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How Animal Science Products, Inc. Plays a Role in the China and U.S. International Relations Saga

Tessa V. Mears

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How *Animal Science Products, Inc.* Plays a Role in the China and U.S. International Relations Saga

Tessa V. Mears*

“How Animal Science Products, Inc. Plays a Role in the China and U.S. International Relations Saga” takes a look at a June 2018 Supreme Court decision that ruled federal courts are not bound to defer to a foreign government’s interpretation of its own law. This paper discusses the pros and cons of absolute deference to foreign governments in these instances, in addition to examining the effectiveness of foreign amicus briefs in antitrust cases before the Supreme Court. This paper finishes with a discussion on the current state of international relations China and the U.S., with a summary of where the case leaves us today.

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I. INTRODUCTION

A foreign company wants to do business with the United States. It is comprised of wise business-persons, and it knows that the U.S. market has the potential to be very lucrative. The company enters into a contract with a U.S. company and all seems to be going well. In an unforeseen twist, the U.S. company sues the foreign company for violating American antitrust law *vis-à-vis* price-fixing activities. However, the foreign company believes it can get “off the hook” because the U.S. law it is accused of violating is in direct conflict with a law of its own country that it is forced to obey. A government agency from its own country even submits an *amicus* brief on its behalf to support the company’s defense that its foreign law requires price-fixing. Unbeknownst to the company, according to a recent United States Supreme Court decision, U.S. federal courts do not have to defer to a country’s interpretation of

its own laws.¹ What the foreign company once thought would be a strong defense may now be altogether meaningless.

Foreign companies can face this exact dilemma with globalization and foreign law.² According to the Bureau of Economic Analysis, imports to the U.S. from September 2019 alone totaled \$258.4 billion.³ With the U.S. government and U.S. companies so enveloped in international relations and trade, the need to understand how foreign laws work for the context of litigation is clear. Similar to domestic disputes, the outcome of a case can hinge on the decision of which law to apply.⁴ Conducting international business typically requires a common understanding in order to contract.⁵ Unfortunately, the federal courts' approach to interpreting international law has been widely inconsistent. When issues arise causing courts to intervene, it is unpredictable how a federal court will choose to rely on information from a foreign government's interpretation of its own laws.

The recent United States Supreme Court decision in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.* sought to provide guidance to an area of the law lacking direction.⁶ The issue the Court considered was: “[w]hen foreign law is relevant to a case instituted in a federal court, and the foreign government whose law is in contention submits an official statement on the meaning and interpretation of its domestic law, may the federal court look beyond that official statement?”⁷

¹ See *infra* Part III; *Animal Sci. Products, Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865, 1869 (2018).

² For the purposes of this paper, “foreign law” will refer to the law of another country. This is to be distinguished from international law, which is the law that is binding on all nations.

³ Bureau of Economic Analysis, *International Trade in Goods and Services*, <https://www.bea.gov/news/2019/us-international-trade-goods-and-services-september-2019> (last visited Nov. 18, 2019).

⁴ See Carolyn B. Lamm & K. Elizabeth Tang, Rule 44.1 and Proof of Foreign Law in Federal Court, 30 LITIG. 31, 32 (2003).

⁵ See generally Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 889 (2011).

⁶ See generally *Animal Sci. Products, Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865, 1869 (2018).

⁷ *Id.*

The Court held that a federal court should practice “respectful consideration” when considering a foreign government’s interpretation of its own laws, but it is not bound to defer to a foreign government’s interpretation of its own laws when deciding legal issues that involve foreign law.⁸ The Court used language from Federal Rule of Civil Procedure 44.1 (“FRCP 44.1”) to support its reasoning, looking to the Advisory Committee Notes of this rule, which says that the court “may engage in its own research and consider any relevant material thus found.”⁹

The Chinese defendants in *Animal Science Products, Inc.* were accused of violating U.S. antitrust laws.¹⁰ U.S. antitrust enforcement is concerned with foreign actions that have a significant and purposeful effect on the United States.¹¹ A uniform standard for foreign government deference in antitrust law had been long awaited.¹²

This note will analyze both the social and political climate that led up to the *Animal Science Products, Inc.* decision, as well as the effects it will have on us all. Part II will discuss the history of FRCP 44.1 and the significance of its 1966 amendment. Part III will discuss the procedural history and circumstances leading up to the *Animal Science Products, Inc.* case. Part IV will examine the reaction of foreign *amicus* briefs in the Supreme Court, as well as the reasons in favor and in opposition of deference to foreign governments’ interpretation of their own laws. Part V will discuss the recent trade talks with China with the U.S., and the longstanding complicated relationships of these two countries to provide context. Finally, Part VI will bring together the takeaways from *Animal Science Products, Inc.* and where the decision leaves us today.

⁸ *Id.*

⁹ This means courts can rely on any research they choose, whether or not it was submitted by the parties. *Id.* at 1869-70 (citing Advisory Committee’s 1966 Note on Fed. Rule Civ. Proc. 44.1, 28 U.S.C. App., p. 892).

¹⁰ *Id.* at 1870.

¹¹ See *John Deq. Briggs, Schrödinger’s Cat and Extraterritoriality*, 29 ANTITRUST 79, 79 (2014).

¹² See *id.* at 84.

II. PRIOR LAW AND PERSPECTIVE

A. *The Important Role of FRCP 44.1 for Foreign Law*

From the time of the Federal Rules of Civil Procedure's adoption until 1966, the rules did not address the requirement of interpreting foreign law.¹³ From 1938 to 1996, the majority of federal courts reviewed foreign laws as facts.¹⁴ This made it difficult to prevail on a motion for summary judgment because opposing parties only needed to present a dispute regarding the substance of the foreign law.¹⁵ Further, the pre-1966 FRCP 44.1 required appellate courts to view disputes of foreign law under the "clearly erroneous" standard, which meant they were effectively closed off from reviewing trial court rulings in application of foreign law.¹⁶

In 1966, however, the Federal Rules of Civil Procedure changed FRCP 44.1 to view foreign law as a question of law instead of fact.¹⁷ The new FRCP 44.1 states:

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.¹⁸

With this update to the rule came two major effects: (1) federal courts were no longer restricted on the research they could conduct when faced with questions of foreign law, and (2) federal courts no longer had to rely on the Federal Rules of Evidence when consid-

¹³ Arthur R. Miller, *Federal Rule 44.1 and the Fact Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 653 (1967).

¹⁴ See *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541, 543 (2d Cir. 1956) ("[t]he general federal rule is that the 'law' of a foreign country is a fact which must be proved."); *Miller*, *supra* note 13, at 653-54.

¹⁵ See *Proof of Foreign Law after Four Decades with Rule 44.1 FRCP AND CPLR 4511*, 61 REC. ASS'N. CITY N.Y. 49, 50 (2006).

¹⁶ *Id.*

¹⁷ Lamm & Tang, *supra* note 4, at 31.

