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IN THE SUPREME COURT OF THE UNITED STATES

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ANIMAL SCIENCE PRODUCTS, INC.,)
ET AL.,)
Petitioners,)

v.) No. 16-1220

HEBEI WELCOME PHARMACEUTICAL CO.,)
LTD., ET AL.,)
Respondents.)

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Washington, D.C.

Tuesday, April 24, 2018

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 11:39 a.m.

1 APPEARANCES:

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3 On behalf of the Petitioners.

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10 People's Republic of China, as amicus curiae,

11 in support of the Respondents.

12 JONATHAN JACOBSON, ESQ., New York, New York; on

13 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:39 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 16-1220, Animal Science
5 Products versus Hebei Welcome Pharmaceutical.
6 Mr. Gottlieb.

7 ORAL ARGUMENT OF MICHAEL J. GOTTLIEB
8 ON BEHALF OF THE PETITIONERS

9 MR. GOTTLIEB: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The question in this case is whether a
12 district court is bound to accept a foreign
13 sovereign's statement of foreign law in the
14 unusual case in which the court has concerns
15 about the statement's clarity, its
16 completeness, or its consistency.

17 The answer to that question is no.
18 District courts have the authority to resolve
19 their concerns by considering any relevant
20 materials, even if they go beyond the materials
21 presented by the sovereign.

22 On the motion to dismiss in this case,
23 the district court found that the amicus brief
24 that was submitted by the Chinese Ministry of
25 Commerce failed to answer important questions

1 about how its Vitamin C regulations applied to
2 the specific agreements that were identified in
3 the complaint. It also found that the
4 Ministry's interpretation appeared to be at
5 odds with the regulations that it cited and the
6 documentary evidence before the court.

7 The Second Circuit held that the
8 district court abused its discretion by failing
9 to dismiss the case at the motion to dismiss
10 stage. And the panel's view was based entirely
11 on its view that the Ministry's appearance
12 deprived the district court of discretion to
13 answer its questions about the Ministry --
14 Ministry's position by proceeding to discovery.

15 JUSTICE GINSBURG: May I ask you a
16 question about your bottom line? You -- you
17 say that the court of appeals should be
18 reversed, but if you're right, that the court
19 of appeals should not have taken what the
20 Chinese Ministry said as conclusive, then
21 wouldn't the proper bottom line be a vacate and
22 remand so the Second Circuit can reassess, with
23 the understanding that what the Ministry said
24 is not conclusive?

25 MR. GOTTLIEB: We do think that

1 vacating and remanding would be an appropriate
2 disposition. However, as we've pointed out in
3 our brief, the Second Circuit in Footnote 10 of
4 its opinion describe -- described what the --
5 what the district court had done as completely
6 and reasonably appropriate in its treatment of
7 the evidence at the motion to dismiss stage and
8 on summary judgment stage.

9 The -- the Second Circuit's opinion
10 was simply that the district court had -- that
11 the -- that the district court had erred and
12 abused its discretion in failing to allow the
13 case to move forward to discovery.

14 The district court -- or the court of
15 appeals hadn't even ruled on, for example, the
16 appropriate complaint. The court of appeals
17 construed the second amendment -- amended
18 complaint as opposed to the third amended
19 complaint, which was before the district court
20 on its motion for summary judgment.

21 The -- the court of appeals did not
22 challenge in any way the district court's
23 construction and interpretation of Chinese law
24 that occurred in its summary judgment opinion.

25 And for that reason, we think that

1 under the -- taking just the terms of Footnote
2 10 of the court of appeals' opinion, the proper
3 disposition would be to reverse. But we
4 certainly accept that vacating and remanding
5 would be an appropriate disposition as well.

6 We think that there are significant
7 costs to the rule that the -- the Second
8 Circuit -- to the rule that the Second Circuit
9 has adopted.

10 One of those costs is the independence
11 of the judiciary to decide questions that are
12 before them. U.S. courts should not give up
13 their responsibility to say what the law is in
14 cases and controversies before them, even when
15 that law is foreign. And courts in this
16 country have been interpreting and construing
17 foreign law for two centuries and not
18 outsourcing that task to other entities simply
19 because those questions are difficult.

20 The integrity of the judicial process
21 relies upon courts --

22 JUSTICE GORSUCH: But, counsel, we
23 actually do outsource saying what the law is
24 sometimes in domestic law; Chevron, for
25 example. We give conclusive weight to a

1 determination by an agency as to what the law
2 is.

3 So why, as a matter of comity,
4 wouldn't we do the same to an administrative
5 agency of a foreign sovereign?

6 MR. GOTTLIEB: There's a number of
7 reasons, the -- the first of which is that the
8 Chevron doctrine has a number of sort of
9 gatekeeping steps or preconditions before this
10 Court would even consider the reasonableness of
11 an agency's interpretation.

12 And so, for example, Chevron step zero
13 and step one --

14 JUSTICE GORSUCH: All that -- all that
15 suggests is perhaps we -- we should import a
16 similar regime here.

17 MR. GOTTLIEB: That would be quite a
18 holding of this Court, Justice Gorsuch. It
19 would require this Court to invent rules for
20 how a court is to determine, for example, what
21 arm of a foreign sovereign is authoritative and
22 how that foreign sovereign arm exercises its
23 authority.

24 JUSTICE KENNEDY: Suppose -- suppose a
25 court said that a decision of the Supreme Court

1 of England must be followed -- must be accepted
2 as the law of England.

3 MR. GOTTLIEB: In that circumstance,
4 Justice Kennedy, you would have, essentially,
5 law that was before the interpreting court. In
6 other words, you would have the opinion of the
7 highest court, which --

8 JUSTICE KENNEDY: Well, and as Justice
9 -- Justice Gorsuch's question indicates, we
10 always accept the law of the state supreme
11 court as being the law of the state.

12 MR. GOTTLIEB: Justice Kennedy, this
13 Court does not always accept that law.
14 Generally, it defers to the -- the
15 interpretation of the highest state court, but
16 there are exceptions to that; for example --

17 JUSTICE GINSBURG: But it doesn't take
18 their view of what the attorney general of the
19 state says is the law.

20 MR. GOTTLIEB: That's correct, Justice
21 Ginsburg.

22 JUSTICE GINSBURG: That's --

23 MR. GOTTLIEB: The -- the highest
24 ranking law enforcement officer of a state
25 would not receive binding or conclusive

1 deference on its interpretation of -- of its
2 state law.

3 But, importantly, Justice Kennedy,
4 with respect to the question of a foreign
5 court, even if presented with an opinion of a
6 foreign nation's highest court, the task for
7 the United States court would still remain to
8 determine is that -- is that opinion or is that
9 precedent binding on the question that is
10 before me.

11 JUSTICE BREYER: Fine, fine. What's
12 the difference between what various professors
13 have suggested I might have written in places
14 that we should give respectful deference to the
15 -- the opinions about the foreign nation,
16 highest court or appropriate, respectful
17 deference and what the court here said? We
18 defer to the Ministry's reasonable
19 interpretation that the term means or suggests.

20 I mean, maybe there's a difference
21 between "defer to a reasonable interpretation"
22 and "give respectful deference to." But what
23 is it?

24 MR. GOTTLIEB: The first formulation
25 of that standard that you described, Justice

1 Breyer, is the substantial deference standard,
2 which is what the district court applied in
3 this case. And we think there is nothing
4 inappropriate about that and it is what most
5 courts in this country --

6 JUSTICE BREYER: So what you want us
7 to do is to say you used the term "defer to a
8 reasonable interpretation" and you should have
9 used the term "we give respectful deference
10 to." And for that reason, we would like you to
11 reconsider the whole thing.

12 Now I -- I -- I see that. It
13 certainly has a point. But I'm afraid people
14 would sort of start to smile on the court of
15 appeals when we wrote such an opinion.

16 MR. GOTTLIEB: Justice Breyer, if that
17 were our position, I would expect people to
18 smile, but that is not our position.

19 JUSTICE BREYER: No. Well, what is
20 it?

21 MR. GOTTLIEB: Our position is that
22 the standard that the court of appeals applied
23 was not a defer -- if the substance of the
24 opinion is reasonable standard. The standard
25 that the court of appeals applied -- applied

1 was a -- a court that receives a sovereign
2 interpretation is bound to defer if it is -- if
3 the opinion is reasonable under the
4 circumstances.

