Antitrust, Vol. 33, No. 1, Fall 2018.

A Scurvy Ride: The U.S. Supreme Court Limits Deference in the *Vitamin C* Case

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ON JUNE 14, 2018, A UNANIMOUS U.S. Supreme Court held in *Animal Science Products* that U.S. courts should not conclusively adopt a foreign government's official statement about its own laws, even if U.S. courts make an initial determination that the statement is reasonable.[1] In reaching that holding, the U.S. Supreme Court reversed the U.S. Court of Appeals for the Second Circuit and resolved a divergence of views among the sister circuit courts.

The consequences of the decision likely will be significant. By minimizing the extent to which American courts will accept foreign governments' statements regarding their laws, a more open-ended standard likely will create uncertainty for foreign firms and individuals subject to different regulations in their home countries but that want to engage in the American economy. It may also exacerbate the current cycle of tit-for-tat retribution in international trade, potentially exposing American firms to new lawsuits or sanctions abroad.

This article provides a brief history of the litigation, describes and analyzes the U.S. Supreme Court's decision, and assesses its impact on governments, individuals, and private firms.

The Litigation

In 2005, a putative class of U.S.-based purchasers of vitamin C sued four Chinese corporations under Section 1 of the Sherman Antitrust Act, claiming, *inter alia*, that the Chinese companies conspired to fix prices and constrain the supply of vitamin C exports to the United States.[2] The Chinese companies moved to dismiss, citing the act of state doctrine, the foreign compulsion doctrine, and principles of international comity, and claimed that the alleged anticompetitive conduct was compelled by Chinese law.[3] In an unprecedented act, an agency of the Chinese government appeared as amicus curiae to validate the defendants' position that it had in fact compelled their conduct.[4]

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The Federal District Court for the Eastern District of New York denied the defendants' motion to dismiss, holding that although the Chinese government's brief was "entitled to substantial deference," it did not provide "conclusive evidence of compulsion" because it was contradicted by the plaintiffs' documentary submissions indicating the companies' behavior was voluntary.[5] The district court later denied the defendants' motion for summary judgment on similar grounds.

After the denial of the motion for summary judgment, the case was tried and resulted in a $147 million jury verdict for the plaintiffs and a permanent injunction against further violations of the Sherman Act.[6] The defendants appealed the denial of their motion to dismiss to the Second Circuit.

The Second Circuit reversed, holding "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."[7] The Second Circuit noted, "Instead of viewing the ambiguity surrounding China's laws as a reason to defer to the Ministry's reasonable interpretation, the district court, recognizing generally the unique features of China's system, attempted to parse out Defendants' precise legal role within China's complex vitamin C market regulatory framework."[8]

The Second Circuit also cautioned against scrutinizing a foreign government's motives in enacting regulations or verifying that these regulations are enforced to determine whether the regulations exist.[9] While the defendants had raised a number of defenses, the Second Circuit opted to dismiss the lawsuit on international comity grounds rather than the act of state doctrine or the defense of foreign sovereign compulsion.[10]

The U.S. Supreme Court granted certiorari and reversed the Second Circuit, noting, "Because the Second Circuit ordered dismissal of this case on the ground that the foreign government's statements could not be gainsaid, we vacate that court's judgment and remand the case for further consideration."[11]

For a U.S. court to attempt to discern the intention and meaning behind foreign law which is often embodied with cultural and political subtext is a situation fraught with the potential for error.

The U.S. Supreme Court held that the appropriate weight to accord a foreign government's statement about its laws "will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials."[12] Writing for the Court, Justice Ginsburg cautioned against relying on foreign government statements especially when a government makes conflicting statements or offers its perspective in the context of litigation.[13] Discouraging the taking of these statements at face value, the Court advised lower courts to consider 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 entering the statement; and the statement's consistency with the foreign government's past positions."[14]

Specifically, the Court held that Federal Rule of Civil Procedure 44.1, which governs federal courts' judicial determinations regarding foreign law, "does not address the weight a federal court determining foreign law should give to the views presented by the foreign government."[15] Nevertheless, the Court added that Rule 44.1's prescription for courts to consider "any relevant material or source" and for the determination of foreign law to "be treated as a ruling on a question of law" should not result in binding deference to foreign government submissions.[16]

Notably, the Second Circuit did not actually advocate the unqualified acceptance of a foreign government's legal interpretation. Rather, the Second Circuit noted that "[t]o the extent there is no documentary evidence or reference of law proffered to support a foreign sovereign's interpretation of its own laws, deference may be inappropriate."[17] The dispute therefore hinged on interpreting a government notice.[18]

What Standard Did the Court Adopt?

