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SCOTUS: US Courts Not Bound by Foreign Government's Statement of Its Laws

The Supreme Court has ruled US federal courts should carefully consider a foreign government's interpretation of its own domestic laws, but are not required to give it conclusive effect.

Key Points

- The Supreme Court's "respectful consideration" standard means foreign governments will likely face uncertainty as to how their domestic laws will be interpreted by US courts.
- Lower courts' future application of the Supreme Court's five factors for consideration will provide guidance on how foreign governments can best position and support their interpretations.
- The parties' evidence in support of and against a foreign government's submitted interpretation of its domestic laws may be given substantial weight in determining the proper interpretation under US law.

Supreme Court's Decision

The United States Supreme Court's opinion in *Animal Science Products Inc. et al. v. Hebei Welcome Pharmaceutical Co. Ltd. et al.*, No. 16-1220, sheds light on the level of deference US courts should give to a foreign government's interpretation of its own laws or regulations. The unanimous decision, delivered by Justice Ginsburg on June 14, 2018, holds that when a "foreign government whose law is in contention submits an official statement on the meaning and interpretation of its domestic law," a US federal court "should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements."[1]

The opinion reverses the Second Circuit's decision in the same action, which held that US courts are "bound to defer" to a foreign government's interpretation of its domestic law, as long as it is "reasonable under the circumstances presented."[2] Applying this rule, the Second Circuit gave full weight and deference to an amicus curiae brief filed by the Ministry of Commerce of the People's Republic of China's (MOFCOM), which interpreted the requirements of a Chinese export law. In doing so, the Second Circuit vacated the judgment against defendant Hebei (a Chinese exporter) and reversed the district court's order denying Hebei's motion to dismiss.

The Justices disagreed with the "unyielding rule" adopted by the Second Circuit and found it to be inconsistent with the plain language of Federal Rule of Civil Procedure 44.1.[3] Rule 44.1 states that a

determination of an issue of foreign law "must be treated as a ruling on a question of law," and permits US courts to consider "any relevant material or source" as part of such a determination.[4] The Court held that the Second Circuit therefore erred in disregarding evidence that conflicted with the Chinese government's interpretation, and should have considered '"the shortcomings the District Court identified in the [Chinese official's] position" and "other aspects of the 'District Court's careful and thorough treatment of the evidence before it.'"[5] This evidence included the Chinese government's 2002 statement to the World Trade Organization that China no longer regulates its Vitamin C exports.[6]

Although the Supreme Court's opinion makes clear that US courts are not bound by a foreign government's interpretation of its laws, the Court's description of the appropriate level of deference could be difficult for lower courts to apply. Respectful consideration will undoubtedly look different in different actions, especially when weighed against other and often conflicting evidence, the strength and volume of which will also vary among cases. To this end, the Court acknowledged that "no single formula or rule will fit all cases in which a foreign government describes its own law" especially "[g]iven the world's many and diverse legal systems, and the range of circumstances in which a foreign government's views may be presented."[7] In apparent recognition of the challenges lower courts might face under the new respectful consideration standard, the Court's opinion identifies five "[r]elevant considerations" to guide future analyses of a foreign government's interpretation of its domestic law: (1) the statement's "clarity, thoroughness and support"; (2) the statement's "context and purpose"; (3) the "transparency of the foreign legal system"; (4) the "role and authority of the entity or official offering the statements"; and (5) "the statement's consistency with the foreign government's past positions."[8]

Because the Court's respectful consideration standard leaves ample room for subjectivity in the lower courts, foreign governments and defendants will want to incorporate any available facts that tilt the five factors in their favor. Although none of the Court's five factors contemplate additional evidence *consistent* with the foreign government's position, such evidence would similarly be considered "any relevant material or source" under Rule 44.1, and so could be a powerful tool when available to parties litigating under the new rule. To this end, litigants might consider fortifying their positon with evidence of the foreign government's own application of the law consistent with the asserted interpretation, the legislative or other history of the law that could illustrate the lawmakers' intent, or supporting expert testimony.

