2018 WL 1666001 (U.S.) (Appellate Brief)
Supreme Court of the United States.

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

No.
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1220
.
April 4, 2018.

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

Brief of Amicus Curiae Ministry of Commerce of the People's Republic of China in Support of Respondents

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*i QUESTION PRESENTED

Where a foreign government appears in a U.S. court to explain the meaning of its own law, should the court defer to the foreign sovereign's reasonable interpretation of that law?

*iii TABLE OF CONTENTS

*v TABLE OF AUTHORITIES

***1** INTEREST OF *AMICUS CURIAE*[1]

Amicus Ministry of Commerce of the People's Republic of China (the "Ministry," sometimes called MOFCOM) is a component of the central Chinese government and the highest administrative authority in China authorized to regulate foreign trade. The Ministry is the equivalent of a U.S. cabinet-level department. Chinese law places the Ministry in charge of foreign trade throughout the country. The Ministry accordingly formulates strategies, guidelines, and policies concerning domestic and foreign trade and international cooperation. It also drafts and enforces trade laws and regulations, and regulates markets. And contrary to Petitioners' groundless suggestion, the Ministry's authority to interpret the regulations at issue here was established below and is incontestable.

The Ministry has been actively involved in this litigation since 2005. It first presented the Chinese government's authoritative interpretation of Chinese law in 2006, when it filed an *amicus* brief in the district court. It reaffirmed its position in supplemental submissions to the district court in 2008 and 2009, and in an *amicus* brief in the court of appeals in 2014. As both courts below observed, this was "historic." Pet. App. 6a. Never before had "any entity of the Chinese Government … appeared *amicus curiae* before any U.S. court." *Id.* at 6a n.5.

The Ministry's submissions explained the Chinese trade regulations that, at relevant times (2002-2005), required the defendant companies to coordinate their ***2** export activities. China further made clear, in a 2014 diplomatic note to the State Department, that the Ministry spoke for the Chinese Government in this litigation.

Unfortunately, the Ministry's efforts to assist the district court in understanding the meaning of its regulations, including by explaining the economic, cultural, linguistic, and legal context in which those regulations were created, were treated with open suspicion and hostility. The district court even asserted that the Ministry's submissions reflected "a post-hoc attempt to shield defendants' conduct from antitrust scrutiny." Pet. App. 121a. Petitioners and some of their *amici* have continued that smear campaign here.

These accusations are profoundly disrespectful and wholly unjustified. As the Second Circuit explained, the reasons the district court gave for disparaging the Ministry's submissions were ill-considered and at points "nonsensical." Pet. App. 27a. Consistent with its obligation to review *de novo* the district court's foreign-law determination, the Second Circuit re-examined the Ministry's interpretation, found it "reasonable," and therefore deferred to it. *Id.* The Ministry respectfully submits that the Second Circuit's approach and conclusions are correct. A contrary result would signal to private parties that they should follow Petitioners' lead and disparage the competence and motives of foreign sovereigns who appear in U.S. courts. It would likewise signal to foreign sovereigns that their interpretations of their own laws will not be respected here. Those signals would seriously disserve the interests of accurate adjudication and international comity, to the detriment of courts, regulators, and regulated parties around the world.

***3** SUMMARY OF ARGUMENT

I. THE SECOND CIRCUIT CORRECTLY HELD THAT A U.S. COURT IS BOUND TO DEFER TO A FOREIGN SOVEREIGN'S REASONABLE EXPLANATION OF ITS OWN LAW.

A. *United States v. Pink* held that a foreign sovereign's official interpretation of its law, offered for use in U.S. litigation, is "conclusive." 315 U.S. 203, 21820 (1942). *Pink's* holding is not narrowly confined to its facts; instead, as the United States previously told this Court, *Pink* established that "American courts are obligated to accept [a foreign sovereign's legal] statement at face value" unless it is facially ambiguous, inconsistent, or incredible. Br. of United States as *Amicus Curiae* at 23, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1985) (No. 83-2004) (*Matsushita* U.S. Br.). In *Pink,* it was enough that *some* evidence supported the foreign sovereign's interpretation, even though the New York courts had held that the voluminous record as a whole supported a different interpretation.

This Court's other decisions have similarly relied on foreign governments' explanations of their own law, submitted (as here) through *amicus* briefs. The courts of appeals, too, have consistently recognized that deference is warranted to a foreign government's plausible interpretation of its own laws. They have thus declined to defer where a foreign governmental body does not appear before the court or its interpretive authority is unclear, or where deferring to a changed interpretation on appeal would disturb the finality of the judgment. Nothing of the kind occurred here. The Ministry presented a single, unchanging position throughout this litigation.

***4** B. Deference enhances the accuracy of U.S. courts' foreign-law determinations. The tools, doctrines, and intuitions that serve American judges so well in interpreting U.S. law are frequently unhelpful or even misleading when it comes to foreign law. Plain-language analysis of translated materials is treacherous, and may not accord with foreign interpretive principles. Secondary sources may not exist in English. And expert testimony frequently comes with a partisan spin.

Accordingly, it is only logical to regard a foreign sovereign's official and reasonable interpretation of its own law as "conclusive." The district court's analysis here vividly illustrates the dangers of a contrary approach; the court attempted to decipher the "plain language" of translated regulations, overlooking that Chinese regulatory regimes rely heavily on other types of material and use terms that might seem ambiguous or euphemistic to an English-speaker schooled only in American law. This misguided approach led the district court to accuse the Chinese government of attempting to mislead the court, understandably prompting a diplomatic protest.

Petitioners and the Solicitor General suggest that foreign governments may mislead U.S. courts to protect foreign interests, but they can identify no example of that happening in this Court or any other. Notably, the Ministry adhered to its interpretation here even when the United States (among others) used the Ministry's submissions in this case to support its claims that China's trade practices violated WTO standards. That occurrence illustrates why foreign sovereigns are unlikely to espouse positions in U.S. courts they do not believe. The positions they take here, in public filings, will have consequences in domestic settings and around the world.

***5** Deference is also critical to international comity. Rejecting a foreign sovereign's explanation of its own law can imply only two things: that a U.S. court knows a country's laws better than its own government, or that the foreign government is not being candid. Both are profoundly disrespectful. The Court should not adopt a rule that encourages litigants to accuse foreign governments of incompetence or deceit, and encourages courts to reject foreign sovereign's views in precisely those cases that are important enough for them to participate directly.

C. Federal Rule of Civil Procedure 44.1 did not discard the rule of deference to foreign sovereigns. As the Solicitor General correctly acknowledges, there is no conflict between a rule of deference and Rule 44.1's text. Nor is there a conflict with Rule 44.1's goals of (a) making foreign-law determinations questions of law, not fact, and (b) removing limitations on the materials a court can consider. In domestic contexts, courts regularly grant deference on questions of law, and consider extrinsic materials in applying deference doctrines. So too here.

Although the parties agree that domestic deference doctrines should not be transplanted wholesale into the foreign-law context, analogies may be illuminating. Like the Seventh Circuit, the Ministry believes it would be inappropriate for

courts to afford greater deference to executive-agency interpretations of domestic statutes than to foreign government interpretations of foreign law. When U.S. courts decline to defer to a foreign sovereign's interpretation of foreign law, they risk applying a rule that has never before existed and applies to no one else, thereby imposing conflicting legal obligations on the parties before them. And they risk international discord as a result.

***6** D. The Solicitor General's newly minted standard - in which any number of "circumstances" dictate the amount of deference due, if any - will not aid courts in resolving difficult issues of foreign law, and will not serve the interests of comity. Indeed, although the Solicitor General asserts that his approach will "ordinarily" afford "substantial weight" to a foreign government's interpretation, that assurance is impossible to square with his position that a court should resolve "a disputed question of foreign law … in the same manner as a court facing any other unsettled legal question." The Court should not adopt that unprecedented approach.

II. THE COURT OF APPEALS CORRECTLY DEFERRED TO THE MINISTRY'S REASONABLE EXPLANATION OF CHINESE LAW.

A. The Second Circuit carefully examined the Ministry's submissions in context and in light of underlying materials. It also carefully explained the district court's key analytical errors - which together produced a "nonsensical" reading of Chinese law. Yet Petitioners claim the Second Circuit blindly deferred to the Ministry and but for that deference, the Second Circuit would have embraced the district court's construction. That is a strawman - the Second Circuit said nothing of the kind.