The district court found the regulatory landscape in China to be too ambiguous to determine whether Chinese law had in fact compelled defendants' violations of the Sherman Act.[19] In circumstances where courts are charged with interpreting ambiguous federal statutes or regulations, courts often defer to an administrative agency's interpretation. But the U.S. Supreme Court did not take that approach here.

The U.S. Supreme Court eschewed a "single formula or rule [that would] fit all cases in which a foreign government describes its own law" because of the diverse array of legal systems and the "range of circumstances in which a foreign government's views may be presented."[20] In so holding, the Court adopted the ad hoc approach advocated by the U.S. Department of Justice in its amicus brief.[21] The Department of Justice argued that Rule 44.1 leaves courts with maximal discretion to consider "any relevant material or source" to interpret foreign law.[22] With respect to deference owed to a foreign government, the Department of Justice appeared to advocate a level of deference between "some degree of deference" and "binding" deference.[23]

The petitioners, apart from opposing a binding deference standard, did not advocate for a specific level of deference.[24] Respondents endorsed the "defer if reasonable" standard used by the Second Circuit.[25]

The Supreme Court held that "a government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight . . . ."[26] Given the circumstantial considerations suggested by the Court and an amorphous "substantial" deference standard, it is difficult to discern a cohesive deference standard articulated by the Court. Instead, unless and until the lower courts flesh out a more precise standard, litigants are left wondering what standard to employ when trying to interpret the laws of foreign countries.

Trying to read the tea leaves to tease out a standard, one could argue that the Supreme Court afforded a *Skidmore* level of deference to the Chinese government's submission. In *Gonzales v. Oregon*, the Supreme Court delineated three primary deference options available to courts when construing an ambiguous federal statute or regulation.[27] Courts should assign *Auer* deference, the most deferential standard, when an agency is interpreting its own ambiguous regulation.[28] When Congress has delegated authority to an agency to interpret an ambiguous statute and the agency interpretation was promulgated pursuant to that authority, courts should assign *Chevron* deference. Finally, courts should assign *Skidmore* deference, which offers "respect" to persuasive agency interpretations when agencies are not charged with authority to interpret an ambiguous statute.[29] The weight assigned to an interpretation in the *Skidmore* context "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[30]

The Supreme Court in *Animal Science Products* did not explicitly hold that courts should apply *Skidmore* deference to foreign government statements. But the Court appeared to echo a familiar set of factors to those announced in *Skidmore*.[31] If our analysis is correct, by affording limited deference to the Chinese government's interpretation of its own rules, the Court assigned it a lower level of deference than it would give to a domestic agency vested with interpretive authority. As China's Ministry of Commerce offered to interpret its own rule, it would seem that the commensurate deference standard would be *Auer* deference.[32] The *Auer* deference standard treats an agency interpretation of its own regulations as "controlling 'unless plainly erroneous or incon-

sistent with the regulation.'"[33] But the Court was not prepared to adopt such a standard and defer to the Chinese agency's interpretation of its own regulation.

Skepticism Regarding Foreign Government Submissions

What explains the hesitancy of the Supreme Court to accept the Chinese government's submission? In short, the Chinese government interpretation was viewed as inaccurate and self-serving. Particularly germane to the Court's assessment of credibility was the Chinese government's allegedly inconsistent position regarding its regulation of vitamin C exports in front of the WTO.[34]

However, in the U.S. agency context, the potential for an agency's inconsistency ordinarily does not by itself preclude judicial deference.[35] While one justification of agency deference is that "affording agencies significant discretion to interpret the law they administer recognizes the value of agency expertise and the comparatively limited experience of the judiciary where an interpretation requires specialized knowledge," deference also serves the purpose of "promot[ing] national uniformity in regulatory policy, thereby enabling agencies to avoid the difficulty of enforcing different rules depending on the jurisdiction."[36] There is an even heightened danger of different American jurisdictions forming contradictory conclusions about foreign law than there is about domestic law, potentially exposing foreign entities to not only one inconsistent set of rules in America, but multiple sets of inconsistent rules.

Nevertheless, even if a quest for accuracy is not the sole motive for deference, the potential for inaccuracy by offering limited deference is greater in the international than in the domestic deference context. For a U.S. court to attempt to discern the intention and meaning behind foreign law which is often embodied with cultural and political subtext is a situation fraught with the potential for error. Moreover, foreign governments may draft laws that they expect will be interpreted not only by native speakers, but by advocates and citizens well-versed in local canons of construction.

