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Between a Rock and a Hard Place: Vitamin C and the Future of U.S. Antitrust Enforcement Against Chinese Companies

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Over the last three decades, government antitrust enforcers and private plaintiffs in the United States have increasingly sought to apply U.S. antitrust laws to conduct by foreign businesses that is deemed to have effects on the U.S. economy. Many of these foreign businesses have been located in Asia: since the 1990s there have been waves of U.S. criminal prosecutions and civil cases alleging anticompetitive conspiracies between Japanese, Korean, and Taiwanese sellers and manufacturers. For most of this time, however, companies in mainland China—despite being the largest exporters of goods to the United States, first in Asia and now in the entire world—have rarely been targeted for U.S. antitrust enforcement.

A primary reason for this dearth of Chinese defendants is a principle of U.S. law called "foreign sovereign compulsion." Under this doctrine, some U.S. courts have declined to impose liability on foreign businesses for conduct that was mandated by a foreign government, such that the foreign business could not refuse to engage in the conduct without suffering significant penalties. The doctrine reflects the fact that such businesses are forced into an unfair position: either they proceed with the conduct and suffer penalties under U.S. law, or they decline to engage in the conduct and suffer penalties imposed by their own government.

Many Chinese businesses would argue that they are in exactly this position with respect to their sales to the United States, because the Chinese government often imposes a variety of requirements regarding pricing, output, and supply (among other things) that Chinese businesses are not free to ignore. For years, then, the foreign sovereign compulsion doctrine, in conjunction with the related "act of state" doctrine and principles of international comity, cast doubt on whether it is even possible for a U.S. antitrust enforcer to impose liability on many Chinese companies.

This doubt went effectively unchallenged until the so-called *Vitamin C* case–which has been pending for 14 years and is still working its way through U.S. courts. There, Chinese Vitamin C makers argue they are immune from U.S. antitrust liability because they are state-owned enterprises and their conduct was required by the Chinese government, arguments that the Chinese government has confirmed in its own court filings. Through many twists and turns, the case has now come to focus on the question of whether the U.S. court should accept the Chinese government's declaration of what its own laws require. Most recently, the U.S. Supreme Court issued a unanimous decision that U.S. courts are not required to accept the Chinese government's statements regarding Chinese law, and must make their own determinations of what Chinese law actually requires in a particular case. The Court remanded the case back to a lower appellate court with instructions to make that determination as to the *Vitamin C* defendants. Because the lower court in *Vitamin C* has already acknowledged some skepticism about the Chinese government's statements, there is a real possibility that it will reject the *Vitamin C* defendants' immunity arguments.

Regardless of the ultimate resolution of the *Vitamin C* case, the new legal landscape—where U.S. courts have discretion to reject the Chinese government's statements regarding its own laws—could open the floodgate to U.S. antitrust litigation against Chinese defendants. These cases will not be decided in a vacuum, but in the midst of an escalating trade war between China and the United States, at a time when elements of the U.S. government are openly hostile to various Chinese businesses and their products. It is probably unavoidable that political realities will inform the filing and resolution of future cases and the ongoing development of U.S. law in this area.

U.S. enforcers and plaintiffs have long been eager to bring cases against Chinese companies they believe are openly engaging in conduct that violates U.S. antitrust laws. Many of these enforcers and plaintiffs will view the *Vitamin C* case as their invitation to proceed. And it is now a very real possibility that not even the pronouncements of the Chinese government itself will be enough to stop them.

The Beginnings of *Vitamin C* in 2005

Vitamin C began in 2005, when a class of purchasers sued four Chinese sellers of vitamin C. Ten separate class action complaints were consolidated in multidistrict litigation in New York, alleging that Chinese sellers had formed a cartel beginning in 2001—facilitated by the efforts of their trade organization—to fix the prices and restrict the output of vitamin C in violation of Section 1 of the U.S. Sherman Act.

The Chinese sellers did not deny that they fixed prices or output. Instead, they argued that they were compelled to do so by the Chinese Government and thus were immune from U.S. antitrust laws under the doctrines of act of state and foreign sovereign compulsion, as well as principles of international comity. In a historic act, the Chinese Ministry of Commerce (MOFCOM) filed an amicus brief in support of the Chinese sellers' motion to dismiss, explaining that it is the administrative body authorized to regulate foreign trade in China, and that the alleged conspiracy was actually a pricing regime mandated by the Chinese government. MOFCOM further explained that the regulations at issue were intended to assist China in its transition from a state-run command economy to a market-economy, and that the resulting price-fixing was intended to ensure China remained a competitive participant in the global vitamin C market and to prevent harm to China's trade regulations. MOFCOM's advocacy was particularly significant given that it was the first time any entity of the Chinese Government had appeared as amicus curiae before any United States Court.

