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Lingering Questions on Foreign Sovereignty and Separation of Powers After the *Vitamin C* Price-Fixing Verdict

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THIS PAST SPRING, A NEW YORK JURY found Chinese manufacturers of vitamin C liable for fixing prices of exports from China into the United States, in violation of U.S. antitrust laws. In the private suit, the jury awarded treble damages—$162.3 million—to a plaintiff class of direct purchasers of vitamin C, and, in so doing, it explicitly rejected the Chinese vitamin C manufacturers' central defense: that their agreement on prices was compelled by the Chinese government.[1] That rejection is particularly striking because the Chinese government claimed responsibility for ordering the manufacturers to fix the prices in question. Moreover, the U.S. executive branch, through the U.S. Trade Representative, alleged in a complaint to the World Trade Organization (WTO) that the Chinese government had fixed prices of vitamin C exports.

These questions are still being debated, as the case remains in post-trial briefing and is also under sharp criticism from the Chinese government. Since the jury verdict on March 14, 2013, the Director General of the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM), Shang Ming, has expressed his "deep dissatisfaction" that the U.S. district court refused to defer to China's own interpretation of Chinese law, stating that the court proceeding—in which the judge accused China of providing less than a "complete and straightforward explanation of Chinese law"—"shows disrespect" for China. A MOFCOM spokesman termed the verdict "unfair," "inappropriate," and "wrong," and reportedly stated that, if the verdict stands, "the international community will have concerns, and eventually rising disputes may in turn hurt the interests of the United States."[2]

The *Vitamin C* case has potentially expansive implications for how the U.S. antitrust laws do and should interact with executive branch and foreign interests on international trade. While courts have discretion to interpret the laws of foreign sovereigns, one issue raised by the case is how that discretion should be exercised when a duly authorized representative of a foreign government represents directly to a court that it has compelled the actions being challenged under U.S. law. Where the United States has diplomatic and trade relationships with that government, the potential impact on foreign relations and trade arguably should weigh heavily in the exercise of the court's discretion.

Relatedly, the district court has entered a judgment that is at least in tension with the executive branch's position, posing a second question about separation of powers: that is, whether the judiciary's application of the U.S. antitrust laws should defer to the executive branch's positions on foreign trade.

And last, the Chinese export program here resembles a California price-fixing regime once upheld by the Supreme Court as not subject to the Sherman Act—raising the question of whether our antitrust laws ought to be interpreted as giving greater deference to the sovereignty of individual U.S. states than to the sovereignty of foreign governments.

Vitamin C District Court Proceedings

In January 2005, a class of direct purchasers of vitamin C imported from China brought a series of antitrust lawsuits against manufacturers of vitamin C. They alleged that, beginning in December 2001, Chinese manufacturers exporting raw vitamin C products agreed upon the price and volume of vitamin C products exported from China into the United States and worldwide, in violation of Section 1 of the Sherman Act.

Motion to Dismiss. In the suits, which were consolidated in the Eastern District of New York, the vitamin C manufacturers did not dispute that they took part in a price-fixing cartel. Instead, they argued that they were compelled by the Chinese government to fix prices.

The defendants moved to dismiss the consolidated suit on three legal grounds arising from their position that the price-fixing system occurred at the behest of MOFCOM. First, the defendants claimed they were compelled to fix prices by the Chinese government under the foreign sovereign compulsion defense, which provides that a private actor should not be held liable under the U.S. antitrust laws where (1) the foreign government compelled the private actor's conduct, rather than simply allowed it, and (2) "the foreign government's order was 'basic and fundamental' . . . to the conduct."[3]

The defendants also argued that the price fixing was itself an act of the Chinese state and, therefore, subject to the act of state doctrine, a defense whereby a court declines to exercise jurisdiction when it "*must decide* . . . the effect of official

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action by a foreign sovereign," based on respect for the independence of sovereign states and on the separation-of-powers notion that foreign policy has traditionally been the province of the executive and legislative branches.[4]

Finally, the defendants stated that the U.S. court should defer to China's authority as a foreign sovereign under the doctrine of international comity, whereby a court declines to exercise jurisdiction where there is direct conflict between U.S. law (which, here, forbids price-fixing) and foreign law (which, the defendants alleged, mandated it).[5]

In support of these three defenses from the vitamin C manufacturers, MOFCOM explicitly endorsed the defendants' positions and acknowledged that the challenged conduct was the result of the Chinese government's price-fixing regime. Through MOFCOM, in 2006, China filed an amicus brief (reportedly for the first time in a U.S. court), as well as two subsequent statements in 2008 and 2009. In those filings, MOFCOM informed the court that the plaintiffs challenged what it described as "a regulatory pricing regime mandated by the government of China."[6] MOFCOM therefore characterized the price-fixing scheme as carrying out a governmental policy initiative rather than a system for promoting private ends.

