Experts *Connect*™ No. 2: The Vitamin C Case: Important Role for the Federal Courts and Clear Message to Foreign Countries*

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Commentary

The U.S. Supreme Court's unanimous decision in *Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et. al.* (commonly known as the "*Vitamin C* case") [1] on the issue of determining foreign law—whether a federal court determining foreign law under Federal Rule of Civil Procedure 44.1 is required to treat as conclusive a submission from the foreign government characterizing its own law—is unsurprising, but confirms an important role for the federal courts and sends a clear message to foreign countries, including China.

Supreme Court's Decision: Inevitable Outcome

China showed great interest in the *Vitamin C* case, with its Ministry of Commerce ("MOFCOM") submitting amicus briefs stating that Chinese law required the defendants' export cartel, and its embassy in the United States sending a diplomatic note to the U.S. Department of State that "China has attached great importance to this case" and that MOFCOM accurately "described China's compulsory requirements concerning vitamin C exports". [2] MOFCOM stated that the District Court and the Solicitor General were "disrespectful" in questioning its representations on China's law. [3]

This level of China's interest in the case, together with the facts that irrebuttable presumptions are often viewed skeptically in U.S. jurisprudence [4] and that the underlying issues of foreign sovereign compulsion, state action, and comity are significant, likely made the justices feel a need to render a unanimous decision on the threshold question of how to determine the applicable foreign law. [5]

In the end, Justice Ruth Bader Ginsburg, the Supreme Court's civil procedure expert, [6] wrote a unanimous decision for the Court, articulating that a "federal court should accord respectful consideration to a foreign government's submission" [7] regarding foreign law, but must make an independent determination of the law. Justice Ginsburg, who is a proponent of referencing foreign law to inform U.S. judicial decisions, [8] made it clear that a standard of binding deference to a foreign government's statement characterizing its own law is unacceptable.

Federal Courts' Important Role

The Supreme Court's decision is arguably simply a reading of the plain language of Federal Rule of Civil Procedure 44.1. Rule 44.1 established that the determination of foreign law is a question of law, so that federal courts "may consider any relevant material or source […] whether or not […] admissible under the Federal Rules of Evidence". The Supreme Court clarified that the weight given a foreign governmental statement regarding foreign law "will depend on the

circumstances", including "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." [9] The Supreme Court, however, expressly refrained from deciding the outcome in *Vitamin C* once all relevant factors are considered. [10]

On remand, the Second Circuit has an important role to play to clarify some legal issues, regardless of its final decision. On the one hand, the Second Circuit might consider evidence beyond MOFCOM's statements, still conclude that Chinese vitamin C exporters were legally compelled to fix prices, and then find again that comity requires dismissal of the action or remand to the District Court for reconsideration of the motions to dismiss and for summary judgment.

In its consideration of all relevant factors, the Second Circuit will have a chance to elaborate on how these factors are weighed. The court might also consider the fact (which was apparently little noted by the parties in the case) that this vitamin C lawsuit did not follow a U.S. government investigation. The U.S. government brought no antitrust action against the exporters, in contrast to the major criminal investigation it conducted in the mid-1990s that led to dozens of civil treble damage lawsuits against vitamin manufacturers from other countries, including the action that resulted in the Supreme Court's application of the Foreign Trade Antitrust Improvements Act in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* [11] This might reflect recognition by the Department of Justice that at least some compulsion from the Chinese government may have been involved in the case of the Chinese vitamin C exporters, so that the Department of Justice exercised prosecutorial discretion to refrain from action. [12]

If, on the other hand, the Second Circuit on remand concludes that the vitamin C exporters were not compelled by Chinese law to fix prices and comity does not require dismissal, then entities may be exposed to *ex post* challenges under U.S. law for conduct they might have thought legally required. Nonetheless, in reaching this decision that there is no direct conflict between U.S. and Chinese law, [13] the Second Circuit can help avoid conflicts that the doctrines of act of state, foreign sovereign compulsion, and comity seek to prevent.

Message Sent to Foreign Countries

The Supreme Court's decision in the *Vitamin C* case may be a roadmap for what is needed to support a statement of foreign law. A statement by the highest court of the foreign jurisdiction, which is consistent with the country's previous statements and actions, and is not subject to attack as a litigation position paper, would likely be persuasive as to the foreign law. Such a roadmap should not be considered as a threat to foreign entities doing business with U.S. entities but rather as a cautionary note that conduct known to violate U.S. law should be undertaken if and only if a clear record of the foreign government's role is created.