5 And we know that the way that the
6 court of appeals applied that standard was by
7 only looking to the district court's decision
8 on a motion to dismiss, in which the district
9 court did not construe Chinese law.

10 The district court did not construe or
11 interpret Chinese law on the motion to dismiss.
12 It simply held that the record before it, as it
13 stood at that point, was inconclusive and
14 required further development.

15 JUSTICE BREYER: All right. In this
16 Court, we have a brief submitted by what they
17 purport to be the official interpreters of
18 Chinese law, which you'll hear in a couple of
19 minutes, and they say, one, it is Chinese law
20 that these individual companies -- like our
21 Webb-Pomerene association is what they are --
22 they -- but they have to make an effort to get
23 together on price, and even if they don't,
24 someone who exports must export at the price
25 that the Chinese Webb-Pomerene association

1 fixes.

2 Normally, you get three producers in a
3 room, they can agree on price. That isn't a
4 tough problem. So -- so they'll agree. And
5 then, when they do agree, the key point is you
6 can't export unless you follow their price.

7 Now I asked my clerk to go through the
8 record and see if there's anything in the lower
9 court that actually suggests that isn't Chinese
10 law. Well, I don't know, not much.

11 So that's my question. What is there?
12 What is there? Before we send this back to say
13 you shouldn't have used the word "reasonable
14 interpretation," you should have used the word
15 "respectful deference," what is there, given
16 the brief filed here, that you will use or
17 could use to suggest, or have used, I haven't
18 seen it here, that that isn't the law of China?

19 MR. GOTTLIEB: So, on the merits of
20 that question, Justice Breyer, the first thing
21 I would point out is that the Ministry's
22 interpretation of its regulations has not been
23 consistent through this case. And in the 2006
24 amicus brief that it submitted to the district
25 court, the Ministry interpreted its 1997

1 regulations, which included a notice and a
2 charter of the Vitamin C subcommittee.

3 The notice had been repealed and the
4 -- and the charter of the Vitamin Sub -- C
5 subcommittee had been replaced. The replaced
6 provisions of the Vitamin C sub -- Vitamin C
7 subcommittee charter made clear that you did
8 not need to be a member of the committee
9 anymore to export, and that you -- and that you
10 could, in fact, export Vitamin C without
11 participating in any of the pricing gap --

12 JUSTICE BREYER: That isn't my
13 question there, on that part. It is what is
14 there that suggests that a Chinese exporter
15 could set a price lower than the price set by
16 their equivalent to the Webb-Pomerene
17 association? That's -- is there any evidence
18 on that point?

19 MR. GOTTLIEB: Absolutely, Justice
20 Breyer.

21 JUSTICE BREYER: What?

22 MR. GOTTLIEB: There are -- we have
23 documents in the case repeatedly demonstrating
24 that Chinese exporters did, in fact, sell their
25 products in the United States at lower than the

1 \$3.35 price point.

2 JUSTICE BREYER: All right. That --
3 that -- that would be a point. And yet that
4 might also equally prove that they don't all
5 follow the law.

6 MR. GOTTLIEB: With respect to that,
7 Justice Breyer, we also have documents from the
8 Chamber, one of which is cited at pages 398 to
9 400 of the Joint Appendix, showing that at
10 certain times during this case the Ministry of
11 Commerce did not list -- the Ministry or the
12 Chamber did not list an export price for
13 Vitamin C.

14 And we have documents as well that are
15 in the record demonstrating that the Chamber
16 understood this and the participants in the
17 system understood this, that for certain time
18 periods during the case, because the businesses
19 could not get together and agree upon a set
20 export price, they allowed the businesses to
21 export without a -- a set or mandatory export
22 price.

23 And -- and again, that's pages 397 to
24 400 of the Joint Appendix, as well -- as well
25 as other authorities that we've cited in our

1 reply brief and our opening brief. And the
2 point of that is that not only -- there's an
3 additional point that the district court made
4 in its opinion for summary judgment, which is
5 that the 2002 notice, which they take as sort
6 of the central regulatory document in the case,
7 contained a suspension provision.

8 It contained in it a provision that
9 said that the Chamber and its members can get
10 together when market conditions demand and
11 essentially stop the price review function of
12 the price verification and chop regime.

13 One of the problems that the district
14 court had with the Ministry's brief in this
15 case is that the 2006 amicus brief doesn't even
16 mention the existence of the suspension
17 provision. It doesn't construe it. It doesn't
18 offer an interpretation of it. They have done
19 so here in this Court. But the district court
20 can't be faulted for not deferring --

21 JUSTICE BREYER: We're not. But, I
22 mean, in Pink and others, that's the other
23 part. I don't know. They filed a brief in
24 this Court, and shouldn't we take as given what
25 they say in that brief?

1 MR. GOTTLIEB: Justice Breyer, I don't
2 think that that is the lesson of Pink, if
3 that's -- if that's what your question is. And
4 I don't think --

5 JUSTICE BREYER: Well, fine. But here
6 we have a government. They say this is our
7 law. And is there -- I don't know the answer
8 to that question, but I think it could be that
9 we should take that as the law, unless you come
10 up with a fairly good reason to think that
11 isn't a -- that isn't.

12 MR. GOTTLIEB: Well, on the merits, I
13 think I've just described why the position is
14 wrong. But as far as this Court's precedents
15 go, Justice Breyer, I'd point out that in the
16 Abbott case involving Chilean custody, you
17 joined Justice Stevens' dissent in that case.

18 And in Footnote 9 of Justice Stevens'
19 dissent, Justice Stevens attacked the
20 Chilean -- the interpretation of Chilean law
21 issued by the Chilean official in that case
22 because it was "a piece of advocacy."

23 This Court can and does and in many of
24 its cases has looked at the legal
25 interpretations rendered by foreign sovereigns

1 to determine their context, to determine the
2 authority of the source offering the
3 interpretation, and to determine whether the
4 question that is being addressed in the
5 interpretation is one of foreign law
6 exclusively or one that sort of sits at the
7 intersection of foreign law and U.S. law, which
8 is what this Court did in the Intel case in
9 rejecting the suggestions of the -- of the
10 European Commission when this Court rejected
11 very strong arguments made by the EC that the
12 United States' line between investigation and
13 adjudication did not map on well to the
14 European line.

15 And this Court in an 8-1 decision held
16 that -- that it would not accept the European
17 Commission's interpretation, with respect.

18 Now, specifically with respect to
19 Pink, we don't think that Pink was ever
20 intended to be a rule of perspective or binding
21 deference. Pink was decided in the pre-Rule
22 44.1 era when questions of foreign law were
23 typically and traditionally treated as
24 questions of fact rather than questions of law.

25 And the lower court opinion in the

1 Moscow Fire case, the referee had held that the
2 United States had failed to meet its burden in
3 proving its case as to foreign law, which is --
4 which would not be the type of inquiry in which
5 any case would engage in today.

6 So we think as the -- as the case came
7 to this Court, it would be a completely
8 different case today, and, in any event, the
9 United States was completely aligned in that
10 case with the position that was -- that was put
11 forth by the Commissariat for Justice from
12 Russia. Here --

13 JUSTICE GINSBURG: There was no
14 suggestion in Pink that there was any
15 inconsistency in the position that the Soviet
16 Union was taking, and here we do have a
17 suggestion of inconsistency?

18 MR. GOTTLIEB: That's correct. Before
19 this Court reached -- before the -- the
20 sentences in this Court's opinion in Pink that
21 said that the Commissariat's declaration would
22 be conclusive, this Court stopped and paused to
23 note that the position that the United States
24 had taken in Pink was supported by powerful
25 expert testimony that was before the referee

1 below.

2 And -- and, additionally, there was a
3 specific finding on which this Court relied in
4 Pink that the referee had held that the
5 Commissariat for Justice had the power to issue
6 authoritative interpretations of Russian law.