Despite MOFCOM's support, the district court denied the Chinese sellers' motion to dismiss.[2] The court explained that while MOFCOM's brief was "entitled to substantial deference," the court was not bound under the Federal Rules to accept it as conclusive evidence of defendants' compulsion. After considering all evidence before it, the court concluded that the record as it stood was "simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions."

The Chinese sellers subsequently moved for summary judgment in 2009 on the same grounds, supported again by two supplemental submissions from MOFCOM which affirmed its position that Chinese law had compelled defendants' conduct. Again, the district court rejected the Chinese Government's position, and – after five years of extensive and costly discovery – denied the motion for summary judgment. [3] Based on its own interpretation of all the evidence before it, the court determined that the Chinese sellers were *not* in fact compelled by the Chinese Government to fix prices or limit supply, but had instead engaged in voluntary, "consensual cartelization."
The case was then tried to a U.S. jury, which found that the Chinese sellers had agreed to fix the prices and quantities of vitamin C exports and that the Chinese Government had not compelled their actions. The jury awarded the class *$147 million in damages after mandatory trebling,* and the defendants were enjoined from engaging in further violations of the Sherman Act.

The Second Circuit Reverses, Giving Conclusive Deference to the Chinese Government

The Chinese sellers appealed and in 2016, the Second Circuit reversed, holding that when a foreign government directly participates in U.S. court proceedings by providing a sworn proffer regarding the construction and effect of its own laws and regulations, U.S. courts are bound to defer to those statements so long as they are reasonable under the circumstances. Applying this standard, the Second Circuit explained that the district court should have granted the sellers' motion to dismiss because the Chinese Government had filed a formal statement in the district court, reasonably asserting that Chinese law required the sellers to set prices and reduce quantities of vitamin C sold abroad. Because the sellers could not simultaneously comply with both Chinese and U.S. laws, principles of international comity required the district court to abstain from exercising jurisdiction in the case.

In its decision, the Second Circuit cautioned that deference to the Chinese Government's interpretation of its laws was particularly appropriate because of the complex nature of the Chinese economic regulatory system and China's "distinct" legal system, which frequently governs through regulations promulgated by various ministries and private citizens or companies authorized under Chinese regulations to act as government agents.

The U.S. Supreme Court Does Another About-Face

The U.S. Supreme Court then granted purchasers' petition for writ of certiorari to resolve how much deference federal courts should give to the views presented by a foreign government. In a unanimous decision supported by all nine Justices, the Supreme Court rejected the Second Circuit's conclusive deference standard, and held that although a federal court should accord "respectful consideration," it is not bound to accord conclusive effect to a foreign government's views and may consider any other relevant materials in determining the requirements of foreign law.

More particularly, the Supreme Court explained that the weight a court should give to a foreign government's statement about its laws is fact specific, and will depend on relevant considerations such as the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign 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.

The Court further cautioned that where a foreign government has conflicting statements as to its laws, or offers its statement in the context of litigation, there may be cause to treat the foreign government's submission with skepticism.

The Supreme Court did not make a determination as to whether the Chinese sellers' conduct was mandated by Chinese law. Instead, because the Second Circuit had ordered dismissal of the case on the ground that the Chinese Government's statements could not be gainsaid under the circumstances, the Supreme Court vacated the decision and remanded for further consideration.

As of the date of this article, the case is still pending before the Second Circuit on remand. Of note, MOFCOM has filed yet another amicus brief with the Second Circuit reaffirming that it is still the Chinese Government's position that Chinese law required the sellers to participate in the regulatory regime that enforced an industry-wide negotiated price for vitamin C exports.[4]

Repercussions of *Vitamin C* for Chinese and Other Foreign Companies Conducting Business in the U.S.

The Supreme Court's clarification that international comity does *not* require a court to give binding deference to a sovereign's interpretations of its own laws has far-reaching and significant consequences. Namely, the Supreme Court's fact-specific analysis for determining the weight to afford a foreign sovereign's interpretation of its own laws underscores the uncertainty foreign companies – especially those in China with blurred divisions between public and private sectors – face when doing business in the U.S. The *Vitamin C* decision makes clear that a federal court not only has significant discretion in choosing *what* material to consider when determining foreign law, it also has substantial discretion in assigning *weight* to the materials before it. This raises two primary concerns.

