ALERT MEMORANDUM

Unanimous Supreme Court Rules Federal Courts Not Bound to Defer to Foreign Governments' Statements

June 19, 2018

On June 14, 2018, a unanimous United States Supreme Court issued *Animal Science Products v. Hebei Welcome Pharmaceutical Co. Ltd.*, overturning a ruling by the Second Circuit that a U.S. court is bound to defer to a foreign government's asserted interpretation of its own law.[1] The Supreme Court concluded that although courts should give respectful deference to a representation from a foreign sovereign regarding the meaning of its laws, such a statement should not be given "binding" effect as a matter of law. *Animal Science Products* sets a significant precedent, affirming the broad discretion afforded to courts under Federal Rule of Civil Procedure 44.1 to "consider any relevant material or source" in reaching accurate determinations of foreign law.

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[1] 585 U. S. __, 2018 WL 2973745 (2018) ("Supreme Court Decision").

Background to *Animal Science Products v. Hebei Welcome Pharmaceutical Co. Ltd.*

This case was filed as a class action in 2005 by users of vitamin C in livestock supplements and food products ("Petitioners"). Petitioners alleged that a group of Chinese manufacturers ("Respondents") fixed the prices of vitamin C they exported to the U.S., in violation of the Sherman Act. Respondents moved to dismiss the Complaint, arguing that there could be no claim against them because of the act of state, foreign sovereign compulsion, and international comity doctrines. In support of the defendant companies' motion, the Chinese Ministry of Commerce (the "Ministry") filed an *amicus* brief with the District Court—the first time the Chinese government has ever done so before a U.S. court—claiming Chinese law had compelled Respondents' conduct.

The Ministry described itself as the "highest administrative authority in China authorized to regulate foreign trade," and as "the equivalent in the Chinese governmental system of a cabinet level department in the U.S. governmental system."[2] According to the Ministry, the defendant companies identified by the plaintiffs as a "trade association"[3] were member entities belonging to China's Chamber of Commerce of Medicines and Health Products Importers & Exporters (the "Chamber"). Within the Chamber, in 1997, the Ministry authorized creation of a "Vitamin C Subcommittee." From the inception of this Subcommittee, the Ministry required it to limit the production of vitamin C for export and to set export prices, and the Ministry only issued export licenses to manufacturers whose export volumes and prices complied with the output quota and price coordinated by the Subcommittee. In 2002, the procedure changed so that the Ministry itself no longer reviewed manufacturers' pricing and contracts. Instead, the Chamber would inspect each export contract and, if it complied with the coordinated quotas and prices, would attach a seal (called a "chop") to the contract. China's customs authority would only allow export if the exporter presented a contract with such a "chop." The Ministry asserted that this post-2002 procedure was a continuation of the earlier mandatory price- and output-fixing regime.

Petitioners alleged that the Ministry had failed to disclose to the Court that the Chamber's original charter had been repealed, had failed to disclose the existence of a new charter from 2002, and had failed to point to any law or regulation compelling a price or price agreement at issue in the Complaint. Petitioners also asserted that, while the Chinese government regulated export prices and volumes for vitamin C in the past, it ceased doing so by the end of 2001 to facilitate China's entry into the World Trade Organization. Accordingly, Petitioners argued that the procedure adopted in 2002 was a system of voluntary industry coordination, and that Respondents' anticompetitive conduct was voluntary.

District Court Proceedings

The District Court denied Respondents' motion to dismiss.[4] The District Court recognized that although the Ministry's brief was "entitled to substantial deference, [it would] not be taken as conclusive evidence of compulsion, particularly where, as here, the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position."[5]

[2] *In re Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546, 552 (E.D.N.Y. 2008).
[3] *Id.*
[4] *Id.* at 559.
[5] *Id.* at 557.