7 By contrast, the referee in the -- in
8 the decision below in Moscow Fire had held that
9 the Commissariat for Foreign Affairs did not.
10 And so there was this preliminary question that
11 this Court would have to reach the chief --

12 JUSTICE SOTOMAYOR: Mr. Gottlieb,
13 could you state -- I read some words in the
14 opinion below that gave me pause. The court
15 below said: "We reaffirm the principle that
16 when a foreign -- foreign government acting
17 through counsel or otherwise directly
18 participates in U.S. court proceedings by
19 providing a sworn evidentiary proffer regarding
20 the construction and effect of its laws and
21 regulations, which is reasonable under the
22 circumstances presented, a U.S. court is bound
23 to defer to these statements."

24 I guess, what are you challenging or
25 what -- can you just give me a bullet point

1 listing of where the court erred in that
2 statement?

3 MR. GOTTLIEB: We think the Court
4 erred in saying that the district court was
5 bound to defer, particularly at the motion to
6 dismiss stage, when it had not yet reached a
7 construction of -- of Chinese law.

8 We think the court of appeals erred in
9 its reference to a sworn evidentiary proffer.
10 There was no sworn evidentiary proffer in this
11 case. There was simply an attorney declaration
12 that authenticated the documents in question.

13 We think the court of appeals erred in
14 insisting on the appearance of the foreign
15 sovereign in order to trigger --

16 JUSTICE SOTOMAYOR: All right. Let's
17 assume the following, which is closer to Pink.
18 Okay? There is a statement by the highest
19 court in Timbuktu, okay, not to denigrate by
20 using that, but in another country, a sworn
21 statement either by the Minister of Justice,
22 who says this is a translation of the Supreme
23 Court decision, our court is the supreme --
24 comparable to your court. It's the supreme
25 court of our nation. And it addresses this

1 issue.

2 I think, first, you're saying the
3 court has to determine whether the evidentiary
4 proof is based on a statement by someone who
5 can actually say what the law is as a final
6 arbiter in that country, correct?

7 MR. GOTTLIEB: Yes, Justice Sotomayor.

8 JUSTICE SOTOMAYOR: All right. So the
9 first inquiry is, is it a final statement, is
10 it someone who's reliable. What else?

11 MR. GOTTLIEB: Well, so, Justice
12 Sotomayor, the court would also have to
13 determine whether the supreme -- whether that
14 highest court's opinion is dispositive of the
15 question presented, whether it actually speaks
16 to the question that's before the United States
17 court.

18 And imagine that that same court
19 received a -- a -- a later decided opinion from
20 that same foreign highest court that appeared
21 to directly contradict the opinion that was put
22 forward by the foreign sovereign interpreting
23 it. Our position is that the interpreting U.S.
24 court should, of course, have the discretion
25 and, indeed, the duty to consider whether that

1 later opinion is relevant in any way to the --
2 to deciding the foreign law question.

3 Mr. Chief Justice, if I could reserve
4 the balance of my time.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Fletcher.

8 ORAL ARGUMENT OF BRIAN H. FLETCHER
9 ON BEHALF OF THE UNITED STATES, AS AMICUS
10 CURIAE, IN SUPPORT OF THE PETITIONERS

11 MR. FLETCHER: Thank you, Mr. Chief
12 Justice, and may it please the Court:

13 If I could start with Justice
14 Sotomayor's question to my colleague about
15 where the Second Circuit went wrong. I think
16 it's useful to distinguish between what we see
17 as two related but distinct mistakes that the
18 Second Circuit made.

19 One of them relates to how much weight
20 or deference a federal court should have given
21 to a submission like the Ministry's amicus
22 brief in this case, and that's the question
23 that the parties have really focused on. And I
24 do want to explain why we think that the
25 standard that the Second Circuit articulated is

1 -- is too rigid and too deferential to foreign
2 sovereign submissions.

3 But there's another important mistake
4 that we think the Second Circuit made. And on
5 that, we think my friends on this side of the
6 table actually really aren't defending what the
7 Second Circuit has done, and that is in
8 defining what's the universe of materials that
9 a U.S. court can consider in applying the
10 appropriate standard of deference in assessing
11 the foreign government's submission and
12 ultimately in determining what foreign law is.

13 And what we understand the Second
14 Circuit to have done -- and this is the
15 clearest in Footnote 10 of its opinion on page
16 30a -- is to say that when a foreign government
17 presents its views about the construction of
18 its laws to a U.S. court, the U.S. court is
19 bound to defer if that construction is facially
20 reasonable and the U.S. court cannot look
21 behind that construction to things like
22 contradictory statements in other fora or to
23 other relevant materials on foreign law that
24 cast doubt on the foreign sovereign's
25 representation.

1 And we think that was a serious error.
2 And we think it's reflected in the way that
3 this case has unfolded. The district court, at
4 the motion to dismiss stage, said I have the
5 Ministry's brief, it's due deference, but I
6 still have questions and I need more
7 information. It then developed at the summary
8 judgment stage a lengthy analysis of all of the
9 different things that it believed bore on the
10 relevant question of Chinese law. That
11 analysis runs to some 50 pages.

12 And the Second Circuit said, in that
13 footnote that I referenced earlier, that the
14 district court's consideration of that material
15 would have been "entirely appropriate" had the
16 Ministry not appeared in this case.

17 But the Second Circuit believed that
18 because the Ministry had appeared, that inquiry
19 and that analysis of the Ministry's other
20 statements and of the other evidence wasn't
21 appropriate. And, therefore, the Second
22 Circuit didn't consider any of that and so
23 hasn't adjudicated a lot of the debates about
24 the meaning of Chinese law that the parties are
25 now trying to have before you in the first

1 instance.

2 JUSTICE BREYER: All right. So -- so
3 -- so what are -- look, what do you want? What
4 words do you want to appear in the opinion? I
5 mean, you're representing the State Department,
6 right?

7 MR. FLETCHER: Yes.

8 JUSTICE BREYER: Okay, fine. The
9 State Department, I'm sort of interested in
10 their opinion, very.

11 MR. FLETCHER: Yes.

12 JUSTICE BREYER: A hundred ninety-two
13 countries. We have nearly 1,000 federal
14 judges. The -- by and large, the
15 characteristic of a federal judge is he knows
16 very little, if anything, about the law of 192
17 countries.

18 And so what precisely should we write
19 in this opinion? It can't be no matter what,
20 accept what they say. But, my goodness, if you
21 open the door, I mean, how -- how is this to be
22 done?

23 So that's why, "respectful deference,"
24 I don't know if that's the right phrase.

25 MR. FLETCHER: So I --

1 JUSTICE BREYER: And I don't know if
2 "defer if it's reasonable." Reasonable seems
3 to open it. So what are the words that these
4 900 judges are going to follow when they get
5 submissions from the highest legal authorities
6 in 192 countries without producing some kind of
7 international chaos?

8 MR. FLETCHER: So, first, just to
9 close out the point I was speaking to earlier,
10 I think the words that you should write to fix
11 the first error that I was focused on there,
12 about the universe of materials, is that when
13 it gets one of these submissions, a federal
14 court is never required -- required to close
15 its eyes to other materials that it believes
16 bear on the question; that applying whatever
17 standard you decide is the right form of words,
18 the federal court gets to apply that standard
19 with the benefit of all of the evidence that it
20 believes is relevant, including, for example,
21 other representations by the foreign sovereign
22 in other fora.

23 Now, on the question --

24 JUSTICE GINSBURG: Is that -- would
25 that include here the representation to the

1 World Trade Organization?

2 MR. FLETCHER: That -- the district
3 court did believe that was important here. I
4 -- I don't understand either Respondents or the
5 Ministry to argue that that sort of potential
6 inconsistency that the district court found
7 between what China was telling the district
8 court in this case and what it had told the WTO
9 in other cases isn't relevant to the weight
10 that a foreign sovereign's submission should
11 receive.

12 Here, I understand the Ministry and
13 Respondents think that there was no
14 inconsistency, and that's a question that would
15 be -- remain to be settled on remand by the
16 Second Circuit. But, yes, absolutely, that
17 sort of inconsistency is potentially relevant.