The district court's criticisms of the Ministry's position were unfounded. The Ministry provided a clear, detailed, and cohesive interpretation of relevant Chinese law. The district court appeared troubled that aspects of the regulatory system were not fully spelled out in positive enactments, but that is typical of Chinese law. Nor did the Ministry fail to distinguish between the 1997 and 2002 regulatory regimes; rather, it carefully explained that the later regime rested on ***7** the same basic concept as the earlier one, but was implemented differently.

The Ministry's position here is also fully consistent with China's statements to the WTO. Those statements referred to the pre-2002 system of export quotas and licenses, but *not* to mechanisms such as the verification-and-chop system, pursuant to which (before 2008) certain chambers of commerce were granted implementing authority to coordinate export prices, and thereby minimize export dumping issues that Chinese manufacturers might encounter. Indeed, the United States later *invoked the Ministry's filings in this very case* to argue to the WTO that China controlled export prices in precisely this way, including during the 2002-2005 period, and the WTO agreed. The district court simply misread China's reference to "export administration," giving that term a construction never adopted by the trade specialists in the WTO proceedings - an error Petitioners repeat here.

B. There is no merit to the suggestion that the Ministry lacks authority to interpret the regulatory materials at issue. In 2001, China's State Council promulgated rulemaking procedures that empower the Ministry (and other Chinese agencies) to make and interpret its own regulations. The Ministry exercised that authority and, moreover, speaks for the People's Republic of China here.

***8 ARGUMENT**

I. U.S. COURTS ARE BOUND TO DEFER TO A FOREIGN SOVEREIGN'S REASONABLE EXPLANATION OF ITS OWN LAW.

A. *Pink* Held That A Foreign Sovereign's Explanation Of Its Own Law Is Conclusive.

This Court has already held, on materially indistinguishable facts, that a foreign government's explanation of its own law, provided for use in U.S. litigation, is "conclusive." *Pink,* 315 U.S. at 218-20. That holding, which the Second Circuit followed below, is fully supported by other decisions of this Court and the courts of appeals, and should be sustained.

1. *Pink* held that an official Soviet declaration explaining the "intended effect of the Russian decree nationalizing [Russian] insurance companies" after the Russian Revolution was "conclusive" of the decree's meaning under Russian law. *Id.* at 218-20 (footnote omitted). As the Solicitor General previously told this Court, *Pink* establishes that "[o]nce a foreign government presents a statement dealing with subjects within its area of sovereign authority … American courts are obligated to accept that statement at face value; the [foreign] government's assertions concerning the existence and meaning of its domestic law generally should be deemed 'conclusive.' " *Matsushita* U.S. Br. at 23 (quoting *Pink,* 315 U.S. at 220). Only "[p]lainly ambiguous," "internally inconsistent," or facially "incredible" assertions do not warrant deference. *Id.*

The Solicitor General has now flipped positions and, like Petitioners, argues that *Pink* turned on "unusual" and distinguishable facts. SG Br. 27-29; Pet. Br. 39-41. They argue that (i) "a wealth of record evidence … ***9** confirmed" the Soviet interpretation; (ii) the interpretation came "in response to an explicit invitation from the U.S. Executive Branch"; and (iii) this Court first found "that the Commissariat had power to interpret Russian law." Pet. Br. 41. These claims are unavailing.

First, Petitioners and the Solicitor General misunderstand the facts of *Pink.* The New York courts had held - based on expert testimony, government documents, court decisions, and academic writings, see *Moscow Fire Ins. Co. v. Bank of N. Y. & Tr. Co.,* 294 N.Y.S. 648, 683 (N.Y. Sup. Ct. 1937) - that the nationalization decrees "were not intended to have effect here." *Moscow Fire Ins. Co. v. Bank of N. Y. & Tr. Co.,* 20 N.E.2d 758, 767 (N.Y. 1939), *aff'd by an equally divided court,*309 U.S. 624 (1940). "Subsequently to the hearings in that case," the United States obtained and submitted the official Soviet declaration. *Pink,* 315 U.S. at 218. When the issue arose again in *Pink,* on the same record, *id.* at 216-17, this Court deemed the declaration "conclusive." It did so even though the declaration contradicted the New York courts' holdings based on "all the evidence in the voluminous record," which this Court "d[id] not stop to review." *Id.* at 218.

Thus, *Pink* did not defer to the Soviet declaration *because* it was supported by the entire record (Pet. Br. 41; SG Br. 10-11, 28-29); it deferred *even though* the lower courts thought the record, on balance, supported the opposite conclusion.

Second, although U.S. courts previously obtained foreign legal interpretations "through official diplomatic channels" (SG Br. 28; Pet. Br. 41), that practice was discontinued 40 years ago at this Court's suggestion, with the State Department's concurrence. See Kristen E. Eichensehr, ***10** *Foreign Sovereigns As Friendsof the Court,* 102 Va. L. Rev. 289, 299 (2016). "[F]oreign governments [now] communicate their views to the judicial branch through … the filing of formal briefs," *id.,* as the Ministry did here. [2]

Moreover, China *did* act through diplomatic channels. After the district court ruled, the Chinese Embassy sent a diplomatic note to the State Department highlighting that "China has attached great importance to this case" and reiterating that the Ministry's submissions had correctly "described China's compulsory requirements concerning vitamin C exports." JA782-84. That note was before the Second Circuit, just as the Soviet declaration was before the New York courts in *Pink.* 315 U.S. at 220.

Third, Petitioners now contend (at 42-43) that *Pink* turned on a "threshold" finding that the Soviet declaration was issued pursuant to the Commissariat's power to interpret law, and that the Ministry has not shown equivalent authority here. But insofar as the lower courts made no such formal finding, that is because Petitioners never raised this point below. See *OBB Personenuerkehr AG v. Sachs,* 136 S. Ct. 390, 398 (2015) ("Absent unusual circumstances … we will not entertain arguments not made below."). Regardless, MOFCOM's power to authoritatively interpret the regulatory materials at issue here is confirmed by the record, by the diplomatic note, and by Chinese statutory law. See *infra* p. 32.

This case is on all fours with *Pink.* In both cases, a foreign governmental department issued a statement for use in U.S. litigation regarding the specific issue ***11** being litigated; its authority to speak on behalf of the foreign nation was beyond dispute; and there was other evidence of foreign law whose import was disputed. The Second Circuit correctly followed *Pink* by deferring to the Ministry's reasonable interpretation of the rules that the Ministry and the relevant chamber of commerce (acting under the Ministry's direction) made, implemented, and enforced.

2. Contrary to Petitioners' (at 29) and the Solicitor General's (at 20-21) claims, *Fremont v. United States* further supports deference here. 58 U.S. (17 How.) 542 (1854). *Fremont* concerned the validity of a claimant's title to California land, arising from a pre-annexation grant by the Mexican government. The court noted that in similar cases it had considered a variety of sources to determine foreign law. *Id.* at 557. There was no question of deference because no official foreign interpretation was proffered. The Court emphasized, however, that it "could not, without doing injustice to individuals, give to the Mexican laws *a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution." Id.* at 561 (emphasis added). The Court thus declined to impose preconditions to the vesting of title that Mexican "regulations for granting lands" seemed to require, because title "would have been regarded as vested and valid by the Mexican authorities" regardless. *Id.* at 561-62. *Fremont* thus demonstrates this Court's practice of *accepting* a foreign government's understanding of foreign law even where a U.S. court writing on a blank slate might reach a different conclusion.

3. This Court's more recent decisions have similarly relied on foreign governments' explanations of their own law. In *Hartford Fire Insurance Co. v. California,* ***12** this Court (while disagreeing with the United Kingdom's ultimate policy recommendation) accepted at face value the United Kingdom's explanation of what British antitrust law did and did not require. 509 U.S. 764, 798-99 (1993). Similarly, *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.* relied on "the United Kingdom's own filings" and diplomatic notes to establish the "United Kingdom['s] … authority over the BVI's statutory law," and thus the citizenship of BVI corporations. 536 U.S. 88, 96-97 (2002). And *Abbott v. Abbott* relied on "a Chilean agency['s]" explanation to hold that Chilean law created a "joint" or "shared" right to determine a child's place of residence. 560 U.S. 1, 10 (2010).