Impact of Decision on Principles of International Comity

The greatest repercussion from minimal deference is a court's potential offense to a foreign government. Courts traditionally abstain from intruding on foreign policy issues best left to the competency and practical discretion of the political branches. "In the spirit of 'international comity,' a federal court should carefully consider a foreign state's views about the meaning of its own laws."[37]

In the context of this litigation, despite the Chinese government admitting to anticompetitive conduct under the U.S. laws, the district courts and the Supreme Court continued to be skeptical that it was accurately portraying the nature of the regulations at issue. The Chinese government stated that "the exercise of jurisdiction by the district court has already negatively affected U.S.-China relations." The Second Circuit noted: "The Chinese Government . . . repeatedly made [it] known to the federal courts, as well as to the United States Department of State in an official diplomatic communication relating to this case, that it consider[ed] the lack of deference it received in [American] courts, and the exercise of jurisdiction over this suit, to be disrespectful and that it 'has attached great importance to this case.'"[38]

Apart from potentially offending other countries, there are other potential, negative implications. The Supreme Court's holding that "transparency of the foreign legal system," and the interpretative statement's "clarity, thoroughness, and support,"[39] impact the appropriate level of deference potentially aggravates the practical and political consequences of the Court's decision.

The practical and political consequences of the decision are manifold. First, examining the level of transparency in a country's regulatory regime, further disturbs principles of comity by potentially creating a hierarchy based on the ease of interpretation of foreign legal regimes and, thereby, a concomitant hierarchy in the deference offered to government statements. This hierarchy may systematically advantage the effect given to Western legal rules merely because they are more familiar to American courts.

Second, demanding clear and explicit interpretations from foreign governments potentially puts foreign governments into a regulatory and/or political bind, where they are forced to take action based on the doubts and reservations of an American judge. Foreign governments would also be forced to interpret their laws according to the litigation schedule in an American courtroom. It also may complicate foreign governments' efforts to afford preferential treatment to local firms without triggering WTO and trade treaty repercussions if governments are forced to be explicit about their level of assistance. Foreign governments could also impose reciprocal obligations on the U.S. government.

Third, the willingness of a foreign government to intercede in a U.S. litigation on behalf of its nationals is not guaranteed. Indeed, the Chinese government's intervention here was unprecedented. Therefore, some firms and individuals may be exposed to liability under U.S. law without the defense of their national governments. And governments may be less willing to mount a defense in the wake of *Animal Science Products* if such a defense would be inconvenient, politically risky, and potentially unsuccessful.

Perhaps among the more common areas where such conflicting obligations may confound foreign companies are in the realm of foreign discovery, global asset restraints, and international enforcement actions. Here, foreign law is even less likely to be fully fleshed out, and foreign government interpretations would be more applicable in the context of such ambiguity. A foreign company refusing to disclose information subject to a data protection law risks facing sanctions in U.S. courts, including an adverse inference for its failure to produce. Likewise, efforts to enforce a U.S. judgment in

a foreign country may raise interpretive questions about a certain country's narrower conception of property rights. As a result of the Supreme Court's decision, a foreign government is less likely to resolve these questions for U.S. courts.

Conclusion

As a result of the Supreme Court's decision, the case has been remanded to the Second Circuit,[40] for the parties to litigate whether defendants' actions were compelled by Chinese law in light of the Court's holding that the Chinese government's interpretive statement is due limited deference. The parties recently concluded briefing. Included among the briefs was another amicus brief from the Chinese Ministry of Commerce filed in support of the defendants. The Ministry contended, *inter alia*, that the Second Circuit had been justified "rejecting the district court's 'nonsensical' interpretation in favor of the 'reasonable' interpretation presented by the Ministry, with or without deference."[41] The Ministry also argued that if the Second Circuit were to address deference, the "Ministry's authoritative interpretation of the regulations it authored should be granted the same 'substantial . . . weight' that 'ordinarily' is owed to a foreign sovereign's interpretation of its own law" based on the factors the Supreme Court deemed relevant.[42] The Second Circuit's decision is pending.

Meanwhile, since the Supreme Court's ruling, China consolidated its antitrust agencies under the State Administration for Market Regulation (SAMR). A new Anti-Monopoly Bureau will have authority to guide Chinese businesses with regard to foreign antitrust litigations and investigations. It will be interesting to see how the Anti-Monopoly Bureau will advise companies on compliance with foreign rules in the wake of the *Animal Science Products* decision. To be continued.

