UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE **VITAMIN C ANTITRUST LITIGATION**	**1:06-MD-01738 (DGT) (JO)**
THIS DOCUMENT RELATES TO: **ANIMAL SCIENCE PRODUCTS, INC., *et al.*,** **Plaintiffs,** ***v.*** **HEBEI WELCOME PHARMACEUTICAL CO., LTD, *et al.*,** **Defendants.**	**CV-05-453**

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR DETERMINATION OF FOREIGN LAW AND ENTRY OF JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 4

I. STATEMENT OF FACTS 4
- A. Vitamin C and Sales in the United States 4
- B. Defendants 4
- C. The First Vitamin C Conspiracy 5
- D. Defendants Form a Cartel 5
- E. The Cartel Continues Through Voluntary Action of its Members 10

II. EXPORT REGULATION 25
- A. Formation of Chambers of Commerce 25
- B. The Vitamin C Subcommittee 28
- C. The End of Export Administration Over Vitamin C 30
- D. The Official Abolition of the Ministry's Vitamin C Regulations Under the Old Quota and Licensing System and Revision of the Charter 32
- E. The Adoption of the Verification and Chop System 35
- F. Verification and Chop in Practice 38
- G. The Chamber is a Non-Governmental Organization 40
- H. Unpublished and Ad-Hoc Restrictions on Exports Are Prohibited By Chinese Law 43

ARGUMENT 44

I. DEFENDANTS ARE NOT ENTITLED TO JUDGMENT UNDER THE DOCTRINE OF FOREIGN SOVEREIGN COMPULSION 44
- A. Whether the Chamber Coerced Defendants' Violations of U.S. Antitrust Law is A Disputed Issue of Fact that Precludes the Entry of Judgment 46
- B. The Government of China Did Not Compel – And Did Not Authorize the Chamber to Compel – Defendants' Violations of U.S. Antitrust Law 49
- C. The Ministry's *Amicus* Submission is Not Determinative of Compulsion 53
- D. The Purported Delegation of Governmental Authority to the Chamber Is Insufficient to Establish Sovereign Compulsion under U.S. Law 60
- E. Professor Shen's Opinions Are Inaccurate and Unpersuasive 62
- F. Dr. Stern's Report Should be Considered 63
- G. Professor Speta's Report Is Irrelevant 65

II. DEFENDANTS HAVE NOT MET THEIR BURDEN UNDER THE ACT OF STATE DOCTRINE 67
A. Defendants Have Not Identified Any Official Act of the Chinese Government That Would Be Invalidated By Granting Relief to Plaintiffs 68
B. Defendants Are Not Entitled to Judgment Based Upon Any Act of the Chamber 70
C. Separation of Power Issues Are Not Implicated 70
D. Only Conduct Within the Borders of China Is Within the Ambit of the Act of State Doctrine 71

III. DEFENDANTS ARE NOT ENTITLED TO JUDGMENT ON COMITY GROUNDS 72

CONCLUSION 74

TABLE OF AUTHORITIES

Cases

Access Telecom, Inc. v. MCI Telecommunications, Inc.,
197 F.3d 694 (5th Cir. 1999).....57

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).....71, 72

Allied Bank Int'l v. Banco Credito Agricola de Cartag,
757 F.2d 516 (2d Cir. 1985).....71

Allstate Life Ins. Co. v. Linter Group Ltd., 994 F.2d 996 (2d Cir. 1993) 72

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).....67

Batruk v. Mitsubishi Motors Corp., 1998 WL 307383 (S.D.N.Y. 1998).....62

Beatty v. Republic of Iraq, 480 F. Supp. 2d 60 (D.D.C. 2007) 71

Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).....73

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 57

Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.,
176 F.3d 601 (2d Cir. 1999).....63

Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York,
273 F.3d 481 (2d Cir. 2001).....58

Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).....57, 58

Community Communications Co. v. Boulder, 455 U.S. 40 (1982).....60

Continental Ore Co. v. Union Carbide & Carbon Corp.,
370 U.S. 690 (1962) 2, 45, 73

Cronin v. Aetna Life Ins. Co., 46 F.3d 196 (2d Cir.1995).....45

Curly v. AMR Corp., 153 F.3d 5 (2d Cir. 1998) 55

Curtis v. Beatrice Foods Co., 481 F.Supp. 1275 (S.D.N .Y. 1980)..... 62

*Duran v. Beaumon*t, 534 F.3d 142 (2d Cir. 2008) 55

Faggionato v. Lerner, 500 F.Supp. 2d 237 (S.D.N.Y. 2007).....62

Filetech S.A. v. France Telecom S.A., 157 F.3d 922 (2d Cir. 1998).....72

FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).....62

Gross v. German Found. Indus. Initiative, 456 F.3d 363 (3d Cir. 2006).....68, 72-73

Hartford Fire Ins. Co. v. Cal., 509 U.S. 764 (1993).....72, 73, 74

Hilton v. Guyot, 159 U.S. 113 (1895).....72

Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977).....70, 71

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).....58

Int'l Assoc. of Machinists and Aerospace Workers v. OPEC,
649 F.2d 1354 (9th Cir. 1981).....70, 73

In Re Grand Jury Subpoena Dated August 9, 2000,
218 F. Supp. 2d 544 (S.D.N.Y. 2002).....71

In re Maxwell Comm. Corp., 93 F.3d 1036 (2d Cir. 1996).....73

In re Vitamin C Antitrust Litig., 584 F. Supp. 2s 546 (E.D.N.Y. 2008).....44

Interamerican Refining Corp. v. Texaco Maracaibo, Inc.,
307 F. Supp. 1291 (D. Del. 1970).....47

Karaha Bodas Co., L.L.C. v. Pertamina, 313 F.3d 70 (2d Cir. 2002).....55

Linseman v. World Hockey Assoc., 439 F. Supp. 1315 (D. Conn. 1977).....46

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1293 (3d Cir. 1979).....46, 60, 67

Matsushita Elec. Co. v. Zenith Radio Corp.,
(No. 83-2044) 1985 WL 669667 (June 17, 1985).....54, 61

Matz v. Household Int'l Tax Reduction Inv. Plan, 388 F.3d 570 (7th Cir. 2004).....58

McKesson HBOC, Inc., v. Islamic Republic of Iran, 271 F.3d 1101 (D.C. Cir. 2001).....56

Monolithic Power Sys., Inc. v. O2 Micro Intern. Ltd.,
Nos. C 04-2000, C 06-1919, 2006 WL 2975587 (N.D.Cal. Oct. 18, 2006).....70

NRDC v. Abraham, 355 F.3d 179 (2d Cir. 2004).....58

Oceanic Exploration Co. v. ConocoPhillips, Inc.,
No. 04-332 (EGS), 2006 WL 2711527 (D.D.C. 2006) 69

Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082 (N.D. Cal. 2008) 69

O.N.E. Shipping Ltd. v. Flota Mercante Grancolumbiana S.A.,
830 F.2d 449 (2d Cir. 1987) 69, 71

*Rhodes-Bradford v. Keisle*r, 507 F.3d 77 (2d Cir. 2007) 57

Southern Motor Carriers Rate Conference, Inc. v. United States,
471 U.S. 48 (1985) 60, 61 65

Taggart v. Time Inc., 924 F.2d 43 (2d Cir. 1991) 46, 4, 49

Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir.1976) 68

Trugman-Nash, Inc. v. New Zealand Dairy Board, Inc.,
954 F. Supp. 733 (S.D.N.Y. 1997) 62

U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984) 57

United States v. Brodie, 174 F. Supp.2d 294 (E.D. Pa. 2001) 45

United States v. Portrait of Wally, 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002) 55, 73

United States v. Sisal Sales Corp., 274 U.S. 268 (1927) 2, 45, 68,

United States v. Watchmakers of Switzerland,
1962 Trade Cases (CCH) ¶ 70,600 (S.D.N.Y. Dec. 20, 1962) 46

Watt v. Alaska, 451 U.S. 259 (1981) 58

White v. ABCO Eng'g Corp., 221 F.3d 293 (2d Cir. 2000) 45

Williams v. Curtis-Wright Corp., 694 F.2d 300 (3d Cir. 1982) 45, 61,71

W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l,
493 U.S. 400 (1990) 68, 71

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,
540 U.S. 398 (2004) 1

Statutes

28 U.S.C. § 517 71

PRELIMINARY STATEMENT

Defendants in this Section 1 antitrust case are Chinese manufacturers of vitamin C and their affiliates who, in December 2001, voluntarily formed an illegal cartel to fix prices and limit supply of vitamin C for export, including exports to the United States. Defendants did so to "restrict quantity to safeguard prices" with such action taken "*completely by their own decision and self-restraint without any government intervention*." Plaintiffs' expert, Dr. B. Douglas Bernheim of Stanford University, has concluded that the cartel imposed tens of millions of dollars in damages on U.S. customers. Like other cartels among foreign companies that have been subject to U.S. criminal and civil prosecution, this cartel must be stopped: cartels are the "supreme evil of antitrust." *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

In their motion for summary judgment, Defendants do not deny that there is an ongoing vitamin C cartel that has damaged U.S. purchasers, but argue they are entitled to summary judgment under several legal doctrines. Each of Defendants' legal defenses has the same premise: Defendants claim the Chinese government compelled them to violate U.S. antitrust laws. Defendants' argument is based on three basic contentions: (1) the government of China mandates their participation in the Vitamin C subcommittee (the "Subcommittee") of the China Chamber of Commerce of the Chambers of Medicine and Health Products Importers and Exporters (the "Chamber"); (2) the Chamber compels them to engage in per se illegal price fixing and supply restrictions; and (3) the Chamber is a delegated arm of the government entitled to take advantage of the legal doctrines of government compulsion, act of state, and comity.

These contentions are demonstrably false or, at a minimum, involve disputed issues of fact. Defendants' own business records and sworn testimony from their own witnesses show that Defendants voluntarily agreed to fix prices and limit supply and that their decision to sell vitamin

C into the U.S. at fixed, supra-competitive prices was *not* compelled by any Chinese law or government directive. Nor was it even compelled by the Chamber.

This factual evidence alone precludes summary judgment because the compulsion defense only arises if Defendants can prove that their violations of U.S. antitrust law were coerced. It is not a defense that Defendants' voluntary agreements were facilitated or aided by government action (or by the Chamber). *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927).

Even if Defendants could point to undisputed facts to show that the Chamber forced them to sell vitamin C into the U.S. at fixed supra-competitive prices – and they cannot – the argument that the Chamber constitutes a private arm of the government of China remains factually and legally flawed. China's chambers of commerce for import and export and the Chinese government have consistently declared to U.S. government agencies, the World Trade Organization ("WTO"), and others that (1) the chambers of commerce are nongovernmental organizations; (2) that the government of China does *not* compel price fixing for any exported product; and (3) China does not impose any restriction on the export of vitamin C. Dr. Paula Stern, former chairwoman of the U.S. International Trade Commission (ITC), provides in her expert opinion numerous examples of these representations to the WTO and the U.S. government.

Defendants' arguments on compulsion rely on outdated and even repealed laws that are irrelevant to their defense that the Chinese government coerced them into selling vitamin C into the U.S. at supra-competitive prices from December 2001 through the present day. The only regulations on which Defendants rely that were effective during this time period concern a system of verification and chop by the Chamber that on their face do not compel the conduct at is-

sue here. This year, the European Court of Justice agreed that the "verification and chop" system is a voluntary program and is not indicative of any interference by the State in export decisions.[1]

Further, the doctrines of act of state, comity and sovereign compulsion may not, as a matter of law, be invoked based on the discretionary conduct of the Chamber. The delegation of authority to the non-governmental Chamber that Defendants argue has occurred is virtually unlimited. Defendants do not, and cannot, cite any authority that supports extending the doctrines of sovereign compulsion, act of state, or comity to such discretionary conduct by a non-sovereign entity.

The record of disputed evidentiary facts establishes that this is not a case for summary judgment. To avoid a trial, Defendants therefore argue that the record should consist only of the assertions of Amicus the Ministry of Commerce (the "Ministry") and that all factual evidence disputing what the Ministry says should be ignored, no matter what the evidence shows. Whatever deference should be afforded to the positions taken by the Ministry in its *amicus* brief, it has no authority to impose undisputed facts or other factual findings on a U.S. court.

According any deference to the Ministry's *amicus* brief is now also questionable because the Ministry's position in this litigation conflicts with very different statements the government of China (including the Ministry) has made to the World Trade Organization and to the U.S. government. The Ministry is not entitled to deference when it says two different things to the U.S. government whether due to convenience or poor intra-agency coordination.

---

[1] Case T-498/04, *Zhejiang Xinan Chemical Industrial Group Co. Ltd v Council of the European Union*, 2009 ECJ EUR-Lex LEXIS 529 (June 17, 2009) (Exhibit A to the Declaration of Jennifer Milici in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, Determination of Foreign Law and Entry of Judgment ("Milici Decl.")), at ¶ 160.

The record overwhelmingly supports that the case of compulsion is an after-the-fact fiction. Defendants' reliance on an *amicus* brief for its *factual* case shows that Defendants' proposed undisputed facts are a mirage. Plaintiffs have earned a trial and should have it.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. Vitamin C and Sales in the United States.

Vitamin C (also known as ascorbic acid) is commonly used in the United States as an ingredient in food and beverage products and in the production of vitamins packaged for consumer use under major brand names.[2] The U. S. market for vitamin C exceeds $100 million per year.[3]

B. Defendants.

Defendants in this case include four manufacturing companies and their related affiliates which sell vitamin C into the United States: Northeast Pharmaceutical Group Co., Ltd. ("NEPG"), Weisheng Pharmaceutical Co., Ltd. ("Weisheng"), Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei"), Jiangsu Jiangshan Pharmaceutical Co., Ltd. ("Jiangshan"), North China Pharmaceutical Group Import and Export Trade Co., Ltd.; North China Pharmaceutical Co., Ltd., and North China Pharmaceutical Group Corp.[4] Defendant China Pharmaceutical Group, Ltd. ("China Pharmaceutical") has directly participated in the conspiracy and owns, controls and dominates its affiliated defendants Shijiazhuang Pharmaceutical (USA), Inc. and Weisheng. Defendant JSPC America, Inc. ("JSPCA"), a California corporation, is a wholly-owned subsidiary of Jiangshan that sold Jiangshan's vitamin C in the United States.

---

[2] Expert Report of B. Douglas Bernheim, Nov. 14, 2008, ("Bernheim") (Milici Decl., Ex. B), at ¶¶ 14-15, 18.

[3] *Id.*, p. 7 & Figure 2.

[4] *Id.*, ¶¶ 35-38.

