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## Foreign Law in Federal Courts: Challenges for the Twenty-First Century

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**Howard and Iris Kaplan Memorial Lecture Series Address**

**Hon. William J. Nardini**

**Maurice A. Deane School of Law, Hofstra University**

**Hempstead, NY, March 31, 2022**

Good afternoon, everyone, and thank you Dean Prudenti for that very kind introduction. It's an honor to be here today speaking at the Maurice Deane Law School at Hofstra.

I'm especially pleased that we can see each other in person. It was about two years ago when COVID first flooded over us, only a few months after I became a judge. The pandemic pushed our Court, like much of the world, into a universe of video conferences and remote arguments. If you're like me, you're probably relieved to be back in the classroom, or the courtroom, after too many hours on Zoom sessions. But even clouds have silver linings, and we all learned something from working remotely. For example, I learned that when I'm trapped in my house during a snowstorm, I can still hear oral arguments from my dining room over Zoom, and— even better—nobody can tell from the video link that my judicial robe is still hanging in chambers at the courthouse, and what I'm actually wearing is one of my kids' Harry Potter robes. (The key is to hide the Gryffindor logo.) Today, I'm especially grateful to see all your smiling faces live (and not an array of your video feeds).

On a personal note, let me say what a delight it is to give this lecture in memory of Howard and Iris Kaplan. I've had the privilege of knowing their son Tony and his wife Marilyn for over twenty years. Tony is one of Hofstra Law School's most distinguished alumni—a brilliant lawyer who clerked for Chief Judge Wilfred Feinberg, one of the greatest judges to serve on the Second Circuit. Tony has dedicated his career to serving the public as a prosecutor—first for New York State, then for the U.S. Department of Justice. Most of his career has been spent at the U.S. Attorney's Office in Connecticut, where I had the great fortune of having Tony first as a mentor, and later as a valued colleague and dear friend. So, thanks very much to the Kaplan family for their role in making this happen.

You will note, of course, that I met AUSA Kaplan in New Haven, Connecticut—far to the north of Hofstra, across the Long Island Sound. Why, you might justifiably ask, should your law school invite a speaker from the faraway Constitution State, land of nutmeg and steady habits? Well, I hope that my presence here can remind us of the ties that bind us together, in Connecticut and Long Island.

In part, the ties are geographical. We are all proud inhabitants of the best federal judicial circuit in the land—Second perhaps in name, but not in the hearts of our legal practitioners. In fact, for my first two years as a judge, my office window looked directly south across New Haven Harbor and the Sound, where in the

distance, the only man-made structure visible to the naked eye was that great landmark of modern architecture: the Central Islip Courthouse.

Geography isn't everything, of course. The ties between Connecticut and Long Island are historical as well. Indeed, they are older than the federal judiciary itself. And so, before I turn to my principal topic today—which is the place of foreign law in American courts—I hope you will forgive me for a brief historical detour about how (but for a cruel twist of fate) those of us in Connecticut and Long Island would have even more in common than we do today.

This story—like most good stories—starts with a king getting his head chopped off. During the English Civil War in 1649, fifty-nine judges assembled to sign a death warrant for King Charles I. Oliver Cromwell eventually assumed the title of Lord Protector of the realm. Upon his death eleven years later (in 1660), the son of the beheaded king was restored to the throne. That son was Charles II. Understandably, Charles II didn't feel much love for the judges who had sentenced his father to death. He sent emissaries to track them down in England and overseas. Three of those fifty-nine judges concern us today: John Dixwell, Edward Whalley, and William Goffe. Those three fled to the Puritan colonies in North America, which were sympathetic to their cause. Each, for a time, took refuge in New Haven to escape royal vengeance.

Dixwell was the luckiest of the three. The Crown thought he had died, and so he was able to live out his days peacefully in New Haven under a pseudonym: “John Davids.” In fact, he was buried only a short walk from my chambers. Whalley and Goffe, however, constantly had to stay one step ahead of their pursuers. Most famously, for a time they hid in a giant tumble of boulders which is known today as the Judges’ Cave, atop a cliff known as West Rock Ridge. Eventually, they were chased out of the cave not by the *English*, but by a *panther*. (I like to take my clerks on hikes up to the Judges’ Cave. It’s a good reminder of the perils of judicial hubris.)

