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

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INTRODUCTION

U.S. courts are not bound to defer to interpretations of foreign law offered by appearing foreign sovereigns. "Deference does not mean acquiescence," *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 508 (1992), and the District Court was not relieved of its obligation to decide the questions of foreign law before it because the Chinese Ministry of Commerce ("Ministry") filed an *amicus* brief.

The District Court followed a well-trodden path by applying a "substantial deference" standard. The United States endorsed the standard fifteen years ago, and it was the prevailing approach prior to the decision below. A substantial deference standard permits courts to consider the completeness, consistency, and authority of foreign legal statements, and it is consistent with principles of international comity and international practice. The rules favored by the Ministry and Respondents would require deference to interpretations of foreign law that U.S. courts find inconclusive, inaccurate, or even misleading. Courts can and will benefit from the expertise of foreign sovereigns under a substantial deference standard—there is no reason to resort to the artificial constraints of an ill-conceived rule.

The Ministry's warnings of diplomatic chaos ring hollow. No other government has endorsed the Ministry's position. Instead, the Executive Branch—which unlike this Court has authority and expertise in matters of foreign relations—has appeared in this Court supporting Petitioners notwithstanding China's protests.

The District Court appropriately applied a "substantial deference" standard that permitted it to consider the thoroughness, consistency, and accuracy of the Ministry's brief. The Ministry does not dispute that its presentation of Chinese law was incomplete and inaccurate—it repeatedly cited provisions of a repealed version of the Vitamin-C Subcommittee Charter as though they remained in force, declined to interpret relevant provisions of the regulatory scheme, and offered the District Court no explanation of its conflicting statements to the World Trade Organization ("WTO").

The District Court's interpretation of Chinese law was not "nonsensical"—and it was far more thorough than the cursory examination on which the Second Circuit relied. Following its accession to the WTO, China sought to avoid anti-dumping penalties. In that context, the requirement that the Chamber "verify the submissions by the exporters based on the industry agreements," JA105, made perfect sense alongside price agreements that were encouraged but not mandated. Such a system permitted profitable exports to continue when agreements could not be reached, but offered a mechanism for enforcing anti-dumping minima when agreements were achievable. Far from being a theoretical construct invented by the District Court, the record showed this to be the actual system in place during the class period, and the agreements for which Respondents were held liable were not required by it. Pet. Br. 10-11.

ARGUMENT

I. The Second Circuit's Binding Deference Standard Should Be Reversed.

A. There is No Legal Support for a Binding Deference Standard.

1. Petitioners have previously explained why the Second Circuit's rule amounts to conclusive deference. Supp. Br. for Pet. 3-7. Respondents do not defend the merits of a conclusive deference standard, but instead endorse a "modest holding" that directs courts to "defer if reasonable." Resp. Br. 20, 22. That is not what the panel held.

a. In the sentence immediately following the phrase "reasonable under the circumstances presented," the panel explained that "[i]f deference by any measure is to mean anything, it must mean that a U.S. court not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations. . . ." Pet. App. 25a-26a. The Ministry attempts to limit the court's "do not challenge" command to inquiries based upon U.S. legal principles, but the panel's interpretation was more expansive. Under the panel's test, a court may not question a sovereign's representations by comparing them to information submitted by a non-sovereign party, prior conflicting sovereign statements, or information discovered by the court's own research. Rather, the only exception is where "no documentary evidence or reference of law [is] proffered" to support the interpretation. Pet. App. 25a n.8. That approach would limit Rule 44.1 inquiries to evaluating the reasonableness of the representation on its face.

b. The rigidity of the Second Circuit's rule is evident from its reversal of the District Court's denial of Respondents' motion to dismiss. Pet. App. 2a n.2. The District Court's only holding at that time was that "the record as it stands is simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions." Pet. App. 186a. To hold that the District Court abused its discretion by permitting discovery must mean that the court lacked authority to consider materials beyond the Ministry's brief.

The Ministry now claims that conclusive deference does not limit a court's discretion to consider extrinsic materials, Ministry Br. 25, but said the opposite below. The Ministry argued that its *amicus* brief required the District Court "to ignore" Petitioners' expert testimony, CAJA A622, and further urged that, "unless the Court makes an affirmative finding that it finds [the Ministry's] presentation inherently non-believable, the only proper disposition is to credit the government's finding *and to foreclose an inquiry into what the law says and other findings*," *id.* (emphasis added). The panel ultimately adopted that view.

c. Even with Respondents' gloss, the panel's standard would still require deference to legal interpretations that are unpersuasive, yet nonetheless "reasonable under the circumstances." Pet. App. 25a. Such a test is indistinguishable from the standard applied under *Chevron*. But the Ministry's brief would not pass muster under a *Chevron*-like rule, Pet. Br. 48-55, and there is no basis for substituting such a rule for the discretion Rule 44.1 contemplates.

