Chinese Vitamin C Producers Price-Fixing Verdict Raises Questions of Comity and Conflict with Executive Branch Views

March 27, 2013

In a case that potentially has important implications for U.S. antitrust enforcement and for U.S. trade relations with the People's Republic of China, this month a New York jury found Chinese manufacturers of vitamin C liable for fixing prices of vitamin C exported from China into the U.S., in violation of U.S. antitrust laws. In the private suit, the plaintiff class of direct purchasers was awarded $162.3 million following a jury verdict that explicitly rejected the Chinese vitamin manufacturers' central defense: that their agreement on prices was compelled by the Chinese government. That rejection is all the more striking because the Chinese government itself claimed responsibility for ordering the defendants to fix the prices in question.

Since the jury verdict on March 14, the Chinese government has swiftly and unequivocally criticized the judgment. The Director General of the Anti-Monopoly Bureau of the Ministry of Commerce ("MOFCOM"), Shang Ming, expressed his "deep dissatisfaction" that the U.S. district court refused to defer to China's own interpretation of Chinese law, stating that the court proceeding – in which the judge accused China of providing less than a "complete and straightforward explanation of Chinese law" – "shows disrespect" for China. A MOFCOM spokesman termed the verdict "unfair," "inappropriate," and "wrong," and news outlets noted that he stated that, if the verdict stands, "the international community will have concerns, and eventually rising disputes may in turn hurt the interests of the United States."[1]

The judgment – which the defendants plan to appeal – presents some difficult and far-reaching questions for U.S. antitrust law and for U.S./China trade. Here, we seek to provide a framework for this evolving debate by reviewing the conflict over Chinese government compulsion in the vitamin C class action and the ways in which the proceedings in the vitamin C case diverge from proceedings before the World Trade Organization ("WTO") and other U.S. district courts. We then turn to discuss the issues the U.S. will likely confront, both as a result of the appeal and China's clear "dissatisfaction" with the ruling.

Vitamin C District Court Proceedings

Plaintiffs' allegations of price-fixing in the federal district court in the Eastern District of New York. In January 2005, plaintiffs – direct purchasers of vitamin C imported from China – filed lawsuits alleging that, beginning in December 2001, Chinese manufacturers and exporters of raw vitamin C products agreed upon the price and volume of vitamin C products exported from China into the U.S. and worldwide, in violation of Section 1 of the Sherman Act.

Defendants' affirmative defenses of government compulsion. In the suits – which were consolidated before a federal district court in New York – defendants did not challenge that they took part in a price-fixing cartel. Instead, defendants argued that they were compelled by the Chinese government to fix prices. They therefore moved to dismiss the consolidated suit on three related grounds: (1) that they

[1] *See, e.g.*, Zhu Ningzhu, *News Analysis: U.S. ruling on Chinese vitamin C producers unfair,* XINHUANET.COM (Mar. 19, 2013); *MOFCOM's Shang says US judgment in vitamin C case shows 'disrespect'*, POLICY AND REGULATORY REPORT (Mar. 22, 2013).

were compelled to fix prices by a foreign sovereign, (2) that the price-fixing was an act of the Chinese state, and (3) that the U.S. court should defer to China's authority as a foreign sovereign under the doctrine of international comity where there is direct conflict between U.S. law (which forbids price-fixing) and Chinese law (which mandates it).

Chinese government's *amicus* filing asserting government compulsion. The Chinese government explicitly endorsed the vitamin C manufacturers' defense that it was the source of the price-fixing regime. Through MOFCOM, China filed an *amicus* brief (reportedly for the first time in a U.S. court), informing the court that plaintiffs challenged "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."[2] To that end, China alleged it created the Chamber of Commerce of Medicines and Health Products Importers & Exporters (the "Chamber"), an entity "under the Ministry's direct and active supervision," which exercised its regulatory authority to control the prices and volumes of vitamin C exports through a Vitamin C Sub-Committee. China adduced evidence of this regulatory scheme, including evidence that it adopted a new system in order to accommodate its 2001 entry into the WTO – which proscribes export constraints. Under that new system, the Chamber and the Sub-Committee would set minimum price thresholds through coordination among manufacturers, and manufacturers then had to demonstrate to Chinese Customs that their vitamin C exports met required conditions. If manufacturers' export contracts did not meet the Chamber's conditions, manufacturers were denied the ability to export.

