STREAM READINGS

COMPARATIVE LEGAL POLICY IN ASIA – REGULATION OF MARKETS AND ENTERPRISES

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Comparative Legal Policy in Asia – Regulation of Markets and Enterprises

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Description

Asia has always presented itself as a challenge to the western liberal legal order. Recent rise in nationalism and the race to market dominance, however, have led to movements towards illiberal law around the world and also in Asia. This stream will examine some of these trends with a Case-Study on antimonopoly law and policies.

This stream deals with legal policies on markets focusing on antimonopoly laws in East Asia. Anti-monopoly laws are generally deemed by the West as one of the main tools for regulating global cartels. By preventing collusive practices, anti-monopoly laws are said to promote fair competition for the benefit of consumers. But cartels can and actually have different roles in relation with national economic policies. In some countries such as China cartels work in coordinating and developing the economy under the direction of political powers. Anti-monopoly laws then can diverge among national legal systems in terms of their actual role and function.

In addressing these issues, our focus will be to take an inward and outward perspective of Antimonopoly law. In the first session, this stream examines how anti-monopoly policies can often be in tension with domestic industrial policies, and how anti-monopoly serves the more political goal in legitimizing central authority. As inward analysis, we will focus on contextualizing Antimonopoly Law and its real role and function in each jurisdiction.

In the second session, we take a more outward looking perspective to see how and if national antimonopoly laws can check global cartels overreaching national boundaries. As outward analysis, we address the issue of how to constrain cartels closely connected and/or controlled by sovereign powers. As such, we also ask whether the "western" frame of rule of law that emphasizes a limited government and the public/private divide fits the East Asian model. Indeed, we ask whether East Asia's "illiberal" anti-monopoly law should instead by viewed as an alternative model.

We take as our main case-study, Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd, et. al. (commonly known as the Vitamin C case), brought against Chinese pharmaceuticals for anti-trust violations in the U.S. federal courts. The Chinese defendants claimed the Foreign Compulsion defense — that they should be shielded from liability because they had been ordered by the Chinese Ministry of Commerce to set a price floor for vitamin C exports. This case also calls into consideration issues of comity in cases of global cartels, and the extent to which one foreign government's statement about its own laws should be conclusive in another country's courts.

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2019 IGLP Scholar Workshop Stream

Comparative Legal Policy in Asia – Regulation of Markets and Enterprises

Margaret Woo & Hisashi Harata

To prepare for our discussion, please read the following materials and answer the questions below:

Readings:

1. Eleanor Fox, *Anti-Trust, Economic Development & Poverty*, pp. 1-6
2. Jingmeng Cai, *Public Antitrust Enforcement of Resale Price Maintenance in China*, pp, 13-21
3. Vitamin C litigation materials: Brief of Amicus Curiae: The Ministry of Commerce of the PRC
4. Mark Tushnet, *Rule of Law and Rule by Law*, pp. 80-85

Questions:

1. Please read material nos. 1 & 2, Chinese Anti-Monopoly Law (AML) Arts. 7 & 51, and prepare your answer to the following questions:

   a. Who are the actors to implement AML in China?
   b. Who are the targets of AML regulation in China?
   c. What may be the real function and role of AML in China?
   d. What are the characteristics of China's socio-economic order?

2. Please read material no.3 and prepare your answer to the following questions:

   a. What is the mechanism of "price fixing" challenged by plaintiffs in this case?
   b. What is the relationship between defendant "private" companies, the Chinese Chamber of Commerce and the Chinese government?
   c. How are domestic cartels, like the Chinese Vitamin C companies, dealt with in your country?
   d. How are foreign cartels, like the Chinese Vitamin C companies, dealt with in your country?
   e. Does your country accept the exemption based on State Action/Foreign Sovereign Compulsion doctrine?

3. Please read material no. 4 and prepare your answer to the following questions:

   a. What is "rule of law"? How is it different from "rule by law"? What is the "thin" idea of "rule of law"?
   b. Is there a link between rule of law and markets? Is there a link between rule of law and democracy?
   c. Are there any difficulties in applying the western conception of "rule of law" to China?
   d. Do we need to rethink the concept of rule of law in terms of China's economic system? If so, why?

Anti-Monopoly Law of the People's Republic of China

Article 7 - With respect to the industries which are under the control of by the State-owned economic sector and have a bearing on the lifeline of the national economy or national security and the industries which exercise monopoly over the production and sale of certain commodities according to law, the State shall protect the lawful business operations of undertakings in these industries, and shall, in accordance with law, supervise and regulate their business operations and the prices of the commodities and services provided by them, in order to protect the consumers' interests and facilitate technological advance.

The undertakings mentioned in the preceding paragraph shall do business according to law, be honest, faithful and strictly self-disciplined, and subject themselves to public supervision, and they shall not harm the consumers' interests by taking advantage of their position of control or their monopolistic production and sale of certain commodities.

Article 51 - Where an administrative development or an organization authorized by laws or regulations to perform the function of administering public affairs abuses its administrative power to eliminate or restrict competition, the department at a higher level shall instruct it to rectify; the leading person directly in charge and the other persons directly responsible shall be given administrative sanctions in accordance with law. The authority for enforcement of the Anti-monopoly Law may submit a proposal to the relevant department at a higher level for handling the matter according to law.

Where otherwise provided for by laws or administrative regulations in respect of administrative departments or organizations authorized by laws or regulations to perform the function of administering public affairs that abuse their administrative power to eliminate or restrict competition, such provisions shall prevail.

Reading No. 1 Eleanor Fox, *Anti-Trust, Economic Development & Poverty: The Other Path* pp. 1-6

ANTITRUST, ECONOMIC DEVELOPMENT AND POVERTY: THE OTHER PATH

Eleanor M. Fox[*]

"Technocrats may be inclined to ignore distributional issues, but no one else will."
Harvard Institute for International Development, 1991[1]

Abstract

Developed countries often insist that antitrust only exists for aggregate efficiency and consumer welfare and that any broader focus will protect small competitors and mire the economy in inefficiencies. Developing countries retort that *their* antitrust must also address issues of distribution and power.

This chapter argues that developing countries do and must ask a broader question than whether conduct decreases aggregate consumer or total wealth. While antitrust should not be used to protect inefficient Davids against Goliath, it may and should be used to *empower* Davids against Goliath by opening paths of mobility and access. Indeed, enhanced mobility tends to produce efficiencies in societies in which the economic opportunity of masses of people has been suppressed. An antitrust law for developing countries that values mobility, access and efficient development of the economy, while not protecting small firms at the expense of consumers, is 'The Other Path' of this chapter, which articulates principles, factors and strategies that give content to the other path.

[*] Eleanor Fox is the Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. This paper is based on *Economic Development, Poverty and Antitrust: The Other Path*, first printed in 13 Southwestern Journal of Law & Trade in the Americas 211 (2007). The chapter is dedicated to, and is in memory of, my dear friend, colleague and co-author, Lawrence A. Sullivan, a great humanist who always cared about the less fortunate people on this earth. The author thanks Dennis Davis, John Fingleton, Frederic Jenny, Wolfgang Kerber and D. Daniel Sokol for their helpful comments. She thanks the members of the symposium in honour of Lawrence Sullivan sponsored by Southwestern Law School. She thanks Gauri Chhabra and Meredith Laitner for their research assistance. Also, she is grateful to the Filomen D'Agostino and Max E. Greenberg Foundation for its generous research support.

[1] *Reforming Economic Systems In Developing Countries* 3 (Dwight H. Perkins & Michael Roemer, eds, 1991).

1. Introduction

This chapter is about competition, antitrust law, poverty and economic development. It asks: What is the foundational perspective that should inform competition law in developing countries?

Important scholarship argues that context matters in designing and applying competition law and its supporting institutions for developing countries[2]. This literature commonly begins with the model of antitrust law of industrialized countries. It then asks what changes are warranted by context such as weak institutions, lack of funding, high barriers, and weak capital markets. This chapter takes a next step. It advocates the need for placing a developing country's antitrust in the broader context of development economics. In doing so it argues for the relevance of developing countries' plight in the storms and

[2] Ground-breaking work has been done by William Kovacic. For example, William Kovacic, *Capitalism, Socialism, and Competition Policy in Vietnam*, 13 Antitrust 57 (1999); *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 Brook. J. Int'l L. 403 (1997); *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 Am. U.J. Int'l L. & Pol'y 437 (1996); *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine and Zimbabwe*, 44 DePaul L. Rev. 1197 (1995); *Competition Policy, Economic Development, and the Transition to Free Markets in the Third World: The Case of Zimbabwe*, 61 Antitrust L. J. 253 (1992); William E. Kovacic & Robert S. Thorpe, "Antitrust and the Evolution of a Market Economy in Mongolia", in *De-Monopolization and Competition Policy in Post-Communist Economies* 89 (Ben Slay, ed., 1994).

bargains of world trade and competition, which often result in the marginalization of the weakest economies.

Spokespeople for developing countries often express the need for an antitrust paradigm different from that of the developed world[3]. Spokespeople for the developed world tend to argue for universal norms[4]. Moreover, they commonly describe antitrust as "*for efficiency*"[5], meaning no antitrust enforcement unless the transaction is, by some measure, inefficient.

This chapter takes a different starting point. It treats as the central condition a deep systemic poverty, aggravated by corruption, cronyism, selective statism and privilege, weak institutions, and often unstable democracy[6]. It asks, for such

[3] See Ajit Singh, U.N. Conf. On Trade & Dev., *Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions* (2002).

[4] See, e.g., Makan Delrahim, *The Long and Winding Road: Convergence in the Application of Antitrust to Intellectual Property*, Remarks at George Mason Law Review Symposium (Oct. 6, 2004), in 13 Geo. Mason L. Rev. 259 (2005) ("*consensus-based antitrust enforcement is vital to global business and consumer welfare*").

[5] By one common formulation, antitrust is only for efficiency. One common formulation of the efficiency standard is that antitrust law should proscribe only that which does a disservice to consumers and is inefficient, as judged by output limitation. Business conduct other than hard-core cartels is presumed efficient; it is argued that, apart from cartels, the law should proscribe only conduct that has an output-limiting outcome and is not a legitimate business response to consumers.

There are alternative ways to regard efficiency and how to achieve it. One major alternative focuses on preserving the structure and forces of competition, positing that the process of competition is most likely to create incentives to compete and invent. Diversity and openness are thought to promote knowledge and experimentation and to function as a feedback mechanism that facilitates adaptation and dynamic change. See Wolfgang Kerber, *Competition, Experimentation, and Legal Rules and Institutional Framework* (Dec. 2, 2006) (unpublished manuscript, on file with author); see also Eleanor Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 Antitrust L. J. 371 (2002).

[6] Mark Dutz and R. Shyam Khemani wrote on the "*tyranny of predatory vested interests*": These factors (high market concentration, high barriers to entry, high ownership concentration and weak corporate governance) tend to reinforce one another and give rise to inflexible, inefficient industrial and financial market structures. They also have adverse implications not only for fostering effective competition and competitiveness, but also for governance at both the state and corporate levels – and for the persistence of an anti-competitive nexus mutually supporting vested interests between incumbent firms and government, with some of the earned rents used to entrench market power by buying government favouritism. Since firms tend to be large in size and few in number, they have organizational and

economies: what is the most congenial foundational perspective on which to formulate antitrust law? In particular, would this cohort of countries be best served by a foundational principle that trusts liberalization and free enterprise ("first model"), or would it be served by a foundational principle that centrally takes account of the opacity, blockage and political capture of markets, and includes some measure of helping to empower people economically to help themselves ("second model")? There are, of course, other formulations. There are also formulations within the formulations[7].

There are trade-offs, whatever model is applied. I would be clear at the outset that protectionism is not a desirable option, whether in terms of protecting small firms from efficient competition or protecting domestic firms from foreign competition. The inquiry of this chapter is how to make the market work for the good of development, and not to suppress it. If suppression is politically inevitable, then that is an obstacle that will tend to defeat the enterprise.

