ALERT MEMORANDUM

Second Circuit Dismisses Antitrust Claims Against Chinese Pharmaceutical Companies Based on International Comity

September 2, 2021

The U.S. Court of Appeals for the Second Circuit recently issued a 2-1 decision in *In re Vitamin C Antitrust Litig.*, dismissing antitrust claims against two Chinese pharmaceutical companies for reasons of international comity in a case that has lasted over 15 years.[1] On August 10, 2021, the Second Circuit held there was a "true conflict" between U.S. law and Chinese law because Chinese law required the price fixing at issue. Weighing this with the remaining factors in a comity analysis, the Second Circuit found that dismissal was warranted.

Earlier in the proceedings, the Chinese government made its first official appearance in a U.S. court through submission of an *amicus* brief. The Second Circuit previously ruled in favor of dismissal in deference to the Chinese government's statement regarding its own laws, but was reversed by a unanimous U.S. Supreme Court, which held that such statements should be given "respectful consideration" but were not "conclusive." On remand, the Second Circuit once again ruled in favor of the Chinese companies, in a decision with implications for the sources and authorities litigants should present in advancing interpretations of foreign law.

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[1] *In re Vitamin C Antitrust Litig.*, No. 13-4791-cv, 2021 WL 3502632 (2d Cir. Aug. 10, 2021).

Background

Cleary Gottlieb's June 19, 2018 Alert Memorandum provides a full description of the background of this case. By way of summary, the case was filed in 2005 as a class action, alleging that a group of Chinese pharmaceutical companies ("Defendants") fixed the prices of vitamin C exported to the United States in violation of U.S. antitrust laws. Defendants moved to dismiss the claims based on the act of state doctrine, the doctrine of foreign sovereign compulsion, and international comity. In the first official appearance by the Chinese government in a U.S. court, the Chinese Ministry of Commerce (the "Ministry") filed an *amicus* brief in support of Defendants' position.

The district court denied Defendants' motion to dismiss, ruling that the Ministry's *amicus* brief regarding Chinese law was "entitled to substantial deference" but was not "conclusive."[2] After allowing discovery to proceed as to Defendants' claim that the acts alleged to be antitrust violations were compelled by Chinese law, the district court subsequently denied Defendants' motion for summary judgment or, in the alternative, for a determination of foreign law under Federal Rule of Civil Procedure 44.1.

After a jury returned a verdict finding the Defendants liable resulting in a trebled damages award of over $147 million plus interest, the district court also denied the Defendants' renewed motion for judgment as a matter of law pursuant to Federal Rule 50(b) and entered a permanent injunction against further anticompetitive behavior.

In 2016, the Second Circuit reversed the district court's denial of Defendants' motion to dismiss, finding that the key question was whether Defendants could follow both Chinese law and U.S. antitrust law. The answer depended on the "amount of deference that [courts] extend to the Chinese Government's explanation of its own laws."[3] The Second Circuit held that "when a foreign government . . . 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."[4] Accordingly, since the Ministry's interpretation of Chinese law was "reasonable," the Second Circuit concluded that "Chinese law required Defendants to engage in activities in China that constituted antitrust violations here in the United States."[5]

The U.S. Supreme Court granted certiorari to resolve a Circuit split on whether "a federal court determining foreign law under Rule 44.1 [is] required to treat as conclusive a submission from the foreign government describing its own law."[6] The Supreme Court unanimously reversed the Second Circuit, concluding that "[a] federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements."[7] While "a federal court should carefully consider a foreign state's views about the meaning of its own laws . . . the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials."[8] In particular, the Supreme Court found that because the Second Circuit accepted the Ministry's submission as conclusive, it ignored China's contradictory statement to the World Trade Organization ("WTO") that it had ceased to administer the exportation of vitamin C.

2021 Second Circuit Decision

Applying the standard articulated by the U.S. Supreme Court, in a 2-1 decision on remand the Second Circuit held that the action should be dismissed for reasons of international comity, which it described as "both a principle guiding relations

[2] *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 557 (E.D.N.Y. 2008).
[3] *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 186 (2d Cir. 2016).
[4] *Id.* at 189.
[5] *Id.* at 189–90.
[6] *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. LTD.*, 138 S. Ct. 1865, 1872 (2018) (citation omitted).
[7] *Id.* at 1869.
[8] *Id.* at 1873 (citation omitted).

between foreign governments and a legal doctrine by which U.S. courts recognize an individual's acts under foreign law."[9]

As an initial matter, the majority found that Chinese law required the price-fixing at issue, meaning Defendants "could not comply with both Chinese law and U.S. antitrust law."[10] In arriving at this conclusion, as directed by the U.S. Supreme Court, the Second Circuit "carefully consider[ed]" but did "not defer conclusively to the Ministry's statement on the meaning of Chinese law."[11] Instead, it weighed the "clarity, thoroughness, and support" of the Ministry's statement; its "context and purpose"; "the transparency of the [Chinese] legal system"; "the role and authority of the entity or official offering the statement"; and "the statement's consistency with the foreign government's past positions."[12]

As to the last factor, the Second Circuit reconciled China's prior statements to the WTO on the basis that they were in fact "consistent with the notion that China was *loosening* price controls by delegating regulatory authority *from* the Ministry and Customs *to* the Chamber and Sub-Committee, not abandoning export regulations altogether" and that, even if there was a material contradiction, it was "entirely plausible that China sought to exaggerate to the WTO its compliance with that organization's accession principles in becoming a WTO member."[13]