First, *Vitamin C* provides little guidance as to what evidence a foreign entity can marshal to establish foreign law. Indeed, the decision suggests only two circumstances where the burden of proving foreign law would be easily satisfied. Primarily, the Supreme Court critiqued the Second Circuit's conclusive deference standard as inconsistent with analogous standards for treating submissions from U.S. states in construing state laws. The Supreme Court explained that while federal courts are bound by the interpretation of state law by that state's highest court, the views of the state's attorney general, while entitled to "respectful consideration," are not controlling. This implies that federal courts would defer to a statement of foreign law by the highest court of the foreign jurisdiction as binding *unless* the highest court's interpretation was in conflict with a foreign government's statements or offered in the context of litigation as a position statement. Next, the Supreme Court affirmed its reasoning in *United States v. Pink*,[5] in which the Court treated the uncontradicted "official declaration of the Commissariat for Justice" of the Russian Socialist Federal Soviet Republic that was obtained by the U.S. Government as conclusive in establishing the extraterritorial reach of Russian law. Though the Supreme Court noted

Pink arose in "unusual circumstances[,]" and that its holding was limited to those circumstances, the *Vitamin C* Court's discussion of *Pink* suggests that the uncontradicted declaration of a foreign government or government entity with authority to interpret the relevant foreign law, obtained by the U.S. through "official diplomatic channels[,]" may conclusively establish foreign law.

Second, there is a significant risk that U.S. federal courts, even with the benefit of a statement of foreign law from a foreign government, will reach erroneous, contradictory, and inconsistent rulings based on the discretion they enjoy in weighing the materials before them. This concern likely will apply with equal force to criminal enforcement proceedings – which implicate possible prison sentences for company executives – as the Supreme Court noted in *Vitamin C* that civil and criminal standards for determining foreign law are "substantially the same."

Foreign companies that are owned or directed by foreign governments – as in China – thus must grapple with the deliberate lack of a bright-line rule to inform their business practices and the very real possibility of inconsistent judgments when defending themselves in antitrust criminal and civil litigation in the U.S.

Time should flesh out how the Supreme Court's respectful consideration standard will be applied, and indeed, the Second Circuit's reconsideration of *Vitamin C* on remand should provide some much-needed guidance. Significantly, the Second Circuit will likely have to confront head-on the voluminous factual record established by the district court in evaluating the Chinese sellers' motions to dismiss and for summary judgment. This would provide helpful instruction on the relative weight of the Chinese Government's submissions to the court and its correspondence with the State Department, and the contradictory evidence relied on by the purchaser class and the district court, including translations of charter documents for the vitamin trade organization and the Chinese Government's comments to the World Trade Organization.

Putting It All in Context

The *Vitamin C* decision is but one of a growing collection of obstacles for Chinese companies to navigate when doing business in the US. Recent developments include the ongoing US-China trade war, the rollout of the China Initiative, the passage of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), and the unprecedented extradition of the Chinese citizen CFO of Huawei Technologies, China's largest smartphone and communications equipment maker. *Vitamin C* creates additional uncertainty for Chinese companies potentially facing conflicting demands from Chinese and US authorities. The stakes can be particularly high when it comes to antitrust enforcement in the U.S., where prison time, treble damages and class actions are very real possibilities.

The standard articulated by the Supreme Court leaves open the possibility that district courts and courts of appeal may reach decisions that completely or partially reject positions of foreign governments on the interpretation or application of their own laws. Future decisions like this may further raise tensions with China or give rise to even more issues that Chinese companies need to consider. Indeed, in its amicus brief to the Supreme Court, MOFCOM argued that "[r]ejecting a foreign sovereign's explanation of its own law can imply only two things: that a U.S. court knows a country's laws better than its own government, or that the foreign government is not being candid." Either of these implications, MOFCOM warned, were "profoundly disrespectful" and risked an "international incident" and "international discord as a result." And MOFCOM protested in its most recent amicus brief to the Second Circuit that "[i]t would make no sense for a sovereign [to] appear in U.S. court for the first time to offer untrue statements that could be used against its *own* interests by other nations, all to support a handful of domestic companies facing litigation abroad" unless it was offering a bona fide interpretation of its own regulations.

Chinese companies engaged in trade with the U.S. should take a fresh look at their compliance programs and business practices. As the law continues to develop and courts grapple with recent changes, Chinese companies will need to adjust to new realities, but in partnership with their counsel, will also have an opportunity to mold the direction that courts take on these complex issues.

[1] *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865 (2018).

[2] *In re Vitamin C Antitrust Litig.,* 584 F. Supp. 2d 546 (E.D.N.Y. 2008), *rev'd*, 837 F.3d 175 (2d Cir. 2016), *vacated and remanded sub nom. Animal Sci. Prod., Inc.*, 138 S. Ct. at 1865.

[3] *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522 (E.D.N.Y. 2011).

[4] Amicus Brief 1-2, *In Re: Vitamin C Antitrust Litig.* (No. 13-4791), ECF No. 293.

[5] 315 U.S. 203 (1942).