Defendants' and their co-conspirators' vitamin C sales currently account for approximately 80% of the over-$100 million in vitamin C annually imported into the United States.[5]

C. The First Vitamin C Conspiracy.

As ultimately illustrated by multiple guilty pleas in the 1990s, European manufacturers F. Hoffmann La Roche, Ltd. of Switzerland, Merck KgaA and BASF AG of Germany, the Japanese company Takeda Chemical Industries, Ltd. ("Takeda"), and other companies engaged in an illegal conspiracy to suppress competition and fix prices for a range of vitamins, including vitamin C, that became the subject of criminal prosecutions by the United States Department of Justice and legal actions around the world.[6]

D. Defendants Form a Cartel.

Through the end of the 1990s and into 2001, the Chinese vitamin C industry consolidated until the four major manufacturer defendants in this case, NEPG, Hebei, Jiangshan, and Weisheng dominated the world and U.S. market.[7] By late 2001, a Japanese competitor, Takeda, had withdrawn from the market, and European competitors had halted production lines or announced planned withdrawals from the market.[8] As a result, by 2002, Defendants had captured over approximately 80 percent of the worldwide market for vitamin C.[9]

---

[5] *Id.*, ¶ 43 & Figure 11 & 12.

[6] http://www.usdoj.gov/atr/public/press_releases/1999/2450.htm; *Vitamin Companies Back In Court*, BBC News, Feb. 7, 2003, *available at* http://news.bbc.co.uk/2/hi/business/2737835.stm.

[7] *Id.* ¶ 43.

[8] Plaintiffs' Deposition Exhibit ("PX") 72; PX 111 at HEB 3649-50; Bernheim ¶¶ 27-28. All Plaintiffs' Deposition Exhibits cited in this Memorandum are attached to the Declaration of Jennifer Milici in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, Determination of Foreign Law and Entry of Judgment in numerical order.

[9] Bernheim p. 22.

At the same time that Chinese companies had acquired this market power, vitamin C prices had fallen below $3 per kg.[10] A Weisheng Business Plan noted: "In 2001, the Vc market saw brutally sharp competition, slack performance and a sustained price decline."[11]

In response to these developments, in December 2001, Defendants and their co-conspirators formed a cartel to fix prices and control the volume of exports for vitamin C. According to records of the Chamber:[12]

> In December 2001, through efforts by the [Subcommittee], 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 stabilizing and 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 decision and self-restraint*, **without any government intervention**.[13]

The negotiations leading to this agreement were sometimes difficult, but the parties could agree because prices had reached rock bottom. And following China's accession to the World Trade Organization ("WTO"), the companies perceived the need for self-regulation. According to a document from the file of Wang Renzhi, General Manager of NEPG, who attended the meetings:

> On November 16, 2001, under the aegis of the [Chamber] the four major companies from the domestic VC industry . . . sat down together to coordinate respective export quantities for the coming year. Analysis from persons within the industry was that *the enterprises were able to sit down together at this particular time basically because* VC priced 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 enterprise was impelled and had no choice but to seek industry self-regulation*. However the discussion process was extraordinarily difficult and because of the intense impact on profits, the discussion reached several impasses. *After several*

---

[10] PX 72.

[11] PX 21 at CPG 934.

[12] *See* Declaration of Jeffrey M. Smith (Milici Decl., Ex. C).

[13] PX 72. Throughout this Memorandum, unless otherwise indicated, all emphases contained in quotations are added and internal citations and quotations have been omitted.

> *stretches of silence lasting ten to twenty minutes, the companies finally reached a basic agreement.*[14]

In his deposition, Wang Renzhi confirmed that "We began to seek self-regulation under the organization and leadership of the Chamber" and we "reached an impasse several times."[15]

At the time of this agreement, Kong Tai was General Manager of defendant Jiangshan and was responsible for all of its operations; he was also the CEO of defendant JSPCA.[16] (As demonstrated in Plaintiffs' opposition to JSPCA's motion for summary judgment, Mr. Kong acted on behalf of both Jiangshan and JSPCA at this and other cartel meetings.) Consistent with the minutes of the meeting, Mr. Kong has confirmed that he attended the November 2001 meeting along with the heads of the other major vitamin C manufacturers.[17]

Minutes of the meeting establish that the manufacturers decided by hand-voting to enter a cartel agreement because the participants wielded sufficient market power:

> The participants of the meeting *through enthusiastic discussions have reached an agreement aimed at enhancing the self-discipline of the industry*. They have concluded that Chinese Vitamin C manufacturers are absolutely capable of realizing the self-discipline of the industry. . . . the production of vitamin C in China is highly centralized in four manufacturers and thus *it is relatively easy to reach unison within the industry*...
>
> The meeting, by way of *hand voting*, has *unanimously* passed the resolution on restricting the export volume and protecting the price.[18]

---

[14] PX 38.

[15] July 17, 2008 Deposition of Wang Renzhi ("Renzhi Dep.") (Milici Decl., Ex. D) at 21:11-23:21.Wang Renzhi testified "I cannot recall" when asked whether the manufacturers reached an agreement at the meeting. *Id.*, 24:3-12.

[16] June 17 Deposition of Kong Tai ("Kong Dep.") (Milici Decl., Ex. E) at 9:22-10:1, 126:1-20.

[17] Kong Dep. 28:20-25; PX 47 at JJPC 43070.

[18] PX 47 at JJPC 43070.

Kong Tai testified that he received and signed the minutes to indicate his approval of its language.[19] He also confirmed that he voted at the meeting on a resolution to limit supply of vitamin C for export and that the vote of the manufacturers was unanimous.[20]

As reflected in the minutes, the participants entered a written memorandum agreement to limit supply to increase prices:

> *Through friendly consultation*, the four Chinese Vitamin C manufacturers…have entered into the following memorandum on restricting the export volume and protecting the export price:
>
> 1. In 2002, the export volume of Chinese Vitamin C products will be 35,500 tons, among which, Northeast GPF will export 11,750 tons, Jaingsu Jiangshan will export 8,750 tons, Shijiazhuang Group and Weisheng will export 8,000 tons, and Hebei Welcome will export 7,000 tons. . . . .
>
> 3. No manufacturers will be allowed to expand their production capacity based on any reasons.[21]

Kong Tai acknowledged that his signature confirmed his approval of the memorandum agreement.[22]

A Weisheng business plan following the meeting noted that a "number of large domestic manufacturers are now taking steps to reduce output, which is very likely to have a positive im-

---

[19] Kong Dep. 29:1-30:6 ("yes").

[20] Kong Dep. 31:19-32:2 ("yes"). Wang Renzhi of NEPG who attended the meeting testified "I cannot recall" as to whether the resolution was passed unanimously. Renzhi Dep. 29:8-16.

[21] PX 47 at JJPC 43072.

[22] Kong Dep. 30:24-31:1 ("yes"). Zhang Yingren of Hebei who is recorded as having attended the meeting testified "I don't recall" with respect to his knowledge of the minutes of, and memorandum that resulted from, the meeting. June 18-19, 2008 Deposition of Zhang Yingren ("Zhang Dep.") (Milici Decl., Ex. F) at 16:13-17:16. Feng Zhenying of Weisheng, who also attended this meeting, testified "I cannot recall the specifics of the meetings." June 12, 2008 Deposition of Feng Zhen Ying ("Feng Dep.") (Milici Decl., Ex. G) at 20:6-11. "I cannot recall the specific content of the meeting." *Id.* at 23:1-6.

pact in reactivating the Vc market."[23] A speech outline from Weisheng also explains that these new arrangements were the first successful efforts by defendants at implementing a cartel:

> In 2002, the four major VC manufacturers in China begin to implement industry self-discipline, *and are able to reach consensus more often than before* in price coordination mechanism and export quota management, which has played an excellent role in promoting the restoration of normal market order in this industry, and the actual effects are very good as well.[24]

Similarly, a Hebei report states:

> in order to turn the cruel situation of VC market, the 4 main domestic companies reached the common understanding of production limitation and price retention under the coordination of [the Chamber]; meanwhile *the former state active quota restraint was changed to industrial self-discipline management*. This brought the VC market to a standardized course of development and significant changes took place in the VC market, for example, the upturn of VC price.[25]

The formation of the cartel in December 2001 caused the price for vitamin C sold into the United States to increase from $3 or less per kilogram in December 2001 to over $7 per kilogram in 2003.[26] The effect of the cartel was dramatic.[27] Dr. Bernheim concluded that the "price of Vitamin C was substantially higher [on average over 32% higher] as a direct consequence of defendants' conspiracy to restrain trade and control price" and he has estimated damages (before trebling) in this case at $58.4 million.[28]

---

[23] PX 21 at CPG 941.

[24] PX 49 at 4.

[25] PX 111 at HEB 3650-51.

[26] Bernheim ¶¶ 47-49.

[27] *Id.* at ¶ 57 & Figure 19.

[28] *Id.* ¶¶ 10-11. Dr. Bernheim was accepted as an expert witness and testified at trial before Chief Judge Hogan of the District Court for the District of Columbia in *In re Vitamins Antitrust Litigation*.

E. The Cartel Continues Through Voluntary Actions of its Members.

1. Voluntary Conduct by Defendants in 2002 and 2003.

Wang Qi, Jiangshan's assistant General Manager, prepared monthly work summary reports during the period at issue in this case.[29] As assistant General Manager, Wang Qi was Jiangshan's head of marketing and sales with responsibility for setting vitamin C prices.[30]

A July 2002 work summary report prepared by Wang Qi explains that the manufacturers were agreeing about price quotes in 2002:

> This month our company had contact with the export department of other domestic manufacturers and planned to negotiate to raise the export price for the fourth quarter. North East Pharmaceutical was not keen on this proposal, Welcome was the most eager about this proposal, Weisheng was also eager. Afterwards, we met with Weisheng's export department manager Wang Ya Guan in Shanghai and agreed to a price of $3.8 USD/kg CFR as the basis for quoting during the fourth quarter.[31]

When Kong Tai was asked if Wang Qi's report correctly described what happened, he testified that it was accurate: "This is the situation."[32] Wang Qi also confirmed that he had many telephone calls with his competitors and discussed increasing prices:

> Q. Did you have phone calls with Mr. Wang of Weisheng about increasing prices for Vitamin C for export?
> A. We have a lot of phone calls back and forth, and we might have talked about this, yes.[33]

Another of Wang Qi's work summary reports describes a September 2002 meeting at which the manufacturers again successfully reached consensus on supply limits and prices:

---

[29] Wang Qi testified that he prepared the regular monthly reports with the goal of accuracy and it was "a routine report about routine matters." July 2-3, 2008 Deposition of Wang Qi ("Wang Qi Dep.) (Milici Decl., Ex. H) at 38:22-40:5, 47:16-20.

[30] Kong Dep. 33:16-19; Wang Qi Dep. 7:25-8:8 ("generally speaking, yes").

[31] PX 74; Wang Qi Dep. 50:7-14 (confirming authorship); *Id.* 58:10-59:9 (document accurately reports agreement on quoting $3.8/kg).

[32] Kong Dep. 37:22-38:21.

[33] Wang Qi Dep. 56:14-20.

> September 6 VC Subcommittee . . . . brought four VC producers together and convened a meeting in Qingdao, which North East Pharmaceutical took charge of convening and organization. It was concluded in the meeting that current quota and price limit maintained unchanged, consultation among four producers continues in the next meeting held in Beijing in early November.[34]

> Kong Tai further explained how final decisions were made at the meetings:

> Let me tell you a little bit more, because the Chamber of Commerce, they had us meet together to discuss the quantities and the price. They had two different levels of meetings: one level of meeting was each company's general manager and then the other level of meeting was the – the meeting between the heads of market – heads of sale for each company. The heads of the vitamin C subcommittee of the Chamber of Commerce, he would attend both of these different types of meetings, and sometimes he would discuss the quantities and pricing with the heads of the sales departments of these companies. But these meetings were discussions, and they would not make any decisions. *Final decisions would only be able to be made by the meetings between the general managers of the various companies.*[35]

Kong Tai also admitted the consensual nature of these agreements:

> Q. And decisions made by the vitamin C subcommittee required consensus of everybody in attendance, correct?
> A. Basically, yes.[36]

Kong Tai also asserted that some final decisions were made by the Chamber but admitted that he could not recall a single instance where a change in price was made over the objection of one of the manufacturers.[37] When asked about a meeting where no consensus on price and supply was reached, Kong answered:

> Q. And no decisions on those issues could made until a consensus among all the parties was reached, right?

---

[34] PX 76; Wang Qi Dep. 61:5-13; Kong Dep. 44:2-13, 45:19-25 (Kong received memo as a regular monthly report, decision at meeting was unanimous).

[35] Kong Dep. 37:22-38:21.

[36] Kong Dep. 49:15-18. Zhang Yingren of Hebei asserted that while "all the manufacturers talk about their own opinion and use" at the meetings, contrary to the consistent documentary record of the meetings, "I do not remember any situation where a consensus was reached." Zhang Dep. 48:22-49:13. Later, he admitted "this consensus does happen." *Id.* at 52:3-53:13.

[37] Kong Dep. at 49:20-50:14.

A. That's correct.[38]

An NEPG document prepared by a section chief for the General Manager later referred to the agreements reached at Chamber meetings as "gentlemen's agreements": the report argued for a strategy of "strengthen self-regulation in the VC industry, but don't rely completely on the 'gentlemen's agreements' of the Chamber of Commerce."[39]

Wang Qi of Jiangshan wrote a memorandum summarizing a November 2002 meeting of the vitamin C manufacturers and the Chamber.[40] Kong Tai of Jiangshan also attended the meeting and he received a copy of the memo.[41] Wang Qi's responsibilities included circulating memos following the meetings of competitors and the Chamber and to retain them in company files (although memos have been produced only for some of the meetings he attended).[42] In his memos, he attempted to state accurately what happened at the meeting.[43] Wang Qi testified time and again that his meeting memos were accurate, but other than what was recorded in the memos, "I don't remember" what happened in the meetings:[44]

> The same answer as before. If I had recorded it, I would have put it into the memo and it would have been correct. If I did not record it, I do not recall.[45]

---

[38] *Id.* at 67:22-69:6, 95:11-20.

[39] PX 42 at 8; Renzhi Dep. 75:15-76:23 (confirming authorship); *see also* PX 141 at 9 ("such allegiance is vulnerable and will easily succumb to the temptation of profit and before the test of time").

[40] PX 50; Wang Qi Dep. 68:12-21 (confirming authorship).

[41] Kong Dep. 46:2-16.

[42] Wang Qi Dep. 73:3-74:11 ("right, that is part of my work"), 216:18-217:2 ("Under normal circumstances I would write a report every time"); Kong Dep. 46:13-16. Wang Qi began preparing the memos of Vitamin C Subcommittee meetings during the meetings by typing information from the meeting directly into his laptop. Wang Qi Dep. 90:16-91:7. He prepared the final memos one or two days after the meeting. Wang Qi Dep. 92:5-18, 96:3-14.

[43] Wang Qi Dep. 96:9-14 ("yes").

[44] Wang Qi Dep. 99:11-17; *Id.*, 101:11-22

[45] Wang Qi Dep. 101:23-102:9; *accord* Wang Qi Dep. 133:22-134:10.

