No. 16-1220

In the Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,
***Petitioners*,**
v.
HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief for China Chamber of International Commerce As Amicus in Support of Respondents

SIENHO YEE
Counsel of Record
Law Building
Wuhan University
Wuhan, Hubei 430072
China
+86 27 6785 2707
Email: yee@sienhoyee.org

Attorney for
China Chamber of
International Commerce

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QUESTION PRESENTED

Whether a federal court determining foreign law under Federal Rule of Civil Procedure 44.1 is required to treat as conclusive the interpretation or characterization of that law by the authoritative decision-maker in the foreign country at issue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

INTEREST OF *AMICUS CURIAE* 1

FEDERAL RULE INVOLVED 3

SUMMARY OF ARGUMENT.....3

ARGUMENT 6

I. Rule 44.1 addresses only what materials may be used in determining foreign law, not what effect to give to these materials, which effect must be determined on considerations outside the Rule, and is consistent with whatever effect properly derived, including "binding deference" 6

II. A distinction must be made, among the materials used to determine foreign law, between what may count as applicable law and the subsidiary means for determining applicable law, and the interpretation or characterization of Chinese trade law by MOFCOM counts as applicable law.....8

III. The *Pink* precedent demands that binding deference be given to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area.....12

IV. The act of state doctrine as reflected in *Sabbatino* also supports binding deference to the interpretation or characterization of Chinese trade law by

MOFCOM as the authoritative decision-maker in this area 18

V. Alternatively and subsidiarily, the interpretation or characterization of Chinese trade law by MOFCOM as the highest administrative authority on trade law in China should be given substantial deference analogous to *Chevron* deference 21

VI. The alleged inconsistency between China's representations to the WTO and its position in this case, even assumed to exist, does not affect the validity of its position in this case as a matter of domestic law and therefore the binding deference due to it 25

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 17-21

Brown v. Ohio, 432 U.S. 161, 167 (1977).....13

Charming Betsy, 6 Cranch 64 (1804).....14

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 21-23

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) 15

Garner v. Louisiana, 368 U.S. 157, 169 (1961) 13

In re Oil Spill by the Amoco Cadiz Off the Coast of France, 954 F.2d 1279, 1312 (7th Cir. 1992) 23-24

In re Vitamin C Antitrust Litigation, 837 F.3d 175 (2nd Cir. 2016) 4, 7

Marbury v. Madison, 1 Cranch 137 (1803).....14

Medellín v. Texas, 552 U.S. 491 (2008) 25

The Paquete Habana, 175 US 677 (1990).....9-10

U.S. v. Pink, 315 U.S. 203 (1942) 12-13

Wainwright v. Goode, 464 U.S. 78, 84 (1983) (*per curiam*) 13

Statutes, Treaties, and Rules

European Convention on Human Rights 14

European Convention on Information on Foreign Law, art. 8, June 7, 1968, 720 U.N.T.S. 154 8

Federal Rule of Civil Procedure 44.1.....8-10

Inter-American Convention on Proof of and Information on Foreign Law, art. 6, May 8, 1979, O.A.S.T.S. No. 53, 1439 U.N.T.S. 111 8

Rules of Decision Act, 28 U.S.C. § 1652 8

Statute of the Permanent Court of International Law, Article 38 10

Statute of the International Court of Justice, Article 38 10

Supreme People's Court of China, Interpretive Directives on the Application of the Administrative Litigation Act 15

United Kingdom Human Rights Act of 1998, Sections 3, 4 & 10 14

Drafting History

Fed. R. Civ. P. 44.1 Advisory Committee's notes 7

Others

Restatement, Third, Foreign Relations Law of the United States, § 454 23

Daniel A. Crane, The Chinese Vitamins Case: Who Decides Chinese Law?, COMPETITION POLICY INT'L, at 4 (March 2018), available at <https://www.competition policyinternational.com/wp-content/uploads/2018/03/ North-America-Column-March-Full-Crane.pdf> (last accessed April 4, 2018) 16

Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight", 112 Columbia L. Rev 1143 (2012) 24

Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Columbia L. Rev. 1093 (1987) 24

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Brief for China Chamber of International Commerce As *Amicus* in Support of Respondents

INTEREST OF *AMICUS CURIAE*[1]

Amicus, China Chamber of International Commerce (CCOIC), is the China National Committee of the International Chamber of Commerce (ICC), and carries out relevant business worldwide with more than 130 country members of

[1] The parties have consented to the filing of this *amicus* Brief. Respondents have filed a blanket consent. The consent of Petitioners has been received by email. Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that no counsel for a party wrote this Brief in whole or in part, and that no person or entity, other than *Amicus*, or its counsel made a monetary contribution to the preparation or submission of this Brief.

the ICC on behalf of the business community of China.