Respondents and the Ministry misapprehend the import of this Court's cases involving deference to administrative agencies. Pet. Br. 47-57. This Court has countenanced standards of binding deference based upon an implied congressional delegation of rulemaking authority to an agency. Even in that context there are substantial limits to deference that the Second Circuit's rule ignores, *id.* at 48-55, and outside that context, deference is not required even when an interpretation appears reasonable, *id.* at 54. Similarly, the Ministry offers no persuasive justification for insisting that a foreign trade ministry receive more respect than the highest ranking law-enforcement official of a U.S. state. *Id.* at 56-57.

2. There is no place for a conclusive deference standard under Rule 44.1. Pet. Br. 31-38. While the rule permits courts to "consider any relevant material or source" in interpreting foreign law, the Second Circuit held that courts may not rely upon materials beyond the four corners of the sovereign's statement. In holding that the District Court committed legal error by permitting discovery to proceed, the panel held that *all* of the materials developed during discovery and trial were unworthy of consideration. Pet. App. 2a n.2, 30a. A court's discretion to "decide what weight is to be given to information obtained from any of these sources," *Fremont v. United States*, 58 U.S. (17 How.) 542, 557 (1855), is pointless if relying upon such sources constitutes reversible error.

Contrary to the Ministry's claim, Ministry Br. 11, this Court's decision in *Fremont* did not grant conclusive weight to any legal interpretation offered

by the Mexican government. Instead, the interpretation of Mexican law on which this Court relied was rendered in 1844, a decade before *Fremont* was decided. *Fremont*, 58 U.S. (17 How.) at 561. And the interpretation that this Court accepted was a pre-litigation decision by Mexican authorities not to enforce procedures that Mexican laws purported to require—in other words, this Court held that Mexico's laws as written should be read in light of how Mexican officials had implemented them in practice. *Id.* at 561-62. Under *Fremont*, the Second Circuit erred in holding that the District Court should not have considered pre-litigation evidence relating to enforcement, including the Chamber's practice of permitting exports that did not comply with the Ministry's interpretation of the regulatory scheme. Pet. App. 32a.

The Ministry's consecutive "[n]ever before" declarations, Ministry Br. 23, misunderstand U.S. law. Since the enactment of Rule 44.1, federal courts have thought it highly "desirable"—and necessary—to review questions of foreign law *de novo*, even where foreign sovereign legal interpretations are involved. *E.g. Riggs Nat'l Corp. & Subsidiaries v. Comm'r of Internal Revenue Serv.*, 163 F.3d 1363, 1368 (D.C. Cir. 1999) ("We are . . . hesitant to treat an interpretation of law as an act of state, for such a view might be in tension with rules of procedure directing U.S. courts to conduct a *de novo* review of foreign law when an issue of foreign law is raised.").

3. Requiring conclusive deference would sacrifice the accuracy of foreign law determinations by privileging the identity of the interpreter above the content of the interpretation. Pet. Br. 31-39. Reliance

on a foreign sovereign's legal statement may enhance accuracy in some cases, but that is not a reason to require conclusive deference in all cases. There is also no justification for a rule that would grant conclusive deference to an *amicus* brief submitted by a foreign sovereign's U.S. counsel, but not to a duly-enacted regulation of a foreign agency, an interpretive letter of a foreign minister, a decision of a foreign court, or a sworn affidavit of a non-appearing foreign official. Pet. App. 30a n.10.[1]

The Ministry argues that foreign governments "have strong incentives" to explain their laws accurately in U.S. courts, Ministry Br. 18, but those incentives failed to keep the Ministry honest here, *infra* at 15-19, and the incentive to protect domestic industry is also powerful. Further, the consequences of inaccuracy are different when the interpretation concerns repealed laws. Unlike the "existing" Russian law interpreted by the Commissariat in *United States v. Pink*, 315 U.S. 203, 220 (1942), the Ministry's interpretation described a legal regime

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[1] The Ministry appears to believe that conclusive deference applies only when sovereigns appear as *amici*. The Ministry argues that multiple briefs filed by the Islamic Republic of Iran in *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001), did not receive conclusive deference because they did not offer an "official interpretation of Iranian law" (the Ministry ignores *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012)). Ministry Br. 14. But the Ministry's only interpretation of Chinese law at the motion-to-dismiss stage was its *amicus* brief signed by U.S. counsel, and that brief was no more "official" than the briefs Iran filed as a party in *McKesson*.

that Respondents abandoned after Petitioners filed suit, Pet. Br 13.

