

U.S. Supreme Court Decides that Chinese Government's Interpretation of PRC Law Should Not Receive Conclusive Deference in Vitamin C Antitrust Case

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On June 14, 2018, the U.S. Supreme Court decided that U.S. federal courts should only give “respectful consideration”—rather than conclusive deference—to a foreign government’s interpretation of its laws in a U.S. legal proceeding. In so doing, the Court vacated a ruling from the Second Circuit that had taken a more absolute bright-line approach to deferring to foreign governments’ interpretations of their laws. This question of deference arose in the context of a long-standing price-fixing dispute between American Vitamin C purchasers Animal Science Products, Inc. (“Animal Science”) and the Ranis Company, and Chinese Vitamin C exporter Hebei Welcome Pharmaceutical Co., Ltd (“Hebei”) and its holding company North China Pharmaceutical Group Corporation (“North China”) (*Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et al.*). Please see our prior alerts from [January 18, 2018](#), [September 22, 2016](#) and [March 27, 2013](#) for discussion of earlier phases of this litigation.

Background

In 2005, a Texas based livestock supplement company, Animal Science, sued Hebei and North China in federal district court, alleging that the companies had fixed prices and supply volumes of exported Vitamin C in violation of U.S. antitrust laws. Hebei and North China argued that their anticompetitive conduct had been compelled by Chinese law. Defendants’ position was supported by an amicus brief submitted by China’s Ministry of Commerce (the “Ministry”)—“the highest . . . [entity] authorized to regulate foreign trade.” The Ministry defended the conduct on the grounds that the defendants were subject to a regulatory regime requiring them to coordinate with other industry participants to fix the price and quantity of Vitamin C in order to comply with anti-dumping regulations and promote the Chinese Vitamin C export industry.

Plaintiffs offered arguments and evidence to dispute Defendants’ position, including a 2002 Ministry Notice describing the Vitamin C regime and expert testimony, both suggesting that price-fixing was not compulsory under the Chinese regime. Defendants moved for summary judgment and submitted a supporting statement from the Ministry as well as expert evidence that the Ministry’s interpretations were given “decisive weight” under Chinese law. Among the evidence Plaintiffs relied on in opposing the summary judgment motion was a public statement made by the Chinese government to the World Trade Organization (“WTO”) in 2002 that China no longer administered export prices of Vitamin C. Notably, no government agency or official appeared in this private litigation to take a position on behalf of the U.S. government. The District Court denied the motion for summary judgment. At trial, the jury found for the plaintiffs, awarding them approximately \$147 million in damages.

On appeal, the Second Circuit reversed, finding that the District Court erred in denying Defendants’ motion for summary judgment. In reaching this determination, the Second Circuit explored whether there was a “true conflict” between U.S. and Chinese laws which would make the Chinese companies unable to adhere to both sets of laws. As part of this exercise, the Court considered the amount of deference owed to the Ministry’s interpretation of Chinese law and ultimately held that a U.S. court is “bound to defer” to a foreign government’s explanation of its laws when that government “directly participates in U.S. court proceedings” and its explanation is “reasonable under the circumstances.” The Second Circuit found that the Ministry’s description of the Chinese Vitamin C law was reasonable and should therefore be accorded conclusive deference. In reaching this holding, the Court focused solely on the Ministry’s submissions

during the litigation and disregarded the contradictory statement the Chinese government had made to the WTO in 2002 as well as the other submissions by the Plaintiffs that cast doubt on the Ministry's interpretation.

Following this decision, Animal Science filed a petition for a writ of certiorari in April 2017. In assessing the petition for certiorari, the Supreme Court invited the U.S. Government to outline its views on the issue. The Trump Administration's Solicitor General argued in an amicus brief that foreign governments' interpretations of their laws be given "substantial" rather than "conclusive" deference. This was the first time the U.S. Government appeared in the litigation. On January 12, 2018, the Court granted the petition, agreeing to specifically consider the question of deference.