In its submissions, MOFCOM described the export program as a regulatory program directed and supervised by the Chinese government. MOFCOM stated that China had created the Chamber of Commerce of Medicines and Health Products Importers & Exporters (Chamber), an entity "under the Ministry's direct and active supervision," which exercised its regulatory authority to control the prices and volumes of vitamin C exports through a vitamin C subcommittee, whose members were vitamin C manufacturers.

MOFCOM adduced evidence of this regulatory scheme, including an explanation that it adopted a new system (replacing an older production and export licensing system) to accommodate its 2001 accession to the WTO, which proscribes certain export constraints. Under that new system, the Chamber and the subcommittee set minimum price thresholds coordinated among manufacturers, and manufacturers were required to demonstrate to Chinese customs that their vitamin C exports met such thresholds (a system known as "price verification and chop," in which the Chamber reviewed the price in the export contract and stamped the contract if it passed muster). If manufacturers' export contracts did not have the Chamber's seal of approval, their products could not pass Chinese customs for export.

The district court, however, refused to give conclusive weight to China's interpretation of its own regime and denied the defendants' motion to dismiss. The court noted that the record contained conflicting evidence as to whether the defendants' actions were undertaken voluntarily, as the plaintiffs alleged and as certain prior public statements MOFCOM had made suggested, or whether they were mandated by the Chinese government, as MOFCOM claimed in its 2006 amicus brief and in its 2008 and 2009 statements. The court stated that MOFCOM's position was "entitled to substantial deference," but then refused to credit MOFCOM's position as "conclusive evidence of compulsion," as it found that "the plain language of the documentary evidence submitted by the plaintiffs directly contradicts [China's] position."[7] The court denied the defendants' motion to dismiss because the record was too ambiguous to foreclose further investigation into whether the price-fixing system was voluntary or compelled.

Summary Judgment. The perceived ambiguity over whether China's export program was voluntary or compulsory led to a second ruling against the vitamin C manufacturers in 2011, when the court denied the defendants' summary judgment motion. The court, drawing from its ability to interpret foreign law under the Federal Rules of Civil Procedure, ruled that the conduct at issue was not compelled by China.[8] The court held that China "encouraged" the vitamin C cartel as a "policy preference," but that MOFCOM's conduct did not rise to the level of compelling the vitamin C manufacturers to fix prices. To the contrary, the court credited documentary evidence that, at least on its face, supported the voluntary nature of the agreement (e.g., the Chinese government's use of terms such as "self-discipline"), as well as evidence that manufacturers could deviate from the scheme without punishment.[9] The district court thus held that MOFCOM's "assertion of compulsion is a post-hoc attempt to shield the defendants' conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period in question."[10]

In addition to rejecting MOFCOM's position, the district court also gave little weight to the position of the U.S. Trade Representative, the executive branch agency responsible for U.S. international trade policy. In 2009, the U.S. Trade Representative had complained to the WTO that China had violated its WTO commitments by imposing export restraints, including export quotas and minimum export price requirements, on certain raw materials. In doing so, the United States drew from various sources of evidence, including Chinese government export regulations, export regime charters, regulations on the penalties for noncompliance, licensing procedures, Chamber websites, as well as the submissions the Chinese government had made in support of the defendants' motion to dismiss in the *Vitamin C* litigation.[11] Using this evidence, the U.S. Trade Representative argued that China required exporters of certain raw materials to participate in those schemes and developed sanctions for noncompliance with the regulatory regime.

Refusing to defer to the executive branch, however, the *Vitamin C* court instead noted that vitamin C was not an export at issue in the WTO proceedings and that the executive branch had not appeared in the litigation to request that the court accord MOFCOM's statements heightened deference.[12] While the district court was technically correct that the WTO proceedings involved Chinese exports other than vitamin C, it does appear that the procedures established by

MOFCOM to bring about price coordination among bauxite producers and among magnesite producers (two of the products at issue in the WTO) were extremely similar to the price verification and chop procedures adopted in China with respect to vitamin C pricing.

Trial. After the district court refused to grant summary judgment to the vitamin C manufacturers, one defendant settled with the plaintiffs, and two others settled after the trial itself began. The two remaining defendants, one of which is an investor affiliate of the other, declined to settle and chose to proceed to trial.