Like Wang Qi, Defendants' witnesses suffered from many memory problems about what was discussed at meetings.[46] Many witnesses insisted that they could not recall *any* details of Subcommittee meetings. This is remarkable because Subcommittee meetings were not short; they typically lasted half a day.[47]

Wang Qi's memorandum of the November 2002 meeting reflects adjustments in the agreement to restrict production, adjustments which Defendants agreed to misrepresent to their customers:

> Adjustment: Each manufacturer would be given an extra quota of 1,000 tons for this year, and the total production will be 43,000 tons for the year, but we are asked to tell outsiders that the total production in 2002 is no more than 40,000 tons.[48]

At the same meeting, on the topic of minimum export pricing, the manufacturers could not reach a consensus: "No consensus was reached about price at the meeting."[49] Kong Tai of Jiangshan confirmed that this was correct.[50]

At the meetings of the Chamber and in other settings, the manufacturers regularly discussed vitamin C export prices.[51] These discussions also sometimes led to agreements. Wang Qi of Jiangshan recorded in an April 2003 work report that "we will maintain the original price level for deliveries in May and June, which is USD 11.50/kg or above . . . we have communi-

---

[46] *See* footnote 22, *supra*.

[47] Zhang Dep. 71:19-72:22.

[48] PX 50 at 2.

[49] *Id.*

[50] Kong Dep. 49:9-14.

[51] PX 51 ("the export price is US$11.00/kg"); *see* Wang Qi Dep. 115:11-25.

cated with Weisheng and Welcome, hoping that they will maintain a similar pricing policy for our common interest."[52]

In his June work report, Wang Qi reported another price agreement reached at a meeting:

> On the 11th of this month, our 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.[53]

Wang Qi's memo also questioned whether the agreement worked: "every manufacturer quoted prices lower than the floor price."[54] Kong Tai received and read this memo and testified:

> Q. And what's he writing is that all six of the Chinese manufacturers who attended that meeting agreed to set the floor price at $9.20 per kilogram, right?
>
> ***
>
> A. Yeah, at this meeting, from what I remember, this was basically – this was – this sort of thing happened.[55]

Kong noted that the agreement was not implemented, but admitted:

> Q. You believe that all six of the Chinese vitamin c manufacturers agreed to set the floor price at $9.20 per kilogram, right?
>
> ***
>
> A. It's like that.[56]

In July 2003, concerned about exports, the Subcommittee met and discussed a topic that would eventually flower into a new plan to restrain supply: "can each producer take turns to stop

---

[52] PX 135 at 4bb & dd; Wang Qi Dep. 125:13-22; *Id.* at 129:24-130:10 ("I believe what is said here is accurate").

[53] PX 136 at 1-2; Wang Qi Dep. 130:24-131:18 ("I think it's correct").

[54] PX 136 at 1-2.

[55] Kong Dep. 62:14-19; *Id.*, 61:7-13.

[56] Kong Dep. 64:23-65:2. Feng Zhenying of Weisheng repeatedly asserted at his deposition that decisions made at Subcommittee meetings were the decisions of the Chamber, but eventually admitted that he could not recall even a single example of a decision that was made at a meeting with which any manufacturer disagreed. Feng Dep. 48:16-21. He also testified "I'm not sure" and "I cannot remember clearly" as to whether there were meetings where no consensus was reached. *Id.* at 49:13-22. 50:19-22.

> Chamber Meeting. On December 26, the CCCMHPIE organized a coordination meeting of the four major VC manufacturers in Beijing. At the end of the meeting, representatives from all four *agreed to limit production* during the first half of 2004 in order to stabilize the market.[61]

Wang Qi followed this with a January 2004 work report confirming "primary domestic VC manufacturers uniformly and seriously implemented strategy of 'Limit Production to Protect Prices' prior to January."[62] Even this price of $9 per kg was considered unsatisfactory to some. According to a Weisheng internal report: "The several domestic suppliers have indeed taken the measure to put limitation on volume to protect price."[63] But, according to the report, "[t]he policy as adopted by several domestic suppliers to put limitation on volume to protect price so far has not brought forth a satisfactory situation (namely, the VC price is kept around US$9.0/Kg)."[64]

2. Defendants Establish a Common Warehouse for Inventory and Again Agree to Measures to Increase Prices.

Beginning in 2004, the manufacturers established by agreement a common warehouse in Shanghai to store inventory of all manufacturers that could be held off the market. A February 2004 work report by Wang Qi explained: "Concerned with price drop in the market, all participating manufacturers *agreed to increase stock* in the Shanghai warehouse starting from February" and established that each manufacturer would maintain 200 tons of product at the warehouse.[65]

---

[61] PX 137 at 2; Wang Qi Dep. 140:6-12 (confirming authorship); *Id.* at 140:16-142:23 ("This is written here, and I think it is – it seems to be correct").

[62] PX 138 at 2; Wang Qi Dep. 143:6-11 (confirming authorship); *Id.* at 146:6-18(confirming accuracy).

[63] PX 56 at 3.

[64] *Id.*

[65] PX 81 at 2.

The common warehouse permitted each defendant to monitor each other's compliance with the agreement. Another memo by Wang Qi confirmed: "the participants at the meeting agreed that, on March 2nd, each manufacturer will send a representative to examine the amount of stock already in the Shanghai warehouse."[66]

A Wang Qi memorandum of a March 2004 Subcommittee meeting reported on "[d]ecisions made at the meeting," including signed agreements among the manufacturers to limit supply:

1) *All the agreements reached (and signed by representatives of all the companies)* during the VC coordination meeting at the end of December, 2003 still have to be carried out strictly.
2) With respect to the inventory level at the Shanghai warehouse, beginning from March (including March), the Big 4 can store 150 tons, or more, again each month (in February, each of them still has to maintain an inventory of no less than 200 tons at the warehouse).[67]

Kong Tai of Jiangshan has confirmed that he attended a Subcommittee meeting at which "everybody agreed to limit their output in the first half of 2004."[68]

Defendants have not produced the signed agreements referred to in the memorandum. Kong Tai confirmed that such documents existed: "Yes, there would be the formality of signing."[69]

3. Defendants Unsuccessfully Agree to Production Shutdowns for June 2004.

In June 2004, a company email from Wang Qi explained that Defendants planned a series of production shutdowns "because we had an agreement among all the producers, and the pro-

[66] *Id.* Wang Qi Dep. 157:20-25 (confirming authorship).

[67] PX 57 at 2; Wang Qi Dep. 146:19-147:4 (confirming authorship); *Id.* at 148:11-149:8 (confirming accuracy).

[68] Kong Dep. 75:18-76:20 ("yes").

[69] Kong Dep. 84:4-18.

duction shutdown in June is part of this agreement."[70] Some defendants, however, were uncertain: "It is not known whether or not the four large manufacturers in China can execute the plan for suspension of production in June according to the agreement."[71]

As feared, defendant Weisheng "unilaterally tore up the agreement," as confirmed by an internal Jiangshan memo by the secretary to the General Manager.[72] "As a result, the agreement fell apart and plans for ceasing production in June were canceled."[73]

4. Defendants Discuss Prices in Las Vegas in 2004 and Continue to Restrain Supply.

Despite this failure of the June agreement, Defendants again sought to increase prices later in 2004. According to an internal NEPG report on the Supply Side West exhibition at the Venetian & Sands Expo in Las Vegas, "before the exhibition, manufacturers of China had intentionally increased the shipment price from China."[74] Prices were also discussed in Las Vegas: "The intention for price increase was very strong at the exhibition, and [manufacturers] were eager to have a try, but market confirmation was not available."[75]

Following the Las Vegas expo, the manufacturers and the Chamber met in Shanghai in October 2004. Wang Qi's memo of the meeting describes how Weisheng reported at the meet-

---

[70] PX 139; Wang Qi Dep. 165:14-19 (confirming authorship).

[71] PX 160.

[72] PX 85; Kong Dep. 89:12-90:10 (memo is summary of what Kong said at meeting); Wang Qi Dep. 180:2-181:23 (report by secretary of "managers," "workshop heads, chiefs").

[73] PX 85; Kong Dep. 90:23-91:14 (memo is correct); *see also* PX 83 ("Because the domestic VC manufacturers' regulation meeting in May was not successful, the originally planned stopping of production in June could not be carried out"); PX 119 at 8 ("reneging on the production suspension agreement").

[74] PX 159 at 4.

[75] *Id.*

ing that "Since September 28-30 when Supply Side West conference was closed in America, the market price began to rise with no doubt, certain companies bid[d]ed the price of USD 4.50/kg.[76]

This price increase in Fall 2004 was due in part because "manufacturers in China stopped production."[77] A speech prepared for Jiangshan's General Manager Kong Tai subsequently confirmed: "These VC enterprises, mediated by Chamber of Commerce for Pharmaceutical and Health Products, took measures last year to limit production to protect price and to ensure a 'soft landing.'"[78] Kong Tai also confirmed at his deposition that:

> Q. You attended the meeting and all the vitamin C manufacturers agreed that this was a good idea to arrange to suspend production before the end of October, right?
> A. It is that way.[79]

At the October meeting, there was no consensus of how next to proceed: "With respect to the output and export price of every company in the meeting, there was not any request or suggestion."[80] At another meeting of the manufacturers and the Chamber in December, again "[a]ll participants exchanged market information in this conference but did not reach a unanimous agreement."[81]

5. Defendants Discuss this Lawsuit and Decide to Continue their Illegal Conduct.

Plaintiffs filed the first lawsuit in this action on January 26, 2005. At an April 2005 meeting of the manufacturers and the Chamber, according to Wang Qi's memorandum of the

---

[76] PX 58; Wang Qi Dep. 206:15-207:3 (confirming authorship); Wang Qi Dep. 207:23-208:4 (Weisheng hoped to get that price).

[77] PX 58.

[78] PX 141 at 9.

[79] Kong Dep. 86:25-88:13.

[80] PX 58 at 2.

[81] PX 86 at 33678(1); Wang Qi Dep. 208:14-19.

meeting, it was reported: "The recent antitrust lawsuit is unprecedented, but we shall not suspend the coordination mechanism of the VC industry in our country."[82] The manufacturers at the meeting discussed price quotes for vitamin C.[83] The attendees ironically agreed: "No written record for this meeting."[84]

A Jiangshan report expressed that Defendants should not be concerned about the lawsuit due to the *amicus* brief, but that the cartel's conduct would now take place in hiding: "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, government would take the foremost part of the responsibility. After all, we need to do many things in a more hidden and smart way." [85]

Nonetheless, following - and it would seem as a consequence of - the filing of this lawsuit, the cartel began to wane in effectiveness, particularly in comparison to its early success.[86] As detailed below, efforts at cartelization have continued, but without the same effect on prices, at least as of mid-2008.[87]

6. Defendants Reach Agreements to Suspend Production After the Lawsuit is Filed.

As documented by a memorandum from Wang Qi, the Vitamin C Subcommittee met on May 19, 2005 and debated another agreement on production suspension.[88] General Manager

---

[82] PX 142 at 1; Wang Qi Dep. 212:6-14 (confirming authorship).

[83] PX 142 at 1; Wang Qi Dep. 213:3-8 (memo "should be correct").

[84] PX 142 at 2.

[85] JJPC 32205-06 (Milici Decl., Ex. J) at 5.

[86] Bernheim ¶ 60.

[87] *Id.* Updated analysis for 2008 and 2009 would be necessary to consider the cartel's current conduct and effects.

[88] PX 87; Wang Qi Dep. 222:6-18 (confirming authorship).

Feng Zhenying of Weisheng stated at the meeting that "he hopes steps will be taken to stabilize the price properly, such as each manufacturer reducing its production volume proportionately?"[89] Jiangshan's General Manager Kong Tai indicated "he does not agree the proposal of proportionately decreasing production…Therefore it will not participate in this production reduction."[90] Huang Pinqi of Hebei then made two "proposals":

1. Using the current prices for obtaining the export pre-authorization stamp as the floor prices to export VC for each manufacturer;
2. During July and Aug., each manufacturer will stop fermentation for about 20 days so as to reduce the production volume appropriately and ultimately relieve the situation that supply surpasses demand.[91]

Wang Qi then observed: "As for the proposal for production shutdown/limitation, each manufacturer will *as usual* have its own calculation. In addition, due to the damage to the agreement caused by Weisheng last year, it is still an open question as to what extent the consensus made at the meeting will be implemented."[92]

In November 2005, according to a Jiangshan memo of the meeting, the manufacturers and Chamber then met and discussed "Market Coordination" and a post-lawsuit return to cartel conduct.[93] Du Chengxiang, Vice President of Northeast General Pharmaceutical Factory, a subsidiary of NEPG responsible for manufacturing and selling vitamin C, declared at the meeting:

> we need to come to senses and need to resist the pressure from the market. It is unwise to have an internal war where none of us can pull each other down for now. Pencillin was an example. Therefore we have one way to go and that is getting together and controlling the market risk.[94]

---

[89] PX 87.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] PX 144 at 2.

[94] *Id.*

The results were partially successful: NEPG reported in a weekly work report on June 30, 2006 that "The Chinese VC manufacturers' conference held last week produced a certain effect on the marketplace, which stopped the continued fall of the market."[101]

7. Defendants Discuss Prices Again in Las Vegas.

In October 2006, representatives of the manufacturers again attended the Supply Side West Expo in Las Vegas. Wang Qi's trip report describes a "Meeting with Chinese domestic manufacturers."[102] ZhangYingren of Hebei stated that "he thought that the price was rising, but such an increase was lower than they expected."[103] He was "in favor for the domestic manufacturers to hold another meeting in November."[104] Guo Jiping of Weisheng "expressed that Weisheng fully agreed that export prices and quantities should be coordinated."[105]

Zhang Yingren was someone with whom Wang Qi had talked "quite a lot" and "quite a bit" by telephone in China.[106] Wang Qi also spoke to the NEPG representative and "[p]rice was included in our conversation," including specifically Jiangshan's "plans to raise its price."[107]

Wang Qi reported in an email later in 2006: "In 2nd half of the year, thanks to the proper market control by the domestic manufacturers, the price gradually inched back."[108]

---

[101] PX 40.

[102] PX 149 at 2; Wang Qi Dep. 253:5-254:11 (confirming authorship).

[103] PX 149 at 3.

[104] *Id.*; Wang Qi Dep. 258:20-25 (report is correct). Zhang Yingren of Hebei testified "I cannot recall" to questions about communications with competitors at the Las Vegas exposition. Zhang Dep. 65:4-66:14, 145:4-18.

[105] PX 149 at 3; Wang Qi Dep. 262:9-15 (confirming accuracy).

[106] Wang Qi Dep. 255:20-256:13; *Id.* at 257:14-19. Zhang Yingren was less forthright about these calls with Jiangshan, testifying "From what I remember, there wasn't any." Zhang Dep. 126:22-127:10. Zhang even claimed at his deposition that he could not remember whether Wang Qi was man or a woman. *Id.* at 144:9-145:3.

[107] Wang Qi Dep. 260:8-23.

[108] PX 150; Wang Qi Dep. 263:20-264:6 (confirming authorship).