4. The Ministry zigzags between defending a "clear" rule of conclusive deference, Ministry Br. 22-23, and a standard that permits courts to "consider any relevant material" and defer only if "reasonable under the circumstances," *id.* at 24. But the only way the Ministry's rule could be "clear" is by inappropriately limiting the discretion contemplated by Rule 44.1. Pet. Br. 27-39. A standard that applies only to "reasonable" interpretations, Ministry Br. 4, would be hopelessly indeterminate absent guidance on what is reasonable, including what (if any) extrinsic materials a court may consider when those materials contradict a sovereign's *amicus* brief. In any event, Respondents and the Ministry cannot credibly oppose "open-ended balancing tests"—the comity defense they would have this Court affirm is a meandering ten-factor test that offers no guidance on the respective weight to be accorded to those factors. *See* Pet. App. 220a-222a.

B. *United States v. Pink* Does Not Support the Second Circuit's Deference Standard.

1. Respondents misleadingly assert that "[t]his Court has never deviated from the clear rule of deference established in *Pink* more than 75 years ago," Resp. Br. 25. *Pink* did not establish a prospective rule of deference, let alone a "clear rule of deference" that controls this case. Pet. Br. 40-41. The deference owed to an "official declaration" of a foreign sovereign was *not* a question presented in *Pink*, and this Court did not analyze it. 315 U.S. 203, 219 (1942). Nor did this Court hold that legal

arguments offered by a foreign ministry's *amicus* brief, absent endorsement of the Executive Branch as this Court credited in *Pink*, ought to always or even generally receive conclusive deference.

Contrary to the Ministry's claim, Ministry Br. 9, *Pink* did not hold that it would be inappropriate to consider "the evidence in the voluminous record" of the New York courts' *Moscow Fire* cases because of the Commissariat's declaration, *Pink*, 315 U.S. at 218. This Court did not explain why it declined to review the "voluminous" record before the referee, "except to note that the expert testimony tendered by the United States gave great credence to its position," *id.*, and there is no reason to presume that this Court would have reached the same result had the United States taken a contrary position.

2. *Pink* illustrates the infirmity of a conclusive deference rule. Pet. Br. 42-43. The Commissariat's "power to interpret existing Russian law" was essential to this Court's finding that its declaration was "conclusive." *Pink*, 315 U.S. at 219. Respondents concede that who has the power to interpret foreign law is a question of foreign law, yet do not explain how courts should decide that question. Ordinarily, such a question "must be decided by a court, without deference to the agency." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting). Yet under the panel's rule, a court would have to defer when an appearing sovereign representative asserts its power to interpret foreign law. That approach could force U.S. courts to side with one arm of a foreign sovereign over another by happenstance of which arm of the sovereign appears in U.S. court first. *Cf.* Brief for the Republic of

Honduras as *Amicus Curiae* in Support of Petitioner, *McNab v. United States*, No. 03-622 (Dec. 29, 2003) ("The 'original government position' . . . consists of statements made by mid-level government bureaucrats who were unauthorized to offer legal opinions on behalf of Honduras.").

3. The Ministry never informed the District Court of its "unquestioned" authority to interpret Chinese law. Pet. Br. 42-43. Rather than explaining its failures, the Ministry resorts to the misrepresentation that Petitioners "never" raised the issue. Ministry Br. 10, 32. Petitioners raised this precise argument in response to Respondents' motion to dismiss: "Defendants have offered no evidence to show that the Ministry of Commerce has *any* power under Chinese law to interpret Chinese law, or, if it has such power, that it may do so through a litigation brief." Plaintiffs' Mem. in Opposition to Mot. to Dismiss, *In re Vitamin C. Antitrust Litig.*, No. 06-md-1738, (E.D.N.Y. Aug. 16, 2006), ECF No. 46, at 32. The Ministry offered no response until Respondents appealed—and even then did not claim that its authority was confirmed by China's diplomatic note.[2] Petitioners agree that this Court should not "entertain arguments not made below," Ministry Br. 10, but it is the Ministry's claim to law-interpreting authority that this Court should ignore.

