UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE VITAMIN C ANTITRUST LITIGATION **This Document Relates To:**	MASTER FILE 06-MD-1738 (DGT)(JO)
ANIMAL SCIENCE PRODUCTS, INC. and THE RANIS COMPANY, INC. **Plaintiffs,** **- v. -** **HEBEI WELCOME PHARMACEUTICAL CO. LTD.; et al.,** **Defendants.**	Case No. CV 05-453 (DGT)(JO)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR DETERMINATION OF FOREIGN LAW AND ENTRY OF JUDGMENT PURSUANT TO RULE 44.1, FED. R. CIV. P.

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PRELIMINARY STATEMENT

There are many notable deficiencies in Plaintiffs' Opposition to Defendants' motion for summary judgment. However, three stand out:

- First, with few exceptions, Plaintiffs do not attempt to respond to Defendants' actual position. Instead, they misconstrue what Defendants have said in order to reply to their own straw-man version of Defendants' arguments and analysis.

- Second, consistent with that approach, Plaintiffs all but ignore (and in one important instance *completely* ignore) what the Chinese government has said about the nature of its legal and regulatory system.

- Third, and most striking, Defendants have provided the Court with a detailed analysis of Chinese law and regulatory practice by a distinguished legal expert from the People's Republic of China, and the Chinese government has stated, and twice re-affirmed, that Defendants took the actions that Plaintiffs challenge in accordance with the requirements of Chinese law and in furtherance of China's national trade policy.[1] Plaintiffs offer no expert rebuttal to these submissions, yet they nonetheless ask the Court to conclude that Defendants' expert *and the government of China* have fundamentally misrepresented the nature of China's legal and regulatory system as applied to vitamin C export trade.

Defendants have explained directly and succinctly that since 1994, and throughout the period at issue in this litigation, China has regulated vitamin C exports in order to maintain an orderly market, avoid destructive competition and promote China's interest in maintaining a profitable vitamin C export industry. The government of China has set forth this system of regulation in clear and unequivocal terms in several submissions to this Court. Plaintiffs' inability to find anyone willing or able to support their contrary position simply underscores the

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[1] These statements are: Brief of *Amicus Curiae* the Ministry of Commerce of the People's Republic of China in Support of the Defendants' Motion to Dismiss the Complaint, dated September 22, 2006 ("*Amicus* Submission") (Declaration of Annabelle Chan in Support of Defendants' Motion for Summary Judgment or, in the Alternative, for a Determination of Foreign Law and Entry of Judgment Pursuant to Rule 44.1, Fed. R. Civ. P., dated August 31, 2009 ("Chan Decl."), Ex. 1); Statement in *In re Vitamin C Antitrust Litigation* (June 9, 2008) ("6/9/08 Statement") (Chan Decl., Ex. 3) and Statement in *In re Vitamin C Antitrust Litigation* (August 31, 2009) ("8/31/09 Statement") Declaration of Steven R. Newmark in Support of Defendants' Motion for Summary Judgment or, in the Alternative, for Determination of Foreign Law and Entry of Judgment Pursuant to Rule 44.1, Fed. R. Civ. P. ("Newmark Decl."), Ex. 1), served by email from Joel Mitnick, counsel to the Ministry, on August 31, 2009 (Newmark Decl., Ex. 2). Although the point has been explained at some length previously, an *amicus curiae* brief is the recognized method for a foreign government to make its official views known to a United States court. *See* Defendants' Reply Memorandum in Support of Motion to Dismiss ("MTD Reply") (D.E. 72) at 9-10 for a full citation to the relevant authorities.

reasons why Defendants' motion should be granted.

ARGUMENT

I. This Motion Presents an Issue of Law Appropriate for Resolution on a Motion for Summary Judgment or Under Rule 44.1, Fed. R. Civ. P.

Plaintiffs' assertions that this case should proceed to trial because there are disputed issues of material fact is wrong. The issue presented by this motion involves the nature of Chinese law and regulation, which is an issue of law for the Court, not an issue of fact to be resolved by a trial – let alone a jury trial. Defendants explained that point in their opening brief.[2] Plaintiffs offer no response – and for good reason.

Rule 44.1 explicitly states that determination of the content of foreign law presents an issue of law, not fact.[3] Moreover, disagreements between the parties about what Chinese law provides is no bar to resolution of that legal issue under Rule 56. *See Kim v. Co-operative Centrale Raiffeisen-Boerenleenbank B.A.,* 364 F. Supp. 2d 346, 349 (S.D.N.Y. 2005) ("Summary judgment is not inappropriate…when the parties present conflicting evidence about the 'content, applicability, or interpretation of foreign law'"); *see also Access Telecom v. MCI Telecomm. Corp.,* 197 F.3d 694, 713 (5th Cir. 1999); *Banco de Credito Indus., S.A. v. Tesoreria General,* 990 F.2d 827, 838 (5th Cir. 1993); *Rutgerswerke AG v. Abex Corp.,* 2002 WL 1203836 at *16 (S.D.N.Y. 2002); Def. Mem. at 27 *et seq.*[4] Defendants' motion, accordingly, is ripe for

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[2] Memorandum of Law in Support of Defendants' Motion for Summary Judgment or, in the Alternative, for Determination of Foreign Law and Entry of Judgment Pursuant to Rule 44.1, Fed. R. Civ. P. ("Def. Mem.") at 27-30.

[3] Although the Local rules do not contemplate a further reply to Plaintiffs' responsive Local Rule 56.1 Statement, Defendants note that because their summary judgment motion presents an issue of law, not fact, the purported material facts that Plaintiffs set forth in the initial part of their responsive Statement are either irrelevant or, in any event, do not prevent entry of judgment in Defendants' favor. Moreover, in many instances where Plaintiffs purport to respond to Defendants' Local Rule 56.1 Statement, the response amounts to arguments of counsel, not qualified in Chinese law, who seek to attach their own interpretation to documents that are in no way inconsistent with the statements of the Chinese government regarding the compulsory regulatory process applicable to Defendants.

[4] Plaintiffs also offer no response to Defendants' observation that the legal issue presented here can be resolved definitively as a motion for determination under Rule 44.1, itself. *See* Def. Mem. at 30.

conclusive resolution.[5]

II. Plaintiffs' Discussion of Earlier Regulations Misses the Point of Why That Information Was Presented and Their Contention That Defendants Rely on Purportedly "Irrelevant" or "Rescinded" Regulations Is Mistaken

Plaintiffs' repeated assertions that Defendants rely upon laws and regulations that are irrelevant because they were rescinded or abandoned by the time of the alleged conspiracy set forth in the complaint are incorrect and fundamentally miss the point of the discussion.[6]

First, a central point made by Defendants' submission, and Professor Shen's Report, is that there has been a basic *continuity* in China's approach to regulating the export trade of certain key commodities, including Vitamin C. This policy is clearly reflected in the 1994 Foreign Trade Law,[7] as well as in statements by the head of MOFTEC in the late 1980s which, among other things, urged companies "to unite and act in unison" in foreign trade.[8] That policy was implemented in regulations delegating regulatory responsibilities to Chambers in the early

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[5] In light of the unambiguous provisions of Rule 44.1 as well as the status accorded to an official statement of a foreign government (whether in the form of an *amicus* brief or otherwise), Plaintiffs' repeated assertions (Plaintiffs Memorandum in Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, for Determination of Foreign Law and Entry of Judgment ("Pl. Mem.") at, *e.g.*, 47), that an *amicus* brief is not "evidence," is not only unpersuasive, but mystifying.

[6] *See* Pl. Mem. at 2, 25, 32-35, 41.

[7] *See* Foreign Trade Law of the People's Republic of China (Promulgated by Order No. 22 of the President of the People's Republic of China on May 12, 1994) ("1994 Foreign Trade Law") (Newmark Decl., Ex. 3 at Art. 1, 16, 19, 20 and 24).

[8] Chan Decl., Ex. 9 at 36. For reasons that are, at best, murky, Plaintiffs claim that the words about acting in unison do not appear in the cited documents. *See* Plaintiffs' Responses to Defendants' Local Rule 56.1 Statement in Support of Their Motion for Summary Judgment at 22. What Plaintiffs mean when they say that is not that Defendants have made up something that is not there, but simply that they believe that a more precise translation would be, either, "to present a united front" (Chan Decl., Ex. 13 at ¶ 1) or "to achieve a united approach to outside parties" (*id.*, Ex. 14 at p. 5). Whatever subtle distinctions Plaintiffs hope to draw with this linguistic nit-picking, they certainly do not undermine Defendants' basic point that the Chinese government was directing Chinese exporters to act in a coordinated fashion in order to further China's national trade policy.