The three judges were never caught. And so Charles II took his revenge against the independent colony of New Haven for having protected the regicides. He did two things. For one, he had New Haven absorbed into the more loyal, and royal, colony to the north, which was known as the Connecticut Colony (based in Hartford). For another, he looked at Long Island, whose towns were settled by people from New England, not from New York. Although some sensible folk in what is now known as Suffolk County pressed to be part of Connecticut, they ultimately had to yield. All of Long Island became a part of the newly organized colony of New York—named after the King’s brother, the Duke of York—instead of Connecticut.

So, what is the moral of this story? It is simply this: Had the regicides chosen somewhere *else* besides New Haven as their hide-out, I’d be speaking to you today—

here at Hofstra’s law school—at what would undoubtedly be known as the most illustrious law school in *Connecticut*.

Connecticut’s loss, though, has been New York’s gain. I would be remiss if I did not recognize that Hofstra Law School is celebrating an important milestone this year: the school’s 50th anniversary. From its earliest days, Hofstra has earned a reputation for innovative legal training. Let me sincerely congratulate the many people who have made Hofstra Law School’s remarkable growth possible.

And to turn to the substance of what I’d like to talk about today, let me suggest another goal to which Hofstra might aspire, to remain on the cutting edge of legal education: that is, the importance of training our future lawyers on how foreign law fits into American legal practice. To illustrate, I want to talk about the role that foreign law plays in federal courts.

In 1998, Sandra Day O’Connor published a commentary entitled “Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law.”<sup>1</sup> In that article, she talked about how advances in communications technology were shrinking the modern world; about the need for a deeper understanding of foreign cultures; and about how to survive in an increasingly multinational environment. The legal profession, she noted, suffered from being too “insular” and “short-sighted” right from the beginning of our careers. We have a natural tendency to look

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<sup>1</sup> Sandra Day O’Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45-SEP FED. LAW. 20 (1998).

to the laws of our own states; in federal law, we focus on the decisions of our local circuit court of appeals. That makes sense, of course. These decisions are binding upon us. But increasingly, we also have to set our eyes further, beyond the horizon. As Justice O'Connor accurately predicted, questions of foreign law arise more and more often in domestic legal practice. The answers to those questions are rarely to be found in the pages of the Federal Reporter. As a result, there is a corresponding need for the legal profession to have a working knowledge of how to solve foreign legal issues. And when I say "legal profession," I mean lawyers and judges, academics and law students.

That process of learning how to analyze foreign law problems should begin early, in law school—as it does with our training on how to analyze issues of U.S. law—and it should continue throughout one's legal career. There is no doubt: sorting through foreign legal issues can be tricky. They are, in more ways than one, "foreign" to us. They often require proficiency in a language other than English. And even when translated into English, they involve unfamiliar legal concepts and frames of reference. And so, dealing with them requires us to start from a very simple premise: we have to learn how to speak with each other across legal divides, both linguistically and conceptually.

Linguistically, we need to do better. When I worked overseas, there was a common joke, which maybe you've heard before. What do you call someone who

speaks two languages? Bilingual. What do you call someone who speaks three languages? Trilingual. And what do you call someone who speaks one language? American. Language study in America is often required for a couple of years in high school, and depending on where you go, maybe a bit in college. Too often, formal language study stops there, leaving many students with little ability to ask much beyond quaint phrases like, “Où est la bibliothèque?” We must encourage greater language competency—whether by moving beyond those high school classes or building on native proficiencies in second and third languages from one’s family background—to acquire the specialized legal vocabulary in a given language. There can be no doubt that lawyers of the future will have a competitive advantage if they can speak more than one language.

Of course, I understand that we can’t all be polyglots. But that brings me to my other point: to be successful, lawyers must achieve competency in speaking other legal languages conceptually, if not linguistically. We must learn to be at least conversant in the basic concepts and structures of other systems of law, beyond the familiar common-law system. We need at least a passing familiarity with, say, the civil law system, derived from Roman law and filtered through its more modern French and German models. And we need to recognize that there are other legal traditions in the world—say, in China—which are different yet again.



We need to understand when we are looking at a country where judicial pronouncements of a higher court, like the United States Supreme Court, are precedents that bind the decision-making of inferior courts. And we must recognize when, instead, we are looking at a country where the notion of binding precedent would be anathema, viewed as tantamount to placing the judiciary over the legislature.

In the world of criminal procedure, we need to recognize when we are looking at a country with an inquisitorial model, compared to our adversarial model—or perhaps a country that has adopted some sort of hybrid.