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[2] Contrary to Respondents' suggestion, Resp. Br. 3 n.1, the diplomatic note does not assert that Chinese law delegates law-interpreting authority to the Ministry. JA783.

C. Comity Does Not Support a Binding Deference Standard.

While principles of international comity counsel "respect for the knowledge that foreign sovereigns have about their own law," Resp. Br. 28, they do not require binding deference.

1. Neither Respondents nor the Ministry dispute that the Second Circuit's approach is an international outlier—most of the world has rejected binding deference. Br. of Professors of Conflict of Laws and Civil Procedure at 19-25. Nor do Respondents dispute that the leading international treaties are at odds with the panel's rule. The notion that a theoretical foreign nation *could* adopt a more rigorous rule, Resp. Br. 30, is farfetched—no nation has done so. And the Ministry has not represented that Chinese courts would grant conclusive deference to the Justice Department's interpretations of U.S. law.

2. Respondents and the Ministry are correct that this Court should avoid "interference with the international relations prerogatives of the political branches," Resp. Br. 33, but their prescription would replace the traditional judicial role with diplomacy by fiat. The Executive Branch has communicated its prerogatives regarding this case, and notwithstanding China's vociferous objections, the United States has urged this Court to vacate the decision below and hold that binding deference is inappropriate. U.S. Br. 30-32.

The Ministry appears to view "respect" as a one-way street: it repeatedly attacks the District Court for disrespecting Chinese sovereignty, Ministry Br. 2,

5, 22, while in the same breath lecturing the U.S. Executive and Judicial Branches on how to interpret and apply U.S. law, *id.* 3-6, 8-9, 20, 22-23. In any event, courts should not decide cases based upon the perceived degree of offense taken by a foreign nation. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) ("This Court has little competence in determining precisely when foreign nations will be offended by particular acts.").

3. Respondents incorrectly assert that the "extraterritorial application of U.S. antitrust laws" warrants more robust deference than might otherwise apply. Resp. Br. 34, 57-58. Congress determines whether federal statutes apply extraterritorially, *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016), and Congress can weigh the interests of foreign governments in deciding whether to apply U.S. laws to foreign conduct, as it has already done in cases where, as here, foreign conduct has caused domestic injuries, *see F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004). This case was limited to direct sales into the United States that harmed U.S. victims via inflated prices, and conclusive deference to foreign sovereign submissions is unnecessary to avoid the imprecise application of U.S. law in such circumstances.

Further, the comity doctrine includes numerous factors beyond the "true conflict" test that directly account for foreign sovereign interests. *See Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.,* 549 F.2d 597, 614-15 (9th Cir. 1977). Under the Ministry's conclusive deference rule, these additional factors would serve almost no purpose, and the "true

conflict" test would become a reflection of the foreign sovereign's policy interests rather than an accurate assessment of whether two legal regimes conflict.

II. The District Court Applied an Appropriate Deference Standard.

A. The District Court Granted "Substantial Deference" to the Ministry's Legal Submissions.

1. The District Court's motion-to-dismiss opinion appropriately held that the Ministry's brief was "entitled to substantial deference, but will not be taken as conclusive evidence of compulsion" because "the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position." Pet. App. 181a.

At summary judgment, the District Court reaffirmed this "substantial deference" standard and again rejected Respondents' argument that the Ministry's brief was entitled to "conclusive" deference. Pet. App. 95a-97a. The court plainly did not apply a "no" or "negative" deference standard—the court deferred to certain of the Ministry's representations. Pet. App. 118a-119a n37.

2. The parties agree that the Chinese authorities on which the Ministry chiefly relies contain ambiguous provisions, *e.g.* JA98-106, but dispute

how to resolve those ambiguities.[3] Respondents argue that these ambiguities compel deference to the Ministry's brief, but the District Court held that other sources also warranted attention. Specifically, the court weighed the pre-litigation statements and conduct of Respondents and Chinese government officials, which revealed how the participants in China's regulatory scheme understood the system during the relevant period. In doing so, the court did not "embark[] on a solo mission," Ministry Br. 16, or substitute its judgment for "those in the best position to provide direction," Resp. Br. 47, but instead credited the *contemporaneous* statements and actions of the same people and entities it is now accused of disrespecting.