CCOIC's main responsibilities are to organize and promote trade, investment and economic and technological cooperation in various forms, to organize or participate in foreign negotiations and public-relations lobbying on behalf of enterprises, to provide advice on economic and trade policy-making and foreign trade negotiations, trade conflict-resolution, and to represent the Chinese business community in their participation in rule-making regarding the international economy and trade, and to make policy recommendations to the United Nations and ICC members.

In light of this mission, CCOIC and the business community it represents have a substantial interest in the developments in the United States courts, especially in the Supreme Court of the United States, which are bound to affect the business environment in both China and the United States as well as the volume of trade between them. This particular case has the potential to create substantial disruptions in business operations in China, and, as such, is of enormous interest to CCOIC, its membership, and the Chinese business community at large.

FEDERAL RULE INVOLVED

Federal Rule of Civil Procedure 44.1 provides as follows:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. 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.

SUMMARY OF ARGUMENT

In this case Petitioners alleged that Respondents engaged in a certain price-fixing scheme injuring consumers in the United States. Respondents claimed that the scheme was government-mandated under Chinese law. The Ministry of Commerce (MOFCOM) of China participated in the proceedings below as *amicus curiae*, described itself as "the highest administrative authority in China authorized to regulate foreign trade, including export commerce", *see* MOFCOM *Amicus* Brief in Support of

Defendants' Motion to Dismiss, Petitioners' Cert Petition, at 190a, and represented that the scheme was required by Chinese law. *Ibid.*, 191-192a and *passim*. Subsequently the substance of this representation was also stated in a diplomatic note to the State Department. *See* Diplomatic Note No. CE027/14 from the Embassy of the People's Republic of China to the State Department, J.A. 782-783. The Court of Appeals for the Second Circuit held that in determining foreign law, the federal courts were bound to defer to this representation, or interpretation or characterization of Chinese law in issue, *In re: Vitamin C Antitrust Litigation*, 837 F.3d 175 (2nd Cir. 2016), referred to as "binding deference" for convenience. Whether this "binding deference" is proper is now presented before this Honorable Court.

In this Brief, *Amicus* respectfully submits as follows: I. Rule 44.1 addresses only what materials may be used in determining foreign law, not what effect to give to these materials, which effect must be determined on considerations outside the Rule, and is consistent with whatever effect properly derived, including "binding deference"; II. A distinction must be made, among the materials used to determine foreign law, between what may count as applicable law and the subsidiary means for determining applicable law, and the interpretation or characterization of Chinese trade law by MOFCOM counts as applicable law; III. The *Pink* precedent demands that binding deference be given to the

interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area; IV. The act of state doctrine as reflected in *Sabbatino* also supports binding deference to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area; V. Alternatively and subsidiarily, the interpretation or characterization of Chinese trade law by MOFCOM as the highest administrative authority on trade law in China should be given substantial deference analogous to *Chevron* deference; and VI. The alleged inconsistency between China's representations to the WTO and its position in this case, even assumed to exist, does not affect the validity of its position in this case as a matter of domestic law and therefore the binding deference due to it.

ARGUMENT

I. Rule 44.1 addresses only what materials may be used in determining foreign law, not what effect to give to these materials, which effect must be determined on considerations outside the Rule, and is consistent with whatever effect properly derived, including "binding deference"

Federal Rule of Civil Procedure 44.1 provides that "[i]n 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." Fed. R. Civ. P. 44.1. The plain terms of this Rule make clear that Rule 44.1 addresses only what materials may be used in determining foreign law, not what effect to give to these materials, which effect must therefore be determined on considerations outside the Rule, and is consistent with whatever effect properly derived, including "binding deference" or "substantial deference". The last sentence, "The court's determination must be treated as a ruling on a question of law", attaches a certain nature to such a determination, which is a consequence of such an

operation to determine law, and does not affect the weight or effect to be given to the materials utilized.