In short, we need to understand that there are other systems far removed from our American experiences, so that we do not make erroneous assumptions about how those systems work. A failure to comprehend these differences can be fatal to a client's case.

Before going any further, let me be clear about two things that I'm *not* talking about today. First, I'm not talking about the idea that U.S. courts should look abroad to the laws or judicial opinions of other countries for guidance on how to interpret American laws. Our Constitution and laws have been adopted in a specific context, and through a specific democratic process here in the United States. And with certain narrow exceptions, looking to foreign sources to interpret and apply

American law would be inconsistent with that democratic process and—just as bad—betray an ignorance of the very different contexts in which foreign law develops in different countries.

Second, I'm also not talking about policy questions. It makes perfect sense for legislators to look at ways in which other countries have addressed issues that we are facing here in the United States. Unlike the judiciary, our political branches have a legitimately creative role in our legal system, and it is appropriate for them to study the successes and failures of other nations' laws.

No, what I want to talk about today is more mundane. I want to talk about how the courts deal with foreign law in real-life cases, and accordingly how lawyers should be equipped to litigate those foreign-law issues.

In some ways, of course, American lawyers already have a leg up. We're used to sorting through questions of state versus federal law. And when state law governs a problem, we are accustomed to figuring out *which* state's laws apply. In federal court, this comes up all the time in diversity cases. We know how to research the laws in, say, New York and New Jersey. We know how to read state statutes. And we know how to look up state court decisions in Westlaw. The legal terminology and the legal concepts used among the states are, generally, consistent and easily understood by all American lawyers.

It's much harder when we have to look at the laws of France, or Brazil, or Namibia. And there is an incredible range of contexts in which foreign law may be dispositive of cases in American courts. This is mostly true in international civil litigation. But it can also extend to some areas of criminal law.

On the civil side, we are frequently confronted by choice-of-law problems. Whose law governs a contract dispute, where one party is in New York and the other in Tokyo? Does the contract have a choice-of-law clause? Does it specify a venue for dispute resolution? Which jurisdiction's choice-of-law rules apply? Let me offer just a few examples that we've confronted in the Second Circuit. In one case, we considered the tort claims of a U.S. passenger on an American Airlines flight from New York to Puerto Vallarta, arising out of the suspected use of marijuana during the plane's final descent. We applied New York choice-of-law rules; and they led to the conclusion that Mexican law governed the dispute.<sup>2</sup>

In another case, we looked at a maritime tort action brought in New York after a container ship sank. The case could have been governed by the laws of five different countries: South Korea, the United States, the United Kingdom, Sweden,

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<sup>2</sup> *Curley v. AMR Corp.*, 153 F.3d 5, 9–10 (2d Cir. 1998).

or Panama. We ultimately found that Korean law applied and decided the claims under that country's laws.<sup>3</sup>

We see many cases in New York seeking enforcement of foreign money judgments<sup>4</sup> or foreign arbitral awards<sup>5</sup> in the United States. We are all too often called upon to consider a foreign country's family laws under the Hague Convention for the return of children, in custody disputes.<sup>6</sup> We have even had to consider foreign patrimony laws, in disputes over antiquities that are brought into the United States, to decide whether those treasures need to be repatriated.<sup>7</sup>

On the criminal side, issues of foreign law are less common. But they do arise in specific and often predictable ways. In extradition cases, where one country seeks to have a fugitive sent back for trial, we consider whether the offense satisfies the dual criminality requirement of our extradition treaties. (I'll come back to this.) Other circumstances include invoking foreign law to justify non-compliance with a document subpoena, and defenses to prosecution generally.<sup>8</sup> And to take a very

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<sup>3</sup> *Rationis Enterprises Inc. of Panama v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580, 585–88 (2d Cir. 2005).

<sup>4</sup> *See, e.g., Servipronto De El Salvador, S.A. v. McDonald's Corp.*, 837 F. App'x 817, 819 (2d Cir. 2020); *Beyonics Int'l PTE Ltd. v. Smith*, 833 F. App'x 492, 493 (2d Cir. 2020); *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1318 (2d Cir. 1973).

<sup>5</sup> *See, e.g., Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, 864 F.3d 172, 178–79 (2d Cir. 2017).