Moreover, Defendants believe that their translation actually is more true to the words in question. The same four Chinese characters appear in both Chan Decl., Ex. 13 and Chan Decl., Ex. 14. The four characters are "lianhe tongyi yizhi duiwai" which, literally translated, mean "unite/in unison/unanimity/in dealing with the foreign." (In addition, how Plaintiffs can criticize Defendants' supposed linguistic imprecision when they translate the same exact Chinese characters in two different ways is curious, to say the least. *Compare* Plaintiffs' translations of Chan Decl., Ex. 13 at ¶ 1 and Chan Decl., Ex. 14 at p. 5, respectively.)

Instead, they assert that this largely undisputed history is irrelevant because of alleged changes in regulatory policy that occurred in 2002 following China's accession to the WTO.[13]

That argument simply misses the point. The relevance of Defendants' discussion of this history is, instead, explained by this Court's opinion on Defendants' Motion to Dismiss, in which the Court asked why China was interested in regulating the export of vitamin C, as well as whether such regulations came into effect only at the behest of Defendants and only after Chinese manufacturers obtained economic power in the international vitamin C market.[14] In part to respond to those inquiries, Defendants retained Professor Shen Sibao to address those matters and to supplement the Chinese government's initial submission to this Court.

Not only is that purpose clear from Defendants' opening memorandum,[15] but Professor Shen himself was explicit about this point in his Expert Report, which states that:

> To understand the regulation that has taken place since 2001, one must first understand the historical context, and how that regulation has developed and evolved over time. In the paragraphs which follow, I will describe that evolution....[16]

Given this clear statement, it is disingenuous for Plaintiffs to assert that Defendants, Professor Shen or the Chinese government have based their discussion or analysis of vitamin C export regulation in the post-2001 period on regulations or statements that purportedly have been rescinded, when the Court itself invited that inquiry and explained why it was relevant.[17]

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[13] *Id.* at 31.

[14] *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 559 (E.D.N.Y. 2008).

[15] Def. Mem. at 3, 6-17.

[16] Shen Report at ¶14.

[17] In addition to their charge that Defendants have based their description of Chinese law on regulations that did not apply during the conspiracy period, Plaintiffs attempt to cast doubt over the reliability of Defendants' submission by implying that they have provided the Court with incomplete documents or offered unreliable translations *See* Pl. Mem. at, *e.g.*, notes 119, 125, 133 and 173. The point is correct in the very limited sense that Defendants chose not to burden the record with irrelevant portions of lengthy Chinese documents – particularly since Plaintiffs remained free to provide the Court with any additional portions that they felt had been inappropriately omitted. However, having raised these issues in an apparent attempt to imply impropriety through innuendo, Plaintiffs fail to point to a single instance of omitted text that, they claim, is material, or ought to have been included. Nor (with one

Equally important, Plaintiffs' argument that these regulations are irrelevant because they were "rescinded" in 2002 is seriously misleading. It ignores the fact that their Complaint claims that the conspiracy they allege was formed in November 2001, when the supposedly "rescinded" regulations were still very much in place.[18] It overlooks, as well, the fact that as late as April 2001, representatives of MOFTEC attended a Subcommittee meeting at which they specifically reminded Defendants to *obey* industry agreements reached under the supervision of the Chamber and that MOFTEC *required* the Subcommittee to act proactively.[19] Most notable, the ostensibly formative meeting of the conspiracy in November 2001 was convened at the direction of a senior MOFTEC official.[20]

Plaintiffs' argument also misstates the nature of the ongoing regulations in the post-2001 period. As discussed below, the policy of self-discipline, set forth in China's 1994 Foreign Trade Law, was reiterated in China's 2004 Foreign Trade Law, and more recently in China's 2008 Anti-Monopoly law.[21] In addition, the 1992 Interim regulations delegating certain regulatory functions to the Chambers also continued in force – as evidenced by some of the very documents that Plaintiffs cite. The 1997 directive, discussed above, was reiterated in a 2002 State Council regulation[22] and MOFTEC's requirements to "maintain the order of market

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incongruous exception, *see* note 8, *supra*) do they claim that any of Defendants' translations are misleadingly incorrect. In the same vein, Plaintiffs refer to a document that they claim Defendants did not cite or provide during discovery. *See* Pl. Mem. at 29, citing Milici Decl., Ex. S. But, again, Plaintiffs do not say what that "withheld" item is supposed to prove – which is no surprise, because it proves nothing. Moreover, this tantalizingly secret and un-produced document has at all times been *publicly available on the Internet. See* http://www.medste.gd.cn/Html/Article/166092.html.

[18] Third Amended Complaint (D.E. 355) at ¶ 53 *et seq.*

[19] Chan Decl., Ex. 26 at 2.

[20] *Id.; also see* Chan Decl., Ex. 27, discussed *infra.*

[21] Shen Report, ¶¶ 77-78, referencing 2004 Foreign Trade Law Art. 56 (Newmark Decl., Ex. 4) and Art. 11, 15 of the Anti-Monopoly Law (Chan Decl., Ex. 55).

[22] Milici Decl., Ex. P at Art. 62.

competition…[and] promote industry self-discipline" under verification and chop,[23] as well as the coordination function in the 1997 Subcommittee charter, remained in a revised 2002 charter that still instructed the Subcommittee to "coordinate and guide vitamin C import and export business activities, promote self-discipline in the industry, maintain the normal order for vitamin C import and export operations, and protect the interests of the state, the industry and its members."[24]

To be sure, particular regulatory *mechanisms* have varied over time, as Defendants pointed out in their initial brief,[25] and China's approach to regulation continues to evolve. However, what has *not* varied is the Chinese government's policy to maintain a profitable export trade in important commodities, such as vitamin C, by preserving an orderly export market and avoiding destructive and disorderly competition. The regulatory mandate implemented by the Chamber's self-disciplinary process also has not changed. Thus, as the Chinese government has unequivocally stated to this Court in three separate filings: *during the alleged conspiracy period* as well as before it, the government has regulated vitamin C exports, and *during the alleged conspiracy period,* the government compelled the acts of which Plaintiffs complain.[26]

III. Plaintiffs' Discussion of China's Regulation of Vitamin C Exports During the Alleged Conspiracy Period Ignores or Misstates Defendants' Position and Supporting Materials

Having acknowledged that vitamin C exports were subject to a detailed system of regulation for many years prior to late 2001, Plaintiffs argue that everything suddenly changed with China's accession to the World Trade Organization.[27] The result of this supposed

[23] Milici Decl., Ex. Z at 1.

[24] Chan Decl., Ex. 36, Art. 8, Sec. 8.

[25] Def. Mem. at 18-21.

[26] *Amicus* Submission at 9-15 (Chan Decl., Ex. 1); 6/9/08 Statement at 2 (ratifying *Amicus* Submission) (Chan Decl., Ex. 3); 8/31/09 Statement at ¶ 4 (Newmark Decl., Ex. 1).

[27] Pl. Mem. at 31.

> price-fixing...is a regulatory pricing regime mandated by the government of China – a regime instituted to ensure orderly markets during China's transition to a market-driven economy and to promote, in this transitional period, the profitability of the industry through coordination of pricing and control of export volumes. Most importantly, this regime was established to safeguard the national interests of China.[29]

Plaintiffs' response, again, mostly ignores Defendants' position. To the extent that Plaintiffs do purport to respond to Defendants' actual arguments, that response consists mainly of an attack on the Report of Professor Shen and the submissions of the Chinese government – an effort supported not by an expert in Chinese law but, rather, by their own counsel, who have culled together a variety of Chinese documents and then purport to opine on their meaning, plus a variety of WTO-related documents (not involving vitamin C at all) that have been assembled by a Washington trade consultant who disclaims any expertise as regards Chinese law or China's regulation of vitamin C. In asking the Court to discredit the descriptions and representations of both the Chinese government and a well-respected Chinese legal scholar, Plaintiffs merely highlight the insufficiency of their legal position and the inadequacy of their support for it.

A. Defendants' Position

Lest there be any question regarding Defendants' actual position, as explained in their initial memorandum as well as by Professor Shen and the Chinese government, we summarize that position again here:

During the alleged conspiracy period in this case, Defendants' export sales of vitamin C continued to be subject to regulation and direction by the Chinese government through the Vitamin C Subcommittee of the Chamber. This regulation took the form, in part, of a licensing system known as "verification and chop," which was designed to protect against various

[29] *Amicus* Submission at 5-6 (Chan Decl., Ex.1).

concerns, including possible anti-dumping actions and fraudulent sales.[30] However, the system of regulation that continued after 2001 also involved a mandatory process of industry regulation, superintended by the Chamber and implemented, in the first instance, through a process of Chamber-directed self-discipline.[31] That system was designed to avoid market disorder through agreements regarding price and, to an even greater extent in this period, quantity.[32]

This system (or process) of self-discipline under the supervision and authority of the Chamber was mandated by the government and was administered by the Chamber in accordance with well-understood concepts of Chinese law and culture.[33] It was designed to implement the clearly articulated policy goals of the Chinese government.[34] Under this government-mandated approach, *which combined industry self-regulation and government superintendence*, Defendants not only were permitted, but expected, to express their views freely and to discuss and debate the appropriateness of particular solutions in an effort to reach consensus regarding the implementation of price and output agreements. However, participation in this self-discipline system was mandatory, and non-compliance was subject to sanction. Defendants could not choose to disregard the process, nor could they choose not to reach agreements on price or output in the manner required by the government.[35]

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[30] Def. Mem. at 18-19; *Amicus* Submission at 14-15 (Chan Decl., Ex. 1).