Respondents' claim that the District Court relied on its "own view" of the "post-translation 'plain language'" of the Ministry's regulations, Resp. Br. 38, misses the mark. The Ministry's brief parsed much of the same language that the District Court examined, Pet. App. 202a-209a, and the District Court's reading of the regulatory texts was confirmed by its examination of contemporaneous statements by

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[3] Respondents again claim that Petitioners "concede[d]" that price fixing was "mandatory" under the 2002 regime. Resp. Br. 13 & n.8. That is still false. Cert. Reply Br. 10 n.1. Petitioners' statement referred to a heading in *Respondents'* brief, and the surrounding paragraphs and pages make clear that Petitioners continued to argue that price-fixing was not mandatory, and that even Respondents' position about Chinese law would not absolve them of liability. *See generally* Br. of Plaintiffs-Appellees, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Aug. 11, 2014), ECF No. 174.

Respondents and the Chamber. Further, the Ministry offered official translations of "notarized" Chinese regulations, and represented that they had been "certified" by a "qualified translation agency." Pet. App. 198a-200a & n.10. At minimum, the District Court was justified in relying on translations that the Ministry represented as authoritative in a sworn declaration by its U.S. counsel. *See, e.g., id.*; Declaration of Joel M. Mitnick, *In re Vitamin C Antitrust Litig.*, No. 06-md-1738 (E.D.N.Y. June 29, 2006), ECF No. 70.

3. The application of "substantial deference" is fully consistent with considering the completeness of a foreign sovereign's submission, the consistency of that submission with underlying legal texts or prior public statements by the sovereign, or other sources that bear upon how the sovereign understood and implemented the law in question. U.S. Br. 21. This Court endorsed such an approach more than a century ago in *Fremont*, and the District Court properly followed it here.

B. The Ministry's Brief Was Unworthy of Conclusive Weight.

1. Applying a standard of substantial deference, the District Court appropriately declined to grant conclusive weight to the Ministry's motion-to-dismiss phase *amicus* brief because it presented an incomplete and misleading summary of Chinese law. The Ministry claimed to "inform the Court of the regulatory scheme that governed defendants during the period encompassed by the Complaint," Pet. App. 191a, but its brief failed in that task. The District Court's decision to permit further discovery was not

"profoundly disrespectful," Ministry Br. 2, but appropriate given the record before it.

2. The Ministry's *amicus* brief failed to explain important provisions of the vitamin-C regime. For example, the brief relied extensively on the Ministry's 2002 PVC Notice, but did not acknowledge the existence of that Notice's suspension provision. Pet. Br. 15. The Ministry now claims that Respondents could not invoke this provision on their own, but that is irrelevant. The question was whether compliance with both legal regimes was *impossible*, and the District Court reasonably observed—in the absence of *any* interpretation of the provision by the Ministry—that Chinese law provided a mechanism that could have been invoked to comply with U.S. law. Pet. App. 97a, 124a. Respondents now say that this provision "was not continued in the 2003 Announcement," Resp. Br. 8, but there is no indication that the 2003 Announcement was meant to replace the 2002 Notice, and the Ministry has never interpreted it in that way. Finally, Respondents observe that the suspension provision was never invoked, Resp. Br. 8, but that conflicts with their position that under a "true conflict" test it is the face of China's regulations, not how those regulations were implemented, that matters, Resp. Br. 22, 54-56.

3. The Ministry's *amicus* brief affirmatively misrepresented that the 1997 Vitamin C Subcommittee Charter was operative "[t]hroughout the relevant period," Pet. App. 202a, and repeatedly cited provisions of the 1997 Charter to support its compulsion theory without disclosing that those provisions were obsolete for most of the class period,

see Pet. App. 204a-205a, 212a-213a.[4] Not one of the Ministry's three submissions to the District Court mentioned that the 2002 Charter repealed and replaced the 1997 Charter. Pet. App. 132a & n.45; Pet. App. 189a-223a; JA131-33; JA247-51.[5]

The Ministry has never explained why it did not inform the District Court about the 2002 Charter. In this Court, the Ministry argues that it distinguished between the 1997 and 2002 regulatory regimes, Ministry Br. 28, which is true but non-responsive—the 2002 Charter was a pillar of the 2002 regime, but the Ministry pretended it did not exist. In this Court, the Ministry downplays the significance of the changes between the two Charters, Ministry Br. 27-28, but the District Court cannot be held responsible for explanations the Ministry did not offer. Pet. App. 97a.

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[4] Respondents parroted these claims at the motion-to-dismiss hearing. CAJA A606 (arguing that the 1997 Charter "is the charter of this subcommittee," and "only the members of the subcommittee have the right to export Vitamin C").

