***Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 585 U.S. ____ (2018) (Ginsburg, J.).**
Response by Donald C. Clarke
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Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.: Respect but Verify: Foreign Government Statements of Foreign Law Do Not Get Conclusive Deference

In *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*,[1] the Supreme Court, in a brief decision, unanimously reversed a unanimous Second Circuit panel and ruled that when determining foreign law, "[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."[2] Although the ruling may offend the Chinese government, which had argued strenuously that anything but conclusive deference would be disrespectful and would have foreign policy consequences, it is consistent with international practice and very likely the practice of the Chinese government itself.

The case began in 2005 when American buyers of vitamin C sued Chinese sellers (who supplied roughly 80% of the worldwide market), alleging that they had agreed to fix the price and quantity of vitamin C exports to the United States. The price-fixing was allegedly conducted through a cartel facilitated by their trade association, the Chamber of Commerce of Medicines and Health Products Importers and Exporters, all in violation of section 1 of the Sherman Act.[3]

The defendants moved to dismiss under the doctrines of act of state, foreign sovereign compulsion, and international comity, arguing that the cartel was required under Chinese law. China's Ministry of Commerce ("Ministry") submitted an amicus brief supporting all three defenses, asserting that it had mandated the cartel.

There is no question that had the cartel been mandated by the Chinese government, the defendants would not have been liable. But the district court, denying the motion to dismiss, cited evidence that the cartel was voluntary and that the record at that point was "too ambiguous to foreclose further inquiry into the voluntariness of [the Chinese sellers'] actions."[4]

Following a $153 million verdict for the plaintiffs at trial, the defendants appealed to the Second Circuit, which unanimously reversed the 2008 denial of the motion to dismiss. According to the Second Circuit, the district court, for reasons of comity, should have declined to take jurisdiction over the case in the first place. The comity analysis required a determination of whether there was a true conflict between the requirements of U.S. law and the requirements of Chinese law. An agency of the Chinese government—the Ministry—had submitted an amicus brief and some letters stating that there was a conflict. The question then became one of what degree of deference the district court should have shown to the Ministry's statements.[5] If conclusive deference must be shown, then the Ministry's claim that a true conflict existed was enough to establish that it existed, and (in the Second Circuit's view) comity then required the court to decline to exercise jurisdiction.

If less than conclusive deference is required, then a court may decide that it will not simply take a foreign government's word for it that a true conflict exists. This means that the court can then examine the sovereign compulsion defense. That is the position that the district court took when it denied dismissal in 2008.

In their petition for certiorari, the plaintiffs asked the Supreme Court to review three issues, but the Court granted certiorari only with respect to the deference issue, on which there was a circuit split.[6] The Solicitor General, at the Court's invitation, had previously submitted an amicus brief urging the Court to grant certiorari only on the deference issue and to reverse the Second Circuit.

The key question in the deference issue is whether, no matter what the evidence to the contrary, a court should take the word of a foreign government as to what its law requires. Specifically, the Second Circuit held: "[W]hen 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 issue of deference was framed by all sides as that of the relationship between Federal Rule of Civil Procedure ("FRCP") 44.1 and a 1942 Supreme Court case, *United States v. Pink*.[8] FRCP 44.1 provides that, when determining foreign law, a 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."[9] The plaintiffs (as well as the district court and amicus briefs submitted by a number of professors of civil procedure[10]) argued that this means that nothing can be taken as conclusive. That is, the court should inquire into all relevant evidence and do the best it can.

Pink, on the other hand, was cited by the defendants and the Second Circuit as requiring conclusive deference. One argument against *Pink* is to say that it was superseded by FRCP 44.1, but another argument is to say that the Second Circuit vastly overread what *Pink* commands.

Pink actually has very little to say about the degree of deference to be given to a foreign government's interpretation of its own law. It is not really about comity at all; it is about respecting the foreign affairs powers of the executive branch. The Russian government had nationalized the assets of all Russian insurance companies, including one with a branch and assets in the United States. When establishing diplomatic relations with Russia, the United States and Russia agreed that Russia would assign all its claims over Russian property in the United States to the federal government. The question then arose as to whether the original nationalization decree covered assets abroad. The People's Commissariat for Justice of Russia, at the request of the U.S. government, then issued a document stating that it did. The Court spent no time discussing whether it deserved deference. In a mere two sentences, it found the People's Commissariat qualified to interpret Russian law and then pronounced its interpretation conclusive.[11] Almost all of the discussion was about whether New York law and court rulings could take precedence over the deal worked out by the executive branch and the Russian government in the course of establishing diplomatic relations.