[31] As Defendants previously have shown (Def. Mem. at 19), a MOFTEC notice in 2002 describing the new system observed that among its purposes was to "maintain the order of market competition…promote industry self-discipline and facilitate the healthy development of exports." *See* Chan Decl., Ex. 31 at 1. China's *Amicus* Submission cites and quotes from this document to explain the current system of regulation. *See Amicus* Submission at 14 (Chan Decl., Ex. 1).

[32] Defendants previously noted (Def. Mem. at 24) that the main focus of the process in the alleged conspiracy period was on "output" limitations as a means of preserving profitable prices. Economists have long explained that the principal way in which prices are raised is by restricting output, and the antitrust laws thus treat output restrictions as tantamount to direct price-fixing agreements. *See, e.g., Hartford-Empire Co. v. United States*, 323 U.S. 387, 406-07 (1945). To cite but one well-known example, the "OPEC" cartel operates on the basis of agreed-upon output limitations. *See Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1355 (9th Cir. 1981).

[33] Def. Mem. at 23-25.

[34] *Id.* at 25-26.

[35] *Id.*

B. Plaintiffs' Opposition

Plaintiffs try to deflect attention away from Defendants' position by focusing solely on the licensing aspects of the verification and chop system, as if that formal program of approval through the Customs system constituted the whole of the operative regulatory system that was in place during the post-2001 period. Meanwhile, Plaintiffs ignore (or attempt to dismiss as too "vague") the critical self-discipline process that the Chamber administered on behalf of the government. Thus, for example, Plaintiffs assert that "[t]he only regulations on which Defendants rely that were effective during [the alleged conspiracy period] concern a system of verification and chop by the Chamber...."[36]

That characterization is demonstrably incorrect and the argument based on it is misleading. It inexplicably disregards both the points made in Defendants' memorandum and the supporting submissions of Professor Shen and the Chinese government. While the licensing aspects of the verification and chop process unquestionably were an integral part of the regulatory structure during the years in question, including for the purpose of avoiding anti-dumping actions that were a source of considerable concern both to the industry and to the government, to say that there was nothing other than a minimum-price licensing process is akin to asserting that an elephant consists only of its trunk. To the contrary, the critical part of the regulatory "elephant" during the relevant time period was the compulsory self-discipline process that the Chamber administered, which is reviewed in detail in Defendants' prior memorandum and in the submissions from Professor Shen and the Chinese government.[37]

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[36] Pl. Mem. at 2; *see* also *id.* at 35-40. Plaintiffs seek to trivialize the significance of the verification and chop regime by stating that it requires nothing of exporters other than obtaining a chop from their chamber. Pl. Mem. at 36. However, as the 2002 Notice stated, the system was based on a process of "industry-wide negotiated prices," an approach that would be "conducive for the chambers to coordinate export price and industry self-discipline." (Chan Decl., Ex. 31 at 2.)

[37] Def. Mem. at 21-25; *Amicus* Submission at 14-15 (Chan Decl., Ex. 1); 8/31/09 Statement at ¶¶ 3-6 (Newmark Decl., Ex. 1); Shen Report at ¶¶ 58-68 (Chan Decl. Ex. 4). Further to the same point, Plaintiffs refer to a recent

Whatever questions there may have been previously about the existence and nature of this regulatory system are answered conclusively by the Chinese government's 8/31/09 statement. Given Plaintiffs' strenuous effort to distract attention from this critical element of the case, we quote the relevant portions of that submission here in full:

> 2. In order to prevent self-destructive competition through distorted pricing by Chinese exporters caught unprepared for the drastic change of China's export policies, and to mitigate potential exposures to antidumping investigations in other countries against Chinese exporters, the Ministry took active measures by exerting export regulation over certain commodities that might encounter or have encountered such problems. Although different regulatory measures may have been implemented in line with changes of circumstances at different times, enterprises in regulated industries were nevertheless compelled to comply with relevant rules and regulations, or they would otherwise be subject to penalties.
>
> 3. The actual specific measures taken by China to effect its regulatory policies include what is referred to as a "system of self-discipline". This system has a long history in China and has been well known to, and complied with by, Chinese companies. Self-discipline does not mean complete voluntariness or self-conduct. In effect, self-discipline refers to a system of regulation under the supervision of a designated agency acting on behalf of the Chinese government. Under this regulatory system, the parties involved consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies. Persons engaged in such required self-discipline are well aware that they are subject to penalties for failure to participate in such coordination, or for non-compliance with self-discipline, including forfeiting their export right.

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decision in a trade case in the European Union, (*see* Pl. Mem. at 49-50), which, contrary to Plaintiffs' assertions (*id.* at 3), is not by the European Court of Justice but by a division of an intermediate court. The matter at issue in that case had nothing to do with vitamin C. (Milici Decl., Ex. A at p. 3, ¶ 2(c).) Moreover, while the court opined in passing on a peripheral issue of export regulation, that observation was based upon an unchallenged record that contained no input from the Chinese government. (*Id.* at p. 22, ¶ 153). The decision also is on appeal by the European authorities who, it should be noted, have joined with the United States in concluding that China is *not* a market economy even for trade law purposes. *See* Application for Appeal (Newmark Decl., Ex. 5); Def. Mem. at 42 n.112. Even leaving aside all of the foregoing, as the Chinese government previously has stated, different products are treated differently, and a tangential observation in a case involving glyphosphate is not germane to a consideration of the system of vitamin C regulation addressed directly by the Chinese government in multiple statements to this Court.

> 4. Vitamin C falls into the category of products subject to the above-mentioned regulation. During the relevant period in the present case, the Ministry required vitamin C exporting companies to coordinate among themselves on export price and production volume in compliance with China's relevant rules and regulations in order to maintain orderly export, safeguard the interests of the country as a whole and avoid self-destructive competition.
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> 5. The Ministry authorized and instructed the China Chamber of Commerce of Medicines & Health Products Importers & Exporters (the "Chamber") and its Vitamin C Subcommittee to implement relevant policies related to the export of vitamin C products. Embodied in the Ministry's delegation of authority to the Chamber were industry regulatory functions and powers as well as necessary enforcement measures. Vitamin C exporters were thus subject to the regulation by the Chamber, including compliance with the Chamber's requirements of self-discipline, the very purpose of which was to coordinate each exporter's behavior. No vitamin C exporter could ignore these policies, nor could they abstain from such coordination with regard to export price and production volume when asked to by the Chamber.
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> 6. The self-disciplinary system of export coordination also includes meetings and discussions between and among the parties subject to the Chamber's direction and supervision, and reaching agreements among themselves on taking appropriate actions in the interest of the country as a whole. Participation in such discussions, taking a vote and conducting other similar activities to reach their final consensus constitutes an integral part of the self-discipline process. Vitamin C exporters must comply with the above procedures and the agreements reached in compliance with such procedures; otherwise, the Chamber would be required to exercise its power to penalize those who were in violation of such procedures and agreements.

Plaintiffs do not dispute any of the foregoing statements. In fact, *they do not even mention the Chinese government's 8/31/09 Statement anywhere in their 75-page opposition brief!*

On the other hand, Plaintiffs refer at length to the meetings that were held among Defendants and the Vitamin C Subcommittee of the Chamber during the post-2001 period, arguing that these documents disclose discussions and a process of seeking consensus that are at

odds with a system of mandatory government control. But that argument, as well as the lengthy recitation of "evidence," creates a false dichotomy and a false conflict. Defendants do not deny that these meetings took place. We have said so previously.[38] But, far from contradicting the existence of regulation, those meetings were part of – indeed, the essence of – the regulatory process that the Chinese government put in place through the Chamber. The meetings were how the goals of China's regulatory process were accomplished.

As the Chinese government states: "[T]he system of regulation the Ministry imposed on China's vitamin C export industry centered around a process not a price."[39] That is, "while the government did not, itself, determine specific prices or quantities, it most emphatically did insist on those matters being determined *through industry coordination*."[40] That mechanism required Defendants, under the auspices of the Chamber and subject to its direction, to engage in a process of self-discipline through which they would implement the government's national trade policy of maintaining a profitable vitamin C export trade by avoiding destabilizing and destructive competition that resulted from oversupply and consequent price wars.[41]

The whole point of this system was to enable the companies themselves, who best knew their own business, to figure out how to achieve the government's goal of preserving a profitable vitamin C export industry. Self-discipline made this possible without necessitating more direct intervention. But whatever room there may have been for differing viewpoints or, even, for failing to reach agreement in a particular instance, neither the process nor its goals were optional

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[38] *See* Def. Mem. at 23-25. As Defendants further pointed out in their earlier brief, far from attempting to keep these activities hidden, the Chamber publicly lauded them on its Web site, while noting the fact that the "self-restraint measures" that were taken by the Defendants "mainly based on restricting quantity to safeguard prices" were accomplished "through efforts by the Vitamin C Sub-Committee of [the Chamber]." *Id.* at 24.