Even now, this Court has *amicus* briefs before it in *United States v. Microsoft* from several foreign authorities, making arguments based on foreign law. *E.g.,* European Commission Br. at 8 - 16, *United States v. Microsoft,* No. 17-2 (Dec. 13, 2017); U.K. Gov't Br. at 5-6, *id.* These authorities are surely interested in the case's outcome and effects on their citizens. But no one would think these submissions should be disregarded because of those interests, or on the theory that U.S. courts better understand European privacy law or British surveillance powers.

4. Though they have used varying formulations, the courts of appeals have consistently concluded that strong deference to appearing foreign sovereigns' official interpretations of foreign law is warranted.

In *In re Oil Spill by the Amoco Cadiz,* France was a plaintiff seeking recovery from Amoco for a massive oil spill; a key issue was whether a French statute imposed liability for the clean-up costs at issue. 954 F.2d 1279, 1289, 1311 (7th Cir. 1992) (per curiam). The statute was not clear, and "[e]ach side presented an expert of the highest skill and repute." *Id.* at 1312. It ***13** was enough, however, that France's interpretation was "plausible": "A court of the United States owes substantial deference to the construction France places on its domestic law." *Id.* The Seventh Circuit thus declined to "decide whether [France's] understanding of the law is correct," and deferred to it. *Id.*

In *Access Telecom, Inc. v. MCI Telecommunications Corp.,* the Fifth Circuit generally embraced *Amoco Cadiz's* approach. 197 F.3d 694, 714 (5th Cir. 1999). It nonetheless declined to follow the guidance stated in a Mexican government circular because the Mexican agency was "not before the court"; its interpretive authority was unclear; and "[m]ore importantly" the circular pre-dated a significant change in law. *Id.*

In *Richmark Corp. v. Timber Falling Consultants,* the defendant, a company incorporated in China and "an arm of the PRC government," resisted discovery because its financial information "was classified a state secret." 959 F.2d 1468, 1471-72 (9th Cir. 1992). The company produced a letter from the "arm of the State Council … in charge of overseeing [its] operations" confirming this interpretation. *Id.* at 1472. The Ninth Circuit "accept [ed] as valid the [Chinese] letter interpreting the State Secrets Act," explaining that a U.S. court has "neither the power nor the expertise to determine for ourselves what PRC law is." *Id.* at 1474 & n.7. The court then balanced China's "admitted interest in secrecy" against the plaintiffs' interests in disclosure to determine whether discovery was appropriate under U.S. law. *Id.* at 1474.

United States v. McNab, which Petitioners and the Solicitor General invoke, is more about finality than deference. 331 F.3d 1228 (11th Cir. 2003). The defendants were prosecuted under the Lacey Act for importing lobsters taken in violation of Honduran law. *Id.* at 1232. "Throughout the investigation and trial … ***14** both the government and the district court relied upon the Honduran officials' verification of the Honduran laws." *Id.* The Eleventh Circuit said the district court *correctly* deferred to that initial interpretation: "Among the most logical sources for the court to look to in its determination of foreign law are the foreign officials charged with enforcing the laws of their country…. The court reasonably may assume that statements from foreign officials are a reliable and accurate source …." *Id.* at 1241. On appeal, however, Honduras filed a brief that the panel majority described as asserting for the first time that the Honduran regulations were invalid or had been retroactively repealed. *Id.* at 1240 & n.23. [3] The court declined to upset the convictions on this basis, ruling that it would not substitute deference for the first opinion with deference for the second because there "must be some finality with representations of foreign law." *Id.* at 1241 & n.25. Here, the Ministry's position has never varied.

In *McKesson HBOC, Inc. v. Islamic Republic of Iran* (Pet. Br. 32; SG Br. 19), no instrumentality of the Iranian government offered an official interpretation of Iranian law, and deference was never invoked. 271 F.3d 1101 (D.C. Cir. 2001). Rather, the meaning of Iranian law was litigated through expert testimony. *Id.* at 1108-09. Thus, when the D.C. Circuit concluded that Iran's evidence did not establish the categorical legal rule Iran's U.S. counsel asserted, it was *not* refusing to defer to an official interpretation; it merely refused to credit a party's experts. *Id.* at 1109; see Pet. for Certiorari at 24 - 25, *Islamic Republic of Iran v. McKesson HBOC, Inc.,* 537 U.S. 941 (2002) (***15** No. 01-1521) (arguing Iran was entitled to summary judgment because its experts' "affidavits and legal opinions" were "unrebutted").

B. Deference Serves The Interests of Accuracy and International Comity.

Deference serves two crucial values: (1) it enhances the accuracy of the resulting legal determination, and (2) it furthers international comity. And deference does *not* surrender U.S. prerogatives to foreign nations. As *Pink* emphasized, whether foreign law should supply all or part of the rule of decision is a domestic-law matter. 315 U.S. at 221. The United States is free, for example, to establish endangered-species protections that do not incorporate foreign law. Cf. *McNab,* 331 F.3d at 1236. But where the laws of the United States do incorporate foreign-law standards, its courts should defer, in all but the most extraordinary cases, to a foreign sovereign's official interpretation of those standards.

1. Deference enhances accuracy. U.S. judges are "likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country's law interacts with another, or to assume erroneously that the foreign law mirrors U.S. law when it does not." *Bodum USA, Inc. v. La Cafetiere, Inc.,* 621 F.3d 624, 638-39 (7th Cir. 2010) (Wood, J., concurring). Some foreign laws will be the subject of analysis and explanation in English-language materials, but many others will not. Parties can offer expert testimony, but that is expensive and often "adds an adversary's spin." *Id.* at 629 (majority op.). It is thus "logical" to defer to a foreign sovereign's statements, which a "court reasonably may assume … are a reliable and accurate source." *McNab,* 331 F.3d at 1241. And deference is "particularly important" where there are "stark ***16** differences" between the foreign and U.S. legal systems. Pet. App. 29a.

Petitioners repeatedly invoke the need for accuracy (at 27-33), but ignore the risk that a weak or indeterminate deference rule will leave U.S. judges prone to fall back on familiar American legal doctrines or intuitions that may be an unreliable

compass in foreign waters. See *Bader v. Kramer,* 484 F.3d 666, 670 (4th Cir. 2007) (reliance on the "plain and ordinary meaning" of foreign law is "problematic" because it can produce a conclusion "divorced from that term's meaning in the law of the [foreign] country"); *Whallon v. Lynn,* 230 F.3d 450, 456 (1st Cir. 2000) ("Care must be taken to avoid imposing American legal concepts onto another legal culture.").

The district court's analysis here illustrates these perils. The "Chinese legal- and economic-regulatory system" is "unique and complex": "[T]he Chinese government [] frequently governs by regulations promulgated by various ministries"; "private citizens or companies may be authorized under Chinese regulations to act in certain circumstances as government agents"; and "an interpretation suggested by the plain language of a governmental directive may not accurately reflect Chinese law." Pet. App. 29a (omission in original). And Petitioners offered no expert evidence supporting their interpretation. *Id.* at 59a n.5.

The district court thus embarked on a solo mission to interpret the Chinese regulatory regime. It rejected the expert testimony offered by Respondents, and declined to hear argument from any party at summary judgment. It then pursued a "plain language" review of Chinese law, Pet. App. 97a, without asking whether a Chinese lawyer would do the same. It relied on a series of unsupported assumptions about whether and ***17** how Chinese law could "compel []" anticompetitive conduct, which the court of appeals correctly rejected as illogical. *Id.* at 30a-32a. This analysis led the court to accuse the Chinese government of intentional deception. *Id.* at 120-21a ("The 2009 Statement does not read like a frank and straightforward explanation of Chinese law.... [T]he Ministry's assertion of compulsion is a post-hoc attempt to shield defendants' conduct from antitrust scrutiny"). There was nothing "respectful" (Pet. Br. 4) about this approach, and nothing reliable about it either.