¹⁸ FED. R. CIV. P. 44.1.

ering information about foreign law.¹⁹ In other words, courts could now view any relevant materials when making their determination on foreign laws. This discretion allows the judge to consider several critical factors in determining an issue of foreign law, including: significance of foreign law to the case, intricacy of the foreign-law question, and the best way to fairly cater to the needs of both parties.²⁰

The scope of evidence admissible for applying and interpreting foreign law widened dramatically.²¹ Despite the update to the Rules (because the Rules left the issue of what evidence to consider open open), courts continue to use diverse approaches when addressing a question of foreign law.²² This diversity is problematic because courts strive to achieve solidarity in decision making, so it is no surprise that this issue reached the United States Supreme Court in *Animal Science Products, Inc.*²³

III. PROCEDURAL HISTORY AND CASE SUMMARY

This dispute began in 2005 between Chinese sellers of Vitamin C and American buyers of this product.²⁴ The U.S. buyers filed a

¹⁹ Lamm & Tang, *supra* note 4, at 31.

²⁰ Miller, *supra* note 13, at 660.

²¹ For example, the Fifth and Eleventh Circuits have allowed unauthenticated copies and translations of foreign law. *See Forzley v. AVCO Corp. Elec. Div.*, 826 F.2d 974, 979 n.7 (11th Cir. 1987); *Ramirez v. Autobuses Blancos Flecha Roja, S.A.*, 486 F.2d 493, 497 n.11 (5th Cir. 1973).

²² *Compare Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 707 (5th Cir. 1999) (reasoning that “domestic policy should have priority over comity and that a court should not be compelled to protect foreign interests over interests of the forum state”), *and Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir. 1994) (stating that “[c]omity cannot be the source of a disability that prevents a district court from having the power to address wrongdoing that impacts a domestic court . . . comity must yield to domestic policy”) *with Matter of Oil Spill by Amoco Cadiz Off Coast of France on Mar. 16, 1978*, 954 F.2d 1279, 1312 (7th Cir. 1992) (“A court of the United States owes substantial deference to the construction France places on its domestic law.”).

²³ *Animal Sci. Products, Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018).

²⁴ *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 179 (2d Cir. 2016), vacated and remanded sub nom. *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 201 L. Ed. 2d 225 (2018).

class-action lawsuit in the District Court for the Eastern District of New York against four Chinese sellers, alleging that the Chinese sellers agreed to both price-fixing and quantity-fixing in violation of Section 1 of the Sherman Act.²⁵ The Chinese sellers filed a motion to dismiss based on their defense that the price-and-quantity-fixing were mandatory under Chinese law.²⁶ The Ministry of Commerce of the People's Republic of China ("the Chinese government") submitted an *amicus* brief to the court asserting that (1) the Chinese sellers' defense was accurate, and (2) it was the administrative agency responsible for regulating trade in China.²⁷

The U.S. buyers presented three important pieces of evidence in response: (1) a publication that revealed that the Chinese sellers had agreed to fix the price and quantity of Vitamin C, (2) expert testimony, and (3) pointed out that the Chinese sellers did not name any particular law or regulation that required this business conduct.²⁸ The U.S. buyers specifically pointed to China's statement to the World Trade Organization that it concluded its regulation of Vitamin C exports in 2002.²⁹ In light of FRCP 44.1, the district court ruled that a foreign government's interpretation of its law does not automatically qualify for absolute and conclusive deference and that further investigation is permitted.³⁰ Therefore, the district court looked beyond the interpretation of law proffered by the Chinese government and found that its government did not compel the price-fixing and quantity-fixing activities of the Chinese suppliers.³¹ The district court denied the motion to dismiss, and it later denied the Chinese suppliers' motion for summary judgment.³²

²⁵ *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 548 (E.D.N.Y. 2008), rev'd, 837 F.3d 175 (2d Cir. 2016), vacated and remanded sub nom. *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 201 L. Ed. 2d 225 (2018).

²⁶ *Id.* at 548.

²⁷ *Id.* at 552.

²⁸ *Id.* at 554-55.

²⁹ *Id.* at 549.

³⁰ *Id.* at 556.

³¹ *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 556.

³² *Id.* at 560; *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 566-67 (E.D.N.Y. 2011)

The district court's decision was then reversed by the Second Circuit Court of Appeals.³³ The Second Circuit reasoned that when a foreign government provides an official statement that interprets its contested law, federal courts are "bound to defer" to the foreign government's interpretation as long as the interpretation is reasonable.³⁴ The court solely relied on the *amicus* brief submitted by the Chinese government.³⁵ Because of this high level of deference, the appellate court did not reach the other evidence presented by the American buyers at the district court—most notably, the Chinese government's failure to point to a specific law or regulation that required the Chinese suppliers to engage in price-fixing and quantity-fixing. Instead, the court was concerned with principles of international comity and reciprocity in reaching its decision.³⁶ The appellate court began its analysis with the first factor of the comity balancing test: the degree of conflict with foreign law.³⁷ Much like the district court had done, the appellate court centered its analysis on FRCP 44.1; however, the appellate court determined that merely because FRCP 44.1 tells a court what it can review when interpreting foreign law, does not mean it tells a court how it must examine the foreign law.³⁸ Keeping principles of international comity

³³ *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 179 (2d Cir. 2016), vacated and remanded sub nom. *Animal Sci. Products, Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 201 L. Ed. 2d 225 (2018).

³⁴ *Id.* at 189.

³⁵ *Id.* at 189-190.

³⁶ *Id.* at 184.

³⁷ *Id.*; The list of internal comity factors are (1) Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) The extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) Whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979).

³⁸ *Id.* at 187.

in mind, the appellate court reasoned that the international comity factors favor refraining from further intervention. Ultimately, “China’s strong interest in its protectionist economic policies,” outweighed any antitrust enforcement interests of the United States.³⁹

On appeal to the Supreme Court, in June of 2018, Justice Ginsburg delivered the opinion of an unanimous Court in favor of the American buyers.⁴⁰ The Court reasoned that the Second Circuit was incorrect to find that American courts are bound to defer to a foreign government’s interpretation of its own laws, and emphasized that FRCP 44.1 does not provide a level of deference as guidance for these matters.⁴¹ Further, Justice Ginsburg wrote that consideration of a foreign government’s interpretation of its own laws must be on a case-by-case basis—rather than a bright-line rule.⁴² Justice Ginsburg noted that some appropriate considerations for evaluating a foreign government’s interpretation of its own law include, “the statement’s clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement’s consistency with the foreign government’s past positions.”⁴³ These considerations center on the quality and the trustworthiness of the statement, rather than pure deference alone. Further, Justice Ginsburg noted that FRCP 44.1 logically requires a court to consider the foreign law as a “question of law,” not of fact.⁴⁴ Therefore, the Court should not be restricted on the evidence it reviews, and it should consider all relevant evidence in making its determination of the foreign law. Because the Court determined that the Chinese government’s statement was not bound to absolute deference, it remanded the case for consideration of relevant materials.⁴⁵

³⁹ *Animal Sci. Products Inc.*, 837 F.3d at 194.

⁴⁰ *Animal Sci. Products Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1872 (2018).

⁴¹ *Id.* at 1873 (“As the Court of Appeals correctly observed, Rule 44.1 does not address the weight a federal court determining foreign law should give to the views presented by the foreign government.”).

⁴² *Id.*

⁴³ *Id.* at 1868.

⁴⁴ *Id.* at 1869.

⁴⁵ *Id.* at 1875.