Denial of motion to dismiss on "ambiguous" factual record. The New York court, however, refused to give conclusive weight to China's interpretation of its own regime and denied defendants' motion to dismiss. The court noted that the record contained conflicting evidence as to whether the vitamin C manufacturers' actions were undertaken voluntarily – as plaintiffs alleged and as certain prior MOFCOM statements suggested – or whether they were the product of government compulsion, as MOFCOM claimed in its 2006 *amicus* brief and in a subsequent 2008 statement to the district court. The court stated that MOFCOM's position was "entitled to substantial deference," but then refused to credit MOFCOM's statement as "conclusive evidence of compulsion, particularly where, as here, the plain language of the documentary evidence submitted by the plaintiffs directly contradicts [China's] position."[3] Because the record was, in the district court's view, too ambiguous to foreclose further investigation into whether defendants' actions were voluntary, the court denied defendants' motion to dismiss.

Denial of summary judgment and rejection of China's interpretation of Chinese law. That perceived ambiguity evolved into a definitive ruling against defendants' compulsion defense in 2011, when the district court denied defendants' summary judgment motion and, interpreting Chinese law, ruled that defendants' conduct was not compelled by the Chinese government.[4] The court held that China "encouraged" the vitamin C cartel as a "policy preference," but that China's conduct did not rise to the level of compelling the vitamin C manufacturers to fix prices. To the contrary, the court credited documentary evidence that, at least on its face, supported the voluntary nature of the agreement, as well as evidence that vitamin C manufacturers could deviate from the scheme without punishment.[5] The

---

[2] 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, Dkt. No. 69, *In re Vitamin C Antitrust Litig.*, No. 06-MD-01738-BMC-JO (E.D.N.Y. Sept. 22, 2006), at 6.

[3] *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 557 (E.D.N.Y. 2008).

[4] Under Federal Rule of Civil Procedure 44.1, district courts "may consider any relevant material or source" in "determining foreign law," and the court's ruling is a matter of law, not fact.

[5] *See In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 530-36, 552 (E.D.N.Y. 2011).

district court thus held that the Chinese government'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."[6]

Interestingly – as we explore below – in addition to rejecting the Chinese government's position, the district court also placed little weight on the position of the U.S. Trade Representative, the executive branch agency responsible for U.S. international trade policy. In 2009, the U.S. Trade Representative complained to the WTO that China had violated its WTO commitments by imposing export restraints, including export quotas and minimum export price requirements. In so doing, the U.S. drew from numerous sources of evidence, including Chinese government export regulations, export regime charters, regulations on the penalties for noncompliance, licensing procedures, Chamber websites, and, in addition, the Chinese government's submissions in the *Vitamin C* litigation.[7] The U.S. Trade Representative took the position that China required the exporters to participate and that China developed sanctions for noncompliance with the regulatory regime. Refusing to defer to the executive branch on matters of foreign policy, however, the *Vitamin C* court instead noted that vitamin C was not an export at issue in the WTO proceedings and that the executive branch had not appeared in the litigation to request that the court accord MOFCOM's statements heightened deference.[8] While technically correct, it does appear that the procedures established by MOFCOM to bring about price coordination among bauxite producers and among magnesite producers (two of the products at issue in the WTO) were extremely similar to the procedures adopted in China respecting vitamin C pricing.

Verdict in plaintiffs' favor at trial. After the district court refused to grant summary judgment to defendants, one defendant subsequently settled with plaintiffs, and two other defendants settled after the trial itself began. Two remaining defendants declined to settle, instead opting to complete the trial. The court permitted those defendants to produce a witness – Qiao Haili, the former Secretary General of the Vitamin C Sub-Committee – to provide testimony that the vitamin C manufacturers believed that they were operating at the compulsion of the Chinese government. To that end, Mr. Qiao testified that he was appointed to his position by the Chinese government, which has numerous powers over Chamber employees, such as the power to appoint, supervise, and terminate Chamber employees and the power to determine Chamber employees' salary levels. The effectiveness of Mr. Qiao's testimony was limited, however, by various factors, including: (1) the court's exclusion of documentary evidence supporting the compulsion defense; (2) questions raised by plaintiff's counsel about Mr. Qiao's credibility as a witness given alleged inconsistencies with his deposition testimony; and (3) ambiguities in the record as to precisely what kind of pricing Mr. Qiao encouraged and whether his encouragement instituted a voluntary or compulsory regime for regulated firms.

The jury found the defendants liable for price-fixing and supply-limitation and awarded $54.1 million in damages to the plaintiff class, which, trebled, results in a total award of $162.3 million. Once that amount is reduced by all remaining defendants' settlements, the non-settling defendants are likely to face a judgment of approximately $130 million.

---

[6] *Id.* at 552.

[7] *See, e.g.*, United States, First Written Submission of the United States of America, WTO, *China – Measures Related to the Exportation of Various Raw Materials*, DS394, DS395, DS398 (June 1, 2010), at 57-66.

