CLIENT ALERT

Supreme Court Limits Foreign Law Defenses For Non-U.S. Companies Sued For Antitrust Cartel Violations

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In *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, the U.S. Supreme Court unanimously rejected the argument that two Chinese companies could not be found liable under the Sherman Act for conspiring to fix the price and quantity of vitamin C exported to the United States from China simply because the Chinese government submitted court filings stating that Chinese law required the companies to engage in such conduct. In doing so, the Supreme Court expressly held that U.S. courts need not accept as conclusive and binding submissions by a foreign government that characterize or interpret its own law. Instead, U.S. courts must undertake a case-by-case analysis where they give “respectful consideration” to a foreign government’s submission but also conduct their “own research and consider any relevant material.” Such a thorough and independent analysis, the Supreme Court determined, helps ensure that U.S. courts properly decide foreign law questions when adjudicating claims brought under U.S. laws.

The Supreme Court’s decision resolves a circuit split on the question of whether U.S. courts must defer to the submissions of foreign governments describing their own laws when presented with questions of foreign law. Prior to the Supreme Court’s *Animal Science* decision, the U.S. Court of Appeals for the Second and Ninth Circuits had held that U.S. courts were “bound to defer” to a foreign government’s interpretation of its own law whenever that interpretation was “reasonable” while other federal appellate courts had held that the weight given to a foreign government’s statements about its laws depended on the facts and circumstances presented by a case.

The Supreme Court’s decision has several potential implications for U.S. and non-U.S. companies:

- Foreign companies will likely find it more difficult to rely on submissions from their home country's government when seeking to avoid prosecution or liability under U.S. antitrust laws, thereby increasing their exposure to significant fines in government enforcement actions and large treble damages awards in private lawsuits.
- American companies doing business abroad could face increased international exposure because foreign governments could respond to any rejection of their position on how their laws should be construed by declining to recognize certain exemptions under U.S. antitrust laws for export-only activities or other defenses recognized under U.S. law.
- Moreover, foreign antitrust enforcers could respond to the rejection of how their laws should be interpreted by taking retaliatory actions against U.S. companies doing business within their jurisdictions. Such retaliatory actions could include opening investigations into the business practices of U.S. companies, slowing down their review of merges involving U.S. parties or declining to approve such mergers, or filing enforcement actions against U.S. corporations and their employees. For instance, there have been press reports suggesting that Chinese antitrust enforcers have purposely

slowed down their review of mergers involving U.S. parties due to the ongoing international trade disputes between the U.S. and China.

I.Background

A.The Eastern District of New York Declines to Defer to MOFCOM's Interpretation of Chinese Law

In 2005, a class of direct purchasers of vitamin C imported from China filed an antitrust action against four Chinese vitamin C manufacturers, alleging that the defendants violated the Sherman Act by conspiring to set the price and volume of vitamin C exported from China into the U.S. and worldwide. Specifically, the plaintiffs alleged that the defendants – which controlled 60 percent of the worldwide Vitamin C market and accounted for 80 percent of U.S. vitamin C imports – had conspired with the China Chamber of Commerce of Medicines and Health Products Importers and Exporters ("China Chamber of Commerce") to create a global vitamin C shortage, which, in turn, resulted in the plaintiffs having to pay higher prices.

The defendants moved to dismiss the action pursuant to several judicial doctrines (the act of state doctrine, the foreign sovereign compulsion doctrine, and principles of international comity). In their motion, the defendants did not deny that they engaged in the alleged collusive conduct. Instead, they argued that the case should be dismissed because their actions were compelled by Chinese law. Notably, the defendants' motion to dismiss was supported by an amicus brief submitted by the Chinese Ministry of Commerce ("MOFCOM"), which is the "highest . . . [entity] authorized to regulate foreign trade" in China. In its brief, MOFCOM argued that "a regulatory pricing regime mandated by the government of China" required the defendants to coordinate with each other and other industry participants due to anti-dumping restrictions imposed on Chinese exports by foreign countries. MOFCOM's submission marked the first time that a Chinese governmental entity had appeared as an amicus curiae before a U.S. court.

The plaintiffs vigorously disputed MOFCOM's assertion that Chinese law required the defendants to collude when setting vitamin C export prices and supply volumes. Among other things, the plaintiffs noted that: (i) MOFCOM had not identified any written law or regulations expressly ordering the defendants to engage in their anticompetitive conduct; (ii) the China Chamber of Commerce had previously issued an announcement indicating that Chinese vitamin C manufacturers "were able to reach a self-regulated agreement . . . whereby they would voluntarily control the quantity and pace of exports . . . without any government intervention;" and (iii) there was expert evidence showing that the China Chamber of Commerce's pricing and volume requirements for vitamin C exports were not mandated by law.