Nothing in the drafting history of Rule 44.1 points to a different conclusion. As the Court of Appeals below pointed out,

> According to the advisory committee notes, the rule has two purposes: (1) to make a court's determination of foreign law a matter of law rather than fact, and (2) to relax the evidentiary standard and to create a uniform procedure for interpreting foreign law. Fed. R. Civ. P. 44.1 advisory committee's notes to 1966 adoption. The advisory committee notes suggest that Rule 44.1 was meant to address some of the challenges facing litigants whose claims and defenses depended upon foreign law and to provide courts with a greater array of tools for understanding and interpreting those laws. *Id.*

In re Vitamin C Antitrust Litigation, 837 F.3d, at 187.

Nor do the treaty provisions resorted to by Petitioners (Petitioners' Brief, 45-46 & n.13) and by the United States (U.S. Merits Brief, 30) militate in favor of a different conclusion. To some extent similar to Rule 44.1, these provisions address how to obtain materials on which to determine a question of foreign law, and state either that "[t]he information given in the reply shall not bind the judicial

authority from which the request emanated",[2] or that "[t]he State that receives the reports referred to in Article 3.c. shall not be required to apply the law, or cause it to be applied, in accordance with the content of the reply received".[3] Obviously, this effect stated in the two provisions is a matter of *treaty law*. Clearly, they do not prevent or prohibit a contracting party from treating them as binding *by operation of its own national law*. Here, as will be demonstrated below, the operation of US law does accord binding deference to MOFCOM's interpretation of Chinese law on trade.

II. A distinction must be made, among the materials used to determine foreign law, between what may count as applicable law and the subsidiary means for determining applicable law, and the interpretation or characterization of Chinese trade law by MOFCOM counts as applicable law

Rule 44.1 essentially allows courts to utilize any useful materials in determining foreign law. In the nature of judicial decision-making, a distinction must be made, among the materials used to determine foreign law, between what may count as

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[2] The European Convention on Information on Foreign Law, art. 8, June 7, 1968, 720 U.N.T.S. 154.

[3] Inter-American Convention on Proof of and Information on Foreign Law, art. 6, May 8, 1979, O.A.S.T.S. No. 53, 1439 U.N.T.S. 111.

applicable law and the subsidiary means for determining applicable law, between rules of decision and the materials that may help courts reach rules of decision. The idea of rules of decision is most famously codified in the Rules of Decision Act, 28 U.S.C. § 1652, which states that, "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

In the area of international law, the most instructive is this Court's teaching in the celebrated case, *The Paquete Habana*:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning

> what the law ought to be, but for trustworthy evidence of what the law really is.

175 US 677 (1990), at 700. On this rationale, a treaty, controlling executive or legislative act or judicial decision, and, in their absence, customary international law, may be directly used as applicable law, while the works of jurists and commentators are only subsidiary means for helping courts find the customs and usages of various nations. The binding force given to the applicable law results from its force of law on the basis of consent or other proper exercise of authority. The weight given to these subsidiary means result not from any legal force of these scholarly works themselves but from their persuasiveness on the basis of trustworthy evidence of what the law is. Subsequently this idea has been codified in Article 38(1) of the Statute of the Permanent Court of International Law and the same article of the Statute of the International Court of Justice, where a distinction is made between applicable law (treaties, custom international law and general principles of law) and subsidiary means for the determination of rules of law.[4]

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[4] The Statute of the International Court of Justice, Article 38, provides:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

Apply this rationale or an analogy to it in this case before the Court, the interpretation or characterization of Chinese trade law by MOFCOM, as the authoritative decision-maker in this area—to be discussed below—are in the nature of applicable law or rules of decision, and count as such and should be treated as such: they have binding legal force in China. As a result, the statements made by MOFCOM in its interpretation or characterization Chinese trade law cannot be treated as some simple subsidiary means for the determination of foreign law.

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b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the eachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

III. The *Pink* precedent demands that binding deference be given to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area

The interpretation or characterization of Chinese trade law by MOFCOM in this case is that of the authoritative decision-maker in China. The *Pink* precedent demands that binding deference be given to it.

At issue in *U.S. v. Pink*, 315 U.S. 203 (1942), was the intended exterritorial effect of a Russian decree. Voluminous evidence was presented, including an official declaration of the "People's Commissariat for Justice of the R.S.F.S.R". The Court said, "We do not stop to review all the evidence in the voluminous record of the Moscow case bearing on the question of the extraterritorial effect of the Russian decrees of nationalization", *ibid.*, at 218, and held that "[t]he referee in the Moscow case found, and the evidence supported his finding, that the Commissariat for Justice has power to interpret existing Russian law. That being true this official declaration is conclusive so far as the intended extraterritorial effect of the Russian decree is concerned." *Ibid.*, at 220. The word "interpret" here obviously means "*authoritatively* interpret"; that is to say, the "People's Commissariat of Justice" was the authoritative decision-maker, and the Court

accorded binding deference to its official declaration on the intended effect of Russian law. This precedent applies to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area.