The Court's *Animal Science Products* decision comes amid escalating trade tension between the United States and China, and in fact was issued just one day before the US government announced new tariffs on Chinese imports. Whether the decision will have any impact on China's response remains to be seen. Unsurprisingly, the concern for international comity and reciprocity was addressed at each level of the litigation. In support of its undoing of the Second Circuit's "binding deference" rule, the Court explained that the "United States, historically, has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant sources" when interpreting US law.[9] Rather, "the spirit of 'international comity'" dictates that US courts "should carefully consider a foreign state's views about the meaning of its own laws," but "the appropriate weight in each case will depend on the circumstances."[10]

The Court vacated the Second Circuit's judgment and remanded the case for renewed consideration of the proper interpretation of the relevant Chinese law. The Supreme Court did not take a position on the law's proper interpretation.

Procedural History: *In re Vitamin C Antitrust Litigation*

In re Vitamin C Antitrust Litigation began 13 years ago, on January 25, 2005, when plaintiff Animal Science Products (and other US importers of Vitamin C) filed a lawsuit in the United States District Court for the Eastern District of New York alleging that defendants, including Chinese manufacturer Hebei Welcome Pharmaceutical Co. Ltd. and its affiliates ("Hebei"), conspired to fix the prices of Vitamin C and to restrict the supply of Vitamin C exported to the United States. Hebei moved to dismiss the complaint based on the doctrines of foreign sovereign compulsion, act of state, and international comity. In particular, Hebei argued that defendants' alleged coordination on the prices and quantities of their exports was mandated under Chinese laws and regulations set forth by MOFCOM. On September 22, 2006, MOFCOM filed an amicus curiae brief in support of Hebei, in which MOFCOM agreed that the Chinese laws and regulations compelled Hebei's conduct that allegedly violated the US antitrust laws.

MOFCOM's brief, which described the agency as the "highest administrative authority in China authorized to regulate foreign trade," submitted that Hebei's alleged conduct was consistent with the requirements of a regulatory pricing regime mandated by the Chinese government.[11] Specifically, MOFCOM's amicus brief stated that the regulation in question required all exporting companies of a certain category to coordinate their export prices and quantities, and that the exporters (including Hebei) could face penalties in China for non-compliance with these provisions, including forfeiture of their right to export.[12] MOFCOM's amicus brief marked the first time the Chinese government had appeared in a US federal case.

The district court denied Hebei's motion to dismiss. The opinion was careful not to question the Chinese government's governance of its exports, but held that at the time, the record was ambiguous and under-developed as to whether Hebei's price-fixing conduct was compelled or voluntary under the regulations in question. The district court held that MOFCOM's submission was entitled to some degree of deference but would not be considered "conclusive," particularly when the plain language of Plaintiffs' evidence directly contradicted MOFCOM's position.[13]

Three years later, during which time the parties took discovery on whether the Chinese law in question compelled defendants' allegedly collusive conduct, Hebei filed a motion for summary judgment, which relied on the same doctrines as its motion to dismiss: foreign sovereign compulsion, the act of state doctrine, and the doctrine of international comity. In support of Hebei's motion, MOFCOM again submitted a statement reiterating its position that Chinese laws had compelled the defendants' coordination on export prices and quantities.[14] The district court denied Hebei's motion for summary judgment, and held that a foreign government's interpretation of its own law is entitled to substantial deference from US courts, but not "absolute and conclusive deference."[15] The opinion observed that MOFCOM's statement did not read like a "frank and straightforward explanation of Chinese law," but rather like a "carefully crafted and phrased litigation position."[16] But to that end, the district court found MOFCOM's statement lacking in that it did not "address critical provisions of the [government's legal regime] that, on their face, undermine its interpretation," or otherwise cite legal authorities "to support its broad assertions."[17] Weighing MOFCOM's statement with defendants' evidence and plaintiffs' evidence contradicting MOFCOM's position, the district court held that Chinese law did not mandate Hebei's allegedly anticompetitive conduct.[18]

The case proceeded to trial against Hebei as the only remaining defendant, following settlements with the three other defendants totaling US$33 million. At trial, the jury found Hebei liable for violations of the Sherman Act and awarded the plaintiffs approximately US$147.8 million in damages (after trebeling), and a permanent injunction barring Hebei from further violating the Sherman Act. The jury also found in a

special verdict that Hebei had failed to prove its conduct was compelled by the Chinese government during the relevant period.[19]

Hebei appealed the district court's denial of its motion to dismiss to the United States Court of Appeals for the Second Circuit.[20] MOFCOM filed another amicus brief in the Second Circuit, which made similar statements regarding its authority to interpret China's domestic laws and regulations.[21]

