

Deference to Foreign Sovereign Submissions

As previously reported here, the United States Court of Appeals for the Second Circuit issued a decision in 2016 reversing a \$147.8 million price-fixing judgment against two Chinese manufacturers of Vitamin C. The plaintiffs alleged that the Chinese manufacturers engaged in price fixing and supply manipulation in violation of U.S. antitrust laws. In its first ever appearance as an amicus before a U.S. court, the Chinese government filed a formal statement asserting that Chinese law required the Chinese manufacturers to set prices and reduce the quantities of Vitamin C sold abroad. Relying on this statement, the Second Circuit held that because the Chinese manufacturers could not comply with both Chinese law and the U.S. antitrust laws, principles of international comity compelled dismissal of the case.

This case raises a host of interesting questions. First, did the Second Circuit reach the right result? Second, is this a comity case or a foreign sovereign compulsion case? Third, what level of deference is due to a foreign sovereign that appears in private litigation to explain their country's laws? Fourth, should U.S. judges defer to such an explanation?

In June 2017, the United States Supreme Court called for the views of the United States. This past Tuesday, the Solicitor General (SG) filed this brief in response to the Court's order.

In this submission, the SG explains that the Court should grant review of the Second Circuit's decision in order to review the court of appeals' holding that the Chinese government's submission conclusively established the content of Chinese law. According to the SG, "a foreign government's characterization of its own law is entitled to substantial weight, but it is not conclusive." The SG argues that the case warrants the Court's review because "[t]he degree of deference that a court owes to a foreign government's characterization of its own law is an important and recurring question, and foreign sovereigns considering making their views known to federal courts should understand the standards that will be applied to their submissions."

Should the Court grant review, the question of what standard should be applied to foreign sovereign submissions will be key. This is a question I have explored here.

It will be interesting to see whether the Court accepts the SG's request to review the Second Circuit's decision.