

2020

Introductory Note to Animal Science Products Inc. v. Hebei Welcome Pharmaceutical Co. Ltd. (United States Supreme Court)

Christopher A. Whytock
University of California, Irvine School of Law, cwhytock@law.uci.edu

Follow this and additional works at: https://scholarship.law.uci.edu/faculty_scholarship



Part of the [Civil Procedure Commons](#), [Conflict of Laws Commons](#), and the [International Law Commons](#)

Recommended Citation

Christopher A. Whytock, *Introductory Note to Animal Science Products Inc. v. Hebei Welcome Pharmaceutical Co. Ltd. (United States Supreme Court)*, 59 *I.L.M.* 1 (2020).

This Article is brought to you for free and open access by UCI Law Scholarly Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UCI Law Scholarly Commons.



SCHOOL OF LAW

UNIVERSITY of CALIFORNIA • IRVINE

Legal Studies Research Paper Series No. 2021-14

*Introductory Note to Animal Science Products Inc. v.
Hebei Welcome Pharmaceutical Co. Ltd. (United States
Supreme Court)*

Christopher Whytock

cwhytock@law.uci.edu

University of California, Irvine ~ School of Law

The paper can be downloaded free of charge from SSRN at:

INTRODUCTORY NOTE TO ANIMAL SCIENCE PRODUCTS, INC. v. HEBEI WELCOME
PHARMACEUTICAL CO. LTD. (UNITED STATES SUPREME COURT)

BY CHRISTOPHER A. WHYTOCK*

AUTHOR DRAFT: October 18, 2019
Please Cite to Final Published Version

59 INTERNATIONAL LEGAL MATERIALS 1 (2020)
(DOI:10.1017/ilm.2020.3)

The Issue Presented

Domestic courts frequently apply foreign law. For example, the forum’s choice-of-law rules may require a court to apply foreign law, or a party may expressly base a claim or defense on foreign law. Private international law (or “conflict of laws”) provides principles governing many aspects of how courts should identify and interpret foreign law.¹

In the U.S. federal courts, the applicable rule is Rule 44.1 of the Federal Rules of Civil Procedure, which provides, in relevant part: “In determining foreign law, the 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. The court’s determination must be treated as a ruling on a question of law.”²

However, those principles do not provide clear guidance on how heavily a court should weigh a foreign government’s own statements about the meaning of its law.³ This was the issue presented in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*⁴

* Christopher A. Whytock is Professor of Law and Political Science at the UC Irvine School of Law. He is an associate reporter for the American Law Institute’s Restatement (Third) of Conflict of Laws and a member of the U.S. State Department’s Advisory Committee on Private International Law. The author was one of the lead co-authors of an amicus brief filed in the case. See Brief as Amici Curiae in Support of Petitioners, *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 138 S.Ct. 1865 (2018) (No. 16-1220), 2018 WL 1202845 [hereinafter Brief]. This Introductory Note expresses the author’s personal views and should not be taken to represent the views of the American Law Institute. This is the Author’s Original Draft.

¹ See generally PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS §§ 12.15-12.19, at 550-561 (6th ed. 2018); TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? (Yuko Nishitani ed., 2017); Maarit Jäntera-Jareborg, Foreign Law in National Courts—A Comparative Perspective, 304 *Recueil des cours* 281 (2003).

² F.R.C.P. 44.1. See generally Arthur R. Miller, *Federal Rule 44.1 and the “Fact” Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613 (1967).

³ See *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.* 138 S.Ct. 1865, 1873 (“Rule 44.1 does not address the weight a federal court determining foreign law should give to the views presented by the foreign government. Nor does any other rule of statute.”).

⁴ See *id.* at 1869 (2018) (“When foreign law is relevant to a case instituted in a federal court, and the foreign government whose law is in contention submits an official statement on the meaning and interpretation of its domestic law, may the federal court look beyond that official statement?”). For a prior discussion of this case, see Kristen E. Eichensehr, *International Decision*, 113 AM. J. INT’L L. 116 (2019).

The *Animal Science* Litigation

In *Animal Science*, petitioners alleged that respondents conspired to fix the price of vitamin C exports to the United States, in violation of U.S. antitrust law. Respondents raised various defenses based on the assertion that their price-fixing was required by Chinese law.⁵ In support of the respondents, the Ministry of Commerce of the People's Republic of China filed statements asserting that the alleged conspiracy was instead "a regulatory pricing regime mandated by the government of China."⁶ The petitioners challenged this position, noting that the Ministry identified no written law expressly requiring respondents to fix vitamin C export prices, and that China had previously made a statement to the World Trade Organization (WTO) that it "gave up export administration of...vitamin C" in 2002.⁷

In rejecting respondents' argument and holding that Chinese law did not require them to fix prices, the District Court provided one possible answer to the question of foreign government statements regarding the meaning of foreign law: such statements are "entitled to substantial deference, but will not be taken as conclusive evidence...."⁸

The U.S. Court of Appeals for the Second Circuit reversed the District Court's decision, offering an alternative rule: "[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."⁹

An amicus brief filed with the Supreme Court proposed a third approach: "U.S. courts should give respectful consideration to a foreign government's statements about its law. But as a matter of law, a foreign government's statements cannot be binding on U.S. courts. Instead, U.S. courts should accurately and independently determine the meaning of foreign law taking into account not only the foreign government's own statements, but also other relevant information about that law."¹⁰

The Supreme Court's Decision

The Supreme Court vacated the Second Circuit's decision, unanimously holding that "[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."¹¹

⁵ These included defenses based on the act of state doctrine, the foreign sovereign compulsion doctrine, and the principles of international comity. *Id.* at 1870.