On September 20, 2016, the Second Circuit dealt a win to Hebei and reversed the district court's order denying Hebei's motion to dismiss. The opinion held that a US court is "bound to defer" when a foreign government, acting through counsel or otherwise, "directly participates in U.S. court proceedings" and offers an interpretation of its own laws and regulations that is "reasonable under the circumstances."[22] Under this interpretation, US courts cannot challenge a foreign government's representation to a US court regarding its laws or regulations, even if that representation is inconsistent with how the foreign law would be interpreted under US law.[23]

The United States Supreme Court granted *certiorari* in January 2018. MOFCOM again filed an amicus brief in the Supreme Court proceedings and argued for affirmance of the Second Circuit's decision.[24] Several other amici submitted briefs in support of both parties, including the US Chamber of Commerce, the China Chamber of International Commerce, and various groups of law professors from the United States and China. Amici were permitted to participate in oral argument, during which counsel for MOFCOM stated that "Chinese law required the . . . defendants to do precisely what they did in this case."[25] The US Solicitor General, on the other hand, argued that the Second Circuit's approach was "too rigid and too deferential to foreign sovereign submissions,"[26] and that US courts have the freedom to consider materials and evidence outside of a foreign government's submission that they believe to be relevant when interpreting a foreign law.

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Endnotes

1 *Animal Sci. Prods., Inc. et al. v. Hebei, et al.*, 138 S.Ct. 1865, 1868 (2018).

2 *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 189 (2d Cir. 2016).

3 *Animal Sci. Prods.*, 138 S.Ct. at 1874.

4 Fed. R. Civ. P. 44.1.

5 *Animal Sci. Prods.*, 138 S.Ct. at 1875.

6 *Id.* at 1874.

7 *Id.* at 1873.

8 *Id.* at 1873-74.

9 *Id.* at 1875 (emphasis in original).

10 *Id.* at 1868.

11 Brief of Amicus Curiae The Ministry of Commerce of the People's Republic of China in support of the Defendant's Motion to Dismiss the Complaint, at 1, *In re Vitamin C Antitrust Litig.*, 06-md-1738-DGT-JO (E.D.N.Y. Sept. 22, 2006), ECF No. 69.

12 *Id.* at 12.

13 *In re Vitamin C Antitrust Litig.*, 810 F.Supp.2d 522, 541-542 (E.D.N.Y. 2011)

14 Statement at 2, Exhibit 1 to Declaration of Steven R. Newmark in Support of Defendants' Motion for Summary Judgment or, in the Alternative, for Determination of Foreign Law and Entry of Judgment pursuant to Rule 44.1, Fed. R. Civ. P., *In re Vitamin C Antitrust Litig.*, 06-md-1738-DGT-JO (E.D.N.Y. Aug. 31, 2009); ECF No. 399.

15 *In re Vitamin C Antitrust Litig.*, 810 F.Supp.2d at 542.

16 *Id.* at 552.

17 *Id.* at 551. The district court noted that Federal Rule of Civil Procedure 44.1 gave it "substantial discretion to consider different types of evidence" beyond MOFCOM's submissions when interpreting Chinese law. *Id.* at 561.

18 *Id.* at 567.

19 Special Verdict Form, Question 3, *In re Vitamin C Antitrust Litig.*, (E.D.N.Y. March 14, 2013), ECF No. 675.

20 *In re Vitamin C Antitrust Litig.,* No. 13-4791 (2d Cir. 2014).

21 Brief for Amicus Curiae Ministry of Commerce of the People's Republic of China in support of the Defendants-Appellants at 1, 14, *In re Vitamin C Antitrust Litig.,* No. 13-4791 (2d Cir. Apr. 14, 2014).

22 *In re Vitamin C Antitrust Litig.*, 837 F.3d at 189.

23 *Id.*

24 Brief of Amicus Curiae Ministry of Commerce of the People's Republic of China in Support of Respondents at 328, *Animal Sci. Prods.,* No. 16-1220 (U.S. June 14, 2018).

25 Transcript of Oral Argument at 54, *Animal Sci. Prods.*, No. 16-1220 (U.S. Apr. 24, 2018).

26 *Id.* at 23-24.