[8] *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 527, 551-60.

The defendants have signaled their intent to appeal.[9] It will be interesting to see whether MOFCOM now seeks the support of the U.S. State Department in connection with the appeal. Litigants followed this route successfully in the *Matsushita* case,[10] where the Solicitor General, the Justice Department, and the State Department filed a brief in support of the Japanese government's position that it had compelled the conduct in question.

Other Proceedings

The *Vitamin C* litigation stands in contrast to other recent proceedings related to the Chinese government's export regime which have accorded relatively greater weight to the U.S. Trade Representative's position that the Chinese government – and not private Chinese exporters – are responsible for Chinese export quotas and minimum price requirements.

World Trade Organization

As we note above, in 2009, the U.S. Trade Representative filed a complaint – later joined by the European Union and Mexico – alleging that the Chinese government imposed export restraints, including quotas and minimum price requirements, in violation of the commitments China made when it acceded to the WTO in 2001. In order to be actionable under the WTO's dispute resolution, however, the U.S. had to demonstrate that the Chinese government, and not private Chinese entities, were responsible for the export restraints in question. To do so, the U.S. drew from numerous sources of evidence, including the Chinese government's submissions in the *Vitamin C* litigation, in which China claimed that the Chamber and its sub-committees that administered price-fixing were acting under the direction and supervision of the state.

In July 2011, the WTO panel reviewing the complaint ruled that China's export restraints did indeed violate the country's commitments to the WTO, and it explicitly credited statements the Chinese government had made to the *Vitamin C* court as evidence that the Chinese government was directing the country's export restraint program through the Chamber and its sub-committees. In that connection, the WTO panel made clear that "MOFCOM . . . is responsible for the application of export licensing rules and for coordinating export license issuing agencies that are organized in local administrative authorities," and that MOFCOM has the power to impose sanctions for noncompliance.[11]

The WTO's appellate body later reversed the panel's ruling on other grounds related to due process considerations, thereby voiding the panel's findings that the Chinese government had violated its WTO commitments by, among other things, setting export quotas and minimum price requirements. The appellate body *did not*, however, reverse the WTO panel's finding respecting MOFCOM's power to impose sanctions for noncompliance with its regulatory regime, thus leaving the WTO's findings at odds with the district court's ruling in the *Vitamin C* litigation.

Although the district judge in the *Vitamin C* litigation had the benefit of the WTO panel's July 2011 findings when he denied summary judgment two months later, he nonetheless interpreted Chinese law as creating a voluntary scheme. The district judge held that the panel's findings did not alter his interpretation of Chinese law, in part because the panel did not explicitly address whether the Chamber's

---

[9] This appeal will be the first that defendants have taken from the *Vitamin C* court's rulings. Indeed, while defendants have raised the possibility of taking interlocutory appeals earlier in the litigation, the district court refused to permit defendants to take an interlocutory appeal of its order denying summary judgment.

[10] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[11] World Trade Organization, Reports of the Panel, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011), at 222-25.

activities were voluntary or compulsory. (As we note above, however, while the WTO panel did not explicitly term China's regime "compulsory," it is clear that the WTO panel viewed the export regime as created and supervised by the Chinese government, with sanctions available for noncompliance.)

The WTO's panel ruling, followed by the district court ruling, effectively left China's export regime open to liability on both of two contradictory interpretations: as a matter of government action before the WTO and as a matter of voluntary, private action before the U.S. district court.

Other District Courts

Courts in two other cases have struggled with the analysis of alleged antitrust violations arising from China's export program: one in Pennsylvania related to Chinese exports of the mineral bauxite, the primary source of aluminum, and one in New Jersey related to Chinese exports of the mineral magnesite, which is used in the production of synthetic rubber, magnesium chemicals, and fertilizers. Both exhibited somewhat greater deference to the WTO proceedings and the U.S. Trade Representative than the *Vitamin C* court had. Nevertheless, both cases are ongoing and it remains uncertain how the courts will ultimately resolve this issue.

In Pennsylvania, the bauxite court temporarily stayed the private antitrust action pending the outcome of the WTO proceeding.[12] Once the WTO panel made its findings that China had violated various WTO commitments, defendants filed a motion to dismiss, arguing that the Chinese state coordinated the challenged prices and that, to grant relief to plaintiffs, the U.S. court would have to invalidate China's sovereign acts of state. Plaintiffs responded that the WTO's findings were more ambiguous as to the degree of China's control over quasi-governmental bodies. The court agreed with plaintiffs, issuing an oral opinion denying defendants' motion to dismiss. In so holding, the court noted that WTO proceedings lack testimony and differ from the kind of evidentiary hearing that plaintiffs would be permitted in U.S. courts. The case is currently in discovery and has not yet progressed to summary judgment.

