Penn State Journal of Law & International Affairs

Volume 10 | Issue 1

February 2022

NOT SO RESPECTFUL CONSIDERATION: THE U.S. SUPREME COURT'S DEFERENCE OR LACK THEREOF TO FOREIGN GOVERNMENT STATEMENTS OF LAW

Cindy G. Buys
Southern Illinois University of Law

Follow this and additional works at: https://elibrary.law.psu.edu/jlia

 Part of the International and Area Studies Commons, International Law Commons, International Trade Law Commons, and the Law and Politics Commons

ISSN: 2168-7951

Recommended Citation
Cindy G. Buys, *NOT SO RESPECTFUL CONSIDERATION: THE U.S. SUPREME COURT'S DEFERENCE OR LACK THEREOF TO FOREIGN GOVERNMENT STATEMENTS OF LAW*, 10 PENN. ST. J.L. & INT'L AFF. 50 (). Available at: https://elibrary.law.psu.edu/jlia/vol10/iss1/5

The Penn State Journal of Law & International Affairs is a joint publication of Penn State's School of Law and School of International Affairs.

Penn State
Journal of Law & International Affairs

2021 VOLUME 10 NO. 1

NOT SO RESPECTFUL CONSIDERATION: THE U.S. SUPREME COURT'S DEFERENCE OR LACK THEREOF TO FOREIGN GOVERNMENT STATEMENTS OF LAW

By: Cindy G. Buys[1]

The amount of deference due foreign governments' statements regarding the meaning of foreign law has long plagued U.S. courts. Courts have applied a variety of approaches in answering this question, including reliance on doctrines of international comity, respectful consideration, and Rule 44.1 of the Federal Rules of Civil Procedure. The U.S. Supreme Court recently attempted to provide additional guidance to lower courts and litigants in Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., Ltd., where it created a new, five-factor test. However, application of this new test is likely to generate continued uncertainty and inconsistency in this area of law and could potentially lead to negative foreign policy consequences. This article seeks to delineate the different scenarios in which this issue tends to arise and to suggest a more consistent approach to deciding these types of issues in the future that will be less likely to interfere with U.S. foreign relations.

[1] Professor of Law and Director of International Law Programs at Southern Illinois University School of Law.

I. INTRODUCTION

Questions of how much deference to accord foreign governments' statements regarding the meaning of foreign law have plagued U.S. courts for decades. These courts have applied a variety of approaches in determining whether to follow the guidance of a foreign court or governmental agency or official, or whether to independently analyze and interpret the foreign law at issue. U.S. courts have relied on doctrines of comity, respectful consideration, and Rule 44.1 of the Federal Rules of Civil Procedure in addressing this conundrum. These varying approaches have created significant uncertainty and inconsistency in this area of law and potentially could lead to negative foreign policy consequences.

The amount of deference due a foreign government's interpretation of its own law was the key issue in the recent U.S. Supreme Court case, *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., Ltd.*[2] There, the Supreme Court refused to defer to a Chinese government statement regarding the meaning of Chinese law.[3] While the Court stated that the Chinese government's interpretation was entitled to "respectful consideration," U.S. courts are not bound by the foreign government's interpretation, especially where the foreign government has offered different interpretations of the same law in different contexts.[4] Instead, the Supreme Court created

---

[2] Animal Sci. Prods. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018) (hereinafter *Animal Science*).

[3] *Animal Science*, 138 S. Ct. at 1869.

[4] *Id.*

a multi-factor test to be applied to the facts to determine whether and how much deference is due the foreign government.[5]

Traditionally, U.S. courts use the doctrine of international comity when addressing issues of foreign law. In fact, the question presented to the Supreme Court on *certiorari* in *Animal Science* was framed in terms of international comity.[6] However, the Supreme Court reframed the issue and did not discuss the doctrine of international comity or its rationale. Instead, the Court framed the issue as one of providing "respectful consideration" to the representations of a foreign government.[7] In doing so, the Court did not define what it means by "respectful consideration" or whether and how it may be different from the doctrine of international comity. It has not fully grappled with the different contexts in which these issues may arise, which may help provide guidance for a potential resolution. Its new, fact-specific, multi-factor test is likely to lead to continued inconsistency, and thus uncertainty, in this area of law. It is also likely to harm U.S. foreign relations by not according sufficient weight to a sovereign foreign government's interpretation of its own law, thereby potentially causing offense. If the tables were turned, it is likely that the U.S. courts and government would be offended if a foreign court were to reject an official U.S. legal position and impose its own understanding of the meaning of U.S. law. In addition, the Supreme Court's new test may encourage foreign courts to ignore U.S. government pronouncements of its own law. This article seeks to delineate the different scenarios in which the issue of the amount of deference due foreign government interpretations of foreign law tends to arise and to use this review of past cases to suggest a more consistent

---

5 *Id.*

6 The Supreme Court accepted the following question presented on *certiorari*: ("Whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law (as held by the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits), or whether a court is 'bound to defer' to a foreign government's legal statement, as a matter of international comity, whenever the foreign government appears before the court (as held by the opinion below in accord with the Ninth Circuit).") Petition for Writ of Certiorari, Animal Sci. Prods. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018) (No. 16-1220).

7 *Animal Science*, 138 S. Ct. at 1869.

approach to deciding these types of issues in the future that will be less likely to interfere with U.S. foreign relations.

II. ANIMAL SCIENCE PRODUCTS, INC. V. HEBEI WELCOME PHARMACEUTICAL CO., LTD.

Animal Science is just one in a long line of cases in which U.S. courts have struggled with the issue of how much deference is due to foreign governments' interpretations of foreign law.[8] However, because it is the most recent Supreme Court case addressing the issue of the appropriate deference to foreign governments' statements of foreign law, and because the Supreme Court gave its most detailed discussion of the issue in *Animal Science*, it makes sense to start with an understanding of that case.

Animal Science involved a complaint of price-fixing by Chinese manufacturers and exporters of vitamin C allegedly in violation of U.S. antitrust laws.[9] In their defense, the Chinese defendants claimed that Chinese law required them to fix the prices and quantity of vitamin C exports.[10] The Chinese Ministry of Commerce submitted an amicus brief in support of the Chinese sellers in which it stated that the offending behavior resulted from "a regulatory pricing regime mandated by the government of China."[11] The U.S. plaintiffs disputed this claim, and provided some contrary evidence, including a statement by the Chinese government to the World Trade Organization (WTO) in which the Chinese government represented to the WTO that it "gave up export administration of . . . vitamin C" in 2002.[12]

After hearing the evidence, a jury returned a verdict in favor of the U.S. plaintiffs, finding that the Chinese sellers were not "actually compelled" to engage in price fixing by Chinese law.[13] Accordingly, the U.S. District Court for the Eastern District of New York entered a judgment against the Chinese sellers in the amount of $147 million in

---

8 *See infra* Part III.C.3.

