

RELEASE IN PART B5

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**From:** Sullivan, Jacob J <SullivanJJ@state.gov>  
**Sent:** Wednesday, September 7, 2011 6:52 PM  
**To:** H  
**Subject:** FW: Ruling on the China vitamins international anti-trust case

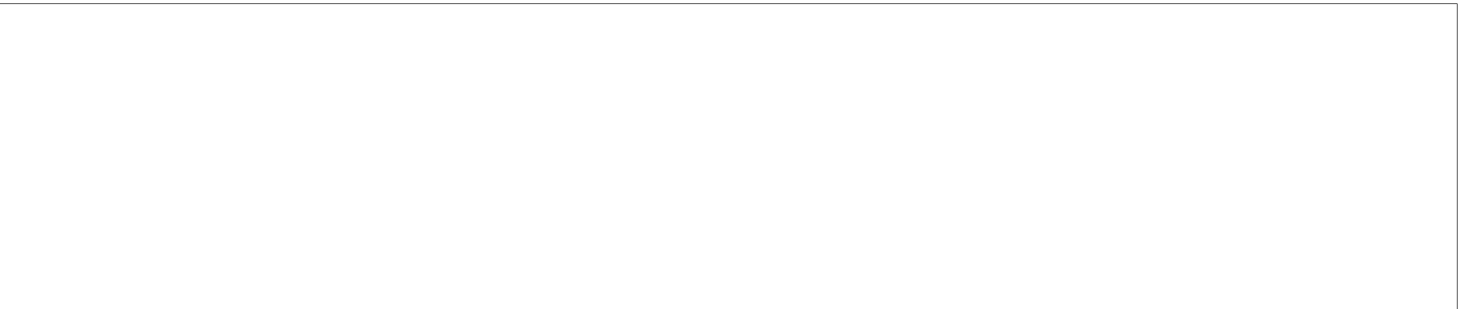
Worth a scan of the below.

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**From:** Harris, Jennifer M  
**Sent:** Wednesday, September 07, 2011 5:37 PM  
**To:** Sullivan, Jacob J; Harrell, Peter E  
**Subject:** Ruling on the China vitamins international anti-trust case

Jake—

Wanted to flag some late-breaking developments in this case, since it seemed to grab the Secretary's interest. Upshots: EDNY ruled very much in favor of US claimants; in his opinion (link below), Judge Cogan explicitly calls out the Chinese government for cooking up a "post-hoc attempt to shield" the companies, becoming my new favorite judge. Assuming you're not allergic to opinions after years of clerking, this one is worth a read.



B5

-Jen

### **Judge Rules Vitamin Companies Can't Blame Chinese Government for Price-Fixing Cartel**

In the course of battling federal class action claims that they illegally fixed prices for vitamin C, a group of Chinese companies has boiled its defense down to a single assertion: Our government made us do it. China's Ministry of Commerce even took the unprecedented step of hiring lawyers at Sidley Austin to join the litigation and take responsibility for requiring the companies to act as a cartel.

On Tuesday, to the relief of the direct purchaser plaintiffs and their lawyers at Boies, Schiller & Flexner; Susman Godfrey; and Hausfeld LLP, a federal judge in Brooklyn rejected the companies' defense. In a [72-page decision](#), Judge Brian Cogan concluded that Chinese law "did not compel [the defendants'] illegal conduct" and faulted the Chinese government for cooking up a "post-hoc attempt to shield" the companies.

"Although the Ministry encouraged defendants' cartel and now fervently desires that defendants be dismissed from this suit, those policy preferences do not establish that Chinese law 'required' defendants to follow their anti-competitive predilections," Judge Cogan wrote.

William Isaacson of Boies Schiller said that Judge Cogan's decision marked the first time a court had considered the so-called foreign sovereign compulsion doctrine in relation to Chinese law. "If you look at the original documents we found, they said 'we did this without any government help,'" Isaacson said. Only after the antitrust suits began piling up in 2005 did the Chinese companies begin arguing that China's government had compelled participation in the cartel, he said.

The defendants include Northeast Pharmaceutical Group Co., Ltd.; Jiangsu Jiangshan Pharmaceutical Co. Ltd.; Hebei Welcome Pharmaceutical Co., Ltd.; and China Pharmaceutical Group, Ltd. The companies, which controlled more than 60 percent of the global market for vitamin C in November 2001, never disputed that they fixed prices or agreed to restrict output. But, they argued, they were members of the Chamber of Commerce of Medicines and Health Products Importers and Exporters, a government-supervised entity through which the companies claimed the government exercised authority on the vitamin C market. China's Ministry of Commerce supported this position in a 2006 amicus brief and other filings.

Judge Cogan didn't buy it. He ruled that there was more persuasive evidence that the alleged cartel was voluntary. "The three doctrines upon which defendants rely recognize that a foreign national should not be placed between the rock of its own local law and the hard place of U.S. law," the judge wrote. "Here, there is no rock and no hard place. The Chinese law relied upon by defendants did not compel their illegal conduct."

Lawyers for the defendants did not respond to requests for comment, nor did Joel Mitnick of Sidley Austin, who filed the amicus brief for the Chinese government. The defense lineup includes James Serota of Greenberg Traurig (for Northeast Pharmaceutical); Richard Goldstein of Orrick, Herrington & Sutcliffe (for Jiangsu); Charles Critchlow of Baker & McKenzie (for Hebei); and Dale Christensen Jr. of Seward & Kissel (for China Pharmaceutical).