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## U.S. Supreme Court Clarifies Rules Governing Proof of Foreign Law

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### INTRODUCTION<sup>1</sup>

International dispute practitioners are well aware of the challenges that arise when the substance of foreign law is disputed in U.S. courts. Most practitioners are aware that the question is governed by Rule 44.1 of the Federal Rules of Civil Procedure, the text of which affords a U.S. federal court significant discretion and latitude in determining the substance of foreign law. When foreign law is placed in issue, however, the government whose law is at issue may seek (or be called upon) to offer its own views. The question of how much deference to afford a foreign government's view of its own law had become a contentious issue in U.S. litigation, particularly in cases—including cases against a foreign sovereign or one of its instrumentalities—where the foreign state has an interest in the outcome of that determination.

On June 14, 2018, the United States Supreme Court decided *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*,<sup>2</sup> a case arising from a class-action suit brought by U.S. based purchasers of vitamin C (the U.S. purchasers) against four Chinese companies that manufactured and exported the vitamin. The plaintiffs accused the sellers of fixing the price and quantity of the nutrient exported to the United States. The sellers' primary defense was that Chinese law mandated that they fix the price and quantity of vitamin C exports.

During the lower court proceedings before the United States District Court for the Eastern District of New York, the Ministry of Commerce of the People's Republic of China (the Ministry) submitted an *amicus curiae* brief supporting the Chinese sellers' assertions regarding Chinese law.

On appeal, the central question before the Supreme Court was the level of deference that federal courts should accord to official statements made by foreign governments regarding the interpretation of their own laws, in cases where that government's law was relevant to a case. The Supreme



Court held that federal courts should accord “respectful consideration” to such interpretations, but are not “bound to defer” to them.<sup>3</sup>

## BACKGROUND

*Animal Science Products* began with a class-action suit filed by the U.S. purchasers against the sellers alleging that the sellers agreed to fix the price and quantity of vitamin C exports from China to the United States in violation of §1 of the Sherman Act, 15 U.S.C. § 1. Specifically, the U.S. purchasers accused the sellers of forming a cartel facilitated by the efforts of their trade association, the Chamber of Commerce of Medicines and Health Products Importers and Exporters (the Chamber).

The case was consolidated with other related suits for pretrial proceedings in the United States District Court for the Eastern District of New York, where the sellers moved to dismiss on the basis that they were shielded from liability because Chinese law purportedly required them to fix the price and quantity of vitamin C exports. The Ministry filed an *amicus curiae* brief stating that the Chamber was under its “direct and active supervision,” and was authorized to regulate vitamin C exports. Importantly, the Ministry clarified that the sellers were not engaged in an unlawful cartel, but were instead subject to “a regulatory pricing regime mandated by the government of China.”<sup>4</sup>

Disputing the binding nature of the Chinese law relied on by the sellers, the U.S. purchasers noted that the Ministry had not identified a specific written law or regulation mandating the pricing agreement amongst the sellers. They also noted a Chamber announcement that the sellers had a self-regulated agreement pursuant to which they would voluntarily control exports, without government decree.<sup>5</sup> While the district court considered that the Ministry’s *amicus* brief was “entitled to substantial deference,” it nonetheless did not consider the Ministry’s statements “conclusive” in light of the U.S. purchasers’ evidence that indicated the price fixing was voluntary.<sup>6</sup> The district court rejected the sellers’ motion to dismiss.

The sellers then moved for summary judgment, and the Ministry provided an additional statement, emphasizing that it authorized the Chamber to regulate the price of vitamin C exports.<sup>7</sup> The district court nonetheless denied summary judgment. A subsequent jury trial returned a verdict for the U.S. purchasers, finding that the sellers agreed to fix the prices and quantities of vitamin C, but that Chinese law did not actually require them to do so.

The U.S. Court of Appeals for the Second Circuit reversed and held that the district court committed error in denying the sellers’ motion to dismiss. At the heart of the Second Circuit’s reversal was its determination that: “When 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 presented, a U.S. court is bound to defer to those statements.”<sup>8</sup> The Second Circuit concluded that the Ministry’s interpretation of Chinese law was “reasonable” and analyzed only the Ministry’s brief and its sources, ignoring the submissions from the U.S. purchasers on Chinese law.

## THE SUPREME COURT’S HOLDING: RESPECTFUL CONSIDERATION, NOT DEFERENCE

At the Supreme Court, the Court framed its discussion around Rule 44.1, which dictates how federal courts determine foreign law. The rule states, in relevant part: “In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination must be treated as a ruling on a question of law.”