<sup>6</sup> *See, e.g., Velozny v. Velozny*, No. 21-1993-CV, 2021 WL 5567265, at \*2 (2d Cir. Nov. 29, 2021); *Blondin v. Dubois*, 189 F.3d 240, 245, 249 (2d Cir. 1999).

<sup>7</sup> *See, e.g., United States v. Schultz*, 333 F.3d 393, 410 (2d Cir. 2003).

<sup>8</sup> *See* Fed. R. Crim. P. 26.1, Advisory Committee Notes to 1944 Addition; *see also* 18 U.S.C. §§ 1201, 2312 to 2317.

unusual example, consider the Lacey Act. That U.S. law makes it a crime for any person to knowingly import or export fish, wildlife, or plants that are taken, possessed, transported, or sold in violation of foreign law or Indian tribal law.<sup>9</sup> Fascinatingly, an individual can be prosecuted in the United States for a Lacey Act offense based on a violation of a foreign country's laws, *even if* the underlying conduct does not violate any other U.S. law.<sup>10</sup> Similarly, a scheme to defraud a *foreign* government of tax revenue has been found to be a criminal offense in violation of the U.S. federal wire fraud statute.<sup>11</sup> This, of course, requires consideration of foreign tax laws.

With this breadth of foreign law issues and contexts in mind, I'd like to use the remainder of my time today to talk about three things. First, I'd like to discuss the general framework within which federal judges can resolve foreign legal issues, and present some of the challenges inherent in that process. Second, I'd like to bring these general ideas to life with an example that I often confronted in my previous life, during my four-year stint as the U.S. Department of Justice Attaché in Rome. Specifically, let me talk about the dual criminality requirement that is embedded in most modern extradition treaties. Third, I'd like to use an example from my time on

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<sup>9</sup> 16 U.S.C. § 3372(a)(1)–(2).

<sup>10</sup> Bettina Bammer-Whitaker, *The Lacey Act and Proof of Foreign Law in Domestic Criminal Proceedings: A Critical Look at the Seventh Circuit's Approach in Bodum USA v. La Cafetière*, 25 GEO. INT'L ENVTL. L. REV. 175, 182 (2012).

<sup>11</sup> See *Pasquantino v. United States*, 544 U.S. 349, 354 (2005); 18 U.S.C. § 1343.

the bench involving civil law. And so I'll discuss a rather complex case involving a U.S. antitrust claim that required analysis of Chinese law.

First, the legal framework. The Federal Rules give us guidance on how to resolve issues of foreign law in the courts. Civil Rule 44.1 and Criminal Rule 26.1 operate largely the same way, so I'll talk about them together. (To the extent there are differences, they relate to constitutional protections specific to criminal prosecutions that are not pertinent to our discussion today.)<sup>12</sup>

The rules have three important features. First, a party intending to raise an issue about a foreign country's law must give reasonable notice to the court and the other parties by a pleading or other writing. Second, 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. Third, the determination must be treated as a ruling on a question of law.<sup>13</sup>

These rules were adopted in 1966 to address flaws and ambiguity in how federal courts were to make determinations of foreign law. The notice requirement was added to avoid unfair surprise and to clarify that the applicability of foreign law need not be in a pleading under Rule 8(a). Instead, because the relevance of foreign

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<sup>12</sup> See Fed. R. Civ. P. 44.1 advisory committee notes to the 1966 Amendments; Fed. R. Cr. P. 26.1 advisory committee notes to the 1944 Addition.

<sup>13</sup> Fed. R. Civ. P. 44.1; Fed. R. Cr. P. 26.1.

law may not be clear from the outset of a case, notice is sufficient so long as it is “reasonable.”<sup>14</sup>

The liberalization of evidentiary standards regarding the materials a court can consider in making a foreign law determination was intended to provide greater flexibility to the judge. Previously, Rule 43(a) often required courts to look to state law to find the rules of evidence by which the content of foreign-country law is to be established. The variation in state laws made the process inefficient and cumbersome, and prevented the examination of material that would otherwise have been helpful in making a proper determination. The new rule also allows federal courts to engage in their own research so they don’t have to rely only on party submissions.<sup>15</sup>

Finally, the rules’ requirement that determinations of foreign law are questions of law, rather than of fact, is designed to do two things. At the district court level, the rule allows the judge, rather than the jury, to make the finding as to the substance of a foreign law. And on appeal, as a question of law, we can review it *de novo* rather than being constrained by the clearly erroneous standard that would otherwise apply to factual determinations.<sup>16</sup>