The Second Circuit also considered whether the Ministry's position was supported by other available sources, including administrative documents and contemporaneous industry records. On balance, the Second Circuit found that these considerations supported a determination that Chinese law facially required non-compliance with U.S. antitrust law—meaning there was a "true conflict" between Chinese law and U.S. law.[14]

The Second Circuit distinguished this "true conflict" component of the international comity analysis from the similar doctrine of foreign sovereign compulsion ("FSC"). Whereas the FSC doctrine requires a showing "that a 'foreign government's order . . . compelled [the defendant] business to violate American antitrust law,'" international comity "instead focus[es] entirely on whether foreign law, taken at face value, 'requires [the defendant] to act in some fashion prohibited by the law of the United States.'"[15] As a result, courts engaging in an international comity analysis consider whether "compliance with the laws of both countries is . . . impossible,"[16] while a defendant invoking FSC must show that "non-compliance with foreign law portends a significant risk of substantial sanctions" and may also need to establish that it "act[ed] in good faith by 'mak[ing] all efforts to comply with U.S. law.'"[17]

Moreover, while FSC can serve as "a standalone basis for abstention, the finding of a true conflict is only one step—albeit a critical one—in a comity analysis."[18] Courts must also consider (1) the nationality of the parties and location of the anticompetitive conduct; (2) the effectiveness of enforcement and alternative remedies; (3) the foreseeable harm to American commerce; (4) reciprocity; and (5) the possible effect on foreign relations.

Applying this multi-factor test,[19] the Second Circuit concluded that "the existence of a true conflict between Chinese and U.S. antitrust law, Chinese nationality of all of the defendants, extraterritorial nature of the anticompetitive conduct, and potential

[9] *Vitamin C Antitrust Litig.*, 2021 WL 3502632, at *4.
[10] *Id.*
[11] *Id.* at *11 (citing *Animal Sci. Prods.*, 138 S. Ct. at 1873).
[12] *Id.*
[13] *Id.* at *14.
[14] *Id.* at *11.
[15] *Id.* at *5–*6 (citations omitted).
[16] *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2911 (1993).
[17] *Vitamin C Antitrust Litig.*, 2021 WL 3502632, at *5 (citation omitted).
[18] *Id.* at *6.
[19] The multi-factor test was "set forth by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614–15 (9th Cir. 1976), and then revised by the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979)" and "has been explicitly used [by the Second Circuit]."). *Id.* at *4.

impact upon foreign relations together strongly favor[ed] dismissal."[20]

As to the other factors, the Second Circuit noted that the U.S. Department of Justice had not brought criminal antitrust enforcement actions against the Defendants and the U.S. Department of State did not submit an *amicus* brief. It also highlighted that there were alternative methods available for the U.S. to vindicate its interests in the enforcement of its antitrust laws, such as "bilateral diplomatic efforts, multilateral discussions, trade proceedings in the WTO, or dispute resolution in another international forum."[21]

In dissent, Judge Wesley argued that the majority failed to answer the question of whether Chinese law required the Defendants' conduct and instead "improperly appl[ied] the doctrine of international comity to avoid a finding it cannot contest: that Chinese law did not require the defendants to fix prices."[22] In Judge Wesley's view, Defendants could have avoided a conflict with U.S. antitrust laws by either resigning from the committee that was subject to the price restrictions or declining to collude on prices above the minimum established by Chinese law. Therefore, dismissal based on international comity was not warranted. As to the Chinese government's statement of its views, Judge Wesley found that it did not "merit deference under the Supreme Court's five-factor test" and, in particular, questioned the "self-serving position [taken] for the first time in the context of this litigation."[23]

Conclusion

The Second Circuit's recent ruling has implications beyond the antitrust context, and suggests that international comity-based defenses may be available where there is a facial "true conflict" between foreign law and U.S. law, without the need for evidence that the defendant was compelled to act in violation of U.S. law.

To raise such defenses, parties must be prepared to present comprehensive evidence in support of their interpretation of foreign law. The Second Circuit's ruling underscores that in analyzing and applying foreign law, courts must take into account all relevant evidence and available information. A statement from a foreign government on its own law may be persuasive, but is not dispositive—and courts must consider both context and incentives in assessing the credibility of that statement. Parties should aim to develop further support for the interpretation of foreign law that they are advancing, since courts will look to the entire record in making their determinations.

Such further support could come in the form of declarations from independent experts in the foreign country's law, primary documents such as the provisions of statutes or regulations, and/or judicial opinions issued by the foreign country's domestic courts.[24] It could also consist of pronouncements of competent foreign government authorities made *outside of the litigation*, including those that may themselves have force of law in the relevant foreign jurisdiction. And parties should be aware of any inconsistencies between positions taken by foreign authorities in litigation versus in statements elsewhere, which could potentially be relied upon to argue that the position currently taken is unduly influenced by the existence and circumstances of the litigation itself.

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[20] *Id.* at *18.
[21] *Id.*
[22] *Id.* at *19.
[23] *Id.* at *20.
[24] *See Bugliotti v. Republic of Argentina*, 17 Civ. 9934 (LAP), 2021 WL 1225971 (S.D.N.Y. Mar. 31, 2021) (appeal pending) (granting motion to dismiss filed by the Republic of Argentina, represented by Cleary Gottlieb, on issues of Argentine law based on presentation of independent expert declarations and underlying Argentine law sources).