The Supreme Court's Ruling

In a unanimous decision authored by Justice Ginsburg, the Supreme Court vacated the Second Circuit's ruling, holding that "[a] federal court determining foreign law . . . should accord respectful consideration to a foreign government's submission, but the court is not bound to accord conclusive effect to the foreign government's statements." *Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd.*, No. 16-1220, 585 U.S._ (2018).

The Court elaborated that while federal courts should "carefully consider" a foreign government's description of its laws, the "appropriate weight" given to a foreign government's statements will depend on the circumstances of each case. Moreover, it explained that "when a foreign government makes conflicting statements . . . or, as here, offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government's submission."

Notably, the Court's opinion adopted arguments from the U.S. Government's amicus brief submitted during the merits phase, including the argument that there was no single rule or formula for use in all cases but rather several factors should be considered in making an evaluation. These 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."

Additionally, the Court noted that giving conclusive deference to a foreign government's statements would be inconsistent with federal courts' treatment of statements from state governments: while federal courts are bound by rulings on questions of state law by a state's highest court, statements made by state attorneys general and other state officials do not receive dispositive deference.

The Court also considered reciprocity as a basis for affording conclusive deference to a foreign government's statements, finding that while it was an important consideration, it did not justify the Second Circuit's judgment because the U.S. had not historically argued that foreign courts are bound to accept its interpretations or are foreclosed from reviewing other sources. Moreover, in response to questions from Justice Kagan during oral argument, counsel for the Chinese government could not affirm that the rule of conclusive deference was used by Chinese courts themselves, nor could counsel identify any other country that employed a rule of conclusive deference. This, in the Court's view, undermined the defendants' argument that international comity demanded such a rule.

The Court remanded the case to the Second Circuit for reconsideration under the new standard.

Potential Implications of the Supreme Court's Decision

This decision has some important implications for foreign companies that conduct business in the United States. The specific, immediate impact of the ruling is that foreign companies will not be shielded from U.S. antitrust liability simply because their governments state that the defendants' actions are required by foreign law. Instead, U.S. courts will look at a variety of factors to determine whether the foreign

government's position can serve as a shield to antitrust liability, including consistency of the evidence and the context of litigation for the government's interpretation of its own laws.

This limitation also may apply in different contexts. Specifically, there are tensions between the FCPA and certain foreign laws that may implicate the Court's ruling. In the FCPA context, US regulators expect companies doing business in China to exert a degree of oversight and control over the distribution chain for their products. Conversely, under the PRC Anti-Monopoly Law, companies that exert too much control over their distribution channels can be found liable of vertical price fixing. A company that is unable to meet expectations of US regulators due to its obligations under the PRC Anti-Monopoly Law may be unable to rely on the statements of the Chinese government to insulate it from FCPA liability.

Most importantly, the Supreme Court's ruling creates uncertainty as to the level of deference that will be afforded a foreign government's interpretation in any particular case. As noted above, under the Court's decision, U.S. courts now have the leeway to consider several factors in determining how much weight to afford a foreign government's statements on a case-by-case basis. Courts can also review relevant sources beyond the statements of foreign governments in considering questions of foreign law.

The Court's decision also leaves open the question of whether foreign courts' interpretation of their nations' laws will be treated differently than foreign governments' interpretation of the same laws. In explaining the inconsistency of the Second Circuit's approach in the U.S. domestic context, the Court noted that federal courts are bound by the rulings on state law made by a state's highest court but not by the statements of state government officials. It is unclear whether this suggests that greater deference may be given to rulings by foreign courts as opposed to statements made by foreign government officials or agencies. Nevertheless, in circumstances where foreign companies are compelled by foreign jurisdictions to act in ways that expose them to U.S. liability, these companies might be better served by obtaining court orders outlining their obligations under foreign law rather than relying on statements from government officials.

Given the uncertainty surrounding these issues, foreign companies seeking to defend U.S. litigation by showing that their conduct was compelled by foreign law may face protracted disputes over the evidence necessary to justify a foreign authority's position, even with the agreement of that authority.

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