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COMITY

An attorney with Skadden, Arps, Slate, Meagher & Flom LLP discusses the implications of the ruling in *Animal Science Products* and what the ruling means for international comity.

INSIGHT: Supreme Court Cautions Courts On Deference to Foreign Governments



BY SEAN M. TEPE

Although the declining deference shown by the Trump Administration to long-standing U.S. allies and trading partners grabs the headlines, the U.S. Supreme Court recently sent its own signal about deference to foreign governments. In June, it ruled federal courts should not be “bound” by how foreign governments interpret their own laws when those laws become an issue in U.S. litigation.

In *Animal Science Products Inc. v. Hebei Welcome Pharmaceutical Co.*, the Supreme Court unanimously held that when a foreign government appears in U.S. litigation to explain its own laws, federal courts should accord only “respectful consideration” to those views. In so ruling, the Court vacated the Second Circuit’s holding that the Chinese government’s interpretation of its regulations governing vitamin C exports must be given “conclusive effect.”

However, the Court declined to offer a bright line rule of its own, because “no single formula or rule will fit all cases” given the diversity of the world’s legal regimes and potential legal disputes. Instead, the Court merely set forth “[r]elevant considerations” in analyzing a gov-

ernment’s submission, which “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.” The implications of this ruling are explored below.

Notably, the Court did not opine on the comity-based doctrines that play a crucial role in managing conflicts with foreign legal regimes and the reach of U.S. law to foreign defendants. The issue before the Supreme Court—the degree of deference to accord a foreign government’s interpretation of its own laws—was a narrow question of law embedded in the larger dispute over whether Chinese exporters of vitamin C should be exposed to U.S. antitrust law.

Deference as a Pendulum

Petitioners, U.S. purchasers of vitamin C, filed a class action suit against Chinese exporters alleging a cartel in China fixed the price and quantity of vitamin C exports. The Chinese defendants moved to dismiss, contending they should be shielded from U.S. antitrust liability because they were following Chinese law. The Ministry of Commerce of the People’s Republic of China filed an amicus curiae in support of defendants’ motion, interpreting China’s export regulations as compelling defendants to set and coordinate vitamin C export prices and volumes.

Initially, the District Court for the Eastern District of New York ruled that, although the Ministry’s position was “entitled to substantial deference,” the record was “too ambiguous to foreclose further inquiry into the vol-

untariness” of defendants’ actions. Defendants’ motion to dismiss was denied.

After discovery, defendants moved for summary judgment, supported by an additional statement from the Ministry. This time, the district court “decline[d] to defer to the Ministry’s interpretation of Chinese law,” calling the Ministry’s position a “post-hoc attempt to shield defendants’ conduct” and not a “straightforward explanation of Chinese law.” Like a swinging pendulum, deference to the Ministry had swung from “substantial” to largely non-existent. The case was tried before a jury, which ruled that Chinese sellers independently fixed vitamin C exports and rendered a \$147 million judgment for plaintiffs.

On appeal, the Second Circuit vacated the judgment and reversed the denial of defendants’ motion to dismiss. After considering the Supreme Court’s decision in *United States v. Pink* and previous circuit precedent, the Second Circuit concluded that “a U.S. court is bound to defer” to a foreign government’s “reasonable” interpretation of its laws when it “directly participates in U.S. court proceedings.” In the court’s view, the Ministry had provided such a reasonable interpretation at the motion to dismiss stage to which the district court should have deferred.

The Second Circuit’s ruling can best be understood as a reaction to the district court’s critical and non-deferential approach to the Ministry’s submissions. To some observers of the case, the district court’s treatment of the Ministry was “insulting.” Nonetheless, if the Second Circuit’s response pushed the pendulum too far towards deference, the Supreme Court has swung it back.

Impact of the Court’s Ruling

Facially, the Supreme Court’s ruling is narrow. It addresses only the level of deference owed to a foreign government’s “submission” to federal courts regarding the meaning and interpretation of its domestic law. Foreign governments rarely make official appearances in U.S. litigation, especially on behalf of private entities. This litigation marked the Chinese government’s first official appearance in a U.S. court.

Under the Second Circuit’s approach, governments might have been tempted to appear and protect their companies and industries, knowing that their legal interpretations would receive conclusive deference at early stages of litigation. Accordingly, the Supreme Court’s ruling’s greatest effect may be to blunt more appearances by foreign governments. (In turn, that would mean fewer opportunities to employ the Court’s guidance in *Animal Science*.)

The Court’s ruling does have at least one clear consequence for future litigations: it cements the trial judge as the pivotal actor in determining how to weigh a foreign government’s interpretation of its own laws. The Court’s opinion provides lower courts a non-exclusive list of “considerations” when evaluating government explanations but no guidance on how to weigh them. For example, the Court lists “transparency of the foreign legal system” as a consideration, but gives no indication as to whether the government’s interpretation

should be given more or less weight in a less transparent regime, like China’s.

By ruling that the “appropriate weight” to give foreign government submissions will “depend upon the circumstances” of each case and the non-exclusive list of “relevant considerations,” the Court effectively allows lower courts to extend “respectful consideration” to such submissions without substantively deferring to a foreign government’s interpretation of its own laws. In other words, the Supreme Court is potentially enabling what the Second Circuit had been attempting to correct: a failure to extend any real deference to the Ministry.

Lastly, but perhaps most importantly, the Court’s ruling should not be construed as necessarily increasing the exposure of foreign defendants to U.S. liability. In *Animal Science*, the degree of deference to accord a foreign government in determining foreign law was a threshold question to the “main event” of deciding whether U.S. antitrust law should extend to the exporters’ conduct in China. Indeed, most of the Second Circuit’s opinion focused on “whether principles of international comity” required dismissal.

The comity analysis, untouched by the Supreme Court, applied the multi-factor balancing tests set forth by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.* and the Third Circuit in *Mannington Mills Inc. v. Congoleum Corp.* One of the principal factors is the degree of conflict between U.S. and foreign law. Relying on the Supreme Court’s decision in *Hartford Fire Ins. Co. v. California*, the Second Circuit held that there was a true conflict—defined as where compliance with the laws of both countries would be impossible. The court ruled that defendants could not comply with both U.S. antitrust law, which prohibited any price-fixing, and Chinese law, which required at some level the fixing of export prices and quantities.

Although the effect on the comity analysis of the Second Circuit’s inability to conclusively defer to the Ministry’s position remains to be seen, the court may well reach the same conclusion on remand that international comity requires dismissal. Alternatively, the Second Circuit can consider the comity-based doctrines it chose not to address last time, including the act of state doctrine. This doctrine precludes the courts of this country from questioning the validity of the public acts of a foreign sovereign. The vitamin C record would appear to support application of this doctrine for reasons similar to those the Second Circuit articulated in finding a true conflict in its comity analysis.

In any event, if the Second Circuit reevaluates its comity analysis, the foundation may be set for a new cert petition regarding the application of these comity doctrines. Until then, the availability of these doctrines, not to mention the many practical hurdles of litigating against foreign defendants for foreign conduct, should slow any rush to the courthouse by the plaintiffs’ bar as a result of the vitamin C decision.

Author Information

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