8. Defendants Continue Their Conspiracy.

In 2007, Defendants planned further coordinated shutdowns to fight off price declines. An NEPG Status Report explained:

> With respect to the shutdown time and days in 2007, we will still act in accordance with the basic spirit of the Qingdao and Haikou meetings to establish the dates as June 15 to 25, during which time all factories can start to shut down in accordance with their own circumstances.[109]

"In September, all the production shops resumed production in succession."[110]

Although dampened by this lawsuit, in 2007 Defendants again attempted to continue their price coordination. Wang Qi reported in March 2007 to his General Manager that he met with Hebei and Weisheng and discussed current market export prices for vitamin C and that "we should inform each other before sending quotes out so as to keep quotes at the same level, and that the quotes should be higher than current market prices." [111] A Weisheng General Manager Meeting Report on April 7 similarly reported: "After the industry coordination meeting on March 15 . . . the international market price will be raised to 4.5 USD/kg."[112] At an August 2007 conference, the manufacturers again circulated information on the average vitamin C price "among all enterprises for the first half of the year."[113]

Weisheng's 2008 Guidelines and Targets Report concluded:

> As the policy of restricting production to preserve the price carried out in 2007 was a success, it is quite possible that this policy will be re-enacted in 2008.[114]

---

[109] PX 164 at 2.

[110] PX 64 at 1.

[111] PX 154; Wang Qi Dep. 276:20-277:11 (confirming authorship).

[112] PX 61 at 4.

[113] PX 92 at 3.

[114] PX 65 at 4.

In 2008 and thereafter, the conspirators appear to be holding fewer meetings due to the lawsuit, but they continue to communicate by telephone about vitamin C prices.[115] Wang Qi admitted with respect to these conversations:

> Of course when we discuss prices we would – one of the major contents would be whether we should keep it at the present level or whether we should raise it. That would be a primary topic of conversation.[116]

II. EXPORT REGULATION

Defendants present an inaccurate and misleading view of China's legal system as it relates to foreign trade and, in particular, to the export of vitamin C during the relevant time period. Defendants, their expert, and the Ministry's *amicus* brief rely on outdated laws and regulations and ignore relevant and binding legal authority. The laws and regulations in effect during the relevant time period did not compel Defendants' violations of U.S. antitrust law.

A. Formation of the Chambers of Commerce

In 1986, China requested contracting party status under the General Agreement on Tariffs and Trade ("GATT") and, in connection with that request, China's trade representative submitted a Memorandum on China's Foreign Trade Regime to the GATT Contracting Parties at the request of the government of China.[117] As China explained, by 1987 China was replacing its "totally mandatory foreign trade planning" with a combination of mandatory planning, guidance planning, and adjustment through market forces.[118]

---

[115] Wang Qi Dep. 69:19-72:10.

[116] *Id.* at 71:12-17.

[117] Permanent Representative of the People's Republic of China, *Memorandum on China's Foreign Trade Regime*, Feb. 13, 1987 (L/6125) ("China's 1987 Foreign Trade Memorandum") (Milici Decl., Ex. L).

[118] *Id.* at 11-12.

Defendants and their legal expert, Professor Shen Sibao, rely on a speech given by Li Lanqing in 1987 to describe current events in China. In the (unofficial and edited) version of the speech Defendants have submitted to this Court, Li primarily addressed reforms aimed at increasing the independence of exporters, ending government subsidies, and making enterprises responsible for their own profits and losses.[119] Li also discussed the formation of five import and export chambers and proposed that these organizations would be "semi-official" (or "quasi-governmental").[120] Following the actual formation of the chambers of commerce, however, the Chinese Trade Delegation informed the GATT contracting parties that "[t]he chambers of commerce are ***voluntary associations***, ***legally independent of the government*** and enterprises."[121]

Defendants cite multiple regulations concerning the administration of three categories of export products mentioned in Li's speech.[122] These regulations confirm that the second of the three categories of products, which included vitamin C, were "subjected to directive planning."[123] During the early 1990s, chambers of commerce were directed to establish sub-chambers

---

[119] *See* Li Lanqing, *Problems of the Reform of the 1988 Foreign Trade Regime*, Research of Macro Economy (Milici Decl., Ex. M) ("Li") at 11-12. Defendants did not submit a complete translation of the edited speech to this Court. Citations in this memorandum to "Li" are to the complete translation submitted herewith.

[120] *Id.*, 14-15.

[121] Working Party on China's Status as A Contracting Party, China's Foreign Trade Regime, Note by the Secretariat, Sept. 7, 1993 (Spec(88)13/Add.13) (Milici Decl., Ex. N) at 23. This document was reviewed for accuracy by the Chinese authorities. *Id.* at 1

[122] *See* Li, *supra*, at 9-10 (proposing that, beginning in 1989, China would implement different planning and operation mechanisms for three different categories of exports and that the second category would follow "directive export planning").

[123] *See* Notification of Adjusting the List of Categories of Export Goods & Strengthening the Operation and Administration of Export Goods, MOFTEC (January 23, 1990) (Declaration of A. Chan in Support of Defendants' Motion for Summary Judgment (Chan. Decl."), Ex. 17) Art. I (The second category of export goods "are also subjected to directive planning..."); The State Council's Decision on Several Matters Concerning Further Reforming and Perfecting the Foreign Trade System (January 1, 1991), Guo Fa No. 70 (Chan. Decl., Ex. 14) at 5 ("The second

and to coordinate the market, client, and price of commodities subject to mandatory central planning.[124]

In 1992, the Ministry then promulgated new regulations concerning export administration.[125] In place of the prior three category system, the 1992 Interim Export Measures created five categories of export products: commodities subject to unified management of the State, commodities under planned quotas, commodities under active quotas, commodities under general export licensing control, and commodities under passive quotas.[126] Vitamin C was listed among the commodities subject to planned quotas.[127]

China eliminated all mandatory export planning by 1993.[128] And the 1992 Interim Export Measures were explicitly abolished by the State Council in 2001.[129] Consequently, the above regulations have no bearing on the issues raised in this case.

---

category of products "shall be operated … following the planning and arrangement of [the Ministry]").

[124] *See* Notification of Adjusting the List of Categories of Export Goods, MOFTEC (January 23, 1990) (Chan. Decl., Ex. 17) at Art. III.

[125] Ministry of Foreign Trade and Economic Relations and Trade of the People's Republic of China, Interim Measures on the Administration of Export Commodities, Order No. 4, (December 29, 1992) ("1992 Interim Export Measures") (Milici Decl., Ex. O). Defendants submitted an incomplete translation of this document, which is titled "Interim Provisions for Administration of Export Commodities" in the translation Defendants provide. Professor Shen translated the title of the same regulations as "Interim Regulation of Export Goods, MOFTEC, MOFTEC Order No. 4." Shen Rep. at 16 fn. 40. Citations in this memorandum are to the complete translation attached hereto.

[126] *Id.*, Art. 1, 3.

[127] *Id.* at A.

[128] Working Party on China's Status as A Contracting Party, China's Foreign Trade Regime, September 7, 1993 (Spec(88)13/Add.13), *supra*, at 31.

[129] Decree of the State Council of the People's Republic of China, No. 332, Regulations of the People's Republic of China on the Administration of the Import and Export of Goods (promulgated on December 10, 2001) ("2001 State Council Export Regulation") (Milici Decl., Ex. P), Art. 77.

Professor Shen relies extensively on these abolished regulations in his report.[130] At his deposition, Professor Shen admitted that he did not conduct any research to determine whether provisions of regulations that he relied upon in his report remained effective and testified that he could not remember whether regulations he cited had been abolished.[131]

Likewise, Defendants cite these regulations in support of purportedly undisputed facts concerning *current* requirements applicable to vitamin C exports.[132]

B. The Vitamin C Subcommittee.

In February of 1996, the Ministry called a meeting of vitamin C exporters and the Chamber. Following the meeting, the Ministry issued a report to the State Council explaining that between 1994 and 1996 more than 200 enterprises of all types exported vitamin C from China and those "[c]ompanies have been competing with each other by blindly cutting prices."[133] Concerned about below-cost pricing, the Ministry suggested measures to improve the vitamin C export situation, including government-imposed restrictions on production and quota allocation.[134] The suggested measures do not mention the Chamber, the formation of a subcommittee, or price-fixing among competitors.

---

[130] Report of Professor Shen Sibao ("Shen Report") (Chan Decl., Ex. 4) ¶¶ 29, 43, 47, 48,49, 65.

[131] April 16, 2009 Deposition of Shen Sibao ("Shen Dep.") (Milici Decl., Ex. Q) at 85:14-86:16; 177:13-16.

[132] *See* Defendants' Rule 56.1 Statement, Statement 11.

[133] Report regarding the Current Situation of Vitamin C Exports and Suggestions for Responsive Measures, [1996] MOFTEC Guan Fa No. 185 (Milici Decl, Ex. R). The copy of the report submitted to this Court is incomplete; a complete copy has not been produced in this litigation. In addition, Defendants cite to a selective translation of this document. Plaintiffs' citations are to the translation provided herewith.

[134] *Id.*

In the fall of 1997, exporters of vitamin C, including Defendants, formed the vitamin C Subcommittee. A charter for the subcommittee was passed upon discussion of the members on October 11, 1997.[135] The 1997 Charter provided that the Subcommittee "shall coordinate and administrate market, price, customer and operation order of Vitamin C export."[136] Additional provisions approved by Defendants limited the right to export vitamin C to members of the Subcommittee and required members to implement the coordinated price.[137]

Six weeks after the Charter was passed by the members of the Subcommittee, the Ministry and the State Drug Administration ("SDA") issued a Notice that has been extensively cited by Defendants in this case.[138] Notwithstanding the actual sequence of events, Professor Shen asserts in his report that the formation of the Subcommittee was mandated by the government of China rather than at the request of private parties.[139]

In 1998, the Ministry issued a "Notice on the Supplementary Provisions of the Notice on the Relevant Matters Concerning Strengthening the Administration of Production and Export of Vitamin C."[140] The 1998 document has not been produced in this litigation and has not been provided to the Court.

---

[135] Charter of the Vitamin C Subcommittee of China Chamber of Medicines and Health Products Importers & Exporters (October 11, 1997) ("1997 Charter") (Chan Decl., Ex. 22), introduction.

[136] *Id.*, Art. 7.

[137] *Id.*, Arts. 12, 15(6).

[138] Notice Relating to Strengthening the Administration of Vitamin C Production and Export (promulgated by the Ministry and SDA on Nov., 27 1997) (Chan. Decl., Ex. 21) (the "1997 MOFTEC & SDA Notice").

[139] Shen Report ¶ 52

[140] *See* List of the Fourth Batch of Departmental Decisions Abolished by the Ministry of Foreign Trade and Economic Cooperation, Order No. 24 (March 21, 2002) (Milici Decl., Ex. S).

Defendants have submitted minutes of three meetings held by the subcommittee between 1999 and April 2001.[141] In marked contrast to the meetings held after the licensing and quota regime ended, Ministry officials attended each of those meetings.[142] Despite the presence of the Ministry, the meetings were ineffective in increasing prices.[143] In 2000, Defendants reached a unanimous agreement to nullify an agreed-price because it had "no practical effect," and their unanimous agreement was submitted to the Ministry for its approval.[144]

C. The End of Export Administration Over Vitamin C.

In 2000, the Chinese Delegation to the WTO, led by the Director General of the Ministry,[145] submitted an official communication to the WTO Secretariat attaching both an updated Memorandum on China's Trade Regime and a comprehensive list of the laws and regulations related to foreign trade currently in effect.[146] This communication, like the 1987 memorandum cited above, is an authoritative interpretation of Chinese foreign trade law submitted by the government of China, through its trade representative, with the expectation that it would be relied upon by members of the WTO, including the United States.

As China explained to the WTO, by 2000 the only export remaining export restrictions were (1) prohibitions on the export of a few products and (2) an export licensing and quota sys-

---

[141] *See* NEPG 75767 (Chan Decl., Ex. 24); PX 167 (NEPG 42592) (Chan Decl., Ex. 25); PX 173 (Chan. Decl., Ex. 26).

[142] *See* NEPG 75767 (noting that representatives of the Ministry and SDA attended the meeting); PX 167 (noting attendance of representative of the Ministry); PX 173 (listing among attendees an officer of the Ministry).

[143] Bernheim Report ¶ 49 & Figure 15.

[144] PX 167.

[145] *See* Report of Dr. Paula Stern (Chan Decl., Ex. 43) ("Stern Rep.") at 9.

[146] Communication from China submitted by the Chinese Delegation to the WTO Secretariat (March 20, 2000), WT/ACC/CHN/17 ("2000 Communication from China") (Milici Decl., Ex. T).

tem.[147] There were no restrictions on pricing and, as China told the world, "*export prices are fixed by enterprises without government intervention*."[148] Thus, as the record here establishes, in 2000 vitamin C producers were again competing on price.[149]

None of the laws or regulations cited by Defendants from the 1990s appears on the "comprehensive list" of regulations concerning foreign trade submitted to the WTO in March of 2000.[150]

Upon accession to the WTO in December 2001, China enacted a sweeping series of legislative and regulatory reforms related to foreign trade. These included, most notably, a law promulgated by the State Council governing the import and export of goods that explicitly abolished the 1992 Interim Export Measures relied upon by Defendants and Professor Shen.[151] The 2001 State Council Export Regulation provides for limited and specific restrictions on exports, including a quota and licensing system described in detail therein.[152] The law does not permit or require uniform national export pricing, price collusion among competitors, or collusive supply agreements. And the only mention of chambers of commerce in the 2001 law is a provision *permitting* – but not requiring -- importers and exporters to join chambers of commerce.[153]

The 2001 State Council Export Regulation governed exports during the entire cartel period but Defendants have not cited the Regulation to this Court. The Ministry also does not cite

---

[147] *Id.*, at 11-12.

[148] *Id.* at 16.

[149] *See, e.g.*, PX 72 at 1 ("Between May 2000 and December 2001, vitamin C in our country experienced the second 'price war' since 1995…"); PX 21.

[150] 2000 Communication from China, *supra*, at 1, 20-28.

[151] 2001 State Council Export Regulation, *supra*, Art. 77.

[152] *Id.* at section III.

[153] *Id.* at Art. 62.

it. And Professor Shen not only fails to cite the controlling law, he apparently is unaware of it as demonstrated by his testimony that provisions of the 1992 Interim Measures, which were explicitly abolished by the 2001 State Council Export Regulation, nevertheless remained effective after China's accession to the WTO.[154]

In November 2002, the head of China's trade delegation, who was also a Vice Minister of the Ministry, submitted a statement to the WTO regarding China's implementation of its WTO commitments.[155] On behalf of the government of China, the Ministry official stated:

> China maintains export administration of a small number of products … which are in conformity to GATT 1994. **From 1 January 2002, China gave up export administration of … vitamin C ….**[156]

It is at this point, with the end of any export administration by the government looming, that Defendants reached a voluntary agreement in December 2001 to limit output and fix prices, which was "completely implemented by each enterprises' own decision and self-restraint, without any government intervention."[157]

D. The Official Abolition of the Ministry's Vitamin C Regulations Under the Old Quota and Licensing System and Revision of the Charter.

The 1997 MOFTEC & SDA Notice relied on so heavily by Defendants primarily concerned outdated export quotas and licensing requirements for vitamin C.[158] Thus, with the end of

---

[154] Shen Dep. 132:13-135:13.

[155] Statement by the Head of the Chinese Delegation on the Transitional Review of China by the Council for Trade in Goods, November 22, 2002 (G/C/W/441) ("2002 Transitional Review Statement") (Milici Decl., Ex. U); *see* Stern Rep. at 8 (the head of the Chinese Delegation at the time was also a Vice Minister at the Ministry).