9 *Id.* at 1870.

10 *Id.*

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

12 *Id.* at 1871.

13 *Id.*

treble damages and enjoined the Chinese sellers from further violations of U.S. antitrust law.[14] The Chinese defendants appealed to the U.S. Court of Appeals for the Second Circuit, which reversed the District Court.[15] While acknowledging competing authority on the issue, the Second Circuit held that a U.S. court is bound to defer to a foreign government's statements regarding the construction and effect of its own laws and regulations, as long as such statements are reasonable.[16]

On appeal, the U.S. Supreme Court reversed the Second Circuit, holding that the circuit court erred in concluding that it was bound to defer to the Chinese Ministry of Commerce's statements.[17] Determinations of foreign law are governed by Federal Rule of Civil Procedure (FRCP) 44.1, which treats them as questions of law.[18] Under Rule 44.1, courts may consider any relevant material or source.[19] However, as the Supreme Court acknowledged, Rule 44.1 does not address the *weight* a federal court determining foreign law should give to the views presented by a foreign government.[20] Nor does any other rule or statute. In the spirit of "international comity," a federal court should carefully consider a foreign state's views about the meaning of its own laws.[21]

In light of the lack of statutory guidance, the Supreme Court stated that in determining foreign law under FRCP 44.1, a U.S. "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."[22] The amount of deference due the foreign government's statement(s) will depend on the circumstances.[23] The Supreme Court then proffered a laundry list of factors to consider when evaluating a foreign government's view of its own law, including: "the statement's clarity, thoroughness, and support; its context and

---

14 *Id.*
15 *Animal Science,* 138 S. Ct. at 1872.
16 *Id.*
17 *Id.* at 1874.
18 *Id.* at 1873.
19 *Id.*
20 *Id.* at 1868.
21 *Id.*
22 *Animal Science,* 138 S. Ct. at 1869 (emphasis added).
23 *Id.*

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."[24] The Supreme Court noted that when a foreign government makes conflicting statements or offers its interpretation of its law in the context of litigation, U.S. courts may need to exercise more caution in evaluating the foreign government's submission.[25]

In applying this guidance in *Animal Science*, the Supreme Court decided that the Chinese Ministry's statements were not entitled to deference because they were offered for the purposes of litigation and the government had offered a prior inconsistent interpretation in another context.[26] The Supreme Court distinguished prior cases in which more deference was given to statements of foreign governments because in those cases, there was no inconsistency in the foreign government's prior statements.[27] The Court stated that its decision was consistent with international practice as reflected in two international treaties (to which the United States is not a party): the European Convention on Information on Foreign Law and the Inter-American Convention on Proof of and Information on Foreign Law, both of which treat information provided by foreign governments as nonbinding.[28] The Supreme Court ultimately vacated the judgment of the Court of Appeals and remanded the case for reconsideration in accordance with its opinion.[29]

The Supreme Court's ruling in *Animal Science* that U.S. courts are "not bound to accord conclusive effect to foreign government's statements" is not particularly controversial standing alone.[30] One can easily imagine circumstances in which an absolute rule in favor of blind deference could lead to undesirable results. Just as federal circuit court splits regularly exist in U.S. law, differing interpretations are followed by different courts or executive branch officials of foreign

---

24 *Id.*
25 *Id.* at 1873.
26 *Id.* at 1874–75.
27 *Animal Science,* 138 S. Ct. at 1874.
28 *Id.* at 1875.
29 *Id.*
30 *Id.* at 1869.

governments and have not yet been resolved internally. In such situations, the proper interpretation of the foreign law would not be settled and would not be entitled to deference. However, the Supreme Court's decision is bound to lead to further confusion where it falls short in four critical aspects: (1) failure to create a presumption in favor of an interpretation proffered by an appropriate foreign-government official regarding its own law; (2) failure to define "respectful consideration"; (3) failure to explain how "respectful consideration" may differ from international comity; and (4) omission of 'weight' or 'hierarchy' from the new multi-factor test. This article reviews how federal courts have addressed this issue in the past and suggests a different approach to bring further clarity and certainty to this area of law.

III. DIFFERENT APPROACHES TO DETERMINING FOREIGN LAW

As evident from the Court's decision in *Animal Science*, there are at least three different rules or tests courts have applied in the past to assist in determining how much weight to give statements of foreign law by foreign governments: (1) Federal Rule of Civil Procedure 44.1; (2) international comity; and (3) respectful consideration. This section describes each of these approaches and provides examples of their past usage to identify common themes and to determine the best approach to future cases.

A. Federal Rule of Civil Procedure 44.1: Determining Foreign Law

Federal Rule of Civil Procedure 44.1 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.[31]

[31] FED. R. CIV. P. 44.1.

Rule 44.1, adopted in 1966, represented a change from earlier common law practice, which treated questions of foreign law as questions of fact and required such questions to be pleaded and proven in accordance with the rules of evidence.[32] By contrast, under Rule 44.1, courts may conduct their own research and may consider "any relevant material or source" in determining the meaning of foreign law.[33]

The Advisory Committee Notes from 1966 state, "Rule 44.1 is added by amendment to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country."[34] The Advisory Committee Notes further state that "the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties."[35]

In applying Rule 44.1 to the Chinese government's interpretation of its law on behalf of the respondents in *Animal Science*, the Supreme Court noted that Rule 44.1 does not explain how much weight to give to the views of a foreign government.[36] Thus, Rule 44.1 is a starting point, but not an ending point for this analysis. In addressing this issue, the Supreme Court in *Animal Science* held that a U.S. "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."[37] Modeling a spirit of flexibility similar to Rule 44.1, the Supreme Court created the multi-factor test described above to determine the weight to be given to a foreign government's statement regarding the meaning of its own law.[38]

---

32 *Animal Science*, 138 S. Ct. at 1872–73.

33 FED. R. CIV. P. 44.1.

34 *See* FED. R. CIV. P. 44.1 advisory committee's note to 1966 addition.

35 *Id.*

36 *Animal Science*, 138 S. Ct. at 1873.

37 *Id.* at 1869.

38 *Id.* at 1873–74.

B. International Comity

A second approach U.S. courts have long applied in determining whether to recognize and give effect to judgments of foreign courts is international comity.[39] As discussed below, there are varying definitions of comity, but many of these definitions include use of the words "respect" and "consideration," suggesting that international comity may be quite similar to the doctrine of "respectful consideration."[40] However, a review of the case law indicates that U.S. courts use the doctrine of international comity most frequently to give *res judicata* effect to foreign judgments in U.S. courts, rather than to give effect to interpretations of foreign law by foreign governments. Thus, there may be a subtle, but important difference between the two doctrines.

