CPI's North America Column Presents:

The Chinese Vitamins Case: Who Decides Chinese Law?

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The U.S. Supreme Court is about to decide who decides what Chinese law is.[2] The answer seems obvious: the Chinese do! Nonetheless, there is a serious possibility that the Court will interpret Rule 44.1 of the Federal Rules of Evidence to mean that, even when the highest responsible authority of a foreign state asserts that *x* is true of that state's law, a U.S. court might interpret the law differently. Such a holding would be problematic theoretically, practically, and politically.

The Dispute, In Brief

Since the 1970s, when China began to transition from a command-and-control economy to a more market-oriented one, the Chinese government has maintained export controls in the Vitamin C market in order to maintain a competitive edge over producers from other countries. In part due to the regulatory activities of the Chinese government, Chinese companies control about 60% of the worldwide Vitamin C market. A class of vitamins purchasers alleged that the defendant Chinese vitamins companies conspired to fix the price of Vitamin C sold to U.S. companies, in violation of Section 1 of the Sherman Act. Rather than contest the facts, the defendants enlisted the aid of the Ministry of Commerce of the People's Republic of China ("MOFCOM"), which describes itself as the "highest administrative authority in China authorized to regulate trade between China and other countries, including all export commerce."[3] MOFCOM submitted an *amicus curiae* brief in the district court asserting that defendants' output reduction agreements were directed by MOFCOM itself and were mandatory.

The defendants filed a motion for summary judgment, arguing that, under principles of international comity, the court was obliged to accept the Chinese government's formal representation that Chinese law required defendants to engage in the challenged activities. Relying on the testimony of an expert on Chinese law, plaintiffs argued that defendants actually were not compelled by Chinese law to engage in collusion, and hence that international comity principles did not preclude application of U.S. antitrust law. The district court agreed with the plaintiffs, declining to defer to MOFCOM's interpretation of Chinese law because it "failed to address critical provisions" of the "price verification and chop" policy that undermined MOFCOM's interpretation of Chinese law. A jury found for the class at trial and the district court awarded $147 million in damages and issued a permanent injunction.

On appeal, the U.S. Court of Appeals for the Second Circuit sided with defendants, finding that a U.S. court is "bound to defer" to a foreign government's legal statement as a matter of international comity. The court also recognized the existence of a circuit split. The U.S. Supreme Court had seemingly required adherence to a foreign government's interpretation of its own law in 1942 in *U.S. v. Pink*,[4] where the Court found that a 1918 declaration by the Russian Government regarding the extraterritorial effect of the Bolsheviks' decree

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[2] *Animal Science Prods., Inc. v. Hebei Welcome Pharmaceutical Co., 138 S.Ct. 734 (Mem 2018).*

[3] *In re Vitamin C Antitrust Litig.*, Brief for Amicus Curiae Ministry of Commerce of the People's Republic of China in Support of Defendants-Appellants, 2014 WL 1509344.

[4] 315 U.S. 203.

nationalizing the Russian insurance industry was conclusive as to the decree's extraterritorial effect. In the intervening years, however, some lower courts—most notably the Seventh Circuit[5]—had held that, while U.S. courts owe deference to the interpretations of foreign governments, such interpretations need not be conclusive. The Supreme Court granted certiorari to resolve the circuit split.

Theoretical Problems

At the outset, we may put aside a set of circumstances that may describe some of the lower court decisions in which U.S. courts have not deferred to the interpretation of another nation's laws by its own regulatory authorities—circumstances where there are conflicting or ambiguous interpretations of law by the foreign nation's authorities. In *Chinese Vitamins*, by contrast, there seems to be no doubt what the Chinese government thinks the relevant Chinese law to be: the highest responsible organ of the Chinese government intervened directly in the case unambiguously to express its views. (If MOFCOM had misrepresented its competence to speak authoritatively for the Chinese government, then perhaps *that* issue could be litigated in a U.S. court, but that is not what the district court ruled here). The district court essentially held that the Chinese government is wrong about the interpretation of its own laws.

At one level, there is nothing problematic about saying that a government can misinterpret its own laws. There are countless cases in which U.S. courts reject the U.S. government's interpretation of U.S. law. Following *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[6] If the Supreme People's Court of the PRC had ruled directly on point, it would seem obvious that its judgment unassailably embodied Chinese law. That did not happen here. One could imagine a regime in which only the pronouncements of foreign courts—not other branches of government—counted as conclusive on the meaning of foreign law. But there are two problems with applying such a judiciary-centric approach to international comity questions.