The court permitted those defendants to produce a fact witness—Qiao Haili, the now-retired former Secretary General of the vitamin C subcommittee—to provide testimony that the defendants believed that they were operating at the behest of MOFCOM. (Mr. Qiao testified regarding the degree to which the defendants *believed* themselves to be compelled because the district court had already rejected the foreign sovereign compulsion defense as a legal matter prior to trial.) To that end, Mr. Qiao testified that he was transferred from MOFCOM to his position at the Chamber.[13] He also testified that the Chinese government has numerous powers over Chamber employees, such as the power to appoint, supervise, and terminate Chamber employees and the power to determine Chamber employees' salary levels.[14]

The effectiveness of Mr. Qiao's testimony was limited, however, by various factors. The court excluded certain documentary evidence that the defense proffered, such as what Mr. Qiao described as the regulations for penalizing low-price exporters. The court also excluded some of the evidence proffered because it fell outside of the relevant time period of the challenged conduct, some evidence on hearsay grounds, and some legal documents on the reasoning that the court had already made its legal ruling that the Chinese government did not compel the pricing scheme. Moreover, there were ambiguities in the record as to precisely what kind of pricing Mr. Qiao encouraged—that is, whether he intended to require Chinese exporters to engage in supra-competitive pricing or simply not to engage in below-cost predatory pricing, and whether he imposed a voluntary, self-regulating system or a mandatory regime with official enforcement mechanisms. Additionally, no current MOFCOM official appeared at trial, and hearsay rules curbed what testimony Mr. Qiao could provide regarding his claims that senior officials at MOFCOM had instructed him to establish the pricing system.

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

Since the verdict, the non-settling defendants have filed post-trial motions for judgment as a matter of law, which focus in part on the foreign sovereignty defenses and in particular on the foreign act of state defense, presumably because they had put the compulsion defense to the jury and lost. Pending the outcome of those motions, the defendants have signaled their intent to appeal.[15] One possibility is that MOFCOM could seek the support of the U.S. State Department in connection with the appeal. Litigants followed such a route successfully in the *Matsushita* case (discussed below),[16] where the Solicitor General, the Justice Department, and the State Department filed an amicus brief urging that the court below had erred in failing to defer to the Japanese government's position that it had compelled the conduct in question.

Other Proceedings

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

World Trade Organization. In 2009, the U.S. Trade Representative filed a complaint—later joined by the European Union and Mexico—alleging that the Chinese government imposed export restraints, including quotas and minimum price requirements, in violation of the commitments China made when it acceded to the WTO in 2001, and that the export controls at issue were "attributable to China."[17] To state a cause of action subject to the WTO's dispute resolution, however, the United States had to demonstrate that the Chinese government, and not private Chinese entities, was responsible for the export restraints in question. As discussed above, the United States drew from numerous sources of evidence, including the Chinese government's submissions in the Vitamin C litigation, in which MOFCOM claimed that the Chamber and its subcommittee which administered price fixing were acting under the direction and supervision of the state.

In July 2011, the WTO panel reviewing the complaint ruled that China's export restraints were indeed "requirements" that were "attributable to China" and that violated the country's commitments to the WTO. In so doing, the panel explicitly credited the statements that MOFCOM had made to the *Vitamin C* court as evidence that the Chinese government was directing the country's export restraint program through trade chambers. In that connection, the WTO panel made clear that "statements made by China's MOFCOM in the context of U.S. domestic court proceedings prior to this dispute appear to confirm [that MOFCOM exercised authority through a trade chamber similar to the Chamber]."[18]

The WTO's appellate body later vacated some of the panel's rulings on other grounds related to due process considerations, thereby voiding the panel's findings that the Chinese government had violated its WTO commitments by,

among other things, setting export quotas and minimum-price requirements. The appellate body did not, however, reverse the WTO panel's finding respecting MOFCOM's power to impose sanctions for noncompliance with its regulatory regime.[19] The WTO proceedings are thus left in tension with the *Vitamin C* litigation, which held the price-fixing program to be neither an act of the Chinese government nor the product of government compulsion.

Although the district court in the *Vitamin C* litigation had the benefit of the WTO panel's July 2011 findings when it denied summary judgment two months later, it nonetheless interpreted Chinese law as creating a voluntary scheme. The district court held that the WTO panel's findings did not alter its interpretation of Chinese law, in part because the panel did not explicitly address whether the Chamber's activities were voluntary or compulsory. As noted above, however, while the WTO panel did not explicitly term China's regime "compulsory," it is clear that the WTO panel viewed the export regime as created and supervised by the Chinese government, with sanctions available for noncompliance.

The WTO panel's ruling, coupled with the district court ruling, have effectively created two contradictory interpretations of China's system: a matter of government action before the WTO and a matter of voluntary, private action before the U.S. district court. The partial reversal of the WTO panel's ruling by the WTO's appellate body has since ensured that China was not found liable. But the United States, China, and Chinese entities generally could face future parallel proceedings in the WTO and U.S. federal court that may result in findings that are not parallel.

Other District Courts. Courts in two other cases have struggled with the analysis of alleged antitrust violations arising from China's export program: one in Pennsylvania related to Chinese exports of the mineral bauxite, the primary source of aluminum, and one in New Jersey related to Chinese exports of the mineral magnesite, which is used in the production of synthetic rubber, magnesium chemicals, and fertilizers.[20] Both decisions exhibited somewhat greater deference to the WTO proceedings and the U.S. Trade Representative than the *Vitamin C* court had. Nevertheless, both cases are ongoing and it remains uncertain how the courts will resolve this issue.

