

Proving Chinese Law: Deference to the Submissions from Chinese Government?

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The recent U.S. Supreme Court case, *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd*, concerns what weight should be given to the Chinese government's submission of Chinese law. On Page 58 of the trial transcript, Justices Kagan and Ginsburg asked how about other countries dealing with formal submissions from the Chinese government. There are two examples.

One is Hong Kong. In *TNB Fuel Services SDN BHD v China National Coal Group Corporation* ([2017] HKCFI 1016), the issue is whether the defendant, a state-owned enterprise, is protected by Chinese absolute sovereignty immunity under Chinese law. The court deferred to an official letter provided by the Hong Kong and Macao Affairs Office of the State Department in Mainland China. The Office answers no absolute sovereignty immunity to Chinese state-owned enterprises carrying out commercial activities. The Court adopted this opinion without second inquiry (para 14 of the judgment). After considering a bunch of other factors, the court ruled against the defendant.

The other is Singapore. In *Sanum v. Laos* ([2016] SGCA 57), the issue is whether the China-Laos Bilateral Investment Treaty (BIT) shall be applied to Macao Special Administrative Region. Chinese embassy in Laos and China Ministry of Foreign Affairs provided diplomatic announcements indicating that the BIT shall not be applied to Macao. However, the Court of Appeal of Singapore held that China's announcements were inadmissible and, even if admitted, they did not change the applicability of the BIT to Macau. This is partly because, before the dispute with Sanum crystalized, no evidence showed that China and Laos had agreed that the BIT should not be applied to Macau. Therefore, the China's diplomatic announcements should not be retroactively applied to a previous dispute. For a more detailed discussion, please see pages 16-20 of my article.

TNB Fuel Services and Sanum share important similarities with *Animal Science*

Products, because the key issues are all about the proving of Chinese law. In the three cases, Chinese government all provided formal submissions to explain the meaning and the applicability of Chinese law. However, TNB Fuel Services and Sanum can also be distinguished from Animal Science Products, because comity plays no role in the former two cases. TNB Fuel Services concerns sovereign immunity, which is an issue that Hong Kong courts must follow China's practices. This is established by *Democratic Republic of the Congo v. FG Hemisphere Associates* (FACV Nos. 5, 6 & 7 of 2010). Sanum is a case to set aside an investment arbitration award, so the Court of Appeal of Singapore need not consider comity between Singapore and China. In contrast, in *Animal Science Products*, the U.S. Court of Appeals for the Second Circuit elaborated the importance of comity between the U.S. and China. Therefore, *Animal Science Products* should not be considered as a technical case of proving foreign laws. The U.S. Supreme Court may consider deferring to the submissions of Chinese government to a certain extent but allows judges to decide whether the Chinese government's submission is temporally consistent with its position on the relevant issue of Chinese law.