KIRKLAND **ALERT**

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Supreme Court Cautions that Companies May Not Be Able to Rely on Foreign Governments' Interpretations of its Laws

Introduction

On June 14, 2018, the U.S. Supreme Court issued its opinion in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co Ltd.*, No. 16-1220 — the latest decision addressing the effect of a foreign entity's interpretation of its own law in U.S. federal courts. The Supreme Court held that under the Federal Rules of Civil Procedure, a U.S. court "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."[1] In other words, in the event a company is required to participate in conduct in a foreign jurisdiction that may result in an antitrust violation in the U.S., companies may *not* be able to conclusively rely on the defense that the company was required by a foreign government to participate in such behavior.

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Relevant Background

In this case, a group of U.S.-based purchasers of vitamin C filed a class action lawsuit against four Chinese corporations who manufactured and sold the vitamin in the U.S.[2] The complaint alleged that through their trade association, the Chamber of Commerce and Health Products Importers and Exporters, the four Chinese corporations formed a cartel to fix the price and quantity of Vitamin C exported to the U.S.[3] The U.S. purchasers alleged that this violated § 1 of the Sherman Act, 15 U.S.C. § 1.[4]

At the district court, the Chinese corporations moved to dismiss "on the ground that Chinese law required them to fix the price and quantity of vitamin C exports."[5] In particular, they argued that the case must be dismissed to preserve international comity, and to be consistent with the act of state and foreign sovereign compulsion doctrines.[6] The Ministry of Commerce of the People's Republic filed an *amicus* brief with the district court in support of the Chinese corporations' argument.[7] The ministry explained that it is "the highest administrative authority in China authorized to regulate foreign trade," and that the purported conspiracy in restraint of trade was, in reality, "a regulatory pricing regime mandated by the government of China."[8] In other words, the ministry noted that the defendants' conduct was required by the government of China.

The U.S. purchasers challenged that Chinese law mandated Chinese corporations to fix prices. The U.S. purchasers noted that the ministry had not identified a Chinese law or regulation mandating price coordination amongst the Chinese corporations.[9] Indeed, the trade association announced that the Chinese corporations "were able to reach a self-regulated agreement . . . whereby they would voluntarily control the quantity and price of exports . . . without any government intervention."[10] The U.S. purchasers also put forth expert testimony suggesting that the trade association's policy did not mean that Chinese law mandated price fixing.[11]

The appellate court determined that because the Chinese government required the defendant vitamin manufacturers to participate in the alleged conduct, the vitamin manufacturers should not be held liable in the U.S. for that behavior.

The Proceedings Below

The District Court (the trial court level) denied the Chinese corporations' motion to dismiss.[12] Though the court noted that the ministry's interpretation was "entitled to substantial deference," the court did not regard the ministry's interpretation as "conclusive."[13]

The district court revisited the issue at summary judgment. The Chinese corporations reiterated their argument that "the ministry specifically charged the Chamber [trade association] . . . with the authority and responsibility . . . for regulating, through consultation, the price of vitamin C manufactured for export."[14] The U.S. purchasers presented conflicting testimony, including China's statement to the WTO that it "gave up export administration of . . . vitamin C" in 2002.[15]

Based on this conflict, the District Court held "that Chinese law did not require the seller to fix the price or quantity of vitamin C exports."[16] At trial, the jury agreed, finding that the Chinese corporations were not "actually compelled" to enter into price fixing agreements.[17] Accordingly, the jury awarded the U.S. purchasers $147 million in treble damages and enjoined the Chinese corporations from violating the Sherman Act.[18]

On appeal, the Second Circuit reversed.[19] In so doing, the Court determined that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a [statement] regarding the construction and effect of [the foreign government's] laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements."[20] Therefore, the Second Circuit found the ministry's interpretation "reasonable," and held that "Chinese law required [the Chinese sellers] to engage in activities in China that constituted antitrust violations here in the U.S."[21] In other words, the appellate court determined that because the Chinese government required the defendant vitamin manufacturers to participate in the alleged conduct, the vitamin manufacturers should not be held liable in the U.S. for that behavior.

The Issue Before the Supreme Court

On April 3, 2017, Petitioners Animal Science Products, Inc. filed a petition for writ of certiorari to the Supreme Court. The Supreme Court first referred the case to the Attorney General. But on January 12, 2018, the Supreme Court granted the cert

petition, but limited review to the following question: "Is a federal court determining foreign law under [Federal Rule of Civil Procedure] 44.1 required to treat as conclusive a submission from the foreign government describing its own law?"[22] The Supreme Court heard oral argument on April 24, 2018.

The Chinese Ministry of Commerce also submitted an *amicus* brief in support of the Second Circuit's ruling. The *amicus* brief argued that in the U.S., a foreign sovereign's official interpretation of its law, and offered for use in U.S. litigation, is conclusive. Thus, U.S. courts should give deference to the ministry's interpretation of its own regulations, as it would maintain international comity. The ministry also argued that its position and interpretation remained consistent throughout the litigation, and consistent with interpretations it presented on an international scale, including before the WTO.

Despite these arguments, the Supreme Court unanimously held that a submission from a foreign government does not have conclusive effect.[23] Rather, the Court held that U.S. federal courts "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."[24]

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Determining "the appropriate weight" to give a foreign government's submission "will depend on the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials."[25] But "[r]elevant 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."[26] Based on this new standard, the Supreme Court remanded the case for furthering proceedings.

Conclusion

The Supreme Court's latest decision on the deference to afford a foreign sovereign's interpretation of its own law demonstrates that it is a fact-intensive inquiry based on the unique circumstances of the case. In any event, the Supreme Court rejected the argument that such interpretations need be given conclusive effect. Thus, a foreign sovereign's interpretation of law remains relevant to a defense against antitrust liability, but uncertainty remains as to how a Court may afford "respectful consideration" to the foreign government's submission in future litigation.

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1 *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co Ltd.*, 16-1220 (filed June 14, 2018).

2 *Id.* at 2.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* at 3 (internal quotation marks omitted).

9 *Id.* at 3-4.

10 *Id.* at 4.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 5 (internal quotation marks omitted).

15 *Id.* (internal quotation marks omitted).

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at 6.

21 *Id.*

22 *Id.* at 6.

23 *Id.* at 1.

24 *Id.* at 1.

25 *Id.* at 8-9.

26 *Id.* at 9.

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