The choice of models is not uncomplicated. Even if the second model (recognizing empowerment and distributional concerns) might in the abstract seem more legitimate to a developing economy than the first (emphasizing the virtues of aggregate efficiency and non-intervention as the means to produce it), the first model is a path well travelled, and reinventing a path is difficult and costly. Moreover, the first model offers some clear and relatively simple rules without risking the costs of error from too much intervention and costs of political forays inherent in a grant of excessive discretion to officials.

The chapter concludes by suggesting that reliance on markets is critical for economic welfare; that extreme neo-liberal principles that animate much of antitrust law in this age of

financial advantages in influencing legislation and regulation. Mark Dutz & R. Shyam Khemani, *Competition Law & Policy: Challenges in South Asia* 11 (2007).

[7] For example, one mainstream perspective assumes that markets work well and that government interventions work badly (neo-liberal assumptions). At the other end of the continuum, analysts may acknowledge that market structures may be "*skewed in favour of entrenched elites with inequitable distributions of wealth with social stratification drawn along racial or ethnic lines*", a situation that competition law might exacerbate. Taimoon Stewart, Julian Clarke & Susan Joekes, *Competition Law in Action: Experiences from Developing Countries* iv (2007), available at http://www.idrc.ca/en/ev-111677-201-1-DO_TOPIC.html.

"modernization"[8] are not necessary for efficiency and could run contrary to it; and that developing countries are likely to be served by exploring a path that is most sympathetic to their context.

This chapter is written at a time when "convergence" is repeatedly referenced as an imperative objective of antitrust in a globalized world. Convergence implies universal standards, or at least universal norms implemented in common ways. The phrase "universal standards" normally refers to the standards of the United States and Europe,[9] which have become the dominant models for the world. This chapter suggests that developing countries should nonetheless consider the benefits of a perspective of their own before considering the virtues – which there are – of convergence. It further suggests that substantial convergence can be achieved and will naturally occur even in the face of varying perspectives.

2. The choice

Approximately one hundred nations in the world have adopted antitrust laws. Perhaps a quarter of these nations are developing countries. Yet other developing countries have not adopted antitrust laws; some are considering doing so.

By one perspective, all of these nations should adopt antitrust laws[10], and all of these nations should adopt the developed

[8] Both the United States and the European Union have launched commissions or projects to consider how competition law should be modernized. Moreover, in the United States, successive Supreme Court opinions have narrowed the purview of US antitrust law. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 2007 WL 1835892 (US June 28, 2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069 (2007); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 US 164 (2006); *Tool Works Inc. v. Independent Ink, Inc.*, 547 US 28 (2006).

[9] This is the case even while the standards of the United States and Europe are changing, as institutions in both jurisdictions embark on "modernization" projects, and as the United States Supreme Court successively narrows the scope of the law. Yet with the economic rise of China and India, one might expect the American and Euro-centric centre of gravity to shift, and to do so in ways not predictable today.

[10] ***Compare*** A.E. Rodriguez and Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N. C.J.Int'l L. & Com. Reg. 209 (1994) (arguing that antitrust law is largely inappropriate for developing countries

world's framework: free markets and antitrust in the service of unleashing markets and pursuing aggregate efficiency. Much like the developed countries, developing economies are often riddled with cartels and other restraints that obstruct their markets and hurt their people. Many are peppered with monopolistic abuses, especially by state-owned and privileged enterprises – more than are developed countries. Globalization has lowered barriers and paved the way to the efficiency benefits from markets and, it is argued, liberalization and antitrust should work hand in hand to anchor these benefits[11].

This chapter argues that developing countries require a larger canvas. The canvas includes the dire economic conditions of developing countries and the treatment they receive from the world community. Developing countries often see free-market rhetoric and aggregate wealth or welfare goals as inappropriate to their context because of the tendency of free-market policies to disproportionately advantage the already advantaged in every game played[12].

This does not imply that antitrust for developing countries would or should look dramatically different from a developed country's antitrust. There are reasons why it might look much the same, as I develop below; but there are also reasons why the perspective might differ from the neo-liberal one that currently informs many antitrust laws of developed countries – a perspective that has "*relatively little resonance for the great majority of the population that is poor*"[13].

and that the liberal effects of the law will be overwhelmed by interest-group politics procuring protection), ***with*** Craig W. Conrath and Barry T. Freeman, *A Response to "The Effectiveness of Proposed Antitrust Programs for Developing Countries,"* 19 N.C.J .Int'l L. & Com. Reg. 233 (1994) (arguing that antitrust law and advocacy will benefit consumers).

[11] Efficiency is usually seen as the measure of antitrust benefits. At this point I do not raise differences between consumer welfare and total welfare in measuring efficiency. I stress aggregate concepts – whether defined in terms of all consumers or all consumers and producers: Do the winners win more than the losers lose? And if so, should we disregard distributional consequences?

[12] See Nancy Birdsall, *Inequality Matters: Why Globalization Doesn't Lift All Boats*, Boston Rev., Mar.–Apr. 2007, at 7; Francis Fukuyama, *Keeping Up with the Chavezes*, Wall St. J., Feb. 1, 2007, at A17; Peter Sutherland, *The Doha Development Agenda: Political Challenges to the World Trading System — A Cosmopolitan Perspective*, 8 J. Int'l Econ. L. 363 (2005).

[13] Fukuyama, *supra* note 12.

Reading No. 2. Jingmeng Cai, *Public Antitrust Enforcement of Resale Price Maintenance in China*, pp, 13-21

2. Profile of Public Antitrust Enforcement in China—a Two-Tiered and Tripartite System of Authority

The AML provides a two-tiered administrative structure to ensure enforcement of the Act.[42] The top tier is the Anti-monopoly Commission of the State Council ("Anti-monopoly Commission"), which is responsible for formulating policies and guidelines related to competition, coordinating high-level strategies, and supervising the overall enforcement of the AML.[43] After the AML was enacted, the State Council appointed three administrative agencies—the NDRC, the Ministry of Commerce (MOFCOM), and the State Administration for Industry and Commerce (SAIC) to enforce the AML. The three agencies can be thought of as the second tier of the enforcement mechanism. Specifically, both the NDRC and the SAIC are responsible for investigating monopoly agreements, abuse of dominant market positions, and abuse of administrative power.[44] The difference between the NDRC and SAIC's responsibility is whether the relevant conduct is price-related.[45] In other words, the NDRC is responsible for investigating price-related behaviors, while the SAIC oversees nonprice-related behaviors. MOFCOM is responsible for reviewing mergers and international cooperation related to competition laws.[46] In the scope of this article, investigating and making decisions regarding RPM fall within the NDRC's authority.

42. AML, *supra* note 1, arts. 9, 10.

43. *Id.* art. 9.

44. *See* Guojia Gongshang Xingzheng Guangli Zongju Zhuyao Zhize Neishe Jigou He Renyuan Bianzhi Guiding (国家工商行政管理总局主要职责内设机构和人员编制规定) [Regulations of the SAIC Major Duties, Internal Institutions and Personnel] (July 11, 2008), sec. B, art. 6 [hereinafter Regulations of the SAIC], http://gkml.saic.gov.cn/auto3743/200809/t20080901_112597.htm?type=1; *see also* Guojia Fazhan He Gaige Weiyuanhui Zhuyao Zhize, Neishe Jigou He Renyuan Bianzhi Guiding (国家发展和改革委员会主要职责内设机构和人员编制规定) [Regulations of the NDRC Major Duties, Internal Institutions and Personnel] (Aug. 21, 2008), sec. C, art. 23 [hereinafter Regulations of the NDRC], http://www.gov.cn/gzdt/2008-08/21/content_1076506.htm.

45. *See* Regulations of the SAIC, *supra* note 44; Regulations of the NDRC, *supra* note 44.

46. Shangwubu Zhuyao Zhize Neishe Jigou He Renyuan Bianzhi Guiding (商务部主要职责内设机构和人员编制规定) [Regulations of the MOFCOM Major Duties, Internal Institutions and Personnel] (Aug. 22, 2008), sec. C, art. 11, http://www.mofcom.gov.cn/aarticle/ae/ai/200808/20080805739577.html.

At the local level, the NDRC authorizes its local agencies at the provincial level (local agencies in provinces, autonomous regions, and municipalities directly under the central government, collectively referred to as "Provincial Agencies") to enforce the AML within their respective administrative region, and, if necessary, the NDRC can require them to cooperate with its investigations.[47] The authorized Provincial Agencies' activities are also under the NDRC's supervision.[48]

B. Cases of RPM

Historically speaking, many Chinese companies have used RPM.[49] An increasing number of high profile investigations and decisions between August 2008 and March 2016 by the NDRC, however, have alerted companies to be cautious in using RPM. This section will discuss the NDRC's investigations into companies in the liquor, infant formula milk, corrective lens, and motor vehicle industries, which include the background story and decision of each case.

47. Guanyu Fanjiage Longduan Zhifa Shouquan de Jueding (关于反价格垄断执法授权的决定) [Decision About Authorization of Anti-price Enforcement's Authority] (promulgated by the NDRC, Dec. 15, 2008, effective Dec. 15, 2008), Order No. [2008] 3509 (China) [hereinafter Decision About Authorization of Anti-price Enforcement's Authority], http://www.xxpi.com/Article/ShowArticle.asp?ArticleID=10061; *see also* Provisions on the Administrative Procedures for Law Enforcement Against Price Fixing (promulgated by the State Dev. & Reform Comm'n, Dec. 29, 2010, effective Feb. 1, 2011) art. 3, CLI.4.143498(EN) (Lawinfochina) [hereinafter Provisions on the Administrative Procedures for Law Enforcement Against Price Fixing]. In addition, the names of Provincial Agencies vary among the different provinces. In some provinces, they are called "Development and Reform Commissions." In other provinces, they are called "Price Bureaus."

48. Decision About Authorization of Anti-price Enforcement's Authority, *supra* note 47; Provisions on the Administrative Procedures for Law Enforcement Against Price Fixing, *supra* note 47.

49. Zhou Rui, *Moutai Chufa Jiangjia Jingxiaoshang, Zhuanjia Cheng Hujiang Zhaozhi Fanlongduan Diaocha* (茅台处罚降价经销商, 专家称或将招致反垄断调查) [*Moutai Punished Discounters, Experts Claimed It May Cause Antitrust Probe*], CHINA NEWS AGENCY (Jan. 11, 2013), http://finance.chinanews.com/cj/2013/01-11/4481529.shtml.

1. The Liquor Case

In 2013, the NDRC imposed penalties on two of the most famous state-owned Chinese producers of premium liquor for using RPM. This marked the first time the NDRC penalized RPM under the AML.

a. Background Story: Luxury Gift-Giving Culture and a Political Incident

Kweichow Moutai Co., Ltd. ("Moutai") and Wuliangye Yibing Co., Ltd. ("Wuliangye"), two state-owned liquor producers in China, specialize in producing premium alcoholic spirits (also known as "premium white spirits" in China). According to statistics issued by the China Alcoholic Drinks Association in 2006, the sales volume of premium white spirits was merely 0.48% of the whole white spirits industry, but the sales revenue accounted for 15% of the white spirits industry.[50] As leading producers of high-priced white spirits, Moutai and Wuliangye own roughly 75% of the market share in the high-priced white spirits market.[51]

The popularity of Moutai and Wuliangye's products could be explained by the importance of white spirits in Chinese culture. White spirits are traditionally served during special occasions, such as weddings, family gatherings, reunions, and business or official banquets. White spirits are also popular gifts due to the tradition of Chinese gift-giving. Because of its price, the white spirits produced by Moutai and Wuliangye are usually chosen as gifts for official or business purposes. Therefore, such preference of picking white spirits as gifts further increases the price, which has soared since 2009. For example, the average retail price of Moutai was 800 yuan per bottle ($123 USD per bottle) in 2009.[52] By the end of 2011, the price increased to 2,000 yuan per bottle ($308 USD per bottle), and in January 2012, the price reached

50. Zhang Juan & Tan Liyong, *Woguo Baijiu Hangye de Xianzhuang Yu Fazhan Qushi* (我国白酒行业的现状与发展趋势) [*Current Situation and Development of White Spirits Industry in China*], 5 SHIDAI JINGMAO [ECON. & TRADE UPDATE] 57, 58 (2007).