Consistent with the most common usage of international comity, *Black's Law Dictionary* limits the concept of comity to "respect [for] the judicial decisions of another state."[41] However, other law-related sources define the concept of comity more broadly to include respect for other pronouncements by foreign governments in addition to court decisions. For example, the *Oxford English Dictionary* defines comity as "[t]he courteous and friendly understanding, by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and interests."[42] Similarly, the Legal Information Institute at Cornell Law School defines comity as "[t]he legal principle that political entities (such as states, nations, or courts from different jurisdictions) will mutually recognize each other's legislative, executive, and judicial acts. The underlying notion is that

---

[39] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 30 (2d ed. 1841); Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

[40] In fact, one way to view the doctrine of respectful consideration is as a subset of cases involving international comity.

[41] *Comity*, THE LAW DICTIONARY.COM, https://thelawdictionary.org/judicial-comity/ (last visited Nov. 22, 2021).

[42] *Comity of nations*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/36943?redirectedFrom=comity#eid (last visited Nov. 22, 2021).

different jurisdictions will reciprocate each other's judgments out of deference, mutuality, and respect."[43]

One of the most cited statements on comity in U.S. law is the Supreme Court's description of the doctrine in *Hylton v. Guyot* from 1895. There the Court stated,

> Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its law.[44]

International comity serves both public and private purposes.[45] It promotes friendly relations among nations by showing respect for the acts of co-equal sovereign governments, in part, to have that respect returned in equal measure.[46] It also serves to bring an end to litigation, thereby conserving judicial resources when used to give *res judicata* effect to a foreign judgment.[47] Moreover, it facilitates

---

[43] *Comity*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/comity
(last visited Nov. 22, 2021).

[44] Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) (This statement has been subject to much academic criticism as being "both incomplete and ambiguous"); *see, e.g.,* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2072, 2075 (2015) (noting it is ambiguous because it does not clarify whether and to what extent U.S. courts are bound by the doctrine); *see also* Michael D. Ramsey, *Escaping "International Comity*," 83 IOWA L. REV. 893 (1998) (The statement is incomplete because it does not fully encompass how the doctrine has been applied by U.S courts); *Comity*, *supra,* note 43.

[45] Dodge, *supra* note 44, at 2095.

[46] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 32–35 (2d. ed. 1841) ("The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.").

[47] *Restatement (Second) Conflict of Laws* § 98 cmt. b (Am. L. Inst. 1971).

international commerce by giving parties to an international business transaction some assurance that their contracts will be enforceable in multiple jurisdictions.[48]

Professor Michael Ramsey argues that there are two different strands of international comity involving decisions of foreign courts: (1) whether to give *res judicata* effect to a foreign judgment, and (2) whether to use the foreign judgment as proof of foreign law.[49] Professor Ramsey does not use the phrase international comity for either one because he believes it leads to confusion and uncertainty.[50] Regardless, a review of the case law shows that courts use the concept of international comity much more frequently to refer to the recognition of foreign judgments rather than to refer to giving evidentiary weight to interpretations of foreign law by foreign government officials.[51]

In *Animal Science*, the Supreme Court gave a nod to the concept of comity when it stated, "[i]n the spirit of 'international comity,' a federal court should carefully consider a foreign state's views about the meaning of its own laws."[52] However, it did not further discuss the principle of international comity or cases decided pursuant to that principle. Instead, its holding referred to the concept of "respectful consideration."[53] In light of the fact that U.S. courts more commonly use the concept of international comity to decide whether to give *res judicata* effect to decisions by foreign courts, it may be that the U.S. Supreme Court has developed the doctrine of "respectful

---

[48] Ulrich Huber, *De Conflictu Legum*, in SELECTED ARTICLES ON THE CONFLICT OF LAWS 164-65 (Ernest G. Lorenzen ed., 1947)); *see also* Dodge, *supra* note 44, at 2085.

[49] Ramsey, *supra* note 44, at 906 (The proof of foreign law strand of comity appears most similar to the "respectful consideration" doctrine).

[50] *Id.* at 893, 931 (Professor Ramsey briefly discusses "enforcement of foreign law," but that seems to occur when the entire lawsuit rests on the application of foreign law as opposed to the application of U.S. law with one element of foreign law at issue. The article focuses instead on a conflicts of laws analysis regarding whether U.S. or foreign law should be used to resolve the dispute).

[51] *See, e.g., Restatement (Second) Conflict of Laws* § 98 (Am. L. Inst. 1971) and cases cited therein.

[52] Animal Science, 138 S. Ct. at 1873 (internal citation omitted).

[53] *Id.* at 1869.

consideration" to refer to the "proof of foreign law" issue, i.e., the weight to be given to an official pronouncement by a foreign government regarding the meaning of its own law.

Following the Supreme Court's decision in *Animal Science*, a lower federal court discussed different types of international comity in *JYCC v. Doe Run Resources Corp.*[54] There, the U.S. district court had to decide whether a case against a U.S. corporation, involving injuries to Peruvian children allegedly suffered as a result of exposure to toxic lead emissions from a smelter operated by a Peruvian subsidiary of the U.S. corporation, should be heard in the United States or Peru.[55] The U.S. corporation moved to dismiss the U.S. case on the basis of international comity.[56] The district court drew a distinction between prescriptive, prospective, and retrospective comity.[57] The court stated that prescriptive comity is afforded to lawmakers and legislators and serves as a guide to statutory interpretation where the issues to be resolved are entangled in international relations.[58] Prescriptive comity was not at issue in *JYCC* because neither the legislative authority of Peru nor the United States was at issue.[59]

The court described prospective adjudicative comity as a form of abstention similar to the *forum non conveniens* doctrine.[60] It takes into account the interests of the foreign government, the U.S. government, and the international community in seeing the dispute resolved.[61] In *JYCC*, the parties submitted conflicting letters purporting to reflect the views of the Peruvian government as to whether the litigation should proceed in the U.S. court.[62] These letters were from a Peruvian Minister of Economy and Finance and two Peruvian Congressmen and presented contradictory positions.[63] Applying the factors identified by

---

54 JYCC v. Doe Run Resources Corp., 403 F.Supp.3d 737 (E.D. Mo 2019).

55 *Id.*

56 *Id.* at 743.

57 *Id.* at 747–48. For a discussion of these different types of comity, *see also* Dodge, *supra* note 44, at 2075.

58 JYCC, 403 F.Supp.3d at 747.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* at 748.

63 *Id.*

the Supreme Court in *Animal Science*, the district court determined that the letters from the government officials were not persuasive as to Peru's interest in the case because they were conflicting, prepared by the opposing parties for purposes of the litigation, and did not represent the official position of the Peruvian government.[64] Ultimately, the U.S. District Court determined that international comity did not warrant dismissal of the case.[65]

International comity has proved an amorphous concept that has been used by judges and scholars to assist in resolving many different legal problems including recognition of foreign judgments, conflicts of laws, acts of state, assistance to foreign courts, *forum non conveniens*, abstention, and more.[66] Because international comity has already been stretched in so many directions, it may make sense to adopt a separate doctrine, such as respectful consideration, to separate questions of proof of foreign law from recognition of foreign judgments and other uses of international comity. However, for the reasons set forth below, the doctrine of respectful consideration itself requires more development and clarification.