[156] *Id.* at 3.

[157] PX 38.

[158] *See* 1997 MOFTEC & SDA Notice, *supra*, at Arts. 1-4.

export licensing and quotas for vitamin C on January 1, 2002,[159] the 1997 Notice ceased being effective. Consequently, when the Ministry reviewed its departmental regulations in early 2002, it abolished the 1997 Notice.[160] Pursuant to Chinese law, "[i]f an official document is abolished, it shall be deemed as invalid starting from the date of abolition."[161] As Professor Shen explained, the Ministry "abolished the document itself so that the document is no longer valid."[162]

Despite the abolishment of the 1997 MOFTEC & SDA Notice, Professor Shen cites the document extensively in his report.[163] The Ministry also cites the abolished document extensively in its *amicus* submission.

Within weeks of the abolishment of the 1997 Notice, Defendants held a meeting to amend the charter of the Subcommittee.[164] A draft of the new charter was discussed by Defendants at a meeting held on May 23, 2002 and "passed in principle."[165] Under the draft charter,

---

[159] In their interrogatory responses, Defendants refer to export quotas between June 2006 and the present. *See, e.g,* Northeast Pharmaceutical Group Co.'s Fourth Amended Response to Plaintiffs' Second Set of Interrogatories, (Milici Decl., Ex. V), Response to Interrogatory No. 5. Defendants do not rely on the new export quota system in their Motion and the regulations governing export quotas, which do not include any mention of chambers or compulsory collusion, are not cited by Defendants, by the Ministry, or by Professor Shen. *See* Measures for the Administration of Export Commodities Quotas, Ministry of Foreign Trade and Economic Cooperation (December 20, 2001) (Milici Decl., Ex. W)

[160] *See* List of the Fourth Batch of Departmental Decision Abolished by the Ministry of Foreign Trade and Economic Cooperation (No. 24), *supra*.

[161] Notice of the Procedures for Handling Official Documents in the Administrative Departments of the Government Issued by the State Council (Guofa 2000 No. 23) (Milici Decl., Ex. X) at Art. 49.

[162] Shen Dep. at 196:10-12.

[163] Shen Report ¶¶ 46, 52, 53, 54, 71.

[164] PX 37.

[165] JJPC 51276 (Milici Decl., Ex. Y) at 1.

"[a] company, *without being a member of the [Subcommittee] can export VC*..."[166] A revised charter was passed by a vote of the members on June 7, 2002.[167]

The differences between the 1997 Charter and the 2002 Charter are striking. For example, while the 1997 Charter stated that the Subcommittee was organized upon approval by the Ministry, the 2002 Charter states that the Subcommittee "is an organization jointly established on a *voluntary* basis."[168] In contrast to the previous Charter, in the 2002 Charter members also have the right "[t]o *freely resign* from the subcommittee."[169]

The provisions of the 1997 Charter stating that the Subcommittee shall "coordinate and administrate market, price, customer, and operation of vitamin C export" and that members "shall strictly execute export coordinated price" were omitted from the 2002 Charter, which does not mention export prices at all. While the 2002 Charter refers generally to "industry agreements" it does not specify the content of those agreements.[170] And the only penalties for violating any such agreements are public criticism, warnings, suspension from the subcommittee, and revocation of membership in the Subcommittee.[171]

Professor Shen and the Ministry rely exclusively on the 1997 Charter and fail to cite the 2002 Charter, even in describing the current operations of the Subcommittee.

---

[166] *Id.*

[167] Charter of the Vitamin C Subcommittee of the China Chamber of Commerce of Medicines & Health Products Importers & Exporters (JJPC 55589) (the "2002 Charter") (Chan Decl., Ex. 36) Art. 53.

[168] *Id.*, Art. 3.

[169] *Id.*, Art. 16(8).

[170] *See Id.*, Art. 19(3).

[171] *See Id.*, Art. 19(4).

tiated" prices with Customs that left the price for vitamin C blank.[175] Defendants have not produced any filings with customs of agreed prices for vitamin C.

The Notice requires *nothing* of exporters other than the obtainment of a chop from the relevant chamber prior to export. Even this requirement is not a mandate as, pursuant to the Notice, verification and chop was subject to suspension by agreement among exporters.[176]

In 2003, the Ministry and Customs "on the basis of demands of the industries engaging in export and import" announced a list of products that would be subject to verification and chop on a "trial basis."[177] As the procedures attached to the announcement explain, the primary purpose of verification by the chambers is to ensure that contracts are not fraudulent – not that they result in supra-competitive profit for exporters. Pursuant to the procedures, "if it is verified that the contract is *correct*" the chamber "*shall* apply a counter-forgery V&C chop" and return the contract to the exporter.[178]

While the 2003 Announcement states that the chambers "shall verify the submission based upon the industry agreements" it does not refer specifically to agreements on price.[179] There is no guidance provided by the Announcement concerning price agreements, if any, and no procedures or penalties are proscribed if an agreement on price is not reached.

The 2003 Ministry and Customs Announcement does not require that exporters join a chamber or a subcommittee or participate in price-fixing. To the contrary, the Announcement

---

[175] PX 52.

[176] *Id.*, Art. 5.

[177] Announcement of the Ministry, General Administration of Customs (No. 36, 2003) (Milici Decl., Ex. AA) ("2003 Ministry and Customs Announcement").

[178] *Id.*, Art. A.

[179] *Id.*, Art. C.

specifically states "for V&C applications made by *non-member exporters*, the Chambers shall give them the *same treatment* as to member exporters."[180]

Verification and chop is thus a voluntary system that does not coerce supra-competitive pricing. Paracetamol, for example, appears on the lists of products subject to verification and chop by the Chamber.[181] Yet more than a year after the verification and chop system was adopted, the Paracetamol Subcommittee of the same Chamber as vitamin C reported:

> *Attendees fervently indicated their wish to use the example of the Vitamin C Industry self-regulation as management model to improve the export situation of Paracetamol.* In reply to this, the Chamber of Commerce Vice Chairman Mr. Zhang Changxin explained *that certain China products such as Vitamin C are leading the dominant position* in the international market as all aspects of the products have been developed and matured whereas Paracetamol is still changing.[182]

Contrary to all of this evidence, Professor Shen opines that the end of the licensing and quota system and the adoption of verification and chop by the Chamber "did not in any way change the level of control that the government maintained over the vitamin C industry."[183] He ignores the virtually non-existent role of the government described in the 2002 MOFTEC & Customs Notice and the 2003 Ministry and Customs Announcement and instead relies on outdated materials.

Professor Shen also asserts that under verification and chop exporters are required to hold membership in the Subcommittee and would lose the right to export if they refused to participate in price-fixing orchestrated by the Chamber.[184] Professor Shen cites no authority for those prop-

---

[180] *Id.*, Art. F.

[181] *See* 2002 MOFTEC and Customs Notice; 2003 Ministry and Customs Announcement.

[182] Minutes of the Paracetamol Sub-Committee Meeting, March 19, 2004 (Milici Decl., Ex. BB).

[183] Shen Report ¶ 61.

[184] Shen Report ¶¶ 59, 63.

ositions, nor could he. The verification and chop regulations expressly contemplate exports by non-members of the Chamber and prohibit the Chamber from discriminating against non-members that apply for a "chop."[185]

F. Verification and Chop in Practice.

Defendants have acknowledged in interrogatory responses that the minimum export price subject to verification and chop since May 2002 has been a constant price of $3.35 per kilogram.[186] The verification and chop minimum prices are "industry agreed export prices" and "agreed prices."[187] In practice, an assistant would fax vitamin C contracts to the Chamber and all contracts were approved by the Chamber, regardless of price.[188]

Whether or not the Chinese government or the Chamber has compelled an agreed-upon minimum price subject to verification and chop, that price was an unchanging $3.35 per kilogram. Even assuming that the voluntary verification and chop system imposed some restriction on Defendants, Defendants each had the discretion to sell vitamin C into the U.S. at any price above $3.35 per kilogram and to decline to participate in any collusive agreements to increase prices. As the record firmly establishes, Defendants voluntarily chose to enter illegal agree-

---

[185] 2003 Ministry and Customs Announcement, *supra*, at p. 7 Art. F.

[186] NEPG's Interrogatory Responses, *supra*, Response to Interrogatory No. 13; *see also* Hebei Welcome Pharmaceutical Co. Ltd.'s Second Amended Response of Plaintiffs' Second Set of Interrogatories, Response to Interrogatory No. 13 (Milici Decl., Ex CC) Weisheng Pharmaceutical (Shijiazhuang) Co. Ltd.'s Second Amended Response of Plaintiffs' Second Set of Interrogatories, Response to Interrogatory No. 13 (Milici Decl., Ex. DD); *see also* Wang Qi Dep. 19:7-20:2 ("since I became department manager it's been six years, it [$3.35] has always been that price" for verification and chop); *Id.* 220:24-221:3 (same).

[187] PX 52 at 2.

[188] April 17, 2008 Deposition of Ning Hong ("Ning Dep.") (Milici Decl., Ex. EE) at 67:10-70:22.

ments beginning in December 2001 that caused much higher prices for vitamin C than $3.35 per kilogram, including specific agreements on price far exceeding $3.35.[189]

Defendants were also free to charge less than the minimum verification and chop price. As Wang Renzhi testified:

> Q. Do you have any reason to contest the accuracy of what is indicated in Exhibit 161, companies were selling Vitamin C at $2.80 to $2.90?
> A. This was the actual market price of Vitamin C in the second half of 2005.
> Q. Was NEPG and the other three major manufacturers of Vitamin C in China selling at that market price in the second half of 2005?
> A. The majority of them, yes.[190]

Wang Qi confirmed that the minimum price subject to verification and chop was not always followed by Defendants:

> Q. So during 2006, there was a period in which the Chinese manufacturers were charging their customers much less than $3.35 per kilogram; is that right?
> A. I should say that – I should say that there was such a period in time in which the market price was lower than the floor price.[191]

No penalties were imposed upon Defendants for disregarding the minimum verification and chop price:

> Q. The Chinese Vitamin C manufacturers in this time were selling below the $3.35 minimum export price. Was anyone penalized in any way, shape or form for selling below the minimum export price by the Chamber?
> A. I told you the situation.
>
> ***
>
> Q. It's a simple question. Was anyone penalized or not? Yes or no.
> A. No.[192]

Confirming that the verification and chop system does not actually impose any restriction on competition, the China Chamber of Commerce of Metals, Minerals & Chemicals Importers &

---

[189] Bernheim ¶ 57 & Figure 19; PX 38 (US$4 - $5/kilogram); PX 136 (9.20 USD/Kg); PX 137 at 2 (USD 9.00/kg)

[190] Renzhi Dep. 73:8-19.

[191] Wang Qi Dep. at 265:20-266:6.

[192] Renzhi Dep. at 74:23-75:14.

Exporters (the "CCCMC"), the relevant chamber of commerce for nine products subject to verification and chop,[193] stated to the U.S. Department of Commerce: "Chinese enterprises are all independent in decision making...and the market competition is fierce and perfect."[194] According to the chamber:

> The government, at both national and local levels, has faded out from direct involvement in the management of enterprises and become a macro regulator. It *has no right to fix the prices for these enterprises, whether they are state-owned or privately owned*, nor does it have the ability to influence prices by interfering in the purchase of raw materials, the channels of distribution, or *company business practices. This system protects the independence and autonomy of enterprises, and ensures that the nature and quantity of the goods to be produced are decided by the producer at his own will, according to the demand of the market.*[195]

Likewise, the China Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME), which is also the relevant chamber of commerce for nine products subject to verification and chop, has stated to the U.S. Department of Commerce that:

> The operation of companies [in the chamber], encompassing all operational activities and the whole product life, are determined by market forces. ….*Each company has complete freedom in negotiating prices both within the PRC and abroad. Such prices and contracts are not subject to the approval of any government entity.*[196]

G. The Chamber is a Non-Governmental Organization.

---

[193] *See* 2003 Ministry and Customs Announcement *supra.*

[194] China Chamber of Commerce of Metals, Minerals, and Chemicals Importers & Exporters communication to the U.S. Department of Commerce Re: Surrogate Country Selection and Separate Rate application in Anti-Dumping Proceedings Involving Non-Market Economy Countries, April 19, 2007 (Milici Decl., Ex. FF) at 3.

[195] Comments of the China Chamber of Commerce of Metals, Minerals Chemicals Importers & Exporters to the U.S. Department of Commerce on Market Oriented Enterprises (Dec. 10, 2007) (Milici Decl., Ex. GG) at 1.

[196] Comment of the China Chamber of Commerce for Import & Export Machinery and Electronic Products on the Market Economy Characteristics in Chinese Machinery and Electronic Industry to the U.S. Department of Commerce (May 19, 2004) (Milici Decl., Ex. HH) at 8.

Even if the Measures for Administration were effective during some relevant time period of the vitamin C cartel, they do not confer sovereign governmental authority on the Chamber. As the Ministry has explained to this Court, the Measures do "not say every [c]hamber is an instrumentality that is acting in the nature of a regulatory body. It is only in those instances where the Ministry later imbues them through regulation with the power to regulate that they become so."[203] Thus, "[t]here are certainly parts, products and parts of the Chamber, where it is not acting as a government instrumentality."[204]

There is no delegation of governmental authority to the Chamber to regulate vitamin C. The Ministry has conceded to this Court that regulations issued under the export licensing and quota system are not relevant because "this whole regulatory regime was in fact superseded by the 2002 Price Verification and Chop system."[205] And, as set forth above, the only authority delegated to the Chamber by the verification and chop system is the authority to review contracts to determine whether the contract is "correct."

The Ministry has explained to this Court that paracetamol exporters, subject to precisely the same verification and chop regulations that the Ministry and the Defendants rely upon, are not authorized to fix supra-competitive prices:

> plaintiffs cite to subcommittee meetings from the Paracetamol subcommittee. They show that here is an example where a group of industry participants tried to get together to form like a Vitamin C committee, a self-regulatory body and was denied the authority to do that. That I believe, Your Honor, proves the very point that we are trying to make, that some subcommittee products are authorized, some aren't…[206]

---

[203] Hearing Transcript of June 5, 2007 (Milici Decl., Ex. LL) at 100:21-25. This interpretation is contrary to the plain language of the document, which refers to organizations "*established with*" regulatory functions, not organizations later delegated regulatory functions.

[204] *Id.* at 105:21-25.

[205] *Id.* at 111:24-112:1

[206] *Id.* at 101:1-16.

