Respectful consideration, but not deference: Chinese Sovereign Amici in the US Supreme Court vitamin C judgment


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Neither a Rock Nor a Hard Place?
Reassess the Standard of International Deference ex post Vitamin C

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Key Points

• In the first lawsuit in the U.S. history, the Vitamin C witnesses the Chinese government’s intervention to take a position as *amicus curiae*.
• It is also for the first time, the U.S. Supreme Court has articulated a “respectful consideration” test that lower courts should use in the application of Federal Rule of Civil Procedure (FRCP) 44.1 while dealing with foreign sovereign’s interpretation of their own law.
• The implications of the Supreme Court’s decision reach well beyond the confines of antitrust doctrine. In an era of increasing globalisation, the case sets the ground rules for a broad range of cross-border disputes.

Introduction

The U.S. has been accusing China of unfair trade practices, which results in an escalating trade war between the world's two economic superpowers. In such a climate of trade tension, it is sensitive but also essential to ascertain whether it is appropriate for a U.S. court to maintain jurisdiction over a matter that concerns application of international comity. Applying the "bound to defer" standard, the Second Circuit in Vitamin C deemed conclusive the Chinese Ministry of Commerce (MOFCOM)'s interpretation of its own law. The appellant court limited the district court's discretion and declined the jurisdiction. A challenge before the Supreme Court is to clarify whether U.S. courts under the Federal Rule of Civil Procedure (FRCP) 44.1 must give absolute deference to court filings from foreign sovereigns characterising their own law. On 14 June 2018, the U.S. Supreme Court in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.* reversed the Second Circuit’s 2016 decision to vacate a $147 million judgment against the Chinese defendants, who allegedly fixed vitamin C prices. It issued a unanimous opinion that federal courts should not accept as binding a foreign government’s representation. It clarified that the courts can exercise independent review of a foreign sovereign’s interpretation. The Court’s position is not only similar to that of the European Convention, but also applies to the jurisdiction. Nevertheless, there is no guidance for court to deal with the level of deference. To address this inquiry requires a deep contextual and theoretical response, the paper proceeds in four sections as follows.

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2 *In re Vitamin C Antitrust Litigation*, 2016 WL 5017312 (2nd Cir. 2016)
3 *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.* 138 S. Ct. 1865 (2018); The case is hereinafter referred to “Vitamin C”, given vitamin C is the subject matter of the case. The two titles are interchangeably used in the study.
Part I looks at the standard deference from both statutory and theoretical perspectives. Despite the split of the deference levels, this section examines a long-standing doctrine of international comity. Part II moves to the Vitamin C case, which presents an inquiry whether a federal court under FRCP 44.1 must treat as conclusive a submission from the Chinese Ministry of Commerce (MOFCOM). A focus is put on the most controversial standard of “Bound to Defer”, which advocates that international comity requires federal courts to abstain from asserting jurisdiction over the case. Overturning the ruling of the appellant court, the Supreme Court established a new deference standard of respectful consideration. Part III initiates an equitable analysis based on the MOFCOM’s filings and highlights that only accurate representation will strengthen the credibility of its defence. This section goes further to challenge the Second Circuit’s decision by referring to the theory of reasonableness test. Part IV seeks to address whether the newly-created “respectful consideration” standard could reshape the landscape of deference. Apart from its jurisprudential impact, the Supreme Court’s decision has also had spill-over effects on both China’s legislative reform and its multinational corporations’ behavioural change. Given many uncertainties considered, such as the asymmetric reciprocity, the ruling is far from being considered as a revolution but an evolution. A conclusion remark is given identifying some gaps for future research.

I. Deference in the Context of Statutory Ground and Comity Principles

Deference normally refers to a scenario that is used to deal with a variety of judicial approaches. At stake before a U.S. court is what the substance of foreign law is. The burden of proof was placed on the proponent of the foreign law to prove the content and meaning of that law. It remains to be addressed properly when a court is influenced by a foreign sovereign’s presentation. A recurring issue is the degree of deference that a court owes to a foreign government’s presentation of its own law.

