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American courts owe respect to foreign court interpretations, but need not defer

In its October 2017 term, the U.S. Supreme Court considered the amount of deference U.S. courts should give to foreign government interpretations of foreign law.



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Are U.S. courts bound to defer to foreign governments when determining the meaning of foreign law? In its unanimous June 14, 2018 opinion in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, the U.S. Supreme Court held that the answer is no. 2018 DJDAR 5671.

The *Animal Science* case involves price-fixing claims against the respondents, who are Chinese producers of vitamin C. 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.

The district court in *Animal Science* "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. In reaching its conclusion, 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. 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 Supreme Court granted certiorari.

In an amicus brief filed with the Supreme Court, I, along with professor Zachary Clopton of Cornell Law School and other professors of conflict of laws and civil procedure, argued against the 2nd Circuit's "bound to defer" rule. "U.S. courts should give respectful consideration to a foreign government's statements about its law," we argued, but "a foreign government's statements cannot be binding on U.S. courts."

The Supreme Court adopted essentially the same position, holding that "[a] federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements." The Supreme Court reasoned that the 2nd Circuit's "unyielding rule is inconsistent with Rule 44.1," which provides that "[i]n 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" and that "[t]he court's determination must be treated as a ruling on a question of law." It also pointed out -- as we did in our amicus brief -- that the 2nd Circuit's rule was inconsistent with international practice, as reflected in two treaties dealing with the determination of foreign law.

What, then, does it mean to give "respectful consideration" to foreign government statements? The Supreme Court stated that "no single formula or rule will fit all cases in which a foreign government describes its own law." It did, however, identify a number of considerations that are relevant when determining how much weight to give to a foreign government's interpretation, including "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 government's past positions." Regarding context, the Court emphasized that when the foreign government offers the interpretation "in the context of litigation, there may be cause for caution in evaluating the foreign government's submission." On the other hand, under the Supreme Court's approach it would seem that a prior decision of a foreign country's independent court about the meaning of its own law would ordinarily deserve substantial weight.

The Supreme Court's approach is a sensible one. Unlike the 2nd Circuit's "bound to defer" rule, the "respectful consideration" standard does not prevent U.S. courts from "consider[ing] any relevant material or source" when determining foreign law, as Rule 44.1 expressly authorizes them to do. Respectful consideration is also consistent with the principle of accuracy in the determination of foreign law, which implies that courts must consider information about foreign law based on how reliable and persuasive the information is. Moreover, it is consistent with the principle that U.S. courts should determine law -- including foreign law -- independently. The principle of independence is especially important in cases, like *Animal Science*, 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.

In practical terms, the *Animal Science* decision means that courts and lawyers should follow the same Rule 44.1 process for determining foreign law, whether or not a foreign government submits a statement about the meaning of that law. If a foreign government submits a statement, the court should respectfully consider it, but ultimately must independently decide how much weight to give the statement based on considerations such as those identified in the Supreme Court's opinion.

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