51. *Id.* at 58.

52. *2015 Nian Zuixin, Jianguo Yilai Linian Maotaijiu Jiage Biao* (2015 年最新，建国以来历年茅台酒价格表) [*The Latest Calculation in 2015, The Price Figure of Moutai Since the Founding of PR China*], JIUZHI WANG [LIQUOR WEB] (Aug. 8, 2015), http://www.cnjiuzhi.com/price/p6706.html.

its peak of 2,250 yuan per bottle ($346 USD per bottle).[53] Wuliangye also admitted that the wholesale prices of its liquors increased by 20 to 30 percent as of September 10, 2011.[54]

On February 5, 2012, however, President Xi Jinping, the newly elected General Secretary of the Communist Party in China, issued his "eight-point principles" for government officials, which imposed a form of austerity on civil servants.[55] President Xi hoped to end extravagant taxpayer-financed banquets and bribes that are typically associated with the giving of gift-wrapped luxuries, such as premium white spirits.[56] This political incident was one of the major reasons why this best-selling period of premium white spirits ended.[57]

As a result, the sale of Moutai and Wuliangye's white spirits plummeted before the 2013 Chinese New Year, which used to be a peak selling season.[58] During this time period, the price of Moutai dropped to 1,900–2,300 yuan per bottle ($292–$354 USD per bottle), compared to 2,600–3,000 yuan per bottle ($400–$462 USD per bottle) in the previous Chinese New Year. Further, the prices of Wuliangye spirits even dropped below 1,000 yuan per bottle ($154 USD per bottle) during this time.[59] Despite the price

53. Zhang Xin & Liu Jingyi, *Canting Shou Moutai, Jieqian Po Liangqian* (餐厅售茅台，节前破两千) [*The Price of Moutai Reached 2,000 RMB/Bottle Before the Spring Festival*], XINHUA WANG [XINHUA NET] (Jan. 28, 2013), http://news.xinhuanet.com/fortune/2013-01/28/c_124289908.htm.

54. SHENZHEN STOCK EXCHANGE, YIBIN WULIANGYE GUFEN YOUXIAN GONGSI DONGSHIHUI GONGGAO (宜宾五粮液股份有限公司 董事会公告) [WULIANGYE'S ANNOUNCEMENT OF BOARD OF DIRECTORS] (Aug. 30, 2011), http://disclosure.szse.cn/m/finalpage/2011-08-31/59901595.PDF.

55. *Zhonggong Zhongyang Zhengzhiju Zhaokai Huiyi Shenyi Guanyu Gaijin Gongzuo Zuofeng, Miqie Lianxi Qunzhong de Youguan Guiding, Fenxi Yanjiu 2013 Nian Jingji Gongzuo* (中共中央政治局召开会议审议关于改进工作作风、密切联系群众的有关规定 分析研究二〇一三年经济工作) [*CPC Central Committee Political Bureau Holding Meeting to Improve the Work, Keeping Close Contact with the Masses, and Analyzing the Economic Work in 2013*], PEOPLE.CN (Dec. 5, 2012), http://cpc.people.com.cn/n/2012/1205/c64094-19793530.html.

56. As the first point, President Xi emphasizes that no banquet or reception should be held or arranged for civil servants, as gifts and premium wines are traditionally given and served in such banquets and receptions. *See id.*

57. Xu Bing, *"Baxiang Guiding" Duiyu Jingji de Yingxiang* ("八项规定" 对于经济的影响) [*The Impact of "Eight Principles" on The Economy*], LIAOWANG ZHONGGUO [OUTLOOK CHINA], http://www.outlookchina.net/template/news_page.asp?id=6392&page=1 (last visited Mar. 24, 2017).

58. Zhang Xin & Liu Jingyi, *supra* note 53.

59. *Id.*

decrease and distributors' promotional efforts, the market for high-priced white spirits remained sluggish.[60]

In response, Moutai and Wuliangye required their dealers to strictly implement RPM in order to prevent the retail price from decreasing.[61] According to disclosed information from the Provincial Agencies, beginning in 2009, Wuliangye entered into more than 3,200 RPM agreements with independent distributors.[62] For those who violated these RPM agreements, Wuliangye imposed various punishments, such as reducing supply, confiscating deposits, deducting market supporting fees, and imposing fines.[63] For example, in 2011, Wuliangye stopped supplying a large-scale supermarket chain because it sold Wuliangye white spirits below the minimum resale price set by Wuliangye.[64] Further, in 2012, Wuliangye punished fourteen distributors in eleven provinces and municipalities for "selling below the restricted price" by confiscating deposits and cutting fees for market promotions.[65] The CEO of Moutai stated publicly: "The key assignment of the company is to avoid these price drops. . . ."[66] Like Wuliangye, Moutai also punished three dealers for selling Moutai white sprits below the required price floor. Moutai imposed a penalty of 20 percent of deposits on the three dealers as a result of their violations of the RPM and threatened to revoke their distribution agreements in the event of future violations.[67]

60. *Id.*

61. Sichuan Dev. & Reform Comm'n, *Wuliangye Gongsi Shishi Jiage Longduan Bei Chufa 2.02 Yiyuan* (五粮液公司实施价格垄断被处罚 2.02 亿元) [*The Penalty of 202 Million Yuan on Wuliangye's Price Monopoly Behavior*], SCDRC.GOV (Feb. 22, 2013), http://www.scdrc.gov.cn/dir25/159074.htm [hereinafter *Sichuan Provincial Agency's Decision on Wuliangye*].

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Yang Qiubo, *Moutai Huiying Jiage Longduan Jiancha, Chexiao Dui Xiangguan Jingxiaoshang Chufa* (茅台回应价格垄断检查 撤销对相关经销商处罚) [*Moutai Responses to the Price Monopoly Investigation and Revoking Punishments on Distributors*], CAIXIN.COM (Jan. 16, 2013), http://companies.caixin.com/2013-01-16/100483460.html.

67. *Id.*

b. The NDRC's Decisions

The NDRC authorized Provincial Agencies in Sichuan province and Guizhou province to investigate Wuliangye and Moutai, respectively,[68] and the agencies started investigating around January 2013.[69] In response to the Guizhou agency's investigation, Moutai declared on its official website that (1) all of the company's marketing policies that violated the AML would be terminated immediately, (2) punishments for distributors would be revoked, and (3) all confiscated deposits would be returned to distributors.[70] One day later, Wuliangye made a similar announcement on its website.[71]

Despite the two companies' "confessions," however, the Provincial Agencies imposed on Moutai and Wuliangye fines calculated as 1 percent of each company's sales revenue of the previous year.[72] Both companies paid the penalties in full in less than a

68. This is because Wuliangye is headquartered in Sichuan province and Moutai is headquartered in Guizhou province.

69. In the end of December 2012 Wuliangye and Moutai punished their dealers for violating the RPM agreements. *See Sichuan Provincial Agency's Decision on Wuliangye*, *supra* note 61; *see also Guanyu Moutai Jiage Longduan de Gonggao* (贵州物价局关于"茅台价格垄断罚款"公告) [*Penalty Decision on Moutai's Price Monopoly*], CFDA.COM (Feb. 25, 2013), http://www.cfda.com.cn/newsdetail.aspx?id=61047 [hereinafter *Guizhou Provincial Agency's Decision on Moutai*]. Shortly thereafter, on January 16, 2013, Moutai made an announcement on its official website claiming that it would stop implementing RPM agreements because of the Provincial Agency's investigation. One day after, Wuliangye made a similar announcement. *See* Kweichow Moutai Group, Maotai Gonggao (茅台公告) [Moutai Announcement] (Jan. 16, 2013) [hereinafter Moutai Announcement], http://www.china-moutai.com/xinwen/2013/645.html; *see also* Wuliangye, Wuliangye Gonggao (五粮液公告) [Wuliangye Announcement] (Jan. 17, 2013) [hereinafter Wuliangye Announcement], http://www.wuliangye.com.cn/zh/main/main.html#/g=NEWS&id=33&dId=50. Therefore, it is reasonable to infer that the agencies conducted their investigations between the end of December 2012 and January 16, 2013. Because, normally, companies respond quickly after the agencies launch their investigations, it is likely that the agencies started the probes only one or two days before the companies made their announcements.

70. Moutai Announcement, *supra* note 69.

71. Wuliangye Announcement, *supra* note 69.

72. *See Sichuan Provincial Agency's Decision on Wuliangye*, *supra* note 61; *see also Guizhou Provincial Agency's Decision on Moutai*, *supra* note 69. Guizhou Provincial Agency imposed a 247 million RMB fine on Moutai, and Moutai's annual report of 2012 revealed that its sales volume was 26.4 billion RMB

month.[73] While each of the Provincial Agencies issued their respective decisions, these decisions are brief with insufficient analysis. Compared to the Guizhou agency's one paragraph decision regarding Moutai, the Sichuan regulators disclosed relatively more information relating to Wuliangye. The Sichuan Regulators stated that by entering into price-restricting agreements and dividing geographical markets, Wuliangye set the price floor for products, which were vertical monopoly agreements and violated Article 14 of the AML.[74] Such behaviors thus restricted and eliminated the competition and harmed consumers' welfare.

2. The Infant Formula Milk Case

In 2013, the NDRC fined six multinational infant formula milk producers for implementing RPMs in violation of the AML. The NDRC launched the investigation on multinational dairy companies because prices of foreign-brand infant formula milk continuously increased after 2008, when Chinese domestic brands were involved in a food-safety scandal.

a. Background Story: The 2008 Chinese Milk Scandal Boosted Foreign Brands' Prices

In 2008, China's infant formula milk industry was involved in a food-safety scandal.[75] Several domestic brands of infant formula milk were found to be adulterated with melamine, a toxic chemical.[76] The contaminated milk powder caused almost three hundred thousand babies to become ill, and six infants died of

in 2012. *See* MOUTAI ANNUAL REPORT 2012, at 6 (Apr. 9, 2013), http://www.moutaichina,com/touzi/2013/337.html. Therefore, although Guizhou Provincial Agency did not clearly state the percentage of sales volume used to calculate the fine, one can deduce that, as in the Sichuan Provincial Agency's decision, the fine on Moutai was 1 percent of its sales volume earned in the previous year.

73. Chen Jie, *Moutai Wuliangye Yi Quan'e Jiaona 4.49 Yiyuan Jiage Longduan Fadan* (茅台五粮液已全额缴纳 4.49 亿元价格垄断罚单) [*Moutai and Wuliangye Paid the Penalty of CNY$449 Million in Full*], NEWS.CN (Mar. 14, 2013), http://news.xinhuanet.com/photo/2013-03/14/c_124460543.htm.

74. *Sichuan Provincial Agency's Decision on Wuliangye*, *supra* note 61.

75. Yang Fan, *Zhongguo Ruye Zhe Wunian* (中国乳业这五年) [*Five Years of China's Dairy Industry*], PEOPLE.CN (2013), http://paper.people.com.cn/xaq/html/2013-10/01/content_1324677.htm.

76. *Id.*

kidney stones and kidney damage.[77] Afterward, it came to light that a well-known domestic brand of infant formula milk was contaminated with enterobacter sakazakii, a life-threatening bacterium to infants.[78] Later, several domestic milk brands were accused of selling milk powder that caused infants to have dangerously high levels of female hormones.[79]

As a result of safety concerns, the scandal ruined the reputation of infant formula milk producers in China, and Chinese parents resorted to purchasing foreign brands instead.[80] Prior to the milk scandals in 2008, domestic milk producers accounted for more than 60 percent of the market share. After the scandal, however, the market share dropped to 48 percent in 2013.[81] Due to Chinese parents' obsession with foreign infant formula milk and the growing distrust of domestic brands, prices of foreign-brand infant formula milk have increased by at least 30 percent since 2008.[82]

b. The NDRC's Decision

On August 7, 2013, approximately five months after launching the investigation, the NDRC imposed fines totaling 668.73 million yuan (about $102.88 million USD) on six manufacturers of infant formula—five foreign producers and one Hong Kong company—for restricting the minimum resale price with distributors in violation of Article 14 of the AML.[83]

According to the NDRC's decision, the involved companies fixed their products' resale prices or restricted the minimum resale prices and punished violators through various methods,

77. *China Dairy Products Found Tainted with Melamine*, BBC NEWS (July 9, 2010), http://www.bbc.com/news/10565838.