Contrasting the determination of questions of law from questions of fact,<sup>9</sup> the Court explained that the adoption of Rule 44.1 signaled a shift from the common law approach of treating a question of foreign law as a question of fact. That held significant implications, including that courts, when deciding questions of foreign law, would not be “limited to materials submitted by the parties; [but] instead ‘may consider any relevant material or source . . . whether or not . . . admissible



under the Federal Rules of Evidence,”<sup>10</sup> and that similar to questions of domestic law, questions of law would be subject to *de novo* review on appeal.<sup>11</sup> The Court however observed that Rule 44.1 does not provide guidance on what weight federal courts should accord to the views of foreign governments on the interpretation of their laws; and neither does any other rule or statute.

Rejecting the bound-to-defer-if-reasonable approach adopted by the Second Circuit, the Supreme Court instead held that courts “should carefully consider” the views of foreign governments.<sup>12</sup> The Court explained: “[T]he appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt the foreign government’s characterization nor required to ignore other relevant materials.”<sup>13</sup> Moreover, the Court advised caution when evaluating a foreign government’s submission in the context of litigation, or when the foreign government has made conflicting statements.<sup>14</sup> The Court also enumerated the factors that courts must consider when evaluating a foreign government’s statements, namely, “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.”<sup>15</sup>

Tying its analysis back to Rule 44.1, the Court considered the Second Circuit’s approach as an “unyielding rule inconsistent with Rule 44.1,” a rule requiring courts to treat questions of foreign law as a question of law, and that permits them to consider “any relevant material or source.”<sup>16</sup> The Court also sought to align the interpretation of foreign governments’ views with its treatment of analogous submissions from U.S. states, where interpretations of state law by the highest courts of States are “binding on the federal courts,”<sup>17</sup> whereas statements from a State’s attorney general would only invite “respectful consideration” and not “controlling weight.”<sup>18</sup>

## SUMMARY

In *Animal Science Products*, the Supreme Court provided guidance to federal courts on the weight they should accord to statements from foreign governments regarding the interpretation of their own laws. Courts should respectfully – and carefully – consider foreign governments’ views, and are not bound to defer to their statements. Instead, courts should undertake a more nuanced analysis based upon the circumstances of the case, the nature of the foreign government’s statements, the foreign legal system, the entity or official giving the statement, and the statement’s consistency with past positions.

As well, the decision provides guidance to litigants against foreign states, and the foreign states themselves. Litigants should provide courts with as much “relevant material or source” including testimony (and expert evidence) to assist them in deciding questions of foreign law. The Court’s decision also points litigants to a number of ways they can rebut or discredit a foreign government’s statement on its laws; and in a way, the Court’s rejection of unyielding deference to foreign governments’ views paves the way for a more balanced playing field. Courts could no longer take statements of foreign governments at face value.



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<sup>1</sup> The authors would like to thank William Panlilio, an associate in King & Spalding's Trial & Global Disputes Practice in Singapore. William's practice focuses on international arbitration and litigation.

<sup>2</sup> No. 16-1220 (United States Supreme Court June 14, 2018) ("*Animal Science Products*").

<sup>3</sup> *Id.* at \*1.

<sup>4</sup> *Id.* at \*3 (quoting App. to Pet. For Cert. 197a) (internal quotations omitted).

<sup>5</sup> Additionally, the U.S. purchasers submitted expert testimony that the Chinese government's authorization of a Vitamin C Subcommittee within the Chamber did not automatically mean that the committee's pronouncements on price fixing were law.

<sup>6</sup> *In re Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546, 559 (E.D.N.Y. 2008).

<sup>7</sup> The Chinese sellers submitted expert testimony in support of the Ministry's statement; while the U.S. purchasers provided additional evidence, including a Chinese statement to the World Trade Organization that it "gave up export administration of ... vitamin C" in 2002.

<sup>8</sup> *In re Vitamin C Antitrust Litigation*, 837 F. 3d 175, 189 (2d Cir. 2016).

<sup>9</sup> As the Supreme Court explained, the adoption of Rule 44.1 signaled a shift from the common law approach of treating a question of foreign law as a question of fact.

<sup>10</sup> *Animal Science Products*, at \*8 (citations omitted).

<sup>11</sup> *Id.* (citations omitted).

<sup>12</sup> *Id.* at 9. The Court explained that "no single formula or rule" applies to all cases when a foreign government presents its views on the construction of its own laws not only because of the world's many legal systems, but also the numerous ways in which foreign governments can express their views.

<sup>13</sup> *Id.* at 8-9.

<sup>14</sup> *Id.* at 9.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* The Court found it problematic that the Second Circuit did not consider other evidence presented by the U.S. purchasers, as for example, China's statement to the World Trade Organization.

<sup>17</sup> *Id.* (citing *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (*per curiam*); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

<sup>18</sup> *Id.* (citing *Arizonaans for Official English v. Arizona*, 520 U.S. 43, 76-77, n. 30 (1997); *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 393-396 (1988)).