[39] 6/9/08 Statement at 2 (Chan Decl., Ex. 3). *See* also *id.*: "In this case the Ministry specifically charged the [Chamber] with the authority and responsibility, subject to Ministry oversight, for regulating, through consultation, the price of vitamin C manufactured for export from China so as to maintain an orderly export."

[40] *Amicus* Submission at p. 18 (emphasis in original) (Chan Decl., Ex. 1).

[41] Shen Report at ¶¶ 8, 12.

or open to debate or disregard.[42] As the government states: "No vitamin C exporter could ignore [the Chamber's requirement of self-discipline] nor could they abstain from such coordination with regard to export price and production volume when asked to by the Chamber."[43]

Plaintiffs plainly misapprehend the relationship of "self-discipline" and mandatory regulation. Thus, while on the one hand, as discussed hereafter, they dismiss it as too evanescent to be credited, at other points they suggest that it is too pervasive – extending not just to organizations such as the Chamber, but to trade associations of all kinds. *See* Pl. Mem. at 51. However, that tension is yet another instance of Plaintiffs missing the point – which, of course, is why the statements of the government and Professor Shen (as opposed to Plaintiffs' counsel's unsupported *ipse dixit*) are so critical. (*See* pp. 21 - 27, *infra.*) Plaintiffs are correct that the concept of self-discipline has broad application within China in a wide variety of contexts. The pertinent point, though, is that self-discipline did not function in isolation. Rather, the Chinese government utilized that familiar concept *in combination with a delegation of authority to the Chamber* (including the power to sanction non-compliance) to ensure that self-discipline was used to implement the government's regulatory policy objectives specifically with respect to vitamin C exports. It is that combination which constitutes the regulatory regime.[44]

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[42] *Amicus* Submission at 18 (Chan Decl., Ex. 1). Plaintiffs suggest that even if participation in the process was mandatory, that does not prove compulsion because, they claim, the manufacturers simply could have agreed to compete as a result of their self-discipline process. Pl. Mem. at 62. That strained argument, once again, completely misstates the nature of the compulsion that was in operation. The system that the Chinese government mandated involved a process designed to result in an orderly market and a profitable industry through price and output coordination. See the statement quoted in text, above, making clear that the companies could not "abstain from...coordination with regard to export price and production volume...." In short, the point of the regulatory system was not just to have discussions, but to further China's national export policy interests implemented through industry-wide price and quantity agreements.

[43] 8/31/09 Statement at 2-3 (Newmark Decl., Ex. 1).

[44] In the same vein, Plaintiffs point to the fact that there often was aggressive price competition during the conspiracy period as evidence that there was no compulsion. But, again, that misses the point of the system. The goal of government regulation was to have a profitable vitamin C export industry. That was what the Chamber was charged with achieving and that, in turn, required allowing active competition at times while directing the manufacturers to cooperate as to prices or output at other times in order to prevent a breakdown in market order through what the government viewed as harmful, or destructive, forms of competition of which China disapproved.

Viewed within this critical context, none of the documents or testimony cited by Plaintiffs demonstrates a lack of compulsion. In fact, the contemporaneous documents to which Plaintiffs point are wholly consistent with the regulatory structure that Defendants have described. Thus, it is undisputed that nearly every meeting involving the Defendants was held in the presence of, and with active participation and direction by, the Chamber. For example:

- On page 6 of their Opposition, Plaintiffs cite to an internal report from defendant NEPG that refers to agreements made "under the aegis of the [Chamber]."[45]
- An internal Hebei Welcome document from March 2003 refers to a "production limitation" and "price retention" arrangement that was implemented "under the coordination of [the Chamber]."[46]
- According to yet another document referred to by Plaintiffs, "[o]n December 26[, 2003] the [Chamber] organized a coordination meeting…in Beijing" in order to reach agreement about production limitations.[47]
- Three months later, there was another meeting presided over by the Chamber, which resulted in "agreements among the manufacturers to limit supply."[48]
- After still further meetings that also involved the Chamber, the head of defendant Jiangshan reported, in an internal company speech, that as a result of discussions "mediated by [the] Chamber" measures had been taken to limit production.[49]
- Still again, in November 2005, "the Chamber…held a meeting of the manufacturers" where "it is decided to have an unconditional production shutdown…to limit the output and preserve the price."[50]

Thus, the Subcommittee meetings were intermittent (on an "as needed" basis). The government points out this characteristic of the system in its 8/31/09 Statement (at ¶ 5) (emphasis added) (Newmark Decl., Ex. 1), which notes that Vitamin C exporters may not "abstain from…coordination with regard to export price and production volume *when asked to [do so] by the Chamber.*"

[45] Pl. Mem. at 6, citing Milici Decl., Ex. 38.

[46] Milici Decl., Ex. 111 at HEB 003651.

[47] Pl. Mem. at 16, citing Milici Decl., Ex. 137 at 2.

[48] Pl. Mem. at 17.

[49] Pl. Mem. at 19, citing Milici Decl., Ex. 141 at 9.

[50] Pl. Mem. at 22, citing Milici Decl. Ex. 88 at 2. Related to the issue of production shutdowns, Plaintiffs argue in their opposition brief that such shutdowns were not mandated by the Chamber. (Pl. Mem. at 48-9.) That position is proven false by an incident involving defendant Weisheng. According to Weisheng's General Manager, pursuant to a production shutdown directive by the Chamber in 2003, Weisheng agreed to shut down its two existing production lines but took the position that a third, new production line should be allowed to operate on a trial basis. Weisheng,

In fact, virtually every one of the post-2001 documents mentioned by Plaintiffs in their Opposition involves a meeting that included the Chamber. The Chamber was there as the government's representative to make sure that the self-discipline process was successfully implemented so that an orderly vitamin C export market was maintained.[51] In short, what happened in 2001-2 is that the prior system of regulation changed from a quota system to a regulatory regime implemented under the direction of the Chamber through consultation,[52] but no less mandatory on that account.[53]

Plaintiffs' argument that there was a sudden sea-change in late 2001 also is belied by a number of other facts – some of them referenced by Plaintiffs, themselves, in their Opposition. In actuality, the Vitamin C Subcommittee's efforts to maintain orderly markets through self-disciplinary measures began well before the end of 2001 and continued more or less in the same fashion thereafter. Defendants reviewed the meetings of the Subcommittee from its inception prior to 2001 in their opening brief, and Plaintiffs contest none of that information. To the contrary, Plaintiffs emphasize that involvement by noting that representatives of MOFCOM appeared at three Subcommittee meetings between 1999-2001.[54]

In fact, one of those three meetings occurred in April 2001 – just a few months before the

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however, was forced to shut down the third production line "under the mandatory requirement of the Chamber." Feng Zhenying Dep. Tr. at 83:8-19 (Chan Decl., Ex. 33).

[51] *See, e.g.*, Kong Tr. at 35:22-36:3, 94:19-95:5 (Newmark Decl., Ex. 6); Wang Qi Tr. at 267:3-7 (Newmark Decl., Ex. 7); Zhang Yingren Tr. at 29:25-30:6, 30:14-18 (Newmark Decl., Ex. 8); Huang Pinqi Dep. Tr. at 80:21-81:9 (Newmark Decl., Ex. 9); Du Chengxiang Tr. at 41:14-42:6 (Newmark Decl., Ex. 10); Feng Zheng Ying Tr. at 30:13-15, 31:24-25 (Newmark Decl., Ex. 11).

[52] As the discussion of *Southern Motor Carriers* in Defendants' opening memorandum makes clear, a system designed to supplant competition with regulation is exempt from antitrust scrutiny even where substantial discretion for private discussion and action is permitted. *See* Def. Mem. at 50-52, discussing *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985). *See also* pp. 39-40, *infra*.

[53] If there were any doubt that Defendants understood that regulation continued after 2001 but simply in a different way, a Hebei Welcome memorandum from March 2003 (nearly two years before this litigation commenced) pointedly notes that the "former state…quota restraint" system had been "changed to industrial self-discipline management." Milici Decl., Ex. 111 at HEB 3650-51.