18 And, Justice Breyer, to your question
19 about then what's the form of words, how to say
20 the sort of amount of deference, we would urge
21 the Court not to do what the Second Circuit
22 did, which is to try to articulate something
23 like a Chevron-type rule, a sort of one size
24 fits all, if the foreign sovereign's
25 interpretation is reasonable or if it meets

1 some other standard, then it's binding and
2 that's the end of the case.

3 And the reason why we'd urge you away
4 from a standard like that -- well, there are
5 actually two important reasons. One is that we
6 don't see any support for that in international
7 practice. We think that the Second Circuit was
8 exactly right to say that U.S. courts should
9 afford foreign sovereigns' submissions the same
10 sort of weight and consideration that we would
11 respect -- expect in courts of other countries.

12 But the United States does not expect
13 and does not receive that sort of binding
14 deference or deference to anything that's
15 reasonable that we say about U.S. law when --

16 JUSTICE BREYER: So, if it's not
17 supposed to be that, and we're not supposed to
18 tell them, what is it we're supposed to say?
19 And if you say open the door, maybe we could
20 say, of course, do whatever the State
21 Department tells you. I mean, that is -- I'm
22 making it sound facetious, but there -- there
23 -- you can work out that kind of thing. Is
24 that what you want?

25 MR. FLETCHER: I certainly think --

1 JUSTICE BREYER: I mean, what?

2 MR. FLETCHER: -- anytime, if the
3 State Department appears in the case, that's
4 going to be relevant and we hope that the
5 courts would take that into account.

6 JUSTICE BREYER: There is, of course,
7 the risk that the State Department will say
8 thing A when it's country A and B when it's
9 country B.

10 MR. FLETCHER: Well, and also the
11 State Department may not be there. We weren't
12 in this case, and we're still not in this case
13 on the question of what does Chinese law
14 actually mean. That's a dispute that fixes the
15 rights between two private parties. And
16 sometimes the department --

17 JUSTICE BREYER: What about saying
18 when in doubt you can ask the State Department,
19 see what they think.

20 MR. FLETCHER: I mean --

21 JUSTICE BREYER: Take it into account
22 for what it's worth.

23 MR. FLETCHER: Sure. Courts can do
24 that in cases involving foreign relations. And
25 I -- I'm not sure that they've done it here.

1 JUSTICE BREYER: You're seriously
2 saying what you want us to say is say nothing?
3 Say nothing about what the standard is, nothing
4 other than some general word like "respectful
5 deference"? Should we say that?

6 MR. FLETCHER: I think -- I would
7 separate out two things. I would say always
8 respectful consideration. We'd be very
9 troubled if federal courts were not listening
10 to what foreign sovereigns had to say and were
11 not considering them with respect.

12 I would also say that it would be
13 appropriate to say that, ordinarily, the
14 submission from a foreign government is going
15 to get substantial weight, is entitled to
16 substantial weight. But, yes, we think that
17 the weight that it's entitled to is inevitably
18 going to depend on the circumstances.

19 JUSTICE ALITO: Suppose there's a case
20 where there's an issue of foreign law, there's
21 also an issue of -- of U.S. law in a U.S.
22 court, and the court receives a submission from
23 the ministry of commerce from the foreign
24 country and also a brief submitted by the
25 United States on behalf of the U.S. Department

1 of Commerce. Are they treated the same way?

2 MR. FLETCHER: No. I think the brief
3 for the Department of Commerce would depend on
4 the authority that the Department of Commerce
5 had in that context if it was describing an
6 interpretation it had adopted in the exercise
7 of authority under Chevron.

8 JUSTICE ALITO: Well, it's a brief
9 submitted -- it's a brief submitted by the
10 Department of Justice on behalf of the
11 Department of Commerce. It's the official
12 statement of the executive branch of the U.S.
13 government. And you have something comparable
14 from a foreign government.

15 So are they treated the same way?

16 MR. FLETCHER: I don't think so. I
17 think both of them --

18 JUSTICE ALITO: Why not?

19 MR. FLETCHER: Both of them are
20 entitled to respect. The respect and the
21 weight that the U.S. government's submission is
22 entitled to will be determined under domestic
23 administrative law doctrines, like Chevron,
24 like Skidmore, things like that.

25 The weight -- the foreign government's

1 submission should also get weight, but the
2 factors that would inform the degree of weight
3 that it should be given are going to depend on
4 the foreign legal system and might differ, just
5 to give a few examples, on whether or not it's
6 interpreting regulations that that Ministry
7 actually administers or is interpreting perhaps
8 some common law question or some provincial law
9 question that the Ministry actually has nothing
10 to do with, right?

11 And so part of our point is that
12 federal courts are actually presented with
13 interpretations that could be characterized as
14 falling within the Second Circuit --

15 JUSTICE GORSUCH: I -- I'm curious.
16 So -- so federal agencies get deference, but
17 foreign countries don't. I -- I got that.

18 But what -- what -- what does the
19 State Department do in foreign litigation when
20 a domestic -- American law is at issue? Does
21 it seek Chevron deference in -- from foreign
22 courts in the interpretation of American law?

23 MR. FLETCHER: Only when Chevron
24 deference would apply --

25 JUSTICE GORSUCH: So it does?

1 MR. FLETCHER: -- under American law.

2 JUSTICE GORSUCH: So it does?

3 MR. FLETCHER: When Chevron deference
4 would apply under American law.

5 JUSTICE GORSUCH: Yeah, so it says
6 that foreign courts must defer to
7 administrative agency interpretations --

8 MR. FLETCHER: When American law --

9 JUSTICE GORSUCH: -- in the United
10 States.

11 MR. FLETCHER: When American law
12 assigns them that weight. And, Justice
13 Gorsuch, if a foreign country had a system like
14 Chevron and had a rule like Chevron, and an
15 agency of that country that was entitled to
16 Chevron deference under the foreign legal
17 system came in and presented that --

18 JUSTICE GORSUCH: You'd argue the same
19 thing here?

20 MR. FLETCHER: No. Of course, that
21 would be appropriate to consider. My point is
22 just it depends on the authority of the
23 interpretation within the foreign legal system.
24 And you can't say across the board everything
25 that comes from a foreign sovereign or an arm

1 of a foreign sovereign or a foreign sovereign
2 owned entity gets that same level of deference
3 without regard to what actually -- how things
4 work in the foreign --

5 JUSTICE ALITO: Well, let me
6 reformulate my question. Suppose the foreign
7 country is just like the United -- it's exactly
8 like the United States, except it's not the
9 United States. It's a foreign country. So the
10 government is exactly the same, exactly the
11 same structure, everything relates to each
12 other in exactly the same way. And you get a
13 brief from the -- the U.S. Department of
14 Commerce and the Department of Commerce from
15 this alter ego-United States. Would they be
16 treated the same way?

17 MR. FLETCHER: I'm -- I'm sorry,
18 treated the same way in the United States?
19 Would they get --

20 JUSTICE ALITO: Yes.

21 MR. FLETCHER: Would they get --

22 JUSTICE ALITO: Yeah. Is there
23 anything about the fact that one is different
24 -- is a foreign country and one is the United
25 States that would point to different treatment?

1 MR. FLETCHER: Potentially yes. And I
2 think there, potentially, there are factors
3 that would merit giving more deference to the
4 foreign government's interpretation, in part
5 because it's a different legal system that the
6 court isn't going to be familiar with and that
7 the foreign government can explain that
8 wouldn't come into play in the domestic legal
9 system.

10 So this is not a one-way ratchet, and
11 we're not suggesting that foreign sovereign
12 representations are not entitled to weight or
13 don't merit deference. Our principal
14 submission is just that it's going to
15 inevitably depend on the circumstances and that
16 those circumstances have to be evaluated on a
17 case-by-case basis.

18 JUSTICE BREYER: Well, when --

19 JUSTICE KENNEDY: Suppose you have two
20 -- two questions -- two different cases. One
21 is, what is the general principle of the
22 foreign country, what is the general principle
23 of law, like a restatement, the restatement of
24 law?

25 The other is, was this conduct

1 mandated by the government -- by the foreign
2 government in a particular case? Any
3 difference as to what deference we should give
4 in case one and case two?