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<sup>14</sup> See Fed. R. Civ. P. 44.1 advisory committee notes to the 1966 Amendments; Fed. R. Cr. P. 26.1 advisory committee notes to the 1944 Addition.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

As a practical matter, there is some overlap between traditional legal and factual inquiries in the process of making a determination of foreign law. That is primarily because of the limited tools and methods federal courts have readily accessible to them. Courts may consider any material the parties wish to present as proof of the purportedly applicable foreign law, including contractual choice of law clauses, statutes, administrative material, and judicial decisions. Expert testimony is frequently provided by parties to explain or clarify the meaning, application, or function of a foreign law. Under the rules, courts have broad discretion to engage in their own research on the relevant topic. We can ask the parties to give us extra briefing. We can invite *amicus* briefs if the parties' submissions are insufficient. And in rare cases (as I'll discuss in greater detail shortly), foreign governments can appear in cases to explain their own law to the court.<sup>17</sup>

As various courts and observers have noted, each of these methods suffers from shortcomings that federal courts need to be aware of in making any decision. First, any expert testimony offered on behalf of a party is potentially at risk of expressing a biased or skewed opinion in favor of the party that's paying their expert fees. Likewise, the motives of a foreign government could run counter to the district court's responsibility for getting the foreign law right and, depending on the form or quality of the government making such a submission, may be driven by factors that

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<sup>17</sup> 9A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 2444 (3d ed. 2022).



are inconsistent with U.S. norms of adherence to the rule of law. And of course, a court's ability to conduct its own research may be constrained by a relative lack of knowledge or familiarity with the particular foreign legal system, and the law clerk may not have access to library materials sufficient to complete (or at least efficiently complete) the task.

So, how does this all work in practice? It depends a bit on the context, as you might imagine, and the role you're playing in that context. That's why I wanted to flesh this out first with an example drawn from my time as a prosecutor and attaché in Italy, and then finish with another from my time on the bench.

And so let's talk about extraditions. Extraditions are usually done pursuant to bilateral treaties, and they come in two flavors: old-fashioned "list treaties," and the more modern "dual criminality treaties." A "list treaty" is precisely what it sounds like. It contains a list of extraditable offenses: murder, rape, robbery, and so forth. But as we entered the modern era, it became clear that "list treaties" were clumsy. They needed frequent updating when countries enacted new laws. What about money laundering? Securities fraud? Child pornography? It takes years of effort to modify a treaty. Not only does it take lengthy international negotiations, but in America it requires a signature by the President and ratification by two-thirds of the Senate.

The modern solution is the “dual criminality” treaty. Instead of a list of, say, ten or twenty crimes, the treaty allows for extradition if the charged conduct would be a crime under the laws of *both* countries—that is, both the requesting country that seeks to prosecute, and the requested country that is being asked to surrender the fugitive. And under most treaties, the crime has to be serious enough to be punishable by more than a year in prison. This has the tremendous advantage of being a self-updating treaty. If both treaty partners criminalize money laundering, it now becomes an extraditable offense.

As you will have immediately realized, this requires a close assessment of the law in two countries. For extraditions to the United States, it requires not only that there be charges under some American criminal law (whether federal or state), but also that the conduct would have been criminal under the law of the requested state. The criminal statutes don’t have to match up perfectly, which of course they never do in different countries. Rather, dual criminality exists if the offenses in the two countries punish the same basic evil, and if the laws are sufficiently analogous. The focus is on the acts of the defendant and the conduct charged.<sup>18</sup>

One example of the difficulties that can arise in the dual criminality context, and which raises an important point for how extradition treaties evolved, is a case

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<sup>18</sup> 9B Wright & Miller, FED. PRAC. & PROC. CIV. § 22:2377.

called *Lo Duca v. United States*.<sup>19</sup> In that case, Italy sought the extradition from the United States of a defendant named Lo Duca, who had been tried and convicted in Italy for the crime of “association of mafia type.” The district court held that it was an extraditable offense, and Lo Duca appealed.