On balance, the Supreme Court's decision in the *Vitamin C* case is a helpful clarification of an important point of civil procedure, while giving the federal courts the important role to clarify legal issues and sending a clear message to foreign governments that legal clarity and transparency is important.

Endnotes

* The citation of this Experts *Connect*™ is: Yee Wah Chin, *The* Vitamin C *Case: Important Role for the Federal Courts and Clear Message to Foreign Countries,* 2 China Law Connect 35 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, Experts *Connect*™, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-connect-2-yee-wah-chin.

The original, English version of this Experts *Connect*™ piece was edited by Jordan Corrente Beck, Jeremy Schlosser, Sean Webb, Dimitri Phillips, and Dr. Mei Gechlik. The information and views set out in this piece are the responsibility of the author and do not necessarily reflect the work or views of the China Guiding Cases Project.

[1] *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 585 U.S. ___, 138 S. Ct. 1865 (2018). The slip opinion of the Supreme Court is available at https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf.

[2] Joint Appendix on Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 782–84, https://www.supremecourt.gov/DocketPDF/16/16-1220/36711/20180226192522246_Appendix.pdf.

[3] Brief of *Amicus Curiae* Ministry of Commerce of the People's Republic of China in Support of Respondents at 2, 5, 22, https://www.supremecourt.gov/DocketPDF/16/16-1220/42398/20180404190231218_MOFCOM%20brief.pdf.

[4] *See, e.g.*, Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534 (1974); James J. Duane, *The Constitutionality of Irrebuttable Presumptions*, 19 Regent U. L. Rev. 149 (2006).

[5] The views of the U.S. Solicitor General, which the Court requested, were likely also persuasive. The Solicitor General argued that a "foreign government's characterization of its own law is entitled to substantial weight, but it is not conclusive", so that the "Court of Appeals erred by treating the Ministry's amicus brief as conclusive and disregarding other relevant materials". Brief for United States as Amicus Curiae at 6, 9, https://www.supremecourt.gov/DocketPDF/16/16-1220/20062/20171114160440437_16-1220%20Brief%20as%20A.C..pdf.

[6] Justice Ginsburg taught civil procedure for many years. *See* Ruth Bader Ginsburg, Remarks for the Second Circuit Judicial Conference at 11 (June 12, 2015) , https://www.supremecourt.gov/publicinfo/speeches/RBG_Speech_Second_Circuit_Judical_Conference_06_12_15.pdf.

[7] *Animal Science Products*, 138 S. Ct., *supra* note 1, at 1869.

[8] *See, e.g.*, Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Speech at the International Academy of Comparative Law, American University, "A decent

Respect to the Opinions of [Human]kind"; The Value of a Comparative Perspective in Constitutional Adjudication (July 30, 2010)， https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-02-10.

[9] *Animal Science Products*, 138 S. Ct., *supra* note 1, at 1873–74.

[10] *Id*. at 1875.

[11] 542 U.S. 155 (2004).

[12] It is noteworthy that the state action doctrine exempts from the Sherman Act the intentional or foreseeable result of state government policy. *See Parker v. Brown*, 317 U.S. 341 (1943); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980).

[13] *Cf*.《中华人民共和国价格法》(*Price Law of the People's Republic of China*), Article 14, passed and issued on Dec. 29, 1997, effective as of May 1, 1998, http://www.gov.cn/banshi/2005-09/12/content_69757.htm (partly superseded by《中华人民共和国反垄断法》*(Anti-Monopoly Law of the People's Republic of China*), passed and issued on Aug. 30, 2007, effective as of Aug. 1, 2008, http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm [hereinafter "AML"], prohibiting unofficial cartels). The AML extends the prohibition to governmental action. AML Chapter 5. Moreover, AML Article 16 prohibits trade associations from organizing cartels. *Cf*. Export Trading Company Act, Pub L. No. 97–290, 96 Stat. 1233 (1982), and the Webb-Pomerene Act, 15 U.S.C. §§ 61–65, which exempt certain export cartels from the Sherman Act, but provide no protection from foreign law.