IV. ARGUMENT

A. *A Brief History of Foreign Government Amicus Briefs in U.S. Federal Court, with a Special Focus on China*

This section will provide a brief history into how *amicus* briefs began, how they have changed overtime, and China's appearance as *amicus* in antitrust actions in the Supreme Court.

Amicus briefs, also known as "friend of the court" briefs, have evolved overtime to what we know today.⁴⁶ The concept originated in Roman Law and pre-eighteenth century England.⁴⁷ Back then, an *amicus* brief was actually an in-court attorney that represented neither party, whose sole presence was to engage in "oral shepardizing," i.e. inform the judge of any unknown case law.⁴⁸ In 1821, the first *amicus* in U.S. court was Henry Clay in *Green v. Biddle*.⁴⁹ This was a land dispute case in which Clay personally appeared before the Supreme Court to act as an *amicus* on behalf of non-party landowners.⁵⁰ The case, decided in 1823, marks the beginning of the *amicus* brief transformation from an unbiased lawyer speaking on the issue, to advocacy on behalf of a party.⁵¹

The evolution of *amicus* briefs and the effects of globalization have led to a greater presence of foreign *amicus* in the Supreme Court.⁵² According to a systematic study conducted by Eichensehr⁵³ on foreign governments' *amicus* brief filings to the Court in 2016, forty-six countries have filed or signed *amicus* briefs in merit cases in the past four decades.⁵⁴ Merit briefs involve substantive legal questions, like the brief submitted by the Ministry in *Animal*

⁴⁶ Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1765–68 (2014).

⁴⁷ *Id.* at 1765.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1766; *Green v. Biddle*, 21 U.S. (8 Wheat) 1, 17 (1823).

⁵⁰ *Green*, 21 U.S. at 17 (In this case, Clay served both as an arm of the court and as a representative for the non-party landowners.).

⁵¹ *See* Larsen, *supra* note 46, at 1766.

⁵² *See* Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289, 306 (2016).

⁵³ Kristen Eichensehr was a visiting Assistant Professor at UCLA School of Law when she conducted this study.

⁵⁴ *Id.*

*Science Products, Inc.*⁵⁵ Typically, countries with well-established trade relationships with the U.S. file *amicus* briefs at the highest rates in U.S. court. For example, the United Kingdom has filed the highest amount of merit briefs in the past forty years.⁵⁶ From the sixty-eight foreign sovereign *amicus* briefs filed on the merits between 1978 to 2013, 44% address the foreign government's domestic laws.⁵⁷

While filing rates can tell us why foreign governments submit *amicus* briefs, citation rates show us the weight the Court gives to these briefs. From the thirty-nine merits cases involving at least one foreign *amicus* brief since 1978, Eichensehr found that 44% were cited at least once in the opinion of the case.⁵⁸ This number proves to be even more significant when compared to Supreme Court cites of other institutional entities. In 2000, Kearney and Merrill⁵⁹ conducted a study that involved the Court's citation rates of the ACLU and the AFL-CIO from 1986 to 1995.⁶⁰ The study found that, during this time period, the Court cited 4.86% of briefs submitted by the ACLU and 9.72% of briefs submitted by the AFL-CIO.⁶¹ During this same time period, the Court cited 55% of *amicus* briefs submitted by foreign governments.⁶²

Animal Science Products, Inc. is a critical case to examine because it marks the first time the Chinese government has submitted an *amicus* brief to the Supreme Court in a proceeding in which one of the parties is from its own country.⁶³ The top five countries who

⁵⁵ See *Id.* at 306; Brief of Amicus Curiae Ministry of Commerce of the People's Republic of China in Support of Respondents, *Animal Sci. Products, Inc. v. Hebei Welcome Pharm Co. Ltd.*, 138 S. Ct. 1865 (2018) (No. 16-1220), 2018 WL 1666001.

⁵⁶ See Eichensehr, *supra* note 52.

⁵⁷ *Id.* at 318.

⁵⁸ *Id.* at 320-21.

⁵⁹ Kearney was an Assistant Professor of Law at Marquette University when he conducted this study. He now serves as the Dean of this law school. Merrill was a John Paul Stevens Professor of Law at Northwestern University when he conducted this study. He is now a Professor of Law at Yale University.

⁶⁰ Joseph D. Kearney & Thomas W. Merrill, *Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 761 (2000).

⁶¹ *Id.*

⁶² See Eichensehr, *supra* note 52, at 322.

⁶³ This determination was made by cross-referencing the LexisNexis and Westlaw Supreme Court briefs databases.

file *amicus* briefs to the Court are the United Kingdom, Canada, Mexico, Switzerland, and Japan.⁶⁴ China, despite being a top trading partner to the United States, is noticeably absent from the list of the top five filers of *amicus* briefs.⁶⁵

The only other instance the Chinese government submitted an *amicus* brief to the Supreme Court was in *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l.*⁶⁶ That case involved a bid for a construction company in which a New Jersey-based Nigerian company was accused of bribing the Nigerian government in order to be awarded the construction contract.⁶⁷ A bidder that was not awarded the contract sued the winning company after learning about a 20% commission it paid to two Panamanian “entities” for aiding the successful bidder in securing the contract.⁶⁸ China submitted a brief to urge the Court to stay out of this matter.⁶⁹

In *W.S. Kirkpatrick & Co.*, China—although not directly involved in that case—submitted an *amicus* brief for two main reasons: (1) China is a top trading partner of the United States, so it is itself no stranger to being called into proceedings here and recognizes the function of the Act of State doctrine in preventing U.S. courts from having to decide pending claims that have the potential to harm foreign relations; and (2) China’s distress regarding the effects of allowing unsuccessful bidders to call into question a foreign government’s decision to contract by claiming corrupt activities in the selection process.⁷⁰ The two other *amicus* briefs submit-

⁶⁴ Eichensehr, *supra* note 52, at 307 (European Union, placed second, is removed from the list above because it is a union of 28-member countries, as it refers to itself on its official website: https://europa.eu/european-union/about-eu_en).

⁶⁵ International Trade Administration, https://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_003364.pdf (last visited Mar. 9, 2019).

⁶⁶ *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l.*, 493 U.S. 400 (1990).

⁶⁷ *Id.* at 401.

⁶⁸ *Id.* at 402.

⁶⁹ Brief of the Republic of China as Amicus Curiae, *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l.*, 493 U.S. 400 (1990) (No.87-2066), 1989 WL 1127463.