78. Yang Fan, *supra* note 75.

79. *Id.*

80. *Id.*

81. *Id.*

82. Edward Wong, *Chinese Search for Infant Formula Goes Global*, N.Y. TIMES, July 26, 2013, at A1.

83. Nat'l Dev. & Reform Comm'n, *Heshengyuan Deng Rufen Shengchan Qiye Weifan Fanlongduan Fa Xianzhi Jingzheng Xingwei Gongbei Chufa 6.6873 Yiyuan* (合生元等乳粉生产企业违反《反垄断法》限制竞争行为共被处罚 6.6873 亿元) [*Penalty on Milk Powder Producers of Restricting Competition and Fined 668.73 Million Yuan*], NDRC, http://www.ndrc.gov.cn/xwzx/xwfb/201308/t20130807_552991.html (last visited Mar. 29, 2016) [hereinafter *NDRC Decision on Infant Formula Milk Producers*].

such as imposing fines, deducting rebates, and limiting or stopping supply.[84] The NDRC further claimed that infant formula milk producers restricted resale prices, boosted prices, eliminated intrabrand competition, and damaged consumers' welfare.[85] Furthermore, the decision also disclosed that all the companies involved admitted that their conduct constituted RPM and that they failed to prove that their conduct could satisfy the exemption requirements under Article 15 of the AML.[86]

Notably, the NDRC investigated nine companies in total, but it only imposed penalties against six companies.[87] The NDRC did not penalize three companies because they voluntarily reported their RPM to the NDRC. Among the six companies, the NDRC gave mitigated penalties to five of them because they proactively cooperated with the investigation and/or carried out self-corrective measures.[88] The varying penalties imposed by the NDRC can be seen in Figure 1.[89]

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *See* Figure 1.

Figure 1. Penalties on infant formula producers.[90]

Name	Reasons for Penalty	Self-Corrective Measures	Commitment	Penalty (% of previous year's sales revenue)
Biostime	Serious violations. Failed to proactively cooperate with the investigation and failed to implement qualified corrective measures	Rewarded consumers extra 50% purchasing points (the resale price could be reduced by 11%)	No price increases within one year	6%
Mead Johnson Nutrition	Failed to proactively cooperate with the investigation, but proactively implemented corrective measures	Reduced the prices of its major products by 7%–15%	No price increases within one year	4%
Dumex	Proactively cooperated with the investigation and implemented corrective measures	Reduced the prices of its major products by 5%–20%	No price increases of its major products within one year	3%
Abbott	Proactively cooperated with the investigation and implemented corrective measures	Reduced the prices of its six major products by 4%–12%	Unclear	3%
Royal Friesland Campina	Proactively cooperated with the investigation and implemented corrective measures	Reduced prices by 8%	Unclear	3%
Fonterra	Proactively cooperated with the investigation and implemented corrective measures	Reduced prices by 9%	Unclear	3%
Wyeth Nutrition	Voluntarily reported RPM agreement to the agency, submitted important evidence, and proactively implemented corrective measures	The first company to reduce prices—reduced the prices of its twelve major products by 6%–20%	No price increases of new products within one year	0%
Beingmate	Voluntarily reported RPM agreement to the agency, submitted important evidence, and proactively implemented corrective measures	Reduced prices of its major products by 5%–20%	Cease implementing all RPM agreements	0%
Meiji	Voluntarily reported RPM agreement to the agency, submitted important evidence, and proactively implemented corrective measures	Reduced prices of all products by 5%–7%	No price increases within two years	0%

90. Data is taken from disclosed information provided by the NDRC. *See NDRC Decision on Infant Formula Milk Producers*, *supra* note 83; *see also* Gu Zhengping, *Ying'er Peifang Naifen Qiye Zao Chuangjilu Zhongchuang, Cong Chufa Jieguo Fenxi Fanlongduanfa Xia Kuada Zhengce de Juti Yunyong* (婴儿配方奶粉企业遭创纪录重罚从处罚结果分析反垄断法下宽大政策的具体运用) [*The Huge Penalty on Infant Formula Producers, Analysis of the Application of Leniency Policy by the NDRC*], CLI.A.216737 (2013), http://v6.pkulaw.cn/lawfirmarticles/1778401633.html (Lawinfochina).

Reading No. 3.–Vitamin C litigation materials: Brief of Amicus Curiae: The Ministry of Commerce of the PRC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE
VITAMIN C ANTITRUST LITIGATION

MASTER FILE 06-MD-1738
(DGT)(JO)

This Document Relates To:

ALL CASES

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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

Sidley Austin LLP

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INTEREST OF THE AMICI

In this lawsuit, plaintiffs seek to recover treble damages from four Chinese manufacturers of vitamin C, and the affiliates of one of these manufacturers, based on conduct that was compelled by Chinese law. Because the conduct that allegedly violated U.S. antitrust law occurred entirely in the territory of China, and because the defendants were required by the laws of China to engage in that conduct, this lawsuit cannot be resolved without interfering with Chinese industrial policy respecting the operation of domestic firms within China and without impermissible inquiry into the motives of the Chinese government. Accordingly, three closely related doctrines, the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity, mandate dismissal of this action.

Amicus the Ministry of Commerce of the People's Republic of China (hereinafter "the Ministry")[1] is deeply interested in the prompt and proper resolution of this lawsuit. The Ministry is a component of the State Council (the central Chinese government) and is the highest administrative authority in China authorized to regulate foreign trade, including export commerce. It is the equivalent in the Chinese governmental system of a cabinet level department in the U.S. governmental system. The Ministry formulates strategies, guidelines and policies concerning domestic and foreign trade and international economic cooperation, drafts and enforces laws and regulations governing domestic and foreign trade, and regulates market operation to achieve an integrated, competitive and orderly market system.

If this Court were to find the defendants' conduct violated U.S. antitrust laws, it would improperly penalize defendants for the sovereign acts of their government and would adversely affect implementation of China's trade policy. The Ministry therefore files this brief to inform the Court of the regulatory scheme that governed defendants during the period encompassed by the Complaint[2] and that dictated the conduct alleged to violate U.S. antitrust laws. The Ministry accordingly supports the defendants' request that this action be dismissed.

The information the Ministry is providing is properly considered in connection with a motion to dismiss under Rule 12(b) because each of the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity implicate this Court's subject matter jurisdiction. See Robinson v. Gov't of Malaysia, 269 F.3d 133, 141 n.6 (2d Cir. 2001) (a district court "must" consider materials outside complaint if they "may result in the dismissal of the complaint for want of jurisdiction"). Indeed, both the United States Supreme Court and the Second Circuit have recognized that the statements of a foreign government about the scope and meaning of its laws are to be given binding and conclusive effect by U.S. courts. See U.S. v. Pink, 315 U.S. 203, 218-21 (1942) (statement of Soviet Commissariat for Justice concerning extraterritorial effect of nationalization decree deemed "conclusive"); Agency of Canadian Car & Foundry Co. v. American Can Co., 258 F. 363, 368-69 (2d Cir. 1919) (authoritative representation by Russian government is "binding and conclusive in the courts of the United States"). Since 1978, the U.S. government has encouraged foreign governments to present their views concerning pending judicial proceedings directly to the U.S. courts,[3] and the

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[1] The Ministry was initially known as the Ministry of Foreign Trade and Economic Cooperation. This brief uses the term "Ministry" to refer to both this predecessor entity and the current Ministry of Commerce.

[2] The "Relevant Period" referenced in the Complaint is December, 2001 through the present.

[3] See Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), reprinted in U.S. Dep't of State, 1978 Digest of United States Practice in International Law 560, reprinted in part in 73 Am. J. Int'l L. 122, 125 (1979); Department of State Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), reprinted in U.S. Dep't of State, 1978 Digest of United States Practice in International Law 560, reprinted in part in 73 Am. J. Int'l L. 122, 124 (1979); see also Letter from Deputy Legal Adviser Marks (June 15, 1979) (described in 73 Am. J. Int'l L. 669, 678-79 (1979)). A copy of the foregoing is submitted herewith as Exhibit A to the declaration of Joel M. Mitnick, dated June 29, 2006 ("Mitnick Decl.").

U.S. Solicitor General has taken the position that a foreign government's submission of its views in the form of an amicus curiae brief should be "dispositive."[4]

It is particularly appropriate to accord the views of the Ministry dispositive weight here because the Complaint employs terms that have very different meanings under Chinese law, and within the Chinese regulatory system, than those same terms have in the United States. Plaintiffs allege that a Chinese "trade association" facilitated an illegal cartel, which "coordinated" vitamin C export pricing as part of a series of "voluntary" or "self-restraint" agreements. In fact, the "association," or "social organization," is a Ministry-supervised entity authorized by the Ministry to regulate vitamin C export prices and output levels, and the price "coordination," or so-called "voluntary self-restraint," it facilitated is a government-mandated price and output control regime. Because China's ongoing transition from a state-run command economy to a market-driven economy is utterly foreign to the economic history and traditions of the United States, there is a very significant risk of misunderstanding by U.S. lawyers and judges of the regulatory concepts China has adopted to manage this transition. Accordingly, the Ministry files this amicus brief to explain those very different concepts as well as to emphasize that the conduct alleged in the complaints here is mandated by Chinese law. Properly understood, China's regulation of vitamin C exports mandates dismissal of this lawsuit.

[4] See Brief for United States as Amicus Curiae Supporting Appellants, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1985) (No. 83-2004) at 17 (explicit and detailed statement by foreign government should be "given dispositive weight"), Mitnick Decl., Ex. B.

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BACKGROUND

I. Allegations of the Complaint

In January 2005, Plaintiffs Animal Science Products Inc. and the Ranis Company ("plaintiffs") filed the first Complaint in this action (the "Complaint")[5] in which they allege that defendants, four Chinese manufacturers and exporters of raw vitamin C products, and affiliates of one of these manufacturers,[6] violated Section 1 of the Sherman Act by agreeing on the price and volume of vitamin C products exported from China to the United States.

Specifically, plaintiffs allege that the defendants formed "a cartel to control prices and the volume of exports for vitamin C. . . . [and] successfully reached an autonomy agreement" in which they allegedly agreed "to control export quantities and achieve stable and enhanced price goals," "to restrict their exports of vitamin C in order to create a shortage of supply in the international market," and "to 'restrict quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically.'" Compl. ¶ 43. Plaintiffs allege that, as a result of the cartel, the prices of vitamin C products exported from China to the United States increased from $2.50 per kilogram in December, 2001, to as high as $7 per kilogram in December, 2002, and that they, as purchasers of vitamin C products, were forced to pay higher prices as a result. Compl. ¶ 45.

Plaintiffs further allege that in 2003, defendants met and agreed to limit production levels further and increase prices (Compl. ¶ 52), and that in 2004, defendants agreed to suspend production in an effort to stabilize prices (Compl. ¶ 56).

[5] Subsequent complaints have not been consolidated into a single complaint, but all of the complaints make substantially identical allegations.

[6] The Chinese defendants are: Hebei Welcome Pharmaceutical Co. Ltd., Jiangsu Jiangshan Pharmaceutical Co. Ltd., Northeast Pharmaceutical Group Co. Ltd., Weisheng Pharmaceutical Co. Ltd., and China Pharmaceutical Group, Ltd. In addition, the Ministry is informed that a defunct U.S. affiliate of one of these defendants was also named in the Complaint.