5 MR. FLETCHER: I guess it depends.
6 And I -- I know that's not a helpful answer to
7 give, but I think it's going to depend on the
8 circumstances, particularly if it's
9 restatement-type common law and the relevant
10 government agency doesn't have any authority to
11 interpret common law, that would be decided
12 solely by the foreign courts, that would cut
13 against deference, and, you know, if, in
14 contrast, the agency was saying it's our
15 regulations that require the compulsion, that
16 would counsel in favor of deference, but there
17 would be lots of other considerations. And so
18 I don't know that I can give a categorical
19 answer.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 MR. FLETCHER: Thank you.

23 CHIEF JUSTICE ROBERTS: Mr. Phillips.

24

25

1 ORAL ARGUMENT OF CARTER G. PHILLIPS
2 ON BEHALF OF THE MINISTRY OF COMMERCE OF THE
3 PEOPLE'S REPUBLIC OF CHINA, AS AMICUS CURIAE,
4 IN SUPPORT OF THE RESPONDENTS

5 MR. PHILLIPS: Thank you, Mr. Chief
6 Justice.

7 And maybe I -- may I begin by
8 expressing the thanks of the Ministry of
9 Commerce -- Commerce for allowing me to
10 participate in the oral argument today.

11 At some point, I'd like to get to
12 somewhat higher level, but I want to start off
13 with a couple of points that it seems my
14 colleagues made that -- that warrant correction
15 at this stage.

16 First of all, Mr. Gottlieb suggested
17 that the kind of program, Justice Breyer, that
18 you described, the -- the price verification
19 and chop, didn't actually operate that way,
20 that there was some gap, and he cited a couple
21 of pages in the Joint Appendix. And I would
22 just quote those pages from the Joint Appendix,
23 and you can evaluate them for yourselves.

24 There, it does say: "No consensus was
25 reached about price at the meeting. The

1 minimum price for export remains unchanged."

2 That doesn't sound like a gap. That
3 says that they keep the price as it was before.

4 A second statement is: "The agreed
5 prices are the minimum prices. We put the
6 limit on the floor prices but not on the
7 ceiling prices."

8 I don't think there's any serious
9 doubt, candidly, that what we have here is the
10 system that we described both to the district
11 court and have described to this Court that you
12 had to get approval. That's not to say that
13 everybody did. I'm not saying we can
14 completely enforce the laws. But it's about
15 the same thing as saying that, well, you don't
16 have some kind of maximum speed limits because
17 people violate those speed laws all the time.

18 JUSTICE GINSBURG: What do you do with
19 the representation of China to the World Trade
20 Organization that it had given up export
21 administration of Vitamin C in 2001 and that it
22 was a matter of voluntary agreement, with no
23 coercion on the part of the government, with no
24 government intervention?

25 That -- that was a statement made by

1 China to the World Trade Organization. It
2 seems directly contrary to its position here.

3 MR. PHILLIPS: I would -- I would take
4 probably three positions with respect to that.
5 First, it seems to me the right answer for that
6 problem is, if the government's got a problem
7 with it, take it up with the World Trade
8 Organization and -- and let that organization
9 deal with those issues.

10 And, indeed, it's interesting that the
11 United States, of course, quotes our briefs
12 filed in the district court before the WTO in
13 suggesting that we had violated our obligations
14 under the WTO.

15 So it seems to me the answer is not
16 give less deference to what a foreign
17 government says to a federal court, but,
18 rather, if there's a concern, deal with the
19 concern directly with the --

20 JUSTICE GINSBURG: But it isn't --
21 it's inconsistent to say the government compels
22 us, that -- yes, our government compels this
23 action by private actors --

24 MR. PHILLIPS: Right.

25 JUSTICE GINSBURG: -- and telling

1 another agency, no, our government doesn't
2 interfere. This is a matter of what the
3 private parties want to do.

4 MR. PHILLIPS: Right. And -- and,
5 Justice Ginsburg, I think the answer -- the
6 second answer I would give is that that was the
7 context that we provided to the district court
8 and explained exactly why the position we took
9 before the WTO was completely consistent with
10 the position we put before the district court.

11 And what we said was that, in 1997, we
12 had a compulsory scheme where the MOFCOM itself
13 essentially set the prices directly through the
14 Chamber. In 2002, we adopted the PVC method in
15 which we said, look, you guys negotiate among
16 yourselves, come up with a price, tell us what
17 it is, and then we will enforce that price.

18 And that's the approach that we took.
19 That's what we said to the WTO. So that when
20 we said that we had abandoned export
21 administration, we did as to certain elements,
22 but what we never said to them and what it was
23 absolutely clear from the entire submission is
24 that we maintained minimum export price
25 requirements, that those were retained

1 throughout.

2 And the United States in its
3 submission to the WTO specifically said,
4 quoting our language, that China retained
5 minimum price requirements and that that's the
6 rule in place, and that was the rule in place
7 --

8 JUSTICE GORSUCH: Mr. Phillips, what
9 if --

10 CHIEF JUSTICE ROBERTS: Your argument
11 --

12 MR. PHILLIPS: -- throughout the
13 entirety of this case. Yes, Your Honor.

14 CHIEF JUSTICE ROBERTS: Your position
15 is that you should not have to make that
16 argument, right? Your position is it doesn't
17 matter what the WTO is, you look at the brief
18 from the Ministry and that's it.

19 So the sort of argument you were just
20 making, which is a typical legal argument in
21 American courts, you say is one that is
22 inappropriate under your position.

23 MR. PHILLIPS: I -- I think that's
24 what this Court said in *Pink*. The Court
25 basically said -- and -- and I would take the

1 Solicitor General in 1984 and 1985's position
2 in the Matsushita case, which is a slight gloss
3 on Pink, that basically says, if a foreign
4 government comes to a U.S. court and says with
5 clarity and -- and unambiguously this is the
6 law, this is our foreign law, this is what it
7 means, that the Court ought to abide by that,
8 unless it's unclear or unless it's incredible
9 on its face.

10 JUSTICE GINSBURG: What about the --
11 the -- being informed by the United States that
12 the United States itself does not urge before
13 foreign tribunals that the foreign tribunal is
14 bound to accept what the U.S. government says
15 is U.S. law?

16 MR. PHILLIPS: Well, I --

17 JUSTICE GINSBURG: We don't -- we
18 don't demand that, and we don't get it.

19 MR. PHILLIPS: Well, I don't know
20 about the don't get it. I didn't --

21 JUSTICE GINSBURG: But, again, respect
22 focuses --

23 MR. PHILLIPS: -- I didn't read a
24 single instance in which the United States said
25 this is our law and -- and the court didn't

1 abide by it. Let's -- let's -- can -- let me
2 give you an example. And -- and I guarantee
3 you the United States' head would explode if
4 this were to happen.

5 So, if the United States went to a --
6 to another government, let's take -- let's pick
7 France, just to get out of picking governments,
8 but -- and said to them that what -- what
9 happened in the United States was consistent
10 with the rule of reason under Section 1 of the
11 Sherman Act, and for some reason, that's
12 directly relevant to France -- French law, if
13 the French -- if a French court were to come
14 back and say: Wait a second, I read your
15 Section 1 that says all restraints of trade are
16 illegal, and you come and tell me about rule of
17 reason, I read your cases as saying there are
18 per se illegalities and you come here telling
19 me about rule of reason?

20 I doubt -- I mean, the -- the notion
21 that this was a respectful analysis of -- of
22 China's, you know, when you say at the end this
23 is a post-hoc attempt to shield somebody's
24 behavior, that's not respect. That's the
25 opposite of respect.

1 Everything you take from the argument
2 on the other side, the best you can come up
3 with is there might have been some ambiguity in
4 the law.

5 JUSTICE BREYER: Well, what should we
6 say in general? I just want you to reach that,
7 because I can see three possible things. Say
8 they're like a state. I'm sorry, if Texas'
9 Supreme Court says this is the law of Texas, I
10 don't care what somebody else says, that is
11 what the law of Texas is, whether they held the
12 exact opposite yesterday or not.

13 Another possibility: Chevron.

14 MR. PHILLIPS: No.

15 JUSTICE BREYER: Okay. Okay. Another
16 possibility: Skidmore. You see? We take it
17 for the power to persuade but not the power to
18 -- you know, it doesn't have the power to -- we
19 just take it for what -- what it's worth and we
20 show respectful consideration.