[54] Pl. Mem. at 30.

supposed "private" cartel was formed, and at a time when China's accession to the WTO was known to be imminent. Nonetheless, as Defendants pointed out in their earlier brief, not only did a MOFTEC representative participate in that meeting, he reminded the Defendants that:

> MOFTEC attaches importance to the establishment and development of the Chamber, and *requires* the Subcommittee to act proactively. Enterprises need to *obey* the industry agreements and industry rules. When enterprises are maximizing their profits, they also need to consider the interest of the State as a whole.[55]

What is more, as we have pointed out above, the November 2001 Subcommittee meeting was called by the Chamber *at the direction of the Chinese government.* Specifically, sometime in the latter half of 2001, China's European missions learned of a possible anti-dumping action against Chinese vitamin C manufacturers. The government's representatives in Europe promptly notified MOFTEC of that development. In response, a senior MOFTEC official – Shang Ming, who currently is the head of China's Competition Bureau (equivalent to the Assistant Attorney General for Antitrust in the U.S.) – sent a handwritten note directing MOFTEC to forward the papers to the Chamber with an instruction to "Please review and get prepared."[56]

In response to this direction from MOFTEC, the Chamber called Defendants together in November 2001, and that Chamber-convened meeting (held at MOFTEC's direction) is what Plaintiffs say constituted the formative meeting of the alleged "cartel." Yet, not only was this meeting held at the direction of the government, but the notes of the meeting refer to actions that needed to be taken to "enhanc[e] the self-discipline of the industry" through an agreement to maintain prices and "restrict[ ] the export volume" of vitamin C to 35,500 tons.[57] In other words, the supposed "private and voluntary" cartel that Plaintiffs describe in their complaint was created

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[55] Chan Decl., Ex. 26 at 2. (emphasis added); *see also* Def. Mem. at 17.

[56] Chan Decl., Ex. 28.

[57] Chan Decl., Ex. 29 at 3.

at a meeting that the Chinese government told the Chamber to convene, and the notes of that meeting refer explicitly to the mechanism of "self-discipline" that both Professor Shen and the Chinese government say was the heart of the regulatory system that the government relied upon to maintain an orderly vitamin C export market throughout the alleged conspiracy period.[58]

At the end of the day, Plaintiffs' only real response to the regulatory system that Defendants and the government have described is to attempt to wave it aside as "vague".[59] But what Plaintiffs really mean is that this regulatory process is not an approach with which they are familiar, or that is followed (or, even, understood) in the United States. Yet the fact that China achieves regulatory compliance in accordance with its own system and its own cultural and social norms does not make that system any less real, any less effective or any less compulsory. It is simply Chinese.

As the Chinese government stated in its *Amicus* Submission, one of the main reasons for its participation in this case is that many of the concepts and approaches that China employs may not be familiar to those outside of China or may not apply in the same way.[60] Indeed, as both the Chinese government and Professor Shen explain, even words or concepts that are used in both China and the United States may not carry the same meaning.[61] Dismissing the essential concept of regulatory self-discipline as "vague" or asserting that there was no compulsion merely because China has its own way of organizing its society and of implementing and assuring

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[58] *Id.*

[59] Pl. Mem. at 49, 50.

[60] *Amicus* Submission at 3 (Chan Decl., Ex. 1).

[61] Defendants are not the only ones who have recognized this important point. In fact, the importance of cultural differences is stressed repeatedly by both American and Chinese scholars in commenting on competition and trade policy in China. *See* Def. Mem. at 45 (and sources cited); *see also*, R. Hewitt Pate, *What I Heard in the Great Hall of the People – Realistic Expectations of Chinese Antitrust*, 75 ANTITRUST L.J. 195 (2008) at 195 (Chan Decl., Ex. 53) ("In 2004 I had the privilege of leading the first U.S. delegation since the 1980's to discuss competition and antitrust issues with Chinese officials. I left convinced that, even when the vocabulary words sound similar, achieving an antitrust meeting of the minds between East and West can be elusive."). (Mr. Pate is a former Assistant Attorney General in charge of the Antitrust Division of the Department of Justice.)

ironically enough – in the one scholarly article that Plaintiffs cite, from Professor Kennedy.[63]

In its opinion on Defendants' Rule 12 motion, the Court observed both the differing nature of the Chinese legislative and regulatory process[64] as well as the "importance" that China attaches to the transitional nature of its system.[65] It further stated that it did "not question that goal or even China's methods of [achieving it]."[66] But to give meaning to those very pertinent observations it is necessary to accept their implications in assessing the record in this case. That is something that Plaintiffs simply are unwilling to do.

C. The Absence of Any Independent Support for Plaintiffs' Position Is A Compelling Reason to Reject Their Arguments

Plaintiffs ask this Court to reject the expert report of Professor Shen and the statements of

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coordination and management of vitamin C exports by the Chamber under the quota and license system. Moreover, those 1992 Interim Export Measures not only are referenced in the appendix as still being in force at the time of the 2000 Communication from China, but also are referenced at page 12 in the text of the 2000 Communication from China, as the "Interim Procedures for the Export Licensing System." Read in context, China was telling the WTO that although it was not setting prices directly, it was continuing a form of regulation through quotas and licensing. As China has advised this Court, that same approach continued with respect to products such as vitamin C during the alleged conspiracy period.

[63] *See* Scott Kennedy, *The Price of Competition: Pricing Policies and the Struggle to Define China's Economic System,* 49 The China Journal 1 (2003) (Milici Decl., Ex. SS). Plaintiffs cite one small portion of Professor Kennedy's article in a convoluted effort to respond to Professor Bruce Owen's observations about "excessive competition." *See* Pl. Mem. at 53. However, in doing so, they simply overlook the point of the article as a whole. Professor Kennedy, like the other scholars whose works Defendants have cited (Def. Mem. at 45-47), recognizes that regulation is still a fact of life in China notwithstanding its ongoing transition to a market economy. Thus, Professor Kennedy points out that at the time his article was written (2003), there was a great deal of debate about the relative merits of more versus less continuing regulation. He then observes that "[t]he enduring co-existence of these two contending views on the proper behavior of government and firms is reflected in *the compromises regularly found in the laws and regulations that govern competition and pricing in China.* This has clearly been in the direction of promoting greater competition and freeing up prices, *but at each point exceptions have been maintained.*" Kennedy, *supra* at 8 (emphasis added).

Equally pertinent, in commenting on China's accession to the WTO and the supposed changes in regulatory structure that accompanied it, Professor Kennedy points out that "[i]n late 2001, the Chinese government announced that it had scrapped 124 price regulations in order to comply with its commitments to the [WTO]." He then says: "*Despite these changes, the self-discipline price story reveals a high level of ambivalence regarding whether inter-firm coordination of prices and production is legitimated and, if so, under what circumstances. The persistence of such views and a legal framework that permits cooperation under certain circumstances... shows that China's march away from a planned economy does not lead inevitably in a free market direction.*" *Id.* at 29 (emphasis added).

[64] *In re Vitamin C,* 584 F. Supp. 2d at 559.

[65] *Id.*

[66] *Id.*

the Chinese government on the ground that they are so completely inaccurate that the Court should give them no weight.[67] Not to mince words, Plaintiffs' position amounts to an argument that both Professor Shen and China's Ministry of Commerce have materially misrepresented the nature of Chinese law in their statements to this Court.[68] While those are strong charges to level against a distinguished expert, they are breathtaking assertions to make about the official statements of a foreign sovereign government. While there is some divergence over whether the representations of a foreign state to a United States court must be taken as conclusive or merely given substantial deference,[69] there is no case cited, and none of which we are aware, in which the kind of detailed and unequivocal representations that have been made by Cabinet-level officials of the government of a recognized foreign sovereign have been treated with the disrespect for which Plaintiffs argue.[70]

Plaintiffs' suggestion is even more extreme because they ask this Court to disregard the statements by the Chinese government based solely on the arguments of their counsel. No expert from China appears here to vouch for Plaintiffs' assertions, let alone to say that the statements of China (or Professor Shen) are incorrect. Nor has any expert been found elsewhere, including the United States, who is willing to offer his or her expertise and reputation in support of Plaintiffs' position. Even Professor Feinerman, who appeared briefly to purport to describe the nature of Chinese trade associations and the process for "authenticating" official documents in China, is

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[67] Pl. Mem. at, *e.g.*, 3, 25, 37, 44, 57-59, 62-63.

[68] For example, Plaintiffs assert that statements made by Defendants that are based on the submissions of the Chinese government are "demonstrably false." Pl. Mem. at 1. What the government itself says, meanwhile, is "inaccurate and misleading" (*id.* at 25), "ignore[s] relevant and binding legal authority" (*id.*); is contrary to the facts [and to] Chinese law" (*id.* at 54) and represents simply a "convenient litigation position" (*id.* at 58). Professor Shen, meanwhile, "ignores the virtually non-existent role of the government" after 2001 and "instead relies on outdated materials". Pl. Mem. at 37. In fact, his opinions generally "are inaccurate" as well as "unpersuasive," (*id.* at 62), presumably because he "merely reiterates the views expressed" by the Chinese government. *Id.* at 44.

[69] *In re Vitamin C,* 584 F. Supp. 2d at 557.

