In Vitamin C Price-Fixing Suit, the Second Circuit Vacates Lower Court Ruling as Abuse of Discretion and Defers to China's Interpretation of Its Laws

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In a closely watched case that has been pending in the federal courts for over a decade—a series of private lawsuits alleging that Chinese manufacturers had colluded to fix prices of vitamin C imported into the U.S.—the Second Circuit on Tuesday vacated a $147 million judgment for the plaintiffs and remanded with instructions to dismiss the complaint with prejudice. Defendants had claimed that they had fixed prices at the direction of the Chinese government.

As two of our colleagues wrote at the time, the district court's initial denial of the motion to dismiss was "particularly striking because the Chinese government claimed responsibility for ordering the manufacturers to fix the prices in question." Michael N. Sohn & Jesse Solomon, **Lingering Questions on Foreign Sovereignty and Separation of Powers After the Vitamin C Price-Fixing Verdict**, Antitrust, Fall 2013, at 78.

The Second Circuit reversed the district court on an abuse of discretion standard, holding that "because the Chinese Government filed a formal statement in the district court asserting that Chinese law required Defendants to set prices and reduce quantities of vitamin C sold abroad, and because Defendants could not simultaneously comply with Chinese law and U.S. antitrust laws, the principles of international comity required the district court to abstain from exercising jurisdiction in this case." **In Re: Vitamin C Antitrust Litig., No. 13-4791-cv, 2016 WL 5017312, at *1 (2d Cir. Sept. 20, 2016) ("Vitamin C")**. The court's ruling has important implications for questions of jurisdiction of the U.S. federal courts in matters relating to acts of foreign governments.

District Court Proceedings: The Eastern District of New York Refuses to Credit China's Interpretation of Regulations

In January 2005, a class of direct purchasers of vitamin C imported from China filed claims against Chinese manufacturers of vitamin C. They alleged that, beginning in December 2001, the defendants, manufacturers and exporters of vitamin C products, agreed upon the price and volume of vitamin C exported from China into the U.S. and worldwide, in violation of Section 1 of the Sherman Act.

The defendants moved to dismiss the claims pursuant to several doctrines (the act of state doctrine, the doctrine of foreign sovereign compulsion, and principles of international comity), arguing that a Chinese government regulatory program required the defendants to agree on price and volume of exports. The Ministry of Commerce of the People's Republic of China ("MOFCOM") filed an amicus brief in support of the motion to dismiss—the first time any entity of the Chinese government had appeared as an amicus curiae before a U.S. court. MOFCOM's brief argued that Chinese regulations required the defendants to set and coordinate vitamin C prices and export volumes.

The district court denied a motion to dismiss a claim for price fixing and volume restrictions under the Sherman Act, essentially overriding the Chinese government's interpretation of its own law. In re Vitamin C Antitrust Litig., 584 F. Supp. 2d 546 (E.D.N.Y. 2008). The district court then, after detailed discovery, denied a subsequent motion for summary judgment, In re Vitamin C Antitrust Litig., 810 F. Supp. 2d 522 (E.D.N.Y. 2011), and, following a jury trial, judgment was entered against the defendants for approximately $147 million.

As our colleagues then observed, "[w]here the United States has diplomatic and trade relationships with [a foreign] government, the potential impact on foreign relations and trade arguably should weigh heavily in the exercise of the court's discretion." Sohn & Solomon, at 78. In fact, the U.S. Trade Representative had alleged in a complaint to the World Trade Organization (WTO) that the Chinese government had fixed prices of vitamin C exports, as MOFCOM had asserted in its submission. However, no U.S. executive agency or official appeared in the private suit to represent U.S. interests, and the district court's ruling ran contrary to the position taken by the U.S. Trade Representative and by the Chinese government.

The ruling itself raised considerable controversy in declining to defer to China's interpretation of its own laws—not least from the Chinese government official then leading MOFCOM, who expressed "deep dissatisfaction" about the ruling and complained that it "shows disrespect" for China. Id. (As we discuss below, China's reaction to the ruling appears to have influenced the Second Circuit's analysis.)

Appellate Court Ruling: The Second Circuit Defers to China's Interpretation

The defendants appealed, and on Tuesday, the Second Circuit vacated the judgment, reversed the district court's denial of the defendants' motion to dismiss, and remanded with instructions to dismiss the complaint with prejudice. It held that the district court abused its discretion in exercising jurisdiction when it should have refrained from doing so under principles of international comity—and, in particular, deference to the Chinese government's interpretation of its own laws. In so doing, the court noted that it needed to "balance the interests in adjudicating antitrust violations alleged to have harmed those within our jurisdiction with the official acts and interests of a foreign sovereign in respect to economic regulation within its borders." Vitamin C, 2016 WL 5017312, at *1.

A district court's ruling on whether to dismiss a claim on international comity grounds is reviewed for abuse of discretion. Courts consider 10 factors to assess whether a district court should dismiss a claim on international comity grounds, including, among others, the degree of conflict with foreign law or policy, the relative importance of the alleged violation in the U.S. compared to conduct abroad, the availability of a remedy abroad, existence of intent to harm American commerce, and potential effects on foreign relations. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 614-15 (9th Cir. 1976). The Second Circuit, citing the Supreme Court's ruling in Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993), focused to a large extent on the first factor: the degree of conflict between the U.S. and foreign law. To find a "true conflict," the court explained, it would be necessary to find that compliance with both U.S. and Chinese law was impossible. Vitamin C, 2016 WL 5017312, at *6. In this case, to find a conflict with the Sherman Act, which prohibits price fixing and output restrictions, the court was seeking to determine "whether Chinese law compelled Defendants' anticompetitive conduct." Id. at *11. While the broader question of whether to dismiss on international comity grounds is reviewed for abuse of discretion, the interpretation of foreign law is a question of law that the court reviews de novo. See id. at *4.

