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## *"Respectful Consideration": U.S. Supreme Court Clarifies Deference Due to a Foreign State's Interpretation of Its Law*

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On June 14, 2018, the U.S. Supreme Court issued a unanimous opinion in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, holding that federal courts should not accept as binding a foreign government's representation regarding the meaning of its laws. Reversing the Second Circuit's decision that treated as determinative the People Republic of China's characterization of its antitrust laws, the Supreme Court held that a foreign government's statements merit a "respectful consideration," but are not necessarily conclusive of the foreign law's requirements. Rather, a federal court should conduct a contextual inquiry to determine the statements' proper weight, and must consider all relevant materials to ascertain the foreign law's meaning.

The Supreme Court's decision is important for all parties engaged in federal court litigation where foreign-law requirements may be at issue. The Court's decision vests U.S. federal courts with discretion when determining what weight to accord to a foreign government's description of its own law, but it also places upon the court a responsibility to determine for itself the meaning of the relevant foreign law. While the views of a foreign government will continue to carry significant weight, the Supreme Court made clear that they are not controlling.

In the aftermath of the Supreme Court's ruling, parties engaged in international litigation before U.S. courts that raise questions of foreign law should not rely exclusively on a foreign government's characterization of its laws. Instead, those parties should be ready to retain foreign-law experts and to present other evidence supporting their construction and application of those foreign laws.

### **Background**

A group of U.S.-based purchasers of vitamin C filed a class-action suit in the Eastern District of New York against four corporations of the People's Republic of China that export vitamin C to the United States. The U.S. purchasers alleged that the Chinese sellers formed a cartel to fix the price and quantity of vitamin C exports in violation of the Sherman Act.

The sellers moved to dismiss on the ground that Chinese law required price- and quantity-fixing, and therefore they were immune under U.S. antitrust law through the act of state doctrine, the foreign sovereign compulsion doctrine, and principles of international comity. China's Ministry of Commerce filed an *amicus* brief stating that Chinese law mandated the pricing regime. The U.S. purchasers



disputed those representations, arguing that no written law or regulation ordered a price agreement, that China had announced a voluntary pricing regime in 2002, and that those representations conflicted with China's prior representations to the World Trade Organization.

The district court denied the Chinese sellers' motion to dismiss and, subsequently, their motion for summary judgment. The court did not accept the Chinese government's *amicus* brief as conclusive on the meaning of Chinese law. The U.S. purchasers ultimately prevailed at a jury trial, which resulted in a favorable judgment, U.S. \$147 million in treble damages, and an injunction against the sellers.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed, finding that the district court should have granted dismissal. The court of appeals held that a U.S. court is bound to defer to a foreign government's reasonable characterization of its own laws and regulations when that government directly participates in the legal proceedings.

## **The Supreme Court's Opinion**

Justice Ginsburg wrote an opinion for a unanimous Supreme Court vacating and remanding the Second Circuit's decision. The Court's opinion presented the issue as follows: "Is a federal court determining foreign law under Rule 44.1 [of the Federal Rules of Civil Procedure] required to treat as conclusive a submission from the foreign government describing its own law?"<sup>2</sup> The Court answered that a foreign government's description of its own law should receive "respectful consideration" but not "conclusive effect."<sup>3</sup>

The Supreme Court approached the issue by first considering the requirements of Federal Rule of Civil Procedure 44.1.<sup>4</sup> Rule 44.1 states that determination of foreign law is treated as a question of law, not a finding of fact. In ascertaining law, U.S. courts are not limited to the parties' submissions, but instead may consider any relevant material. The Court noted, however, that neither Rule 44.1 nor any other federal statute addresses the *weight* courts should afford a foreign state's views about its own laws.

To answer this question, the Supreme Court considered whether "the spirit of international comity" mandates complete deference to a foreign state's views.<sup>5</sup> The Court concluded that a federal court should "carefully consider a foreign state's views about the meaning of its own laws" but ultimately afford whatever weight is appropriate given the circumstances—an approach it labeled "respectful consideration."<sup>6</sup>

The Supreme Court then explained that "respectful consideration" is not reducible to a "single formula or rule."<sup>7</sup> Rather, it involves assessing "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>8</sup> The Court specifically noted the context of litigation and conflicting statements by the Chinese Government as two reasons to be cautious about affording complete deference to a foreign government's views.

The Supreme Court analogized its rule to the standard applied by federal courts when interpreting the meaning and effect of U.S. state law. When state law is established by a decision of the state's highest court, that decision is binding.<sup>9</sup> By contrast, the Court noted, the views of the state's attorney general (a member of the executive branch) receive only "respectful consideration," not controlling weight. The Court also noted that its rule is consistent with international treaties setting forth mechanisms by which one government may obtain from another an official statement characterizing its laws.<sup>10</sup>



## Conclusions and Recommendations

The Supreme Court's decision in *Animal Science* resolves a split among U.S. federal courts of appeals regarding the proper level of deference due to a foreign government's representations on the meaning of its own laws. The Court sided with the majority position, which looks carefully at a foreign government's views but also examines those views in the context of the overall evidence before the court.

In the aftermath of this decision, foreign parties that invoke a foreign law's requirements in support of their position (illustrated specifically in this case as a defense to antitrust allegations) should not rely solely on a foreign government's characterization of that law. Rather, parties appearing before U.S. courts should be ready to substantiate their proposed construction of foreign law with the opinions of foreign-law experts and other evidentiary proof, such as extracts from foreign legal codes, court opinions, legal treatises, authoritative legal articles, and other relevant probative materials. Moreover, companies—especially those operating in less-developed foreign legal systems—should also be mindful that “the transparency of the foreign legal system” is now one relevant consideration in evaluating a foreign government's representations. A foreign government's representations regarding its own laws will still carry significant weight—and a party urging a different interpretation should be prepared to substantiate its position with convincing evidence—but such representations will not be controlling.

The Supreme Court's decision may lead federal courts to assume a more active role in determining the meaning of foreign law, including asking the parties for specific briefing on issues for decision and even conducting their own research where they perceive the material presented by the parties to be inadequate. In recent decisions, some courts of appeals have “stressed the district court's independent obligation to adequately ascertain relevant foreign law, even if the parties' submissions are lacking,” and that failure to conduct an adequate inquiry could be grounds for reversal.<sup>11</sup> By highlighting federal courts' duty to determine for themselves the meaning of foreign laws, the Supreme Court's decision in *Animal Science* may strengthen this trend. Parties engaged in international litigation in U.S. courts should prepare accordingly.



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<sup>2</sup> *Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220, slip op. at 6 (June 14, 2018).

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

<sup>4</sup> *Id.* at 7-8.

<sup>5</sup> *Id.* at 8-9 (citing *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522 (1987)).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 9.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (citing *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam)).

<sup>10</sup> *Id.* at 11-12.

<sup>11</sup> See, e.g., *De Fontbrune v. Wofsy*, 838 F.3d 992, 998 (9th Cir. 2016) (citation omitted). The Ninth Circuit's recognition of the importance of a district court's independent obligation to adequately evaluate foreign law was in tension with its prior decision in *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474 n.7 (9th Cir. 1992), which (with little analysis) deferred to an interpretation of Chinese law proffered by a corporate "arm of the PRC government" on the rationale that the court had "neither the power nor the expertise to determine for [it]self what PRC law is." In the aftermath of *Animal House*, this automatic deference is no longer good law.