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Report from Washington

Supreme Court Considers Whether U.S. Courts Are Bound by a Foreign Government's Interpretation of Its Own Law

April 26, 2018

"A hundred ninety-two countries. We have nearly 1,000 federal judges. By and large, the characteristic of a federal judge is he knows very little, if anything, about the law of 192 countries. And so what precisely should we write in this opinion? It can't be no matter what, accept what they say. But, my goodness if you open the door, I mean, how is this to be done?"

- Justice Breyer

Introduction

The Supreme Court heard oral arguments in *Animal Science Products, Inc. v. Hebei Welcome Pharm. Co. Ltd.*, No. 16-1220, on Tuesday, April 24, 2018, to decide whether a court analyzing foreign law under Federal Rule of Civil Procedure 44.1 is required to accept as binding a submission from a foreign government characterizing its own law, an issue on which the circuit courts are split. Currently, the Second and Ninth Circuits follow a "bound to defer" standard, the D.C. and Sixth Circuits consider a foreign government's interpretation as one "relevant material or source" to be considered along with other evidence, and the Fifth, Seventh, Tenth, and Eleventh Circuits each have various tests that give some, but not total, deference to statements by foreign government entities. The resolution of this split could have broad implications for cases involving conflicts between U.S. and foreign law—such as cases involving discovery disputes over documents and data located abroad and antitrust suits involving collective exporting activity.

Background

In 2005, a group of Vitamin C purchasers in the United States brought suit against Hebei Welcome Pharmaceutical Co., a Chinese Vitamin C manufacturer, and other alleged Chinese co-conspirators, alleging that the defendants established an illegal cartel to inflate worldwide prices of Vitamin C in violation of U.S. antitrust laws. The plaintiffs alleged that, since December 2001, the defendants had coordinated with the China Chamber of Commerce of Medicines & Health Products Importers & Exporters to restrict the supply of Vitamin C to create a global shortage. According to plaintiffs, the Chinese suppliers controlled 60% of the worldwide Vitamin C market and accounted for 80% of the Vitamin C exports to the United States. Plaintiffs alleged that defendants used their market position to restrict the supply of

Vitamin C, thereby driving up prices, in violation of Section 1 of the Sherman Act, which condemns as *per se* illegal price fixing agreements.

Defendants moved to dismiss the complaint on the basis that they were required by Chinese law to sell exports at the prices coordinated with and by the Chamber of Commerce, and argued that this should operate as a total defense against plaintiffs' claims. The Chinese Ministry of Commerce ("MOFCOM") supported the defendants' position and filed an amicus brief, arguing that the Chinese government did in fact require price coordination in order to legally export Vitamin C from China. In response, plaintiffs argued that—notwithstanding MOFCOM's submission—the actual government policy gave exporters the option to opt out of these requirements and contended that any coordination was on a voluntary basis.

"We do have the European Convention of what other countries do. And the European Convention on information about foreign law says that the information, given in reply by the country saying this is our law, shall not bind the judicial authority from which the request emanates."

- Justice Ginsburg

The District Court declined to accept MOFCOM's position on Chinese law and denied the motion to dismiss. The parties repeated their arguments at various stages of the case, and following a jury trial defendants were found to be in violation of Section 1 of the Sherman Act and the jury awarded plaintiffs approximately $147 million in damages.

Defendants appealed to the Second Circuit, which held that the District Court abused its discretion by failing to dismiss plaintiffs' complaint at the motion to dismiss stage. The Second Circuit remanded the case with instructions that plaintiffs' claims be dismissed on international comity grounds, explaining 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 . . . a U.S. court is bound to defer to those statements." And where, as in this case, deference is owed to foreign law under applicable principles of comity, the plaintiffs' claims should be dismissed.

In reaching this holding, the Second Circuit adopted the same approach taken by the Ninth Circuit to statements made by foreign governments in U.S. litigation, thereby deepening a circuit split on this issue. In broad strokes, circuit courts have adopted three different approaches to interpreting foreign law based upon the submissions of a foreign government. The first approach, used by the Ninth Circuit and adopted by the Second Circuit, requires that district courts are "bound to defer" to a foreign government's interpretation of its own laws when the foreign government directly participates in the proceeding, whether as a party or as *amicus curiae*. The second approach, used by the D.C. and Sixth Circuits, holds that courts should not defer to the foreign government's court submissions, and instead should treat such submissions as one "relevant material or source" as they make their own interpretations as to the meaning of foreign law. Finally the third approach, used by the Fifth, Seventh, Tenth, and Eleventh Circuits is a more holistic method that considers a

variety of factors when deciding how much weight to afford a foreign government's interpretation of their own laws, but that affords foreign government submissions some deference. These courts neither deem such interpretations as dispositive, nor do they consider them to be just another piece of evidence in answering the question.

On January 12, 2018, the Supreme Court granted purchasers' petition for certiorari. The Court also granted leave for both the U.S. Solicitor General and MOFCOM to participate in oral argument.

Oral Argument Highlights

"Well, what if the entity that submits the brief on behalf of the foreign country does not have the authority under the law of that country to dictate what the law is? What if the entity is like the executive branch of the government of the United States, which does not have the authority to dictate what the law is?"

- Justice Alito

The justices' questions focused primarily on three broad issues: 1) When a foreign government submission to a U.S. court should be given deference, 2) how much deference should be given, and 3) the interplay of deference with the larger concept of international comity. From the questions asked, the justices appear inclined to reject the binding deference rule put forward by Hebei and MOFCOM and relied on by the Second Circuit.