Petitioners say (at 34-35) it is "incoherent" to afford greater deference when a foreign sovereign actually appears before a U.S. court. The courts of appeals disagree. Compare *Amoco Cadiz,* 954 F.2d at 1312 (deference is owed even if "the interpretation may occur in (or in anticipation of) litigation"), with *Access Telecom,* 197 F.3d at 714 (no deference where, inter alia, Mexican agency was "not before the court"). So does the Solicitor General, who acknowledges that a foreign government's direct participation ensures that the court receives an interpretation grounded in the specific context of the dispute. SG Br. 25. And participation permits the court to engage directly with counsel for the foreign sovereign, including by posing questions at oral argument. [4]

Petitioners and their *amici* raise the specter of a foreign sovereign misleading a U.S. court to protect foreign interests (Pet. Br. 36; SG Br. 25), but they cannot ***18** identify any instance of this happening even though decisions like *Pink* and *Amoco Cadiz* have long been on the books. Little wonder. Foreign governments are not frequently parties in U.S. courts, and when they are, U.S. law usually predominates, cf. *RJR Nabisco v. European Cmty.,* 136 S. Ct. 2090 (2016), even if foreign law plays some role, *e.g., Amoco Cadiz,* 954 F.2d at 1289.

Moreover, foreign governments have strong incentives to accurately explain their laws to U.S. courts. Because U.S. court filings are public, foreign governments know their statements will endure beyond the case at hand, and may have ramifications in their home courts or international tribunals. This very case provides an exemplar: The United States (along with the European Union and Mexico) cited the Ministry's filings as supporting a WTO complaint against China. *Infra* p. 30. And if a foreign government were ever to offer a facially incredible, inconsistent, or wholly unsupported interpretation, neither *Pink* nor the decision below would require deference. Pet. App. 25a & n.8; *supra* p. 8.

2. Deference also serves important international comity principles. As just explained, deference rests on the premise that foreign sovereigns will accurately describe their law to U.S. courts. The Court should not adopt a rule that encourages lower courts to decide "whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith." *Zschernig v. Miller,* 389 U.S. 429, 434 (1968) (cautioning against such inquiries). Foreign sovereigns will have little interest in participating in U.S. litigation if their motives inevitably will be demeaned.

The result of adopting Petitioners' standard would be to deprive the courts of valuable ***19** guidance in many cases, and to create needless international friction in others.

The Solicitor General disputes that these consequences will follow, since "reject[ing] a foreign government's characterization of its laws does not thereby accuse the foreign government of misrepresenting *the pertinent facts.* " SG Br. 24 (emphasis added). But such a rejection necessarily implies that the foreign government is either misrepresenting *the pertinent law* or is so ignorant of its law that an American judge knows better. Neither suggestion promotes comity. Cf. Br. for Australia, Canada, and United Kingdom as *Amicus Curiae* at 9-10, *Matsushita,* 475 U.S. 574 (urging that ignoring *Pink* and allowing a U.S. court to adjudicate the veracity of a foreign sovereign's legal statement "would be an unacceptable intrusion into [its] sovereignty").

3. Some *amid* contend that strong deference would "distort" the "holistic balancing" test this Court has applied to determine the effect of foreign law in a variety of contexts. *E.g.,* U.S. Chamber of Commerce Br. 3,11; see also Am. Antitrust Inst. Br. 4. These arguments confuse two separate issues: (a) how to determine the *content* of foreign law; and (b) once that content is determined, what *effect* foreign law should have in U.S. courts. See *Pink,* 315 U.S. at 220-21 (explaining that these are "distinct matter[s]"). The latter question, emphasized by these *amici,* is beyond the scope of the question presented. Likewise, the "weighty separation-of-powers concerns" in ***20** *Pink* (Pet. Br. 41) influenced the analysis of whether U.S. courts should give effect to the Russian decree, not the antecedent determination of its Russian-law meaning. 315 U.S. at 221 - 34. [5]

Here, after properly deferring to the Ministry's submissions, the Second Circuit turned to Sherman Act precedents to decide whether dismissal was required as a matter of comity. Pet. App. 12a-18a, 33a-38a. The court's answer was yes, and this Court declined to review whether comity is an appropriate basis to dismiss a Sherman Act claim. Pet. i. Thus, U.S. law ultimately controlled this case by determining the effect of Chinese law on the outcome.

C. Neither Rule 44.1 Nor Domestic Deference Doctrines Are Relevant Here.

1. Petitioners and the Solicitor General spill much ink arguing that the decision below - and *Pink,* for that matter - is inconsistent with Federal Rule of Civil Procedure 44.1. Not so. Rule 44.1 provides that "[i]n determining foreign law, the court may consider any relevant material or source," and the resulting decision is "a ruling on a question of law." Fed. R. Civ. P. 44.1. As the Solicitor General concedes (at 17), the Rule says nothing about deference to foreign sovereigns or the scope of a court's discretion in reaching a substantive determination of foreign law. Contra Pet. Br. 31, 33. And there is no suggestion that the Rules ***21** Committee intended to alter or abrogate *Pink* in any way. The Second Circuit rightly found no conflict between Rule 44.1's procedures for determining foreign law and *Pink's* rule of deference. Pet. App. 22a; cf. *Pink,* 315 U.S. at 220-21 & nn.4-5 (applying New York's procedural rules on how a court may receive evidence of foreign law).

Nor is there any conflict between *Pink's* deference rule and Rule 44.1's purposes of (i) establishing that foreign law's meaning is a question of law, not fact, and (ii) removing limitations on the materials a court may consider. See Pet. Br. 28, 30-31; SG Br. 14-16. The "interpretation" of a federal statute is equally "a question of law," *McDermott Int'l, Inc. v. Wilander,* 498 U.S. 337, 356 (1991), and yet courts routinely defer to agency interpretations of those statutes, *Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117, 2124-25 (2016). And the Second Circuit made clear that *Pink's* deference rule does not prevent a court from considering "*any* relevant material or source." Pet. App. 12a, 22a (emphasis added); see *Pink,* 315 U.S. at 221 & n.5.

2. The parties generally agree that domestic deference doctrines do not govern here. [6] SG Br. 19-20; Pet. Br. 47-55; Resp. Br. 31-32. But Petitioners draw the wrong lesson from that fact, arguing there is no basis to "privileg[e] the representations of foreign governments" over those of domestic government bodies. Pet. Br. 47-48. That overlooks critical differences.

U.S. courts lack the expertise to decipher foreign law, and thus risk reaching an erroneous interpretation that - because it does not actually alter foreign law in nonU.S. applications - imposes inconsistent legal obligations on regulated parties. See ***22** *Richmark,* 959 F.2d at 1474 n.7 (court has no "power [ ]or … expertise to determine for ourselves what PRC law is"). Nor can such an error be rectified through remand to a domestic agency or congressional intervention.

Another telling difference is that a court's refusal to defer to a federal or state agency will not cause an international incident. Rejecting a foreign sovereign's interpretation of foreign law can have just that result. The Chinese Government has already protested the district court's disrespectful treatment of the Ministry in this case. JA782-84. Deference here is thus supported by comity concerns that simply do not exist in the domestic arena. See *Amoco Cadiz,* 954 F.2d at 1312 ("Giving the conclusions of a sovereign nation less respect than those of an administrative agency is unacceptable.").

D. The Solicitor General's Position Is Hopelessly Indeterminate.

Since abandoning its recognition that *Pink* provides the standard of deference here, *supra* p. 8, the United States has searched in vain for a clear and consistent position. Although the Solicitor General now says (at 19) that domestic-deference "analogies are generally unhelpful," the Government argued in *McNab* that *Skidmore* deference was the proper "analog[ue]." Brief in Opposition at 17-18, *McNab v. United States,* No. 03-622 (Dec. 29, 2003) (*McNab* Opp.); but see SG Br. 21 n.3. At the certiorari stage in this case, the Government accepted that the Second Circuit's formulation was "not necessarily … problematic." Br. for United States as *Amicus Curiae* at 9. Now the Solicitor General attacks the Second Circuit's "rigid" standard (at 22), but declines to offer any "formula or rule" for deference. He instead posits numerous (non-exhaustive) "circumstances" that are "relevant," suggests "the appropriate ***23** weight in each case will depend on the circumstances," and opines that a court should resolve "a disputed question of foreign law … in the same manner as a court facing any other unsettled legal question." SG Br. 9, 16, 19-20, 21; see also Pet. Br. 54-55.