⁷⁰ *See id.*; The Act of State doctrine prevents federal courts from invalidating the official act of a foreign sovereign involving activities within its own territory. *Id.* at 405.

ted in this case were by the American Bar Association and the United States Department of Justice.⁷¹ It is interesting to note that the Court's opinion only directly addresses the *amicus* brief of the Department of Justice.⁷²

Ultimately, the Court was not convinced by China's argument that the Act of State doctrine must preclude its involvement in the case.⁷³ The Court reasoned that the Act of State doctrine does not create an exception for cases and controversies that may embarrass foreign governments.⁷⁴ Rather, it requires courts to deem the acts of foreign sovereigns taken within their own jurisdictions valid.⁷⁵ Because the validity of the foreign sovereign act was not at issue in the case, the Act of State doctrine was not applicable.⁷⁶

There are a couple important distinctions to note between *W.S. Kirkpatrick & Co.* and *Animal Science Products, Inc.* First, Nigeria acknowledged that Nigerian law forbids the procurement and acceptance of bribes for government contracts.⁷⁷ At the center of dispute in *Animal Science Products, Inc.* was whether Chinese law actually required the Chinese suppliers to participate in price and quantity fixing.⁷⁸ Second, *W.S. Kirkpatrick & Co.* did not involve a foreign governments' interpretation of its own law, so its words likely did not carry as much weight as the *amicus* brief in *Animal Science Products, Inc.*

B. *Problems Posed by U.S. Courts Facing Issues of Foreign Law*

The Supreme Court has recognized the importance of exercising caution to remain objective in the face of other, perhaps unfa-

⁷¹ See Brief Amicus Curiae of the American Bar Association, *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l.*, 493 U.S. 400 (1990) (No.87-2066), 1989 WL 1127469; Brief for the United States as Amicus Curiae, *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l.*, 493 U.S. 400 (1990) (No.87-2066), 1988 WL 1026122.

⁷² *W.S. Kirkpatrick & Co.*, 493 U.S. at 408.

⁷³ *Id.* at 401.

⁷⁴ See *id.* at 409-10.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *id.* at 406.

⁷⁸ *Animal Sci. Products Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1870 (2018).

miliar, cultures and societies.⁷⁹ Justice Kennedy wrote in *Abbott v. Abbott* that “[j]udges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration”⁸⁰ Although the judiciary is an objective branch, it would only be natural for the humans that comprise it to have certain preconceived notions of unfamiliar territory. This raises a couple thought-provoking questions: (1) is the likelihood of foreign *amicus* success at least somewhat determined by its country of origin, and (2) what difficulties do courts encounter when interpreting foreign law?

In civil law jurisdictions, legal codes take precedent to judicial decision when it comes to interpreting law.⁸¹ In *Curley v. AMR Corp.*, the Second Circuit acknowledged that the court had a duty to consider how Mexican courts interpret their own laws because Mexican law is so different from New York state law.⁸² Mexico is a civil law jurisdiction and these jurisdictions depart greatly from our legal traditions.⁸³ The Second Circuit had to answer the question of whether the defendant met the standard for illicit action or against “good customs and habits” of Mexico.⁸⁴ This case presents the dilemma of U.S. courts needing to know societal norms to make a ruling. In instances like these, deferring to *amicus* briefs may be the only way for them to know this information.

Developing countries present a very different obstacle. Oftentimes, recordings of their laws are hard to find—making it almost impossible to concretely interpret the relevant law.⁸⁵ It is only the ability of courts to conduct their own investigations that can truly lead to the best results. If a federal court is presented with a case involving a contested foreign law of a developing country, and the

⁷⁹ See *Abbott v. Abbott*, 560 U.S. 1, 20 (2010) (child custody dispute involving aspects of Chilean law).

⁸⁰ *Id.*

⁸¹ Berkeley Law School, *The Common Law and Civil Law Traditions*, <https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf> (last visited Nov. 18, 2019).

⁸² *Curley v. AMR Corp.*, 153 F.3d 5, 14 (2d Cir. 1998).

⁸³ Comm. on Int’l Commercial Disputes, Proof of Foreign Law after Four Decades with Rule 44.1 FRCP and CPLR 4511, 61 REC. ASS’N BAR CITY N.Y. 49, 56 (2006).

⁸⁴ *Curley*, 153 F.3d at 15.

⁸⁵ Comm. on Int’l Commercial Disputes, *supra* note 83, at 56.

foreign government submitted an *amicus* brief to explain the contest law, courts would be wholly blocked from meaningful investigation into the issues of the case. Just because the interpretation would be meaningful, the court would have to oblige the foreign sovereign's statement. This in turn could lead to a confusion of the issues and misapplication of law.

With *Animal Science Products, Inc.*, the need to understand the differences in legal and societal norms is no different. The deference that the Second Circuit demonstrated can be especially important where the legal system is so different. According to the Chinese government in this case, Chinese law requires price-fixing.⁸⁶ Were this to be true, this would be the exact opposite of what the American government requires.⁸⁷ It is no question that the differences in the way China and the United States conduct business are massive. For example, China boasts a state-run news industry and policy bank.⁸⁸ Additionally, China influences its tech market. The Chinese government released the "*Made in China 2025*" *Key Area Technology Roadmap (Made in China Roadmap)*.⁸⁹ This roadmap sets clear market share targets domestically and globally to be met by Chinese producers in a number of high-tech industries.⁹⁰ As stated previously, the second international comity factor accounts for "nationality of the parties, locations or principal places of business of corporations."⁹¹ This factor suggests that courts may need to treat parties differently based upon where they are from.

⁸⁶ *Animal Sci. Products Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1870 (2018) (stating that Chinese sellers moved to dismiss the U. S. purchasers' complaint on the ground that Chinese law required them to fix the price and quantity of vitamin C exports).

⁸⁷ *Id.* at 1867 (explaining that the Chinese sellers engaged in price-fixing activity in violation of § 1 of the Sherman Act).

⁸⁸ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018), 90-92.

⁸⁹ *Id.* at 10.

⁹⁰ *Id.* at 15.

⁹¹ *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 184 (2d Cir. 2016), vacated and remanded sub nom. *Animal Sci. Products, Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 201 L. Ed. 2d 225 (2018).

This begs the question, would this case have turned out differently if the *amicus* brief and the defendants were from another country more closely related to the U.S. legal system? Could it be that the Supreme Court acted in a way that Justice Kennedy cautioned against in *Abbott*?⁹² To answer this question, we must first look at antitrust jurisprudence in the Supreme Court where foreign governments have submitted briefs. To do this investigation, I cross-referenced the Supreme Court databases on Westlaw and LexisNexis to analyze the outcomes of *amicus* briefs submitted by the United States top trading partners⁹³ in antitrust lawsuits where an organization or corporation from its country was a defendant.

Let us begin with the highest filer of *amicus* briefs to the Supreme Court: the United Kingdom.⁹⁴ For the United Kingdom, the only brief on these databases that fits this description comes from the case *Hartford Fire Ins. Co. v. California*.⁹⁵ Plaintiffs in that case alleged that domestic members of the insurance industry colluded with domestic and foreign insurers to obtain changes in insurance coverage, in violation of Section 1 of the Sherman Act.⁹⁶ In a brief submitted by the United Kingdom, the government pleaded with the Court to refrain from finding liability on part of the petitioners because application of U.S. antitrust law would produce major conflict with English law and policy.⁹⁷ The *amicus* brief raised the issue of “mutual respect between close allies and deference to principles of international law and comity,” and it further asserted that the appellate court decision disregarded these principles by exercising subject matter jurisdiction over this claim.⁹⁸ Ultimately, the Court chose to exercise jurisdiction be-

⁹² See *Abbott v. Abbott*, 560 U.S. 1, 20 (2010) (stating that “[j]udges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration “ when deciding cases).

⁹³ The top trading partners are Canada, Mexico, China, Japan, and the United Kingdom. International Trade Administration, *supra* note 65.

⁹⁴ See Eichensehr, *supra* note 52, at 307.