专家 *连接*™ 第 2 期:《维生素 C 案》：联邦法院的重要角色和给外国的明确信息*

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评论

美国联邦最高法院在 *Animal Science Products, Inc., et al. 诉 Hebei Welcome Pharmaceutical Co. Ltd., et. al.*（常被称为“《维生素 C 案》”）[1] 中就外国法的确定问题——联邦法院根据《联邦民事诉讼规则》第 44.1 条确定外国法律时是否需要将外国政府对其自身法律的陈述视为具定论性——上的一致决定并不让人意外，但确认了联邦法院的重要角色，并向包括中国在内的外国发出了明确的信息。

联邦最高法院的决定：不可避免的结果

中国对《维生素 C 案》非常关注，其商务部提交了法庭之友简报，声称中国法律要求被告的出口卡特尔，并且其驻美使馆向美国国务院发送外交照会说明“中国高度重视此案”、商务部准确地“描述了中国对维生素 C 出口的强制性要求”。[2] 商务部表示，美国地区法院和司法部长质疑商务部对中国法律的陈述是“不尊重”的。[3]

中国对该案有如此程度的关注，连同无法反驳的推定在美国法理中经常被以怀疑的眼光看待的事实，[4] 以及外国主权强制、国家行为和礼让几个根本问题在该案中是重大的，都可能使法官感到需要就如何确定适用的外国法律的门槛问题做出一致决定。[5]

最终，联邦最高法院民事诉讼法专家 Ruth Bader Ginsburg 大法官为法院撰写了一致决定，[6] 指出就外国法律方面，“联邦法院应该对外国政府的陈述给予尊重性的考虑”，[7] 但必须对该法律做出独立确定。Ginsburg 大法官是参考外国法律以使美国司法判决更全面的支持者；[8] 但是她明确表示，外国政府描述自身法律的陈述具有约束力这样的标准是不可以接受的。

联邦法院的重要角色

联邦最高法院的判决可以说是仅仅是解读了《联邦民事诉讼规则》第 44.1 条的简明语言。第 44.1 条规定了外国法律的确定是一个法律问题，於是联邦法院“可以考虑任何相关材料或来源[…]，无论它是否[…]根据《联邦证据规则》而可采纳的”。联邦最高法院澄清，外国政府关于外国法律的声明所具有的重要性“将视情况而定” ，包括“该声明的明确性、全面性和根据；[该声明的]背景和目的；该外国法律体系的透明性；提供声明的机构或官员的角色和权限；以及该声明与该外国政府此前的立场的一致性。” [9] 然而，联邦最高法院明确地避免决定，当考虑过所有相关因素后，《维生素 C 案》的结果会是什么。[10]

发回重审期间，不管第二巡回上诉法院的最终决定是什么，其在澄清一些法律问题上发挥重要角色。一方面，第二巡回上诉法院可能会在考虑中国商务部声明之外的证据之后，仍然得出中国维生素 C 出口商是在法律上被迫定价的结论，由此再次决定，礼让[原则]要求驳回诉讼或者发回联邦地区法院重新考虑驳回诉讼和简易判决的动议。

在考虑所有相关因素时，第二巡回上诉法院有机会详细说明如何权衡这些因素。该法院也可能会考虑到这一维生素 C 诉讼不是跟随美国政府调查这一事实（案件当事人显然少注意到这一点）。美国政府并没有对出口商提起任何反垄断诉讼，这与其在上世纪九十年代中期进行的重大刑事调查形成对比。当时的调查导致数十起针对其他国家维生素制造商的民事三倍赔偿诉讼，其中包括最高法院适用了《对外贸易反托拉斯改进法》的 ***F. Hoffmann-La Roche Ltd.*** *诉* ***Empagran S.A.***一案在内。[11] 这可能反映了美国司法部都承认，在中国维生素出口商的案件中确实涉及一些来自中国政府的强迫，因此司法部行使检察裁量权而避免采取行动。[12]

另一方面，如果第二巡回上诉法院在发回重审期间得出结论，认为维生素 C 出口商没有被中国法律强制要求确定价格且礼让[原则]不要求驳回诉讼，那么出口商可能会因为他们自认为是中国法律要求做出的行为，而面临美国法律的事后追究。但是在做出中美法律之间没有直接冲突这一决定时，[13] 第二巡回上诉法院能够帮助避免国家行为、外国主权强制和礼让原则所试图阻止的冲突。

给外国的明确信息

联邦最高法院对《维生素 C 案》的判决可能是一个路线图，指出需要什么来支持外国法律的声明。倘若声明由外国司法管辖区的最高法院发出、与国家以往的陈述与行为一致，且不作为是诉讼立场文件而受到攻击，则其对外国法律的陈述具有说服力。这样的路线图不应被视为对与美国实体开展业务的外国实体构成威胁，而应当视为警告，即对已知是违反美国法律的行为，只有在外国政府所扮演的角色得到明确记录时，才应施行。

