and granted summary judgment in the defendants' favor. And in the third case (magnesite), a district court in New Jersey has indicated that it will likely give deference to the Chinese government's position on its control of Chinese export prices, but it has not yet ruled on the question.

Below, we explore some implications of these different outcomes, including the possibility of further suits against Chinese exporters subject to export controls, the prospect of forum shopping by plaintiffs in such lawsuits, and the apparent split between the judiciary and executive branches of government in their interpretation of China's actions on matters of international trade.

Vitamin C Antitrust Litigation

In *In re Vitamin C Antitrust Litigation*, the U.S. District Court for the Eastern District of New York declined to dismiss Sherman Act claims that were asserted against Chinese companies for collusive conduct on imports. In so doing, the court explicitly refused to credit statements from the Chinese government about its role in setting export prices.

In January 2005, direct purchasers of vitamin C imported from China brought a series of antitrust class actions against Chinese vitamin C manufacturers, alleging that they had conspired to set the price and volume of vitamin C exports. These suits were consolidated in the United States District Court for the Eastern District of New York. In 2008, the defendants moved to dismiss the suit on the grounds that (1) the manufacturers were compelled by the Chinese government to charge the prices they did for vitamin C exports, (2) the price fixing was an act of the Chinese state, and (3) the court should defer to China's authority as a sovereign state to mandate the price fixing. The Ministry of Commerce, or MOFCOM (one of China's three antitrust enforcement agencies), supported the defendants' arguments and filed an unprecedented amicus brief and two subsequent statements in which it affirmed that China had set up a Chamber of Commerce of Medicine and Health Products Importers & Exporters to control the prices and volumes of vitamin C exports.

The district court, however, refused to credit these explanations. The court explained that other "testimony suggests that the hand of government was not weighing as heavily on defendants as defendants and the Ministry would have this court believe."²³ While the court found that China's interpretation of its own laws was entitled to "some degree of deference," it determined that China's position 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."²⁴ The court identified meeting minutes and publicly available records as documentary evidence undermining the Chinese government's position.

The court later denied a summary judgment motion that was based on similar arguments. In connection with that motion, the court also considered and declined to credit the position expressed by the U.S. Trade Representative,

²³ *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 555-56 (E.D.N.Y. 2008).

²⁴ *Id.* at 557 (internal quotation marks omitted).

which had complained to the World Trade Organization (WTO) that China has been fixing Vitamin C export volumes and prices—the very position taken by the Chinese government in its submission and by the Chinese defendants. The court concluded that defendants’ price fixing was voluntary rather than compulsory, noting that “when the alleged compulsion is in the defendants’ own self-interest, a more careful scrutiny of a foreign government’s statement is warranted.”²⁵ The court also said that it could not “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.”²⁶

At trial, a jury found the defendants liable and awarded the plaintiff class \$54.1 million, which was reduced by the settling defendant’s contribution and then trebled to a total of \$153.3 million.²⁷ The trial court judgment was appealed to the Second Circuit in early 2015 and is currently awaiting a decision.

Bauxite Litigation

The U.S. District Court for the Western District of Pennsylvania faced a similar question in a suit concerning Chinese imports of bauxite. In that case, the court was persuaded by evidence of China’s role in managing exports and in so doing found that the private defendants had *not* unlawfully colluded to fix prices and output volumes in violation of Section 1 of the Sherman Act.²⁸

In February 2006, Resco Products, Inc. brought individual and class action claims alleging a conspiracy to fix the price and volume of refractory grade bauxite, a material used to make high-temperature ceramic coatings in furnaces. The defendants were Chinese bauxite producers and members of a trade association known as the “Bauxite Branch” of the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters (CCCMC). The plaintiff claimed that meeting minutes from the CCCMC showed that the defendants had gathered with other bauxite exporters on a regular basis and haggled with each other over output caps and prices, then took “votes” on what caps should be adopted. The defendants countered with WTO findings that the price and volume restrictions at issue were not the result of agreements, but rather were directly compelled by the Chinese government (MOFCOM).

In 2015, the defendants moved for summary judgment, claiming that there was no conspiracy between them, and that MOFCOM, not the Bauxite Branch of the CCCMC, fixed the quantities and prices of bauxite for export. In contrast to the district court in the *Vitamin C* litigation, the district court in the bauxite case granted summary judgment in favor of the defendants, and it did so largely by accepting evidence that “[t]he implementation of quotas was mandated by the Chinese government” and that “Bauxite Branch member votes for proposals concerning the yearly bauxite quota amount can only be construed as opinions offered to MOFCOM.”²⁹ The court explained that “[i]n a vacuum, proposals to set bauxite quotas at specified levels being voted on at Bauxite Branch meetings appear to indicate explicit member participation in a conspiracy to limit output”; however, the court found that “the Bauxite Branch’s demonstrated lack of authority with respect to quotas invalidates such a finding. Since at least 2001, MOFCOM has been responsible for deciding and announcing the types and the total quota quantity of commodities subject to bidding, not the CCCMC or its Branches.”³⁰ Interestingly, the court came to this conclusion without relying on any evidence from MOFCOM, which did not intervene in the bauxite case.