⁹⁵ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

⁹⁶ *Id.* at 770-71.

⁹⁷ See Brief for the Government of the United Kingdom of Great Britain and Northern Ireland, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (No. 91-1129), 1992 U.S. S. Ct. Briefs LEXIS 774 *.

⁹⁸ *Id.*

cause no direct conflict of the laws existed.⁹⁹ The Court reasoned that “[t]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States anti-trust laws,” even where the foreign state has a strong policy to permit or encourage such conduct.¹⁰⁰ The defendants could comply with both laws, and thus were held liable.¹⁰¹

For Japan, only one case falls into this category: *F Hoffmann-La Roche Ltd. v. Empagran S.A.*¹⁰² That case involved several Japanese companies accused of partaking in an international cartel to fix prices and apportion markets for bulk vitamin sales throughout U.S. markets.¹⁰³ Similar to *Animal Science Products, Inc.*, the plaintiffs in the case were purchasers of vitamins in foreign markets.¹⁰⁴ The Court’s opinion centered around whether the exceptions of the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”) apply to the Japanese companies’ activity.¹⁰⁵ The FTAIA states that the Sherman Act “shall not apply to conduct involving trade or commerce . . . with foreign nations”; unless, the conduct considerably harms American imports, domestic commerce, or exports.¹⁰⁶ The Japanese government’s brief pleaded the Court to maintain principles of comity, stating that that allowing foreign purchasers to claim damages for solely foreign conduct damages the imperative principles of comity.¹⁰⁷ The Court held that because the plaintiff’s harm from the alleged price-fixing activity relied entirely on “independent foreign harm,” the antitrust laws of the United States should not apply.¹⁰⁸ This case was ulti-

⁹⁹ *Hartford Fire Ins. Co.*, 509 U.S. at 799 (citing Restatement (Third) Foreign Relations Law § 415) (stating no conflict where a person can comply with both laws).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

¹⁰³ *Id.* at 159.

¹⁰⁴ *Id.* at 159.

¹⁰⁵ *See id.* at 158-59.

¹⁰⁶ *Id.* at 161.

¹⁰⁷ *See* Brief of the Government of Japan as Amicus Curiae in Support of Petitioners, *F. Hoffman-La Roche Ltd. V. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 U.S. S. Ct. Briefs LEXIS 106 *.

¹⁰⁸ *F. Hoffmann-La Roche Ltd.*, 542 U.S. at 166-67.

mately remanded to address an argument not reached by the appellate court.¹⁰⁹

According to a search of the Westlaw and LexisNexis Supreme Court Brief databases, Mexico has never filed an *amicus* brief in an antitrust suit on behalf of parties from its country to the Supreme Court. The only *amicus* brief that Canada has filed in an antitrust suit on behalf of parties from its country to the Supreme Court was an *amicus* brief for writ of certiorari, which was ultimately denied.¹¹⁰ From the case law, a pattern emerges. In both *Hartford Fire Ins. Co.* (the antitrust suit involving insurers from the United Kingdom) and *F Hoffmann-La Roche Ltd.* (the antitrust suit involving Japanese companies), the Court set aside the arguments raised in the foreign *amicus* briefs to adhere to principles of international comity, and chose instead to rule in favor of the plaintiffs and to enforce U.S. law.¹¹¹

C. *Deference to a Foreign Government's Interpretation of its Own Laws*

This section will discuss my perspective on the United States Supreme Court's ruling that federal courts are not bound to defer to a country's interpretation of its own law. It will contain an in-depth discussion into the pros and cons of extending absolute deference to a foreign government's interpretation of its own laws. The discussion will include the most contested principles from the Eastern District of New York, the Second Circuit, and United States Supreme Court.

The Supreme Court wrote that when interpreting foreign law, the appropriate weight of deference will "depend on the circumstances."¹¹² As mentioned earlier, these circumstances include the "statement's clarity, thoroughness, and support; its context and

¹⁰⁹ *Id.* at 175.

¹¹⁰ See Brief for Amicus Curiae Her Majesty the Queen in Right of the Province of Saskatchewan, Canada, In Support of Petitioners, *Agrium, Inc. v. Minn-Chem, Inc.*, 570 U.S. 935 (2013), (No. 12-650), 2012 U.S. S. Ct. Briefs LEXIS 5449 *; *Agrium Inc. v. Minn-Chem, Inc.*, 570 U.S. 935 (2013).

¹¹¹ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993); *F. Hoffmann-La Roche Ltd.*, 542 U.S. at 166-67.

¹¹² *Animal Sci. Products, Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1868 (2018).

purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions."¹¹³ At first glance, the question of appropriate deference may seem rather simple. If the U.S. wants other countries to respect what we have to say about our laws, we must respect what they have to say about their own laws, *i.e.* we must employ the international comity mindset. However, dealing with the interpretation of foreign law is much more complex. We must strive to find the right balance.

1. Why Federal Courts Should Defer

Under *Chevron* deference, U.S. courts provide absolute deference to a domestic agency's interpretations of the laws that govern the agency,¹¹⁴ so why should U.S. courts not also provide this deference to a foreign government's interpretation of laws that govern them? This question is something that courts have grappled with before. In *Matter of Oil Spill by Amoco Cadiz Off Coast of France on Mar. 16, 1978*, the Seventh Circuit deferred to a foreign government's interpretation of its own law—and cited to the case that established *Chevron* deference in its opinion.¹¹⁵ There are several reasons why federal courts may want to provide a version of *Chevron* deference to foreign governments.

a. Judges are not experts on foreign law

Justice Breyer, in an article about U.S. law and global effects, recently highlighted that “[t]he justices are not experts on the practices of other nations” and to remedy this “knowledge gap,” it is

¹¹³ *Id.*

¹¹⁴ Chevron Deference is a type of judicial deference given to an administrative agency's interpretation of a statute that the agency is responsible for enforcing. The doctrine was established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹¹⁵ See *Matter of Oil Spill by Amoco Cadiz Off Coast of France on Mar. 16, 1978*, 954 F.2d 1279, 1312 (7th Cir. 1992) (“A court of the United States owes substantial deference to the construction France places on its domestic law. Courts of this nation routinely accept plausible constructions of laws by the agencies charged with administering them. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).”).

“helpful to receive briefs from other nations.”¹¹⁶ Federal court is no stranger to foreign agencies interpreting law in U.S. court. Even though federal judges deal with foreign law concepts, this does not mean that they know everything that is important to decision-making. These same federal judges look to *amicus* briefs concerning domestic law, which is wrapped up in all the cultural norms that the judges are familiar with. Judges indisputably use *amicus* briefs to both educate themselves on a given topic and use it for their decision-making process. Two-thirds of the times that the Supreme Court cited to an *amicus* brief during the 2012-2013 term, there was no accompanying citation to support what it was writing.¹¹⁷ Because judges are not experts on foreign law, foreign *amicus* assist federal courts in interpreting unfamiliar law.¹¹⁸

One example of the Court’s acknowledgement of unfamiliar law arises in *Morrison v. National Australian Bank, Ltd.*¹¹⁹ In this case, an Australian bank was accused of committing fraud in the trade of its shares, arising under the Section 10(b) of the Securities and Exchange Act.¹²⁰ The opinion cites to an *amicus* brief submitted by the United Kingdom to acknowledge that regulations in other countries regularly deviates from our own—including, but not limited to, what rises to the level of fraud and what disclosures need to be given.¹²¹ Because all of the activity took place off-shores, and Section 10(b) only applies to domestic conduct, and all the claims took place outside the United States, the Court ultimately affirmed the lower court’s decision to dismiss the complaint.¹²²

¹¹⁶ Stephen Breyer, *The Court and the World: American Law and the New Global Realities* 133 (2015).