The Second Circuit's review of the lower court's analysis is notable for the extent to which it departs from the lower court's reasoning.

While noting that there is "competing authority" on the appropriate level of deference owed by U.S. courts to official statements by foreign governments interpreting their own laws and regulations, the court stated a foundational principle that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." Vitamin C, 2016 WL 5017312, at *7, *9. The Second Circuit noted that the district court's fact-specific analysis would have been "entirely appropriate" had the Chinese government not chosen to appear in the litigation. Id. at *11 n.10. But because the Chinese

government did appear, and because the Chinese government's submission identified a conflict of laws, the court should have declined to exercise jurisdiction under principles of international comity.

Although the Second Circuit's opinion devotes more attention to conflict of laws than to the other nine factors, the court held that the factors in totality weighed in favor of the U.S. courts abstaining from exercising jurisdiction over these claims, noting, for example, that plaintiffs can prosecute their claims in other venues. Id. at *12. The court also found that "there is no evidence that Defendants acted with the express purpose or intent to affect U.S. commerce or harm U.S. businesses in particular," but rather, the court explained, "the regulations at issue . . . were intended to assist China in its transition from a state-run command economy to a market-driven economy." Id. Moreover, the court observed that the exercise of jurisdiction by the district court had "already negatively affected U.S.-China relations." Id. at *13. Despite the fact that abuse of discretion is a highly deferential standard, the court found error in the district court's exercising its jurisdiction, finding that "its decision cannot be located within the range of permissible decisions." Id. at *4 (quoting CBS Broad. Inc. v. FilmOn.com, Inc., 814 F.3d 91, 104 (2d Cir. 2016).

In its analysis, the Second Circuit repeatedly disagreed with the district court's decision not to defer to the Chinese government's interpretation and for its conclusion that the Second Circuit had "adopted a softer view toward [the deference appropriate for] the submissions of foreign governments." Vitamin C, 2016 WL 5017312, at *7 (quoting In re Vitamin C Antitrust Litig., 584 F. Supp. 2d at 557). The Second Circuit noted that it was unable to identify a single case "where a foreign sovereign appeared before a U.S. tribunal and the U.S. tribunal adopted a reading of that sovereign's laws contrary to that sovereign's interpretation of them." Vitamin C, 2016 WL 5017312, at *9. The court continued: "Not extending deference in these circumstances disregards and unravels the tradition of according respect to a foreign government's explication of its own laws, the same respect and treatment that we would expect our government to receive in comparable matters before a foreign court." Id.

Analysis

One question posed by the Second Circuit's decision on Tuesday is how much the court's deference to the Chinese government depends upon the foreign sovereign's decision to appear in the case. Indeed, the Second Circuit suggests that a fact-specific analysis would have been "entirely appropriate" where the foreign sovereign had not appeared. This ruling leaves open a number of questions, including how much a foreign sovereign's appearance should be viewed as a bright-line rule, and whether there are any circumstances that might militate in favor of taking a less deferential approach under the circumstances. In that connection, it is notable that the U.S. executive branch—traditionally the branch with broad oversight of foreign policy—did not appear in this private lawsuit, and thus the Second Circuit did not pass on whether the appearance of a U.S. official might have affected its analysis.

Relatedly, the Second Circuit's opinion on Tuesday demonstrates a keen awareness of the central role that the executive branch plays in foreign affairs. The district court had not imputed much weight to the position of the U.S. Trade Representative, who in 2009 filed a complaint with the WTO that China had fixed prices and imposed export volume restrictions in violation of its commitments in its accession to the WTO. Our colleagues previously noted in commenting on the district court's rulings that the executive branch has broad foreign policy authority and that "the judicial branch might choose to defer to the seemingly greater competence of the executive branch on such matters." Sohn & Solomon, at 82. The Second Circuit made precisely this point, noting that "[a]lthough Plaintiffs may be unable to obtain a remedy for Sherman Act violations in another forum, complaints as to China's export policies can adequately be addressed through diplomatic channels and the World Trade Organization's processes." Vitamin C, 2016 WL 5017312, at *12.

Yet another open question is how much courts will consider the reaction of foreign governments to U.S. court rulings in weighing principles of international comity. The Second Circuit's opinion includes a

lengthy recitation of the ways in which the district court's exercise of jurisdiction had "already negatively affected U.S.-China relations." Id. at *13. The Second Circuit's concern with China's reaction to the decision suggests that how foreign governments react to such rulings is one component to the international comity analysis, potentially creating the possibility that foreign governments' reactions could play into the assessment of whether to exercise jurisdiction.

Plaintiffs have not yet signaled whether they intend to appeal the Second Circuit's decision to the Supreme Court, but if they do—as our colleagues noted previously—such an appeal may encourage the involvement of the U.S. executive branch, whose interests have been at the heart of the case but which has so far been absent in both the district and appellate courts. Sohn & Solomon, at 84.

Conclusion

The Second Circuit's ruling reestablished a firm principle of deference to foreign governments that appear in litigations, as well as broader principles of concerns about the impact of U.S. court rulings on U.S. diplomatic and trade relationships with foreign sovereigns. A key question going forward will be the degree to which the ruling is essentially fact-bound to circumstances in which a foreign government appears in a litigation without a contrary position by the U.S., and how much the principles animating the Second Circuit's language might favor a more cautious approach about extending jurisdiction over matters implicating foreign policy concerns.

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