In its denial of Respondents' subsequent motion for summary judgment, the District Court again declined to grant conclusive deference to the Ministry's submissions, finding that they contained gaps and ambiguities, they did not explain "critical provisions" of the applicable laws and regulations, and certain of the Ministry's statements were directly contradicted by the documentary evidence.[6] Accordingly, the District Court found that the Ministry's statement did "not read like a frank and straightforward explanation of Chinese law," but rather "like a carefully crafted and phrased litigation position"—a "post-hoc attempt to shield [Respondents'] conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period."[7]

The District Court then turned to "what may be considered the more traditional sources of foreign law[,] primarily the governmental directives themselves as well as the charter documents of the [Vitamin C] Subcommittee and the Chamber," in reaching a determination under Rule. 44.1[8] "that the [post-2001] regime did not compel [Respondents'] conduct."[9]

The case went to trial in 2013, and the jury found that Respondents had failed to prove that their conduct had been "actually compelled" by the Chinese government during the class period of December 1, 2001, to June 30, 2006, awarding Petitioners with $147.8 in trebled damages.

The Second Circuit's Decision

On appeal, the Second Circuit reversed the District Court's order denying Respondents' motion to dismiss, and remanded with instructions to dismiss Petitioners' Complaint with prejudice. In reaching this holding, the Second Circuit explained that the governmental notice that changed the procedure in 2002 "does not explicitly mandate price fixing," and accordingly "[o]ur interpretation of the record as to Chinese law thus hinges on the amount of deference that we extend to the Chinese Government's explanation of its own laws.[10]" On this central question of deference within the Court's comity analysis, the panel concluded[11] that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn 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."[12]

The Supreme Court's Decision

In an opinion penned by Justice Ginsburg, the Supreme Court unanimously reversed the Second Circuit, concluding that "[a] federal court should accord respectful consideration to a foreign government's submission, but is not bound to

[6] *See In re Vitamin C Antitrust Litigation*, 810 F. Supp. 2d 522, 551–52 (E.D.N.Y. 2011).
[7] *Id.* at 552.
[8] Federal Rule of Civil Procedure 44.1 instructs courts to treat the determination of foreign law as a legal question and to "consider any relevant material or source."
[9] 810 F. Supp. 2d at 550.
[10] *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 186 (2d Cir. 2016).
[11] The Second Circuit pointed to the decision in *United States v. Pink*, 315 U.S. 203, 62 S. Ct. 552 (1942), in support of the proposition that "an official statement or declaration from a foreign government clarifying its laws must be accepted as 'conclusive.'" The Second Circuit reasoned that in *Pink*, "[t]he Court 'd[id] not stop to review' the whole body of evidence, however, because it determined that the official declaration was 'conclusive' as to the extraterritorial effect of [a] decree [from the Russian Government]."
[12] 837 F.3d at 189.

accord conclusive effect to the foreign government's statements."[13]

The Court based its decision on Federal Rule of Civil Procedure 44.1. Adopted in 1966, the rule makes the content of foreign law to be a question of law, and subject to de novo review, in contrast to the common-law rule that foreign law was a matter of fact. Justice Ginsburg began her analysis by noting that "Rule 44.1 does not address the weight a federal court determining foreign law should give to the views presented by the foreign government"—"[n]or does any other rule or statute."[14] Accordingly, Justice Ginsburg reasoned that "a federal court should carefully consider a foreign state's views about the meaning of its own laws," and that " 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."[15] She further stated that factors a court should consider "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."[16]

Against this backdrop, Justice Ginsburg concluded that "the Court of Appeals erred in deeming the Ministry's submission binding, so long as facially reasonable. That unyielding rule is inconsistent with Rule 44.1 . . . and, tellingly, with this Court's treatment of analogous submissions from States of the United States."[17] Although "the views of the state's highest court with respect to state law are binding on the federal courts,"[18] a State's attorney general's views, while deserving of "respectful consideration," are not dispositive.[19] Moreover, "because the Court of Appeals riveted its attention on the Ministry's submission, it did not address other evidence, including, for example, China's statement to the WTO that China had 'g[i]ve[n] up export administration . . . of vitamin C' at the end of 2001."[20]