H. Unpublished and Ad-Hoc Restrictions on Exports Are Prohibited By Chinese Law.

The State Council, a superior body to the Ministry, has required the publication of all measures related to foreign trade since at least 1993.[207] Pursuant to the 2001 State Council Export Regulation, the Ministry must publish any measures restricting exports prior to implementation.[208] Following China's entry to the WTO, the State Council expanded that mandate and required that all governmental measures that relate to or that *may affect* foreign trade must be published in an official periodical.[209] The Ministry has also instituted specific regulations requiring disclosure of its administrative affairs to the public.[210]

The Chamber is also explicitly prohibited from establishing or maintaining any restriction on exports that is not set forth in a published law or regulation. The 2001 State Council Export Regulations states: "[u]nless it is *clearly provided in laws* or administrative regulations to forbid or restrict the import or export of goods, *no entity* or individual may establish or maintain prohibitive or restrictive measures over the import or export of goods."[211]

Despite the unambiguous requirement that all measures that affect or may affect exports must be published prior to implementation, Professor Shen states that official and binding re-

---

[207] *See* Circular of the General Office of the State Council on Restating Once Again the Provisions Concerning the Promulgation of National Regulations and Policies on Foreign Economic Relations and Trade (September 23, 1993) (Milici Decl., Ex. MM) at ¶ 1 ("all national rules, regulations and policies on foreign economic relations and trade shall be examined and promulgated to the public by" the Ministry).

[208] 2001 State Council Export Regulation, *supra*, Art. 58.

[209] Official Reply of the General Office of the State Council to the Relevant Issues Concerning China's Implementation of the Transparency Clause of the Protocol of the WTO, No. 42 (2002) (Milici Decl., Ex. NN) at Art. 1.

[210] *See* Notice of the Ministry of Commerce on Printing and Distributing the "Interim Measures of the Ministry of Commerce for Making Administrative Affairs Known to the Public" (No. 444 [2003] of the Ministry of Commerce) (November 25, 2003) (Milici Decl., Ex. OO).

[211] 2001 State Council Export Regulation, *supra*, Art. 4.

Summary judgment pursuant to Rule 56 is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R.Civ. P. 56(c). "Only when no reasonable trier of fact could find in favor of the nonmoving party should summary judgment be granted." *White v. ABCO Eng'g Corp.*, 221 F.3d 293, 300 (2d Cir. 2000) (quoting *Taggart v. Time Inc.*, 924 F.2d 43, 46 (2d Cir.1991)). "The inferences to be drawn from the underlying affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion." *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 202 (2d Cir. 1995).

"[T]he defense of governmental compulsion is available only when the offending action was mandated by a foreign sovereign." *Williams v. Curtis-Wright Corp.*, 694 F.2d 300, 303 (3d Cir. 1982) (emphasis added). "In the two cases in which the doctrine has been applied, there was a specific order or action from a foreign government directed at the defendant." *United States v. Brodie*, 174 F. Supp.2d 294, 301 (E.D. Pa. 2001). The Justice Department Antitrust Guidelines for International Operations explain "the foreign government must have compelled the anticompetitive conduct." U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations § 3.32 (1995) ("International Guidelines")

That sovereign acts in furtherance of an antitrust conspiracy—even when key to the success of that conspiracy—do not prevent a U.S. court from adjudicating antitrust claims by injured parties in the United States, is clearly demonstrated in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962). In *Sisal*, it was "discriminatory legislation" (within Mexico) by the Mexican Government that allowed the monopoly to be formed. 274 U.S. at 273. "True, the conspirators were

aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States." *Id.* at 276. The Supreme Court in *Continental Ore* confirmed that there is no defense under the act of state or compulsion doctrines where the acts and decisions were permitted under foreign law. *Id.* at 707. Thus, "[t]he act of state doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government." *Id.*

The compulsion defense thus does not extend to conduct that is sanctioned or assisted by a foreign government, but not compelled. In an antitrust action, "It is necessary that foreign law must have **coerced the defendant** into violating American antitrust law." *Mannington Mills*, 595 F.2d at 1293 (citations omitted); *accord Linseman v. World Hockey Assoc.*, 439 F. Supp. 1315, 1324 (D. Conn. 1977) (the government compulsion defense requires proof that the corporate conduct was "compelled by a foreign sovereign").

Industry agreements in restraint of trade may be *voluntary*, even though they may have been "recognized as facts of economic and industrial life by the nation's government." *United States v. Watchmakers of Switzerland*, 1962 Trade Cases (CCH) ¶ 70,600, 1962 U.S. Dist. LEXIS 5816 at *152 (S.D.N.Y. Dec. 20, 1962). "The fact that the …Government may, as a practical matter, approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate." *Id.* at *152-53.

A. Whether the Chamber Coerced Defendants' Violations of U.S. Antitrust Law is A Disputed Issue of Fact that Precludes the Entry of Judgment.

While Defendants' Motion is largely premised on the Chamber's purported authority to compel the conduct alleged, they submit no evidence demonstrating that the Chamber *in fact* compelled Defendants' violations of U.S. antitrust laws. To make this point clear, Defendants'

Statement of Undisputed Facts in support of its motion relies not on evidence as required, but on the Ministry's *amicus* brief.

As set forth in Plaintiffs' Statement of Facts above, and in response to Defendants Statement of Undisputed Facts, there are disputed issues of fact based on evidence. Even assuming, incorrectly, that the Chamber was delegated broad authority to regulate the export of vitamin C, Defendants here voluntarily reached agreements fixing supra-competitive prices for vitamin C exported to the United States.

Defendants' reliance on *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970), highlights their mistaken view of the law. In that case, the undisputed facts established that a Ministry of the government of Venezuela ordered defendants to boycott the plaintiff. *Id.* at 1293. The plaintiff argued that it should be permitted to demonstrate at trial that the order was not binding under the law of Venezuela because it was oral and without legal authority. *Id.* at 1298-99. The court agreed that the question of whether a foreign official "ordered" certain conduct is an evidentiary question, but held that whether the act of the foreign official was legal under foreign law was not a proper inquiry for the jury. *Id.* at 1301. Here, there are disputed issues of fact concerning whether the Chamber (even if the Chamber were part of the government of China) ordered Defendants' violations of law. That, as *Interamerican* confirms, is an evidentiary question.

Defendants' limited record citations do not satisfy their burden of demonstrating a lack of dispute on this material issue of fact. Defendants argue that the Chamber convened each of the meetings at which prices and production limits were agreed upon, but do not provide record cita-

tions in support of that argument.[213] Even if it were true, the fact that the Chamber convened meetings does not establish that the Chamber required Defendants to reach any agreements at those meetings (or even that attendance was compelled). As described in detail above, at meetings, *Defendants* proposed restrictions on prices and output, *Defendants* discussed those proposals, and *Defendants* either reached consensus or did not. Agreements were also made by telephone and in person outside of the Chamber meetings.[214] While the Chamber may have at times facilitated and encouraged those agreements, Defendants submit no evidence that the Chamber compelled them.

For example, with respect to coordinated shutdowns of production lines to limit supply, Defendants argue that "documents...repeatedly refer to the Chamber directing the parties to agree upon coordinated production shutdowns..." Defendants' Br. at 23-24. Defendants do not, however, cite a *single* document actually referencing a direction from the Chamber to agree on a production shutdown.[215] And many documents described above say the opposite.

Defendants also cite evidence purporting to establish that the Chamber "punished" Defendant Weisheng for breaking a production shutdown agreement by not allowing it to run a new production line. Defendants' Br. at 19 fn. 67. Yet the very evidence cited by Defendants indicates that Weisheng did not run its new production line *because the production line had problems,* not as a result of any punishment by the Chamber.[216] Moreover, as that evidence further

---

[213] Defendants' business records show that Defendants proposed and organized meetings of the Subcommittee. *See, e.g.,* PX 76; PX 136; PX 149.

[214] *See, e.g.,* PX 43; PX 74; PX 85; PX 135; PX 154.

[215] *See* Defendants' Br. at 24 n. 83 (citing Shen ¶ 61 (not referencing any directive from the Chamber); Weekly Work Report (Chan Decl., Ex. 37) (not referencing any directive from the Chamber); and Chan Decl., Ex. 38 (not referencing any directive from the Chamber).

[216] *See* PX 83 (Chan Decl., Ex. 35) at 2 ("At this meeting Weisheng…re-proposed the agenda for quota while stopping production, because their production line had problems").

and chop system by exporters of glyphosate does not represent any governmental intrusion in export pricing.[218] That case concerned exporters of glysophate, a product listed on both the 2002 MOFTEC & Customs Notice and 2003 Ministry and Customs Announcement as subject to verification and chop, who are members of CCCMC. The exporter involved in the European case produced evidence demonstrating that, as with vitamin C, the verification and chop system was established on the initiative of glysophate producers, the 'floor price' was established by the producers, and changes to that price were subject to a vote. [219] The price agreements were not binding, however, and like here, the CCCMC approved contracts with prices lower than the prices agreed to among the producers.[220]

Based on these facts, all of which are present here, the court concluded that the verification and chop system was not imposed by the state and that decisions were made "in response to market signals and without significant State interference in this regard."[221]

The verification and chop regulations also do not confer any governmental authority on the Chamber to coerce Defendants' violations of U.S. antitrust laws. As described in detail above, the only authority delegated to the chambers by those regulations is the authority to review contracts.

Vague references to "coordination" and "self-discipline" (also translated as "self-regulation") do not support Defendants' argument that the Chamber was delegated the authority to compel them to enter *per se* illegal agreements. As the Ministry has stated to this Court "[i]t is

---

[218] Case T-498/04, Zhejiang Xinan Chemical Industrial Group Co. Ltd v Council of the European Union, 2009 ECJ EUR-Lex LEXIS 529 (June 17, 2009) (Milici Decl., Ex. A) at ¶¶ 137, 141, 142, 151 and 163.

[219] *Id.* ¶¶ 141, 142.

[220] *Id.*, ¶¶ 143-149.

[221] *Id.* ¶¶ 151, 160.

only in the situation where there is a *clear regulatory record* that the Chamber is authorized and that the subcommittee is authorized can there be any situation where the Chamber and the subcommittee is acting as a state instrumentality."[222]

A clear regulatory record does not exist here because all trade associations and chambers of commerce in China have the obligation of "self-discipline" and "coordination." China's Foreign Trade Law provides that all "relevant associations and chambers of commerce *shall* … play a positive role in *coordination and self-regulation*."[223] China's new Anti-Monopoly Law, cited by Defendants, also provides that all trade associations "shall *strengthen industry self-regulation*....and safeguard the competitive order of the market."[224] And Provisional Regulations on Curbing Acts of Price Monopoly, enacted in 2003, prohibit price fixing and also provide that "[t]rade organizations should *strengthen their self-discipline* … and may not engage in the acts described in these regulations."[225] Certainly the government of China has not pronounced that the Foreign Trade and Anti-Monopoly Laws confer governmental authority on all trade associations and chambers of commerce in China to coerce their members to fix supra-competitive prices.

With respect to the Chamber at issue in this case, not even all of its members attempt to fix supra-competitive prices. Paracetemol exporters were not coerced into entering supra-

[222] Hr'g Tr. June 5, 2007 at 101:12-15.

[223] Foreign Trade Law of the People's Republic of China (Milici Decl., Ex. PP) at Art. 56

[224] Anti-Monopoly Law of the People's Republic of China (Chan Decl. Ex. 55) at Art. 11.

[225] PX 233 at Art. 14.

competitive price agreements.[226] And when penicillin producers entered a "self-regulation" or "self-discipline" agreement, its members were free to abort that agreement without penalty.[227]

Defendants' theory of compulsion also fails because there is no penalty for failing to participate in the "self-discipline" process. To the contrary, the verification and chop regulations on their face do not require any participation in a "self-discipline" process and expressly provide that non-members of a chamber are entitled to apply for and receive a chop.[228] As set forth in detail above, the 2001 State Council Export Regulations also provide that membership in chambers of commerce is voluntary. Pursuant to the 2002 Charter, the most serious penalty that the Subcommittee may impose on its members is the revocation of membership.

Defendants refer repeatedly to a concern within China about "excessive" competition that can disrupt "market order" in support of their compulsion argument. But the sources that they and Professor Shen rely upon define "excessive" competition as pricing below costs or engaging in conduct that violates consumer protection and product safety laws.[229] The State Council has thus described the acts that disrupt the "market order" as selling fake or shoddy products, smuggling, tax evasion, and commercial fraud.[230]

---

[226] Minutes of the Paracetamol Sub-Committee Meeting, March 9, 2004, *supra*.

[227] Report on Henan Xinxiang Huaxing Pharmacueticals' Refusal to Comply with the Industry's Self-Regulation Agreement (Dec. 5, 2003) (Milici Decl., Ex. QQ).

[228] *See* 2003 Ministry and Customs Announcement, *supra*, at p. 7.

[229] *See* Bruce M. Owen, *et al*, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 Antitrust L.J. 231, 251 (Chan Decl. Ex. 12) ('Owen") ("the term 'excessive competition' as it is understood in China is a misnomer...Common to almost all [examples of claimed excessive competition found in China's economy] is that the competitors have engaged **in illegal, or even criminal, acts that violate the existing competition laws, product safety laws, or consumer protection laws**..."); Yong Huang, *Pursuing the Second Best: the History, Momentum, and Remaining Issues of China's Antimonopoly Law*, 75 Antitrust L.J. 117, 129 (Chan Decl. Ex. 52) ("'bad competition'...refers to **below cost pricing"**).

[230] Decisions of the State Council on Rectifying and Standardizing the Order in the Market Economy (April 27, 2001) (Milici Decl., Ex. RR) at Arts I(1) and (2).

The scholarly articles cited by Defendants also do not support their theory of compulsion. Defendants extensively quote an article by Bruce Owen for the proposition that the government took measures to reign in "excessive competition." But the regulation Owen relies upon concerned *domestic prices* for a *specific list of twenty-one products*.[231] Moreover, that regulation, which was enacted in August 1998, was superseded by a regulation promulgated just three months later.[232] Rather than sanctioning cartels, in July of 1999, the State Council approved a regulation providing penalties for price-fixing of up to five times the amount of the illegal profits.[233]

Finally, displaying circular reasoning, Defendants quote an article by Eleanor Fox and Judge Dennis Davis of South Africa.[234] Fox and Davis, however, rely solely and uncritically *on the amicus brief submitted in this litigation*.[235]

C. The Ministry's *Amicus* Submission is Not Determinative of Compulsion

1. The *Amicus* Submission is Not Entitled to Conclusive Weight

Rather than submit current laws compelling their anticompetitive agreements, Defendants repeat the failed argument from their motion to dismiss that this Court must accept the position of the Ministry taken in its *amicus* submission that price-fixing of vitamin C is mandatory under Chinese law. According to Defendants, the credibility of the Ministry's statements may not be

---

[231] *See* Scott Kennedy, *The Price of Competition: Pricing Policies and the Struggle to Define China's Economic System*, The China Journal, No. 49 (Jan. 2003) (Milici Decl., Ex. SS) at 19.

[232] *Id.* at 24.

[233] Provisions on Administrative Penalties against Price-related Unlawful Practices, approved by the State Council of the People's Republic of China on July 10, 1999 and promulgated by the State Development and Planning Commission (Milici Decl., Ex. TT) Art. 4(1).

[234] *See* Defendants' Br. at 46 (quoting Eleanor Fox & Dennis Davis, *Industrial Policy and Competition - Developing Countries as Victims and Users* in 2006 Fordham Corp. L. Inst. International Law & Policy, Ch. 8 at 156 (Barry Hawk, ed.) (Chan Decl., Ex. 52)).

[235] *See* Fox & Davis, *supra*, at 156.

questioned by this Court, even when those statements are contrary to the facts, Chinese law, and previous statements by the Ministry.