First, courts generally lack the ability to speak directly in a foreign judicial proceeding. To my knowledge, there is no analogue in international law for the practice followed by some federal and state courts of one court certifying a legal question to a different court. In the international sphere, when states speak to states they generally do so through the instrumentality of their executive branches. It would be unrealistic to follow domestic law institutional norms when managing the relationship of sovereign states.

Second, it would be presumptuous to apply *Marbury* reasoning to foreign nations, many of whom do not share the American penchant for judicial supremacy on matters of legal interpretation. I can offer no opinion on whether MOFCOM's interpretation of Chinese trade law is normatively conclusive in China, or whether a Chinese court has the authority to overrule it. As a practical matter, however, it seems likely that companies operating in China *experience* MOFCOM's interpretations of Chinese law as authoritative. Indeed, the same is

[5] *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992).

[6] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

true of companies operating in regulated industries in the United States, where agency decision making is accorded substantial deference by courts, and hence is often functionally conclusive. Oliver Wendell Holmes famously described law as a prediction of what courts will do.[7] Holmes, however, was writing in the common law tradition, before the rise of the administrative state. In the administrative state both home and abroad, it would be more accurate to say that law is a prediction of what *regulators* will do.

Practical Problems

Holding that U.S. courts can second guess the highest administrative authority of a foreign state on interpretations of that state's law would raise serious practical problems. Most obviously, it would create difficulties for the regulated entities, who face the possibility of being told by a foreign regulator that they must do *x* and then being told by a U.S. court that the foreign regulator misunderstood its own domestic law and that they should not have done *x*.

At a minimum, an entity that follows the command of a foreign regulator should have a good faith reliance defense to charges that it acted improperly—a defense allowed under U.S. domestic law.[8] If such a good faith defense would be allowed, why allow a challenge to the foreign regulator's interpretation of its own law for purposes of the comity doctrine? The ultimate question is whether an entity that complies with a foreign government's interpretation of its own laws should be held liable under U.S. antitrust law. Whether we call it comity or good faith reliance, the result should be no liability.

Political Problems

Declining to defer to the foreign government's interpretations of its own laws when unambiguously expressed in U.S. court also creates the potential for serious political problems. The goal of the comity doctrine is to maintain "good neighbourliness, common courtesy, and mutual respect" among co-equal states.[9] In the sensitive world of international relations, there is something unseemly about a domestic court telling a foreign government that it is wrong about the meaning of its own law. Imagine a Chinese court telling the Department of Commerce that it misunderstands the Webb-Pomerene Act. That surely would not be interpreted as courteous or respectful.

The potential for embarrassment and provocation goes beyond a suggestion by the domestic court that the foreign government is incompetent. When a government takes the time to intervene through counsel in a foreign court to express its interpretation of its own laws, it is unlikely to be acting carelessly or inconsiderately. If MOFCOM's assertion to the district court that defendants' conduct was compelled by Chinese law was erroneous, the obvious inference is that MOFCOM was deliberately distorting Chinese law in order to protect Chinese companies

[7] OLIVER W. HOLMES, The Path of the Law, in COLLECTED LEGAL PAPERS 167, 173 (1920).

[8] *International Union v. Brock*, 783 F.2d 237, 248 (D.C. Cir. 1986).

[9] *JP Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 423 (2d Cir. 2005).

from damages claims abroad. To be certain, that may be what actually happened here. (I have no idea what actually happened here—my statement is purely hypothetical). It is nonetheless provocative and discourteous for a domestic court to imply it about a foreign sovereign. The comity doctrine directs a solicitous judicial deportment with respect to foreign countries. In the same way that I may sharply criticize my own country but feel my hackles rise when hearing the same criticisms levelled by a foreigner, so too are judges not supposed to say things about foreign agencies that they might say about their own domestic agencies.

To those accustomed to thinking about judicial processes as pristine searches for truth, it may rankle to hear that judges should defer to foreign governments' interpretations of law even when those interpretations may be sloppy, erroneous, or even self-serving and deceptive. But it is through such temperance that the international order perseveres. The Chinese government may not be infallible on the meaning of Chinese law as a general matter, but it should be considered infallible in a U.S. court for purposes of comity analysis.

Although comity questions should be decided under general principles, it cannot escape our attention that this case involves the challenging and particularly important trade relationship between the United States and China. The respect or disrespect that U.S. courts accord the Chinese government will doubtlessly have repercussions for the international order. The comity doctrine presumes an equality of sovereigns, a principle often observed in its breach. A Supreme Court decision affirming the dignity of the Chinese government in U.S. courts—and of course an expectation of reciprocity—could provide some modest positive reinforcement to the world's most important trading relationship.