The plaintiffs appealed the judgment against them to the United States Court of Appeals for the Third Circuit on February 29, 2016.

²⁵ *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 552 (E.D.N.Y. 2011).

²⁶ *Id.*

²⁷ *In re Vitamin C Antitrust Litig.*, No. 06–MD–1738, 2013 WL 6858853, at *1 (E.D.N.Y. Dec. 30, 2013).

²⁸ *Resco Products, Inc. v. Bosai Minerals Grp.*, 2016 WL 308863, at *8 (W.D. Pa. Jan. 25, 2016).

²⁹ *Id.*

³⁰ *Id.* (internal quotation marks omitted).

Magnesite Litigation

A third private suit alleging price fixing of Chinese imports is pending in the United States District Court for the District of New Jersey. That case involves imports of magnesite, another raw material used in the production of furnaces, kilns, and incinerators. The court has not yet addressed the question of whether the case should be dismissed based on superseding Chinese government price controls, but it has made note of the high level of deference that should normally be given to the Chinese government's statements with respect to its role in setting export prices.

Plaintiff purchasers of magnesite-based products brought suit against various Chinese importers, claiming that defendants colluded to fix artificially high prices in violation of Section 1 of the Sherman Act. While the rulings in this case so far have centered on questions of jurisdiction, the court has stated that “a foreign sovereign’s admission of legal compulsion of its subjects might warrant a high—often, nearly binding—degree of deference, even if the admitted compulsion was based on what might be deemed, in American jurisprudence, a form of unwritten law.”³¹ The court concluded that its approach will therefore be to assess “(a) whether there is an incongruence between such body of evidence and the interpretations offered in the MOFCOM’s E.D.N.Y. Statements [i.e., the statements made in support of the *Vitamin C* defendants]; and, in the event such incongruence is detected, (b) whether this incongruence is of such nature or magnitude to render MOFCOM’s interpretations unreliable.”³²

The court’s initial decision granting defendants’ motion to dismiss on jurisdictional grounds was vacated and remanded in 2011. On remand, in July 2014, the district court dismissed the case without prejudice, finding that plaintiffs had failed to plead antitrust standing.³³ Plaintiffs then filed a second amended complaint in November 2014. Defendants moved to dismiss the second amended complaint in early 2015 for lack of standing, failure to state a claim, and foreign sovereign compulsion. There has been no ruling on that motion.

Analysis

These cases show different degrees of deference given to a foreign government’s statements about its own regulatory activities involving export trade. One court has already declined to uphold an antitrust defense based on superseding Chinese government price controls. Given that there are numerous raw materials exported to the United States from China that are subject to regulation by the Chinese government—such as fluorspar, coke, magnesium, silicon carbide, silicon metal, yellow phosphorus, and zinc—it is possible that there could be additional private suits against companies importing such raw materials into the United States. And the different outcomes thus far reached by courts in the Second and Third Circuits could create a forum-shopping opportunity for plaintiffs.

The tension between the rulings in these cases also raises questions related to the roles of the courts and the executive branch in questions of foreign law. Foreign policy is traditionally administered by the executive branch. However, these cases present opportunities for U.S. courts to depart from the executive branch position on matters of foreign trade. In the *Vitamin C* litigation, the court declined to credit the position taken by the U.S. Trade Representative in WTO proceedings, and neither the bauxite nor magnesite courts explicitly relied on such evidence in their decisions. The U.S. government has not directly offered its views in any of these cases, so the degree of deference that would be afforded if the executive branch elected to intervene remains an open issue.

It remains to be seen whether the appeals now pending in the Second and Third Circuits will resolve the current split, provide clarity on the interplay between antitrust law and international trade, or give rise to a circuit split that may potentially warrant Supreme Court review.

³¹ *Animal Sci. Products, Inc. v. China Nat. Metals & Minerals Imp. & Exp. Corp.*, 702 F. Supp. 2d 320, 426 (D.N.J. 2010), vacated and remanded sub nom. *Animal Sci. Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), as amended (Oct. 7, 2011) (internal quotation marks omitted).

³² *Id.* at 429.

³³ *Animal Sci. Products, Inc. v. China Minmetals Corp.*, 34 F. Supp. 3d 465 (D.N.J. 2014).



Joel M. Cohen is a partner in the New York, NY office of Davis Polk & Wardwell LLP, and a Vice Chair of the Corporate Counseling Committee.



Christopher B. Hockett is a partner in the Menlo Park, CA office of Davis Polk & Wardwell LLP.



Jesse Solomon is an associate in the Washington, DC office of Davis Polk & Wardwell LLP.



Anthony W. Mariano is an associate in the New York, NY office of Davis Polk & Wardwell LLP.

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