The district court denied the defendants' motion to dismiss, finding that the record was "too ambiguous to foreclose further inquiry into the voluntariness of [the defendants' collusive] actions." In reaching this ruling, the district court held that MOFCOM's submission, while "entitled to substantial deference," was not binding on the question of whether Chinese law required the defendants to collude when setting vitamin C export prices and levels. The district court based this holding on the fact that the plaintiffs had submitted evidence that directly contradicted MOFCOM's assertion that the defendants' collusive conduct was compelled by Chinese law. The district court also noted that MOFCOM's submission failed to address provisions in China's export law that appeared to undermine MOFCOM's position (such as a "suspension provision" which seemed to suggest that companies could unilaterally suspend the government's review of their export prices), or explain the direct conflict between MOFCOM's position in the litigation and the Chinese government's prior public statements.

After the parties completed discovery, the defendants moved for summary judgment and raised many of the same arguments that were included in their motion to dismiss. In support of this motion, the defendants cited expert testimony indicating that MOFCOM's interpretation of Chinese law "carries decisive weight" and referenced a second MOFCOM submission which again indicated that the defendants' collusive conduct was mandated by Chinese law. In their opposition, the plaintiffs cited additional evidence indicating that the defendants voluntarily chose to collude when setting vitamin C export prices and volumes. This additional evidence included China's prior statements to the World Trade Organization ("WTO"), which argued that China "gave up export administration of . . . vitamin C" prior to the alleged cartel activity. After reviewing the record and parties' submissions, the district court denied the summary judgment motion and, following a jury trial, entered an order requiring the defendants to pay approximately $147 million in treble damages and enjoining them from engaging in future conduct that violates the Sherman Act.

MOFCOM expressed "deep dissatisfaction" with the district court's rulings and complained that the court's failure to defer to MOFCOM's interpretation of Chinese law "shows disrespect" for China. Notably, the U.S. government never participated or took a position in the proceedings even though (i) the U.S. Trade Representative accused the Chinese government of fixing the prices of vitamin C exports in a WTO complaint that was filed during the pendency of the proceedings (which was consistent with MOFCOM's position in the lawsuit), and (ii) the district court's rulings had the potential to adversely impact U.S.-China relations and the interests of U.S. companies in China.

B.The Second Circuit Holds That the District Court Was Compelled to Defer to MOFCOM's Reasonable Interpretation of Chinese Law

On appeal, the Second Circuit held that principles of international comity required the district court to grant the defendants' motion to dismiss because MOFCOM had represented that the defendants' collusive conduct was mandated by Chinese law. In doing so, the Second Circuit concluded that "a U.S. court is bound to defer to [a foreign government's] statements" whenever "a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a [statement] regarding the construction and effect of [the foreign government's] laws and regulations, which is reasonable under the circumstances."

Applying this highly deferential rule, the Second Circuit held that MOFCOM's interpretation of Chinese law was entitled to conclusive weight because its submissions and the sources cited therein showed that this interpretation was reasonable. In assessing the reasonableness of MOFCOM's interpretation, the Second Circuit did not consider the contrary evidence cited by the plaintiffs, reasoning that "a U.S. court [must] not embark on a challenge to a foreign government's official representation [of its laws]." According to the Second Circuit, a judicial rule which requires courts to defer to a foreign government's statements on how its laws should be interpreted shows "the same respect and treatment that we would expect our government to receive in comparable matters before a foreign government."

Notably, the Second Circuit strongly suggested that it would have affirmed the district court's decision absent the conclusive effect it gave MOFCOM's submissions: "[I]f the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate."

II.The Supreme Court's Decision and Potential Implications for U.S. and Non-U.S. Companies

Prior to granting certiorari, the Supreme Court requested the U.S. Department of Justice's views on how much deference should be given to MOFCOM's interpretation of Chinese law. In its submission, the DOJ declined to endorse the Second Circuit's highly deferential rule, arguing that a foreign government's characterization of its own laws should be given "substantial" but not "conclusive" deference because federal courts have a duty to consider other relevant material when interpreting foreign law. The DOJ's position stands in stark contrast with the position that it took when confronted with the same question in a similar case over 30 years ago. In that case (*Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)), the DOJ argued that the Supreme Court should give "dispositive weight" to the statements of foreign governments regarding how their laws should be construed because the failure to do so would create "deep concern" among "significant trading partners of the United States." (The Supreme Court's analysis in *Matsushita* did not reach the question of how much weight U.S. courts should accord a foreign government's interpretation of its laws.)