¹¹⁷ Larsen, *supra* note 46, at 7.

¹¹⁸ Justice Breyer acknowledges the important role foreign *amicus* briefs play in cases involving foreign law when he writes, “[i]t is . . . helpful to receive briefs from other nations as well as pertinent foreign associations.” Breyer, *supra* note 116.

¹¹⁹ See *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247 (2010).

¹²⁰ *Id.* at 253.

¹²¹ *Id.* at 269.

¹²² *Id.* at 273.

b. To avoid tensions while simultaneously enabling trade and international relations

The global economy today requires a level of positive international relations to thrive. Thus, declining to exercise deference to foreign government interpretation could send a message that is detrimental to international relations. It is important to consider exactly how international relations for the U.S. are affected when the Supreme Court essentially conveys that it will not trust the interpretation—and ways to avoid this dilemma altogether.¹²³

c. To streamline the judicial process and avoid expensive legal experts

One comprehensive study conducted on over 1,000 expert witnesses in over 300 fields of work found that the average pay for in-court testimony is \$385/hour, with the highest reported to be \$7,500/hour.¹²⁴ Trials can last for multiple days, and this cost does not even consider other pre-trial needs for expert witnesses—such as retainer fees, hourly deposition fees, or travel expenses. Providing deference to a foreign government's interpretations of its own laws eliminates all of these issues and streamlines the process. In *Animal Science Product, Inc.*, there was a battle of the experts. The U.S. purchasers relied on an expert on Chinese law to argue that the defendants' conduct was not compelled by Chinese law.¹²⁵ In contrast, the Chinese suppliers relied on expert testimony to support its contention that the Chinese government's interpretation of its own law was accurate.¹²⁶ Perhaps litigation costs for clients could decrease if the Court deferred to foreign *amicus* briefs.

Still, there is more to consider. It is important to weigh the reasons federal courts should defer to a foreign governments' interpretations of its own laws against the reasons why federal courts should not defer, in order to be fully aware of the consequences their deference.

¹²³ See *infra* Part IV, D for more on the current state international relations and trade with China.

¹²⁴ *Expert Witness Fees*, SEAK, <https://seak.com/expert-witness-fee-study/> (last visited September 1, 2019).

¹²⁵ See *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1867 (2018).

¹²⁶ *Id.* at 1871.

2. Why Federal Courts Should Not Defer.

Some may argue that federal courts should afford foreign governments the same amount of deference as they do with *Chevron* deference to U.S. agencies.¹²⁷ However, the theory behind *Chevron* deference would be misapplied to foreign governments for two key reasons.

In contrast to foreign agencies, U.S. officials are responsible for appointments within domestic agencies. This gives a level of control over the persons in these agencies and familiarity with these persons. Second, these domestic agencies are governed by U.S. domestic laws, which federal judges are inherently more familiar with than foreign law. Although there may be benefits that come with deference to a foreign government's interpretations of their its own law, it would be imprudent to overlook the dangers that accompany this approach. There are several reasons why federal courts may not choose to defer.

a. Federal courts should be allowed to keep their independence

Michael Gottlieb, attorney for the United States in *Animal Science Products, Inc.*, said this decision “will promote free and open markets, while protecting the independence of the U.S. courts.”¹²⁸ If federal courts are bound to defer to a foreign government's interpretation, then the decision-making autonomy of the judicial branch—the gatekeeper that enforces our nation's laws—is greatly threatened.

b. To avoid the danger in ignoring resources, such as expert testimony and independent research

There are dangers involved in accepting statements from *amicus* briefs as true, especially in a lawsuit where there is much at stake. The potential for confusion of the facts and/or interpretation of law when all parties are domestic and bound to U.S. laws are

¹²⁷ See generally Eichensehr, *supra* note 52, at 296.

¹²⁸ Andrew Chung and Lawrence Hurley, *Trump gets win at U.S. Supreme Court in China antitrust case*, REUTERS (June 14, 2018, 7:12 AM), <https://www.reuters.com/article/us-usa-court-china/supreme-court-hands-trump-win-in-china-antitrust-case-idUSKBN1JA21B>.

undeniable. This problem is multiplied when one side to the suit is foreign. The need to accurately understand the laws are even more important. Ignoring resources—more specifically testimony challenging the Chinese government’s statement on interpretation of its own law—is the reason the Supreme Court remanded *Animal Science Products, Inc.*¹²⁹

Further, federal courts cannot simply take what they are given at face value.¹³⁰ The Seventh Circuit in *Twohy v. First Nat’l Bank of Chicago* cautioned that “[a]ll too often counsel will do an inadequate job of researching and presenting foreign law or will attempt to prove it in such a partisan fashion that the court is obliged to go beyond their offerings.”¹³¹ Although that case involved purely domestic parties, this principle applies to foreign parties as well. We must allow our judicial branch to fulfill its purpose in reaching unbiased determinations of law. This is exactly what FRCP 44.1 allows the judiciary to do when it encounters questions of foreign law.

c. To avoid countries from misrepresenting their laws to circumvent lawsuits

In *Animal Science Products, Inc.*, the Supreme Court said “[w]hen a foreign govt. makes conflicting statements . . . or offers an account in the context of litigation, there may be cause for causation in evaluating the government’s submission.”¹³² This is a gravely important consideration that many advocates for absolute deference overlook. In *Bamberger v. Clark*, the D.C. Circuit acknowledged that mere presence of FRCP 44.1 on the books does not mean that federal courts will no longer defer to a foreign agen-

¹²⁹ Justice Ginsburg noted that “[b]ecause the Court of Appeals concluded that the District Court was bound to defer to the Ministry’s brief, the court did not consider the shortcomings the District Court identified in the Ministry’s position.” The Court did not take a position on the correct interpretation of Chinese law, but said the evidence identified by the district court were at least relevant to the correct interpretation of Chinese law. *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1875, (2018).

¹³⁰ See *Twohy v. First Nat’l Bank of Chicago*, 758 F.2d 1185, 1193 (7th Cir. 1985) (quoting 9 C. WRIGHT & A. MILLER, § 2444, p. 408).

¹³¹ *Id.*

¹³² *Animal Sci. Products, Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1873 (2018).

cy's interpretation, as long as the view is "not unreasonable or contrary to the plainly ascertainable intent of the legislature."¹³³ This practically mirrors the Second Circuit's view of deference that federal courts are bound to defer to a foreign government's interpretation of its own law when that interpretation is reasonable in *Animal Science Products, Inc.*¹³⁴ However, the Second Circuit in this case did not include language prohibiting unreasonable interpretations or contradictory interpretations of the legislature. This short phrase at the end functions very differently from the Second Circuit's view of deference to require the statement to go beyond one more hurdle—that is, to allow for federal courts to review legislative evidence in its decision-making. If we evaluate the Chinese government's statement through this context, its inability to point to a specific law that required price-fixing could mean that its interpretation would be contrary to the legislature and outside the scope of appropriate deference.

