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Domestic Welfare Trumps International Comity in Strongly Worded Price-Fixing Case

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In a recent, strongly worded federal antitrust decision, pleas for international comity by China's nationalized vitamin industry and its regulatory overseer, China's foremost trade industry, fell short in a showdown with U.S. domestic antitrust laws. The case indicates that foreign compulsion defenses are likely to be strictly and narrowly viewed when bumping against the domestic welfare statutes like the Sherman Act. Equally important, the case should signal a caution flag to industries coordinating in nationalized economies exporting to America.

Specifically, in the multidistrict In re: Vitamin C Antitrust Litigation, plaintiffs alleged that four Chinese vitamin C manufacturers agreed to fix prices and limit the supply of Vitamin C exports to the United States. The four defendant companies, Hebei Welcome Pharmaceutical, Aland (Jiangsu) Nutraceutical, Northeast Pharmaceutical, and Weisheng Pharmaceutical, are all members of the PRC's Chamber of Commerce of Medicines and Health Products Importers and Exporters. They moved to dismiss the complaint on this basis, raising the "foreign sovereign compulsion defense, contending China required the companies to coordinate output and export pricing. The Chinese Ministry of Commerce (MOFCOM) (formerly the Ministry of Trade and Economic Cooperation) filed an amicus brief in support of the motion, but the court denied the motion, finding the record related to the defendants too ambiguous.

After completing additional discovery, the defendants moved for summary judgment. Once again they did not dispute that they had reached agreements on pricing and exports, but argued the Chinese government had compelled the nationalized companies to reach the agreements.

The district court reviewed the history of Chinese law governing vitamin C exports. In March 2002, MOFCOM delegated authority to the Chamber of Commerce of Medicines and Health Products Importers and Exporters ("Chamber'), according to the court. MOFCOM also created an export regime known as Price Verification and Chop, under which customs would permit export of vitamin C only if the applicable contract had been reviewed by the Chamber and had been given a seal affixed to the contract.

As an amicus supporting the China vitamin C manufacturers, MOFCOM explained its expectation that the industry would exercise "self-discipline," with an awareness that, MOFCOM explained, failure to coordinate with the Chamber would result in penalties, including the right to export.

The court held, however, that Chinese law did not compel the defendants to reach agreements on price and output. The court held defendants had the unilateral power to suspend verification and chop

and that, without a government mechanism punishing a manufacturer deviating from the price and output restrictions, the agreements were voluntary. The court termed the resulting conduct "consensual cartelization."

The court also cast a skeptical cloud over MOFCOM's amicus position, "declin[ing]] to defer to the Chinese government's statements to the court regarding Chinese law." MOFCOM's brief, the district court explained, "does not read like a frank and straightforward explanation of Chinese law. Rather, it reads like a carefully crafted and phrased litigation position."

Denying summary judgment, the court wrote that the foreign compulsion defense "recognize[s] that a foreign national should not be placed between the rock of its own local law and the hard place of U.S. law," but held "here, there is no rock and no hard place." The court expressed doubt that the foreign sovereign compulsion defense could ever apply to such a case, where "defendants enthusiastically embrace a legal regime that encourages, or even 'compels,' a lucrative cartel that is in their self-interest."

The case will proceed to trial.

The case could bear on the outcomes of two other cases currently involving similar facts for different Chinese industries working their way through the federal system. Equally important, the case serves a warning to any industry regime operating under foreign regulations in results-based, nationalized economies exporting to the United States. Though the case does not go this far, it could, together with the others working their way through the United States courts, eventually raise the question whether a foreign compulsion defense should be recognized at all to nullify application of U.S. antitrust law. Currently the defense is a matter of comity not statute, and the United States courts could establish a rule that doing business in the United States carries with it a commensurate obligation to conform relatd foreign export conduct to U.S. law.

The case is In re: Vitamin C Antitrust Litig., No. 1:06-md-01738 (E.D.N.Y. Sept. 6, 2011).

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