Before leaving the discussion of international comity, it should be noted that there is a distinction between giving deference to interpretations of foreign law offered by foreign courts as compared to interpretations of international law provided by international courts and tribunals, such as the International Court of Justice. International courts and tribunals are not part of co-equal sovereign states. Rather, they are commonly formed by a group of sovereign States coming together and agreeing to create an international body to adjudicate international disputes, usually by treaty. International comity is based on mutual respect between co-equal sovereign government entities. Because international courts and other tribunals are not part of these co-equal sovereign governments, the basis for according respect or

---

[64] *Id.* at 749.

[65] *Id.* As discussed in more detail below, cases such as *JYCC* that involve competing interpretations of foreign law where the official and final position of the foreign government is not clearly established are examples of a situation where less deference is owed to the statements by foreign officials.

[66] Professor Dodge sets forth the many different uses of international comity in a chart in his article, *International Comity*. *See* Dodge, *supra* note 44, at 2079.

deference to interpretive decisions of international courts and tribunals must rest on a different basis. As discussed below, "respectful consideration" still may be appropriately used for such decisions because these international courts and tribunals are expressly given authority by the sovereign states creating them to provide authoritative treaty interpretations.

C. "Respectful Consideration"

One reason that attorneys and judges have long struggled with the meaning of "respectful consideration," and the appropriate weight to accord foreign views regarding the interpretation of foreign law, is that U.S. courts have not been careful and consistent in categorizing the international or foreign entities that made the statement in question to help determine the amount of deference due. In general, these cases fall into three broad categories: (1) decisions by international courts and tribunals; (2) decisions by foreign courts; and (3) statements by foreign executive or legislative branch officials. Each is discussed in turn below.

1. Decisions by International Courts and Tribunals

In the international context, the U.S. Supreme Court has most prominently used the phrase "respectful consideration" in connection with decisions by the International Court of Justice (ICJ). For example, in a series of cases brought at the ICJ against the United States for its failure to provide consular notification to foreign defendants as required by the Vienna Convention on Consular Relations (VCCR), all of the justices of the U.S. Supreme Court agreed the ICJ's interpretations of the treaty are entitled to "respectful consideration" because the international court had been given jurisdiction by treaty to interpret the VCCR.[67] However, the justices differed as to how to apply that standard and the appropriate result of that respectful consideration. Writing for the majority in *Sanchez-Llamas v. Oregon*, Chief Justice Roberts stated that the opinion of the ICJ prioritizing the United States' treaty-based obligation to provide consular notification over state procedural default rules is entitled to "respectful

[67] *See* Breard v. Green, 523 U.S. 371, 375 (1998); *see also* Sanchez-Llamas v. Oregon, 548 U.S. 331, 353–54 (2006).

consideration."[68] However, the majority held that U.S. courts are not bound by decisions of the ICJ and that the Oregon legal system was not required to suppress evidence against Sanchez-Llamas due to its failure to provide timely consular notification to him.[69] Justice Ginsburg concurred in the result but wrote a separate opinion in which she attempted to distinguish the facts of the *Sanchez-Llamas* case from a previous ICJ opinion and to reconcile the ICJ's interpretation of the VCCR with a U.S. statute to avoid friction and conflict.[70]

In a more recent VCCR case, *Medellin v. Texas*, the U.S. Supreme Court reaffirmed that, "[i]n considering our own treaty obligations, we also consider the views of the ICJ itself, 'giving respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [the treaty].'"[71] The Court did not define the meaning of respectful consideration, however, or attempt to apply the standard because the Court stated that it was not clear whether the principle should apply to the question of the binding nature of the ICJ judgment itself as opposed to its interpretation of a treaty provision.[72]

Federal courts have also used the doctrine of "respectful consideration" when reviewing a decision by an international tribunal such as the World Customs Organization (WCO).[73] In a tariff classification dispute, the Court of Appeals for the Federal Circuit

---

[68] *Sanchez-Llamas*, 548 U.S. at 353–54.

[69] *Id.* at 350. Justice Roberts wrote, "Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts. The ICJ's decisions have '*no binding force* except between the parties and in respect of that particular case,'. Any interpretation of law the ICJ renders in the course of resolving particular disputes is not binding precedent *even as to the ICJ itself*; there is accordingly little reason to think that such interpretations were intended to be controlling on our courts." (emphasis in original) (internal citations omitted).

[70] *Id.* at 360 (Ginsberg, J., concurring).

[71] Medellin v. Texas, 552 U.S. 491, 513 n.9 (2008) (citing *Breard*, 523 U.S. at 375; *Sanchez-Llamas*, 548 U.S. at 333–34).

[72] The dissenting justices in *Medellin* argued that because the United States had consented to the ICJ's jurisdiction by treaty, U.S. courts were bound by the ICJ's decision directing Texas to review and reconsider its judgment against Medellin when Texas failed to provide the required consular notification. *See* Medellin v. Texas, 552 U.S. 491, 538 (2008) (Breyer, J., dissenting).

[73] *See* Cummins, Inc. v. United States, 454 F.3d 1361 (Fed. Cir. 2006).

stated that a WCO classification opinion is not binding but is entitled to respectful consideration.[74] The court analogized the case to *Sanchez-Llamas*, stating that when an international court or tribunal interprets an international treaty, a U.S. court is not bound to defer to the international opinion or to treat it as obligatory, but in performing its own independent analysis, the U.S. court may consult the international opinion for its persuasive authority.[75]

2. Decisions by Foreign Courts

A second category of cases consists of decisions by foreign courts interpreting foreign law. This line of cases involve what Professor Ramsey refers to as the use of a foreign judgment as proof of the content of foreign law.[76] Perhaps surprisingly, there are few cases in which a U.S. court was asked to use a foreign judgment to inform its understanding of the foreign law separate from enforcing a decision by a foreign court as *res judicata*.[77] Most of these cases are framed instead as a decision whether to recognize a judgment by a foreign court interpreting its own law.[78]

In *Animal Science*, both at oral argument and in its decision, the U.S. Supreme Court referred to the "analogous" submissions of state governments.[79] The Court stated that if the relevant state law is

---

[74] *Id.* at 1366.

[75] *Id.*

[76] Ramsey, *supra* note 44, at 906. The proof of foreign law strand of comity appears most similar to the respectful consideration doctrine. It is neither "prescriptive comity," which refers to conflicts of law or the application of the act of state doctrine, nor "adjudicative comity," which refers to recognition of foreign judgments and judicial assistance. *See* Dodge, *supra* note 44, at 2079.