Further, although the Second Circuit "reasoned that a foreign government's characterization of its own laws should be afforded 'the same respect and treatment that we would expect our government to receive in comparable matters,'" Justice Ginsburg pointed out that "the United States, historically, has not argued that foreign courts are bound to accept its characterizations or precluded from considering other relevant sources."[21]

For these reasons,[22] the Supreme Court vacated the judgment of the Court of Appeals and

[13] Supreme Court Decision at *3.
[14] *Id.* at *6.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Wainwright v. Goode*, 464 U. S. 78, 84 (1983) (per curiam).
[19] *Arizonans for Official English v. Arizona*, 520 U. S. 43, 76–77, n.30 (1997).
[20] Supreme Court Decision at *6 (citation omitted).
[21] *Id.*
[22] The Court also found the Second Circuit's reliance on *Pink* to be misguided, given that (1) "*Pink* was a pre-Rule 44.1 decision," (2) "*Pink* arose in unusual circumstances," (3) "[t]his Court's treatment of the Commissariat's submission as conclusive rested on a document *obtained by the United States*, through official 'diplomatic channels," rather than volunteered by a state agency in litigation, and (4) "[t]here was no indication that the declaration was inconsistent with the Soviet Union's past statements." Justice Ginsburg remarked that the fact that "the Commissariat's declaration was deemed 'conclusive' in the circumstances *Pink* presented scarcely suggests that all submissions by a foreign government are entitled to the same weight." *Id.* at *7.

remanded the case for renewed consideration consistent with the Court's opinion.

Impact and Implications

While the Court's decision clarifies the discretion of the lower courts in determining foreign law, its decision is unlikely to cause a fundamental change in how lower courts do so. Across the spectrum of litigation, direct involvement by foreign governments offering opinions about their own law is already rare, and this decision will not prompt an increase. Thus, the Court's decision should be taken as a lesson to litigants and the lower courts that considerations of foreign law need to take all of the relevant evidence and available information into account. Parties should anticipate that the types of disputes about the meaning and import of foreign law that have arisen in the past—for example in the context of cross-border discovery and competition law claims involving regulated foreign entities—will continue to be hotly contested.

The Court's decision may indeed have a chilling effect on the willingness of foreign governments to weigh into such disputes. Because the Court has confirmed that the lower courts should examine and may critique official positions taken by foreign authorities, those authorities may well prefer to avoid such review. This reluctance may arise in particular if the authority involved would not be subject to such review and potential challenge in its home jurisdiction.

Even with an opinion from a foreign government in hand, a party may not rely on it as a "silver bullet" that will automatically allow it to prevail. Rather, the courts will look to the entire record in determining foreign law, and parties will be well advised to develop comprehensive support for their interpretations of foreign law. In particular, parties will need to address inconsistencies between positions taken by the foreign authority in the litigation and statements made elsewhere, such as the differences the Court noted between the Ministry's position in its *amicus* brief and the opposite position taken when China joined the WTO.

Importantly, the Court's analysis was addressed to statements by a foreign government offered in the context of litigation describing its own law, as opposed to a pronouncement by a competent authority of a foreign government outside litigation that *itself* has the force of law within that foreign territory. While not addressed in this case, it stands to reason that foreign binding judicial decisions, decrees, or other similar official acts should continue to be treated by the courts as primary evidence of what the foreign law actually is—which, once identified, a U.S. court should not second guess—as opposed to a mere non-binding statement describing the law, to which only respectful consideration is required under *Animal Science*.

In short, litigants will need to prepare a thorough and convincing case for their position on the content of relevant foreign law, using all the tools of expert evidence and advocacy traditionally used in presenting foreign law under Rule 44.1.

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