

September 2016

## U.S. court says price-fixing by Chinese firms is a diplomatic issue, vacates jury award

In a landmark decision with implications for U.S.-China relations, the U.S. Court of Appeals for the Second Circuit this week tossed out a US\$147m jury award for price fixing against Chinese manufacturers of Vitamin C.<sup>1</sup> The appellate court ruled that the trial court should have refused to assert jurisdiction over the case on the basis of international comity, a doctrine which allows courts to decline to exercise jurisdiction where, among other things, a conflict exists between U.S. law and the law of the defendant's domicile.

In vacating the judgment, the appellate court held that, because the defendant companies could not comply with both Chinese law and U.S. antitrust law, the trial court should have abstained from exercising jurisdiction. Importantly both from an evidentiary and a diplomatic perspective, it also held that, in determining the content and effect of Chinese law, the trial court should have treated as dispositive a brief submitted by the Chinese government explaining its own domestic laws, rather than considering the Chinese government's statement merely as one piece of evidence on that question.

The case represents the first time any entity of the Chinese government has appeared *amicus curiae* in a U.S. litigation, and the trial court's failure to accord preclusive effect to the Chinese government's statement of its own laws had created diplomatic tension between the countries.

### **Background of the Vitamin C class action**

Since 2005, numerous lawsuits have been filed against two Chinese companies alleging that they established an illegal cartel with others to fix prices and limit the supply of Vitamin C sold in the U.S. and elsewhere. Instead of denying the underlying factual allegations, the defendants moved to dismiss the complaint on grounds of international comity, arguing that they had acted in conformity with Chinese law. The Chinese government submitted an *amicus curiae* brief in support of the defendants' motion to

---

<sup>1</sup> *Animal Science Products Inc. et al. v. HeBei Welcome Pharmaceuticals Co. Ltd. et al.*, 13-4791, in the U.S. Court of Appeals for the Second Circuit.

dismiss, explaining the background, content and effect of Chinese domestic laws that, it argued, required the defendants to act as they did.

The trial court denied the defendants' motion to dismiss, as well as their subsequent summary judgment motion based on the same arguments, which was also supported by a submission from the Chinese government. In denying the motions, the trial court "decline[d] to defer to the [Chinese government's] interpretation of Chinese law" because, it said, the Chinese government had failed "to address critical provisions" of its legal regime that "undermine[d] [the Chinese Government's] interpretation of Chinese law." The district court reasoned that, when interpreting Chinese law, it had "substantial discretion to consider different types of evidence" beyond the Chinese Government's official statements, including, for example, the testimony of plaintiffs' expert witness, a scholar of Chinese law.

The case went to trial, where a Brooklyn federal jury found the defendants to have fixed prices and limited the supply of Vitamin C exports from China into the U.S., in violation of the Sherman and Clayton Acts.<sup>2</sup> A third defendant settled with the plaintiffs before trial, and two more Chinese exporters settled mid-trial. The two companies were ordered to pay US\$147m to the victims, after the judge trebled the compensatory damages portion of the jury's award.

In the lower court, the two Chinese exporters failed to convince the trial court or the jury that they were merely implementing orders from the Chinese authorities. There was, however, significant evidence that Chinese exporters of Vitamin C were fixing prices and limiting the supply of Vitamin C at the request of a "chamber of commerce" operating under the supervision of the Chinese Ministry of Commerce ("MOFCOM").<sup>3</sup>

The jury award came under increased scrutiny when a Pennsylvania district court in January 2016 dismissed a case against Chinese exporters of bauxite.<sup>4</sup> In the bauxite case, the judge accepted that the chamber of commerce was established by MOFCOM to organise the exports of bauxite, effectively leaving Chinese exporters with no manoeuvre room – a ruling difficult to reconcile with the 2013 Vitamin C decision, considering that the facts were largely similar.

### **The appellate court decision to vacate the 2013 award**

The appellate court vacated the jury award against the defendants, ruling that the lower court should have declined to exercise jurisdiction on international comity grounds. The key factor in the court's decision was the fact that the Chinese government appeared in the case as *amicus curiae*. The Court held that where a foreign sovereign appears and gives a reasonably supportable explanation of the content and effect of its own laws, U.S. courts are generally bound to defer to that sovereign's interpretation of its own regulatory regime. The Chinese government's appearance in the case was

<sup>2</sup> *In re Vitamin C Antitrust Litig.*, 1:06-md-01738-BMC-JO (E.D.N.Y.).

<sup>3</sup> MOFCOM is the Chinese agency with responsibility for merger control under the Chinese Antimonopoly Law. MOFCOM has a wide range of other responsibilities, including international trade and export related issues.

<sup>4</sup> *Resco Products Inc. v. Bosai Minerals Group Co. Ltd. et al.*, 2:06-cv-00235 (W.D.Penn).

dispositive; indeed, the appellate court noted that had the Chinese government not appeared, the analysis undertaken by the trial court as to the effect of Chinese law “would have been entirely appropriate.”