[5] The District Court was not obliged to give notice that it intended to rely on the 2002 Charter, or the other regulatory provisions that contradicted the Ministry's legal interpretation. Resp. Br. 49-50. All of the regulatory materials before the District Court were submitted by the Ministry or the parties, including the 2002 Charter, and the Ministry had "more than ample opportunity to explain . . . Chinese law" when it chose in 2009 "not to discuss, or cite to, any specific governmental directives." Pet. App. 97a n.24.

The Subcommittee's mandate changed radically in 2002, and the Ministry's contrary claims defy credulity. The regulations diverge in several respects: first, the 2002 Charter departed from its predecessor by describing the Subcommittee as "a self-disciplinary industry organization jointly established on a voluntary basis," JA182; second, unlike in 1997, the 2002 Charter did not require exporters to be members of the Subcommittee and contained provisions by which members could initiate resignations[6], JA83-84, 186-187; and third, the 2002 Charter omitted each and every provision in the 1997 Charter that purported to require Chamber members to engage in price-setting activities, *compare* JA85, *with* JA182-199. *See infra* 1a-3a.

In response, the Ministry cites a December 2001 resolution, Ministry Br. 28-29, but has never explained how that resolution interacted with the 2002 Charter provisions that abandoned the 1997 Charter's price-setting provisions. Separately, Respondents claim that a 2003 Announcement trumped contrary provisions in the 2002 Charter,

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[6] Respondents now claim for the first time that the right to resign under the 2002 Charter could not be invoked because members were selected to four-year terms. Resp. Br. 10. That argument was not made below, and it is at odds with Article Eighteen of the Charter. JA187. Respondents also claim that it would not have been "practical" for any member to resign, Resp. Br. 10, but the pre-trial affidavit Respondents cite does not address the Charter's specific resignation provision, and in any event what the affiant believed was "practical" does not define what Chinese law required.

Resp. Br. 8-9, but the Ministry did not offer that interpretation below so it could not have been a basis for deference. In any event, the 2002 Charter was in effect for a year and a half of the class period before the 2003 Announcement took effect. *Compare* JA182, *with* JA102.

C. The District Court Appropriately Weighed China's Statements to the World Trade Organization.

1. There is no dispute that China represented to the WTO that it "gave up export administration of . . . vitamin C" as of January 1, 2002. JA319. The explanations of this statement that Respondents and the Ministry offer this Court were not before the District Court, and the Second Circuit did not rely upon them.

2. The Ministry did not explain China's WTO statements before the District Court—when asked at the motion-to-dismiss hearing, the Ministry's counsel offered no response. CAJA A599-A630. Through summary judgment, the Ministry had "ma[de] no attempt to explain" its WTO statements in any submission. Pet. App. 121a. Without any explanation from the Ministry, the District Court observed that the date on which China said it had given up "export administration of vitamin C"—January 1, 2002—"coincides with the repeal, on January 1, 2002, of" the 1997 vitamin C export regime that governed Respondents' pre-2002 conduct, Pet. App. 123a, and appropriately concluded that China's prior statements raised doubts about the accuracy of the Ministry's *amicus* brief.

3. Respondents now assert, without explanation, that the PVC system only ended "non-automatic licensing" for Chinese vitamin C exports. Resp. Br. 11-12, 40-41. But China represented that it had abandoned "restrictions on exports through non-automatic licensing *or other means*," Pet. App. 74a (emphasis added), and it remains unclear why the PVC regime was not an export restriction through "other means." The Ministry does not explain how PVC was different from a regime of non-automatic licensing, or why China never published the vitamin-C PVC procedures in an "official journal" if they were intended to operate as an export restriction under the WTO. *See* Br. of Donald Clarke and Nicholas Howson as *Amici Curiae* in Support of Petitioners 11-17.

4. Separately, Respondents and the Ministry highlight the United States' submissions in the WTO's raw materials proceedings, but that case involved a different record and legal standard. None of the extrinsic materials that the District Court analyzed were before the WTO panel. U.S. Br. 31 n. 7. And the U.S. noted that its assumptions about China's export system had relied upon the Ministry's representations, in large part because that system was "non-transparent." First Written Submission of the United States, ¶¶ 205, 212, 215, 229.

