



## Antitrust ADVISORY ■

**JUNE 18, 2018**

### Unanimous U.S. Supreme Court Limits Deference to Foreign Government Legal Views

Rejecting an earlier appellate case that allowed Chinese companies to escape liability in the United States for allegations of price fixing because their government said it was not illegal under Chinese law, the U.S. Supreme Court unanimously held, in *Animal Science Products Inc. v. Hebei Welcome Pharmaceutical Co. Ltd., No. 16-1220*, that a U.S. court is not bound by a foreign government's interpretation of its own laws. Justice Ruth Bader Ginsburg, writing for a unanimous court in a decision released on June 14, 2018, held that a court should give "respectful consideration" to a foreign government's submissions, but the Second Circuit had gone too far in giving those submissions controlling weight. The Court's position is similar to that of the European Convention, which Justice Ginsburg noted during oral argument requires "that the information, given in reply by the country saying this is our law, shall not bind the judicial authority from which the request emanates." The Court's decision is likely to have a lasting impact on legal decision makers across the globe as they make determinations about deference to foreign laws, including U.S. laws.

#### **Background**

This issue arose from tensions between Chinese regulations governing vitamin C exports and U.S. antitrust laws prohibiting anticompetitive conduct. Plaintiff Animal Science and other vitamin C purchasers in the U.S. brought an antitrust class action against Chinese vitamin C suppliers in 2005, claiming that the suppliers had conspired to fix prices and supply on their way to controlling 60% of the worldwide market. Defendant Hebei Welcome Pharmaceutical and other suppliers responded that export regulations administered by the Chinese government essentially required them to coordinate prices and create a supply shortage. Animal Science disagreed with this interpretation of Chinese law and relied on evidence suggesting that the suppliers had acted voluntarily and without government involvement.

This case is unique because, for the first time, the Chinese government entered an appearance as amicus curiae in U.S. court. The Chinese Ministry of Commerce (commonly referred to as MOFCOM) argued that the case should be dismissed on international comity grounds because the regulation at issue required the price coordination that later was found unlawful under the U.S. antitrust law. But the district court in New York "decline[d] to defer to the Ministry's interpretation of Chinese law," and at trial a jury awarded \$147 million in treble damages to the U.S. purchasers.

The Second Circuit Court of Appeals reversed and ordered dismissal in 2016, holding that the district court had abused its discretion by asserting jurisdiction despite comity concerns weighing in favor of abstention. The Second Circuit explained "that when a foreign government ... directly participates in U.S. court proceedings by providing a sworn

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evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements.”

The U.S. purchasers urged the Supreme Court to take the case, highlighting that this was the latest in several appellate decisions that had applied conflicting degrees of deference to foreign governments’ interpretation of their domestic law. The Court agreed to take up the case, and the U.S. government appeared in support of the purchasers in [what appears to be](#) the first plaintiff-side class action, antitrust or otherwise, to ever to attract the support of both the U.S. solicitor general and the U.S. Chamber of Commerce.

## Supreme Court Decision

On June 14, 2018, the Supreme Court sided with the U.S. purchasers in a unanimous opinion authored by Justice Ginsburg, holding that U.S. courts should give only respectful consideration—not conclusive effect—to a foreign government’s legal submission interpreting its domestic laws. “Because the Second Circuit ordered dismissal of this case on the ground that the foreign government’s statements could not be gainsaid,” the Supreme Court vacated the Second Circuit’s judgment and remanded the case for further consideration.

The Court’s analysis began with Federal Rule of Civil Procedure 44.1, which empowers courts to consider any relevant material or source when interpreting foreign law. But the appropriate weight given to the views presented by a foreign government is not addressed by Rule 44.1 or any other rule or statute. Instead, “the 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.” Recognizing that “no single formula or rule will fit all cases in which a foreign government describes its own law,” the Court provided this guidance on weighing such statements of law:

Relevant considerations include 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.

Based on these considerations, “the Court of Appeals erred in deeming the Ministry’s submission binding, so long as facially reasonable.” The Supreme Court found that such deferential interpretation was inconsistent with Rule 44.1, which required consideration of other conflicting evidence presented by the U.S. purchasers, such as China’s statement to the World Trade Organization that its government no longer administered exports of vitamin C. “When a foreign government makes conflicting statements,” or “offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government’s submission,” the Court noted. By way of analogy, the Court reasoned that views of a state’s “attorney general, while attracting ‘respectful consideration,’ do not garner controlling weight.”

Later in the opinion, the Court reconciled earlier precedent incorrectly relied on by the Second Circuit, explaining that *United States v. Pink*, 315 U.S. 203 (1942), “was a pre-Rule 44.1 decision” and “arose in unusual circumstances.” The Court also rejected the Second Circuit’s reasoning that U.S. courts should reciprocally defer to foreign governments’ interpretations of domestic law based on those governments’ deferential treatment of legal interpretations by the U.S. government. Such deference was not warranted because “the United States, historically, has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant sources.” In support, the Court likened its less deferential approach to that of two international treaties among European, South American, and Central American countries that similarly entitle “a government’s expressed view of its own law ... to substantial but not conclusive weight.”

Ultimately, the Supreme Court took no position on the correct interpretation of Chinese law, but it observed that “shortcomings the District Court identified in the Ministry’s position ... were at least relevant to the weight the Ministry’s submissions should receive and to the question whether Chinese law required the Chinese sellers’ conduct.” On remand, the lower court was instructed to apply a less deferential lens to the Ministry’s characterization of Chinese law and to consider other sources in ascertaining Chinese law.

## Takeaways

The Supreme Court has foreclosed the possibility that foreign governments can help their constituents automatically avoid criminal and civil liability under the Sherman Act by offering views about why their domestic laws required or permitted the conduct. The decision is likely to have a ripple effect that influences both foreign and domestic courts.

Foreign courts are likely to take note and give little deference to U.S. authorities’ interpretation of U.S. laws and regulations when U.S. companies are subject to investigations and litigation abroad. This is true not only in the antitrust context, where the decision may strain enforcement cooperation and dialogue between U.S. and foreign competition authorities, but also in the larger global trade regime. The decision’s impact could well be amplified within the context of the recent “America first” policies put forth by the Trump Administration, including the administration’s self-proclaimed trade war against China.

In the U.S., the case will likely embolden future antitrust plaintiffs to file suit against foreign defendants who may have otherwise been able to point to foreign law as a defense. U.S. district court judges are also likely to give evidence of foreign governments’ interpretation of their laws less weight in all types of cases as they will no longer be concerned about the possibility of reversal on deference grounds.

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