Writing for the Court in this case, Justice Ginsburg found FRCP 44.1 determinative. Adopted in 1966, FRCP 44.1 changed foreign law determinations from questions of fact to questions of law, thus freeing courts to use whatever sources they deemed relevant. The Court disposed of *Pink* in two sentences. First, it noted that *Pink* was decided before the adoption of FRCP 44.1, implying that it had thus been superseded. Second, it noted the special circumstances under which *Pink* was decided, including the fact that the executive branch had requested the very interpretation at issue, thus essentially limiting *Pink* to its facts.

The Court then noted that the rule of conclusive deference required the Second Circuit to ignore relevant evidence bearing on the accuracy of the Ministry's statements—for example, the fact that the Ministry had previously stated to the World Trade Organization that it had given up export administration of vitamin C at the end of 2001.[12]

Perhaps most damaging to the position of the defendants, the Chinese government, and the Second Circuit—that international comity and appropriate respect for foreign governments required a standard of

conclusive deference—was the inability of counsel for the Ministry in oral argument to show that *any* country, let alone China, had adopted the standard of deference they were urging on the Court for the United States. As Justice Kagan stated,

> I mean, it seems as though if some country used that rule, you're a great lawyer, you would be able to tell us that some country used that rule. . . . [H]ow can you say that the only thing that shows respect to foreign governments is to do something that we don't know that any other foreign nation does?[13]

In her opinion for the Court, Justice Ginsburg made a similar point: while acknowledging the force of the Second Circuit's view that the United States should do for other nations what it expects them to do for it, she rejected the implicit premise that the United States expects conclusive deference. Quite the contrary, she wrote: "[T]he United States, historically, has not argued that foreign courts are *bound* to accept its characterizations" of U.S. law.[14] She also cited two relevant international treaties, neither of which calls for conclusive deference to a foreign government's statement of its own law.[15]

How much deference should be granted, then? The Court declined to adopt a specific verbal formula, opting instead to identify various factors affecting the weight to be given to a foreign government's statement: "[T]he 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."[16]

Although the Ministry suggested in its amicus brief that anything other than conclusive deference was "profoundly disrespectful" and could "cause an international incident,"[17] these concerns seem exaggerated. As the Court's opinion and an amicus brief pointed out, the standard adopted by the Court in this case—respectful, but not conclusive, deference—is the one prevailing around the world and the one expected by the United States itself. It is also the standard that many U.S. courts have been applying for years, apparently without incident. While the determination of foreign law, especially in a jurisdiction so different from the United States as China, is unquestionably a difficult task, it is one that courts have no alternative but to undertake. FRCP 44.1 instructs courts to find the truth with whatever sources the court deems appropriate; that task cannot be accomplished by willful blindness to all but one source.

A final interesting feature of the case—not addressed by the Court, because not directly relevant to its holding—was the picture of the Chinese legal system implicitly endorsed by the Chinese government. The defendants' expert at the trial stage, Professor Shen Sibao, argued that looking for Chinese law in formal pronouncements was a mistake:

> Many official requirements are also transmitted through communications that may consist of department documents or oral directions, even including telephone calls. It is not the form of communication that creates its binding character, but the source and authority of the party giving the direction. Regardless of form, to the extent that these directions come from people in superior authority they are no less binding and obligatory on subordinates and the companies than any other type of "law."[18]

In other words, all of Chinese law is a set of commands within a hierarchy. There is no process-based Hartian rule of recognition;[19] the rule of recognition is simply, "Is the person giving this order my superior?" This picture of the Chinese legal system is consistent with the quasi-military model espoused by some scholars of Chinese law, but not with the picture of a society governed by the rule of law that China would like to present to the world.

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In addition to his academic work on Chinese law, Professor Clarke founded and maintains Chinalaw (formerly Chinese Law Net), the leading Internet listserv on Chinese law, writes the Chinese Law Prof Blog, is a co-editor of Asian Law Abstracts on the Social Science Research Network, and has often served as an expert witness on matters of Chinese law. Professor Clarke also speaks and reads Japanese and has published translations of Japanese legal scholarship in Law in Japan.