Even if this Court were inclined to weigh the U.S. raw materials submission, China's refusal to make its WTO filings publicly available makes it impossible to know whether those filings were consistent with its *amicus* brief. There is reason to suspect otherwise. *See* JA728 (noting China's argument that the "*2001 CCCMC Charter* does not

contain either imperative or authoritative rules of conduct" under the WTO). Further, China's submissions to the U.S. Commerce Department prior to the raw materials case contradict the Ministry's claim that China still required "exporters to follow a price-setting regime." Ministry Br. 31. In 2004, the Ministry asserted—with limited exceptions not including vitamin C—that in China price and output decisions were based on market considerations, JA241; in 2007, the Ministry declared that "[t]here are no State restrictions on price or output." JA356.

III. The Judgment of the Court of Appeals Should Be Reversed.

1. This Court should reverse the Second Circuit's comity decision and remand for further proceedings consistent with its opinion as to Respondents' remaining defenses. At minimum, this Court should vacate the judgment and remand for further proceedings under the correct deference standard.

The District Court's failure to grant conclusive deference to the Ministry's brief was the sole dispositive factor requiring reversal. Pet. App. 30a n.10; Pet. Br. 59. If the District Court was not "legally bound" to accept the Ministry's brief, then the panel's decision rests entirely on its reading of the District Court's motion-to-dismiss stage construction of Chinese law, but that cursory review of the District Court's preliminary holding cannot withstand scrutiny.

2. Respondents and the Ministry argue that the Ministry's legal interpretation was so patently correct that it should have been affirmed under any standard of deference. Not so. The record reveals a

system designed to stabilize vitamin-C export prices and avoid anti-dumping suits, but does not support the claim that Respondents were required to reach agreements to charge supracompetitive prices and restrict output. Pet. App. 139a-142a.

a. The Ministry and Respondents repeat the panel's error by presuming that evidence relating to the 2001 decision to enact the PVC regime was solely about the motive of the Chinese Government. Pet. App. 30a-31a; Resp. Br. 54-55; Ministry Br. 26. That inquiry was aimed at the Ministry's conduct, not its motive. Pet. App. 185a-186a.

The PVC system did not exist in November 2001 when Respondents agreed to raise prices to $3/kg. Pet. Br. 7. The contemporaneous records of that meeting, alongside China's repeal of certain regulations and representations to the WTO, convinced the District Court that Respondents reached that agreement voluntarily. Pet. App. 123a. In light of that history, and Respondents' long-running price war, JA108, the District Court credited contemporaneous descriptions of the November 2001 meeting, including that "persons within the industry [concluded] that the enterprises were able to sit down together at this particular time basically because VC prices had reached rock bottom, and no one could sustain a further slide," and that enterprises "had no choice but to seek industry self-regulation" because "the country had opened up the commercial products business, from a free competition aspect," JA364. In other words, Respondents agreed to fix prices because of government *deregulation*, not compulsion. *Id.*

b. Respondents and the Ministry, citing the panel's one-paragraph discussion, Pet. App. 32a, dismiss nearly all of the evidence relating to class-period conduct as irrelevant evidence of "non-enforcement," Resp. Br. 54-55; Ministry Br. 26 n.8. That argument contradicts China's position in the WTO raw materials proceeding that "evidence showing that exports of yellow phosphorous occurred below the minimum export price demonstrates that China did not maintain a minimum export price requirement for yellow phosphorous." Second Written Submission of the United States ¶ 390. Further, evidence relating to so-called "non-enforcement" illustrated how the Ministry and Respondents understood and implemented the regulatory regime.

The District Court reviewed the regulations attached to the Ministry's brief, but found nothing that prohibited exports in the absence of industry price agreements. Pet. App. 132a. The Ministry has never explained what provision or concept of Chinese law Respondents violated when they exported without a price agreement. This gaping regulatory hole is not theoretical—for significant periods *before and during* the class, the Chamber openly permitted exports with no price agreement in place. *See* JA398-400 (Vitamin-C had no agreed-upon export price "for the spring of 2003"); JA397 ("Each company can provide price quote based on its own judgment, and no specific restraint or requirement is imposed."); Ex. 25 to Declaration of Annabelle Chan in Support of Defendants' Motion for Summary Judgment, *In re Vitamin C Antitrust Litig.*, No. 06-md-1738 (E.D.N.Y. Nov. 23, 2009), ECF No. 394-5 at 41 (Respondents

"unanimously agreed to nullify the export restrictive price" because the price "at US$5.1/kg has no practical meaning").