The New Jersey district court dismissed the plaintiffs' magnesite case outright prior to the WTO panel's report, on jurisdictional grounds. The court did not make a definitive ruling on the foreign sovereign compulsion defense, but it did suggest substantially more deference to the executive branch on foreign policy matters, explicitly stating that it will read the WTO complaint from the U.S. as "strongly suggesting" that the price-fixing in question is compelled, and not voluntary, in nature.[13] The Third Circuit subsequently reversed and remanded the court's jurisdictional analysis without reaching the district court's decision on the act of state or foreign sovereign compulsion defenses,[14] and the Supreme Court declined to review the decision. The case now remains pending in district court.

In sum, neither the U.S. Trade Representative's complaint against China nor the WTO panel's findings of Chinese violations conclusively ended either the bauxite or the magnesite cases. But in both of those litigations, the district courts exhibited more deference to the U.S. Trade Representative on matters affecting U.S. foreign trade policy and to the WTO proceedings than the *Vitamin C* court did – even though the U.S. Trade Representative has not yet appeared in any of the three litigations. Taken

---

[12] *See Resco Prods, Inc. v. Bosai Minerals Group Co., Ltd.*, No. 06-235, 2010 U.S. Dist. LEXIS 54949 (W.D. Pa. June 4, 2010).

[13] *See Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, 702 F. Supp. 2d 320, 435 (D.N.J. 2010). The district court rejected defendants' state action defense on the grounds that a state's commercial activities in setting prices are not the sovereign acts that the doctrine is designed to protect, but it left open the possibility of a foreign sovereign compulsion defense, citing multiple sources of evidence, including a clear source of compulsion (adherence to a minimum price requirement), sanctions for noncompliance (inability to obtain, exercise, or keep export licenses), and the actual existence of punitive compulsion (here, prescripts mandating a minimum price).

[14] *See Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011).

together, these cases suggest that appellate courts will ultimately need to address and resolve the complex antitrust issues relating to China's export program.

Issues Facing the U.S.

We expect that the U.S. will now face a host of difficult legal and policy questions as a result of the Chinese government's dissatisfaction with the *Vitamin C* court's ruling and the *Vitamin C* defendants' imminent appeal.

Procedural Considerations

Deference to U.S. executive branch on foreign policy? One likely issue on appeal is whether it is appropriate for U.S. courts in private antitrust actions to reach decisions contrary to positions taken by the U.S. Trade Representative, who presents the views of the U.S. government to the WTO. It is arguable that in the realm of foreign policy and international trade matters, the judicial branch might choose to defer to the seemingly greater competence of the executive branch on such matters. In this connection, it is worth noting that the U.S. Department of Justice, which had vigorously prosecuted the European vitamin C cartel, extracting what was then the largest-ever criminal fine, chose not to proceed against the Chinese vitamin C manufacturers.

In another antitrust action involving a defense that a foreign government had compelled a pricing cartel, the Solicitor General – joined by the Justice Department and the State Department – took the clear position that a court should give "dispositive weight" to the statements of foreign governments that they have compelled the conduct of petitioners; indeed, to do otherwise would "cause[ ] deep concern to [governments] that are significant trading partners of the United States" and "fail[ ] to accord the proper respect due a foreign government that has taken appropriate steps to convey its views to a United States court in connection with litigation."[15]

In short, it is an open question whether the district court erred in making determinations of Chinese law at odds with the U.S. government, instead of choosing to stay the litigation pending resolution of the WTO proceedings. The district court's interpretation of Chinese law, as a matter of law, is reviewed *de novo* by the appellate court, without deference to the district court's findings. It may be that this standard of review invites skepticism at the appellate court level about a determination of law that set aside a contrary finding by the WTO panel.

Substantive Considerations

Are international comity concerns due less deference than domestic federalism concerns? Interestingly, a prior Supreme Court case – *Parker v. Brown* – held that a state regulatory scheme that restricted competition among California raisin growers and maintained raisin prices did not violate Section 1 of the Sherman Act,[16] signaling the Supreme Court's deference to U.S. states on regulatory price-setting matters as an issue of federalism on facts not unlike those in the *Vitamin C* litigation. Just as in the *Vitamin C* case, power to delegate pricing was delegated to a committee of raisin growers and actively supervised by the state: both involved producers agreeing upon a commodity price at the direction of state-appointed actors and state supervision, with approval granted by the state and sanctions imposable for noncompliance with the regulatory regime. And in *Parker v. Brown*, the Supreme Court found no language in the Sherman Act to suggest that Congress intended the antitrust laws to apply in the face of

[15] Brief for The United States as *Amicus Curiae*, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, No. 83-2004, 1985 WL 669663 (Jan. 4, 1985), at *6, *18.