In Pennsylvania, the bauxite court temporarily stayed the private antitrust action pending the outcome of the WTO proceeding.[21] Once the WTO panel made its findings that China had violated various WTO commitments, the bauxite manufacturers filed a motion to dismiss, arguing that the Chinese state coordinated the challenged price fixing and that, to grant relief to the plaintiffs, the U.S. court would have to invalidate China's sovereign acts of state. The plaintiffs responded that the WTO's findings were more ambiguous as to the degree of China's control over quasi-governmental bodies, such as the trade chambers. The court agreed with the plaintiffs and issued an oral opinion denying the defendants' motion to dismiss. In so holding, the court noted that WTO proceedings lack testimony and differ from the kind of evidentiary hearing that plaintiffs would be permitted in U.S. courts. The case is currently in discovery through late 2013 and has not yet progressed to summary judgment.

We expect that the United States will now face a host of difficult legal and policy questions as a result of MOFCOM's dissatisfaction with the *Vitamin C* court's ruling and the *Vitamin C* manufacturers' appeal . . .

The New Jersey district court dismissed the plaintiffs' magnesite case outright prior to the WTO panel's report, on jurisdictional grounds. The court did not make a definitive ruling on the foreign sovereign compulsion defense, but it did conclude, based in part on MOFCOM's statements in the *Vitamin C* case, that the relevant trade chamber was an arm of the Chinese government. It also demonstrated substantially more deference to the executive branch on foreign policy matters, stating that it will read the WTO complaint from the United States as "strongly suggesting" that the price fixing in question is compelled, and not voluntary, in nature.[22]

The Third Circuit subsequently reversed and remanded the court's jurisdictional analysis without reaching the district court's decision on the act of state or foreign sovereign compulsion defenses, and the Supreme Court declined to review the decision.[23] The case now remains pending in district court, which has most recently raised sua sponte questions about whether the plaintiff class has Article III standing—an issue that the parties are currently briefing.[24]

Neither the U.S. Trade Representative's complaint against China nor the WTO panel's findings of Chinese violations conclusively ended either the bauxite or the magnesite cases. But in both of those litigations, the district courts exhibited more deference to the U.S. Trade Representative on matters affecting U.S. foreign trade policy and to the WTO proceedings than the *Vitamin C* court did—even though the U.S. Trade Representative has not yet appeared in any of the three litigations. One court—the New Jersey district court—also exhibited more deference to MOFCOM's representation of Chinese law. Taken together, these cases suggest that appellate courts will ultimately need to resolve the complex antitrust issues relating to China's export program.

Questions Facing the United States

We expect that the United States will now face a host of difficult legal and policy questions as a result of MOFCOM's dissatisfaction with the *Vitamin C* court's ruling and the *Vitamin C* manufacturers' appeal: Should courts defer to the executive branch on matters affecting foreign policy? Should courts defer to foreign governments' interpretation of their

laws? Is the sovereignty of foreign governments narrower than the sovereignty accorded to individual U.S. states?

Deference to Executive Branch. One likely issue on appeal is whether it is appropriate for U.S. courts in private antitrust actions to reach decisions potentially at odds with positions taken by the U.S. Trade Representative, who presents the views of the U.S. government to the WTO. The *Vitamin C* court placed the burden on the executive branch to communicate its views directly to the district court rather than in the WTO proceeding, implying in its order denying summary judgment that it would not defer to the U.S. Trade Representative's position in the WTO proceeding because the U.S. Trade Representative had not explicitly moved the court to do so.[25] As some have argued,[26] it is possible that in the realm of foreign policy and international trade matters, the judicial branch might choose to defer to the seemingly greater competence of the executive branch on such matters—without presuming that there is no deference to the executive branch unless the executive moves the district court to defer.

Indeed, the executive branch has broad power over matters of foreign policy.[27] In this connection, it is also worth noting that the U.S. Department of Justice, which had vigorously prosecuted the European vitamin C cartel in 2000, extracting what was then the largest-ever criminal fine, did not proceed against the Chinese vitamin C manufacturers.[28]

Another antitrust action, the *Matsushita* case, involved a defense that a foreign government had compelled a pricing cartel. In *Matsushita*, the Solicitor General—joined by the Justice Department and the State Department—took the clear position that a court should give "dispositive weight" to the statements of foreign governments that they have compelled the conduct of petitioners; to do otherwise would "cause[ ] deep concern to [governments] that are significant trading partners of the United States" and "fail[ ] to accord the proper respect due a foreign government that has taken appropriate steps to convey its views to a United States court in connection with litigation."[29]

It is an open question whether the *Vitamin C* court erred in making determinations of Chinese law in tension with the U.S. executive branch, instead of choosing to stay the litigation pending resolution of the WTO proceedings that were initiated by the U.S. Trade Representative. The district court's interpretation of Chinese law, as a matter of law, is reviewed de novo by the appellate court, without deference to the district court's findings. Under these circumstances, if the case were indeed to be appealed, it will be interesting to see how the Second Circuit reacts to the district court's approach.

