

## Questioning US Antitrust Liability Of Foreign Defendants

*Law360, New York (October 05, 2011, 2:54 PM ET)* -- In an antitrust price-fixing case against Chinese vitamin C manufacturers,[1] U.S. purchasers of vitamin C claim that defendants formed a cartel aided by the Chinese Chamber of Commerce of Medicines and Health Products Importers and Exporters (the Chamber) and engaged in collusive, anti-competitive price-fixing among the defendants whereby defendants agreed to fix prices and volume of exports for vitamin C.

Defendants in the *In re Vitamin C Antitrust Litigation*[2] do not dispute that they engaged in a price-fixing cartel, but argue that because they are members of the Chamber, which is a government-supervised entity through which the Chinese government has some control, defendants were compelled by the Chinese government to fix the price of vitamin C they exported to the United States.

In support of the defendants' arguments, the Ministry of Commerce of the People's Republic of China (the Ministry) filed an amicus brief explaining that defendants' actions were compelled by the Chinese government. Despite the defendants' and the Ministry's efforts to persuade the court that the defendants were caught between a rock and a hard place — that it was impossible to comply with the laws of both countries as the laws of China required them to take action that was illegal in the United States — the court said, "Here, there is no rock and no hard place. The Chinese law relied upon by defendants did not compel their illegal conduct." Unconvinced that the doctrines of foreign sovereign compulsion, act of state or comity saved defendants from antitrust liability in the United States, the court denied defendants' summary judgment motion.[3]

The court explained that the Chinese government created several China Chambers of Commerce for Import and Export and granted these Chambers the authority to regulate import and export commerce. These Chambers were given governmental functions, which included the responsibility of addressing anti-dumping charges and industry coordination. The Chambers were also given private functions, which included the responsibility of conducting market research, mediating trade disputes and organizing trade fairs.

In an effort to address problems surrounding the expanding vitamin C industry, including anti-dumping lawsuits, a vitamin C subcommittee was created by the Chamber to oversee exportation of vitamin C and was directed to establish mandatory minimum export prices. The subcommittee enacted a 1997 charter that provided that the subcommittee would "supervise the implementation of export licenses, advise the Ministry on export quotas and 'coordinate and administrate market, price, customer and operation order of Vitamin C export.'"

Later, as a part of China's effort to open its economy to the world and pursuant to China's entry into the World Trade Organization, existing export regulations were abolished and the vitamin C subcommittee revised its charter in 2002. The new charter made at least two key changes: Membership in the subcommittee was no longer required in order to export vitamin C, and material penalties for noncompliance were removed. Nonetheless, between the period of 2002 to 2005, the subcommittee held several meetings during which defendants reached agreements on price and export quotas of vitamin C.

The three defenses upon which defendants rely are all rooted out of respect for the sovereignty of other independent states and the separation of powers within the United States. The court, however, ultimately declined to defer to the Ministry's interpretation of law reasoning that the Ministry failed to address critical provisions of the 2002 regime. The court noted, for example, that "the Ministry makes no attempt to explain China's representations [to the World Trade Organization] that it gave up export administration of vitamin C."

The court also noted that, although not dispositive, it could not ignore the fact that the defendants' economic interests were aligned with the allegedly compelled conduct. The court ultimately found that there was no affirmative evidence of compulsion by the Chinese government but rather, the evidence suggested that defendants voluntarily agreed to fix the price of vitamin C they sold in the United States. The court further questioned the credibility of documents filed by the Ministry after commencement of the lawsuit, finding that other facts before the court suggested that the Ministry was merely attempting to shield defendants' illegal conduct rather than provide a straightforward explanation of Chinese law.

In addressing the related defenses asserted by defendants, the court stated that it was "unclear" whether a factor-based test for analyzing comity issues, advanced by the Ninth and Third Circuit Courts of Appeal, was still valid after the U.S. Supreme Court's holding in *Hartford Fire*.<sup>[4]</sup> Rather than analyze these factors, the court concluded that absent a "true conflict envisioned by *Hartford Fire*," dismissal on comity grounds would not be justified.

The court concluded that the foreign sovereign compulsion defense did not apply for the same reason and also because defendants did not face "the imposition of penal or other severe sanctions" for failure to comply. The court further declined to accept defendants' position that it was the sovereign acts of the Chinese government that compelled defendants to engage in price-fixing.

Subjecting Chinese manufacturers to antitrust liability in the United States could impact foreign relations between the United States and China and their ability to cooperate on global antitrust enforcement. While it may be too early to determine if other courts will follow the Eastern District of New York's conservative approach when analyzing the doctrines of foreign compulsion, comity, and act of state, courts have begun to grapple with similar issues concerning antitrust liability of foreign defendants.

In *Animal Science Products Inc. v. China Nat'l Metals & Minerals Import & Export Corp.*,<sup>[5]</sup> the District of New Jersey granted defendants' motion to dismiss in a price-fixing case where Chinese magnesite manufacturers argued that through the auspices of their trade association, the Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, they were compelled by the Chinese government to control prices.

In *In re Potash Antitrust Litigation*, the Northern District of Illinois denied a Belarus potash producer's motion to dismiss antitrust claims concluding that defendant's conduct was not compelled by an official act of the Republic of Belarus and stating that the court was "not convinced that this is a situation where

we would be forced to inquire into official acts and conduct of the Republic of Belarus." [6] In *Resco Products Inc. v. Bosai Minerals Group Co. Ltd.*, [7] plaintiffs claimed that Chinese defendants conspired to fix prices and control the supply of bauxite in violation of Section 1 of the Sherman Act.

Defendants argued that the price controls on bauxite was mandated by China's export control on regulations and policies. The Western District of Pennsylvania denied defendants' motion to dismiss without prejudice and stayed the proceedings pending the outcome of the World Trade Organization proceeding concerning China's export restriction on bauxite and other raw materials. The court concluded that while not dispositive, the WTO's report may implicate separation of powers concerns that the court should consider when determining whether the act of state doctrine applies to the case.

As more and more foreign manufacturers become subject to claims that their conduct violates U.S. antitrust laws, it will be interesting to watch how the federal district courts and federal courts of appeal approach these doctrine — whether they will follow a strict reading of *Hartford Fire* and closely scrutinize whether a true conflict exists such that a foreign defendant is caught between a rock and a hard place, or take a more expansive approach of analyzing other factors in making comity determinations.

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[1] The four main defendants in the case were: Hebei Weolcom Pharmaceutical Co. Ltd.; Aladn (Jiangsu ) Nutraceutical Co. Ltd.; Northeast Pharmaceutical Co. Ltd. ; and Weisheng Pharmaceutical Co. Ltd.

[2] *In re Vitamin C Antitrust Litig.*, 06-MD-1738, 2011 (E.D.N.Y. Sept. 6, 2011).

[3] In a predecessor case, the defendants' motion to dismiss was similarly denied. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008).

[4] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

[5] *Animal Sci. Prods. Inc. v. China Nat'l Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320, vacated on other grounds, 2011 (3rd Cir. Aug. 17, 2011).

[6] *In re Potash Antitrust Litig.*, 686 F. Supp. 2d 816, 825 (N.D. Ill. 2010) (citing *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 559 (E.D.N.Y. 2008)).

[7] Resco Prods. Inc. v. Bosai Minerals Grp. Co. Ltd., No. 06-235, 2010 (W.D. Penn. June 4, 2010).

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