[16] *Parker v. Brown*, 317 U.S. 341, 347-48 (1943).

this state regulatory regime; ruling that the Sherman Act is "a prohibition of individual and not state action," the *Parker* Court noted that the Sherman Act "makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action *directed* by a state."[17]

It is equally true that the Sherman Act contains no hint that it was intended to restrain action directed by a foreign country. Therefore, while it is often said that this so-called "state action" doctrine is not applicable to a situation involving similar foreign government regulation, it is difficult to explain why comparable considerations of international comity should not yield the same result on the same or similar facts. The critical inquiry for whether a court should decline to exercise jurisdiction for international comity principles is whether there is an actual conflict between the laws of two nations; in order to find that actual conflict, a defendant must prove that foreign law "requires it to act in some fashion prohibited by the law of the United States" or that it is impossible to comply with U.S. and foreign law at the same time.[18] In the *Vitamin C* litigation, there may well be a conflict between U.S. antitrust law and Chinese regulations that mandate that vitamin C manufacturers coordinate a price and enforce it, on penalty of losing their export licenses. The U.S. antitrust laws prohibit such conduct, and in the view of both MOFCOM and the U.S. Trade Representative, the Chinese regulations mandate it. With that said, however, there are factual questions in the record about whether sanctions for noncompliance were enforced and how mandatory the regime was. We expect that one question on appeal will likely be why California's regulatory regime in *Parker v. Brown* was sufficiently mandatory to qualify as state action, whereas the district court found China's similar regulatory regime in the *Vitamin C* litigation *not* to be sufficiently mandatory to apply international comity principles.

Dispositive weight to a foreign sovereign's interpretation of its own laws? Another critical question is whether the district court provided appropriate deference to the Chinese government's claims of compulsion when it dismissed China's filing as something less than a "complete and straightforward explanation of Chinese law."

At one point, the Supreme Court held that a foreign government's statements regarding its law should be deemed conclusive, but since then Federal Rule of Civil Procedure 44.1 was enacted to provide U.S. judges wide latitude in determining foreign law – and courts today tend to regard foreign governments' views of their own laws with "some degree of deference" without deeming such statements conclusive.[19] After the enactment of Rule 44.1, however, the Solicitor General and the State Department have still taken the position that foreign sovereigns' interpretations of their laws should be granted dispositive weight.

This remains an unsettled area of law.

---

[17] *Id.* at 351-52 (emphasis added). In order for the state action doctrine to apply, the conduct must have been "compelled by direction of the State acting as a sovereign." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975).

[18] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993). If such a conflict exists, courts choose to exercise or withhold jurisdiction under principles of comity through a balancing analysis that considers numerous factors, including the degree of the conflict and its potential effect on foreign relations. *See, e.g.*, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614 (9th Cir. 1976).

[19] *Compare United States v. Pink*, 315 U.S. 203, 220 (1941) (Russian government's official declaration interpreting its law is conclusive) *with Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002) ("We also agree with other Courts of Appeals that have suggested that a foreign sovereign's views regarding its own laws merit – although they do not command – some degree of deference.").

Conclusion

It is clear that the *Vitamin C* litigation, as well as the bauxite and magnesite cases, present numerous unsettled – and challenging – questions of U.S. law and policy, and the *Vitamin C* jury verdict in plaintiffs' favor is by no means the final word on the conduct at issue in that case. All three pending cases present the question of what degree of deference should be accorded to statements of the Chinese government and the interpretation of Chinese law by the U.S. executive branch in addressing international trade and foreign policy concerns, particularly where the executive branch's views are consistent with the Chinese government's. The extent to which, if at all, the United States seeks to participate in further proceedings in these cases may be pivotal.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Arthur J. Burke	**212 450 4352** **650 752 2005**	**arthur.burke@davispolk.com**
Joel M. Cohen	**212 450 4592**	**joel.cohen@davispolk.com**
Arthur F. Golden	**212 450 4388**	**arthur.golden@davispolk.com**
Ronan P. Harty	**212 450 4870**	**ronan.harty@davispolk.com**
Christopher B. Hockett	**650 752 2009**	**chris.hockett@davispolk.com**
Miranda So	**+852 2533 3373**	**miranda.so@davispolk.com**
Michael N. Sohn	**202 962 7145**	**michael.sohn@davispolk.com**
Howard Zhang	**+86 10 8567 5002**	**howard.zhang@davispolk.com**