[77] In his article, *Escaping "International Comity,"* Professor Ramsey provides several examples of cases involving a *res judicata* effect, but only one example of proof of foreign law*, i.e.,* Ramsay v. Boeing, 432 F.2d 592 (5th Cir. 1970). *See* Ramsey, *supra* note 44, at 893.

[78] *See, e.g.,* Von Saher v. Norton Simon Museum of Art at Pasadena, 897 F.3d 1141, 1156 (9th Cir. 2018) (U.S. court refuses to "second guess" or invalidate decisions by the Dutch Court of Appeals and State Secretary settling questions of ownership of artwork stolen by Nazis in WWII under Dutch royal decrees).

[79] At oral argument, Justices Gorsuch, Kennedy, and Breyer all asked questions that analogized to deference to state court judgments. *See* Transcript of Oral Argument, Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct.

established by a decision of a state's highest court, that decision is binding on federal courts.[80] Some scholars and lower court judges also have made comparisons between decisions of the U.S. states' highest courts and decisions by the highest court of a foreign country.[81] This line of reasoning in *Animal Science* suggests the Supreme Court may view a legal interpretation of foreign law by the highest court of a foreign country as similarly authoritative to a state's highest court, or at least entitled to more weight than a statement by an official of the executive or legislative branch.

3. Statements By Foreign Executive And Legislative Branch Officials

Statements of foreign law by foreign executive or legislative officials have given U.S. courts the most difficulty in determining how much deference is due. The following discussion provides several demonstrative examples, which serve to both illustrate the problems and to highlight some commonalities that may lead to a better approach in the future.

a. Extradition Cases

The issue of deference to a foreign government's interpretation of its own law has frequently arisen in the context of extradition. In such cases, the defendant opposing extradition from the United States to another country frequently claims a defect with the criminal process in the foreign country. The U.S. court must determine whether the extradition may properly go forward, which in turn may

---

1865 (2018) (No. 16-1220), 28 WL 1932827, at *7-9, *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1220_4hd5.pdf.

[80] *Animal Science,* 138 S. Ct. at 1874 (internal citations omitted). However, the Supreme Court also stated that if the interpretation of law is made by an attorney general, it is not entitled to controlling weight. *Animal Science*, 138 S. Ct. at 1874 (citing Arizonians for Official English v. Arizona, 520 U.S. 43, 76-77, n. 30 (1997); Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 393-96 (1988)).

[81] *See, e.g.*, Kristen Eichensehr, *International Decision, Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., Ltd.*, 113 AM. J. INT'L L. 116 (2019); In re Oil Spill of the Amoco Cadiz, 954 F.2d 1279, 1312 (7th Cir. 1992).

require the U.S. court to inquire into the propriety of the procedures followed in the foreign country requesting the extradition.

Extradition is usually governed by a bilateral extradition treaty between the United States and a foreign country, implemented in U.S. law through a federal extradition statute.[82] The scope of judicial review in such cases is quite limited. The "judicial officer's inquiry is confined to the following: whether a valid treaty exists; whether the crime charged is covered by the relevant treaty; and whether the evidence marshaled in support of the complaint for extradition is sufficient under the applicable standard of proof."[83] The narrow scope of judicial inquiry in such cases is partly due to principles of international comity.[84] As the Second Circuit stated in *Skaftouros v. United States*, "it has long been recognized that an extradition judge should avoid making determinations regarding foreign law."[85] In *Skaftouros*, a Greek national fought his extradition from the United States to Greece to stand trial as an accomplice to kidnapping and murder of a minor on several procedural grounds.[86] The Greek government, with the assistance of its prosecutor's office, defended its procedures as proper under the Greek criminal code.[87]

The *Skaftouros* court stated that in extradition cases, U.S. courts are strongly discouraged from reviewing whether the foreign country has complied with its own laws.[88] Arguments as to compliance with foreign law are for the courts of the foreign country, not for U.S. courts to resolve.[89] U.S. courts have repeatedly stated they should not engage in an examination of the foreign country's laws and procedures in extradition cases except to ensure the requirements of the treaty and implementing statute are met.[90] For these reasons, the Second Circuit

---

82 18 U.S.C § 3184 (2021).

83 Cheung v. United States, 213 F.3d 82, 88 (2d Cir. 2000).

84 *See* Skaftouros v. United States, 667 F.3d 144, 156 (2d Cir. 2011); *see also* Grin v. Shine, 187 U.S. 181, 190 (1902).

85 *Skaftouros*, 667 F.3d at 156 (citing Jhirad v. Ferrandina, 536 F.2d 478, 484-85 (2d Cir. 1976)).

86 *See Skaftouros*, 667 F.3d at 146-47.

87 *See id.* at 152-53.

88 *Id.* at 156.

89 *Id.*

90 *Id.*

in *Skaftouros* determined that the district court had erred in placing the burden of proof on the Greek government to demonstrate compliance with Greek law.[91]

Other courts in the United States also have been highly deferential to foreign governments' interpretation of their own law in extradition cases. For example, in *Cornea v. Sessions*, the Eleventh Circuit Court of Appeals accepted a Greek court's interpretation of the Greek Criminal Code with respect to service of process requirements when interpreting the U.S.-Greek extradition treaty.[92] Similarly, in *Basic v. Steck*, the Sixth Circuit Court of Appeals accepted a Bosnian government's interpretation of which documents constitute an arrest warrant under Bosnian criminal law.[93] Most recently, in *Taylor v. McDermott*, the United States District Court for the District of Massachusetts accepted a Japanese prosecutor's evidence of the meaning of Japanese criminal law, stating that although *Animal Science* was not an extradition case, a U.S. court should still give "'respectful consideration' and 'substantial but not conclusive weight' to a foreign government's interpretation of its own law."[94]

While U.S. courts have been very deferential to foreign government interpretations of their own criminal laws and procedures in extradition cases, some of that deference may be explained by the context. In such cases, the defendant will have another opportunity to raise any procedural defects in the criminal courts of the prosecuting country, which will be applying its own law.[95] However, in other contexts, there may not be a second opportunity for a foreign court to review and interpret its own laws. Perhaps partly for this reason, U.S. courts have not shown the same level of deference on issues of foreign law outside the extradition context.

---

[91] *Id.* at 157.

[92] *See* Cornea v. Sessions, No. 18-61069, 2018 U.S. Dist LEXIS 120008 (S.D. Fla. July 17, 2018); *see also* Liuksila v. Tunner, 351 F. Supp.3d 166, 179-80 (D.D.C. 2018) (U.S. court deferred to Finnish government's representations regarding certain procedural matters under Finnish law in an extradition proceeding).

[93] *See* Basic v. Steck, 819 F.3d 897, 901 (6th Cir. 2016).

[94] Taylor v. McDermott, No. 4:20-cv-11272-IT, 2020 WL 4569693, n.4 (D.Mass. Aug. 7, 2020).