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Plaintiffs claim that the meetings held by defendants, and the agreements to which defendants were party, were "facilitated by the efforts of their trade association," the Western Medicine Department of the Association of Importers and Exporters of Medicines and Health Products of China.[7] Compl. ¶ 43. This "association," it is alleged, also "coordinated" the meetings at which defendants agreed to the limitations of sales and exports to the United States (Compl. ¶ 46), called a late 2003 "emergency meeting" attended by the defendants in which the "association" discussed how the defendants were to "rationalize the market and restrain and limit the production levels of vitamin C to increase prices" (Compl. ¶ 53), and met with the defendants at the "China Exhibition of World Pharmaceutical Ingredients," during which they "devised plans to rationalize the market and to limit production levels and increase prices" (Compl. ¶ 54).

II. The Regulation of the Vitamin C Export Industry in China

A. The Nature and Regulatory Role of the Chamber of Commerce of Medicines and Health Products Importers & Exporters

As an initial matter, the allegations of the Complaint rest on a fundamental misunderstanding concerning the nature of the Chamber of Commerce of Medicines and Health Products Importers & Exporters ("Chamber") and its role in the vitamin C industry in China. The Complaint characterizes the Chamber as a mere "trade association" that has facilitated the collusive actions of a "cartel." Compl. ¶ 43. In fact, the Chamber is vastly different from a U.S. trade association, or private Chamber of Commerce. Rather, it is an entity under the Ministry's direct and active supervision that plays a central role in regulating China's vitamin C industry. What the Complaint describes as a "cartel,"[8] and an "ongoing combination and conspiracy to

[7] The official Chinese name of this entity translates as the "Chamber of Commerce of Medicines and Health Products Importers and Exporters." As described infra, this entity, among other things, regulates China's import and export of pharmaceuticals (or "Western medicines") and health care products, including vitamin C.

[8] In their Complaint, and before Magistrate Judge Orenstein, plaintiffs sound a simplistic

suppress competition" through price-fixing (Compl. ¶¶ 43-44), 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.[9]

The United States has never had a state-run command economy with state-owned industries. In the years following the Civil War, chambers of commerce and other trade associations sprang up voluntarily throughout the country as a means of gathering and providing information to members of particular industries. See Maple Flooring Mfrs. Ass'n v. U.S., 268 U.S. 563 (1925). The proliferation of numerous voluntary commercial and trade organizations led President Taft to note the need for a central organization in touch with such groups throughout the United States. President William Howard Taft, Third Annual Message to Congress (Dec. 5, 1911). This, in turn, led to the creation the following year of the U.S. Chamber of Commerce, an entirely voluntary, non-governmental organization created to, among other things, represent business interests before the federal government.

but very misleading theme: defendants here have "stepped into the shoes" of a defunct cartel of European and Japanese vitamin manufacturers, many of whom pleaded guilty to criminal price fixing charges. Hr'g Tr. 48:2-3, May 3, 2006. This theme is a blatant attempt to "poison the well" before the Court has an opportunity to understand the fundamentally different conditions under which the Chinese vitamin C export industry operated from its European and Japanese counterparts. Other than that both industries involved vitamin C, the circumstances of how those industries priced their export products could not have been more different.

[9] As China carried out its economic reform beginning in 1978, namely through de-centralizing Government control over, and direct management of, economic activities by permitting state-owned entities to have decision-making power and by encouraging wide private ownership in the economic sector, China was concerned about the possible effects (as it saw them) of unfettered competition between and among enterprises, including that it could retard the orderly development of a stable domestic vitamin C industry and adversely effect levels of employment in that industry. The Government attempted to temper the effects of economic reform in its regulation of domestic and foreign commerce.

The origins and purposes of that institution stand in stark contrast to those of the similarly-named, but functionally very different, Chamber here. Prior to the advent of any free market system in China, the government itself participated in and controlled the manufacturing and exporting of goods. Only a number of state-owned national exporting entities were allowed to engage in exporting, and no private enterprises or manufacturing enterprises were allowed to export directly. These designated state-owned national exporting enterprises functioned to regulate exports under the Ministry's direction. Subsequently, however, when other types of enterprises (both private and state-owned) were allowed to obtain export licenses, the function of regulating export had to be stripped away from these state-owned national exporting entities so that they were not in the position of regulating the exports of their competitors. The Chamber was established, in part, to serve that role with respect to imports and exports of pharmaceutical products, including vitamin C; it regulates the export of those products under the authority and direction of the Ministry and the General Administration of Customs ("Customs").[10]

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10 The Chamber described its role in Chinese foreign commerce during the Relevant Period as:

> To meet the need of building the *socialist market economy* and *deepening the reform of foreign economic and trade management system*, the China Chamber of Commerce of Medicines & Health Products Importers & Exporters was established in May 1989 in an effort to boost the sound development of foreign trade in medicinal products. As a social body formed along business lines and enjoying the status of legal person, the Chamber is composed of economic entities registered in the People's Republic of China dealing in medicinal items as authorized by the departments under the [S]tate Council responsible for foreign economic relations and trade as well as organizations empowered by them. *It is designated to coordinate import and export business in Chinese and Western medicines* and provide service for its member enterprises. Its over 1100 members are scattered all over China. The Chamber abides by the state laws and administrative statutes, *implements its policies and regulations governing foreign trade, accepts the guidance and supervision of the responsible departments under the States Council. The very purpose is to coordinate and supervise the import and export operations in this business, to maintain business order and protect fair competition, to safeguard the legitimate rights and interests of the state, the trade and the members and to promote the sound development of foreign trade in medicinal items.*

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Although the Chamber is denominated a "social organization," this term also has a very different meaning under Chinese law than it has in the United States. The Chinese notion of a "social organization" includes within its scope the various "chambers" that exist under Chinese law for the purpose, when authorized, of regulating specific industries (e.g., the Chamber regulates certain pharmaceutical industries, including the vitamin C industry).[11] See the Ministry's implementing regulation for the administration of "social organizations" (including "chambers") in foreign trade, Measures for Administration over Foreign Trade and Economic Social Organizations (February 26, 1991) Arts. 2 and 14 ("Measures for Administration"), Mitnick Decl., Ex. D (emphasis added) ("Social organizations established with *coordination and industry regulation functions as authorized by [the Ministry]* must implement the administrative rules and regulations relating to foreign trade and economy."). As discussed, infra, regulation over export pricing and output levels was a specific vitamin C "industry regulation function" delegated by the Ministry to the Chamber.

China Chamber of Commerce of Medicines & Health Products Importers & Exporters, Publication of Administration and Regulation (2003), at 3 (emphasis added), Mitnick Decl., Ex. C.

This document, along with all Ministry rules or regulations cited herein and attached to the Mitnick Declaration, have been authenticated under the procedures of Federal Rule of Evidence 902(3), which governs self-authentication of foreign public documents. First, an authorized official of the Ministry or the Chamber, as applicable, attested in the presence of a P.R.C. notary public to the authenticity of each document. (In the case of the Chamber, the attestation was also in the presence of a Ministry official who further authenticated the Chamber attestation.) Next, the attestation was further certified by the Consular Department of the P.R.C. Ministry of Foreign Affairs and the U.S. Embassy in Beijing. See Mitnick Decl., document index, for a summary of the attestation(s) and certification(s) applicable to each such document. Translations of all Chinese language documents attached to the Mitnick Declaration are certified by a qualified translation agency and further notarized by a P.R.C. notary public.

11 "Chambers [defined as 'chambers of commerce of importers and exports'] are social organizations." Notice of [Ministry] Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters (Sept. 23, 1994) ("Notice Regarding Chamber Personnel Management") at 1, Mitnick Decl., Ex. E.

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The Ministry's authority over the Chamber is plenary: covering such aspects as the Chamber's selection of its leaders, its personnel management system, its budget and accounting systems and its salary structure. Id. Art. 16. See also, Notice Regarding Chamber Personnel Management, Annex II, 4 (Ministry shall verify and approve Chamber's authorized number of personnel); Annex III, 8 (Chamber's general working staff "shall be chosen primarily from the employees in service of their membership organizations or the competent authorities in charge of foreign trade and economics and the public institutions directly under their leadership"); Annex IV, 13 (candidates for senior positions within the Chamber "are recommended by [the Ministry] or recommended by over 1/3 of the [C]hamber's member companies and approved by [the Ministry]"); and Annex V, 17 (Ministry shall "verify and approve the total amount of salary of the [C]hamber"). The Chamber, in turn, must submit to the Ministry its "annual working plan and arrangements of major events," including all "important meetings and activities." Measures for Administration, Art. 21. Similarly, the Chamber "must implement the administrative rules and regulations relating to foreign trade and economy." Id. Art. 14. In short, the Chamber is the instrumentality through which the Ministry oversees and regulates the business of importing and exporting medicinal products in China.

B. The Vitamin C Sub-Committee

Throughout the Relevant Period, the Chamber exercised its regulatory authority with respect to vitamin C exports through its Vitamin C Sub-Committee. The Sub-Committee was established in 1997, at the Ministry's order, against a backdrop of "intense competition and challenges from the international [vitamin C] market." Approval for Establishing VC Sub-Committee of China Chamber of Commerce of Medicines & Health Products Importers & Exporters (issued March 23, 1998), Mitnick Decl., Ex. F. The Sub-Committee, operated under the Chamber's direction and administration, is responsible for "coordinating the Vitamin C

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export market, price and customers of China, to improve the competitiveness of Chinese Vitamin C produce in the world market and promote the healthy development of Vitamin C export of China." Id. ¶ 2.

Only companies that exported vitamin C in certain specified volumes were eligible to be members of the Sub-Committee. Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters (October 11, 1997) Art. 11 ("Vitamin C Sub-Committee Charter"), Mitnick Decl., Ex. G. Pursuant to the Vitamin C Sub-Committee Charter, only Sub-Committee members "have the right to export Vitamin C and are simultaneously qualified to have Vitamin C export quota." Id. Art. 12. With this right come a series of "obligations," including the duty to "comply with the . . . regulations of the Vitamin C Sub-Committee and implement [its] resolution," and to export and supply vitamin C "only to those foreign trade enterprises verified by the Sub-Committee." Id. Art. 15(1)&(2). Most significantly for purposes of this case, members are obligated to *"[s]trictly execute export coordinated price set by the Chamber and keep it confidential."* Id. Art. 15(6) (emphasis added). The Charter further provides that any "failure to implement any resolution or regulation of the Sub-Committee and failure to perform any member's obligation shall be punished by the Sub-Committee." Id. Art. 16. Authorized punishments include "warning, open criticism and even revocation of . . . membership," and imposition of monetary penalties. Id. In addition, the Sub-Committee may recommend, through the Chamber, that the Ministry "suspend and even cancel the Vitamin C export right of such violating member," id., resulting in a total ban on participation in exporting altogether.

1. Initial Regulations Mandating Coordination (So-Called "Voluntary Self-Restraint") in Establishing Export Price and Quantity

Shortly after it mandated the establishment of the Vitamin C Sub-Committee, the Ministry, acting in conjunction with the State Drug Administration, promulgated a new

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regulation authorizing and requiring the Chamber and Sub-Committee to limit the production of vitamin C for export and to set export prices. Notice Relating to Strengthening the Administration of Vitamin C Production and Export ("1997 Ministry & SDA Notice"), Mitnick Decl., Ex. H. The regulation limited participation in the vitamin C export industry to those companies qualified to be members of the Sub-Committee, then required all such eligible entities to "participate in such [Sub-Committee] and subject themselves to the coordination of the [Sub-Committee]." Id. at 2. The Sub-Committee, in turn, was required to *"formulate and adjust [the] export coordination price, which the Vitamin C export enterprises must strictly implement."* Id. (emphasis added).

Under this regulation, qualified vitamin C manufacturers and import and export companies were able to receive a Vitamin C export quota license. The issuance of Vitamin C export licenses was subject to two criteria. First, the export volume was required to be in compliance with the export quota. Second, the export price was required to be no lower than the price established by the Vitamin C Subcommittee's coordinated price agreements. See id. ("The organizations that [are] authorized by [the Ministry] to issue export licenses [were to] strictly verify the qualification of Vitamin C export and operation of the enterprises, and verify their export contracts and issue export license according to the Vitamin C coordinated price and volume quotas."). In addition, the volume to be exported by each qualified entity under this "Production and Export Licensing System" was determined by the Ministry, in conjunction with the State Drug Administration and "relevant departments." Id. at 1-2. Attempts to circumvent the verification process were subject to penalties, including a reduction in an entity's export quota or the revocation of its exporting license. Id. para. 7 ("Vitamin C Export Coordination Group shall timely organize meetings for the major Vitamin C export enterprises . . . to . . . formulate and adjust export coordination price, which the Vitamin C export enterprises must

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strictly implement in accordance with. With respect to enterprises competing at low price and reducing price through any disguised means, a penalty shall be imposed . . . ."") and para. 10 (". . . penalties [for violating provisions of Paragraph 7] shall be . . . the Vitamin C export quota may be reduced, in the worst case their Vitamin C export right shall be revoked").