Deference to Foreign Sovereign. Another key question facing the United States in future litigation involving a foreign sovereign's interpretation of its own laws is whether the district court provided appropriate deference to MOFCOM's position when it dismissed MOFCOM's filing as something less than a "complete and straightforward explanation of Chinese law."[30] At one point, the Supreme Court held that a foreign government's statements regarding its law should be deemed conclusive, but, since then, Federal Rule of Civil Procedure 44.1 was enacted to provide U.S. judges wide latitude in determining foreign law. Courts today thus tend to regard foreign governments' views of their own laws with "some degree of deference" without deeming such statements conclusive.[31] Since the enactment of Rule 44.1 in 1966, however, the Solicitor General and the State Department have still taken the position that foreign sovereigns' interpretations of their laws should be granted dispositive weight.[32]

This remains an unsettled and difficult area of law and policy. After all, there are reasons why courts may choose to be skeptical of foreign governments' interpretations of their laws, such as where a foreign government may not be recognized as legitimate by the United States. On the other hand, deciding how credible a foreign government is poses a legal question with expansive foreign policy implications to be borne by the executive branch, particularly where, as here, the U.S. government has diplomatic and trade relations with the country in question.

Is the Sovereignty of U.S. States Greater than That of Foreign Governments? Finally, the *Vitamin C* verdict raises a related issue on the deference of the Sherman Act to acts of state, specifically, whether individual U.S. states are accorded a greater degree of sovereignty under the Sherman Act than are foreign governments with which the United States has diplomatic relations.

Just this year, the Supreme Court unanimously reiterated the state-action immunity principle that "when a local government entity acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, it is exempt from scrutiny under the federal antitrust laws."[33] Under that doctrine, the Supreme Court has repeatedly held that Congress did not intend to abrogate states' sovereign capacity to impose market restraints or have non-state actors do so pursuant to a state regulatory program.[34] Nonetheless, the Supreme Court exercises particularly close scrutiny when the scheme "is carried out by others pursuant to state authorization," requiring the state policy to be "clearly articulated and affirmatively expressed" and "actively supervised by the State."[35]

Parker v. Brown,[36] the case that gave rise to the state-action doctrine, strikes us as directly relevant to the *Vitamin C* litigation. In that case, the Supreme Court upheld a state regulatory scheme that is strikingly similar to the scheme at issue in the *Vitamin C* case. In *Parker*, the Supreme Court absolved private defendants of Sherman Act liability for adhering to a price-fixing regime undertaken by the State of California. The Supreme Court held that a state regulatory scheme that restricted competition among California raisin growers and maintained raisin prices did not violate Section 1 of the Sherman Act,[37] signaling the Supreme Court's deference to U.S. states on regulatory price-setting matters as an issue of federalism.

It is difficult to distinguish the characteristics of California's price-fixing system from those of China's. Both California and

China established a committee and then directed that committee to set prices. In each case, the governments delegated pricing authority to the committees and supervised the committees' activities. Both systems depended upon that supervision by officials who were either state actors or quasi-state actors employed by the state. Both California's and China's pricing regimes proscribed producers from selling freely to buyers; sellers were required to sell based on committee-mandated prices. And both regimes contemplated sanctions for noncompliance.

In *Parker*, the Supreme Court found no language in the Sherman Act to suggest that Congress intended the antitrust laws to apply in the face of California's regulatory regime. Ruling that the Sherman Act is "a prohibition of individual and not state action," the *Parker* Court noted that the Sherman Act "makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action *directed* by a state."[38]

But it is equally true that the Sherman Act contains no hint that it was intended to restrain action directed by a foreign country. Therefore, while it has been said that the "state action" doctrine is rooted in the federal government's reservation of power to the U.S. states, and it is therefore not applicable to a situation involving similar foreign government regulation,[39] it is difficult to explain why, as a policy matter, comparable considerations of international comity should not yield the same result on the same or similar facts.

At least one district judge has hesitated to be "the first to extend the state action doctrine so far beyond its original purpose [to apply to foreign governments]."[40] Refusing to do so, however, leaves open an interpretation of the Sherman Act as privileging the sovereignty of U.S. states over the sovereignty of countries with whom the United States has diplomatic relations—even in instances where, as is arguably the case here, a state's price-fixing regime operates in a similar way as a foreign country's. It is unclear whether the executive branch of our government would view that result as helpful to its diplomatic and trade relationships.