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1 Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd., 138 S. Ct. 1865, 1869 (2018).

2 *Id.* at 1870.

3 *Id.*

4 *In re* Vitamin C Antitrust Litig., 837 F.3d 175, 181 (2d Cir. 2016); *In re* Vitamin C Antitrust Litig., 584 F. Supp. 2d 546, 552 (E.D.N.Y. 2008) ("The Chinese government's appearance as amicus curiae is unprecedented. It has never before come before the United States as amicus to present its views. This fact alone demonstrates the importance the Chinese government places on this case.").

5 *Vitamin C Antitrust Litigation*, 584 F. Supp. 2d at 557.

6 *Vitamin C Antitrust Litigation*, 837 F.3d at 182.

7 *Id.* at 189.

8 *Id.* at 191.

9 *Id.*

10 *Id.* at 194. Even though the Second Circuit did base its dismissal on international comity grounds, it noted that the act of state doctrine precluded an inquiry into the motives behind the Chinese government's decision to regulate the vitamin C market in the manner it did. *Id.* at 191.

11 *Animal Science Products*, 138 S. Ct. at 1870.

12 *Id.* at 1873.

13 *Id.*

14 *Id.* at 1873–74.

15 *Id.* at 1873.

16 *Id.* at 1874 (emphasis added).

17 *Vitamin C Antitrust Litigation*, 837 F.3d at 189 n.8.

18 *Id.* at 181.

19 *Vitamin C Antitrust Litigation*, 584 F. Supp. 2d at 559 ("The record as it stands is simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions.").

20 *Animal Science Products*, 138 S. Ct. at 1873.

21 Brief of the United States as Amicus Curiae Supporting Petitioners at 9, *Animal Science Products*, 138 S. Ct. 1865 (2018).

22 *Id.* at 10.

23 *Id.* at 18–19.

24 Brief for Petitioners, *Animal Science Products*, 138 S. Ct. 1865 (2018).

25 Brief for Respondents at 2, 20, *Animal Science Products*, 138 S. Ct. 1865 (2018).

26 *Animal Science Products*, 138 S. Ct. at 1875.

27 Gonzales v. Oregon, 546 U.S. 243, 255–56 (2006).

28 *Id.* at 255.

29 *Id.* at 268.

30 *Id.* (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

31 *Animal Science Products*, 138 S. Ct. at 1873–74 ("Relevant considerations 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.").

32 Although there are policy arguments to be made to generally deny regulators the authority to interpret their own regulations, as expressed by Justice Scalia in his concurrence and dissent in *Decker v. Northwestern. Environmental Defense Center*, 568 U.S. 597, 617 (2013) (namely, that regulators will be incentivized to draft broad, vague regulations to offer themselves interpretive flexibility in the future), the *Auer* deference standard is still analogous.

33 Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

34 *Id.* at 1874.

35 Callaway v. Comm'r, 231 F.3d 106, 132 (2d Cir. 2000) ("The Court has instructed that an agency is not 'disqualified from changing its mind' nor 'estopped from changing . . . a mistaken legal interpretation.' At other times, the Court has accorded deference, even to agency interpretations appearing for the first time in an amicus brief, where there 'is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.' A new, and therefore inconsistent position, may yet be 'fair and considered.'" (internal citations omitted).

36 Hagans v. Comm'r of Soc. Sec., 694 F.3d 287, 294 (3d Cir. 2012).

37 *Animal Science Products*, 138 S. Ct. at 1873 (citations omitted).

38 *Vitamin C Antitrust Litigation*, 837 F.3d at 193–94.

39 *Animal Science Products*, 138 S. Ct. at 1873.

40 *Id.* at 1875 ("The correct interpretation of Chinese law is not before this Court, and we take no position on it. But the materials identified by the District Court were at least relevant to the weight the Ministry's submissions should receive and to the question whether Chinese law required the Chinese sellers' conduct. We therefore vacate the judgment of the Court of Appeals and remand the case for renewed consideration consistent with this opinion.").

41 Brief of the Ministry of Commerce of the People's Republic of China as Amicus Curiae Supporting Defendants at 2, Case 13-4791. (2d Cir. Sept. 21, 2018).

42 *Id.* (citing *Animal Science Products*, 138 S. Ct. at 1875).