[95] *See, e.g., Skaftouros*, 667 F.3d at 147.

b. Non-Extradition Cases

The issue of the amount of deference owed by U.S. courts to foreign officials' and governments' interpretations of foreign law has arisen in a variety of other cases outside the context of extradition, such as antitrust matters as in *Animal Science*, trade policy, and disputes over international discovery rules.[96] Unfortunately, the language and standards used by U.S. courts in these cases have not been consistent, leading to confusion and uncertainty.

In the 1942 case of *United States v. Pink*, the U.S. Supreme Court determined what effect to give to a 1918 Russian decree nationalizing Russian property held in New York.[97] In that case, the U.S. government supported recognition of the nationalization decree as part of the implementation of Litvinov Assignment settling multiple claims between the United States and the Soviet Union and giving formal diplomatic recognition to the Soviet Union for the first time.[98] At the request of the U.S. government, the Russian government provided a declaration from its Commissariat for Justice asserting that the 1918 decree converted the property of formerly private Russian enterprises and companies to property of the State, regardless of the location of the property.[99] The U.S. Supreme Court accepted that the Commissariat for Justice had the power to interpret Russian law and treated this official declaration as "conclusive" as to the extraterritorial legal effect of the 1918 decree nationalizing the property.[100]

In the more recent case of *Abbott v. Abbott*, involving an international child custody dispute, the U.S. Supreme Court found an affidavit submitted by the Chilean government agency explaining custody rights under Chile's Minors Law 16,618 "notable."[101] It determined the father's *ne exeat* custody rights as described by the

---

[96] *See* Daniel Fahrenthold, *Navigating Respectful Consideration: Foreign Sovereign Amici in U.S. Courts*, 119 COLUM. L. REV. 1597, 1622-26 (2019).

[97] *See* United States v. Pink, 315 U.S. 203, 210-13 (1942).

[98] *Id.* at 218.

[99] *Id.* at 219-220.

[100] *Id.* at 220. In *Animal Science*, the Supreme Court largely distinguished *Pink* on the ground that there were not conflicting government statements in the *Pink* case. *Animal Science*, 138 S.Ct. at 1874.

[101] Abbott v. Abbott, 560 U.S. 1, 10-11 (2010).

Chilean government to be consistent with the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention), and thus enforced the right of custody as described by the Chilean government.[102] While the Supreme Court did not discuss international comity, respectful consideration, or FRCP 44.1 in *Abbott*, it did note that the U.S. government supported the position of the Chilean government in the litigation and that the Chilean government's interpretation of custody rights under the Hague Convention was consistent with other contracting states to the Convention.[103] This case suggests two additional reasons for greater deference to foreign governments' interpretation and application of international treaty law: (1) proper respect for the role of the political branches in U.S. foreign policy; and (2) consistency in treaty interpretation.

Both pre and post *Animal Science*, federal courts of appeals have struggled with the standard to be used and how much deference to accord to foreign governments' interpretations of foreign law. When faced with competing constructions of French law proffered by the parties in *In re Oil Spill of the Amoco Cadiz*, the Seventh Circuit stated that the French government's construction of its own law was entitled to "substantial deference".[104] In reaching this conclusion, the court pointed out that U.S. courts routinely accept plausible interpretations of U.S. statutes by the agencies charged with administering them under the *Chevron* doctrine.[105] According to the court, "[g]iving the conclusions of a sovereign nation less respect than those of an administrative agency is unacceptable."[106]

On the other hand, while recognizing that U.S. courts may defer to foreign government interpretations of foreign law, the Fifth Circuit declined to do so in in *Access Telecom Inc. v. MCI Telcomms.*

---

102 *Id.* at 11-15.

103 *Id.* at 15-16.

104 In re Oil Spill of the Amoco Cadiz*,* 954 F.2d 1279, 1312 (7th Cir. 1992).

105 *Id.*

106 *Id.* Interestingly, the Federal Circuit Court of Appeals has stated that its deference to a Customs' classification ruling is in proportion to its power to persuade. *See Cummins*, 454 F.3d at 1363. Later in the same opinion, the court stated that a tariff classification opinion of the World Customs Organization also has persuasive authority, thereby suggesting some similarity to the weight of decisions by these two bodies. *Id.* at 1366.

Corp.[107] *Access Telecom Inc.* involved breach of contract and antitrust claims by an American company, ATI, against a Mexican telecommunications company. A key issue was the legality of ATI's business under Mexican law.[108] The Mexican defendants relied on an Official Circular issued by the Mexican Secretary of Communications and Transportation to demonstrate that ATI was operating illegally under the terms of the Circular, arguing that the Circular was entitled to deference "as an agency's interpretation of the laws which it administers and enforces."[109] The Fifth Circuit Court of Appeals replied,

> The fact that U.S. courts routinely give deference to U.S. agencies empowered to interpret U.S. law and U.S. courts may give deference to foreign governments before the court does not entail that U.S. courts must give deference to all agency determinations made by all foreign agencies not before the court.[110]

Ultimately, the Fifth Circuit rejected the Mexican defendants' interpretation of the Circular for several reasons, including the fact that the law had changed since the relevant time and a new circular had been issued.[111] In reaching this conclusion, the Fifth Circuit distinguished the Seventh Circuit's holding in *Amoco Cadiz* on the ground that the Mexican government was not a litigant in the *Access Telecom* case, whereas the French government had appeared in *Amoco Cadiz* and its position on French law was entitled to more weight than that of a private litigant.[112]

The Eleventh Circuit Court of Appeals also refused to defer to statements by Honduran government officials in *United States v. McNab* when the Honduran government changed its position during the

---

[107] *See* Access Telecom, Inc. v. MCI Telecomms. Corp., 197 F.3d 694, 714 (5th Cir. 1999).

[108] *See id.* at 713.

[109] *Id.* at 714. As noted above, the U.S. Supreme Court also drew an analogy between U.S. agency interpretations of law and interpretations of law by foreign governments in *Animal Science. Animal Science*, 138 S. Ct. at 1874.

[110] *Access Telecom*, 197 F.3d at 714.

[111] *See id.* at 715.

[112] *See id.* at 714.

course of the litigation.[113] *McNab* concerned alleged violations of the Lacey Act, which prohibits the sale or importation of fish or wildlife taken in violation of foreign law.[114] At trial, several Honduran government officials provided confirmation of Honduran prohibitions on the importation, purchase, and sale of certain Caribbean spiny lobster from Honduras.[115] On appeal, the Honduran government altered its position, putting forward evidence that Honduran law had changed such that the activities at issue were no longer illegal under Honduran law.[116] The Eleventh Circuit refused to defer to statements by the Honduran government on appeal stating that the District Court was entitled to rely on the statements made by the Honduran government officials at the time of trial despite the government's later change in position.[117]

A U.S. district court also refused to defer to certain foreign officials' statements regarding Venezuelan law in *Petroleos de Venezuela*.[118] In that case, a New York district court had to determine the effect of certain resolutions of the Venezuelan National Assembly allegedly condemning a 2016 Exchange Offer that the parties entered into relating to repayment of bonds. One of the parties to the transaction was a corporation wholly owned by the Venezuelan government itself, PDVSA.[119] Plaintiffs, consisting of PDVSA and related entities, sought to avoid their repayment obligations by arguing that the transaction was invalid because the underlying transaction and documents had not been approved by the Venezuelan National Assembly.[120] By way of proof, the plaintiffs submitted statements by a member of the National Assembly, Mr. Guevara, who opined that the National Assembly would "not recognize any public contract that is

---

113 *See* United States v. McNab, 331 F.3d 1228 (11th Cir. 2003).