The critical inquiry for whether a court should decline to exercise jurisdiction for international comity principles is whether there is an actual conflict between the laws of two nations. For a court to find an actual conflict, a defendant must prove that foreign law requires it "to act in some fashion prohibited by the law of the United States" or that it is impossible to comply with U.S. and foreign law at the same time.[41] In the *Vitamin C* litigation, there may well be a conflict between U.S. antitrust law and Chinese regulations that mandate that vitamin C manufacturers coordinate a price and enforce it, on penalty of losing their export licenses. The U.S. antitrust laws prohibit such conduct, and in the view of both MOFCOM and the U.S. Trade Representative, the Chinese regulations mandate it. With that said, however, there are factual questions in the record about whether sanctions for noncompliance were actually enforced and how mandatory the regime was. We expect that one question to come will likely be why California's regulatory regime in *Parker v. Brown* was sufficiently mandatory to qualify as state action, whereas the district court found China's similar regulatory regime in the Vitamin C litigation not to be sufficiently mandatory to apply international comity principles.

The Chinese Price-Fixing Cases in the Context of Other Tensions Involving the Application of Chinese and U.S. Antitrust Laws

As we have seen, Chinese officials have sharply criticized the refusal of the district court in the *Vitamin C* litigation to accept MOFCOM's position concerning the role of the Chinese government in directing the behavior of Chinese exporters to the United States. While the *Vitamin C* case is a private suit, it is notable that neither the U.S. Department of Justice nor the U.S. Trade Representative has taken the position in that proceeding that MOFCOM's interpretation of its laws should be given much greater deference than was given it by the district court.

U.S. officials have, however, voiced thinly veiled criticisms regarding the manner in which Chinese antitrust authorities are applying Chinese laws to U.S.-based companies.[42] In July 2013, the senior Republican Commissioner at the Federal Trade Commission, Maureen Ohlhausen, delivered a speech in Beijing in which she encouraged the Chinese antitrust authorities to promote more transparency in merger review and "show consistent movement away from considering non-competition factors in their decisions."[43] Federal Trade Commission Chairwoman Edith Ramirez also recently raised the same concern. In discussing China, she stated that competition enforcement should be "based solely on an economic analysis of effects of competition," and when it is not, the "nature and effect [of non-competition factors on competition analysis] should be made transparent."[44]

The *Vitamin C* litigation and the other private actions pose an important question regarding whether the U.S. government should seek to express the interests of the executive branch through an amicus filing, particularly where, as here, the Department of Justice did not bring criminal price-fixing cases against any of the defendants and the U.S. Trade Representative took a position diametrically opposed to the views expressed by the private plaintiffs. We suggest that the concerns expressed recently by U.S. antitrust officials about Chinese enforcement of its antitrust laws might fall on more receptive ears if the United States were to do what it did in *Matsushita*—that is, file an amicus brief stating that the Chinese government's interpretation of its own laws should be given greater deference than that afforded by either the private plaintiffs or the district court in the *Vitamin C* litigation.

Conclusion

It is clear that the *Vitamin C* litigation, as well as the bauxite and magnesite cases, present numerous unsettled and challenging questions of U.S. law and policy, and the *Vitamin C* jury verdict in the plaintiffs' favor is by no means the final

word on the conduct at issue in that case. All three cases present the question of what degree of deference should be accorded by U.S. courts to statements of the Chinese government and to the interpretation of Chinese law by the U.S. executive branch in addressing international trade and foreign policy concerns—particularly where the executive branch's views are consistent with the Chinese government's views. The extent to which, if at all, the executive branch of the U.S. government seeks to participate in further proceedings in these cases may be pivotal. ■

ADDENDUM

On November 26, 2013, after this article went to press, Judge Cogan denied the defendants' motion for judgment as a matter of law, finding, as before, that Chinese law did not compel the defendants' conduct and that the doctrines of act of state and international comity did not apply. The court again found that it was appropriate to exclude evidence about Chinese law from the jury, as the determination of foreign law is a matter of law, not fact. The court also found that the jury had ample grounds to find that the Chinese government's actions did not compel the defendants' behavior. *In re* Vitamin C Antitrust Litigation, 1:06-MD-1738-BMC-JO (E.D.N.Y. Nov. 26, 2013).

[1] Jury Verdict, *In re* Vitamin C Antitrust Litig., No. 06-MD-01738-BMC-JO (E.D.N.Y. Mar. 14, 2013), Docket No. 675.

[2] *See, e.g.*, Zhu Ningzhu, *News Analysis: U.S. Ruling on Chinese Vitamin C Producers Unfair*, ENGLISH.NEWS.CN (Mar. 19, 2013), *available at* http://news.xinhuanet.com/english/indepth/2013-03/19/c_132246076.htm; *MOFCOM's Shang Says US Judgment in Vitamin C Case Shows "Disrespect,"* POL'Y & REGULATORY REP. (Mar. 22, 2013).