The Court should reject this invitation to overturn every extant standard and leave the lower courts with none. "[O]pen-ended balancing tests[] can yield unpredictable and at times arbitrary results," *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S. Ct. 1377, 1392 (2014), and that caution is clearly apt here. Never before have U.S. courts reviewed *de novo* a foreign sovereign's interpretation of its own laws. Never before has that been thought desirable. That standard would not mirror past practice, and it would not mirror international practice, under which, for example, "any [WTO] Member can reasonably expect that considerable deference be given to its views on the meaning of its own law." [7] And it is a recipe for chaos and unfair surprise - one-off judicial decisions that do not reflect the actual law of any foreign jurisdiction, impose inconsistent legal obligations on private parties, and give rise to unwarranted diplomatic friction.

There is no need for such experimentation. *Pink* held long ago that a foreign sovereign's reasonable explanation of its own law is conclusive of the foreign-law question. That rule is workable, supported by strong policy considerations, consistent with long ***24** -standing practice, and unaffected by Rule 44.1. The Second Circuit's holding was correct.

II. THE COURT OF APPEALS CORRECTLY DEFERRED TO THE MINISTRY'S REASONABLE INTERPRETATION OF CHINESE LAW.

A. The Second Circuit Properly Determined That The Ministry's Explanation Of Chinese Law Was Reasonable.

1. Petitioners paint the Second Circuit's standard as requiring blind deference to foreign sovereign interpretations in all cases and without regard to other evidence. Pet. Br. 22-23, 26; see SG Br. 22. Not so. The Second Circuit recognized that it could "consider any relevant material or source, including the legal authorities supplied by the parties on appeal." Pet. App. 12a. Even after receiving a foreign sovereign's submission, a court "must still evaluate the relevant source material within the context of each case." *Id.* at 23a. If "there is no documentary evidence or reference of law proffered to support a foreign sovereign's interpretation of its own laws, deference may be inappropriate." *Id.* at 25a n.8; see SG Br. 22 n.4.

At bottom, deference is proper only if the foreign sovereign's explanation is "reasonable under the circumstances." Pet. App. 25a. That is a sound and fair restatement *oi Pink's* holding.

2. In applying this standard, the Second Circuit paid "careful attention" to the Chinese regulations at issue and the facts surrounding their application. Pet. App. 27a-33a. In particular, it observed that, "[t]he 2002 Notice, *inter alia,* demonstrates that from 2002 to 2005 … Chinese law required Defendants to participate in the PVC regime in order to export vitamin C. This regulatory regime allowed vitamin C manufacturers ***25** the export only of vitamin C subject to contracts that complied with the 'industry-wide negotiated' price." *Id.* at 27a. The court said that, by itself, the term "industry-wide negotiated" might be ambiguous, but pointed out that it would be "nonsensical" to require regulated parties to comply with such a "minimum price point if there were no directive to agree upon such a price"; the court thus found reasonable the Ministry's explanation that "members of the regulated industry were required to negotiate and agree upon a price." *Id.* at 27a-28a.

The court similarly observed that "on their face the terms 'industry self-discipline,' 'coordination,' and 'voluntary restraint' " could imply a lack of compulsion, but accepted as reasonable the statement that setting prices was mandatory, in light of the underlying materials and the Ministry's explanation of the trade regulations it had adopted. See Pet. App. 28a (Second Circuit stating that "these are terms of art within Chinese law connoting the government's expectation that private actors actively self-regulate to achieve the government's policy goals"); JA138, 248-49. It was in this context that the Second Circuit said a "court [must] not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations, *even if that representation is inconsistent with how those laws might be interpreted under the principles of our legal system.*" Pet. App. 26a (emphasis added); SG Br. 22 (omitting the italicized language); Pet. Br. 50 (same). The point was not that a court must close its eyes to extrinsic materials; it was that a U.S. court must remain keenly aware of its own limitations as a foreign-law interpreter.

The Second Circuit then highlighted three key errors committed by the district court. "First, [the district ***26** court] determined that whether Chinese law compelled Defendants' anticompetitive conduct depended in part on whether Defendants petitioned the Chinese Government to approve and sanction such conduct." Pet. App. 30a. This was error because the *reason* for the Chinese legal requirements is both irrelevant to their existence and cannot be questioned under the act-of-state doctrine. *Id.* at 31a. "Second, it relied on evidence that China's price-fixing laws were not enforced to conclude that China's price fixing laws did not exist." *Id.* at 30a. This too was error, because it "confuses the question of what Chinese law required with whether the vitamin C regulations were enforced." *Id.* at 32a.[8] "And third, it determined that if Chinese law did not compel the exact anticompetitive conduct alleged in the complaint, then there was no true conflict." *Id.* at 30a. In fact, a true conflict exists whenever it is impossible to comply with both nations' laws, which is the case here. *Id.* at 32a-33a.

3. Petitioners do not attempt to defend these errors. They ignore them, and instead quote - five times - the Second Circuit's observation that, had the Ministry not appeared in the litigation, the district court's approach "would have been entirely appropriate." Pet. App. 30a n.10. Petitioners attempt to spin this into a "concession" that the Second Circuit's decision was "[b]ased solely on the standard of 'binding deference' ***27** that it imposed." Pet. Br. 58-59. Not so. The Second Circuit determined correctly that the district court adopted a "nonsensical" interpretation of Chinese law. It simply noted *hypothetically* that if the Ministry had not appeared, the district court's *approach* of "attempt[ing] to parse … China's complex vitamin C market regulatory framework" would have been "appropriate." Pet. App. 29a-30a & n.10. The district court's erroneous *conclusions* received no blessing.

4. The district court also offered misguided reasons for rejecting the Ministry's interpretation.

First, the district court criticized the Ministry's 2009 statement as "undeserving of deference" because the court believed it lacked citations. Pet. App. 119a-20a. But the 2009 statement expressly invoked and reiterated the arguments in the

Ministry's two prior submissions, JA247-48, which provided much of the specific citation to Chinese law that the district court appeared to seek, Pet. App. 189a-223a; JA131-33.

Second, the district court said the 2009 statement contained "ambiguous terms and phrases," Pet. App. 120a, particularly as to the meaning and consequences of non-compliance with "self-discipline," *id.* at 132a-33a. Both the Ministry and Respondents' expert explained these points, and the district court's desire to see them spelled out in "a published series of specific conduct-dictating prohibitions or compulsions with an identified sanctions system," Pet. App. 116a, was unrealistic. In China, as in the United States, not all important legal concepts are set forth in positive enactments; for example, what statute would an American lawyer cite to prove the existence of non-retroactivity or qualified immunity?

Third, the district court said the Ministry's 2009 statement failed to "distinguish between" the 1997 and ***28** 2002 regulatory regimes, Pet. App. 120a, a criticism Petitioners reprise here (at 14-15). But the Ministry's *amicus* brief - which contained separate sections describing the 1997 "Initial Regulations" and the 2002 "Revised Regulation[s]" - made clear that the 2002 amendments "changed the way in which compliance with the [Chamber of Commerce of Medicines & Health Products Importers & Exporters'] 'coordination' was confirmed." Pet. App. 203a, 208a. Under the new price-verification-and-chop system, or PVC, the Chamber verified each manufacturer's "contract price and volume": "If the price was at or above the minimum acceptable price set by coordination through the Chamber, the Chamber affixed a special seal, known as a 'chop,' on the contract and returned it to the manufacturer." *Id.* at 208a-09a. Export was allowed "only if the contract bore the Chamber's 'chop' "; noncompliance thus meant "denial by Customs of the ability to export." *Id.* at 209a. [9]

As before, the 2002 regime was adopted to "promote industry self-discipline," now based on "industry-wide negotiated prices for those export products subject to price review." JA99-100; see Pet. App. 208a. It was thus based on the same basic concept as before, but implemented differently. Petitioners make much of the fact that the 1997 Charter's requirement to "[s]trictly execute" the coordinated price was "abolished" (Pet. Br. 15 (alteration in original) (emphasis omitted)), but neglect to mention the "resolution" adopted at a Chamber-led meeting in late 2001 that, under the PVC regime, "*[t]he committed export volume as part of the industry self-discipline shall be strictly* ***29** *implemented.*" JA459. Non-compliant exporters "will be punished." *Id.*

Further, Petitioners' explanation of the 2002 regime makes no sense. Petitioners urge the same "nonsensical" view the Second Circuit rejected: That even though the PVC regime permitted export only "if the contract met or exceeded an industry-determined minimum export price," it allowed manufacturers to "opt-out" and "did not prohibit exports in the event that [the industry] declined to reach a price agreement in the first place." Pet. Br. 8-9. Such a regulatory program would be pointless. Pet. App. 27a-28a. And the supposed "opt-out" provision does not say what Petitioners claim: It permits the suspension of price review by "the customs and chambers," *not* by individual manufacturers. JA100. There is no allegation that the regulators ever exercised this authority. Nor could manufacturers "opt-out" by resigning from the subcommittee (Pet. Br. 8 - 9); non-members were also bound to follow the industry-wide negotiated prices because failure to do so would result in the denial of a chop. JA105-06.

