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Expert Analysis

Vitamin C Litigation: Window Into Trump White House International Relations?

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Just before the U.S. Supreme Court's most recent term expired, the justices set the stage for a potential test of the Trump administration's ideological vigor. In this instance, however, they did so without publishing a landmark decision, or even granting a writ of certiorari filed in a controversial case. Instead, on June 26, 2017, the Supreme Court invited Acting Solicitor General Jeffrey Wall to "file a brief … expressing the views of the United States" regarding *Animal Science Products v. Hebei Welcome Pharmaceuticals Co.*, also known as *In re Vitamin C Antitrust Litigation*, 837 F.3d 175 (2d Cir. 2016). This Second Circuit decision is currently under the Supreme Court's consideration for a grant of certiorari in the coming term.

By inviting Wall's office to file a brief, the court has offered President Donald Trump and his government an opportunity to expound on one of the president's most popular talking points pre- and post-campaign—the issue of China's abuses of international trade. Candidate and now President Trump has been explicit in accusing China of hurting the U.S. economy through unfair trading practices, including repeatedly running afoul of anti-dumping laws which are designed to prevent foreign manufacturers from undercutting U.S. companies by selling goods at an unfair price. As China is the largest trade partner of the United States, President Trump's views toward the country could have significant effects on the U.S. and global economies. While the opportunity to file an amicus brief in *In re Vitamin C Antitrust Litigation* is not an explicit invitation to tie President Trump's policy goals to applicable law, keen political observers will be watching for the Solicitor General's filing to gain early insight into the ever-shifting priorities of the new administration. The key issue before the court, if it should decide to take up the case, will relate to how much deference to give to the Chinese Ministry of Commerce's (MOFCOM) interpretation of its own regulations, even where those regulations compel companies to break the laws of the United States.

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'In re Vitamin C'

In re Vitamin C Antitrust Litigation has risen through the federal court system from its beginnings as a multidistrict antitrust class action brought against Chinese vitamin C producers. The plaintiffs, U.S. vitamin C purchasers, allege that the defendants conspired to fix the price and supply of vitamin C sold to U.S. companies in the international market in violation of the Sherman and Clayton

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Acts. After the defendants' motions to dismiss and for summary judgment were denied, a jury awarded the plaintiffs $147 million in damages, which the defendants appealed to the Second Circuit. *In re Vitamin C Antitrust Litig.*, No. 05-CV-0453, 2013 WL 6191945 (E.D.N.Y. Nov. 26, 2013), vacated, 837 F.3d 175 (2d Cir. 2016).

The overarching issue in these decisions has been the conduct of the Chinese producers and their relationship to the Chinese government. During its long transition from a centralized state-run economy to a more market-oriented one, beginning in the 1970s, the Chinese government imposed various successful export controls in order to maintain a competitive edge in the global vitamin C market, including consolidation and price-controlling regulations. Specifically, an "association" or "Chamber" controlled by the Chinese government allegedly colluded with the producers to restrict exports and fix prices.[1] Throughout the litigation, the defendants have not denied that exports were limited and a minimum price was set. Instead, they argue that they acted pursuant to Chinese government regulations imposed by MOFCOM, which mandated that the defendants coordinate prices and create a supply shortage. This distinction is what formed the basis of the defendants' motion to dismiss under the principle of international comity.[2]

Further complicating the issue is that MOFCOM filed an amicus brief in support of the defendants' motion to dismiss, the first such appearance by an entity of the Chinese government in any U.S. court. The brief explained that the association/Chamber is a "Ministry-supervised entity authorized by [MOFCOM] to regulate vitamin C export prices and output levels," in order to safeguard the interests of the Chinese state and promote the development of Chinese trade in vitamin C internationally. To accomplish this goal, the brief explained, the Chinese government attempted a variety of regulatory scheme changes, culminating in a "price verification and chop" policy, which required government approval for any international vitamin C contract. The government explicitly withheld this approval if the contract was not "at or above the minimum acceptable price set by" the association/Chamber.