As the foregoing makes clear, price "coordination" within this regulatory system does not mean that prices are established independently or, even, by "voluntary" agreement among manufacturers, as that term is normally understood in the West. Rather, the decisions to limit the volume of exports and to set export prices were made by the Ministry. The Ministry chose to implement these policies by limiting vitamin C exporting rights to certain qualified entities, compelling those entities to participate in a subcommittee of a Ministry-approved and supervised regulatory body, and requiring that subcommittee to set export prices that exporters were then required to implement, subject to a verification system that included severe penalties for non-compliance. Within this system, therefore, "coordination" refers to the government mandated multilateral process in which prices were set—as opposed to a unilateral process in which the Ministry alone set prices. (Indeed, the Sub-Committee was originally designated the "Vitamin C *Coordination* Group," and was referred to by that name in the 1997 Ministry & SDA Notice. see id. at 2.) The industry participants in this multilateral process, thus, acted pursuant to governmental compulsion; when establishing price controls, they were exercising governmental regulatory power; and the price controls developed through this multilateral process were legally binding and governmentally-enforced.[12]

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12 Plaintiffs rely heavily on a document from the Chamber's website that states:

> In December 2001, through efforts by the Vitamin C Chapter of the China Chamber of Commerce of Medicines and Health Products Importers and Exporters, the manufacturers were able to successfully reach a self-restraint agreement, whereby they would voluntarily control the quantity and pace of exports, so as to achieve the goal of stabilizing and raising export prices.

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This system of Ministry-mandated and Chamber-administered "coordination" was adopted to forestall potential market disorders that might have limited the development of a healthy vitamin C export industry during China's transition from a command economy to a market-driven economy. See Interim Regulations of the Ministry of Foreign Trade and Economic Cooperation on Punishment for Conduct at Exporting at Lower-Than-Normal Price (March 20, 1996), Mitnick Decl., Ex. I (explaining that the Ministry promulgated interim regulations to "ensure orderly development of the country's export trade, safeguard the legitimate rights and interests of the State and enterprises and prevent conduct of exporting at lower-than-normal price"). A system of government-mandated "coordination" among industry participants served the Ministry's goal of transitioning to a healthy market-based economy: it established mandatory coordinated export price and output levels (thereby forestalling what the government feared could be destructive export competition before the foundation for a healthy industry could be laid) by vitamin C manufacturers, although the Ministry itself did not decide what specific prices should be. Instead, this governmental function was delegated to market participants and the Chamber, in their capacities as Vitamin C Sub-Committee members, acting in a coordinated fashion.

Letter from William Isaacson and Alana Rutherford to Honorable James Orenstein (May 12, 2006) at 3 and Exhibit C (emphasis added); see also Hr'g Tr. 47-48, May 3, 2006; Pretrial Order (JO), May 4, 2006, 2-3. In the context of the Ministry's regulation of the vitamin C industry through the Chamber, however, the characterizations by the Chamber of the conduct as "self-restraint" and "voluntary" are unremarkable. The vitamin C industry was under a direct Ministry order to reach a "coordinated" agreement in order to stabilize export pricing. Thus, it is understandable that the Chamber would express its pleasure publicly that the parties were able to comply with the Ministry's order to coordinate pricing and quantities on their own (*i.e.*, "voluntarily" and in "self-restraint") as opposed to requiring more direct Ministerial intervention to reach that result. Indeed, as discussed in Point II.B.2., infra, this regulatory system was expressly enacted "to promote [among other things] industry self-discipline."

2. Revised Regulation of Export Pricing and Quantity: Verification and Chop

In 2002, the Ministry changed the way in which compliance with the Chamber's "coordination" was confirmed by abolishing the Export Licensing System and establishing a so-called "verification and chop" system. See Notice Issued by the Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs for the Adjustment of the Catalogue of Export Products Subject to Price Review by the Customs ("2002 Ministry & Customs Notice"), Mitnick Decl., Ex. J. The Ministry adopted this new system "in order to accommodate the new situations since China's entry into WTO, maintain the *order* of market competition, make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports, *promote industry self-discipline* and facilitate the healthy development of exports." Id. at 1, Preamble (emphasis added). The Ministry explained that this new system would be both "convenient for exporters while it is conducive for the Chambers to coordinate export price and industry self-discipline." Id. at 2, para. 4. The basis of the new system was a process of *"industry-wide negotiated prices."* Id. at 2, para. 3 (emphasis added).

Under this system, the Chamber reported the "coordinated," or "industry-wide negotiated," prices for vitamin C exports to Customs. Id. Manufacturers were required to submit documentation to the Chamber which indicated both the amount and price of vitamin C to be exported. The Chamber "verified," *i.e.*, approved, the contract price and volume. If the price was at or above the minimum acceptable price set by coordination through the Chamber, the Chamber affixed a special seal, known as a "chop," on the contract and returned it to the manufacturer. Upon export, the contract was reviewed by Customs and allowed to go through only if the contract bore the Chamber's "chop." Id. The penalty for violating the system was draconian: withholding of the Chamber's "chop" meant complete denial by Customs of the ability to export.

In 2003, the "verification and chop" system was continued with respect to several commodities industries, including the vitamin C industry. Vitamin C exporters were required to submit contracts to the Chamber, which "verified" the exporters' submissions "*based on the industry agreements* and in accordance with the relevant regulations promulgated by the Ministry of Commerce . . . and the General Administration of Customs." Announcement of Ministry of Commerce of the People's Republic of China, General Administration of Customs of the People's Republic of China (November 29, 2003) (Exhibit 2, para. C) (emphasis added), Mitnick Decl., Ex. K. "Enterprises exporting by forging the [Verification & Chop] on the contracts will be punished by the Customs and Chambers of Commerce according to relevant rules." Id. at 1. Through its 2003 announcement, in conjunction with the General Administration of Customs, the Ministry extended this system throughout the Relevant Period.

ARGUMENT

I. Dismissal Is Mandated By The Foreign Sovereign Compulsion Doctrine

"Under the foreign sovereign compulsion doctrine the courts will immunize private defendants from antitrust liability for conduct that is actually compelled, not merely permitted by a foreign sovereign acting within its jurisdiction. In that case, the acts of the private party 'become effectively acts of the sovereign.'" P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶ 274c at 406-07 (2d ed. 2000), quoting Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1980) (other citations omitted).[13]

[13] In their Antitrust Enforcement Guidelines for International Operations, the U.S. Department of Justice and the Federal Trade Commission provide the following illustration of conduct that they acknowledge cannot be challenged under U.S. antitrust law:

> Assume for the purpose of this example that the overseas production cutbacks have the necessary effects on U.S. commerce to support jurisdiction. As for the participants from the two countries that did not impose any penalty for a failure to reduce production, the Agencies would not find that sovereign compulsion precluded prosecution of this agreement. As for participants from the country that did compel production cut-backs through the imposition of severe penalties, the Agencies would acknowledge a defense of sovereign compulsion.
>
> Greatly increased quantities of commodity X have flooded into the world market over the last two or three years, including substantial amounts indirectly coming into the United States. Because they are unsure whether they would prevail in an antidumping and countervailing duty case, U.S. industry participants have refrained from filing trade law petitions. The officials of three foreign countries meet with their respective domestic firms and urge them to "rationalize" production by cooperatively cutting back. Going one step further, one of the interested governments orders cutbacks from its firms, subject to substantial penalties for non-compliance. Producers from the other two countries agree among themselves to institute comparable cutbacks, but their governments do not require them to do so.

Antitrust Enforcement Guidelines for International Operations, issued by the U.S. Department of Justice and the Federal Trade Commission (April, 2005), Illustrative Example K, Section 3.32.

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U.S. courts, including the Second Circuit, have recognized that they lack subject matter jurisdiction over antitrust actions that challenge private conduct that is compelled by a foreign government. Certified O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 453 (2d Cir. 1987) cert. denied 488 U.S. 923, (1988); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, N.T. and S.A, 549 F.2d 597, 606-07 (9th Cir. 1976); Trugman-Nash, Inc. v. New Zealand Dairy Bd., Milk Prod. Holdings (North America), Inc., 954 F. Supp. 733, 736 (S.D.N.Y. 1997); McElderry v. Cathay Pacific Airways, Ltd., 678 F. Supp. 1071, 1080 (S.D.N.Y. 1988); cf. Interamerican, 307 F. Supp. at 1296-98 (granting summary judgment on the merits based on the defense).

The foreign sovereign compulsion doctrine is "[a] corollary to the act of state doctrine"; it recognizes "that corporate conduct which is compelled by a foreign sovereign is . . . protected from antitrust liability, as if it were an act of the state itself." Timberlane, 549 F.2d at 606. "When the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government, claims under the

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antitrust laws are dismissed" for lack of subject matter jurisdiction. O.N.E. Shipping, 830 F.2d at 453 (affirming jurisdictional dismissal based on the defense); see also McElderry, 678 F. Supp. at 1080 (same). The doctrine is applicable where "the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct." Mannington Mills, 595 F.2d at 1293.

The foreign sovereign compulsion doctrine is fully applicable – and dispositive – here. Chinese law, promulgated by the Ministry and administered through the Chamber, compelled defendants, as members of the Vitamin C Sub-Committee, to coordinate export prices and maximum export volumes and to abide by those requirements. Under the Ministry's regulations, defendants were compelled to become participating members of the Vitamin C Sub-Committee, 1997 Ministry & SDA Notice at 2 Ex. H, and Vitamin C Sub-Committee Charter, Art. 12, Ex. G, they were compelled to *"formulate and adjust [the] export coordination price,"* 1997 Ministry & SDA Notice at 2 (emphasis added), Ex. H, and they were compelled to abide by and implement that "coordinated" price, id., and Vitamin C Sub-Committee Charter, Art. 15(6), Ex. G. Defendants would not have been eligible to export vitamin C at all if they failed to participate in these price-setting and production-limiting activities. 1997 Ministry & SDA Notice, Ex. H; Vitamin C Sub-Committee Charter, Art. 12, Ex. G. Government entities policed defendants' compliance with the resulting prices and volume limits, and non-compliance would subject defendants to severe penalties, including, among other things, reduction in export quotas (resulting in further economic loss), and, possibly, loss of export rights. 1997 Ministry & SDA Notice at 2, Ex. H; Vitamin C Sub-Committee Charter, Art. 16, Ex. G; 2002 Ministry & Customs Notice at 2, Ex. J.

As noted above, while China is in the process of moving actively from its former state-run command economy to a market economy more of a type familiar to the United States,

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the current economic system is transitional and there remains a level of active state direction and coordination that has no analogue in the United States. Thus, for example, one would not find in the United States a government mandate to "maintain order in market competition," to "promote industry self-discipline," or to mandate export pricing and output levels "based on the *industry agreements*"; nor would one find a governmentally-directed organization, such as the Chamber, directing parties to attend meetings, such as those referred to in the complaints, to discuss prices or export quotas, with a view to maximizing industry profitability in export commerce.

That, however, is precisely the transitional framework under which the vitamin C industry functioned throughout the Relevant Period. Thus, while the Government did not, itself, determine specific prices or quantities, it most emphatically did insist on those matters being determined *through industry coordination*. That, of course, is all that is alleged in the complaints here and that is conduct that was compelled by the Chinese government in the interests of insuring "order in market competition."