Petitioners' reliance on the supposed plain language of the 2002 documents is, like the district court's, misplaced: Petitioners simply assume that Chinese terms which translate as, *e.g.,* "voluntary," mean what they would mean to a U.S. lawyer. *E.g.,* Pet. Br. 7, 9. These misguided assumptions are not a sound basis to reject the Chinese government's official explanation (supported by expert testimony) of what these terms actually mean. *E.g.,* JA139 (Chinese legal expert explaining: "In no way was participation in the process … 'voluntary' in the sense that it could be ignored.").

Fourth, the district court said, and Petitioners argue, that the Ministry's position here is inconsistent with China's statements to the WTO that it "gave up ***30** 'export administration … of vitamin C as of January 1, 2002." Pet. App. 120a-21a (omission in original); Pet. Br. 9, 19, 21, 53. This view reflects the same misunderstanding as above: The "export administration" China gave up was not the policy of industrial self-discipline that required price and output

coordination, but rather - as the WTO later found - the system of "export quotas and licences" for Vitamin C that China had followed until 2002. WTO, *Trade Policy Review: People's Republic of China,* WT/TPR/S/161, ¶ 141 (Feb. 28, 2006), https://goo.gl/iPtMaZ. [10] The 2002 Notice thus explained that, "in order to accommodate the new situations since China's entry into WTO" *while still "promot[ing] industry self-discipline,*" certain products were "no longer subject to supervision and review by the customs" but were instead "subject to [PVC] by the chambers." JA99 (emphasis added); JA428-29 (describing the replacement of the 1997 "export licensing" regime with the PVC regime).

The United States agreed. In a 2009 WTO proceeding related to raw materials, it *relied on the Ministry's amicus brief in this case* to argue that "China coordinates export prices for the products at issue *through a 'system of self-discipline'* based on informal statements and oral agreements between traders and export regulators and where the [relevant chamber of commerce] directs commodity-specific branches or coordination ***31** groups." JA676 (emphasis added). [11] The WTO accepted that position, holding that "China requires exporting enterprises to export at set or coordinated export prices or otherwise face penalties." JA722. [12] Thus, the United States and the WTO both said what MOFCOM has maintained here: after 2002, China was still requiring exporters to follow a price-setting regime, albeit one that took a different form than before.

There is thus no inconsistency that could undermine the Ministry's position. But the district court's error was more fundamental. Even if China's statement regarding giving up "export administration" *could* be read as connoting an abandonment of every form of price or output control for Vitamin C, including industrial self-discipline, that would at most establish that the reading pressed by Petitioners and embraced by the district court is *possible.* Petitioners have never identified any evidence that anyone contemporaneously read the "export administration" statement as they do, and all evidence is that WTO participants did not. In such circumstances, a court should endeavor to reconcile the foreign sovereign's statements, rather ***32** than jump to the conclusion that the supposed inconsistency is a product of deceitful intent. Only if such reconciliation is impossible should the court consider declining to defer. That slow-to-anger approach is supported by the accuracy and comity considerations discussed above, and fully addresses the Solicitor General's (rather alarmist) concern that foreign governments will lightly swap positions and demand deference at each turn. See *McNab* Opp. at 18-19. Because there was no inconsistency here - much less an irreconcilable one - the Second Circuit properly deferred to the Ministry's reasonable interpretation of the regulations it created.

B. The Ministry's Authority To Interpret Its Own Rules Is Beyond Dispute.

Petitioners assert for the first time in this Court that the Ministry may lack authority to interpret its own rules and directives. This untimely argument is frivolous.

The regulations and requirements at issue indisputably fall within the Ministry's jurisdiction as "the highest authority within the Chinese Government authorized to regulate foreign trade." Pet. App. 6a; Foreign Trade Law, art. 3 (promulgated by Standing Comm. Nat'l People's Cong., May 12, 1994, revised Apr. 6, 2004), https://goo.gl/sHn37U ("The [Ministry] is in charge of foreign trade throughout the country pursuant to this Law."). The Ministry "formulates strategies, guidelines and policies concerning domestic and foreign trade and international economic cooperation, drafts and enforces laws and regulations governing domestic and foreign trade, and regulates market operation," and until 2008 the Chamber operated "under the Ministry's direct and active supervision" as part of "a regulatory pricing regime mandated by the government ***33** of China." Pet. App. 190a-91a, 196a-97a. Respondents' expert testified below, without contradiction, that the Ministry's "interpretation of its own regulations and policies carries decisive weight under Chinese law." JA142. He was correct. In 2001, China's State Council promulgated rulemaking procedures that empower the Ministry to make and interpret its own regulations. *See* Add. 24-25, Decree of the State Council, People's Republic of China (No. 322), Regulations on Procedures for Formulation of Rules, art. 33 (effective Jan. 1, 2002) ("The power to interpret rules belongs to the formulating organs of rules…. Interpretations of rules have the same force and effect as the rules themselves."). [13]

Further, the Chinese diplomatic note submitted to the Second Circuit, JA782-84, underscored the point: The Ministry's brief stated "the official views of the People's Republic of China," JA131. China spoke here with one voice, and the Second Circuit correctly deferred to the Ministry's reasonable interpretation of Chinese law.

*34 CONCLUSION

For these reasons and those stated in Respondents' brief, the Court should affirm the judgment below.

Respectfully submitted,

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April 4, 2018

*1A DECREE OF THE STATE COUNCIL OF THE PRC (NO. 322)

Decree of the State Council of the People's Republic of China (No. 322)

The Regulations on Procedures for the Formulation of Rules were hereby promul-gated and effective as of January 1, 2002.

Premier, Zhu Rongji

November 16, 2001

Regulations on Procedures for the Formulation of Rules

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Chapter I General Provisions

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Article 1 These Regulations are formulated in accordance with the relevant provisions of the Legislation Law to standardize the procedures for the formulation of rules and to ensure the quality of rules.

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***2a** Article 2 These Regulations apply to the project establishment, drafting, examination, decision on, promulgation and interpretation of rules.

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The rules formulated in violation of these Regulations are null and void.

Article 3 The formulation of rules shall comply with the legislative principles established by the Legislation Law and conform to the provisions of the Constitution, laws, administrative regulations and other superior laws.

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Article 4 The formulation of rules shall effectively safeguard the lawful rights and interests of citizens, legal persons and other organizations, and while prescribing the obligations they shall perform, provide the corresponding rights they have and the means by which the realization of such rights are guaranteed.

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***3a** The formulation of rules shall embody the principle of uniting the powers and responsibilities of administrative departments, and while vesting necessary powers in the relevant administrative departments, provide the conditions and procedures for executing such powers, as well as responsibilities they shall undertake.

Article 5 The formulation of rules shall embody the spirit of reform, scientifically regulate administrative acts, and promote the shift of government functions towards economic adjustment, social management and public services.

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The formulation of rules shall conform to the principle of simplification, unification and efficiency, assign identical or similar functions to one administrative department, and simplify administrative formalities.

***4a** Article 6 Rules are normally titled “provisions” or “mea-sures”, but they may not be titled “regulations”.

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Article 7 The wording of rules shall be accurate and concise with the contents of their articles clear, concrete and operable.

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In principle, the matters that have been clearly stipulated in laws or administrative regulations shall not be repeatedly provided in rules.

Rules shall not, in principle be arranged into chapters or sections other than the rules that are complex in content.

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Article 8 With regard to matters which involve the powers of two or more departments of the State Council, and for which the conditions for formulating administrative regulations are not yet ripe and the formulation of rules are called for, the relevant departments of the State ***5a** Council shall jointly formulate rules.

