Are US courts bound to defer to foreign governments?

The Supreme Court is weighing whether the process of determining foreign law should be different when the information given to the court includes a foreign government agency’s interpretation of foreign law.

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The laws of foreign countries frequently play an important role in litigation in U.S. courts. In some cases, when litigation involves foreign parties or events that occurred outside the United States, choice-of-law rules may require courts to apply foreign law. In other cases, choice-of-law clauses in contracts may state that foreign law governs a dispute. In still other cases, U.S. law governs, but its application depends on foreign law. For example, an alleged violator of American law may assert the defense of foreign sovereign compulsion by claiming that foreign law compelled the violation.

The challenge for courts in these cases is to properly determine foreign law -- that is, to ascertain the content of that law and correctly interpret it. Under Federal Rule of Civil Procedure 44.1, "In determining foreign law, the 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." As the official advisory committee notes on the rule state, this means a court is authorized to ‘engage in its own research’ on foreign law "and consider any relevant material thus found."

The determination of foreign law under Rule 44.1 is part of the adversarial process. The parties make arguments about the content and interpretation of foreign law. To support their arguments, they typically give the court some combination of primary sources (such as statutes or court decisions, translated when necessary), secondary sources (including legal treatises and articles), and opinions of legal experts. Rule 44.1 does not require a party to "prove" foreign law (although the term "proof" is sometimes misleadingly used). Instead, the court is ultimately responsible for determining foreign law, based on its independent assessment of how persuasive and well-supported the parties' arguments are and, in many cases, based on the court's own research.

Should the process of determining foreign law be different when the information given to the court includes a foreign government agency’s interpretation of foreign law? This question is now before the Supreme Court in Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd. (certiorari granted Jan. 12, 2018). The petitioners in Animal Science are U.S. purchasers and the respondents are Chinese producers of vitamin C. The petitioners allege that respondents engaged in a cartel to fix the price and limit the supply of vitamin C exported to U.S. purchasers in violation of U.S. antitrust law.
The respondents did not deny that their behavior violated U.S. antitrust law. Instead, they raised several defenses -- including foreign sovereign compulsion and the doctrine of international comity -- each of which depended on a conclusion that Chinese law required them to fix vitamin C export prices. In support of the respondents, the Ministry of Commerce of the People's Republic of China filed an amicus brief asserting that Chinese law indeed required respondents to set prices and reduce quantities of vitamin C sold abroad.

Following the Rule 44.1 process, the district court considered not only the ministry's brief, but also the testimony of the petitioner's expert witness, the text of the relevant government directives, and other sources of information about Chinese law. In a lengthy opinion, the district court found that the ministry's statement was ambiguous and failed to cite to the government directives upon which it relied, that it was contradicted by other information in the record, and that it was inconsistent with representations made by China to the World Trade Organization that it had given up on vitamin C export administration. Based on its analysis, the district court "respectfully decline[d] to defer" to the ministry's interpretation and rejected respondents' defenses, concluding that Chinese law did not compel the respondents' anticompetitive conduct. The case went to trial, and judgment was entered in favor of petitioners.

The 2nd U.S. Circuit Court of Appeals reversed, holding that "when a foreign government ... 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." The question taken up by the Supreme Court is whether a court may instead "exercise independent review of an appearing foreign sovereign's interpretation of its domestic law."

There are obviously good reasons to seriously consider information that a foreign government agency provides about foreign law. Most importantly, a foreign government agency may have expertise about foreign law that a U.S. court lacks. In addition, a foreign government agency may feel disrespected if a U.S. court independently evaluates its interpretation rather than automatically accepting it.

But does this mean that U.S. courts should be "bound to defer" to a foreign government agency's interpretation of foreign law? In an amicus brief submitted to the Supreme Court, I, along with professor Zachary Clopton of Cornell Law School and other professors of conflict of laws and civil procedure, argue that there are important reasons for the answer to be "no," and for U.S. courts to follow the well-established Rule 44.1 process even when a foreign government submits information about foreign law.

One problem is that the 2nd Circuit's "bound-to-defer" rule would limit the ability of U.S. courts to meaningfully "consider any relevant material or source" when determining foreign law, as Rule 44.1 expressly authorizes them to do.

The "bound-to-defer" rule also is in tension with the basic principle that U.S. courts should determine foreign law accurately. The principle of accuracy implies that courts must consider information about foreign law based on how reliable and persuasive the information is. Reliable and persuasive information may, of course, come from a foreign government agency. But being a foreign government agency is not by itself a sufficient indicator of reliability and persuasiveness. Other factors must also be considered. Is the foreign government agency authorized to conclusively interpret the law? Does it have expertise in the area of law it is interpreting? Is the interpretation consistent with its earlier interpretations of the same law? How well-reasoned and well-supported is the interpretation? What if its interpretation conflicts with more reliable and persuasive information about foreign law? For example, what if it is inconsistent with the interpretation of the foreign country's own courts -- perhaps its high court?
Another basic principle is that U.S. courts should determine law -- including foreign law -- independently. The 2nd Circuit's "bound-to-defer rule" is inconsistent with this principle, too, because it can require a U.S. court to adopt a particular interpretation of law even when an independent assessment of available information about foreign law based on ordinary indicia of reliability and persuasiveness would point to a different interpretation. The principle of independence is especially important in cases, like this one, where the determination of foreign law will fundamentally influence the application of U.S. law and hence the implementation of U.S. policy -- here, U.S. antitrust law and policy.

Significantly, the United States pointed out in an amicus brief in Animal Science that the U.S. Department of Justice does not expect foreign courts to be "bound to defer" to its own determinations of U.S. law, and that the department is not aware of any foreign rule that would require such deference. Moreover, the world's two main treaties on the interpretation of foreign law -- the European Convention on Information on Foreign Law and the Inter-American Convention on Proof of and Information on Foreign Law -- expressly provide that information provided by foreign governments pursuant to the treaty provisions are not binding on courts. This evidence suggests that neither the United States nor foreign countries genuinely expect each other's courts to be subject to a "bound-to-defer" rule when determining foreign law.

Of course, U.S. courts should give respectful consideration to a foreign government agency's interpretation of foreign law. But so should a foreign government respect the independence of U.S. courts when they rule on questions of law. Rule 44.1, the principles of accuracy and independence, and foreign and international practice show why the 2nd Circuit's "bound-to-defer" rule is incorrect and unwise.