It is thus clear that these mandates of Chinese law were "basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct." Mannington Mills, 595 F.2d at 1293. The central allegations of the Complaint are that defendants "agreed to control export quantities and achieve stable and enhanced price goals," and that plaintiffs were injured because the price of vitamin C products "has been fixed, raised, maintained and stabilized at artificial and non-competitive levels." Compl. ¶¶ 43 and 62. The decision to control export quantities and require coordinated export prices was made by the Ministry. Defendants were compelled to implement these decisions through participation in the Vitamin C Sub-Committee. Similarly, the Complaint alleges that the allegedly unlawful prices and production limits were established through defendants' "participat[ion] in meetings and conversations in China and elsewhere in which the prices, volume of sales and exports to the

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United States, and markets for vitamins were discussed and agreed upon." Compl. ¶ 46. Again, contrary to the allegations of the complaint, defendants were compelled by the Ministry to engage in these very activities. The government-supervised Chamber facilitated and coordinated those meetings, and was required to advise the Ministry of such meetings.

Accordingly, the price "coordination" alleged in the complaint cannot serve as a basis for the imposition of antitrust liability. Indeed, just as in O.N.E. Shipping, this "antitrust suit represents a direct challenge to [the Ministry's medicinal product export] laws and to the legality of [defendants'] agreements under those laws." 830 F.2d at 451. Those "laws were designed to promote the development of a strong [Chinese medicinal products industry] and to assist [China's] economic development." Id. Accordingly, here, as in O.N.E. Shipping, "the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the [Ministry]." Id. at 453. See also Trugman-Nash, Inc., 954 F. Supp. at 736 (New Zealand dairy producers entitled to defense of foreign sovereign compulsion where New Zealand law required export licensing board to disapprove "of sales price competition among New Zealand dairy producers in respect of exports to nations like the United States that restrict import quantities").[14]

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[14] The arguments of the United States in its amicus brief in Matsushita (see footnote 4, supra) apply here with equal force:

> [T]he court of appeals should have given dispositive weight to the statement submitted to the district court by the Japanese Government, which indicated explicitly that part of petitioners' conduct was compelled. The court's rejection of petitioners' sovereign compulsion defense has caused deep concern to the Government of Japan and to the governments of other countries that are significant trading partners of the United States and threatens to affect adversely the foreign policy of the United States. Mitnick Decl., Ex. B at 6.
>
> The court of appeals erred in rejecting petitioners' sovereign compulsion defense. The Government of Japan explained in the MITI [Ministry of International Trade] Statement that it "directed" petitioners "to enter into" the check price agreement.... [T]hat explicit and detailed statement by a foreign sovereign that it mandated the check price agreement

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Finally, this case stands in stark contrast to those where courts have deemed the foreign sovereign compulsion doctrine inapplicable. For example, in Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962), the Court held that the defense was not available to a Canadian entity that was given the exclusive right to import vanadium oxide into Canada, but then decided, "within its area of discretionary powers," to use that right to conspire with a U.S. subsidiary to boycott and destroy a competitor. Id. at 706-07. The Supreme Court emphasized that there was "no indication that [any] official within the . . . Canadian government approved or would have approved of" this conduct, and that no "law in any way compelled discriminatory purchasing." Id. Here, the Ministry not only approved defendants' conduct in establishing export limits and price coordination, it compelled that very conduct.

Similarly, plaintiffs do not—and cannot—allege that defendants entered into a price-fixing conspiracy, then worked to secure laws or regulations that blessed their arrangements. Cf. U.S. v. Sisal Sales Corp., 274 U.S. 268 (1927) (conspiracy formed in the United States for the purpose of monopolizing sales to the United States was not immunized simply because one element of the conspiracy involved securing laws that recognized the conspirators as exclusive traders and imposed discriminatory sales taxes on rivals). Here, the Ministry imposed the relevant laws on defendants. Indeed, the impetus for these and other price coordination measures was not to endorse existing price-fixing conspiracies, but to prevent disorderly competition.

> in accordance with its laws ... should have been given dispositive weight. It follows that the foreign sovereign compulsion defense precluded use of the check price agreement as a basis for liability under the Sherman Act. Id. at 12.
>
> The MITI Statement also explained that MITI had directed the regulations [through] the Japan Machinery Exporters Association.... Id.

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In sum, Chinese Law mandated the participation of entities engaged in vitamin C export to coordinate with respect to export pricing and volume quotas and to adhere to such limits. Each defendant conducted itself as Chinese law required when it participated in Sub-Committee meetings at which agreements were reached with respect to pricing and volume controls. Refusal to subject oneself to the coordination of the Sub-Committee and the Chamber is unlawful under relevant regulations and would result in severe punishment, either through monetary penalty or loss of ability to participate in the industry altogether. Because all of the elements of the foreign sovereign compulsion doctrine are satisfied, this lawsuit should therefore be dismissed.

II. The Act of State Doctrine Also Mandates Dismissal

The act of state doctrine also forbids judicial inquiry into China's motives in regulating its foreign commerce. The act of state doctrine differs from the foreign sovereign compulsion defense in that the act of state doctrine is grounded in principles of federalism and reflects the view that the courts, in deciding whether to accord recognition to certain foreign acts of state, might hinder the conduct of foreign affairs by the Executive Branch. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 404 (1990). The Supreme Court has acknowledged "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). See also Japan Line, Ltd. v. Los Angeles County, 441 U.S. 434, 448-49 (1979) and Dames & Moore v. Regan, 453 U.S. 654, 669 (1981). "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

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The act of state doctrine, in essence, is "designed primarily to avoid judicial inquiry into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government. Such an inquiry is foreclosed under the act of state doctrine." O.N.E. Shipping, 830 F.2d at 452 (citing Hunt v. Mobil Oil Corp., 550 F.2d 68, 73 (2d Cir. 1977), cert. denied, 434 U.S. 984, 98 S.Ct. 508 (1977)). See also W.S. Kirkpatrick 493 U.S. at 404.

The burden of proving an act of state rests on the party asserting the applicability of the doctrine. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 684-85, (1976), cert. denied, Saksand Company v. Republic of Cuba, 425 U.S. 991 (1976). "[T]his burden requires that a party offer some evidence that the government acted in its sovereign capacity and some indication of the depth and nature of the government's interest." Liu v. Republic of China, 892 F.2d. 1419, 1432 (9th Cir. 1989) (citing Timberlane, 549 F.2d at 607-08).

The act of state doctrine mandates that this Court decline to exercise jurisdiction over this action. As set forth above, the conduct alleged to have been violative here was compelled by the Chinese government. The Chinese government compelled such conduct in its oversight of its foreign trade regulation. Any determination by this Court into the conduct as alleged by the plaintiffs will necessarily invoke an inquiry into the legitimacy of China's foreign policy concerning the manufacture and export of vitamin C. To permit the validity of the policy-making decisions of China "to be reexamined and perhaps condemned by [this] court[] would very certain[ly] 'imperil the amicable relations between [the two] governments and vex the peace of nations." Oetjen, 246 U.S. at 304. It cannot be denied that the possibility of insult to China is significant – "the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means" of regulating domestic conduct. See

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Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1361 (9th Cir. 1981) cert. denied, 454 U.S. 1163 (1982). Such an inquiry is prohibited by the act of state doctrine – if China's regulation of its foreign policy implicates U.S. interests as alleged, then the proper forum for such discussions between the United States and China is not in this Court.

III. This Suit Should Be Dismissed Based on Principles of International Comity

Principles of international comity also render the exercise of jurisdiction over the Complaint inappropriate. Comity

> is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

O.N.E. Shipping, 830 F.2d at 451 n.3 (quoting Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)). The Second Circuit has adopted the multi-factor test set forth in Timberlane for determining when comity principles require courts to decline to exercise jurisdiction over the conduct of foreign actors. See U.S. v. Javino, 960 F.2d 1137, 1142-43 (2d Cir. 1992) cert. denied, Javino v. U.S., 506 U.S. 979 (1992); O.N.E. Shipping, 830 F.2d at 451. Here, virtually all of these factors militate in favor of dismissal.

First, for all of the reasons discussed above, there is an irreconcilable conflict between the requirements of U.S. antitrust law and the laws and policies of China. See Timberlane, 549 F.2d at 614 (courts must examine "the degree of conflict with foreign law or policy"). Simply put, Chinese law mandates conduct that U.S. antitrust law proscribes. See Trugman-Nash, Inc., 954 F. Supp. at 736 (dismissing on comity grounds after finding "actual and material conflict between American antitrust law and New Zealand law in respect of the marketing of dairy export produce"); McElderry, 678 F. Supp. at 1079 (dismissing on comity grounds based on "direct conflict between" U.S. antitrust law and the law of the United

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Kingdom). And that Ministry-mandated conduct, all of which occurs in China, is far more "importan[t] to the violations charged" than any "conduct within the United States." Timberlane, 549 F.2d at 614.

Accordingly, an exercise of jurisdiction cannot achieve "compliance" with U.S. antitrust law: as Chinese entities with their principal places of business in China, defendants cannot export vitamin C at all if they do not comply with the laws of China. See id. (courts must consider the nationality of the parties and their principal places of business and the extent to which enforcement by either state can be expected to achieve compliance). This lawsuit, therefore, cannot compel defendants to conform their future conduct to the requirements of U.S. antitrust law, because they will remain subject to the Ministry's price-coordination requirements.

Those requirements of Chinese law, moreover, were not adopted with "the explicit purpose to harm or effect American commerce," nor were any such harms or effects reasonably foreseeable. See id. To the contrary, the Ministry adopted these requirements to prevent self-destructive price competition during China's transition from a state-run to a market-driven economy. As a consequence, the "significance of effects on the United States" is far smaller than the significance of the effects in China. Id. The price coordination and production limits plaintiffs challenge lie at the very heart of the Ministry's efforts to oversee and facilitate a sweeping transformation of China's entire economic system. Whatever effects defendants' compliance with the Ministry's requirements has allegedly caused in the United States, those effects plainly do not implicate an historic transformation of the U.S. economy.

Finally, and as a consequence, punishing defendants (through an award of treble damages) for their compliance with mandates that the Ministry has deemed essential for the development of a stable market-driven economy can only adversely affect relations between the United States and China. See id. at 609 (noting that nations "have sometimes resented and

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protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts"); Mannington Mills, 595 F.2d at 1297 (warning against a "provincial approach" to the exercise of antitrust jurisdiction over foreign conduct and noting examples of hostile reactions by British and Canadian authorities to such exercises). Insofar as China's sovereign policy decisions about how best to manage its economic transformation conflict with the policies embodied in U.S. antitrust laws, that conflict should be addressed "through diplomatic channels," and not through "the unnecessary irritant of a private antitrust action." O.N.E. Shipping, 830 F.2d at 454.

CONCLUSION

For all of the foregoing reasons, this Court should decline to exercise jurisdiction and should dismiss the Complaint.

Dated:

SIDLEY AUSTIN LLP

By: _____

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Reading No. 4. Mark Tushnet, *Rule of Law and Rule by Law*, pp. 80-85

I discuss here several variants of the idea of rule of or by law, with the aim of illuminating some difficulties associated with the idea of what I will call 'mere' rule-of-law constitutionalism in a nation where a single party controls the government over a long period of time. Of course there is an enormous amount of scholarly literature on the meaning of the 'rule of law,' with important contributions by Lon Fuller – whose work forms the backbone for my discussion –, HLA Hart, Joseph Raz, and other important figures in jurisprudence. My aim here is not to offer a survey of their views or a comprehensive criticism of some of them. As works in jurisprudence, their discussions are relatively abstract and attempt to identify the core conceptual characteristics of the rule of law. As will be seen, their discussions are relatively insensitive to issues of institutional design and practical politics – with the exception of a discussion of whether an evil or iniquitous regime, such as Nazi Germany, could comply with the rule of law.