3. Respondents and the Ministry repeat the panel's flawed reasoning that because the Sherman Act bars all price coordination, any coordination mandate would make compliance with the Act impossible. Resp. Br. 22; Ministry Br. 26; Pet. App. 32a. Antitrust abstention is only appropriate when "compliance with the laws of both countries is . . . impossible." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993). In cases involving minimum price floors, courts have rejected compulsion defenses where defendants have agreed to depart from the mandated floor. *E.g. In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238, 315 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986). That rule is eminently sensible—without it, foreign governments could immunize companies from liability by mandating a coordinated price floor of $0.01 for every product.

Respondents admit that pricing was left "up to the companies so long as they exceeded anti-dumping minima." Resp. Br. 10. That admission is fatal, because the alleged anti-dumping floor was $3.35/kg throughout the class period, yet Respondents concede that they frequently agreed to fix prices above $3.35/kg. CAJA A2091-A2098. Respondents could have declined to fix prices above the $3.35/kg floor consistent with both the Sherman Act and Chinese law. Thus, it was improper to dismiss the District Court's findings of liability on agreements that exceeded anti-dumping minima.

Respondents do not dispute that for most of the class period, the Ministry and Chamber abandoned output restrictions, yet Respondents continued to agree upon output restraints separate from their price agreements. Pet. Br. 11-12. Price fixing and output restrictions both violate the Sherman Act—unless Chinese law compelled both, dismissal was improper.

4. Respondents claim that Petitioners never argued below that the remaining "comity abstention" factors counseled against dismissal. Resp. Br. 56-57. But Petitioners have consistently argued that comity-based abstention is appropriate *only* where a "true conflict" exists between U.S. and foreign law, and that without such a conflict, dismissal is improper. *E.g.* Resp. Br. Ann. A-2. As no conflict exists, the remaining "comity abstention" factors are irrelevant.

CONCLUSION

The Second Circuit's judgment should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Comparison Chart: 1997 Charter vs. 2002 Charter

1997 Charter JA81-88 (appended to the Ministry's motion-to-dismiss stage *amicus* brief)	**2002 Charter** JA182-97 (omitted by the Ministry's motion-to-dismiss stage *amicus* brief)
Art. 2: The Vitamin C Subcommittee is "an industrial organization organized upon approval by the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") and under leadership of the Chamber by those member enterprises" JA81	Art. 3: The Vitamin C Subcommittee "is a self-disciplinary industry organization jointly established on a voluntary basis" by members of the Chamber of Commerce engaging in vitamin C import and export business." JA182
Art. 6: "The Sub-committee will make proposals on the export development plan and annual export quota allocation, supervise the implementation export license by member enterprises and advises on allocation and adjustment of export quota, and issuance of export license." JA82	**Removed in 2002 Charter.**
Art. 7: "The Sub-Committee shall coordinate and administrate market, price, customer, and operation order of Vitamin C export."	**Removed in 2002 Charter.**

JA82	
Art. 10: "The Sub-Committee shall hold . . . working meetings for Vitamin C export to . . . analyze and work out coordinated prices for Vitamin C export, to supervise and inspect the implementation of such coordinated export prices set by the Sub-Committee . . ." JA83	**Removed in 2002 Charter.**
Art. 12: "Only the members of the Sub-Committee have the right to export Vitamin C and are simultaneously qualified to have Vitamin C export quota." JA83	**Removed in 2002 Charter.**
Not in 1997 Charter. JA84	Art. 16(8) (Rights of Members): "To freely resign from the Subcommittee" JA186
Art. 15(6) (Member's obligations): "Strictly execute export coordinated price set by the Chamber and keep it confidential." JA85	**Removed in 2002 Charter.** JA186
Art. 16 (Penalties): "The Sub-Committee will suggest to the competent governmental department, through the Chamber, to suspend and even cancel	Art. 19 (Penalties): "circulation of notice of criticism, issuance of warning, temporary suspension of membership, or cancellation of

the Vitamin C export right of such violating member." JA86	membership." JA187
Not in Relevant Article of 1997 Charter	Art. 19 (Penalties) "Punishment must be approved by the Council of the Subcommittee." JA187
Art. 18(5) (functions of members meeting): "to discuss and set export coordinated price." JA86	**Removed in 2002 Charter.** JA188
Art. 18 (6) (functions of members meeting): "to inspect Vitamin C export coordination and administration and the implementation of export coordinated prices, and to suggest on punishment measures on violating member." JA87	**Removed in 2002 Charter.** JA188
Art 19(6) (Functions of the Council): "Discussing and determining coordinated prices." JA87	**Removed in 2002 Charter.** JA189