[70] Pl. Mem. at, *e.g.*, 53-60.

now notably absent.[71]

In fact, not only does Plaintiffs' Opposition come without the support of an expert on Chinese law and regulation, but Plaintiffs fail to direct the Court to any body of scholarly writing that supports their position. Particularly when taken in conjunction with the absence of any supporting expert, that failure is conspicuous. It is all the more telling in light of the fact that Defendants have supplemented the submission of Professor Shen and the Chinese government with citation to various articles that – notwithstanding Plaintiffs' insubstantial quibbles[72] – strongly support their description of Chinese regulatory trade policy and the role that certain chambers of commerce play. Many other articles to the same effect could be added to that list,[73]

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[71] *See In re Vitamin C*, 584 F. Supp. 2d at 559.

[72] Plaintiffs argue, for example, that when the Chinese say that they are concerned with "bad" competition, it has only to do with fraudulent or below-cost sales. *See* Pl. Mem. at 52-53. But that interpretation is completely at odds with the various comments of senior Chinese officials, as noted in Defendants' earlier brief, and is inconsistent with the cited articles themselves, not to mention the Report of Professor Shen. *See* Shen Report at ¶¶ 25, 27, 28. In addition, if China were concerned only with below-cost pricing, there would be no material divergence between U.S. and Chinese competition policy, because such sales are also condemned as predatory under the Sherman Act. *See, e.g.*, *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). But the pervasive theme of the series of articles that Defendants cite from Professors Yang, Owen and Fox (as well as former Assistant Attorney General Pate) is the fact that China takes a much different view of what is appropriate competition policy generally – a view that is in tension with American antitrust concepts. *See* Def. Mem. at 45-46.

Moreover, these articles offer unquestioned support for the proposition that certain Chinese chambers of commerce continue to play an official role in the implementation of Chinese competition policy. And while it is true that the article by Professor Fox and Judge Jacobs cites to the Chinese government's brief in this case (presumably because they regard it as a definitive statement of government policy), a subsequent article by Professor Fox reiterates that "trade associations…are often emanations of the state or include significant involvement by state officials." Eleanor Fox, *An Anti-Monopoly Law for China – Scaling the Walls of Government Restraints*, 75 ANTITRUST L.J. 173, 191 (2008) (Chan Decl., Ex. 54). In fact, Professor Fox goes on to point out that, even under the recently-enacted Chinese Anti-Monopoly Law (Article 11), trade associations may still be expected to "'strengthen the self-discipline of industries [and] guide firms toward…protecting the order of market competition." *Id.*

[73] *See*, e.g., Howell, *et al.*, *China's New Anti-Monopoly Law: A Perspective from the United States*, 2009 PAC. RIM & POLICY JOURNAL 53, 87-88 (Newmark Decl., Ex.12) ("Since the 1990s, Chinese trade associations, encouraged by the government, have played a major role in facilitating industry-wide price stabilization measures, suggesting that notwithstanding enactment of the AML, they will continue to play such a role. Many of China's trade associations evolved out of the old you guan bumen ('departments-in-charge'), and are staffed with former ministry officials. They play an important role in carrying out sectoral government policies. Article 11, like Article 7 regarding SOEs, appears to contemplate a continuing government administrative role with respect to enterprise decisions on matters such as pricing and output levels"); Wang Xiaoye, *The Prospect of Anti-Monopoly Legislation in China*, 2002 WASH. U. GLOB. STUD. L. REV. 201, 208-09 ("One always should view 'industrial self-discipline prices' as a synonym for government intervention in price competition among enterprises . . . 'Industrial self-discipline prices' operate as a type of compulsory price cartel").

including, as we have noted, the only article that Plaintiffs even mention in their Opposition.[74]

It is no answer for Plaintiffs to suggest – as we presume they would – that what they have presented to the Court is "the law" itself, in the form of texts from which they quote, and that it is those texts which demonstrate that the statements of both Professor Shen and the Chinese government are incorrect and, therefore, should be disregarded. But, if matters truly were that simple, would there not be someone willing to say so? Although Plaintiffs are correct that Rule 44.1 gives a court substantial latitude in ascertaining the content of foreign law, that does not mean that the detailed statements of a well-qualified expert, let alone the direct representations of a foreign government, can be rebutted by the unadorned assertions of opposing counsel saying, in effect, "here it is".[75] In fact, while proof of the content of foreign law is typically done through the submission of an expert from the country whose laws are at issue,[76] even that type of evidence would take a back seat to the actual statement of a foreign sovereign, itself.[77] Here, Defendants offer both, while Plaintiffs present neither.

Moreover, there are several additional problems with Plaintiffs' position:

First, Plaintiffs do not simply say, "Here are the laws." To the contrary, their analysis of what, supposedly, is mistaken in the statements of the Chinese government and Professor Shen is presented as part of a narrative that is filled with debatable, frequently inaccurate and

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[74] *See* Kennedy, note 63, *supra*.

[75] *See Application of Chase Manhattan Bank*, 191 F. Supp. 206, 209 (S.D.N.Y. 1961) ("Attorneys for [a party] are not competent to offer expert testimony on foreign law").

[76] *See* cases and other authorities cited in Defendants' earlier memorandum (Def. Mem. at 37, n.92), discussing the role of experts in determining the content of foreign law.

[77] The Seventh Circuit confronted that situation in *In re Oil Spill by the Amoco Cadiz*, 854 F.2d 1279 (7th Cir. 1992). In that case – unlike here – "[e]ach side presented an expert of the highest skill and repute supporting its interpretation" of controlling French law. *Id.* at 1312. However, the court noted that "the Republic of France appears in this court and assures us that Article 16 applies to oil that reaches shore....A court of the United States owes substantial deference to the construction France places on its domestic law. Courts of this nation routinely accept plausible constructions of laws by the agencies charged with administering them." *Id.*

occasionally self-contradictory assertions, much of it couched in conclusory rhetoric.[78]

Second, the absence of any expert testimony on the subject of Chinese law creates an unmistakable inference that Plaintiffs were unable to find any expert to support their position. As we note, above, if matters were really as self-evident as Plaintiffs say, it would not be difficult to find an expert willing to say so. In fact, when Plaintiffs were urging the Court to conduct an inquiry under Rule 44.1, they asserted that the "failure to present expert testimony on foreign law raised an inference that the law was contrary to the construction advanced."[79]

Third, the "law" – particularly the law of a foreign country with very different political, cultural and legal systems and traditions – is scarcely self-proving even from assertedly "clear" texts. In fact, it can be dangerous to go from even the most pellucid statute or regulation to a determination of what the law actually "is". To take an example from the United States that is close to the case at hand, section 1 of the Sherman Act declares that "Every contract, combination and conspiracy in restraint of trade… is declared to be illegal." But, as the Supreme Court has said on several occasions when addressing that statute, its simple words cannot

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[78] We have previously pointed out a number of the inaccuracies in Plaintiffs' position. *See, e.g.*, pp. 6-7, 11, 16 (n.50), 20 (n.62), *supra*. Further, Plaintiffs cite one in a compilation of statements, all made in other contexts, supposedly for the proposition that the Chambers to which MOFTEC delegated governmental functions in the 1990s were "voluntary associations legally independent of the government." That proposition is not, in any event, inconsistent with "self-discipline" as explained by Professor Shen. Moreover, Plaintiffs fail to note that the cited statement was made in 1988, before the pertinent delegation of governmental function occurred. (Pl. Mem. at 26, citing Milici Decl., Ex. N at 23.) Plaintiffs also assert that "China eliminated all mandatory export planning by 1993" (Pl. Mem. at 27), yet go on to discuss in detail regulatory measures that operated well after that date. *See id.* at 29-31, 35. Indeed, the very next sentence in their memorandum notes that "the 1992 Interim Export measures were explicitly abolished by the State Council *in 2001*"! (Pl. Mem. at 27; emphasis added.) Three pages later, Plaintiffs assert that "by 2000" there were "no restrictions on pricing" (Pl. Mem. at 30-31), and that "[n]one 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 2000." *Id.* Again, these assertions cannot be squared with the further point made repeatedly by Plaintiffs, that many of those same laws that Plaintiffs claim did not exist by 2000 were not rescinded until 2002 – two years later. (*See id.* at 31.)

