

# A Dose of 'Vitamin C' Boosts International Comity

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**Businesses operating entirely outside of the U.S. might assume — at their peril — that they are beyond the reach of private antitrust claims brought in U.S. courts. But if those companies are engaged in trade with U.S. companies or in trade that has an effect on U.S. markets, and their business practices have the specter of anti-competitive conduct, they risk being hauled into U.S. court to answer allegations of antitrust violations. These violations are subject to treble damages.**

**The U.S. Court of Appeals for the Second Circuit recently drew one boundary to antitrust liability for foreign businesses in a narrow set of circumstances where the anti-competitive conduct was mandated by foreign law. This decision makes clear that international comity is an important defense from substantial U.S. antitrust liability for companies operating in countries with highly regulated or state-controlled industries that export to the U.S.**

**Relying on the principle of international comity, the Second Circuit held that the trial court below "abused its discretion" when it did not abstain from exercising jurisdiction over a case in which Chinese companies engaged in business practices in China that were mandated by**

Chinese law, but conflicted with U.S. antitrust regulations. As a result, the Second Circuit, in September, overturned a \$147 million trial judgment.

#### COMITY DEFENSE REJECTED

The two defendants in *In re Vitamin C Antitrust Litigation* were a Chinese vitamin C manufacturer and its Chinese parent holding company. The plaintiffs, U.S. purchasers of vitamin C, alleged the defendants participated in a cartel to fix the supply and price of vitamin C.

Early in the case, the defendants conceded that they colluded with other Chinese manufacturers to set prices and limit supplies for export, but argued that their conduct was required by the Chinese government as part of export and industrial policies set by the China Chamber of Commerce of Medicines & Health Products Importers & Exporters and the Ministry of Commerce.

Put simply, the defendants argued they were unable to comply with both the Chinese regulations and U.S. antitrust laws. The defendants contended that under the principles of international comity, the district court was required to decline jurisdiction and dismiss the case.

Notably, the ministry, in the first-ever amicus curiae brief submitted by a Chinese government entity, confirmed the defendants' interpretation of Chinese law. The ministry represented that all vitamin C exports out of China at the time of the allegations were required by law to comply with price and quantity limits coordinated by the manufacturers.

The district court rejected the defendants' argument, raised in a motion to dismiss, and, later denied summary judgment. The court relied on its own interpretation of Chinese law to conclude the manufacturers were not compelled to collude.

The defendants lost at trial, resulting in a \$147 million damages judgment and an injunction against future anti-competitive behavior.

#### DISMISSAL ORDERED

On appeal, the Second Circuit reversed the district court's denial of the defendants' motion to dismiss. The reversal focused on whether Chinese and American laws conflicted, such that the defendants could not comply with both.

First, the court made clear that, in most cases, where a foreign government takes a position in American court about its own laws, the American court should defer to that interpretation.

Second, relying on the Chinese government's representation that its laws required the collusive activity at issue, the appellate panel concluded the Chinese defendants could not possibly comply with both Chinese export and industrial rules and U.S. antitrust laws.

Crucial to the appeals court's decision to reverse were holdings regarding comity factors, including: (1) complying with conflicting legal regimes was untenable; (2) all relevant conduct occurred in China; (3) alternative relief might be available to the plaintiffs through the World Trade Organization; (4) the case strained U.S.-China relations; and (5) an American court would not enforce an analogous Chinese judgment.

Given the conflict laws, and these key factors, the court reversed and remanded with instructions to dismiss the case with prejudice.

The Second Circuit later denied the plaintiffs' motion for reconsideration en banc. (The plaintiffs have not filed a petition for certiorari, it appears, as of the time of publication of this piece.)

#### COMITY DEFENSE SCOPE UNSETTLED

Lawyers representing companies based in nations where industrial, economic, or export policies compel anti-competitive activity illegal under U.S. law should take heed of the Second Circuit's decision for a number of reasons:

The decision confirms that following the mandates of foreign governments while conducting business that impacts U.S. commerce may be a defense to alleged violations of U.S. antitrust laws.

Second, the Chinese government's active participation in the trial court proceedings was a key consideration on appeal. Such visible support by the government of the pertinent foreign country might make it nearly impossible for a plaintiff to overcome a comity defense.

**Third, the contours of a comity defense — beyond clear evidence that conduct was mandated by foreign law — remain ripe for probing in future cases.** For example, perhaps even if defendants' conduct was not mandated by foreign law, but the litigation might cause a political rift between the foreign government and the U.S. that could justify dismissal for comity.