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1. No. 16-1220, slip op. (U.S. June 14, 2018).
2. *Id.* at 1.
3. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)).
4. *In re* Vitamin C Antitrust Litig. (*Animal Sci. Prods., Inc. I*), 584 F. Supp. 2d 546, 559 (E.D.N.Y. 2008), *rev'd sub nom.* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (*Animal Sci. Prods., Inc. II*), 837 F.3d 175 (2d Cir. 2016), *vacated*, (*Animal Sci. Prods, Inc. III*), No. 16-1220, slip op. (U.S. June 14, 2018).
5. It was an abuse of discretion not to "abstain[], on international comity grounds, from asserting jurisdiction because the court erred by concluding that Chinese law did not require Defendants to violate U.S. antitrust law and further erred by not extending adequate deference to the Chinese Government's proffer of the interpretation of its own laws." *Animal Sci. Prods., Inc. II*, 837 F.3d at 182–83.
6. The Second and Ninth Circuits applied a standard of conclusive deference; several other Circuits applied a lower standard.
7. *Animal Sci. Prods., Inc. II*, 837 F.3d at 189. As Justice Ginsburg remarked, the language about a "sworn evidentiary proffer" was odd, because the Ministry had made no such proffer; in fact, it refused to let any of its officials testify. *See Animal Sci. Prods., Inc. III*, slip op. at 10 n.5. It made its views known through amicus briefs and letters. It is doubly odd in view of the Second Circuit's effort to distinguish *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142 (2d Cir. 2008), an earlier case in which the Second Circuit had declined to credit an affidavit from the Chilean government as to effect of Chilean law. The Second Circuit stated that "because the Chilean Government did not appear before the court in that case, either as a party or as an *amicus*, the level of deference the court afforded the Chilean affidavit does not guide our application here." *Animal Sci. Prods., Inc. II*, 837 F.3d at 188. An affidavit would seem to be precisely the kind of "sworn evidentiary proffer" that the Second Circuit thought worthy of conclusive deference.
8. 315 U.S. 203 (1942).
9. FED. R. CIV. P. 44.1.
10. *See* Brief of Professors of Conflict of Laws and Civil Procedure as Amici Curiae in Support of Petitioners, Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., No. 16-1220, slip op. (U.S. June 14, 2018); Brief of Amici Curiae Donald Clarke and Nicholas Calcina Howson in Support of Petitioners, Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., No. 16-1220, slip op. (U.S. June 14, 2018).
11. "The referee in the *Moscow* case found, and the evidence supported his finding, that the Commissariat for Justice has power to interpret existing Russian law. That being true, this official declaration is conclusive so far as the intended extraterritorial effect of the Russian decree is concerned." *Pink*, 315 U.S at 220.

12. *See Animal Sci. Prods., Inc. III*, slip op. at 10. For more detail on the Ministry's inconsistent statements, see Brief of Amici Curiae Donald Clarke and Nicholas Calcina Howson in Support of Petitioners, *supra* note 10. Ironically, it is entirely possible that the Ministry's statements in this case were truer than their statements to the World Trade Organization, but the inconsistency opened the door to a less deferential standard.
13. Transcript of Oral Argument at 49, 54, Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., No. 16-1220, slip op. (U.S. June 14, 2018). Justice Kagan's line of questioning followed the points made in an amicus brief submitted by a number of professors of civil procedure and conflicts of laws. That brief cited, among other things, a 2017 study showing that international practice, in fact, was to grant some but not conclusive deference. *See* Brief of Professors of Conflict of Laws and Civil Procedure as Amici Curiae in Support of Petitioners, *supra* note 10, at 19–20.
14. *Animal Sci. Prods., Inc. III*, slip op. at 11.
15. See *id.* at 12; Brief of Professors of Conflict of Laws and Civil Procedure as Amici Curiae in Support of Petitioners *supra* note 10, at 23.
16. *Animal Sci. Prods., Inc. III*, slip op. at 9.
17. Brief of Amicus Curiae Ministry of Commerce of the People's Republic of China in Support of Respondents at 5, 22, Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., No. 16-1220, slip op. (U.S. June 14, 2018).
18. Report of Professor Shen Sibao, Feb. 19, 2009, Joint Appendix at 141, Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., No. 16-1220, slip op. (U.S. June 14, 2018), 2009 WL 5133512.
19. *See* Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist?)*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 235, 236-39 (Matthew Adler & Kenneth Einer Kimma eds. 2009).

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