I hope to bring some institutional sensitivity to the discussion by focusing not on evil regimes, or even regimes that pursue bad policies, but rather on regimes in which one party dominates the political system and can be expected to do so for the indefinite future. My thinking has been affected by an examination not of the People's Republic of China ('PRC') but rather Singapore, but I hope that my comments will have some relevance to the situation in the PRC. I think it is important to emphasise at the outset that my interest is in rule-of-law constitutionalism in a dominant party state, and not in the mechanisms by which the dominant party sustains its position. So, for example, I believe that my observations are pertinent to Singapore, where the dominant party has sustained its position for decades through reasonably free and fair elections. Two additional preliminary points: I note that the distinctions I draw are well-established in the scholarly literature, although some of my observations are, I think, reasonably new. Second, much of what I will say would have to be qualified in a way that is difficult to do in an article of this sort.

I begin with the idea of *rule by law*. Here the idea is simple: there are some laws in place, whose content is reasonably clear and known to the people to whom the laws apply. A rule-by-law system exists when the laws in place are reliably applied, subject only to the kinds of random and minor deviations that occur in any system operated by human beings. In a rule-by-law system, people can generally plan for the short term. But their ability to do so is limited by the fact that nothing in a rule-by-law system precludes the government (a term I use to refer generally to those with the power to alter the law) from changing the rules whenever they choose.

Rule-by-law systems have some quite modest virtues. Probably the most important is that the idea of a rule-by-law system allows us to understand that modest and random deviations from the application of the rules in place do not undermine a system's claim to being one in which rule by law prevails. The reason, again, is human frailty. No system, not even the most stringent rule-of-

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law system, is immune to minor and random deviations, and we get no analytic purchase on interesting problems by noticing that such deviations occur. A secondary virtue of a rule-by-law system is that it allows hierarchical superiors – the 'centre', as it is sometimes called – to monitor the behaviour of officials in direct contact with the public. The superiors can use the rules in place as a standard by which to measure subordinates' behaviour. (I note, though, that this is subject to an important qualification, discussed later in this article: the rules used to assess performance must be sufficiently specific and not subject to reasonable variations in interpretation. Otherwise, the subordinate, criticised for deviating from the rules in place, would be able to say, reasonably, that her performance was consistent with the rules in place as interpreted, again reasonably, by the subordinate.)

I turn now to a more substantial concept, that of a system of *rule of law*. (I should note before proceeding that in the scholarly literature what scholars call a 'thin' rule-of-law system is sometimes described as a rule-by-law system.[1]) I use Lon Fuller's widely accepted enumeration of the characteristics of the rule of law: generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruence. None of these is an absolute; they have, as it is put, a range over which they can vary.[2] I have already mentioned an aspect of what Fuller calls congruence, for example, congruence exists when the rules are actually enforced and do not exist simply 'on the books.' But, as I have said, congruence exists even if complete and absolute enforcement does not, as long as the deviations in enforcement are minor and random. Similarly with generality: a general law has a well-defined but not universal scope of application. The obvious example in this venue is that a 'one state, two systems' regime is a general one in Fuller's terms.

A thin rule-of-law system, one that complies with Fuller's requirements, is said to have important virtues. Publicity, prospectivity and stability in particular allow people to plan and execute their plans over longer periods than in a mere rule-by-law system. As Jeremy Waldron puts it, 'By requiring power to be exercised on a basis that is clear and constant, [the rule of law] promotes a social environment in which individuals know where they stand and what they can count on .... Whatever substantive ends are being pursued, if they are pursued through law, they define a predictable space in which individuals can plan and act freely.'[3]

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1 See eg Gordon Silverstein, 'Singapore: The Exception that Proves Rules Matter,' in *Rule by Law*: The Politics of Courts in Authoritarian Regimes 73-101 (Tom Ginsburg & Tamir Moustafa eds, 2008).

2 Lon Fuller, *The Morality of Law* (1964).

3 Jeremy Waldron, 'Why Law – Efficacy, Freedom, or Fidelity?,' 13 Law and Philosophy 259, 266 (1994).

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So, for example, many people argue that the rule of law, in Fuller's sense, is desirable for nations seeking to attract capital investment from abroad.[4] It is said that investors need assurances that they will get adequate returns on their investments and they will look at the laws in place to see whether those laws do indeed guarantee sufficient returns. But, if the laws are not general, they cannot infer from those laws how their investments will be treated, and if some laws are not public they cannot know whether their returns are in fact guaranteed – there might be some secret rule authorising confiscation under conditions they cannot know.

Similarly with stability, which Waldron invokes in referring to the 'constant' basis on which power is exercised: If the rules in place can change whenever the regime wishes, a potential investor cannot reliably calculate the prospective returns on the investment. The rules in place might seem to guarantee adequate returns, but the regime can change those rules to the investor's detriment. Again, confiscation provides a good example. The rules in place might prohibit confiscation, or limit it to circumstances whose risk of occurring the investor can build into her calculations. But, if the regime can change those rules at will, the calculation becomes impossible.

That example illustrates a broader issue. I believe that there are quite substantial difficulties with the argument that the thin rule of law has substantial virtues of this sort in a nation with a dominant political party. The reason is that in such a nation the government cannot credibly guarantee that the rules in place will be sufficiently stable. One-party dominance means that the government has the legal power to change the rules in place whenever it chooses. It may *choose* not to change them – for the moment – but it cannot credibly promise that it will leave them in place indefinitely.

Consider this example – a stylised version of events that have occurred in Singapore – in which Fuller's requirements appear to be satisfied.[5] The government arrests a critic, charging him with violating a statute prohibiting the public distribution of statements likely to cause racial disharmony, by publishing a newspaper editorial criticising the government's policies on affirmative action. The judge before whom the prosecution is brought dismisses the prosecution on

[4] In principle the rule of law in Fuller's sense is desirable to attract investment by the nation's own people. But, with respect to them, the nation has the power to extract investment coercively, through taxation.

[5] The example is loosely based on an incident in Singapore's constitutional history, modified to bring out 'mere rule-of-law' features. The case on which it draws is *Chng Suan Tze v Minister of Home Affairs* [1989] 1 MLJ 69 (Singapore Court of Appeal).

the ground that the editorial did not violate the statute because it was unlikely to cause racial disharmony. The judge orders the critic released. As the police are completing the paperwork to accomplish the release and putting the critic in a taxicab to take him home, the government passes a new statute making it a crime to criticise government policies on affirmative action. The statute defines 'criticising' to include the failure to withdraw from public access statements made before the statute's enactment. When the critic steps out of the taxicab at his house, the police arrest him for violating the new statute. (Assume that the critic has a mobile phone with him in the taxicab, so that he could receive notice of the new statute's enactment and could direct supporters to withdraw the editorial from public availability.) Holding the critic liable is, I believe, consistent with the minimal requirements of the rule of law: the new statute is public, general, prospective and capable of being complied with. But, I think it clear that the government's action lacks the virtues attributed to the rule of law. The example suggests that Fuller's requirements support only a thin idea of the rule of law.

Now generalise the government's behaviour, so that the example is not a simple one of a violation but is typical: the government is alert to challenges, does its best to anticipate them, alters the laws in place whenever it discovers a problem but does so consistent with the requirements of publicity, generality, prospectivity, and the like. We then have mere rule-of-law constitutionalism. In mere rule-of-law constitutionalism the government is limited by law and, to the extent that it responds to challenges only after the event, perhaps we ought not describe it as completely despotic, and yet the government seems not truly limited or non-arbitrary at least in potential.

The preceding observations illuminate a more general argument in the scholarly literature. Tamir Moustafa and Tom Ginsburg provide a helpful catalogue of the 'functions of courts in authoritarian states':

> Courts are used to (1) establish social control and sideline political opponents, (2) bolster a regime's claim to 'legal' legitimacy, (3) strengthen administrative compliance within the state's own bureaucratic machinery and solve coordination problems among competing factions within the regime, (4) facilitate trade and investment, and (5) implement controversial policies so as to allow political distance from core elements of the regime.[6]

[6] Tamir Moustafa & Tom Ginsburg, 'Introduction: The Functions of Courts in Authoritarian Politics,' in Ginsburg & Moustafa, *supra* note 2, at 4.

Though the subject is outside Moustafa and Ginsburg's immediate concern, I note that the rule of law, not only courts, serves some of these functions as well.

Moustafa and Ginsburg's catalogue is one of functions. It is part of a class of explanations that I call functional or instrumentalist or strategic accounts of law, courts and constitutions. These explanations are subject to important instabilities, which are especially acute in connection with dominant-party regimes. The general point is simple: such regimes will use the rule of law to achieve the goals Moustafa and Ginsburg identify only so long as doing so serves the regime's interests. And, because the regime has a dominant party, it faces no constraints on abandoning the rule in place when doing so would serve the regime's interests – or, perhaps more interestingly, when complying with those rules appears, to the dominant party, to be interfering with the regime's (other) goals.

One difficulty with the strategic accounts of the rule of law in dominant-party nations is that they generally do not take the characteristics of party-dominance fully into account. For example, they might describe constitutions as credible commitments by the rulers and judicial review as a mechanism by which some elements of the ruling coalition can monitor the activities of others, typically the chief executive's activities. But, it is puzzling how the commitments can be credible for more than a short period. The dominant party can modify both statutes and the constitution at will, can restrict the jurisdiction of the courts, or even replace the sitting judges. Strategic accounts ignore the possibility that the dominant party will be able to amend the constitution pursuant to its own terms, or will have enough power to ignore the constitution's amendment processes and change it extra legally.

I turn now to one strategic account dealing with investment, to give my argument some degree of specificity. The account involves what Ernst Fraenkel called a 'dual state'.[7] As the term suggests, dual states have two components. In one a 'thick' rule of law prevails and independent courts administer law in a manner consistent with Fuller's requirements. In the other, arbitrary rule prevails. The key to maintaining a dual state is defining the line that divides its two components. Commentators on Singapore's political development have invoked ideas that resemble the dual-state concept. They have argued that the Singaporean government offered the rule of law to foreign investors, for example, while maintaining a system of relatively arbitrary rule domestically. In the early 2000s Singapore's political leadership began to focus on attracting the 'creative'

[7] For an extensive discussion of Fraenkel's analysis and an application to apartheid South Africa, see Jens Meierhenreich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (2008).

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class to the city-state, a cosmopolitan group that would drive innovation forward but the members of which wanted relatively high degrees of freedom for themselves. Again, a dual state – civil liberties for the cosmopolitans, arbitrary rule for the rest – might seem workable.

There is, however, a problem with maintaining a dual state. The line dividing the non-arbitrary state from the arbitrary one has to be drawn by the very people who administer both the arbitrary and the non-arbitrary state and they can provide no guarantees that in doing so they will act pursuant to the rule of law rather than arbitrarily. As a result, people whose actions are *currently* allocated to the regular or independent judicial system should not be confident that when the time comes to appear before a court, they will in fact be brought into that system. And, reasoning backward, people should generally assume that their actions might come within the jurisdiction of the political system. The regime then loses the strategic benefits it sought from the dual state.

In the case of investment, for example, the regime might have in place a set of rules sharply limiting its power to confiscate investments from abroad, while retaining the power to confiscate the property of domestic dissidents. A sophisticated foreign investor should not find this division reassuring. The regime has the power to re-classify foreign investors – or those whose property it wishes to confiscate – as 'domestic dissidents' by defining in a new and perhaps surprising way what constitutes 'dissidence'. A crude example would be this: the regime now asserts that a refusal to provide special payments to specific officials – in short, a refusal to pay bribes – amounts to domestic dissidence and subjects an investor's property to confiscation.

Note that the problem is not one in which the regime can credibly claim that its actions are merely responses to new circumstances. The stability requirement of course allows for changes in the rules, in response to such circumstances. The difficulty here is that the regime cannot claim credibly that its rule-changing behaviour is responsive to these specific new circumstances and that it will not change the rules under any circumstances that might affect other investors. The case of a state in which there is real party competition is different in important ways. The party in power knows that if it goes 'too far' in changing the rules, it might lose power to the opposition. Consider an act of confiscation by the party in power. New investors might be deterred from investing out of concern for future confiscations, and the drop in investment would give the opposition an issue for the next election campaign. Alternatively, investors might calculate that the party in power will lose power within some predictable period and continue to invest, but only as long as the opposition's threat to displace the party in power is a realistic one. These mechanisms suggest that the thin rule of law can be sustained only in specific political – or, as I would call them, institutional – circumstances.

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