[79] Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 25 ("Pl. Opp. to MTD"), citing *Dulles v. Katamoto*, 256 F.2d 545, 547 (9th Cir. 1958). *See also, Universal Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999) (summary judgment for plaintiff reversed and summary judgment for defendant entered where plaintiff "had numerous opportunities to present evidence that would rebut [defendant's expert declaration] regarding Japanese law, [but] introduced nothing"); *Golden Trade v. Lee Apparel Co.*, 143 F.R.D. 514, 524 (S.D.N.Y. 1992) (accepting uncontradicted expert testimony "as to both the state of Norwegian law and the facts relevant to application of that law").

possibly mean what they say.[80] The unambiguous words of that statute also offer no clue to the fact that there are many important interpretative glosses, limitations and exemptions from the Sherman Act.[81]

Determining the content of *foreign* law is, obviously, far more daunting, particularly in a case dealing with an intricate regulatory regime dating back two decades and with an economic system that is peculiar to China and that is universally recognized to be in transition. Allowing counsel for a party to serve as the supposed guide to the content of such law is not only inappropriate, but creates a significant danger of misinterpretation. Our point about U.S. law, above, again illustrates that danger. As Defendants observed in their prior memorandum (at 50-52), and as the Chinese government reiterates in its 8/31/09 Statement at ¶ 6 (Newmark Decl., Ex. 1), even the most aggressively "capitalist" counties impose regulations on various aspects of their economies in furtherance of one government policy or another. Professor Speta describes many of those regulatory exceptions under U.S. law in his declaration.[82] Therefore, someone wishing to demonstrate to a court in China that the United States does not have a "market" economy easily could assemble a lengthy set of citations and quotations in support of that thesis and, then, argue their position based on that "evidence." They simply would be mistaken.[83]

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[80] *See, e.g., Nat'l Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 687 (1978) ("One problem presented by the language of …the Sherman Act is that it cannot mean what it says…[R]ead literally [section] 1 would outlaw the entire body of private contract law."); *see also Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). Moreover, a person unfamiliar with U.S. antitrust law certainly would not get from the statute's unconditional words that the principal test of illegality under American antitrust law is the "rule of reason." *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

[81] *See, e.g., Parker v. Brown*, 317 U.S. 341 (1943) (state action doctrine); *Eastern R.R. Presidents Conference v. Noerr Motor Freight Co.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (*Noerr-Pennington* doctrine); and *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922) (filed rate doctrine).

[82] Report of Professor James B. Speta (Chan Decl., Ex. 5) at ¶8.

[83] As discussed in Defendants' prior memorandum, the need for interpretation and context is one of the reasons why, even in the domestic context, courts are instructed to give "substantial deference" to the "interpretation made by the administrator of an agency" that is responsible for enforcement of a statute or regulation. *See* Def. Mem. at 35, citing *Chevron v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 844 (1984). Plaintiffs respond to the

to different circumstances and different products.[90] Based on those inapposite citations, they urge the Court to conclude that the government and Professor Shen have misstated the facts regarding the *relevant* Chamber and the facts pertinent *to this case*. Again, no expert appears to connect those improbable dots.

Plaintiffs then try to turn the Chinese government's position directly on its head by mis-citing remarks made by the government's counsel during oral argument on the Rule 12 motion in this case.[91] But, as even a cursory review of the transcript reveals, far from disclaiming the official authority of the Chamber, the whole point of counsel's comments was to explain to the Court (as noted above) that while not all chambers of commerce exercise regulatory authority and not all products within a chamber's purview are necessarily subject to the same degree of supervision and control, the Medicines and Health Products Chamber *had* been delegated regulatory responsibilities in regard to vitamin C export sales during the time period in issue.[92]

Plaintiffs' only additional point is that even if the Chamber exercised government-delegated responsibilities under the so-called 1991 Measures for the administration of social organizations, that authority became "obsolete" in light of 1998 State Council regulations.[93] That suggestion would come as a surprise to the Chinese government, which says precisely the contrary.[94] Further, Plaintiffs' argument ignores the fact that the government continued to treat the Chamber as a regulatory body well after 1998. See, for example, MOFTEC's April 2001 statements to the members of the Vitamin C Subcommittee that "MOFTEC attaches importance to the establishment and development of the Chamber *and requires the sub-committees to act*

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[90] Pl. Mem. at 41.

[91] *Id.* at 42.

[92] As counsel for the government advised the Court during his argument (Hearing Transcript of June 5, 2007 (Milici Decl., Ex. LL) at 100-01), the government of China does not continue to regulate all exports and does not intend to assert that all actions taken by exporters were done pursuant to government regulation.

[93] Pl. Mem. at 41.

[94] 8/31/09 Statement, ¶¶ 4-5 (Newmark Decl., Ex. 1); *Amicus* Submission at 14-15 (Chan Decl., Ex. 1).

proactively." [95] A 2003 public report by the Chamber even more directly contradicts Plaintiffs' position, noting that "the Chamber…implements [state] policies and regulation governing foreign trade and "accepts the guidance and supervision of the responsible departments under the State Council."[96] In fact, according to that publicly available report, the Chamber's "very purpose" is to "coordinate and supervise the import and export operations" of businesses under its control, including its "Vitamin C Branch" (*i.e.*, the Subcommittee).[97]

Elsewhere in their Opposition, Plaintiffs discuss the 2002 amendment to the Chamber's original (*i.e.*, 1997) Charter, referring to those changes as "striking".[98] What is striking, however, is the extent to which Plaintiffs' description is misleading. Defendants addressed this subject directly in their initial memorandum at pages 22-23, noting that the statement of objectives in Article 4 of the 2002 Charter is almost identical to the Chamber's enumerated responsibilities under the original 1997 Charter. Defendants also pointed to Article 8 of the revised Charter, which lists the core functions of the Subcommittee, one of which is to "coordinate and guide vitamin C import and export business activities, promote self-discipline in the industry, maintain the normal order of vitamin C import and export operations and protect the interests of the state, the industry and its members."[99] Members were enjoined to abide by all decisions of the Subcommittee, including those implementing Articles 4 and 8, on pain of potentially losing their membership and, hence, the right to export vitamin C.[100]

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[95] Chan Decl., Ex. 26 at 2 (emphasis added).

[96] *Id.*, Ex. 15 at 6.

[97] *Id.*

[98] Pl. Mem. at 34.

[99] Def. Mem. at 22.

[100] Plaintiffs argue that current law permits companies to export under the "verification and chop" system even if they are not members of the Subcommittee. *See* Pl. Mem. at 38. However, the Chinese government has confirmed that, at least in the case of vitamin C, membership was a condition that was expected of all exporters. *See Amicus* Submission at 12; Chan Decl., Ex. 1. Given China's continuing interest in maintaining a profitable industry under

> commodities (such as vitamin C) at a given stage in history serves the specific interests of China and is consistent with the trade policies of importing countries to protect and regulate relevant domestic industries. The regulations are implemented in a manner consistent with international law and custom and, during the process of implementation, have not been subject to challenge from the government of other countries or regions. China understands and believes that virtually all sovereign nations and regions (including the United States), proceeding from their own interests, have exercised various forms of government regulations over part of their private sector and certain industries. China's export regulations of vitamin C at issue in this case are no different.

In some respects, Dr. Stern, herself, offers the most telling critique of her work. In addition to readily conceding that she does not claim any expertise in Chinese law, she candidly testified that her Report was not intended to "opine" on any subject at all,[103] and that she most certainly had no "intention to suggest that there was…an attempt to mislead the Court" by the Chinese government, for which she has "a very high respect."[104]

Despite all of the foregoing, Plaintiffs rely on Dr. Stern's Report as the basis for asking the Court to reject the Chinese government's submissions as unreliable.[105] Yet, not only does Dr. Stern, herself, disclaim such a purpose, but the supposedly inconsistent statements from representatives of China's government to which she refers do not support her characterization, let alone the bold allegations that Plaintiffs make based on her limited and superficial analysis.[106]

The statements and documents cited by Dr. Stern not only are taken out of context (as China's 8/31/09 Statement explains),[107] but a review of those statements reveals that the Chinese government has been careful to say only that China is in the process of transitioning to a

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[103] *Id.* at 38.

[104] *Id.*

[105] Pl. Mem. at 63-65.

[106] Def. Mem. at 39-44.

[107] Plaintiffs' sudden embrace of supposedly inconsistent statements made in the context of the WTO is also curious, in light of their prior assertions to the Court that "China's WTO membership is irrelevant to defendants' motion *and to this case. The WTO is concerned with access to markets and open trade, not antitrust laws.*" Pl. Opp. to MTD at 42 (emphasis added).

government and a decision that rejects the position of the government would have obvious and enormous implications for this country's foreign relations with China, dismissal under the act of state doctrine is required.

Plaintiffs offer three arguments in response: First, they deny that this lawsuit calls into question the validity of any act of the Chinese government. Second, they assert that no foreign policy concerns would be raised by allowing this litigation to proceed. Third, they say that the act of state doctrine does not apply where the internal acts of a foreign state produce effects in this country. None of those objections is valid.[117]

(1) Official Acts of the Chinese Government Are Directly at Issue Here

The essential question in this case is whether Defendants, in arriving at the various agreements "mediated by the Chamber"[118] and carried out under it "aegis,"[119] violated U.S. antitrust law. The Court cannot decide that question without passing upon the status and validity of the Chamber's activities as delegated by the government of China. If Plaintiffs prevail, the Court, in effect, will have declared invalid China's national trade policy and its stated intention to regulate vitamin C export competition. In fact, the only conceivable response to this seemingly obvious point is that there need not be a declaration of invalidity *because there was no such policy to begin with!*

But, in the face of the unambiguous statements from the Chinese government, it is hard to

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[117] In addition to the points discussed in text, Plaintiffs also cite to *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705-6 (1962) as support for an argument that the act of state doctrine does not apply when the sovereign's act only aids or facilitates a conspiracy. Not only is that incorrect, because compulsion is not required under the act of state doctrine, but, as a number of decisions have observed, those cases involved alleged conspiracies entered into in the United States by United States citizens. In neither case was the Court required to pass upon the validity or motivation of a foreign sovereign's act. *See, e.g. O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana,* 830 F.2d 449, 457-58 (2d Cir. 1987); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 74-75 (2d Cir. 1977); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 109-110 (C.D. Cal. 1971).