Defendants rely, as they did in their motion to dismiss, on the position proffered by the U.S. government over 20 years ago in its *amicus* brief in *Matsushita Elec. Co. v. Zenith Radio Corp.*, (No. 83-2044), 1985 WL 669667 (June 17, 1985) ("Matsushita *Amicus* Brief"). In *Matsushita*, the U.S. did not advocate, as Defendants do here, that a court is obligated to blindly accept statements in an *amicus* submission. *See* Matsushita *Amicus* Brief at * 23 (conclusive weight is only appropriate where the statement is clear, unambiguous, internally consistent, and credible on its face).

The blind deference standard advocated by Defendants is also not supported by the Department of Justice's International Guidelines. The Guidelines provide that:

> 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.

International Guidelines § 3.32. The *amicus* submission in this case does not meet that standard: it does not identify any governmental command effective after January 1, 2002 and does not contain any details permitting the Court to see precisely how a refusal to comply with abolished regulations would give rise to the imposition of severe sanctions under Chinese law.

In any event, neither the position taken by the U.S. government in a 20 year old *amicus* brief nor the International Guidelines govern the determination of foreign law by U.S. courts. Rule 44.1, which does govern that issue, expressly gives the Court broad discretion in the materials it can consider in determining foreign law:

> 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. The Advisory Committee note to Rule 44.1 emphasizes the wide range of materials the courts can consider when examining foreign law:

> In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found . . .
> [T]he Rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties."

The Second Circuit urges district courts to use the flexibility provided by Rule 44.1 and look at all relevant materials. *Curly v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998).

Consistent with Rule 44.1, courts in this circuit do not defer blindly to statements made by foreign governments in *amicus* submissions when making determinations of foreign law. *See*, e.g., *Duran v. Beaumont*, 534 F.3d 142, (2d. Cir. 2008) (holding that the district court was "not bound to follow" an interpretation of Chilean law submitted by affidavit of the Chilean Central Authority); *U.S. v. Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532 *7 (S.D.N.Y. April 12, 2002) (finding that a position taken by the Republic of Austria in an *amicus* brief on an issue of Austrian law was "without merit").

In *Karaha Bodas Co., L.L.C. v. Pertamina*, 313 F.3d 70, 92 (2d Cir. 2002), for example, the Indonesian Ministry of Finance submitted an *amicus* brief stating that, pursuant to the law of Indonesia, the government had an interest in 15 bank accounts and those accounts were thus not subject to garnishment. Rather than simply accepting this statement as conclusive on the issue of Indonesian law, the Second Circuit considered the text of the statutes cited by the Ministry, the evidentiary record before it, and the arguments of the opposing party. The Second Circuit held that "a foreign sovereign's views regarding its own laws merit – although they do not command

– some degree of deference" and agreed with the Ministry that certain accounts could not be garnished. *Id.* at 92. The Second Circuit, however, rejected the Ministry's position as to certain other accounts (the "Retention" accounts) because no Indonesian statute was cited in support of that position. *Id.*

Despite the clear holding of *Karaha Bodas*, Defendants argue that the Second Circuit somehow did not reject a conclusive deference standard in that case. According to Defendants, because the parties failed to argue that the conclusive deference standard should be applied and did not cite the only cases that might support such a standard, all of which are over sixty years old and pre-date Rule 44.1, the issue was never addressed by the court. But the decision by the parties in *Karaha Bodas* not to raise arguments that are obviously foreclosed by the federal rules does nothing to change the holding of the Second Circuit.

Regardless of the deference due a foreign sovereign's interpretation of its own laws, case law also demonstrates that summary judgment often cannot resolve foreign law issues where there are fact issues involving what the law requires and whether the foreign law grants discretion to parties. In *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001), for example, the issue on appeal was whether a point of Iranian law was properly resolved on summary judgment. The particular issue was whether Iranian corporate law required shareholders to physically appear in Iran – to "come to the company" -- to collect dividends. Defendant, the Islamic Republic of Iran, submitted affidavits showing the "come to the country" rule was widely followed in Iran. The appeals court held that "the affidavits, however, fall short of proving that this general practice reflects a legal requirement applicable to all Iranian corporations." *Id.* at 1109. The appeals court held that "we think the issue sufficiently close to require a

trial on [plaintiff] McKesson's futility claim, as well as Iran's "come to the company" defense." *Id.*

Access Telecom, Inc. v. MCI Telecommunications, Inc., 197 F.3d 694 (5th Cir. 1999), involved interpretation of an Official Circular of the Mexican Secretary of Communications and Telecommunications ("SCT") that stated certain acts were illegal under Mexican law. The Fifth Circuit rejected the SCT's Official Circular, and held:

> The Republic of Mexico is not a litigant before this court and neither is the SCT. And while the evidence shows that the SCT was empowered to enforce Mexican law, it does not persuasively show that the SCT was empowered to interpret Mexican law. The fact that U.S. courts routinely give deference to U.S. agencies empowered to interpret U.S. law and U.S. courts may give deference to foreign governments before the court does not entail that U.S. courts must give deference to all agency determinations made by all foreign agencies not before the court. More importantly, the most relevant official circular at issue is dated 1996, after the new laws went into effect; thus, it is unclear whether the SCT position was that such activities were currently illegal or had always been illegal. For these reasons, we do not feel compelled to credit the SCT's determinations without analysis.

Id. at 714.

2. The *Amicus* Submission Is Entitled to Little Weight Here

Defendants alternatively argue that the Ministry's *amicus* submission should be accorded "substantial deference" relying on *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). In *Chevron,* the Supreme Court held that a Court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* It is readily apparent from the *amicus* submission, however, that the views expressed by the Ministry it this litigation are based on the licensing and quota regime, which ended on January 1, 2002, and not on any existing law or regulation. The Supreme Court has "***never applied***" *Chevron* deference to agency positions that "are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988);

see also Rhodes-Bradford v. Keisler, 507 F.3d 77, 80 (2d Cir. 2007) (according no deference where the "government is unable to cite a single regulation" supporting its position).

It is also established law that litigation positions by an agency are not entitled to *Chevron* deference. *NRDC v. Abraham*, 355 F.3d 179, 201 (2d Cir. 2004); *see Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (a position adopted in the course of litigation lacks the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify *Chevron* deference). In addition, informal agency actions are not to receive *Chevron* deference, and this includes agency *amicus* briefs. *Matz v. Household Int'l Tax Reduction Inv. Plan*, 388 F.3d 570, 573(7th Cir. 2004).

Moreover, "an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference,' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n. 30 (1987) (*quoting Watt v. Alaska*, 451 U.S. 259, 273 (1981)). Where, as here, the government "takes a convenient litigating position" that conflicts with its prior statements, that position is not entitled to deference. *Bowen*, 488 U.S. at 213.

It cannot be said any longer that the Ministry's *amicus* brief is entitled to substantial deference because it has become clear that the Ministry is taking conflicting positions in different forums. Dr. Paula Stern has substantial specialized knowledge and expertise in international trade and, in particular, in China's negotiations concerning its admission to the WTO and other trade matters. Dr. Stern has submitted an expert report in which she concludes:

> For the defendants in this case to suggest that the Chinese government compelled the VC producers to participate in an export cartel is to contradict the official assurances given by the PRC at the time of its WTO accession in 2001 and to contradict numerous statements made since. Taken together or separately, these statements provide a picture of an eco-

> nomic regulatory policy that reduces the role of government in setting prices, encourages competition in the marketplace, and permits "voluntariness of defendants' actions."[236]

For example, the Ministry states to this Court that the price coordination facilitated by the Chamber "is a government-mandated price and output control regime." *Am.* Br. at 3. But the head of the Chinese Trade Delegation, a Vice Minister of the Ministry, has specifically stated to the WTO that China "gave up export administration" of vitamin C.[237] And, prior to that, the head of Chinese Trade Delegation, the Director General of the Ministry, stated to the WTO that export prices are "fixed by enterprises without government intervention."[238] The Ministry has represented to the U.S. Department of Commerce that:

> Currently, enterprises produce, sell and price their products according to the rules of the market economy. *There are no State restrictions on price or output.* In particular, there is significant *competition among companies participating in of Sin-U.S. trade*; industries exporting to the United States have grown into vibrant fast-growing industries with competition as the motivating factor.[239]

The views expressed by the Ministry in its *amicus* brief are also contradicted by the record in this case. As this Court noted in its decision denying Defendants' Motion to Dismiss, testimony from a person responsible for negotiating export contracts on behalf of one of the Defendants that he could not remember the current price limitation "suggests that the hand of the government was not weighing as heavily on defendants as defendants and the Ministry would have this court believe." *In re Vitamin C,* 584 F. Supp. 2d at 555-56. Zhang Yingren, the Deputy General Manager of Hebei, also has testified that he "cannot recall the exact figure" of the cur-

---

[236] Stern Report ¶ 11.

[237] 2002 Transitional Review Statement, *supra*, at 3.

[238] 2000 Communication from China, *supra*, at 16.

[239] Comments of the Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce on Determination and Treatment of Market Oriented Enterprises (June 25, 2007) (Milici Decl., Ex. UU) at 4-5.

rent export volume limitation and had not even written it down.[240] Defendants' own business records establish that they considered their agreements mere "gentlemen's agreements" and that Defendants questioned whether their voluntary agreements could be enforced.[241] And, as set forth above, Defendants disregarded even the minimum price subject to verification and chop when it suited them to do so.

D. The Purported Delegation of Governmental Authority to the Chamber is Insufficient to Establish Sovereign Compulsion under U.S. Law.

Even accepting Defendants' representations concerning Chinese law as true, the foreign sovereign compulsion defense does not extend to the unfettered delegations of governmental authority argued here. *See Williams*, 694 F.2d at 303 (the compulsion is available only when the conduct alleged was "mandated by a *foreign sovereign*"); *Mannington Mills*, 595 F.2d at 1293 ("*foreign law* must have coerced" the violations of U.S. antitrust law). Defendants novel theory that the sovereign compulsion defense may be invoked based upon discretionary acts taken by a non-sovereign entity, such as the Chamber, is completely without support.

Defendants rely primarily on *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), which is inapposite. In *Southern Motor Carriers*, the Supreme Court addressed a Mississippi statute requiring the State Public Service Commission, a state agency and not a non-governmental organization, to prescribe rates for motor common carriers on the basis of statutorily enumerated factors. *Id.* at 65 n. 25. In carrying out its rate-setting responsibilities, the agency encouraged common carriers to submit joint rate proposals. *Id.* at 64. The Supreme Court held that the state action doctrine applied because Mississippi had clearly articu-

[240] Zhang Dep. 134:5-135:1.

[241] *See, e.g.*, PX 42 at 8; PX 141.

lated an intent to displace competition by requiring the Commission to prescribe trucking rates. *Id.* at 65.

In reaching its decision, the Supreme Court specifically distinguished *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982). *Id.* at 65 n.25. In *Boulder*, the Supreme Court concluded that the state action defense did not apply because, while the defendant municipality acted pursuant to authority delegated by the state when it restricted competition, it was authorized to choose free-market competition as an alternative to regulation. *Id.* In contrast, the state agency at issue in *Southern Motor Carriers* was required to set common carrier rates pursuant to specifically enumerated factors that bore "no discernible relationship to the prices that would be set by a perfectly efficient and unregulated market." *Id.*

As the foregoing discussion makes clear, there are no analogies between *Southern Motor Carriers* and this case.

First, the defense of sovereign compulsion is distinct from the state action doctrine at issue in *Southern Motor Carriers*. As the United States government explained in its *amicus* brief in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.* (No. 83-2044), 1985 WL 669667 (June 17, 1985) applying the state action doctrine in the foreign context:

> *would present private firms with innumerable opportunities for evasion of antitrust requirements were any arguable "authorization" of the challenged conduct sufficient to give rise to the defense*.... Surely the mere fact that a trade restraint is *consistent* with the law of a foreign national's home state *is not in itself a defense to an antitrust violation*. Nor should it lightly be inferred that Congress intended to defer to foreign sovereigns to prescribe the norms for the volitional conduct of private persons concerning trade restraints directly affecting competition in the United States.

Third, Defendants quibble about whether China has stated that it achieved "market economy" status or whether it has merely stated that it has made *progress* towards achieving market economy status. China's second thoughts about the its own past statements about its market economy are not relevant to this case. What is relevant is that while Professor Shen relies on documents from the early 1990s, Dr. Stern's report establishes that China has repeatedly emphasized that such stale evidence is irrelevant to evaluating the current status of its current foreign trade regime.

Finally, Defendants argue that Dr. Stern's report should be disregarded because when posed the question of whether it was her "intention … to accuse the government of China of lying to the Court in this case," Dr. Stern did not reply with an unqualified "yes." This is a strange argument from Defendants because the Ministry has repeatedly stated to the Court that it is a single agency and does not speak for the entire Government of China.[249] Dr. Stern appropriately responded to Defendants that she has great respect for the government of China, and that "there are serious contradictions" between the statements made in this case and official statements by China, which may be unintended and caused by a lack of interagency or intra-agency review.[250] Dr. Stern is correct; it not necessary for her or this Court to conclude that the Ministry is deliberately lying.

G. Speta's Report Is Irrelevant

In support of their motion for summary judgment, Defendants also rely on the expert report of Professor James B. Speta.[251] Professor Speta opines "that the system governing the Chi-

---

[249] *See, e.g.*, May 3, 2006 Hearing Transcript (Milici Decl., Ex. WW) at 40:25-41:2.

[250] Transcript of July 28, 2009 deposition of Dr. Paula Stern (Milici Decl., Ex. XX) at 37:21-38:23.

[251] *See* Report of James B. Speta (Chan Decl., Ex. 5).

nese Vitamin C export industry exhibits the principal characteristics of a 'regulated industry.'"[252] Professor Speta's opinion is an academic exercise in comparative law;[253] it is irrelevant to any of the legal or factual issues concerning Defendants' liability. This Court should, therefore, disregard Professor Speta's expert report.

Fundamentally, Professor Speta's opinion that the Chinese vitamin C export industry "has all the characteristics of a regulated industry" is not germane to Defendants' burden of proving their affirmative defense of government compulsion. It is telling that, although Professor Speta discusses various exemptions from antitrust laws in his lengthy report, he ***expressly disclaims*** offering any opinions with respect to (1) whether the Vitamin C export industry in China falls with the act of state doctrine, (2) whether any implied immunity doctrine should apply, and (3) whether any express or implied antitrust exemption should apply in this case.[254] And Defendants cite no authority for the proposition that an industry is shielded from antitrust liability merely because it is "regulated" in some generic sense.[255]

Professor Speta admits that "within what is broadly defined as a regulated industry, each specific sector has its own statutory framework, its own regulatory body of law, a body of case

---

[252] Speta Report at 3.

[253] Professor Speta testified that his work was "a fairly standard comparative law project of the kind [he has] done a number of times in the past to compare regulatory systems." Transcript of May 1, 2009 Deposition of James B. Speta ("Speta Dep.") at 29:8-12 (Milici Decl., Ex. YY).