21 And maybe we could limit it to the
22 instance where it's the highest interpretive
23 authority of the state, or nearly that, and
24 instances where there are four professors
25 getting into an argument about it.

1 I mean, I'm having a serious problem,
2 as you could tell, as to what words to put in
3 this opinion. You're worried about winning.
4 I'm worried about what words to put in.

5 (Laughter.)

6 MR. PHILLIPS: Well, no, Justice
7 Breyer, I'm actually -- I have the same concern
8 about the words, because the truth is, if you
9 quote the language of the Second Circuit, which
10 you quoted, I won't go through it, but, you
11 know, where it talks about which is reasonable
12 under the circumstances presented, in the
13 context of having had all of the circumstances
14 presented to it, I don't know how this Court's
15 going to improve on that particular language,
16 which -- which does force me, and I -- I want
17 to come back to the Chevron --

18 JUSTICE BREYER: We have very good
19 authorities. You know, the professors are
20 telling us, no, the right language is
21 respectful consideration. And, well, I'm not
22 being facetious. They -- they spend a lot of
23 time looking at this kind of stuff all over the
24 world. And -- and so that's a significant
25 factor.

1 MR. PHILLIPS: I -- I hear you,
2 Justice Breyer. But the problem with that is
3 how do you -- how do you square up respect --
4 respectful consideration with post-hoc attempts
5 to shield? That seems to me --

6 JUSTICE BREYER: So the words, to get
7 back to the question, the words you want us to
8 put in the opinion, at least in respect to the
9 highest or near highest authority or -- or --
10 or -- or are what?

11 MR. PHILLIPS: Personally, I'd go back
12 to Pink and I would -- or the variation of Pink
13 that the Solicitor General adopted in 1984,
14 which says that you should give a conclusive
15 determine -- conclusive -- it should be a
16 conclusive determination, unless there is an
17 ambiguity, unless it's incredible on its face,
18 et cetera.

19 JUSTICE KAGAN: Mr. Phillips --

20 MR. PHILLIPS: That's the standard
21 that I think you ought to apply.

22 JUSTICE KAGAN: -- do -- do -- do
23 China's courts use that rule?

24 MR. PHILLIPS: In -- in dealing with
25 MOFCOM?

1 JUSTICE KAGAN: In dealing with
2 foreign entities.

3 MR. PHILLIPS: Yes. MOFCOM is
4 entitled to absolute -- absolute deference upon
5 its interpretation of its rules.

6 JUSTICE KAGAN: No, no, no. In
7 dealing with foreign countries, do they -- do
8 China's courts use the rule that you're
9 suggesting American courts should use?

10 MR. PHILLIPS: I -- I don't have any
11 Chinese -- I looked for Chinese law on this
12 particular question. I couldn't find a
13 single instance.

14 JUSTICE GINSBURG: We do have -- we
15 have the European Convention as a model of what
16 other countries do. And the European
17 Convention on information about foreign law
18 says that the information, given in reply by
19 the country saying this is our law, shall not
20 bind the judicial authority from which the
21 request emanates.

22 MR. PHILLIPS: Right. It -- it
23 shouldn't bind it unless it satisfies certain
24 conditions, which is it has to be clear, it has
25 to be coherent, and it has to be consistent.

1 JUSTICE KAGAN: Is there -- is there
2 any --

3 MR. PHILLIPS: If it does those
4 things, then it should bind.

5 JUSTICE KAGAN: Is there any country
6 that you can identify that uses that rule?

7 MR. PHILLIPS: Well, the United States
8 up until this case.

9 JUSTICE KAGAN: Yes. Is there any
10 country? You say you don't know whether China
11 uses that rule. Is there any country that you
12 do know uses that rule?

13 MR. PHILLIPS: I -- I don't know of
14 any specifically, but I don't know that any
15 rejects it either, Justice Kagan.

16 JUSTICE GINSBURG: Well, it's -- if
17 you --

18 JUSTICE KAGAN: I mean, it seems as
19 though if -- if some country used that rule,
20 you're a great lawyer, you would be able to
21 tell us that some country used that rule.

22 MR. PHILLIPS: Well, candidly, I
23 didn't go searching all of the countries to
24 figure out whether or not other countries use
25 that rule. I did go look to see whether this

1 issue had arisen in China. I couldn't find any
2 instances in which that had happened, and so I
3 can't represent to you that China would --
4 would reciprocate.

5 JUSTICE GINSBURG: But it does seem
6 that the European Convention that I mentioned
7 and the similar provision in the Organization
8 of American States, that you -- you ask the
9 country, you want to know what their law is,
10 they tell you; you give it respectful
11 consideration, but it doesn't bind your -- you
12 to follow, inevitably that you must follow,
13 what the country tells you is its law. That
14 seems to be the position of both the European
15 Convention and --

16 MR. PHILLIPS: But, see, I -- Justice
17 Ginsburg, I don't think there's an
18 inconsistency between what the Second Circuit
19 did and what you described there, because,
20 first of all, in -- in -- in response to the
21 Solicitor General's position that the court of
22 appeals restrained its review of the
23 appropriate materials, I mean, the -- the court
24 specifically said, in determining foreign law,
25 we may consider any relevant material or

1 source, including the legal authorities
2 supplied by the parties, as well as those
3 authorities presented to the district court
4 below, which, again, if you're trying to figure
5 out how you're going to write an opinion,
6 Justice Breyer, you cannot write an opinion in
7 this case that says, well, you've got to do
8 something different than that. I think clearly
9 that's exactly what you would want to do.

10 JUSTICE ALITO: You don't see a
11 difference --

12 JUSTICE KENNEDY: I'm not sure that
13 the Pink case stands for the proposition that
14 you assert. In -- in the Pink case, the Court
15 looked at what the Commissariat did. The
16 Commissariat looked at the expert evidence and
17 said what the Russian law was. And the Court's
18 answer was premised on the Court's independent
19 assessment that the Commissariat's position
20 would be reliable and accurate.

21 It was as -- as if this Court looked
22 at whether or not there was an expert witness
23 in Russia and said yes, there was and we'll
24 accept that. It's -- it's a careful
25 assessment, we will accept that. It didn't say

1 accept it every time.

2 MR. PHILLIPS: Well, except that in
3 the context of the case where the previous
4 litigation had, in fact, decided exactly the
5 opposite and the Court acknowledged that there
6 was voluminous -- a voluminous record which
7 suggests that there was a very significant
8 argument that there was an extraterritorial
9 effect, all the Court had before it that --
10 that it relied upon was a statement of the
11 highest Ministry, this is the Ministry of
12 Justice, just -- the same as the Ministry of
13 Commerce here, to interpret that particular
14 provision saying it has extraterritorial
15 effect. And the Court --

16 JUSTICE KENNEDY: Well, I'll look at
17 it again, but it says the referee in the Moscow
18 case found and the evidence supported his
19 finding that the Commissariat for Justice had
20 the power to interpret existing Russian law.
21 In other words, the Court is looking at what
22 the expert evidence was and found it -- and
23 found it reliable.

24 MR. PHILLIPS: Right. But that didn't
25 say what -- what standard to apply to the

1 question of what the law is. That says: Is
2 the Commissariat an appropriate entity to give
3 you a final determination of Russian law?

4 I would submit to you that it's no
5 different than the position of the -- of the
6 Ministry of Commerce --

7 JUSTICE ALITO: Mr. Phillips --

8 MR. PHILLIPS: -- in this particular
9 case, Justice Kennedy.

10 JUSTICE ALITO: -- here are two --
11 here are two possibilities: One is the Court
12 says we will give respectful consideration to
13 the submission, but in the end, we will decide
14 what the law is.

15 The other is we will consider -- we
16 will determine whether the submission is
17 reasonable, and if it is reasonable, we will
18 regard it as conclusive. Are they the same?

19 MR. PHILLIPS: I -- I don't think so,
20 because I --

21 JUSTICE ALITO: Isn't the second what
22 the Second Circuit said?

23 MR. PHILLIPS: Yes, that's exactly
24 what the Second Circuit said, but -- and -- and
25 the reason why the Second Circuit's position is

1 important and should be upheld is that there
2 are two purposes for this kind of deference to
3 foreign governments.