A. Statutory Approaches: The Sherman Act

The Sherman Act and Clayton Act comprise the bedrock of American antitrust law, which broadly aims to protect free markets and eliminates conduct that restrains competition. Federal Rule of Civil Procedure (FRCP) 44.1 makes foreign legal issues questions of law. It provides courts with great leeway in determining applicable foreign law. FRCP, however, “does not address the weight a federal court should give to the views presented by a foreign government.” An ongoing debate is whether a federal court is required to treat as

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9 FRCP Rule 44.1 “Determining Foreign Law” states that determination of foreign law is treated as a question of law, not a finding of fact.
conclusive a submission from the foreign government describing its own law. The seminal Alcoa case first clarified that the Sherman Act only applied to foreign conduct that had actual and intended effects on U.S. commerce. In consistence, the enactment of Foreign Trade Antitrust Improvements Act (FTAIA 1982) enables the application of Sherman Act to foreign conduct with a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce. It is unclear whether the FTAIA’s “direct, substantial, and reasonably foreseeable effect” test amends the standard enunciated in Alcoa or merely codifies it. The Supreme Court explained in Hartford Fire that “the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.” However, the boundaries of antitrust law in this scenario are blurred. Neither the precedents nor the statutes definitively explain how a U.S. court hears a Sherman Act claim against a foreign defendant, while referring to the doctrine of comity. In Vitamin C, Chinese exporters were accused of violating the Sherman Antitrust Act. The question before the Court involves the standard of deference owed to the MOFCOM’s interpretation.

B. The Doctrine of International Comity: The Debate of “True Conflict”

Comity is a choice-of-law principle that concerns the extent “to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation.” Comity refers loosely to a set of doctrines which together “mediate the relationship between the U.S. legal system and those of other nations.” The doctrine is used to avoid unnecessary conflict with foreign jurisdictions. Principles of international comity indicate that courts should “carefully consider a foreign state’s views about the meaning of its own laws.” There is substantial room for shaping the doctrine to modern needs. International comity is grounded in respect for foreign sovereigns. As Breyer concurred in Kiobel that the role of comity lies in “lead[ing] each nation to respect the sovereign rights of other nations by limiting the reach of its own laws and their enforcement.” It was echoed in F. Hoffmann-La Roche Ltd that “…a harmony is particularly needed in today’s highly interdependent commercial world”. It is not a factor that should override judicial scrutiny, while courts should take into account principles of

11 Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co., No. 16-1220, slip op. at 6 (June 14, 2018)
12 United States v. Aluminum Co. of America, 148 F.2d 444 (2d Cir. 1945)
17 Hilton v. Guyot, 159 U.S. 113, 164 (1895)
22 Dodge, supra note 18
international comity. It is to ascertain a circumstance of “true conflict” in substance. The U.S. Supreme Court in Hartford Fire held whether international comity cautions against exercising jurisdiction relies primarily upon the degree of conflict between US and foreign law. It further refused to relinquish jurisdiction on comity grounds, explaining that a “true conflict” exists only where a defendant is incapable of complying with both U.S. and foreign law.

C. Split of the Level of Deference

There has been a split regarding the question of how much deference should be accorded to a foreign government. In Hartford Fire, the Supreme Court refused to consider dismissal on grounds of “international comity” unless the conduct prohibited by U.S. law was required by foreign law. Over one decade, the Supreme Court referred to “principles of prescriptive comity” to limit the extraterritorial reach of American antitrust law. It is of significance to avoid “unreasonable interference with the sovereign authority of other nations”. It remains unclear what “unreasonable interference” embraces and how to interpret it accurately. The Restatement (Fourth) of the Foreign Relations Law of the United States suggests it provide a supplementary principle of interpretation. Some commentators advocate the Chevron standard, which brings about uniform and efficiency. Under the Chevron standard, U.S. courts must defer to a foreign agency’s reasonable interpretation of an ambiguous statute. A party may refer to Chevron where it is valuable to consider the subject-matter expertise and a desire to avoid infringing on a legislative or regulatory scheme created by the decision maker. It is noteworthy that the principle in Chevron may not necessarily apply in a context where a foreign sovereign is involved. Vitamin C offers a window into how federal courts may navigate international comity issues in future cases.

II. Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd. (Vitamin C)

In a multi-district class action in 2005, some U.S. purchasers accused the Chinese manufacturers of engaging in a cartel to manipulate the supply and fix prices of vitamin C. The plaintiffs won in a district court and the judge disregarded the statements of the Chinese Ministry of Commerce (MOFCOM). The Second Circuit reversed, holding that the district court was “bound to defer” to the MOFCOM's interpretation when the latter “directly participates”

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31 Restatement (Fourth) of the Foreign Relations Law of the United States § 405
35 Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd. The title of the case and Vitamin C are interchangeably used throughout the paper; Sherman Act §1 and Clayton Act §§4 and 16.
in U.S. proceedings through a “sworn evidentiary proffer regarding the construction and the effect of its laws and regulations.” In a unanimous decision, the Supreme Court held that a federal court determining foreign law under FRCP 44.1 should accord “respectful consideration”, but a court “is not bound to accord conclusive effect” to MOFCOM’s statements. The Court provides lower courts a non-exclusive list of considerations when evaluating foreign sovereign’s explanation but no guidance on how to weigh them.

A. The “Bound to Defer” Standard

District Court for the Eastern District of New York alleged that the Chinese defendants had engaged in a conspiracy to breach the Sherman Act. After a jury trial, the court entered judgment, awarding the plaintiffs approximately US$147 million in damages. The Second Circuit focused upon whether the principles of international comity require a federal court to abstain from exercising jurisdiction over the litigation. In September 2016, the Second Circuit vacated the District Court’s judgment, stating that it was “bound to defer” to the MOFCOM’s interpretation. The Appellant Court found that the lower court erred in denying the motion and articulated a test that was highly deferential to the foreign interest. To support its finding, the Second Circuit referred to the case of United States v. Pink where a foreign government’s official interpretation of its own law was prioritised over all other sources. It is also similar to the landmark case of Daimler, which restricted the scope of general jurisdiction over a foreign defendant. Second Circuit found that the state compulsion had created a “true conflict” as defined by the Supreme Court in Hartford Fire, which has triggered an exemption to antitrust liability. As such, it would be impossible for Vitamin C manufacturers to simultaneously comply with Chinese law and U.S. antitrust laws. This decision is significant because it limits the extraterritorial reach of the Sherman Act, echoing other Supreme Court’s decisions that have narrowed the territorial scope of US law in other areas.

Arguably, Pink is a narrow decision that did not adopt a broad prospective rule of deference. The extent to which the ruling in Pink survived the adoption of Rule 44.1 remains a subject of debate. The binding deference rule is inconsistent with FRCP 44.1, which allows federal courts to consider “any relevant material or source” to determine what foreign law requires. It presents a key inquiry of extraterritoriality as one of requiring a comity balance. As Colangelo observed: “substantive absolute conflicts of law occur when two states’
The plaintiffs petitioned for certiorari, which the Supreme Court granted in January 2018.  

### B. Supreme Court’s Decision: A Standard of Respectful Consideration

After looking into whether “the spirit of international comity” mandates complete deference to a foreign state’s views, the Supreme Court has rejected any blind deference, which should be decided on a case-by-case basis. Justice Ruth Bader Ginsberg, writing for a unanimous Supreme Court, vacated the Second Circuit’s decision and relied on the principles of international comity, articulated in the *Aerospatiale* decision. In terms of context, as an example, the Supreme Court distinguished the Second Circuit’s opinion of *United States v. Pink*. It held that the decision was context-specific and did not create a blanket rule affording foreign government declarations conclusive effect, although Pink gave conclusive deference to a foreign government’s interpretation of its law. This approach is consistent with the *Antitrust Guidelines for International Enforcement and Cooperation 2017*, which provides that the weight accorded to the views of a foreign government depends on the circumstances of each case. The Supreme Court’s opinion is a validation of the approach under the Guidelines. It emphasised that district judges have discretion in applying FRCP Rule 44.1.