114 *See id.* at 1236, citing 16 U.S.C. § 3372(a)(2)(A).

115 *See McNab*, 331 F.3d at 1234-35.

116 *See id.* at 1242.

117 *See id.*

118 *See* Petroleos de Venezuela, S.A. v. MUFG Union Bank, 495 F.Supp.3d 257 (S.D.N.Y. 2020).

119 *See id.* at 262.

120 *See id.* at 270.

not considered or authorized by the Legislative Branch in accordance with [article 150 of] the Constitution."[121]

The court stated that while it respects Mr. Guevara's views, "floor statements by individual legislators rank among the least illuminating forms of legislative history."[122] Further, referring to the Supreme Court's decision in *Animal Science*, the District Court stated that it has "respectfully and carefully considered the views the [Venezuelan] government has expressed regarding the effect of the September 2016 Resolution."[123] However, the Court declined to give conclusive effect to those views for three reasons: (1) the Venezuelan Republic failed to provide support for its position; (2) a Special Attorney General of Venezuela had previously provided an Opinion on the legality of the transaction stating a contrary view; and (3) the Republic's current position was offered specifically for the purposes of litigation.[124] Likewise, in other cases decided since *Animal Science*, U.S. courts have rejected foreign governments' legal positions because their own experts' testimony did not support the legal position taken in litigation, not because the courts refused to accord deference to a clearly supported interpretation of another country's law.[125]

IV. A BETTER SOLUTION TO THE AMOUNT OF DEFERENCE U.S. COURTS SHOULD ACCORD TO FOREIGN GOVERNMENT STATEMENTS OF FOREIGN LAW

The preceding discussion reviewed the different methods and factors U.S. courts use when deciding how much weight to give to statements by foreign governments as to the meaning of foreign law. In some cases, U.S. courts have applied concepts of international comity while in others, courts have applied the concept of "respectful consideration." In both situations, courts had to examine several

---

121 *Id.* at 278.

122 *Id.* (internal citations omitted).

123 *Id.* at 279.

124 *Id.* at 279-80.

125 *See, e.g.,* Petersen Energia Inversora S.A.U. v. Argentine Republic and YPF S.A., 895 F.3d 194, 208 (2d Cir. 2018) (The expert testimony offered by Argentina regarding the meaning of its corporate law did not support its argument in litigation); *see also* In re Grand July Subpoena, 912 F.3d 623,634 (D.C. Cir. 2019).

factors to determine whether to accept the foreign government's interpretation of its own law. Neither comity nor respectful consideration has been well-defined, and the variations in approaches have led to confusion and inconsistencies and may well threaten U.S. foreign relations.

The U.S. Supreme Court's recent decision in *Animal Science* illustrates the resulting uncertainty. While it mentions both Rule 44.1 and international comity, the Supreme Court's holding stated that courts should provide "respectful consideration" to the views of a foreign government as to its own law.[126] However, the Supreme Court did not define "respectful consideration" and did not explain whether use of "respectful consideration" may differ depending on whether it is reviewing a decision by an international court or tribunal, a foreign court, or a statement by a foreign government official. Instead, the Supreme Court set forth a five-factor case-by-case test for when it may be appropriate to defer (or not) to a foreign government's interpretation of its own law.[127] While this standard certainly keeps lawyers in business by giving them more to debate, it does little to clarify the law or to provide guidance to future courts and litigants.

In addition, failure to give appropriate weight to statements and decisions by foreign governments and courts on foreign law is likely to lead to negative foreign policy consequences. Since *Animal Science*, most lower courts applying this new test have not deferred to foreign governments' interpretations of their own laws, thereby risking harm to friendly relations between sovereign States that doctrines such as Foreign Sovereign Immunity and the Act of State doctrine were designed to prevent.[128] For example, in *Von Saher v. Norton Simon Museum of Art at Pasadena*, the Ninth Circuit Court of Appeals dismissed a case brought by the heir to artwork stolen by the Nazis in the Second World War.[129] Throughout the litigation that spanned many years, the various judges discussed the foreign policy implications raised by the California statute on which plaintiff based her claim. Ultimately, the Ninth Circuit dismissed the complaint due to the Act of State

---

126 *Animal Science*, 138 S.Ct. at 1869.

127 *See id.*

128 *See, e.g., Petersen Energia*, 895 F.3d at 209.

129 *See Von Saher*, 897 F.3d at 1156.

doctrine.[130] In reaching this holding, the court stated that to allow the case to proceed would require U.S. courts to "re-litigat[e] long resolved matters entangled with foreign affairs" and "second guess" settled restitution decisions made by the Dutch government and its courts pertaining to such artwork.[131] The court declined to do so in part to avoid foreign policy complications. A U.S. court's refusal to accept an interpretation of foreign law by a foreign government likewise risks offending the foreign nation and interfering with U.S. foreign policy.

There are at least two different approaches that U.S. courts might adopt to bring further clarity to this area of law and reduce the possibility of foreign relations conflicts. First, U.S. courts could continue to use the concept of "respectful consideration," but could start with a presumption in favor of acceptance of the foreign government's view of its own law.[132] This presumption could be rebutted by evidence of the factors past case law suggests are most important, especially situations where different foreign government officials have offered different interpretations of foreign law and one or more of those positions were adopted for purposes of litigation, as occurred in *Animal Science*.[133]

Starting with this presumption recognizes that the foreign government is most familiar and knowledgeable about its own law. It also diminishes the possibility of conflict with the foreign nation through a perceived lack of respect for its sovereignty. Presumptions

---

130 *See* Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712, 721 (9th Cir. 2014), quoted favorably on appeal at *Van Saher*, 897 F.3d at 1156.

131 *Id.* at 967.

132 This author has also argued in favor of a presumption of validity for judgments of the International Court of Justice involving treaty interpretation under the doctrine of "respectful consideration." *See* Cindy Galway Buys, *The United States Supreme Court Misses the Mark: Towards Better Implementation of the United States' International Obligations*, 24 CONN. J. INT'L L. 39, 69 (2008). Factors that support deference to judgments of international tribunals such as the ICJ include their expertise in international law, promotion of uniformity in treaty interpretation, respect for the political branches of government in foreign affairs, and reciprocity of international obligations. *See id.* at 68-69.