In an opinion authored by Justice Ginsburg, the Supreme Court unanimously held that the Second Circuit erred as a matter of law when it concluded that "federal courts are 'bound to defer' to a foreign government's construction of its own law, whenever that construction is reasonable." While noting that "respectful consideration [should be accorded] to a foreign government's submission," the Supreme Court expressly concluded that U.S. courts are "not bound to accord conclusive effect to [a] foreign government's statements."

In reaching its decision, the Supreme Court found that the Second Circuit's "unyielding" deference to the statements of foreign governments was inconsistent with:

- the history and plain text of Federal Rule of Civil Procedure 44.1, which expressly provides that, when adjudicating foreign law questions, a court "may consider any relevant material or source . . . whether or not submitted by a party" and "may engage in its own research and consider any relevant material thus found;"
- the Supreme Court's "treatment of analogous submissions from [State Attorneys General,]" which receive "respectful consideration" but "do not garner controlling weight;"
- the Supreme Court's prior precedent – in particular, *United States v. Pink*, 315 U.S. 203 (1942) – which did not support the conclusion that a foreign government's submission regarding the interpretation of its laws is automatically entitled to conclusive effect; and
- international treatises and diplomatic practices which establish mechanisms and protocols through which one government may obtain from another government recognition of official statements characterizing its laws.

In holding that U.S. courts should apply a case-by-case analysis when determining how much weight to give a foreign government's characterization of its own laws, the Supreme Court noted that courts should not limit their analysis to reviewing the foreign government's submissions and the sources cited therein because Rule 44.1 permits courts to conduct their own research and consider any relevant material. The Supreme Court also noted that courts should consider "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." After setting forth this guidance, the Supreme Court remanded the case to the Second Circuit and instructed it to consider the full record when determining "the weight [MOFCOM's] submissions should receive" and "whether Chinese law required the [defendants' collusive] conduct."

The Supreme Court's decision has several potential implications for both U.S. and non-U.S. companies.

First, it will likely be much more difficult for foreign companies to successfully move to dismiss private antitrust lawsuits at the pleading stage on the basis that their alleged anticompetitive conduct was required by their domestic laws. Consequently, there is a greater likelihood that foreign companies will be forced to participate in time-consuming and costly litigation before they can establish that they cannot be found liable under U.S. antitrust laws because their conduct was compelled under their home country's laws. In addition, foreign companies relying on amicus briefs submitted by their home governments will need to ensure that these briefs take positions that can survive greater judicial scrutiny (*i.e.*, the positions taken in a foreign government's amicus brief will need to be consistent with the government's prior statements and fully supported by the statute's text and past application).

Second, foreign companies will likely face greater challenges when seeking to invoke their domestic laws as a means of convincing U.S. antitrust enforcers that they should close an investigation or decline to bring an enforcement action. Like U.S. courts, the DOJ and Federal Trade Commission will likely read the Supreme Court's *Animal Science* decision to mean that foreign companies cannot simply rely on a submission by their domestic government to avoid liability under U.S. antitrust laws. Instead, they must show that the foreign government's submission establishes that their anticompetitive conduct was clearly required by their domestic laws and that the positions taken in the submission are consistent with the government's prior positions and application of the laws in question.

Finally, the Supreme Court's decision may also have adverse consequences for U.S. companies doing business abroad, particularly in China. These adverse consequences could take several forms:

- Foreign courts and government agencies may be less inclined to recognize the antitrust exclusion for export-only activities authorized by the Webb-Pomerene Act, which allows competitors to engage collectively in export sales provided that this activity does not have an anticompetitive effect in the U.S. or harm their U.S. competitors.
- Foreign governments could pursue retaliatory actions against U.S. companies conducting business in their country, which could include the opening of civil or criminal investigations related to a company's business practices.
- Foreign governments could also modify their merger-control processes at the detriment of U.S. companies. This could lead to slower reviews of mergers involving U.S. parties, which press reports suggest has begun happening in China due to the trade disputes between the U.S. and Chinese governments. In addition, foreign governments could decide to block such mergers or file other types of enforcement actions against U.S. corporations and their employees.

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