

US Supreme Court To Consider Degree of Deference Courts Should Give Foreign Countries' Interpretation of Their Laws

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On January 12, 2018, the United States Supreme Court granted *certiorari* in *Animal Science Products v. Hebei Welcome Pharmaceutical Co. (In re Vitamin C Antitrust Litigation)*, No. 16-1220. The issue before the Supreme Court is “[w]hether a court may exercise independent review of an appearing foreign sovereign’s interpretation of its domestic law,” or whether instead the court is “‘bound to defer’ to a foreign government’s legal statement, as a matter of international comity, whenever the foreign government appears before the court.”

According to the petition for a writ of *certiorari*, there is a circuit split concerning the amount of deference courts must afford a foreign sovereign’s interpretation of its own laws. The question presented to the Court is potentially of broad import and may impact how cross-border disputes are handled in a variety of contexts.

Background

In re Vitamin C Antitrust Litigation began as a multidistrict antitrust class action brought against Chinese producers of vitamin C. The plaintiffs, U.S. purchasers of vitamin C, claimed that the defendant Chinese producers had conspired to fix the price and supply of vitamin C sold to U.S. companies in the international market, in alleged violation of the Sherman and Clayton Acts.

The defendants moved to dismiss the complaint on various grounds, chief among them that their conduct was in fact mandated by the government of the People’s Republic of China (PRC), and thus the plaintiffs’ claims were barred by the act of state doctrine, the foreign sovereign compulsion doctrine and principles of international comity.

On September 22, 2006, in what the United States Court of Appeals for the Second Circuit referred to as “an historic act,” the Ministry of Commerce of the PRC (MOFCOM) filed an *amicus curiae* brief and an evidentiary proffer in support of the defendants’ motion to dismiss. In its submissions, MOFCOM represented that it was the authority within the Chinese government responsible for regulating foreign trade and that during the relevant time it had mandated all vitamin C exports to be sold at prices at or above a minimum threshold.

In a November 2008 decision, however, Judge David Trager of the U.S. District Court for the Eastern District of New York denied the defendants’ motion to dismiss to permit further discovery. Following discovery, and further submissions by MOFCOM, the defendants moved for summary judgment on international comity grounds, among others. In a 2011 decision, Judge Brian Cogan denied the defendants’ motion. In so doing, the court rejected MOFCOM’s interpretation of Chinese law and concluded, in light of other evidence (including the testimony of the plaintiffs’ expert), that defendants had not been compelled by reason of mandatory Chinese laws to engage in the allegedly anti-competitive conduct.

The case ultimately proceeded to trial in late 2013, resulting in a \$147 million jury verdict in favor of the plaintiffs and a permanent injunction barring the defendants from further violating the Sherman Act. The defendants appealed.

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Second Circuit Reverses; Affords Utmost Deference to Chinese Officials' Interpretation of Their Own Laws

On September 20, 2016, a three-judge panel of the Second Circuit vacated the Eastern District's order and verdict. Critically, the Second Circuit ruled that the Eastern District had failed to afford due deference to MOFCOM's submissions on Chinese law.

At the outset, the Second Circuit described the question presented as "what laws and standards control when U.S. antitrust laws are violated by foreign companies that claim to be acting at the express direction or mandate of a foreign government." Specifically, the court set out to determine what weight to afford the statement of a foreign government when it appears before the court, through its official agencies, and "represents that it has compelled an action that resulted in the violation of U.S. antitrust laws."

The Second Circuit explained that, under the well-established doctrine of international comity, a United States court must abstain from asserting jurisdiction in deference to the laws of a foreign country where (among other factors) exercising jurisdiction would require the court to enforce U.S. laws that are in "direct conflict" with the laws of another country, such that a defendant's compliance with both sets of laws would be impossible. The Second Circuit then considered whether Chinese law was in direct conflict with U.S. antitrust principles at issue in the present case.

In conducting that analysis, the Second Circuit turned to MOFCOM's interpretation of Chinese law and, in particular, the issue of whether that agency's interpretation of Chinese law should be treated as conclusive. The Second Circuit held, in this regard, 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." According to the Second Circuit, this standard dictates that U.S. courts may "not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations, even if that representation is inconsistent with how those laws might be interpreted under the principles of our legal system."

The Second Circuit observed that this rule was consistent with the Supreme Court's pronouncement in *U.S. v. Pink*, 315 U.S. 203 (1942). In *Pink*, the Supreme Court held that an official declaration by a Russian government official who had the legal authority to interpret existing Russian law was "conclusive" as to the extraterritorial effects of a 1918 decree nationalizing Russia's insurance business under Russian law.

The Second Circuit acknowledged that the Supreme Court's decision in *Pink* pre-dated the adoption of Federal Rule of Civil Procedure 44.1, which, in creating a flexible framework for determining foreign law, states that a U.S. district 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." However, in the view of the Second Circuit, Rule 44.1 did not modify the level of deference that a U.S. court must extend to a foreign government's interpretation of its own laws because the rule is "silent as to *how*" a court should analyze sources used to determine foreign law.

Applying the "bound to defer" standard, the Second Circuit deemed conclusive MOFCOM's statement as to the meaning of Chinese laws regulating vitamin C exports, and determined that the defendants could not simultaneously comply with Chinese law and U.S. antitrust laws under MOFCOM's interpretation. Based on this finding, as well as its determination that other factors also weighed in favor of abstention, the Second Circuit held that principles of international comity mandated that the district court abstain from exercising jurisdiction over the case. The Second Circuit thus vacated the judgment, reversed the district court's denial of the motion to dismiss and remanded with an instruction to dismiss the complaint with prejudice.

Views of the US Government

In advance of the Second Circuit's decision, the Embassy of the PRC delivered a letter to the U.S. State Department requesting that the Obama administration file a submission in the Court of Appeals in support of the PRC's position. The letter, dated April 9, 2014, indicated that the PRC "has attached great importance to this case." The U.S. government did not make a submission to the Second Circuit in support of the PRC or otherwise.

In November 2017, however, the Trump administration accepted the Supreme Court's invitation to file a brief expressing the views of the administration in connection with the petition for a writ of *certiorari*. The U.S. government argued that the writ of *certiorari* should be granted to review the Second Circuit's holding that MOFCOM's brief conclusively established the import of Chinese law during the relevant period. In the view of the current United States solicitor general, although a federal court should give substantial weight to a foreign government's characterization of its own law, a foreign government's submission should not be treated as conclusive in all circumstances. Thus, in the administration's view, courts should be permitted to consider other relevant evidence, consistent with Rule 44.1.

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Implications

Because the issues of international comity and deference in *In re Vitamin C Antitrust Litigation* can arise in many different contexts, the outcome of this case may impact a variety of cross-border disputes. Foreign laws, and the actions of foreign countries with respect to those laws, are potentially relevant in such disparate areas as securities litigation, contractual disputes involving sovereign states, human rights claims, intellectual property disputes and (as in this instance) antitrust disputes — as well as cases involving the Foreign Sovereign

Immunities Act and act of state doctrine. Many of these cases are politically charged. Whether to accord deference to the manner in which foreign governments characterize their own laws is thus a critical issue that may have far-reaching implications in cross-border and international disputes. In addition, the deference that the Supreme Court ultimately chooses to give to a foreign government's interpretation of its own laws may have reciprocal consequences for the U.S. when it appears before a foreign court.

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