133 Alternatively, if the U.S. Supreme Court does not adopt a rebuttable presumption, the drafters of the Federal Rules of Civil Procedure could amend Rule 44.1 to create this presumption.

based on respect for foreign sovereigns are common in international law. For example, the Foreign Sovereign Immunity Act is based on the presumption that foreign sovereigns may not be sued in U.S. courts unless a statutory exception applies.[134] Similarly, there is a presumption against extraterritorial application of U.S. law abroad.[135] Adopting a presumption in favor of accepting a foreign government's view of its own law also makes it more likely that a foreign court will accept a U.S. government interpretation of U.S. law when such a matter comes before the foreign court.

Second, when applying the factors that have been used by courts in the past and those set forth by the U.S. Supreme Court in *Animal Science*, the courts could create a hierarchy of those factors to guide future cases. In *Animal Science*, the U.S. Supreme Court suggested the following five factors should be taken into account: "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."[136] However, in reviewing past cases, two factors stand out as the most common factors cited when a court refuses to accept a foreign government's interpretation of its own law: (1) when government officials have offered contrary interpretations of the law either in the current litigation or in the past,[137] and (2) when the position taken by the foreign government is new and offered solely for the purposes of the pending litigation (i.e., the "context and purpose" of the statement.)[138] Past court decisions have not discussed the transparency of the foreign legal system,[139] nor have they discussed the

---

134 Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1330; 1605.

135 *See, e.g.,* Kiobel v. Royal Dutch Petroleum, 569 U.S. 108 (2013).

136 *Animal Science,* 138 S. Ct. at 1869.

137 *See, e.g., id.*; Petroleos de Venezuela*,* 495 F.Supp.3d at 279-80; McNab, 331 F.3d at 1242; JYCC, 403 F.Supp.3d at 737.

138 *See, e.g., Animal Science,* 138 S. Ct. at 1869; *see also* Petroleos de Venezuela*,* 495 F.Supp.3d at 279-80.

139 Professor Eichensehr raises some important questions about whether a lack of transparency should lead to more or less deference to a foreign sovereign. *See* Eichensehr, *supra* note 81, at 120.

clarity or thoroughness of the statement. Accordingly, these factors from *Animal Science* could be removed or at least afforded lesser weight.

U.S. courts have occasionally considered the degree of evidentiary support for the foreign government's statement, such as in *Petroleos de Venezuela* where the court found that the government offered no evidence in support of its statement as to the proper meaning of Venezuelan law.[140] With respect to the role and authority of the entity or official offering the statement, the courts have noted whether the person offering the statement is an attorney general or other prosecutor,[141] another executive agency official,[142] or a legislator,[143] but have not explained why one might be more or less persuasive or authoritative than another. Determining whether to give more deference to a foreign executive branch official as opposed to a member of the legislative branch (or vice versa) opens the door to complicated and sensitive issues regarding the respective weight of the executive and legislative branches of the foreign government and the role of the particular person in that branch. Thus, this factor may be difficult, if not impossible, to apply and should carry less weight. However, as noted above, it makes sense to provide heightened deference to a foreign court's interpretation of foreign law, at least in legal systems where the courts have the final say as to the meaning of the law.

If these suggestions were followed, a court's approach to the proper weight to give a foreign government's interpretation of its own law would proceed as follows. The U.S. court would start with the presumption that the foreign government's statement is an accurate statement or interpretation of the foreign law at issue. A party contesting the validity or authority of the statement may rebut that presumption by providing evidence of inconsistent statements or interpretations of the same law by the foreign government in the past and showing that the current position is different and was adopted for purposes of litigation. Proof that the statement is an accurate interpretation of foreign law and whether the statement is an official

---

140 *Petroleos de Venezuela*, 495 F.Supp.3d at 279-80.

141 *See, e.g., Taylor*, 2020 WL 4569693 at n.4.

142 *See, e.g., Petroleos de Venezuela*, 495 F.Supp.3d at 279-80.

143 *See, e.g., JYCC*, 403 F.Supp.3d at 748.

and final position of the government as a whole or only the position of an individual executive officer or legislator would follow as the next most persuasive evidence. Other factors would carry little, if any, weight depending on context.

Applying this test in *Animal Science* may not have changed the ultimate conclusion of the Supreme Court in that case because the Chinese government submitted different interpretations of its law in the context of two cases, one at the WTO and one in U.S. courts. However, use of the proposed test would provide more guidance and certainty as to how to resolve such issues in the future.

Other commentators have also been critical of the Supreme Court's use of the "respectful consideration" standard in *Animal Science* for many of the same reasons outlined here.[144] At least one has suggested that the Supreme Court adopt a "more robust, multi-step framework" to better guide lower courts, suggesting a model similar to a multi-step analysis proposed by Justice Breyer in his dissent in *Sanchez-Llamas v. Oregon*, one of the VCCR cases.[145] A major flaw in this proposal, however, is that it still requires lower courts to weigh multiple factors, with little guidance as to the weight or hierarchy to give to each of the factors. It also does not start with a presumption of deference, which is necessary to recognize the expertise of the international or foreign court or government and to avoid foreign policy tensions.[146]

Adopting a rebuttable presumption does not require U.S. courts to blindly accept statements of foreign law by government officials, but instead allows for flexibility in approaching the issue of what weight to give to a foreign government's interpretation of its own law. However, this approach orders and limits the factors courts should take into account when making this determination. Doing so

---

144 *See, e.g.,* Daniel Fahrenthold, *Navigating Respectful Consideration: Foreign Sovereign Amici in U.S. Courts*, 119 COLUM. L. REV. 1597 (Oct. 2019); Eichensehr, *supra* note 81, at 121.

145 Fahrenthold, *supra* note 141, at 1631-32.

146 As Professor Ramsey states, "Foreign courts, not U.S. courts, are presumably the best judges of foreign law . . . conflict and unfairness may arise from a U.S. court's misinterpretation of foreign law." Ramsey, *supra* note 44, at 935.

will likely bring additional clarity and certainty to this area of law by providing guidance to courts. It also reduces the potential for international friction by starting with a presumption that respects other States' interpretation of their own law and increases the chance that U.S. statements of law will be respected abroad.

V. CONCLUSION

It is long past time for the U.S. Supreme Court to provide better guidance to lower courts and litigants on the issue of the amount of deference owed foreign governments' statements as to the meaning of foreign law. The Supreme Court missed the opportunity to clarify this area of law in *Animal Science*, leading to continued uncertainty and inconsistency. The Court's failure also creates further potential for unwarranted judicial interference in U.S. foreign relations and decreases the likelihood of foreign courts' acceptance of U.S. statements of U.S. law. For these reasons, the U.S. Supreme Court should adopt a rebuttable presumption in favor of acceptance of the foreign government's position as to the meaning of its own law. It also should limit and order the factors to be considered in rebutting this presumption.