At the time (and as it does now), the extradition treaty between the United States and Italy contained a typical “dual criminality” requirement.<sup>20</sup> The offense for which the fugitive would be extradited had to be a crime punishable by more than a year under both Italian and United States criminal law. Lo Duca argued that the Italian anti-mafia law, as applied in the United States, would be unconstitutional (and therefore not a crime) because it punishes mere membership in an association. But the Second Circuit looked closely at the Italian anti-mafia law and concluded that it was not so broad. The court first considered the text of the Italian law, which defined an “association of mafia type” as follows:

An association shall be of mafia type when its members avail themselves of the power of intimidation and of the condition of subjection and conspiracy of silence deriving therefrom for the purpose of committing crimes, of acquiring directly or indirectly the management or control of economic activities, concessions, authorizations, contract works or public services or of obtaining unlawful profits or advantages for themselves or others.<sup>21</sup>

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<sup>19</sup> 93 F.3d 1100 (2d Cir. 1996).

<sup>20</sup> Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, October 13, 1983, U.S.–Italy, art. II(1), T.I.A.S. No. 10837.

<sup>21</sup> Codice penale art. 416 bis. (Italy).

The Court of Appeals concluded that this statutory offense, as outlined in Italian law, was sufficiently analogous to our federal crimes of racketeering and conspiracy.

The court then turned to the defendant's actual conduct to see if it would have fallen within the proscription of American criminal law.<sup>22</sup> The evidence at the Italian trial showed that Lo Duca, as a member of the Sicilian Mafia in New York City, had conspired with numerous others to transport cocaine throughout the United States, South America, and Europe, including one shipment of more than 550 kilograms of cocaine from Colombia to Sicily. Because that conduct plainly fell within U.S. federal drug conspiracy and racketeering laws, the court found the dual criminality requirement satisfied and that extradition on that basis was appropriate.<sup>23</sup>

As it happened, about fifteen years later, I had occasion as the U.S. Department of Justice Attaché to argue almost a mirror-image case before the Italian Supreme Court of Cassation in Rome. The case involved a defendant named Emilio Fusco, who had been indicted in the Southern District of New York. It was alleged that he was a made member of the Genovese crime family, and that he had participated in the murders of two people to prevent them from serving as informants to law enforcement authorities. The charges that he faced included racketeering and racketeering conspiracy, among other things. Working with the FBI, Italian police

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<sup>22</sup> *Lo Duca*, 93 F.3d at 1111–12; *see* 18 U.S.C. § 371 (conspiracy); 18 U.S.C. §§ 1961–63 (racketeering).

<sup>23</sup> *Lo Duca*, 93 F.3d at 1112.

tracked down Fusco in the small town of Sant'Agello, where he was lying low in a house in the countryside.

When the United States requested Fusco's extradition from Italy, he objected that the American charges of racketeering and racketeering conspiracy did not exist under Italian law. Thus, his lawyers argued, there was no dual criminality. The lower court overruled his objection, but he appealed to the Italian Supreme Court of Cassation. Because the case was so unusual, I was asked by Italian prosecutors to appear with them before the Court of Cassation, to explain what, exactly, is the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, commonly known as "RICO." Now, as anyone who has ever written jury instructions for a RICO trial can attest, it is no simple task to describe a RICO offense. In simplified form, RICO makes it illegal to participate in the conduct of an enterprise, which is engaged in interstate commerce, through a pattern of racketeering activity. My task before the Italian Court was to map out how the conduct charged as a RICO violation, which involved committing a series of murders and other illegal activities as a member of La Cosa Nostra, also would have mapped just as well onto any number of associational crimes under Italian law. The Court ultimately agreed with

the United States’ position, and ordered Fusco extradited. He was later convicted of racketeering and his conviction was affirmed by the Second Circuit.<sup>24</sup>

What this pair of cases demonstrates—both *Lo Duca* and *Fusco*—is that there are occasions when courts and litigators need to understand the laws of more than one country. To understand how those laws do and do not line up, we need both linguistic and conceptual understandings of both legal systems. The “dual criminality” provisions in extradition treaties may provide a particularly clean illustration of this point.

The inquiry into foreign law in the Italian cases was aided tremendously by the close institutional cooperation between the United States and Italy. But that kind of cooperation is rarely available, and almost never so in civil cases. In my new role as a judge on the Second Circuit, I’ve experienced a number of cases where that close cooperation did not exist, and we consequently faced great difficulty in discerning the foreign law at issue.

Let me talk about one last case that’s especially helpful in drawing this difficulty out—the Vitamin C antitrust litigation.