Buttressing the argument for binding deference to MOFCOM's interpretation or characterization of Chinese trade law is the binding deference that U.S. federal courts give to the substantive state law decisions of a federal state's highest court. It is solidly established that "the views of the state's highest court with respect to state law are binding on the federal courts". *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (*per curiam*); *see also Brown v. Ohio*, 432 U.S. 161, 167 (1977); *Garner v. Louisiana*, 368 U.S. 157, 169 (1961). The ultimate rationale for this rule is the fact that federal states retain a measure of sovereignty when they joined the Union. This measure of sovereignty renders a federal state similar to a sovereign foreign country and supports the application of this rule to the treatment of the interpretation by a like authority of that foreign country.

In *Pink*, the decision-maker is the "People's Commissariat for Justice", while in the *Wainwright* line of cases it is the highest court of a federal state. The nomenclature is not important; what is decisive is the fact that each is the authoritative decision-maker. In the area of trade law, MOFCOM is such authoritative decision-maker in China.

One should not be surprised that MOFCOM, an executive branch of the government, can be the authoritative decision-maker in trade law, nor should one be tempted to think that only the highest court or judicial authority of a country is the authoritative decision-maker for all matters. After all, the power of judicial review in the style of the celebrated *Marbury v. Madison* case, 1 Cranch 137 (1803), is not universal, or not yet, particularly not in the executive-led government systems. In some legal systems, a certain branch of the executive government is given the authority to act as the authoritative decision-maker in certain areas, whose decisions may not be directly invalidated by the judiciary. One need go no farther to see this than the United Kingdom Human Rights Act of 1998. Under that act, U.K. courts are directed to interpret laws as much as possible so as to comply with the European Convention on Human Rights—a sort of *Charming Betsy,* 6 Cranch 64 (1804), in operation without such a designation. But, if such a mode of interpretation is not able to solve all problems, courts are allowed only to make a declaration of incompatibility between the law in issue and the European Convention, and then leave the matter to the political branches. United Kingdom Human Rights Act of 1998, Sections 3, 4 & 10.

Similarly, in China, courts undertaking judicial review under the Administrative Litigation Act—with Chinese characteristics—of regulations made by administrative authorities may not directly

invalidate or vacate such regulations but may only make suggestions to the rule-making authorities on how to remedy them, which would leave them in full force, with inconveniences, until these authorities agree to do so. This is made clear recently by the Supreme People's Court of China in Article 149 of its Interpretive Directives on the Application of the Administrative Litigation Act, adopted on November 13, 2017.[5]

In any event, if there is an issue as to whether the MOFCOM is the authoritative decision-maker on trade law in China, this issue can be settled through a proper process in the courts.

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983), is inapposite here, contrary to what an *amicus* asserts. In that case, the Court decided not to defer to Cuban law on point, not in the process of determining foreign law or ascertaining what that foreign law means, but after finding out what means, and did so for a reason not relating to its meaning. There is great difference between the meaning of foreign law and the effect it should be given in the United States. Here before this Court is only the question as to how to decide what Chinese trade law means or its effect in the China.

Rejecting binding deference and subjecting the interpretation or characterization of foreign law by a foreign country's authoritative decision-maker to

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[5] Available at < http://www.court.gov.cn/fabu-xiangqing-80342.html> (last accessed April 3, 2018).

reexamination or reinterpretation by another country's courts will lead to chaos in international relations, especially international commerce. As has been pointed out:

> Holding that U.S. courts can second guess the highest administrative authority of a foreign state on interpretations of that state's law would raise serious practical problems. Most obviously, it would create difficulties for the regulated entities, who face the possibility of being told by a foreign regulator that they must do x and then being told by a U.S. court that the foreign regulator misunderstood its own domestic law and that they should not have done x.[6]

And this problem can be multiplied many times, perhaps as many as the total number of countries in the world, because other countries are mostly bound to adopt the same approach either on the basis of reciprocity or by the persuasion of the high profile and standing in the world of this Honorable Court. How can business people engaged in international commerce order their lives and production so as to

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[6] Daniel A. Crane, The Chinese Vitamins Case: Who Decides Chinese Law?, COMPETITION POLICY INT'L, at 4 (March 2018), available at <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/03/ North-America-Column-March-Full-Crane.pdf> (last accessed April 4, 2018).

eke out a living, not to mention aspiring to reap rewards from an economy of scale. Indeed, if chaos is preferred in some quarters, it is definitely to be avoided in international commerce.