4 One is we should get it right. And,
5 candidly, the right answer in this case is we
6 had a minimum price regime and we enforced it,
7 and -- and it dictated the outcome of this
8 case. And it is the basis for the antitrust
9 claim.

10 And you -- you may have other comity
11 considerations that say, well, you apply it,
12 but in this case, this was litigated, it all
13 turned on what Chinese law required, and
14 Chinese law required the plaintiff -- the
15 defendants to do precisely what they did in
16 this case.

17 And then the second part of it is the
18 respect to a foreign government. And by not
19 following what MOFCOM told them, the district
20 judge ends up adopting what the court of
21 appeals quite rightly describes as a
22 nonsensical outcome in this case. Therefore,
23 we know that the right answer is what we said,
24 is there is a minimum price regime and it ought
25 to be applied under these circumstances.

1 JUSTICE KAGAN: But how -- how can you
2 say that the only thing that shows respect to
3 foreign governments is to do something that we
4 don't know that any other foreign nation does?
5 I mean, presumably, all these foreign nations
6 are doing something more like Justice Alito's
7 first option, which is giving respectful
8 consideration. And so that suggests that's
9 what comity demands as an international matter.

10 MR. PHILLIPS: I -- I -- I think the
11 answer to that question is, one, we don't know
12 what the entirety is -- is out there that --
13 that describes how other courts respond. I
14 don't think there are any other courts -- I
15 don't think there's another system that's
16 nearly as litigious as this one and therefore
17 has -- may I -- may I finish?

18 CHIEF JUSTICE ROBERTS: Briefly.

19 MR. PHILLIPS: That is as -- is as
20 litigious as this one. But the rule in the --
21 in -- in this Court for 75 years has been to be
22 -- to be that deferential, and nothing has
23 suggested why that should change, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Jacobson.

2 ORAL ARGUMENT OF JONATHAN JACOBSON

3 ON BEHALF OF THE RESPONDENTS

4 MR. JACOBSON: Mr. Chief Justice, and
5 may it please the Court:

6 I think the best case to start the
7 deference inquiry in this case is by
8 recognizing that the only way the 2002
9 regulation makes sense is under the Ministry's
10 interpretation.

11 Under the regulations, price fixing
12 was clearly required under the 2002 regime.
13 And the -- those regulations make no sense at
14 all under the construction offered by the
15 Petitioners in the district court.

16 JUSTICE SOTOMAYOR: Doesn't that go to
17 the merits of the issue here? That I -- I
18 don't know that it answers the legal question
19 we're looking at, which is the court below
20 didn't go through the body of evidence that
21 Rule 44.1 permits and say there's some
22 contradictory evidence, but it doesn't make
23 sense in light of the minister's explanation.

24 MR. JACOBSON: Justice --

25 JUSTICE SOTOMAYOR: Isn't that what

1 the Second Circuit should have done?

2 MR. JACOBSON: Justice --

3 JUSTICE SOTOMAYOR: What it did was
4 look at the minister's explanation without
5 addressing any potential conflicting evidence
6 and saying it really doesn't conflict.

7 MR. JACOBSON: So -- so, Justice
8 Sotomayor, I think if you look at pages 9a and
9 27 to 28a of the opinion, you'll see that what
10 the Second Circuit did is it looked at the text
11 of the 2002 regulation, said that appears to
12 require price fixing, but there are some
13 ambiguous terms. And then, just to construe
14 those ambiguous terms, that is where deference
15 was granted to the Ministry. So I think that's
16 entirely consistent with what you are
17 suggesting. I would --

18 JUSTICE GINSBURG: What about in the
19 district court? There were -- it was a long
20 opinion. There were several reasons the
21 district court gave to say, I'm -- I'm going to
22 give respectful consideration, but there are
23 these other things, including what China told
24 the World Trade Organization. There were --
25 the -- the Second Circuit, I take it, thought

1 that what the Eastern District did was wrong,
2 to take -- to look at those other sources?

3 MR. JACOBSON: I -- I don't believe
4 so, Your Honor. I think what the court said is
5 when you have the 2002 regulation and you look
6 at the explanation by the Ministry, you don't
7 need to go further.

8 There is a footnote -- it's Footnote
9 14 in the court of appeals' opinion -- where it
10 -- where the court explains that there may be
11 instances where you have to go further, but
12 this is not one of them.

13 And -- and I do want to address the --
14 the issue raised by -- by Justice Kagan and
15 Justice Ginsburg about other countries, what do
16 other countries do. It's an important
17 question.

18 The -- the Europe -- the answer truly
19 is we don't know. The -- the European
20 Convention that we've been talking about for
21 the last few minutes is one where it doesn't
22 address the formal submission of a foreign
23 sovereign. It addresses the various sources of
24 foreign law and says none of these will be
25 dispositive. And that's true and that should

1 be true here as well.

2 JUSTICE BREYER: That's the -- do we
3 draw that distinction, the formal submission of
4 a foreign sovereign? The reason I ask that is
5 -- you practice in this area, right?

6 MR. JACOBSON: I do.

7 JUSTICE BREYER: All right. My
8 impression, not practicing in the area, is
9 these -- this is an unusual case because this
10 normally arises, say, in a contract dispute
11 among private parties, and it says interpret it
12 according to the law of China.

13 And so you'll have experts who say
14 what it is, and they'll conflict. And the
15 judge has to make a decision. That's the
16 normal case. This is an unusual case because
17 the sovereign country of China is itself
18 interested, and that's why they've submitted
19 this.

20 Now do we recognize that in an opinion
21 that's laying down a standard? Do we use a
22 term like you just used? What is -- how do we
23 preserve what, I guess, in an ordinary case
24 should be a judge making a difficult decision
25 in terms of conflicting evidence from this

1 case, where you have the nation itself directly
2 interested in the affair?

3 Maybe the answer is don't distinguish.
4 Maybe it is distinguish. What do you think?

5 MR. JACOBSON: So this Court has
6 received amicus submissions by foreign
7 governments in numerous cases. Certainly,
8 Empagran, there were -- there were a ton of
9 them.

10 JUSTICE BREYER: Yeah, yeah, yeah,
11 that's right.

12 MR. JACOBSON: And -- and this Court
13 has always recognized that the foreign
14 government's statements in those briefs about
15 its own laws should be controlling.

16 So the Intel case was raised. This
17 Court made clear in Intel that the European --
18 that it was accepting the European Union's
19 construction of its own law. The difference
20 was, what does this mean under U.S. law? That
21 was the Intel decision.

22 And that is always going to be true.
23 The foreign government can tell the court what
24 foreign law means, but the U.S. court has to
25 decide what the implications are of that

1 foreign law when reaching its decision.

2 JUSTICE ALITO: What if the entity
3 that submits the brief on behalf of the foreign
4 country does not have the authority under the
5 law of that country to dictate what the law is?
6 What if the entity is like the executive branch
7 of the government of the United States, which
8 does not have the authority to dictate what the
9 law is?

10 It -- it can express an opinion, and
11 that's generally -- it's very often correct and
12 it's entitled to respectful consideration.

13 MR. JACOBSON: I -- I think, in that
14 instance, respectful deference is an
15 appropriate standard. That is not this case.

16 JUSTICE ALITO: Well, why is it not
17 this case?

18 MR. JACOBSON: Because MOFCOM creates
19 the regulations, interprets the regulations,
20 and enforces the regulations. And there's a --
21 a brief by Chinese professors who explain the
22 rule that the rule-maker has the authority to
23 interpret its own rules in China and that that
24 authority is dispositive. That's what makes
25 this different than -- than Chevron deference.

1 It makes it much closer to a certificate -- a
2 certificate to a state supreme court, very,
3 very similar.

4 CHIEF JUSTICE ROBERTS: I -- I have --
5 I don't understand this constant emphasis on
6 respectful. It doesn't mean that you can't
7 disagree, right? I mean, you know, "with all
8 due respect" usually means the person's about
9 to say you don't know what you're talking
10 about.

11 (Laughter.)

12 MR. JACOBSON: Respectfully, Your
13 Honor --

14 (Laughter.)