⁶ 138 S.Ct. at 1870.

⁷ *Id.* at 1871.

⁸ *In re Vitamin C Antitrust Litigation*, 784 F.Supp.2d 546, 557 (E.D.N.Y. 2008) (denying respondents' motion to dismiss). The District Court later denied respondents' motion for summary judgment, "declin[ing] to defer to the Chinese government's statements to the court regarding Chinese law" and holding that "[t]he Chinese law relied upon by [respondents] did not compel their illegal conduct." 810 F.Supp.2d 522, 525 (E.D.N.Y. 2011).

⁹ *In re Vitamin C Antitrust Litigation*, 837 F.3d 175, 189 (2d. Cir. 2016).

¹⁰ Brief, *supra* note *, at 36-39. The author of this Introductory Note was one of the lead co-authors of this brief, along with Zachary D. Clopton and Neil A.F. Popović.

¹¹ 138 S.Ct. at 1869. The Court noted that "[t]he correct interpretation of Chinese law" was not before it and that it took no position on that question. *Id.* at 1875.

What, then, does it mean to give “respectful consideration” to foreign government statements? The Supreme Court affirmed that “a federal court should carefully consider a foreign state’s views about the meaning of its own laws.”¹² However, it emphasized that “the appropriate weight in each case will depend upon the circumstances,” and it explained that “[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.”¹³ The Court also identified warning signs for courts to be alert to, noting that “[w]hen a foreign government makes conflicting statements...or...offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government’s submission.”¹⁴

Assessment and Implications

The Supreme Court’s approach is a sensible one. Unlike the Second Circuit’s “bound to defer” rule, the “respectful consideration” standard does not prevent U.S. federal courts from “consider[ing] any relevant material or source” when determining foreign law, as Rule 44.1 expressly authorizes them to do.¹⁵ Respectful consideration is also consistent with the principle of accuracy in the determination of foreign law, which implies that courts must consider information about foreign law based on how reliable and persuasive the information is,¹⁶ and with the principle that U.S. courts should determine law—including foreign law—independently.¹⁷

The “respectful consideration” standard is also consistent with the principal international treaties on the interpretation of foreign law:¹⁸ the European Convention on Information on Foreign Law¹⁹ and the Inter-American Convention on Proof of and Information on Foreign Law.²⁰ Both treaties allow a court to request information about foreign law from a designated foreign government official. But even when there is a formal request and foreign government reply, the reply is not binding on the court.²¹ Thus, the U.S. Supreme Court’s *Animal Science* opinion may be informative for the courts of other countries when ascertaining the content and meaning of foreign law.

Although it rejected the Second Circuit’s bound-to-defer rule, the Supreme Court’s opinion does not imply that statements by foreign governments about foreign law are unimportant. To the

¹² Id. at 1873.

¹³ Id.

¹⁴ Id.

¹⁵ Id.; Brief, supra note *, at 5-10.

¹⁶ Id. at 11-16.

¹⁷ Id. at 16-18.

¹⁸ See 138 S.Ct. 1875; Brief, supra note *, at 23-25.

¹⁹ European Convention on Information on Foreign Law, June 7, 1968, 720 U.N.T.S. 154.

²⁰ Inter-American Convention on Proof of and Information on Foreign Law, May 8, 1979, 1439 U.N.T.S. 111.

²¹ See European Convention, art. 8 (“The information given in the reply shall not bind the judicial authority from which the request emanated.”); Inter-American Convention, art. 6 (“[Parties] shall not be required to apply the law, or cause it to be applied, in accordance with the content of the reply received.”).

contrary, one would expect that courts applying the respectful consideration standard will in many cases rely heavily on such statements.²² Ordinarily, for example, a U.S. court applying the respectful consideration standard would likely follow an independent foreign court's authoritative interpretation of its own law in an unrelated case. Courts faced with issues of foreign law should welcome—and in some cases actively seek—information from a foreign state about its law.²³ The contribution of the *Animal Science* decision is not to diminish the importance of foreign government statements about foreign law, but rather to clarify that a court is not required to treat those statements as conclusive and to provide factors to consider when determining how much weight to give to those statements.

²² Cf. 138 S.Ct. at 1875 (referring favorably to principle that “a government’s expressed view of its own law is ordinarily entitled to substantial weight but not conclusive weight”).

²³ Brief, *supra* note *, at 37.