Multiple justices grappled with the question of under what circumstances foreign government submissions should be given deference in a U.S. court. There seemed to be agreement among the justices that only those submissions that could be viewed as binding interpretations of foreign law (and thus creating an irresolvable conflict between that foreign law and U.S. law), should be treated with any real deference by a U.S. judge. The questioning suggests the justices are considering how to create a test that recognizes the potentially diverse range of submissions a foreign government might make in a U.S. legal action. Justice Ginsburg, for example, noted that court submissions in one case could be inconsistent with positions taken by that same foreign government in a separate proceeding. In this case, for example, China previously claimed in proceedings before the World Trade Organization that it was deregulating the Vitamin C market, a position which suggested Chinese Vitamin C producers were *not* required by Chinese law to coordinate on export pricing. Justice Ginsburg questioned the fairness of a rule that would defer to a foreign government submission even when those submissions were contradicted by statements made by that same government elsewhere. Justice Ginsburg also pointed out that precedent on which Hebei relied did not involve "any inconsistency [in the position taken by the foreign government] and here we do have a suggestion of inconsistency."

Illustrative of the concern the justices appeared to have that not all government statements are equal, Justice Alito asked a number of questions about which foreign government entities had the authority to submit official statements, highlighting that both the U.S. government and foreign governments have a variety of different agencies and instrumentalities, and

noting that determining which agency or instrumentality has authority to take an official position is not always clear. During one such exchange, Justice Alito asked how to treat the statement of a governmental entity "that submits the brief on behalf of the country [but] does not have the authority under the law of that country to dictate what the law is?" Calling this type of submission "an opinion," Justice Alito seemed to signal his view that a "binding deference" would be difficult to implement without confidence that all court submissions by foreign governments were entirely reliable.

"Before we send this back to say you shouldn't have used the word[s] 'reasonable interpretation,' you should have used the word[s] 'respectful deference,' what is there, given the brief filed here, that you will use or could use to suggest, or have used . . . that that isn't the law of China?"

- Justice Breyer

The justices also explored how much weight to give to foreign government submissions, assuming the submission is in fact the official position of the foreign government. The justices appeared to be focused on developing a practical test that can be readily and easily applied by trial courts, but that also allows trial courts flexibility to question whether statements made by foreign governments in U.S. courts are official. For example, Justice Breyer asked both sides to come up with specific language that could be used by the Court when instructing lower judges how to weigh foreign government submissions. He focused on three hypothetical positions: first, a judge could defer to all official government submissions as Hebei argued; second, a judge could use an analog to *Chevron* deference where deference would be granted to foreign government submissions as long as they were reasonable; third, a judge could give such submissions respectful consideration and weigh them alongside any other relevant evidence. In all three scenarios, Justice Breyer seemed concerned not just with which approach was the "right" one in terms of showing foreign governments the appropriate amount of deference, but also which standard would be able to be implemented feasibly by lower court judges.

Finally, the justices took a step back to consider how this issue fits into the larger concept of comity and mutual respect between nations on the international stage. Justice Gorsuch asked both sides about what type of deference the U.S. seeks when it is involved in litigation abroad. Additionally, Justice Kagen asked if China's courts used a similar binding deference rule that the counsel for MOFCOM advocated in this case. Multiple justices expressed the concern that adopting a binding deference standard would put the U.S. in a unique position globally—it would make the U.S. the only country that automatically defers to the statements of foreign governments. No other country appears to take that position, and the Solicitor General's office confirmed that the U.S. government does not ask for binding deference in foreign courts, but instead asks for deference only where it would be entitled to deference under U.S. law. The justices' questions signaled that adopting such a strict standard of deference without reciprocation would be an unusual and uncomfortable position.

Implications

While the justices did not expressly reject the binding deference standard adopted by the Second Circuit, the justices' questions seemed to demonstrate that the Court will reject the binding deference standard. That suggests the Court will need to provide more guidance and clarity around when and in what manner U.S. courts must defer to the statements of foreign governments.

Clarity in this area of law is important at the trial court level for situations where there is a potential conflict between U.S. and foreign law. One common situation is in the context of discovery, where foreign data privacy laws often put foreign companies in difficult positions when faced with U.S. subpoenas for documents and data located outside the U.S. The decision in this case could lend clarity to district courts in whether and how to defer to foreign governments when interpreting foreign data privacy laws, leading to more predictability in disputes over the extent of extraterritorial discovery.

The decision could also have broad implications on the application of antitrust law, both in the U.S. and abroad. A decision that limits the effect of submissions by foreign governments could expand the exposure of foreign defendants to liability and damages under the antitrust laws. By contrast, a decision that strongly defers to submissions by foreign governments could potentially lead to the immunization of wide swaths of cartel-like behavior overseas if the defendants in those cases can gain the support of their foreign governments. With respect to U.S. companies, a decision by the court could also affect their ability to seek similar protections in foreign courts. The Webb-Pomerene Act provides a limited antitrust exclusion for companies engaged in export-only activities, and some industries continue to invoke the Webb-Pomerene exemption to coordinate their export activities outside the U.S. A decision by the Supreme Court that fails to give deference to foreign law could result in reciprocal treatment by foreign courts of the Webb-Pomerene exemption, thereby exposing U.S. companies to potential exposure outside the U.S.

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