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This evidence was not enough to convince the trial judge, who denied the motion to dismiss and allowed trial to proceed, eventually culminating in the large jury verdict due to violations of §1 of the Sherman Act.

'True Conflict' in Second Circuit

The defendants appealed to the Second Circuit, renewing their argument that the principles of international comity required the district court to dismiss the suit. Ultimately, the Second Circuit agreed, holding that the trial court had abused its discretion by not abstaining from asserting jurisdiction on international comity grounds. In essence, the Second Circuit ruled that the trial judge had not afforded adequate deference to the Chinese government's interpretation of its own laws.

The Second Circuit began its analysis by noting that the application of the principle of comity requires a balance of "the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law." To determine whether a court should abstain from asserting jurisdiction on comity grounds, courts apply a multi-factor balancing test.[3] After a discussion of Supreme Court precedent, the Second Circuit concluded that the first factor—the degree of conflict between U.S. and foreign law—acted as a gatekeeper to the remaining comity analysis. A "true conflict" between the U.S. and foreign law, the circuit declared, is required before abstention on comity grounds is appropriate (assuming that application of the remaining factors would so require).[4] A true conflict is defined as one in which compliance with the laws of both countries is impossible.

The Second Circuit then applied the true conflict test to the *Vitamin C* facts. Given that the Sherman Act per se outlaws horizontal price fixing

agreements, the court explained, if Chinese law required defendants to enter into horizontal price-fixing agreements, compliance with the laws of both countries was impossible. As MOFCOM, in its amicus brief, claims precisely this, the Second Circuit's analysis hung on how much weight it afforded this statement from the Chinese government explaining its own laws. While cases pointed in both directions, the appellate judge ultimately disagreed with the trial judge and reaffirmed the principle that when a foreign government directly participates in U.S. judicial proceedings by providing sworn evidence regarding a reasonable construction of its own laws or regulations, the U.S. court is bound to defer to those statements. Thus, the Chinese government's statements created a true conflict, allowing the comity balancing test to continue. Given that the remaining factors weighed heavily in favor of abstention, the Second Circuit overruled the district court and remanded the case with instructions to dismiss the complaint.

On to the Supreme Court?

Following this unfavorable ruling, the plaintiffs filed a petition for certiorari, arguing that the ruling deepens the split among circuit courts on the standard of deference that should be applied to a foreign government's interpretation of its own law. Prior to making a cert determination, the court has asked the Solicitor General to weigh in. Up until now, the Executive Branch has stayed out of the dispute, likely out of concern for creating a tumultuous relationship between the United States and China. China has "attached great importance to this case," furthering State and Justice Department trepidations.

While it is unclear whether the Acting Solicitor General will file the requested brief, this is a potential opportunity for President Trump and his advisors to message China that private parties should be able to challenge state-sponsored price fixing among Chinese national companies. President Trump has been aggressive with his statements towards China in the past, regularly lobbing accusations of currency manipulation and other malfeasance. It would not be surprising for his administration to see the Solicitor General's brief as an opportunity to attempt to argue to curtail China's power in a highly visible way. In light of President Trump's accusations of Chinese unfairness (particularly regarding dumping), it will be interesting to see how the Solicitor General interprets the applicable legal standards and whether that interpretation appears to be influenced by President Trump's views on international relations policy.

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1. Whether this entity is an "association," like a trade association in the United States, or a government-controlled "Chamber" of producers, unique to China's heavily regulated economy, was a key question in the litigation.

2. International 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 protection of its laws. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

3. These factors include: (1) degree of conflict with foreign law or policy; (2) nationality of the parties, locations or principal places of business of corporations; (3) relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) the extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (5) existence of intent to harm or affect American commerce and its foreseeability; (6) possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) whether the court can make its order effective; (9) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) whether a treaty with the affected nations has addressed the issue. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976); *Mannington Mills v. Congoleum*, 595 F.2d 1287,1297 (3d Cir. 1979).

4. Circuits are split on this issue. Some courts, unlike the Second Circuit, do not require a true conflict between laws before applying the remaining factors of the comity balancing test.