[254] Speta Dep. at 65:23-66:11, 69:17-23. *See also Id.* at 71:11-16 ("I'm not offering a legal conclusion on the scope of or the application of an antitrust immunity in this litigation.").

[255] Professor Speta conceded that the definition of "regulated industry" he employs in his comparative law analysis "doesn't come out of any particular case law, it comes out of a combination of sources." *Id.* at 25:1-4. And although "[t]here are a variety of different kinds and degrees of regulation in a variety of different industries," he merely offers the unremarkable—and irrelevant—proposition "there are a body of industries that share regulatory characteristics that we can define as regulated industries." *Id.* 24:11-21.

II. Defendants' Have Not Met Their Burden Under The Act of State Doctrine

Under the act of state doctrine, U.S. courts are precluded from "inquiring into the validity of the public acts a recognized foreign sovereign committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). *See also Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979). However, the doctrine "does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government." *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 392 (3d Cir. 2006) (*quoting Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 606 (9th Cir.1976) ("governmental approval or foreign government involvement" will not alone immunize the actions of private parties from suit).

Under the unanimous Supreme Court decision in *Kirkpatrick*, the act of state doctrine **can only apply** when the relief sought "require[s] a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990) (emphasis added). This is the "factual predicate for application of the act of state doctrine." *Id.* Without this factual predicate, nothing—not policy considerations, comity concerns, or anything else—will trigger the act of state doctrine.

Sovereign acts that facilitate an antitrust conspiracy—even when key to the success of that conspiracy—do not prevent a U.S. court from adjudicating antitrust claims by injured parties in the United States. *See United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927).

A. Defendants Have Not Identified Any Official Act of the Chinese Government That Would Be Invalidated By Granting Relief to Plaintiffs

Defendants do not identify any Chinese law, regulation, or official act that would be declared invalid by granting Plaintiffs' relief. Because the licensing and quota system ended as of

January 1, 2002, the only sovereign acts at issue here are the regulations governing verification and chop. Granting Plaintiffs' relief does not require any inquiry into the validity of those regulations because Plaintiffs' do not challenge them and their injuries do not flow from them. The most that can be said of verification and chop is that it aided Defendants' ability to enforce their voluntary and unlawful agreements.

O.N.E. Shipping Ltd. v. Flota Mercante Grancolumbiana S.A., 830 F.2d 449, 451 (2d Cir. 1987), and *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977) on which Defendants rely, further reinforce why the act of state doctrine is inapplicable to the present case. In *O.N.E. Shipping*, the plaintiff's injuries were directly caused by Columbia's cargo reservation laws, which the plaintiff alleged defendants had manipulated. 830 F.2d at 451. Likewise, in *Hunt*, the plaintiff alleged that the defendants conspired to cause the government of Libya to move against it and sought damages arising from Libya's sovereign act. 550 F.2d at 70-72. Here, Plaintiffs do not seek to establish that Defendants caused the government of China to take an action that harmed them and do not seek any damages arising from a sovereign act of the Chinese government. To the contrary, this case concerns the voluntary actions of Defendants and the damages inflicted upon Plaintiffs and the class by those actions. *See Oceanic Exploration Co. v. ConocoPhillips, Inc.*, No. 04-332 (EGS), 2006 WL 2711527, at *14-15 (D.D.C. 2006) (act of state doctrine inapplicable where the focus was on defendant's "unlawful conduct and how that conduct resulted in harm to the plaintiffs" rather than any act of state); *Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1099 (N.D. Cal. 2008).

Defendants' argument that this Court may not declare illegitimate China's policies concerning the importance of avoiding "harmful" or "malignant" competition goes too far. To the extent that any such policies exist, they extend to all products, as the authorities cited by Defen-

dants demonstrate. Entering judgment for Defendants based upon such generally applicable principles would effectively grant immunity to all Chinese companies from liability under the Sherman Act without regard to the voluntariness of their conduct or the substantial harm to U.S. companies flowing from their volitional acts.

B. Defendants Are Not Entitled to Judgment Based Upon Any Act of the Chamber.

As Plaintiffs have established, the Chamber did not act with governmental authority with respect to the export of vitamin C. Thus, immunity from U.S. antitrust laws may not be premised on any act of the Chamber.

Even if acts of the Chamber could be attributed to the government of China, Defendants have not identified any official act of the Chamber that would be invalidated by granting relief to Plaintiffs. The Chamber's acts here were limited to convening and attending meetings at which Defendants reached unlawful agreements. Those acts of the Chamber would not be invalidated by granting relief to Plaintiffs. *See Monolithic Power Sys., Inc. v. O2 Micro Intern. Ltd.*, Nos. C 04-2000, C 06-2929, 2006 WL 2975587, at *4 (N.D.Cal. Oct. 18, 2006) (doctrine does not apply where "sovereign activity merely formed the background to the dispute or in which the only governmental actions were the neutral application of the laws.") (citation omitted); *Okinawa Dugong*, 543 F. Supp. 2d at 1099 (mere involvement by foreign sovereign in dispute is insufficient to trigger act of state doctrine).

C. Separation of Power Issues Are Not Implicated

No separation of power issues are implicated by this litigation which is based on U.S. enforcement actions against international cartels. Defendants reliance on *Interntational Association of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354 (9th Cir. 1981) is thus

misplaced. In *Int'l Ass'n of Machinists*, the court concluded that an injunction against a sovereign nation would amount to an order from a domestic court instructing a foreign nation to alter its means of allocating resources. That observation not only fails to "speak directly" to the issues raised here, as Defendants claim, it is irrelevant because Plaintiffs do not seek any injunction against the government of China.

Further, the court in *Int'l Ass'n of Machinists,* after reviewing "extensive documentation of the involvement of our executive and legislative branches with the oil question," found that there was "no question that the availability of oil has become a significant factor in international relations" and "that OPEC and its activities are carefully considered in the formulation of American foreign policy." 649 F.2d at 1360-61.

In contrast, there is no basis in the present record for concluding that the either of the political branches would view adjudication of this case as hindering international relations. *Envtl. Tectonics*, 847 F.2d at 1061 (defendants must "come forward with proof that adjudication of [] plaintiff's claim poses a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the United States government"); *see also Williams v. Curtiss-Wright, Corp.*, 694 F.2d 300, 304 (3d Cir. 1982).[262]

D. Only Conduct Within the Borders of China Is Within the Ambit of the Act of State Doctrine.

The act of state doctrine does not apply to conduct that is intended to effect and does affect the United States. *See Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 686-7 (1976). As the court of appeals held in *Allied Bank Int'l v. Banco Credito Agricola de Cartago,* 757 F.2d 516, 522 (2d Cir. 1985):

[262] There are established mechanisms for the Executive Branch to submit its views in cases and no such submission, called a "Statement of Interest" was made in this case. See 28 U.S.C. § 517; *Beatty v. Republic of Iraq*, 480 F. Supp. 2d 60, 82-84 (D.D.C. 2007).

> Acts of foreign governments purporting to have extraterritorial effect – and consequently, by definition, falling outside the scope of the act of state doctrine – should be recognized by the courts only if they are consistent with the law and policy of the United States.

(situs of subject of notes was in U.S.); *In Re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d 544, 556 (S.D.N.Y. 2002) (act of state doctrine does not apply where effect of foreign governmental act is in the United States).

Here, as shown above, Defendants violated the Sherman Act *while in the United States*. Further, Defendants' conduct within China was intended to affect and did affect commerce and consumers in the United States.[263]

E. Defendants Are Not Entitled to Judgment on Comity Grounds

Comity is a discretionary doctrine and is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard to both 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 (1895); *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 798 (1993). It is an affirmative defense as to which defendants bear the burden of establishing its application. *Allstate Life Ins. Co. v. Linter Group Ltd.*,

---

[263] In addition, a plurality of the Supreme Court has indicated that the act of state doctrine applies only to "the public and governmental acts of sovereign states," not "their private and commercial acts." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). Just months after the Court's decision in *Dunhill*, Congress codified the restrictive understanding of sovereign immunity in the Foreign Sovereign Immunity Act ("FSIA"). See 28 U.S.C. § 1605(a)(2)-(3). In so doing, Congress explicitly approved of Dunhill's commercial activity exception to the act of state doctrine. H.R. Rep. No. 94-1487, at 20 n.1 (1976). Congress nonetheless "found it unnecessary to address the act of state doctrine" in the FSIA precisely because "decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine." *Id.* In particular, Congress indicated its understanding "that the [act of state] doctrine would not apply to the cases covered by [the FSIA], whose touchstone is a concept of 'commercial activity' involving significant jurisdictional contacts with this country." *Id.* The Executive Branch has likewise concluded that the act of state doctrine applies only if the challenged conduct "is governmental, rather than commercial." International Guidelines § 3.33.

994 F.2d 996, 999 (2d Cir. 1993); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998).

To trigger the comity doctrine, a **"true conflict"** must exist between American and foreign law such that compliance with the laws of both countries must be impossible. *Hartford Fire*, 509 U.S. at 798 (compliance with laws of both U.S. and Britain was possible); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006) ("if there is no foreign judgment or ongoing proceeding in a foreign tribunal, application of international comity principles requires the presence of a 'true conflict' between United States law and foreign law"); *In re Maxwell Comm. Corp.*, 93 F.3d 1036, 1049-50 (2d Cir. 1996).

As this Court noted at the hearing on Defendants' Motion to Dismiss, Defendants rely on a false conflict to support their requests for judgment.[264] The Defendants have, at best, produced evidence suggesting that price-fixing agreements by vitamin C exporters are aided by regulations issued by the Ministry and are consistent with vague national policies. But even if it is true that Defendants' conspiracy is permitted under Chinese law and consistent with Chinese trade policy, those facts would not provide a basis for extending comity because:

> 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*. No conflict exists, for these purposes, where a person subject to regulation by two states can comply with the laws of both.

Hartford Fire, 509 U.S. at 799 (emphasis added); see also *United States v. Portrait of Wally*, 2002 WL 553532, at *10 (S.D.N.Y. Apr. 12, 2002) ("comity does not operate as a pre-emption doctrine. . . merely because there are foreign laws that might also apply").

Moreover, defendants here urge the Court to defer not to a pervasive regulatory scheme, but to the actions of an industry committee whose private, corporate members include the defen-

[264] June 5, 2007 Hr. Tr. at 114:9-10.

dants. Defendants fail to show that any court has ever deferred to the actions of such a committee. *See, e.g., Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 129 (E.D.N.Y. 2000) (noting no court has ever deferred to executive-established commission).

Here, compliance with both the Sherman Act and the verification and chop system is not only possible, but actually common. Because, as in *Hartford Fire*, foreign law does not "require[] them to act in some fashion prohibited by the law of the United States," Defendants have not met the threshold for extending comity. *Hartford Fire*, 509 U.S. at 799. As a result, the court need not "address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the grounds of international comity." *Id.*

In any event, even other considerations related to comity were considered, they would weigh strongly in favor of denying Defendants' motion: (1) there is no true conflict of law or policy; (2) plaintiffs are U.S. citizens and the fact that defendants are Chinese companies does not distinguish this case from the numerous others involving foreign defendants; (3) the United States has a long-established interest in the enforcement of its antitrust laws; (4) defendants have pointed to no ongoing or pending proceeding taking place in China; (5) defendants unquestionably intended to and did in fact harm and affect U.S. commerce; and (6) the implications upon foreign relations are minimal given that the United States has not intervened in this case and the Sherman Act specifically gives the courts federal question jurisdiction to resolve antitrust matters.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' Motion for Summary Judgment or, in the Alternative, Determination of Foreign Law and Entry of Judgment be denied.

Dated: October 16, 2009

Respectfully submitted,

/s/ Jennifer Milici
William A. Isaacson
Tanya Chutkan
Jennifer Milici
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW, Suite 800
Washington, DC 20015
Tel.: (202) 237-2727
Fax: (202) 237-6131

Alanna Rutherford (AR-0497)
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, New York 10022
Tel: (212) 446-2300
Fax: (212) 446-2350

James T. Southwick
Shawn L. Raymond
SUSMAN GODFREY L.L.P.
1000 Louisiana, Suite 5100
Houston, TX 77002
Tel.: (713) 651-9366
Fax: (713) 654-6666

Suyash Agrawal (SA-2189)
SUSMAN GODFREY L.L.P.
654 Madison Avenue, 5th Floor
New York, NY 10065-8404
Tel.: (212) 336-8330
Fax: (212) 336-8340

Michael D. Hausfeld
Brian A. Ratner
HAUSFELD LLP
1700 K Street, NW Suite 650
Washington, DC 20006
Tel: (202) 540-7200
Fax: (202) 540-7201

Brent W. Landau
HAUSFELD LLP
1604 Locust St, 2nd floor
Philadelphia, PA 19103
Tel: (215) 985-3270
Fax: (215) 985-3271

Counsel for Plaintiffs Animal Science Products, Inc., The Ranis Company, Inc., and Magno-Humphries Laboratories, Inc.

CERTIFICATE OF SERVICE

I, hereby certify that a true and correct copy of Plaintiffs' Opposition To Defendants' Motion For Summary Judgment Or Determination Of Foreign Law And Entry Of Judgment was served on this 16th day of October, 2009 on each of the persons on the attached service list, via electronic mail.

/s/ Jennifer Milici
Jennifer Milici

SERVICE LIST

Charles H. Critchlow, Esq.
Darrell Prescott, Esq.
James Bailey, Esq.
Christopher Chinn, Esq.
BAKER & McKENZIE LLP
1114 Avenue of the Americas
New York, NY 10036
Tel: (212) 626-4476
Charles.H.Critchlow@bakernet.com
Darrell.Prescott@bakernet.com
James.D.Bailey@bakernet.com
Christopher.Chinn@bakernet.com

Attorneys for Defendant Hebei Welcome Pharmaceutical Co., Ltd.

Stephen V. Bomse, Esq.
ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Tel: (415) 773-5700
sbomse@orrick.com

Richard S. Goldstein, Esq.
Annabelle Chan, Esq.
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Tel: (212) 506-5000
rgoldstein@orrick.com
agoldstein@orrick.com

Jonathan M. Palmer, Esq.
ORRICK, HERRINGTON & SUTCLIFFE LLP
719 Second Avenue, Suite 1000
Seattle, WA 98104-7097
Tel: (206) 839-4300
Jpalmer@orrick.com

Attorneys for Defendant Jiangsu Jiangshan Pharmaceutical Co., Ltd.

James I. Serota, Esq.
Kenneth Lapatine, Esq.
GREENBERG TRAURIG, LLP
200 Park Avenue
New York, NY 10036
Tel: (212) 801-2277
serotaj@gtlaw.com
lapatinek@gtlaw.com
izowerr@gtlaw.com
AngelovaA@gtlaw.com

Attorneys for Defendant Northeast Pharmaceutical Group Co., Ltd.

Daniel S. Mason, Esq.
Joseph Bell, Esq.
Jiangxiao Hou, Esq.
ZELLE HOFMANN VOELBEL & MASON LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
Tel: (415) 693-0700
dmason@zelle.com
jbell@zelle.com
jhou@zelle.com

Attorneys for Defendant Shijiazhuang Pharma.
Weisheng Pharmaceutical (Shijiazhuang) Co., Ltd.