

Vitamin C and Comity

Following up on last week's post on the Second Circuit's comity decision in the Vitamin C Antitrust Litigation case, Professor Bill Dodge of UC Davis has the following thoughts (also cross-posted on *Opinio Juris* here)

American law has many doctrines based on international comity—doctrines that help mediate the relationship between the U.S. legal system and those of other nations. The Second Circuit's decision last week in the *Vitamin C Antitrust Litigation* case correctly identified an international comity issue. But did it choose the right comity tool to address that issue?

Plaintiffs alleged that defendants, two Chinese companies, participated in a cartel to fix the price of vitamin C exported to the United States in violation of U.S. antitrust law. Defendants did not deny the allegations, but argued that Chinese law required them to coordinate export prices. The Chinese Ministry of Commerce backed the defendants in an amicus brief explaining Chinese law. The district court, however, declined to defer to the Ministry's interpretation of Chinese law, awarding the plaintiffs \$147 million in damages and permanently enjoining the defendants from further violations of U.S. antitrust laws.

On appeal, defendants argued that the district court should have dismissed on grounds of foreign state compulsion, international comity, act of state, and political question. While the political question doctrine rests on separation of powers, the other three grounds are all doctrines of prescriptive comity. As I have explained in a recent article, American law is full of international comity doctrines, each with its own specific requirements.

To avoid confusion, it is worth noting at the outset that although the Second Circuit repeatedly framed the question as whether the district court should "abstain from exercising jurisdiction," *Vitamin C* was clearly not an international comity abstention case. International comity abstention is a doctrine of adjudicative comity, or deference to foreign courts. The Second Circuit has held that it is available only if parallel proceedings are pending in a foreign court. See *Royal & Sun Alliance Ins. Co. of Canada v. Century Intern. Arms, Inc.*, 466 F.3d 88, 93-94 (2d Cir. 2006). The same is true in most other circuits that have adopted the doctrine (the cases are collected here at pp. 2112-14). The main

exception is the Ninth Circuit, whose decision in *Mujica v. Airscan Inc.*, 771 F.3d 580 (9th Cir. 2014), applied a broad and uncertain comity abstention doctrine that conflicts with its own precedents, those of other circuits, and even the Supreme Court's. Because no parallel antitrust claims against these defendants were pending in Chinese courts, international comity abstention would not have been an appropriate ground on which to dismiss this case.

Instead, the Second Circuit properly viewed the *Vitamin C* case as raising questions of prescriptive comity—deference to foreign lawmakers—which U.S. law has developed a number of different doctrines to address (for discussion see here at pp. 2099-2105). The court relied particularly on an interest-balancing, comity doctrine commonly associated with *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), and Section 403 of the Restatement (Third) of Foreign Relations Law. In the court's view, this doctrine authorized it to "balance the interests in adjudicating antitrust violations alleged to have harmed those within our jurisdiction with the official acts and interests of a foreign sovereign in respect to economic regulation within its borders" (slip op. at 4). The idea that U.S. courts are institutionally capable of balancing the interests of foreign governments against our own has the subject of significant criticism over the past three decades.

Moreover, it is hard to see how this particular prescriptive comity doctrine survives the Supreme Court's later decisions in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), and *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004), both of which declined to apply a multi-factor balancing approach in antitrust cases. The Second Circuit read *Hartford* "narrowly" (slip op. at 20) not to preclude such an approach, particularly when compliance with both U.S. and foreign law was impossible. But the Second Circuit did not even mention *Empagran*, which expressly rejected case-by-case balancing as "too complex to prove workable." *Empagran* recognized that ambiguous statutes should be construed "to avoid unreasonable interference with the sovereign authority of other nations," but it also said in no uncertain terms that "application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." Plaintiffs unquestionably alleged domestic

antitrust injury in *Vitamin C*, making the application of U.S. law reasonable and consistent with prescriptive comity, at least has the Supreme Court has understood these concepts in the antitrust context.

The act of state doctrine is a separate and distinct manifestation of international comity, requiring that the acts of foreign sovereigns performed within their own territories be deemed valid. But the Supreme Court has made clear that the act of state doctrine applies only when a U.S. court must “declare invalid, and thus ineffective as ‘a rule of decision for the courts of this country,’ the official act of a foreign sovereign.” *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*, 493 U.S. 400, 405 (1990). To find that the defendants fixed the price of vitamin C, the district court did not have to find any part of Chinese law invalid or even to evaluate the conduct of the Chinese government. It only had to find that Chinese law did not immunize the defendants’ own conduct from liability under U.S. law.

The best fitting tool to address the prescriptive comity issue in *Vitamin C* would seem to be the doctrine of foreign state compulsion (also known as foreign sovereign compulsion), which sometimes allows a U.S. court to excuse violations of U.S. law on the ground that the violations were compelled by foreign law. That is precisely what defendants had argued in this case. Although the exact contours of this doctrine are uncertain, the U.S. government has recognized it as a defense in antitrust cases. See Antitrust Enforcement Guidelines for International Operations ¶ 3.32 (1995). China represented that its law compelled the defendants to coordinate export prices for vitamin C, and the Second Circuit considered itself bound by China’s interpretation of its own laws (slip op. at 30), which seems reasonable at least in these circumstances.

Unfortunately for the defendants, there are at least two potential problems with foreign state compulsion in this case. First, it appears that defendants may have asked the Chinese government to mandate their price fixing. See slip op. at 36-37. At least some authority suggests that a defendant wishing to claim foreign state compulsion as a defense must try in good faith to obtain relief from the compulsion from the foreign state. See, e.g., *Societe Internationale v. Rogers*, 357 U.S. 197, 208-09, 213 (1958). Second, it appears that defendants may have fixed prices at levels higher than those mandated by the Chinese government. See slip op. 38. The Second Circuit found this irrelevant to its “comity” analysis but seemed to acknowledge that such facts would preclude a foreign compulsion

defense. See *id.*

U.S. courts have many tools at their disposal to address international comity issues. But sometimes no tool fits. “International comity” is not a universal wrench offering unlimited judicial discretion to dismiss cases that seem problematic. It is a principle underlying specific doctrines, with specific requirements, developed over many years to keep judicial discretion within bounds.