总的来说，联邦最高法院对《维生素 C 案》的决定有助于澄清民事诉讼程序的重要内容，同时给予联邦法院澄清法律问题的重要角色，并向外国政府发出一个明确信息：法律清晰和透明是重要的。

尾注

* 此专家*连接*™的引用是：陈懿华，《维生素 C 案》：联邦法院的重要角色和给外国的明确信息，《中国法律连接》，第 2 期，第{x}页（2018 年 9 月），*亦见于*斯坦福法学院中国指导性案例项目，专家*连接*™，2018 年 9 月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-connect-2-yee-wah-chin。

英文原文由 Jordan Corrente Beck、Jeremy Schlosser、Sean Webb、Dimitri Phillips 和熊美英博士编辑。本中文版本由张磊、周墨奇翻译，并由罗雯和熊美英博士最后审阅。载于本文的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

[1] *Animal Science Products, Inc. 诉 Hebei Welcome Pharmaceutical Co. Ltd.*，585 U.S. ___，138 S. Ct. 1865（2018）。联邦最高法院的判决意见书单行本可见于 https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf。

[2] Joint Appendix on Writ of Certiorari to the United States Court of Appeals for the Second Circuit，第 782–84 页，https://www.supremecourt.gov/DocketPDF/16/16-1220/36711/20180226192522246_Appendix.pdf。

[3] Brief of *Amicus Curiae* Ministry of Commerce of the People's Republic of China in Support of Respondents，第 2、5、22 页，https://www.supremecourt.gov/DocketPDF/16/16-1220/42398/20180404190231218_MOFCOM%20brief.pdf。

[4] *见，例如*，Note，*The Irrebuttable Presumption Doctrine in the Supreme Court*，87 Harv. L. Rev. 1534（1974）；James J. Duane，*The Constitutionality of Irrebuttable Presumptions*，19 Regent U. L. Rev. 149（2006）。

[5] 法院要求的美国司法部长的意见可能也具有说服力。司法部长认为，"外国政府对其自身法律的描述有权获得很大的重视，但它并不具有定论性"，因此"上诉法院将[商务]部的法庭之友简报视为具定论性而无视其他相关材料是错误的"。Brief for United States as Amicus Curiae，第 6、9 页， https://www.supremecourt.gov/DocketPDF/16/16-1220/20062/20171114160440437_16-1220%20Brief%20as%20A.C..pdf。

[6] Ginsburg 大法官教授民事诉讼多年。*见* Ruth Bader Ginsburg，Remarks for the Second Circuit Judicial Conference，第 11 页（2015 年 6 月 12 日），https://www.supremecourt.gov/publicinfo/speeches/RBG_Speech_Second_Circuit_Judical_Conference_06_12_15.pdf。

[7] *Animal Science Products*，138 S. Ct.，注释 1，第 1869 页。

[8] *见，例如*，Ruth Bader Ginsburg，Associate Justice，Supreme Court of the United States，Speech at the International Academy of Comparative Law，American University，"A decent Respect to the Opinions of [Human]kind"; The Value of a Comparative Perspective in Constitutional Adjudication（2010 年 7 月 30 日），https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-02-10。

[9] *Animal Science Products*，138 S. Ct.，注释 1，第 1873–74 页。

[10] *同上*，第 1875 页。

[11] 542 U.S. 155（2004）。

[12] 值得注意的是，州行为原则从《谢尔曼法案》中豁免州政府政策的故意或可预见的结果。*见 Parker 诉 Brown*，317 U.S. 341（1943）；*California Retail Liquor Dealers Ass'n 诉 Midcal Aluminum*，445 U.S. 97（1980）。

[13] *比照*《中华人民共和国价格法》，第十四条，1997 年 12 月 29 日通过和公布，1998 年 5 月 1 日起施行，http://www.gov.cn/banshi/2005-09/12/content_69757.htm（禁止非官方的卡特尔）。该法有一部分被《中华人民共和国反垄断法》中所取代。*见*《中华人民共和国反垄断法》，2007 年 8 月 30 日通过和公布，2008 年 8 月 1 日起施行，http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm [简称"《反垄断法》"]。《反垄断法》将禁止范围扩大到政府行为。《反垄断法》第五章。此外，《反垄断法》第十六条禁止贸易协会组织卡特尔。*比照* Export Trading Company Act，Pub L. No. 97–290，96 Stat. 1233（1982）和 Webb-Pomerene Act，15 U.S.C. §§ 61–65，后者使某些出口卡特尔从《谢尔曼法案》中豁免，但不提供任何外国法律保护。