The fact that in international litigation the United States "historically has not argued that foreign courts are bound to accept its characterizations or precluded from considering other relevant material", or that "although other nations' approaches to determining foreign law vary, we are not aware of any foreign-court decision holding that representations by the United States are entitled to such conclusive weight", US Merits Brief at 29, should not dissuade US courts from according binding deference to those by other countries' authoritative decision-makers. This situation does not result from other countries' refusal to accord such deference, but from the United States' own decision not to seek such deference. It may be there just for the asking. More importantly, this picture that the Solicitor General has painted is one of the past or, at best, the present; the future may have in store a different policy for the policy-makers, but courts cannot change course too often. Even more importantly, *Amicus* submits that the chaos and inefficiency that would result from subjecting the interpretation or characterization of U.S. law by its highest administrative authority in the matter of trade to differing interpretation around the world—possibly by more than 190 different countries, if they all reciprocate by not

according binding deference—would not be appreciated by that authority or the U.S. business community, either.

In short, the interpretation or characterization of Chinese trade law by MOFCOM is that by the authoritative decision-maker in this area in China, and the *Pink* precedent demands that binding deference be given to it.

IV. The act of state doctrine as reflected in *Sabbatino* also supports binding deference to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area

The act of state doctrine as reflected in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and others "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory", *ibid.* at 401. This doctrine supports binding deference to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area.

It is difficult to see how anything less than binding deference to the interpretation or characterization of a country's law by its authoritative decision-maker can be squared with the act of state doctrine. Precluded from inquiring into the validity of the public acts of another country,

the courts of this country cannot examine the propriety of such an interpretation or characterization. Reexamining or reinterpreting that interpretation or characterization is itself inquiring into the validity of that act of interpretation or characterization.

Underlying this doctrine are the "the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." *Ibid.*, 417-18 (internal quotation marks and citations omitted). Indeed, interpreting and reinterpreting another country's authoritative decision-maker's interpretation or characterization of its own laws amounts to saying that a foreign country does not know its own laws or does not know the meaning of its own laws. This would be an affront to an independent sovereign state, and is bound to imperil amicable and friendly relations between countries. In this case, interpreting and reinterpreting China's authoritative decision-maker's interpretation or characterization of its trade laws will no doubt cause an uproar in China, and adversely affect the already tense relations between the two countries.

Underpinning the act of state doctrine are also the constitutional considerations derived from the separation of powers in the United States, which require the avoidance of conflicts between the

judicial branch and the executive branch of the government in the area of international relations. As the Court put it so well,

> [The doctrine] arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Ibid., at 423. These concerns are on full display in this very case. A conflict between the executive branch and the District Court below already has or at least is rearing its head. As Respondents show (Respondents' Merits Brief, at 42-44), the executive branch of the United States already successfully argued at the WTO on the price-fixing system as mandated by the MOFCOM, with the same legal framework applying to different commodities there, contrary to which position the District Court below spoke. Even if one were to work a hairsplitting distinction between the different

commodities or a minor difference in use of terms (required by *vs.* attributable to China) in issue (as the United States argues, US Merits Brief, at 31 & n.7), the same legal framework at work there would ensure a conflict will come to a head in due course. Such potential of a conflict obviously is also what the act of state doctrine is designed to prevent.

In short, the act of state doctrine as reflected in *Sabbatino* also supports binding deference to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area.

V. Alternatively and subsidiarily, the interpretation or characterization of Chinese trade law by MOFCOM as the highest administrative authority on trade law in China should be given substantial deference analogous to *Chevron* deference

One of the most prominent features of contemporary life under administrative regulation is the celebrated *Chevron* deference enunciated by this Honorable Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* Inc., 467 U.S. 837 (1984). There, the Court addressed the weight to be given to the interpretation of a statutory provision by an administrative agency receiving certain delegation of the legislature. The Court held that "if the statute is silent or ambiguous with respect to the specific issue,

the question for the court is whether the agency's answer is based on a permissible construction of the statute", *ibid.*, at 843. Or, as the Court observed, "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Ibid.*, at 844.