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Under the circumstances provided in the preceding paragraph, the rules formulated by a relevant department of the State Council on its own are null and void.

Chapter II Project Establishment

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Article 9 The internal institutions or other institutions of departments of the State Council shall apply to such departments for project establishment when they deem that there is a need to formulate departmental rules.

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The subordinate working departments of the people's governments of the provinces, autonomous regions, municipalities directly under the Central Government and comparatively larger cities or the people's governments at lower levels shall apply to the people's governments ***6a** of the provinces, autonomous regions, municipalities directly under the Central Government or the comparatively larger cities for project establishment when they deem that there is a need to formulate local government rules.

Article 10 The necessity for formulating rules, the major issues to be solved and main systems to be established, etc. shall be stated in the applications submitted for project establishment of the formulation of rules.

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Article 11 The legislative affairs institutions of the departments of the State Council and the legislative affairs departments of the people's governments of the provinces, autonomous regions, municipalities directly under the Central Government and the comparatively larger cities (hereinafter referred to as ***7a** legislative affairs departments) shall study the applications for project establishment of the formulation of rules on a consolidated basis, draft their own departmental or governmental annual working plans for formulating rules, and submit such plans to their own departments or the people's governments at the same levels for approval before implementation.

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The titles of the rules to be formulated, the drafting units, the time for the completion of drafting, etc. shall be clearly provided in the annual working plans for formulating rules.

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Article 12 The departments of the State Council and the people's governments of the provinces, autonomous regions, municipalities directly under the Central Government and the comparatively larger cities shall strengthen leadership over the implementation of their annual ***8a** working plans for formulating rules. The units charged with the drafting of the rules in the said plans shall lose no time in doing so, and submit the draft rules to their own departments or the people's governments at the same levels for decision as required.

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An annual working plan for formulating rules may, in light of actual conditions, be adjusted in the course of its implementation, and additional appraisals shall be carried out for the rules projects to be added.

Chapter III Drafting

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Article 13 The drafting of departmental rules shall be organized by the departments of the State Council; the drafting of local government rules shall be organized by the people's governments of the provinces, autonomous regions, ***9a** municipalities directly under the Central Government and the comparatively larger cities.

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A department of the State Council may assign one or several of its internal institutions to draft rules, or assign its legislative affairs department to conduct or organize such drafting.

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The people's government of a province, an autonomous region, a municipality directly under the Central Government or a comparatively larger city may assign one or several of its departments to draft rules, or assign its legislative affairs department to conduct or organize such drafting.

In drafting rules, relevant experts or organizations may be invited to participate therein, and relevant experts or organizations may also be entrusted with drafting.

***10a** Article 14 In drafting rules, in-depth investigations and researches shall be conducted, practical experience shall be summed up, and the comments of relevant organs, organizations and citizens shall be extensively solicited. The solicitation of comments may take the forms of written correspondence, forums, appraisal meetings, hearings, etc.

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Article 15 When the rules being drafted directly involve the immediate interests of citizens, legal persons or other organizations, and relevant organs, organizations or citizens hold substantive disagreement with the rules being drafted, these rules shall be made public for comments; the drafting units may also hold hearings thereon. A hearing shall be organized in accordance with the following procedures:

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***11a** (1) a hearing shall be open to the public; the drafting unit shall make public the time, venue for, and contents of the hearing 30 days before the hearing is held;

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(2) the relevant organs, organizations and citizens that participate in a hearing shall have the right to put forward questions and make their comments with respect to the rules being drafted;

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(3) written records shall be made for a hearing to faithfully record the speakers' main viewpoints and reasons thereof; and

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(4) the drafting unit shall seriously study the comments expressed at a hearing, and give explanations on the handling of these comments and the reasons for ***12a** such handling when submitting drafted rules for examination.

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Article 16 When drafting departmental rules that involve the powers and responsibilities of other departments of the State Council or are closely related to other departments of the State Council, a drafting unit shall adequately solicit the comments of these departments.

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When drafting local government rules that involve the powers and responsibilities of other departments of the people's government at the same level or are closely related to other departments at the same level, a drafting unit shall adequately solicit the comments of these departments. A drafting unit shall sufficiently consult with the departments that disagree with its comments; where a consensus is not reached after such sufficient consultations, the drafting unit shall give

***13a** explanations on the circumstances of and the reasons for such non- consensus when it submits the draft rules for examination (hereinafter referred to as the draft for examination).

Article 17 A drafting unit shall, in accordance with the provisions, submit a draft for examination and the explanations thereof, the differing comments on the major issues therein and other relevant materials for examination.

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A draft for examination to be submitted for examination shall be signed by the principle responsible person of the drafting unit; a draft for examination jointly drafted by several units shall be signed by the principle responsible persons of the said units.

In the explanations of a draft for examination, the necessity for formulating the rules, the main measures provided therein, ***14a** the opinions of relevant circles, etc. shall be stated.

The relevant materials mainly include the comments collected from various circles, written records of hearings, reports of investigations and researches and the relevant legislative materials from both at home and abroad, etc.

Chapter IV Examination

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Article 18 Drafts for examination shall be uniformly examined by legislative affairs departments.

Legislative affairs departments shall examine drafts for examination mainly in the following aspects:

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(1) whether they are in conformity with the provisions in Articles 3, 4 and 5 of these Regulations;

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***15a** (2) whether they are in harmony or coordinated with the relevant rules;

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(3) whether the comments of the relevant organs, organizations and citizens on the main issues addressed in the draft for examination have been correctly handled;

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(4) whether they conform to the technical requirements of legislation; and

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(5) other items that need to be examined.

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Article 19 Where a draft for examination fall under one of the following circumstances, the legislative affairs department may table the examination thereof or return it to the original drafting department:

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***16a** (1) the basic conditions for formulating the rules are not yet ripe;

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(2) the relevant institutions or departments disagree greatly with one another on the main systems provided in the draft for examination, and the drafting unit has not consulted with these institutions or departments; or

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(3) the submission of the draft for examination does not conform to the provisions in Article 17 of these Regulations.

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Article 20 Legislative affairs departments shall send drafts for examination or the main issues that the drafts for examination involve to the relevant organs, organizations and experts for comments.

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***17a** Article 21 Legislative affairs departments shall conduct on-spot investigations and researches at the grass root level into the main issues that the drafts for examination involve and solicit the comments of the relevant departments, organizations and citizens at the grass root level.

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Article 22 Where a draft for examination involves major issues, the legislative affairs department shall hold forums or appraisal meetings participated by relevant departments or experts to solicit comments, and to study and appraise the draft for examination.

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Article 23 Where a draft for examination involves the immediate interests of citizens, and the relevant organs, organizations and citizens disagree with one another, and the drafting unit have neither made it ***18a** public nor held appraisal meetings in the course of its drafting, the legislative affairs department may, upon the approval of its own department or the people's government at the same level, make the draft for examination public or hold hearings thereon.

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Where a hearing is held, it shall be organized in accordance with the procedures provided in Article 15 of these Regulations.

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Article 24 Where the relevant institutions or departments disagree with one another on issues such as the main measures, administrative systems, the division of powers that a draft for examination involve, the legislative affairs department shall coordinate among these institutions or departments for reaching a consensus; where a consensus is not reached, the main issues, the comments of these institutions or departments and the proposals of the ***19a** legislative affairs department shall be submitted to its own department or the people's government at the same level for decision.

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Article 25 A legislative affairs department shall seriously study the comments from various circles, and it shall, upon consultation with the drafting unit, revise the draft for examination, and prepare the draft rules and the explanations thereof. The explanations of the draft rules shall include the main issues to be solved, the main measures to be established by the formulation of rules and the circumstances of consultations with the relevant departments.

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A draft rules and its explanations shall be signed by the principle responsible person of the legislative affairs department and he/she shall put forward a suggestion that the draft rules and explanation thereof be submitted to the relevant meeting of its ***20a** own department or the people's government at the same level for deliberation.

Article 26 A draft rules the drafting of which is conducted or organized by a legislative affairs department shall be signed by the principle responsible person of the said legislative affairs department and he/she shall put forward a suggestion that the draft rules and explanation thereof be submitted to the relevant meeting of its own department or the people's government at the same level for deliberation.