Deference to foreign sovereigns is unquestionably important. The solution is not absolute deference to foreign *amicus* briefs, but rather, to view them critically. A court should ensure that what the foreign government is representing is actually indicative of the law it claims to interpret. Here, the Chinese government failed at the district court level to point to a single provision to support its contention that the Chinese suppliers were forced to engage in price fixing.¹³⁵ For this specific reason, the Court was wise to remand the case to allow further investigation.

¹³³ *Bamberger v. Clark*, 390 F.2d 485, 488 (D.C. Cir. 1968) (reasoning that "in some instances at least a court will defer to an agency's view of a question of law even though the court itself would not have decided the question the same way if it had considered the matter in the first instance—assuming of course that the agency's view is not unreasonable or contrary to the plainly ascertainable intent of the legislature").

¹³⁴ *See In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 189 (2d Cir. 2016), vacated and remanded sub nom. *Animal Sci. Products, Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 201 L. Ed. 2d 225 (2018).

¹³⁵ *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 554-55 (E.D.N.Y. 2008), rev'd, 837 F.3d 175 (2d Cir. 2016), vacated and remanded sub nom. *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 201 L. Ed. 2d 225 (2018).

3. Can there be a balance?

Under principles of international comity, the Second Circuit in *Animal Science Products, Inc.* was convinced by the Chinese government's statements in its *amicus* brief. This sort of absolute deference meant so much imperative evidence was never even reviewed to allow the court to make an informed determination based on all the evidence. In *Access Telecom, Inc. v. MCI Telecommunications Corporation*, the Fifth Circuit acknowledged that there must be a limit on principles of comity.¹³⁶ The court reasoned that domestic policy should have priority over comity and that a court should not be compelled to protect foreign interests over interests of the forum state.¹³⁷ Because that case also involved an agency's interpretation of law from its country at issue, it presents a helpful analogy to *Animal Science Products, Inc.* The Fifth Circuit ultimately ruled that Mexican agency's interpretation did not deserve deference because it was not party to the suit and there was no evidence that this agency was given the power to interpret the law existed.¹³⁸

One solution to problems posed by foreign law in federal courts is found in the New York State Court of Appeals' and the Supreme Court of New South Wales' reciprocity system.¹³⁹ The first of its kind, this reciprocity system was created to combat the expensive cost of legal experts and diminish confusion caused by contradictory information on foreign law.¹⁴⁰ The participants state that this system is an answer to the legal system's impediment on transnational trade and investment.¹⁴¹ When executed correctly,

¹³⁶ *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F3d 694, 707 (5th Cir. 1999).

¹³⁷ *Id.* (citing *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir. 1994)).

¹³⁸ *Id.* at 714-15.

¹³⁹ The Hon. J.J. Spigelman, Chief Justice, Supreme Court of New South Wales, MOU Between New York and New South Wales Address (Oct. 28, 2010), in COMPILATION OF SPEECHES DELIVERED BY THE HON. J.J. SPIGELMAN, AC, CHIEF JUSTICE OF NSW IN 2010.

¹⁴⁰ Wilson, *supra* note 5, at 919.

¹⁴¹ See The Hon. J.J. Spigelman, Chief Justice, Supreme Court of New South Wales, MOU Between New York and New South Wales Address (Oct. 28, 2010), in COMPILATION OF SPEECHES DELIVERED BY THE HON. J.J. SPIGELMAN, AC, CHIEF JUSTICE OF NSW IN 2010, at 14.

reciprocity systems can ensure accurate interpretation of each other's laws by providing unbiased interpretations and guaranteeing efficiency.¹⁴² Perhaps the U.S. could benefit from a reciprocity system with countries that it has important trading relationships with. After all, China consistently ranks as the U.S.'s third highest trading partner.¹⁴³

V. FOREIGN POLICY IMPLICATIONS OF THIS DECISION

China and the U.S. have had a long-standing and complicated relationship with one another for many years, ranging from competition to strong business ties.¹⁴⁴ This section will discuss the foreign policy implications of the *Animal Science Products, Inc.* Supreme Court decision. To provide context, it will analyze the trade talks with China from 2018 and ponder where *Animal Science Products, Inc.* leaves us today.

The trade talk dance with China began in January of 2018 by the U.S.-issued tariffs on washing machine and solar cell imports from China.¹⁴⁵ Despite the fact that the majority of imports of targeted did not come from China,¹⁴⁶ this was done to send a message of U.S. dominance over the global supply chain.¹⁴⁷ The next month, China began a one-year anti-subsidy investigation of sorghum imported into China from the U.S.¹⁴⁸ Then in March 2018,

¹⁴² See generally *id.* (explaining that “[l]ike most international arrangements, this system will only be effective on the basis of true reciprocity.”).

¹⁴³ Typically, Canada is the first and Mexico is the second. DEPARTMENT OF COMMERCE, TOP U.S. TRADE PARTNERS RANKED BY 2017 U.S. TOTAL EXPORT VALUE FOR GOODS (2018); U.S. Census Bureau, Top Trading Partners, <https://www.census.gov/foreign-trade/statistics/highlights/top/index.html> (last visited Nov. 19, 2019).

¹⁴⁴ See U.S. Relations with China: 1949-2019, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/timeline/us-relations-china> (last visited Oct. 17, 2019).

¹⁴⁵ *The Trade War Is On: How We Got Here and What's Next*, BLOOMBERG NEWS (September 17, 2018, 5:59 p.m.), <https://www.bloomberg.com/news/articles/2018-09-18/the-trade-war-is-on-timeline-of-how-we-got-here-and-what-s-next>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Trump issued tariffs on steel and aluminum from all countries.¹⁴⁹ In response, China chose to impose tariffs on three billion American dollars worth of imports from the U.S.¹⁵⁰ This cat and mouse game continued, and remains to continue, for months—mostly consisting of threats to impose tariffs on even more goods from both sides.¹⁵¹

Experts say that these tariffs are a much bigger hit to China than the U.S.¹⁵² For the U.S., American markets have the potential to disperse evenly among the different markets. If the U.S. stops buying from China, China would take a large hit. As one expert put it, “where would China’s goods go?”¹⁵³ The world is watching, and President Trump has proved he will not shy away from engaging in this trade war. In September 2018, the president tweeted that the tariffs placed on China put the U.S. in a “strong bargaining position,” adding that countries who do not make “fair deals with us . . . will be [t]ariffed.”¹⁵⁴

During this back and forth, the Office of the United States Trade Representative placed China as a top priority on its watch list of nations for the fourteenth consecutive year.¹⁵⁵ This Office explained that both old and new intellectual property concerns warranted heightened focus, consisting of: trade secret theft, “rampant” online piracy, and counterfeit manufacturing.¹⁵⁶ Aside from these reasons, China has been notorious for hacking into technology systems in the U.S. Supermicro, a U.S. company that manufactures its motherboards in China, discovered small microchips on its

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *See id.*

¹⁵² Bloomberg News, *supra* note 145 (video interview).