[3] Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293–94 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 606 (9th Cir. 1976). *See also* Dingding Tina Wang, *When Antitrust Met WTO: Why U.S. Courts Should Consider U.S.-China WTO Disputes in Deciding Antitrust Cases Involving Chinese Exports*, 112 COLUM. L. REV. 1096, 1105–07 (2012).

[4] W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp., Int'l, 493 U.S. 400, 406 (1990); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 418 (1964).

[5] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797–98 (1993); Gross v. German Found. Indus. Initiative, 456 F.3d 363, 392–94 (3d Cir. 2006).

[6] 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 at 6, *In re* Vitamin C Antitrust Litig., 584 F. Supp. 2d 546 (E.D.N.Y. 2008) (No. 06-MD-01738-DGT-JO), Docket No. 69 (the amicus curiae brief); *see also* Ministry of Commerce of the People's Republic of China Statement in In re Vitamin C Antitrust Litig., 584 F. Supp. 2d 546 (No. 06-MD-01738-DGT-JO), Docket No. 306–3 (2008 statement); Ministry of Commerce of the People's Republic of China Statement in *In re* Vitamin C Antitrust Litig., 810 F. Supp. 2d 522 (E.D.N.Y. 2011) (No. 06-MD-01738-BMC-JO), Docket No. 400–2 (2009 statement).

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

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

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

[10] *Id.* at 552.

[11] *See, e.g.*, First Written Submission of the United States of America, *China—Measures Related to the Exportation of Various Raw Materials* ¶¶ 206–229, WT/DS394, WT/DS395, WT/DS398 (June 1, 2010), *available at* http://www.worldtradelaw.net/wtodisputesubmissions/us/DS394_USFirstWrittenSubmission.pdf.

[12] *In re Vitamin C Antitrust Litigation*, 810 F. Supp. 2d at 527, 551–60.

[13] Transcript of Record at 902–03, *In re* Vitamin C Antitrust Litig., No. 05-MD-1738 (E.D.N.Y. Mar. 5, 2013).

[14] *See id.* at 919.

[15] This appeal will be the first that the defendants have taken from the *Vitamin C* court's rulings. The district court refused to permit an interlocutory appeal of its order denying summary judgment.

[16] *See* Brief for the United States as Amicus Curiae, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) (No. 83-2004), 1985 WL 669663 at *6, *18 [hereinafter U.S. *Matsushita* Brief].

[17] First Written Submission of the United States of America, *China—Measures Related to the Exportation of Various Raw Materials* ¶ 208, WT/DS394, WT/DS395, WT/DS398 (June 1, 2010), *available at* http://www.worldtradelaw.net/wtodisputesubmissions/us/DS394_USFirstWrittenSubmission.pdf.

[18] Reports of the Panel, *China—Measures Related to the Exportation of Various Raw Materials* ¶ 7.1005, WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011), *available at* http://www.wto.org/english/tratop_e/dispu_e/394_395_398r_e.pdf.

[19] Reports of the Appellate Body, *China—Measures Related to the Exportation of Various Raw Materials* ¶ 362, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012), *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=93421&CurrentCatalogueIdIndex=0&FullTextSearch=.

[20] Resco Prods., Inc. v. Bosai Minerals Group Co., No. 2:06-CV-235, 2010 U.S. Dist. LEXIS 54949 (W.D. Pa. June 4, 2010); Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 702 F. Supp. 2d 320 (D.N.J. 2010).

[21] *See Resco Products*, 2010 U.S. Dist. LEXIS 54949.

[22] *Animal Science Products*, 702 F. Supp. 2d at 346–48, 435. The district court rejected the defendants' state action defense on the grounds that a state's commercial activities in setting prices are not the sovereign acts that the doctrine is designed to protect, but it left open the possibility of a foreign sovereign compulsion defense, citing multiple sources of evidence, including a clear source of compulsion (adherence to a minimum price requirement), sanctions for noncompliance (inability to apply, exercise, or keep export licenses), and the actual existence of punitive compulsion (here, prescripts mandating a minimum price).

[23] *See* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (Mar. 19, 2012).

[24] *See* Text Order by Judge Kevin McNulty, Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., No. 2:05-CV-04376-K-MAH (D.N.J. Aug. 7, 2013).

[25] *In re Vitamin C Antitrust Litigation*, 810 F. Supp. 2d at 551 n.38.

[26] *See, e.g.*, Wang, *supra* note 3 (arguing that U.S. courts should take into account U.S. positions in ongoing WTO disputes and, to a lesser extent, the WTO's own rulings).

