

U.S. Supreme Court to Decide Whether to Defer to Chinese Government's Interpretation of PRC Laws in Vitamin C Antitrust Case

January 18, 2018

On January 12, 2018, the U.S. Supreme Court agreed to decide whether and to what extent to defer to a foreign government's interpretation of its laws in evaluating whether a foreign company subject to those laws has committed a U.S. antitrust violation in abiding by the law of its home jurisdiction. This question arose in a federal court dispute between American vitamin C importers Animal Science Products, Inc. ("Animal Science") and the Ranis Company, and Chinese vitamin C manufacturer and exporter Hebei Welcome Pharmaceutical Co., Ltd ("Hebei") and its holding company North China Pharmaceutical Group Corporation ("North China") (*Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd., et al.*).

Please see our prior alerts from [September 22, 2016](#) and [March 27, 2013](#) for discussions of earlier phases of this litigation, as well as "[Lingering Questions on Foreign Sovereignty and Separation of Powers After the Vitamin C Price-Fixing Verdict](#)" and "[Foreign Sovereign Compulsion: A Widening Split on Chinese Exports](#)" for a more in-depth discussion of the key issues raised by the case.

Background

Animal Science filed suit in 2005, alleging that Hebei and North China had conspired with other Chinese companies to limit the supply of vitamin C on the international market and fix prices in violation of the Sherman and Clayton Acts ("U.S. antitrust laws"). Defendants did not deny their collusive conduct but instead asserted that their actions were compelled by Chinese law. The Ministry of Commerce of the People's Republic of China (the "Ministry")—the "highest . . . [entity] authorized to regulate foreign trade" in China—submitted an amicus brief confirming Defendants' assertion, which the federal district court characterized as "unprecedented." The Ministry explained that during the relevant period, Defendants were subject to a Chinese export regulatory regime which required them to coordinate with other industry participants to set vitamin C export prices and supply volumes before receiving clearance from customs authorities for the purpose of complying with anti-dumping obligations imposed by foreign countries on Chinese exports. The regime was also created to improve the competitiveness of Chinese vitamin C manufacturers in the global market and promote the Chinese vitamin C export industry.

The District Court considered the Ministry's submission, but declined to give it conclusive deference. The Court found that the submission failed to address provisions of the export law that undermined the Ministry's interpretation (such as a "suspension provision" which seemed to suggest that companies could unilaterally suspend the government's review of their export prices). The Court also pointed out that the Chinese government had made public statements contradicting its own interpretation. The District Court concluded – based on the factual record, which included expert testimony that there were no material penalties for non-compliance with Chinese law—that the defendants were not legally compelled to coordinate export prices and supply volumes. Following that ruling, the defendants were found liable at trial for violating U.S. antitrust laws and were assessed approximately \$147 million in damages.

The proceedings were notable, in part, because the private suit included no representative from the U.S. government, even though, during the pendency of the District Court proceedings in 2009, the U.S. Trade Representative alleged in a complaint to the World Trade Organization (WTO) that the Chinese government had fixed prices of vitamin C exports (much as the Ministry contended in its submission).

Nonetheless, no U.S. executive agency or official appeared in the private suit to represent U.S. interests. 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 the Ministry, who expressed “deep dissatisfaction” about the ruling and complained that it “shows disrespect” for China.

On appeal, the Second Circuit Court of Appeals analyzed whether the principles of international comity required the District Court to decline to exercise jurisdiction. Specifically, the Second Circuit considered whether the U.S. antitrust laws were in “true conflict” with the Chinese regime, making it “impossible” for an entity to comply with both sets of laws. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993). As part of this inquiry, the Second Circuit considered how much deference it should accord the Ministry's interpretation of the Chinese law. Ultimately, the Second Circuit, in a 2016 opinion, held that a U.S. court was “bound to defer” to a foreign government's explanation of its laws when that government “directly participates in U.S. Court proceedings” and offers an interpretation of its laws that is “reasonable under the circumstances.” The court therefore deferred to the Ministry's explication of its vitamin C regime as requiring anti-competitive conduct in conflict with U.S. antitrust laws and concluded that international comity required the lower court to abstain from asserting jurisdiction over the case. Following that ruling, a spokesperson for the Ministry praised the Second Circuit decision and reiterated its support for Chinese companies to defend their rights in foreign court.

Divided Views

The Second Circuit's ruling deepened an existing divide between the circuit courts on this question. The Second Circuit (which covers New York, among other states) and Ninth Circuit (which covers California, among other states) ruled in favor of deference. However, five other circuit courts had conflicting approaches to this issue, with some circuits requiring courts to engage in an independent review of the foreign law based on available evidence, even when the foreign government directly participates in the litigation.

In evaluating the plaintiff's petition for certiorari, the Supreme Court invited the U.S. Solicitor General—who represents the U.S. Government's official position—to submit an amicus brief outlining the Trump Administration's views on the deference question. In his November 2017 brief, the Solicitor General disagreed with the Second Circuit's approach, arguing that foreign governments' characterizations of their own laws should be given “substantial” but not “conclusive” deference because federal courts have a responsibility to consider other relevant material when interpreting foreign law.

Notably, the position of the Trump Administration's Solicitor General stands in direct contrast to the position that the Reagan Administration took on this issue with the Supreme Court in 1986, when the executive branch endorsed the position taken by the Second and Ninth Circuits today. Faced with a defense that the Japanese government had compelled a pricing cartel, the then-Solicitor General, Department of Justice, and State Department took the position that the Supreme Court should give “dispositive weight” to the statements of foreign governments, because failing to do so would trigger “deep concern” among “significant trading partners of the United States.” Brief for the *United States as Amicus Curiae, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (No. 83-2004), 1985 WL 669663 at *6, *20 n. 21. In that case, the Supreme Court's analysis did not reach the issue of the weight to accord a government's interpretation of its laws, thereby leaving open the question that the Supreme Court will now face.

Potential Implications of a Supreme Court Decision

The Supreme Court's decision in this case may have important implications for foreign companies conducting business in the United States. If the Supreme Court adopts the Second and Ninth Circuits' approach to deference, foreign entities would likely be insulated from U.S. antitrust liability if their governments can properly appear in U.S. court proceedings to assert that the defendants' actions were

compelled by their local law to engage in the challenged conduct. (This is not to say that foreign governments and entities would face no liability whatsoever; they may face liability in other proceedings, as the Chinese government did before the WTO, simply not U.S. antitrust liability.)

On the other hand, adoption of the less deferential approach used by the District Court or the “substantial deference” approach advocated by the Solicitor General would create greater uncertainty as to whether the views expressed by a foreign government will be accepted by U.S. courts. Foreign companies may thus face time-consuming and costly litigation to show that their conduct was compelled under foreign law and that they are therefore not liable under U.S. law. Interpretation of domestic legal obligations by home governments acting as *amicus curiae* would still be valuable but not determinative.

Any rule articulated by the Supreme Court may have broader ramifications as well. For example, if the Supreme Court provides less than full deference to foreign authorities’ interpretations of their own laws, then we may see an impact on foreign diplomacy and trade relations in future. In addition, the FCPA’s “local law” defense, which provides an affirmative defense where conduct is lawful under the “written law and regulations” of a foreign jurisdiction, necessarily requires interpretation of foreign laws. Moreover, the question of whether a foreign company can be compelled to produce certain information in discovery is often based in part on the interpretation of foreign secrecy and privacy laws. The Supreme Court’s decision in *Animal Science* may provide guidance as to the extent U.S. courts (or government agencies) will defer to the views of foreign governments as to the application of their own law.

We expect the Supreme Court to hear and decide the case by June 30, 2018.

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