¹⁵³ *Id.*

¹⁵⁴ @realDonaldTrump, TWITTER (Sept. 17, 2018 at 3:11am), https://twitter.com/realDonaldTrump/status/1041630722413527040?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1041630722413527040&ref_url=https%3A%2F%2Fwww.cnbc.com%2F2018%2F09%2F17%2Ftrump-puts-new-tariffs-on-china-as-trade-war-escalates.html.

¹⁵⁵ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, USTR RELEASES 2018 SPECIAL 301 REPORT ON INTELLECTUAL PROPERTY RIGHTS (2018).

¹⁵⁶ *Id.*

devices that were not supposed to be there.¹⁵⁷ Upon further investigation, Supermicro discovered that the microchips were inserted during the manufacturing process in China at the direction of the People's Liberation Army.¹⁵⁸ With these microchips, the hackers had the ability to (1) tell the device to communicate with an anonymous computer with more complex code somewhere else on the internet; and (2) manipulate the device to accept that code.¹⁵⁹ This means that a device that once required security safeguards to obtain access could entirely by-pass the device's safeguards with the aid of the remote code from the microchip.¹⁶⁰ Just to realize the magnitude of this hacking scandal, it is essential to note that Supermicro provides motherboards for top U.S. companies—including Apple and Amazon.¹⁶¹

In April 2018, the U.S. announced that it would be conducting an investigation into Huawei Technologies, a Chinese telecom manufacturer, for possible violations of sanctions against Iran.¹⁶² Then, in December 2018, Meng Wanzhou, the CFO of Huawei, was arrested in Canada to determine whether she would face charges of fraud connected to the Iran sanctions.¹⁶³ In March 2019, Wanzhou appeared in Canadian court; however, no final decision to press charges was made at that time.¹⁶⁴ Currently, Wanzhou faces 13 counts of conspiracy, fraud and obstruction in the U.S.¹⁶⁵ Her hearing is set to begin in January 2020.¹⁶⁶

¹⁵⁷ *The Big Hack: How China Used a Tiny Chip to Infiltrate Companies*, BLOOMBERG BUSINESSWEEK, (Oct. 14, 2018, 5:00 AM) <https://www.bloomberg.com/news/features/2018-10-04/the-big-hack-how-china-used-a-tiny-chip-to-infiltrate-america-s-top-companies>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² BLOOMBERG NEWS, *supra* note 145.

¹⁶³ Jackie Northam, *Top Executive of Chinese Tech Giant, Huawei, Appears At Extradition Hearing in Canada*, NPR (Mar. 6, 2019, 4:23 PM), <https://www.npr.org/2019/03/06/700873530/top-executive-of-chinese-tech-giant-huawei-appears-at-extradition-hearing-in-can>.

¹⁶⁴ *Id.*

¹⁶⁵ *Extradition Hearing for Meng Wanzhou set for early next year*, CBC NEWS (June 6, 2019), <https://www.cbc.ca/news/canada/british-columbia/meng-wanzhou-huawei-court-vancouver-june-2019-1.4850387>.

¹⁶⁶ *Id.*

In the spring of 2018, the U.S. placed additional tariffs on China pursuant to Section 301 of the Trade Act of 1974.¹⁶⁷ These tariffs were put in place in response to an investigation that revealed China's technology transfer, intellectual property, and innovation practices are unreasonable, discriminatory, and burden or restrict U.S. commerce.¹⁶⁸

The tumultuous relations with China go way beyond trade relations with the two nation's presidents. In the 2019 National Defense Authorization Act, Congress forbid government agencies from purchasing goods from Huawei or any company that utilizes Huawei's equipment.¹⁶⁹ The Chinese tech giant responded with a lawsuit, suing the U.S. under the claim that this prohibition is a violation of the Constitution's Bill of Attainder clause.¹⁷⁰ Huawei states that this clause forbids Congress from singling out an individual or company to issue a punishment without a trial.¹⁷¹ Hofstra University law professor Julian Ku commented that U.S. courts will likely not find this argument persuasive, because "doing business with the U.S. government doesn't seem to be a fundamental right, and there are reasonable grounds for Congress to act against

¹⁶⁷ Office of the United States Trade Representative, *USTR Finalizes Tariffs on \$200 Billion of Chinese Imports in Response to China's Unfair Trade Practices*, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/ustr-finalizes-tariffs-200> (last visited Nov. 20, 2019).

¹⁶⁸ The findings of the United States Trade Representative involved several ways that China disadvantages U.S. companies: "China uses joint venture requirements, foreign investment restrictions, and administrative review and licensing processes to require or pressure technology transfer from U.S. companies; China deprives U.S. companies of the ability to set market-based terms in licensing and other technology-related negotiations; China directs and unfairly facilitates the systematic investment in, and acquisition of, U.S. companies and assets to generate large-scale technology transfer; and China conducts and supports cyber intrusions into U.S. commercial computer networks to gain unauthorized access to commercially valuable business information." *Id.*

¹⁶⁹ National Defense Authorization Act for Fiscal Year 2018, H.R. 2810, 115th Cong. (2017) (enacted), <https://www.congress.gov/bill/115th-congress/house-bill/2810/text>.

¹⁷⁰ Matthew S. Schwartz, *Huawei Sues After Congress Bans Purchase of Its Equipment*, NPR (Mar. 7, 2019, 7:26 AM), <https://www.npr.org/2019/03/07/700989603/huawei-sues-u-s-after-congress-bans-government-purchase-of-its-equipment>.

¹⁷¹ *Id.*

Huawei.”¹⁷² This lawsuit has just begun, so we will see the result in the coming months, and more likely, years.

With strained foreign relations with China for many years, *Animal Science Products, Inc.* may have just added fuel to the fire. The two countries’ relations may be complicated, but they are enduring. This trade dispute has no end in sight. One thing is for certain, whether the leaders want to admit it or not: as it stands today, both countries’ economies depend on it each other for success.

VI. TAKEAWAYS AND REMAINING QUESTIONS

Although *Animal Science Products, Inc.* may seem like the long-awaited answer to the question of appropriate foreign deference, this decision does not solve everything. Because this case involves a foreign government’s interpretation of its own law, the Court’s decision leaves open the question of whether federal courts may look beyond an official statement submitted by a foreign court. Justice Ginsburg acknowledged that the issue of “whether Chinese law required the Chinese sellers’ conduct” lingered, requiring the Court to remand the case.¹⁷³ It is indisputable that this story is not yet over. As of the date of publication, the Second Circuit has yet to hear the remand of this case.

Ultimately, the Supreme Court acted wisely by considering the circumstances. While the Court must be cautious of becoming too protectionist and/or nationalist, at times the policy of the U.S. needs to come first. With this decision, the Court has not closed off deference to other countries altogether. Instead, it solidified the already established notion under FRCP 44.1 that courts may conduct their own independent investigations when answering questions of foreign law that involves a foreign government’s interpretation of its law. The Court maintained its autonomy, did not ignore evidence showing contradictory information, and upheld the principles of U.S. antitrust law.

¹⁷² *Id.*

¹⁷³ *Animal Sci. Pro., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1875 (2018).