[27] *Compare* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936) (quoting the Senate Committee on Foreign Relations as stating that "[t]he President is the constitutional representative of the United States with regard to foreign nations" and referring to the President as "the sole organ of the federal government in the field of international relations") *and* U.S. CONST. art. II, §§ 1–3 (providing the President with power

over foreign affairs), *with* U.S. Dep't of State, Foreign Policy Roles of the President and Congress (June 1, 1999), *available at* http://fpc.state.gov/6172.htm (describing foreign policy as a domain shared between the executive and legislative branches).

[28] We can only speculate as to why the Justice Department did not bring criminal charges in the vitamin C, bauxite, or magnesite cases, but it may be that a factor was the involvement of the Chinese government in regulating the conduct that the Justice Department would have challenged.

[29] U.S. *Matsushita* Brief, *supra* note 16, at *6, *20 n.21.

[30] *See In* re *Vitamin C Antitrust Litigation*, 810 F. Supp. at 552.

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

[32] *See* U.S. *Matsushita* Brief, *supra* note 16, at *6, *18.

[33] FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1007 (2013).

[34] *Id.* at 1010; *see also* Patrick v. Burget, 486 U.S. 94, 99–100 (1988); So. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 56–57 (1985).

[35] *Id.* (citing Hoover v. Ronwin, 466 U.S. 558, 568 (1984) and Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980)). The defendants in the *Vitamin C* action raised the state action doctrine as an affirmative defense but the court ruled in its order denying summary judgment that the defendants had not attempted to establish the active supervision requirement of the defense. *See In re Vitamin C Litigation*, 810 F. Supp. 2d at 545–46.

[36] 317 U.S. 341, 347–48 (1943).

[37] *Id.* at 347–48.

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

[39] *See In re* Transpacific Passenger Air Transport Antitrust Litig., No. C-07-05634-CRB (N.D. Cal. May 9, 2011), 2011 U.S. Dist. LEXIS 49853, at *58–60 (refusing, in a price-fixing case, to extend the state action doctrine for U.S. states to acts of Japan because the state action doctrine is rooted in federalism); Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 397 n.25 (D. Del. 1978) ("expressly leav[ing] open" whether the state action doctrine "should be applied to an entity sponsored by a foreign government"). The Supreme Court has explicitly held that *Parker* state action immunity from the Sherman Act does not apply directly to local governments, but it has not ruled one way or another on whether *Parker* should be extended to apply to foreign acts of state or whether the federalism principles of *Parker* extend to U.S. states an immunity from the Sherman Act that is unavailable to foreign sovereigns. *See* City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 370 (1991); Town of Hallie v. Eau Claire, 471 U.S. 34, 38 (1985); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706 (1962) (implicitly leaving open the question of whether Parker is available to foreign sovereigns).

[40] Transpacific Passenger Air Transport, 2011 U.S. Dist. LEXIS 49853, at *59.

[41] *Hartford Fire*, 509 U.S. at 799. If such a conflict exists, courts choose to exercise or withhold jurisdiction under principles of comity through a balancing analysis that considers numerous factors, including the degree of the conflict and its potential effect on foreign relations. *See, e.g.*, *Mannington Mills*, 595 F.2d at 1297–98; *Timberlane*, 549 F.2d at 614.

[42] This criticism has come at a time of controversy about antitrust enforcement between the United States and China. This summer, news outlets reported that the Chinese antitrust agency that handles pricing matters—the National Development and Reform Commission (NDRC)—allegedly sought confessions from about 30 non-Chinese firms, including General Electric, Microsoft, Intel, and Qualcomm, for "any antitrust violations" they may have committed, with warnings against using outside counsel to defend themselves. NDRC has since stated that outside counsel are "welcome" to participate in agency probes. *See, e.g.*, Michael Martina, *Exclusive: Tough-Talking China Pricing Regulator Sought Confessions from Foreign Firms*, Reuters (Aug. 21, 2013), http://uk.reuters.com/article/2013/08/21/uk-china-antitrust-idUKBRE97K05220130821; *China: NDRC refutes bias against foreign firms, external lawyers*, Competition Pol'y Int'l (Sept. 17, 2013), https://www.competitionpolicyinternational.com/china-ndrc-refutes-bias-against-foreign-firms-external-lawyers.

[43] Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, Nurturing Competition Regimes: Evaluation and Evolution, Remarks at Competition Policy in Transition, China Competition Policy Forum (July 31, 2013), *available at* http://ftc.gov/speeches/ohlhausen/130731comppolicychina.pdf.

[44] Leah Nylen, *China Needs to Ensure Procedural Fairness in Its Investigations, FTC Chairwoman Says*, MLex, Sept. 25, 2013; *see also* Bill Perry, *US FTC Chairwoman States that China Needs to Ensure Procedural Fairness in its Antitrust Proceedings*, US China Trade War Blog, http://uschinatradewar.com/.