15 MR. JACOBSON: So -- so I believe,
16 when a foreign government comes in with an
17 official statement of its own laws, respectful
18 deference is not a sufficient standard.

19 The deference standard should be --
20 and -- and, Justice Breyer, this goes to the
21 question that you've been asking throughout --
22 I think, if you look at the first paragraph on
23 page 23 of the Solicitor General's brief in the
24 Matsushita case, that is the correct standard
25 to apply here.

1 CHIEF JUSTICE ROBERTS: So, just to be
2 clear, respectful really plays no role, right?
3 I mean, if you wanted to say -- to the
4 government and say, well, all right, I guess
5 you're right, I guess I have to defer to this,
6 you might say that's disrespectful, but that's
7 all that matters, right, whether you're going
8 to -- and by "defer," you mean accept, whether
9 you're going to accept the proposition or not,
10 right?

11 MR. JACOBSON: Yes.

12 CHIEF JUSTICE ROBERTS: It's not
13 enough to be respectful.

14 MR. JACOBSON: Yes, Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: Okay.

16 JUSTICE ALITO: I -- I thought you
17 just told me that if the entity that submitted
18 the brief on behalf of the foreign country does
19 not have the authority to dictate foreign law,
20 then all it should get is respectful
21 consideration but that this case is different.
22 But then you seem to have turned around and
23 said no, the rule across the board is that you
24 follow what the foreign government submits.

25 So which is it?

1 MR. JACOBSON: So I -- I'm equating
2 the foreign government with the entity that has
3 the authority to interpret law under those
4 circumstances.

5 JUSTICE ALITO: Could this issue ever
6 come up in China -- in the Chinese courts?

7 MR. JACOBSON: I suspect so. The
8 regime has changed. PVC was eliminated in
9 2008. The related restrictions were eliminated
10 in 2010. So it's difficult to see how, in
11 today's milieu, that that would arise, but I --
12 I suspect it could.

13 JUSTICE ALITO: I don't understand
14 enough about the Chinese legal system, but
15 could this come before the Supreme People's
16 Court?

17 MR. JACOBSON: Well, in -- in -- with
18 -- without exhausting all of the myriad
19 contexts in which it might arise,
20 hypothetically, I would think so.

21 JUSTICE ALITO: And would they just
22 say, okay, this is what the Ministry of
23 Commerce says; that's the end of the matter?

24 MR. JACOBSON: Yes, absolutely.

25 JUSTICE ALITO: And can you point to

1 something that shows that?

2 MR. JACOBSON: It's the -- the
3 principle that the rule-maker has the authority
4 to interpret its own rules. It --

5 JUSTICE GINSBURG: Does the Supreme
6 People's Court deal with cases like this?
7 Isn't it true that, in most commercial matters,
8 the courts are not used but arbitrators are?

9 MR. JACOBSON: Justice Ginsburg, I
10 honestly don't know the answer to -- to that
11 question. I do -- I do want to address the
12 point that you've made a couple of times,
13 Justice Ginsburg, about a suggestion of
14 inconsistency.

15 There's absolutely no inconsistency in
16 what China told the WTO about giving up export
17 administration. What confirms that is the
18 continued use, the repeated use and reliance,
19 by the United States, by the European
20 Commission, by Mexico, and, ultimately, by the
21 WTO agreeing with the USTR's submissions in
22 that case, none of which suggested any
23 inconsistency on the part of China.

24 And we have explained in our brief --
25 this is at pages 12 and -- and 40 to 41 of our

1 brief -- precisely why giving up export
2 administration is entirely consistent with the
3 regulations, because prior to 2002, what China
4 did to enforce the -- the price-fixing
5 mechanism was to require transactional quotas
6 and licenses for each transaction. That's at
7 page 428 of -- of the Joint Appendix.

8 And what the implications of that are
9 is that the result of the -- of the conduct is
10 being compelled by the Chinese government and
11 is -- is illegal under U.S. law.

12 My -- my time is running out. I do
13 want to address a point, if I may, in the reply
14 brief the Petitioners submitted, which is the
15 argument that the regime is actually logical
16 under the district court's interpretation. And
17 there are four reasons why -- why that is not
18 true.

19 One, the -- the idea that this is
20 entirely voluntary and -- and not mandated is
21 completely contradicted by the language in the
22 2002 and 2003 regulations, which use the word
23 "shall" repeatedly, use the word "must." It's
24 clearly in -- in that context, mandatory.

25 Second, a point that we really haven't

1 addressed sufficiently, what happened from 1997
2 to 2001 is that the regulatory regime in 1997
3 failed. All right? It -- it led to a price
4 war in 2001 that was very destructive to the
5 Chinese economy.

6 The idea that China would then change
7 the regulatory system to one in which price
8 fixing is -- is not mandated would result in
9 lower prices, not higher prices. And what
10 China was trying to achieve was higher prices.

11 Third, the -- the argument doesn't
12 explain why the regulations would insist on
13 compliance with industry agreements if industry
14 agreements were not required in the first
15 place. That was the point made by the Second
16 Circuit.

17 And then, finally, agreements on
18 minimum prices are clearly illegal per se, even
19 if people charge a higher price than that.
20 That's the Plymouth Dealers case from the Ninth
21 Circuit in 1960. It is consistent with the
22 DOJ's position in the Matsushita case. It's
23 consistent with Socony and this Court's 1943
24 decision in the American Medical Association
25 case. And, finally, it's -- it's entirely

1 consistent with Catalano against Target Sales,
2 a per curiam decision from this Court in 1980.

3 What the Chinese law required was
4 unambiguously price fixing that was in conflict
5 with U.S. law, and that is why, in reaching the
6 determination whether to -- to affirm, vacate,
7 or reverse, we believe the appropriate
8 disposition is to affirm.

9 If there's nothing further.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Gottlieb, two minutes.

13 REBUTTAL ARGUMENT OF MICHAEL J. GOTTLIEB
14 ON BEHALF OF THE PETITIONERS

15 MR. GOTTLIEB: Thank you, Mr. Chief
16 Justice.

17 I'd like to start with a question that
18 Justice Kagan asked, which was the question
19 about whether Chinese courts would -- would
20 provide this kind of deference.

21 There's no indication that Chinese
22 courts would provide a rule of binding
23 deference, and their amicus brief that they
24 have from Chinese scholars on this precise
25 question doesn't make that argument.

1 The importance of this point is it
2 shows that the rule for which the Ministry is
3 advocating here and which Respondents are
4 advocating would place the United States alone
5 in the world.

6 China doesn't apply this kind of
7 binding deference. The United States doesn't
8 ask for it. It doesn't apply it. No other
9 nation supports the Ministry's rule, as our --
10 as the amicus brief from the conflicts of law
11 scholars provides.

12 And in this Court, China is the only
13 nation that is appearing before this Court
14 urging reversal. In -- in the Empagran case,
15 that opposing counsel mentioned, seven other
16 nations appeared asking this Court to constrict
17 -- to restrict the reach of U.S. antitrust
18 laws. In Morrison, three other nations joined.
19 In Hartford Fire, two other nations joined.

20 In -- in this case, all you have is
21 China advocating for this rule. And the reason
22 is because the -- the international standard
23 simply does not support a requirement of
24 binding deference because courts respect the
25 independence of judicial branches that exist in

1 other countries to answer the legal questions
2 that are put to them.

3 The costs of adopting such a rule that
4 the Ministry and the Respondents are proposing
5 are substantial. There are accuracy costs that
6 are built into trying to figure out who the
7 right arm of the foreign sovereign is. And
8 that's not a hypothetical problem. It arose in
9 the McNab case, as described in our briefs. It
10 also arose in the Samantar case.

11 And the rule that you simply defer to
12 whatever foreign sovereign appears could put
13 U.S. courts in a very delicate position without
14 any guidance for how to answer the question of
15 which arm of the sovereign is authoritative.

16 It also creates the risk that the
17 United States will not enforce United States
18 laws in -- or interpret them in the way they're
19 supposed to be interpreted in those areas where
20 questions of foreign law bleed into United
21 States law, as it does -- as they do
22 consistently in cases involving -- in cases
23 involving issues like antitrust. Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, at 12:40 p.m., the case
2 was submitted.)
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