Amicus submits that, if the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker is not given binding deference, it should be, alternatively and subsidiarily, recognized as the interpretation or characterization of Chinese trade law by the highest administrative authority in China and given substantial deference analogous to *Chevron* deference. Given such deference, as long as it is reasonable or permissible under Chinese law, the interpretation or characterization of Chinese trade law by MOFCOM must be respected.

Some have noted that the "domestic origins" of *Chevron* deference render it inappropriate for application to international relations. *Amicus* respectfully disagrees. Such "origins" considerations do not distract from the propriety of its application to a wider area, just like where a hero comes does not distract from his or her prowess. What matters most is whether the interpretation or characterization of trade law by MOFCOM is so similar, or so analogous to the interpretation by U.S. administrative agencies

accorded *Chevron* deference as to trigger the application of the "like cases must be treated alike" principle, thus the application of the *Chevron* precedent. Indeed, the two situations are so similar and so analogous that they cry out for the same treatment. As the highest administrative authority in the area of trade regulation, MOFCOM does—or did in the relevant time period—receive delegation from the legislature to regulate trade matters in China, and its authority in this area is near plenary. If any doubt on this point is entertained, it can be settled through a proper process, just as the issue as to whether MOFCOM is the authoritative decision-maker on trade law issues in China.

Born of international comity and respect for independent sovereign states, the equal treatment accorded to both the Federal Government and foreign governments in the federal courts in the area of foreign relations such as sovereign immunities[7] also counsels equal treatment for the administrative agencies of both the U.S. and a foreign government. Indeed, it has already been recognized by the Court of Appeals in *In re Oil Spill by the Amoco Cadiz Off the Coast of France*, 954 F.2d 1279, 1312 (7th Cir.

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[7] See, e.g., Restatement, Third, Foreign Relations Law of the United States, § 454 cmt. d ("as in regard to responsibility for actions of officials and employees, the . . . [FSIA] follows the corresponding provisions of the [FTCA]"); Reporters' note 3 ("[The discretionary function exception] is designed to place foreign states in the same position before United States courts as is the United States itself when sued under the Federal Tort Claims Act.").

1992), that, "Giving the conclusions of a sovereign nation less respect than those of an administrative agency is unacceptable."

Of great importance to international commerce is the uniform application of law and the resultant efficiency that the application of *Chevron* deference would bring, just as would binding deference, already discussed above. We all know that business people like uniform application of the law as well as efficiency, on which their livelihood depends. The unique way *Chevron* deference promotes uniform application of law and efficiency by placing the agency as the prime actor in a particular space has been appreciated in the literature. [8] That beauty knows no geographical limitations or national boundaries.

Finally, *Amicus* submits that the interpretation or characterization of Chinese trade law by MOFCOM no doubt meets the "reasonable" or "permissible" standard, and the District Court should not have substituted its "better" view for that of the MOFCOM.

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[8] Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight", 112 Columbia L. Rev 1143 (2012); Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Columbia L. Rev. 1093 (1987).

VI. The alleged inconsistency between China's representations to the WTO and its position in this case, even assumed to exist, does not affect the validity of its position in this case as a matter of domestic law and therefore the binding deference due to it

Petitioners and some *amici* have made much of the alleged inconsistency between China's representations to the WTO and its position in this case. Respondents have clearly demonstrated that there is no such inconsistency. Brief for Respondents 40-41. Nothing more can be added in this regard.

However, it is respectfully submitted that such inconsistency, even assumed to exist, does not affect the validity of China's position in this case as a matter of domestic law and therefore the binding deference due to it. This point is illustrated to the full by this Court in *Medellín v. Texas*, 552 U.S. 491 (2008), a case on the death penalty, a matter of considerably greater moment than the price-fixing at issue in this case. There the Court made a distinction between international obligation and domestic obligation, *ibid.* at 520, and between the U.S. President's international representation and international responsibility, on the one hand, and his unilateral authority to create domestic law, on the other, *ibid.*, 529. Regarding application in the United States, the domestic authority prevails. Here in this case, if it is assumed that China indeed made a

representation to the WTO and then acted inconsistently in its domestic sphere, such inconsistency could be the basis for the international responsibility of China, but would not affect the validity of its decisions domestically and, therefore, the binding deference due to it from the U.S. courts.

CONCLUSION

For all the above reasons, the Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

SIENHO YEE
Counsel of Record
Law Building
Wuhan University
Wuhan, Hubei 430072
China
+86 27 6785 2707
Email: yee@sienhoyee.org

Attorney for
China Chamber of International Commerce

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