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Chapter V Decision and Promulgation

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Article 27 Departmental rules shall be decided at ministerial meetings or general meetings of commissions.

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***21a** Local government rules shall be decided at the executive meetings or the plenary meetings of local governments.

Article 28 When a draft rules is being deliberated, explanations may be made by the legislative affairs department or by the drafting unit as well.

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Article 29 The legislative affairs institution shall, on the basis of the deliberation opinions of the relevant meetings, revise the draft rules, prepare the revised draft rules, and submit it respectively to the depart-mental head, or the provincial governor, the chairperson of the autonomous region or the mayor for signing the decree to promulgate the rules.

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Article 30 It shall be specified that the formulating department, the serial number, the title of rules, ***22a** the date of adoption, the date of implementation, the signature of the departmental head, or the provincial governor, the chairperson of the autonomous region or the mayor, and the date of promulgation in a decree promulgating rules.

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Rules formulated jointly by several departments shall be signed jointly by the heads of the relevant departments for promulgation, and the decree serial number of the department that led the formulating shall be used.

Article 31 Departmental rules shall, upon signature for promulgation, be promptly published in the gazette of the department or in the gazette of the State Council and in the nationally distributed newspapers.

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Local government rules shall, upon signature for promulgation, be promptly published in the gazette of the people's government at ***23a** the same level and in the newspapers distributed within their respective administrative areas.

The text of the rules that are published in the departmental gazette, the gazette of the State Council or the gazette of the local people's government is the authentic text.

Article 32 Rules shall be effective 30 days after the date of promulgation; but those rules that involve national security or the determination of foreign exchange rates or monetary policies as well as those the implementation of which will be impeded if they are not implemented promptly may be effective as of the dates of promulgation.

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***24a** Chapter VI Interpretation and Submission for the Record

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Article 33 The power to interpret rules belongs to the formulating organs of rules.

The formulating organs shall give interpretations to the rules that fall under one of the following circumstances:

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(1) the specific meaning of their provisions needs to be further defined; or

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(2) after their formulation, new development makes it necessary to define the basis on which they are applied.

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Interpretations of rules shall be proposed by the legislative affairs departments of the formulating organs with reference to the procedures for the examination of the draft rules ***25a** for examination, and they shall be promulgated after submission to and approval by the formulating organs.
Interpretations of rules have the same force and effect as the rules themselves.

Article 34 Rules shall, with-in 30 days as of the date of promulgation, be submitted by the legislative affairs departments in accordance with the provisions of the Legislation Law and the Regulations on Submission of Regulations and Rules for the Record to the relevant organs for the record.

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Article 35 State organs, social organizations, enterprises and institutions, and citizens may put forward in writing suggestions for reexamination to the State Council where they deem that certain rules contradict with laws ***26a** or administrative regulations, and such suggestions shall be studied and handled by the legislative affairs department of the State Council.

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State organs, social organizations, enterprises and institutions and citizens may also put forward in writing suggestions for reexamination to the people's governments of their respective provinces or autonomous regions where they deem that certain rules formulated by the people's governments of comparatively larger cities contradict with laws or administrative regulations or violate the provisions of other superior laws, and such suggestions shall be studied and handled by the legislative affairs departments of the people's governments of the provinces or autonomous regions.

***27a** Chapter VII Supplementary Provisions

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Article 36 Decisions or orders with general binding force to be made or issued by the local people's governments at or above the county level that do not have the power to formulate rules according to law shall be made or issued with reference to the procedures provided in these Regulations.

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Article 37 The departments of the State Council and the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government as well as the people's governments of the comparatively larger cities shall frequently sort out their rules, and promptly revise or repeal those rules that are found to be inconformity with new enacted laws, administrative regulations or the provisions of ***28a** other superior laws or are found to be in contradiction with laws, administrative regulations or other superior laws.

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The procedures for the revisions of and repeal of rules shall be implemented with reference to the relevant provisions of these Regulations.

Article 38 The editing and publication of the collections of rules in official editions, in the languages of ethnic groups and in foreign languages shall be handled by legislative affairs departments in accordance with the relevant provisions in the Provisions on Administration of Editing and Publication of Collections of Regulations.

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Article 39 These Regulations shall be effective as of January 1, 2002.

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Footnotes

* Counsel of Record.

1 No counsel for any party authored this brief in whole or in part, and no other entity or person made any monetary contribution toward the preparation and submission of this brief. The parties have consenting to the filing of this brief.

2 Nor was the Soviet interpretation "akin to" a certified question to a state high court because it was obtained diplomatically. SG Br. 28. Certified questions are issued by courts; the *Pink* declaration was obtained by the United States, a litigant.

3 A dissent contended that the appellate *amicus* brief was the only official governmental statement presented. 331 F.3d at 1247.

4 The Solicitor General says (at 24) the Second Circuit's description of the Ministry's submission as "a sworn evidentiary proffer" was "inapt," but the Ministry submitted a sworn declaration authenticating the underlying materials. Regardless, whether a foreign submission is "sworn" is not decisive; what matters is whether it presents an official, authoritative interpretation.

5 Thus, *First National City Bank v. Banco Para el Comercio Exterior de Cuba,* 462 U.S. 611 (1983), does not counsel against deference. *Contra* U.S. Chamber Br. 12-13. There, the Court accepted that a Cuban bank was "a separate and distinct juridical entity" from the Cuban government under Cuban law, but applied international and U.S. law to determine "the effect to be given to Bancec's separate juridical status" for FSIA purposes. 462 U.S. at 616 n.3, 619, 621. As in *Pink,* the Court accepted that Cuban law had the *meaning* asserted by Cuban officials, and looked to U.S. law to determine the *effect* of that foreign-law conclusion.

6 Petitioners' lengthy argument (at 48-55) that "the *Chevron* doctrine cannot be sensibly applied" here is thus beside the point.

7 Panel Report, *United States - Sections 301-310 of the Trade Act of 1974,* WTO Doc. WT/DS152/R 1 7.19 (adopted Jan. 27, 2000), https://www.wto.org/english/tratop_e/dispu_e/wtds152r.pdf. The United States advocates this "considerable deference" standard in its own WTO submissions. *E.g.,* Second Written Submission of the United States, *United States - Section 129(c)(1) of the Uruguay Round Agreements Act,* WT/DS221, at 3 (Mar. 8, 2002), https://goo.gl/bnBYdN.

8 The Second Circuit was clearly correct. We do not decide whether theft is prohibited by counting shoplifting incidents. Stealing is illegal, yet it occurs frequently. *Contra* Pet. Br. 10-11. Indeed, Petitioners quote the head of the Vitamin C Subcommittee urging "government departments to assist chambers of commerce in asserting their authority, so that [the chambers] can punish [noncompliant] companies." *Id.* at 12 (first alteration in original). This shows not that compulsion was absent, but that enforcement was challenging.

9 *Amici* Howson and Clarke suggest (at 21) that Customs might have refused to enforce a regime established by Ministry regulations alone, but ignore that the 2002 Notice issued jointly from both departments, JA99.

10 *Amici* Clarke and Howson, who claim no trade-law expertise (at 1-2), flatly ignore WTO's summation in declaring it "inescapable" (at 17) that China made inconsistent statements. They seem not to have considered the possibility that their lay understanding of trade-law terminology is incorrect.

11 *See also* First Written Submission of the United States of America, *China - Measures Related To The Exportation Of Various Raw Materials,* WT/DS394/DS395/DS398 ¶ 208 & nn.284-90 (June 1, 2010), https://goo.gl/95Qiwv (relying heavily on the Ministry's brief); Opening Oral Statement of Complainants, *China - Measures Related to the Exportation of Various Raw Materials,* WT/DS394/DS395/DS398 ¶ 31 (Aug. 31, 2010), https://goo.gl/ Gqkcp6 (arguing that China maintained "a system that prevents exportation unless the seller meets or exceeds the minimum export price").

12 This holding belies the notion that the raw-materials proceeding is distinguishable because it focused on whether conduct was "attributable to," rather than *"required"* by, China. SG Br. 31 n.7.

13 The English translation in the Addendum was performed by Peking University Law School and retrieved from a Chinese commercial legal database, http://www.lawinfochina.com/, on March 20, 2018.

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