[118] *See* footnote 49, *supra*.

[119] *See* footnote 45, *supra*.

imagine how Plaintiffs could think that that makes their position better, rather than infinitely worse. If it is impermissible for a court in this country to inquire into the motivation for a foreign state's action[120] or to pass upon its validity,[121] it is far more extreme for a United States court to be asked to conclude that a system of regulation that the government of China has described in detail to the Court did not actually exist.[122]

(2) This Case Has Immense and Unavoidable Foreign Policy Implications

Plaintiffs' suggestion that act of state principles are not pertinent here because a decision in Plaintiffs' favor would have no implication for U.S.-China relations is even less credible than their argument that the validity of Chinese laws and regulations are not at issue. This Court certainly has had no difficulty appreciating the importance that China attaches to this case.[123] Moreover, China, itself, has been forthright about that issue. In its most recent statement to the Court, it observes that China "has attached great importance to [the current] litigation...against Chinese vitamin C exporters."[124] In light of this unquestioned level of interest and concern, it does not take much imagination to acknowledge the strong likelihood that a ruling against Defendants would give rise to substantial tensions in U.S.-China relations.

However, that is far from the most serious concern. Given the fact that China repeatedly has advised the Court that the conduct at issue in this case was compelled by the Chinese government, a decision rejecting the government's representations about its own laws and policies inexorably would result in substantial consternation (to say the least) on the part of the

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[120] *See, e.g., O.N.E. Shipping*, 830 F.2d at 452 (act of state doctrine is a "principle of law designed primarily to avoid judicial inquiry into the acts and conduct of the officials of a foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government.")

[121] *Id.*

[122] *See Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1299 (D. Del. 1970) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

[123] *In re Vitamin C*, 584 F. Supp. 2d at 552.

[124] 8/31/09 Statement at 1 (Newmark Decl., Ex. 1).

Chinese government. Indeed, it is hard to imagine a situation more fraught with potential offense and more likely to yield serious foreign relations concerns.

It is no answer that the United States has not appeared to urge dismissal. Despite Plaintiffs' suggestion that such silence implies a lack of concern, citing 28 U.S.C. § 517, the United States does not routinely appear at the district court level in cases involving the act of state doctrine.[125] Hence, there certainly is no basis to draw an inference against application of the act of state doctrine on account of the Executive Branch's silence.[126]

(3) The Act of State Doctrine Applies Even If the Internal Acts of a Foreign State Produce Effects Elsewhere

Plaintiffs' final point is simply mystifying. They claim that the act of state doctrine does not apply where the act of a foreign state causes effects within the United States.[127] But, far from precluding application of the doctrine, such effects are a virtual pre-condition to its invocation. In fact, in every antitrust case in which the doctrine has been applied, the conduct at issue has had alleged effects on United States commerce. To cite one obvious example, the whole purpose of OPEC is to raise oil prices throughout the rest of the world, including the United States.[128]

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[125] As far as the record reflects, the United States did not appear in any of the antitrust cases involving the act of state doctrine that Defendants cited in their memoranda in support of dismissal under Rule 12 or in their opening brief in support of the present motion.

[126] If anything, the failure of the United States to disclaim any foreign relations concern supports an inference against *Plaintiffs*. Under the so-called "*Bernstein* letter" exception to the act of state doctrine, if the United States has no objection to a court proceeding with a case that presents foreign relations implications, it is expected to file a letter with the court so stating. *See, e.g., Empresa Cubana Exporetadora de Azucar y Sus Derivados v. Lambert & Co., Inc.*, 652 F.2d 231, 237-38 (2d. Cir. 1981) ("The Executive Branch has expressed no opinion regarding [the act of state doctrine's] appropriateness in the instant case. We therefore have no reason to believe that application of the act of state doctrine here would be inconsistent with the State Department's policy toward Cuba"). While application of this approach is far from consistent, and the state of the *Bernstein* principle remains unclear (*see, generally, Republic of Austria v. Altman*, 541 U.S. 677, 712 (2004); *Menendez v. Saks & Co*, 485 F.2d 1355, 1372 (2d. Cir. 1973)), there is, at least, no basis to draw an inference *against* application of the act of state doctrine here.

[127] Pl. Mem. at 71-72.

[128] *International Ass'n of Machinists*, 649 F.2d 1354; *see also*, *Trugman-Nash Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733 (S.D.N.Y. 1997); (act of state applied to effort to curtail exports from New Zealand to U.S.); *O.N.E. Shipping*, 830 F.2d at 450 (act of state doctrine applied to refusal to deal with shippers operating from U.S. ports); *Interamerican Refining Corp.*, 307 F. Supp. at 1293 (refusal to export crude oil to plaintiff's U.S. facility subject to act of state doctrine).

The only situation in which application of the act of state doctrine has been refused based upon foreign consequences is where the foreign state has sought to apply its law directly to conduct occurring elsewhere, such as by setting an age limit for hockey players in the United States[129] or attempting to apply Canadian tax laws against U.S. entities for actions in this country.[130] However, where the conduct at issue involves only restrictions upon the activities of parties residing in a foreign state, the fact that such conduct may cause effects elsewhere does not preclude dismissal based on act of state principles if the doctrine is otherwise applicable.

C. International Comity

There is little more to be said on the subject of comity. It is a discretionary doctrine that Defendants commend to the Court in light of the sensitive foreign relations concerns that are presented by this litigation as well as the implications of a ruling that questions the veracity of the Chinese government's representations to the Court. If this matter were being considered by the Antitrust Division, it would conduct a comity analysis as an essential aspect of evaluating whether to institute a formal proceeding.[131] As the Supreme Court has observed (and as common sense confirms), private plaintiffs are unlikely to engage in a similar weighing process or to consider the full implications of a decision to pursue litigation seeking treble damages on a class-wide basis.[132] Thus, if the prudence of the present action is to be considered at all, the task of doing so falls to this Court.

In that regard, we respectfully commend to the Court the Supreme Court's decision in *Southern Motor Carriers*, 471 U.S. 48. Plaintiffs seek to distinguish that case as involving a U.S. regulatory framework, as well as on the ground that Chinese law supposedly permitted the

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[129] *Linesman v. World Hockey Assoc.*, 439 F. Supp. 1325 (D. Conn. 1977).

[130] *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 105-6 (2d. Cir 2001).

[131] Antitrust Guidelines, *supra*, at § 3.2.

[132] *See Hoffmann-LaRoche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 171 (2004); *see also, Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 409 (9th Cir. 1983).

companies to choose to compete, rather than coordinate, if they wished to do so. *See* Pl. Mem. at 62. We have noted previously that the latter point is simply mistaken (*see* footnote 42, *supra*). Meanwhile, the fact that domestic regulation was involved in *Southern Motor Carriers* is precisely the point. Here, as in that case, the government has manifested a clear intent "to displace competition" with regulation. In both systems, the mechanisms of implementation allowed substantial freedom for private activity because that was the most efficient way to implement the government's regulatory policy. Whether the rate-setting activities of *Southern Motor Carriers* literally apply, the logic, as a matter of comity, of according the uniquely Chinese regulatory structure that operated here the same degree of deference as the antitrust laws accord to domestic firms, is compelling.

Most important, dismissal of this action on comity grounds will not prevent the United States – which has primary responsibility for antitrust enforcement – from taking action, should it conclude that doing so is in the public interest. It also remains open to other parts of the Executive Branch to pursue this matter through appropriate diplomatic channels,[133] particularly to the extent that trade issues are implicated. In fact, allowing the United States to make that assessment, having in mind the sensitive considerations that are at play here, is highly prudent and supports dismissal on comity grounds.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants' prior memorandum, Defendants' motion for summary judgment or for determination of foreign law should be granted and this litigation dismissed.

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[133] *See* 6/9/08 Statement at 2-3 (Chan Decl., Ex. 3) ("[T]he Chinese government respectfully submits that, to the extent that the plaintiffs take issue with the Chinese government's sovereign actions over the conduct solely of its own citizens, that issue should not be addressed in the courts of the United States but rather through bilateral trade negotiations conducted by the executive branches of the respective sovereign nations involved with recognized norms of international law and diplomacy").

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Respectfully Submitted,

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