This case was unusual because the parties generally agreed that the alleged anticompetitive conduct occurred. Specifically, the complaint alleged a conspiracy

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<sup>24</sup> *United States v. Fusco*, 560 F. App’x 43, 46 (2d Cir. 2014).

to fix the price and quantity of Vitamin C exported to the United States from China, in violation of U.S. antitrust law. The dispute centered on whether Chinese law required the Chinese sellers' conduct, and we had to decide whether Chinese law made it impossible for the Chinese defendants to comply with U.S. antitrust law.<sup>25</sup> We ultimately concluded that Chinese law required the defendants to engage in price-fixing of Vitamin C sold on the international market and, because they could not comply with both Chinese law and U.S. antitrust law, and because we held that the remaining principles of international comity weighed against allowing U.S. antitrust law to reach that conduct, we remanded the case to the district court with instructions to dismiss the complaint with prejudice.<sup>26</sup>

For our purposes today, the most interesting part of the case involved the methods by which we could determine what Chinese law requires. In particular, we were faced with the decision about what kind of deference was owed to a foreign sovereign that appears in a case and submits to the court what that sovereign considers its own law to be. That was particularly notable here because, in the district court, China's Ministry of Commerce filed an *amicus* brief—the first official appearance by the Chinese government in a U.S. court—regarding the interpretation and applicability of its own laws.<sup>27</sup> In addition to the submissions by the Ministry,

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<sup>25</sup> *In re Vitamin C Antitrust Litig.*, 8 F.4th 136, 140 (2d Cir. 2021).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 141.

the record of Rule 44.1 materials contained the Chinese regulations at issue, the charters of the Chinese agencies responsible for overseeing the export regime, internal industry records and trial testimony describing how that regime actually functioned, and China's representations to the World Trade Organization concerning its export controls on Vitamin C.<sup>28</sup>

With respect to the submissions by the Chinese government, we initially held that when a foreign government directly participates in U.S. court proceedings by providing an official representation regarding the proper interpretation of its laws, the U.S. court is bound to defer to that interpretation so long as it is reasonable under the circumstances.<sup>29</sup> The Supreme Court reversed our decision. It held that our Court gave too much deference to the Ministry's submissions, and remanded for us to carefully consider the Ministry's views without giving them dispositive effect.<sup>30</sup> Specifically, the Supreme Court required that submissions by a foreign government be evaluated against its "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."<sup>31</sup> Ultimately, we read the Chinese law, gave careful consideration to the Ministry's statements about what the applicable laws required,

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<sup>28</sup> *Id.* at 147.

<sup>29</sup> *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 189 (2d Cir. 2016).

<sup>30</sup> *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1875 (2018).

<sup>31</sup> *Id.* at 1873–74.



and considered those statements in light of all of the factors outlined by the Supreme Court. In a split decision, we concluded that Chinese law required the defendants to engage in price-fixing conduct violative of U.S. antitrust law. And so, we held that there was “true conflict” between the laws of China and the United States, such that it was impossible for them to comply with the laws of both countries.<sup>32</sup>

The plaintiffs have recently filed a petition for *certiorari* in the Supreme Court, and so it will be very interesting to see what happens next in that case. Because one never knows if the case might come back before our Court, I have to limit my comments to what we said in our opinion. But suffice it to say that the Vitamin C case illustrates the challenges that we face in analyzing foreign law, even when we have an official statement from the foreign government in question purporting to offer an authoritative interpretation of its law. To my knowledge, our Court was the first to apply the list of factors outlined by the Supreme Court in assessing a foreign sovereign’s statement of its own law. But we will certainly not be the last. The task now falls to all of us—litigators and judges, professors and students—to sort all of this out.

In closing, I hope what you’ll take away from today’s discussion is the reality that litigating in federal court increasingly requires a working knowledge of how to solve foreign legal problems. We are faced with these questions in a wide variety

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<sup>32</sup> *In re Vitamin C Antitrust Litig.*, 8 F.4th at 158.

of contexts, both civil and criminal. There is an unfilled need for training that must begin in law school and continue among practicing lawyers and sitting judges. I encourage you to develop the skills, both linguistic and conceptual, for determining foreign law in U.S. courts.

Although Justice O'Connor was not the first to identify this growing need, her words more than twenty years ago ring true today with greater force. I hope you'll take her words, and mine, to heart. And more than anything, I hope you enjoyed today's conversation as much as I did. It was truly a pleasure and an honor to speak with you today as a part of this wonderful lecture series. Thank you.