In this case, MOFCOM’s formal statement, filed with the lower court, explained that MOFCOM is tasked with regulating foreign trade, and that the chamber of commerce set up to regulate exports of Vitamin C is not a U.S.-style “trade association” or “Chamber of Commerce,” but instead is an entity supervised by the Chinese government, and that it is required to implement MOFCOM’s rules and regulations. MOFCOM also provided evidence of its efforts to regulate the trade of Vitamin C, through a quota license until 2002, and through a price verification scheme after 2002. Manufacturers were not allowed to export Vitamin C if their contracts, and most importantly the *quantities* and the *prices* in their contracts, had not been approved by MOFCOM.

In a move that the appellate court noted had led Beijing to formally complain to the U.S. government, the lower court did not simply defer to MOFCOM’s statement, but rather weighed that statement as only one among many pieces of evidence in its attempt to decipher the complex Chinese trade regulations and the web of rules and self-regulating principles on which MOFCOM relied to control the export of Vitamin C. The appellate court faulted this approach, noting that it could not find any U.S. cases in which U.S. courts had not deferred to a foreign sovereign’s statement of its own laws where that sovereign had appeared in a case before the court. In language that may be important in the future, the appellate court emphasized that deference was particularly important in this case “because of the unique and complex nature of the Chinese legal-and economic-regulatory system and the stark differences between the Chinese system and ours.” That was particularly so, the appellate court said, where the lower court was considering translations that used terms of art “unique to the Chinese system.”

Giving deference to MOFCOM’s statement, the appellate court found that simultaneous compliance with both the Chinese regulatory regime and the Sherman Act was impossible. In light of that impossibility, the Court considered a number of other factors relevant to the comity analysis and held that the lower court should have abstained from exercising jurisdiction and should have dismissed the case.<sup>5</sup>

Because the court of appeals’ consideration of international comity was sufficient to decide the case, it did not consider other defences raised by the defendants, including the foreign sovereign compulsion, act of state, and political question doctrines. Those defences potentially could be determinative even where a sovereign does not appear in a litigation, as the

---

<sup>5</sup> Those factors include the nationalities of the parties, relative importance of the violations in the respective jurisdictions, existence of intent to harm American commerce, potential effects on foreign relations, whether the court can make its order effective, whether an order by a foreign court granting similar relief would be acceptable in the U.S. and whether any treaties are implicated.

foreign sovereign compulsion was in the bauxite case decided by the Pennsylvania federal court earlier this year.

## **Implications for foreign defendants in U.S. courts**

This ruling is important for two reasons. First, it stresses that, where foreign governments appear in a U.S. litigation, their declarations as to the content and effect of their own laws must be given a large degree of deference. Second, because U.S. courts may examine other evidence to determine foreign law absent such direct participation, the decision may incentivise foreign governments to appear as *amicus curiae* more frequently in cases where a foreign legal regime may present a defence to U.S. liability.

The decision opens the door to similar rulings in any situation where there is a true conflict between U.S. and foreign law, including in other cases where Chinese exporters to the U.S. claim that they were required to collude under Chinese law. At least one similar case is pending class certification in a U.S. court. The ruling may also have implications in cases where antitrust rules clash with foreign data protection statutes, another area where increasing conflicts have been observed recently.

Authors: Doug Tween, Adam Lurie, Fay Zhou, Clara Ingen-Housz

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

© Linklaters. All Rights reserved 2016

Linklaters Hong Kong is a law firm affiliated with Linklaters LLP, a limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of the LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP and of the non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ, England or on [www.linklaters.com](http://www.linklaters.com).

Please refer to [www.linklaters.com/regulation](http://www.linklaters.com/regulation) for important information on our regulatory position.

We currently hold your contact details, which we use to send you newsletters such as this and for other marketing and business communications.

We use your contact details for our own internal purposes only. This information is available to our offices worldwide and to those of our associated firms.

If any of your details are incorrect or have recently changed, or if you no longer wish to receive this newsletter or other marketing communications, please let us know by emailing us at [marketing.database@linklaters.com](mailto:marketing.database@linklaters.com).

A32594530

## Contacts

For further information please contact:

### **Doug Tween**

Partner

(+1) 212 903 9072

[doug.tween@linklaters.com](mailto:doug.tween@linklaters.com)

### **Adam Lurie**

Partner

(+1) 202 654 9227

[adam.lurie@linklaters.com](mailto:adam.lurie@linklaters.com)

### **Fay Zhou**

Partner

(+86) 10 6535 0686

[fay.zhou@linklaters.com](mailto:fay.zhou@linklaters.com)

### **Clara Ingen-Housz**

Partner

(+852) 2901 5306

[cih@linklaters.com](mailto:cih@linklaters.com)

[Linklaters.com](http://Linklaters.com)