The Supreme Court’s decision clarifies that the Sherman Act can be used to address anticompetitive behaviours that were supposedly compelled by foreign law. *Vitamin C* makes it clear that federal courts have significant discretion in assigning weight to the selective materials. It was held that a “federal court should accord respectful consideration to a foreign government’s submission, but is not bound to accord conclusive effect to the foreign government’s statement.” The Court vacated the Second Circuit’s opinion and remanded for reevaluating its holding pursuant to its substantial-but-not-conclusive deference standard. Under the new respectful consideration standard, the Supreme Court’s opinion identifies five “[r]elevant considerations” to guide future analyses of a foreign government’s interpretation of its domestic law:

- (i) the statement’s “clarity, thoroughness and support”;
- (ii) the statement’s “context and purpose”;
- (iii) the “transparency of the foreign legal system”;
- (iv) the “role and authority of the entity or official offering the statements”; and
- (v) the statement’s consistency with the foreign government’s past positions.

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52 The *Antitrust Guidelines* was issued by the U.S. Department of Justice and Federal Trade Commission on 13 January 2017.
53 Antitrust Guidelines s4.1
56 *In re Vitamin C Antitrust Litigation*, 837 F.3d 175 (2d Cir. 2016), vacated, 138 S. Ct. 1865 (2018) at 1869
57 Dodge, supra note 18
The above criteria would similarly be considered “any relevant material or source” under FRCP Rule 44.1. Despite the lack of a bright line, there is *prima facie* potential for them to be conducive to predictable, and efficient decision-making.\(^{59}\)

This *Vitamin C* case marks the first time in history that the Chinese government has appeared before the U.S. Supreme Court.\(^{60}\) It raises delicate political, economic and legal issues about how U.S. courts should treat foreign companies that argue their conduct was mandated by a foreign government. It is notable that the Supreme Court, for the first time, articulated a test that district courts must use in the application of Rule 44.1 to deal with choice of foreign law. Despite the qualitative analysis of the extent to which a federal court should defer to a foreign sovereign’s interpretation, the Supreme Court has not clarified what exactly international comity abstention entails.\(^{61}\) It opened the door for US courts to consider a long list of non-exhaustive relevant considerations. The appropriate weight in each case will depend on the circumstances,\(^{62}\) of which each case may dictate how a court will weigh a foreign sovereign’s interpretation of its own law.\(^{63}\)

### III. Equitable Analysis

Given substantial state intervention in the unlevelled playing field, a one-sided emphasis on comity principles may not efficiently address the global uncompetitive behaviours. A foreign sovereign could abuse a position of absolute deference, leaving plaintiffs unable to secure relief in U.S. courts. A conclusive-deference approach would encourage foreign sovereigns to manipulate outcomes by filing legal briefs that support local interests. The Supreme Court’s ruling in *Vitamin C* defines the role foreign governments can play in U.S. litigation and guide courts on how to deal with foreign governments that attempt to shield their companies from U.S. litigation.\(^{64}\) As such, a court need to consider the countervailing interests and policies.\(^{65}\)

#### A. Neutrality, Accuracy and Consistence

A foreign sovereign would unlikely be impartial and likely make false or inconsistent representations to federal courts. One of the possible risks is that it may not be neutral, which results from a strong incentive to shield its domestic entities from antitrust liability when accused of violating U.S. antitrust law.\(^{66}\) In *Vitamin C*, MOFCOM may have been motivated to shield domestic industries from treble damages.\(^{67}\) As Sweeney observed, the gains from the uncompetitive behaviour would accrue to their home state, while the victims are foreign.

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\(^{60}\) *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 189 (2d Cir. 2016) at 180

\(^{61}\) Gardner supra note 25


\(^{65}\) Angela Zhang, ‘Strategic Comity’ (2019) 44 (2) Yale Journal of International Law 281, 314


purchasers.\textsuperscript{68} This is reflected in the Chinese government’s allegedly inconsistent position regarding its regulation of vitamin C exports in front of the World Trade Organisation (WTO).\textsuperscript{69} China’s submission directly contradicted previous statements it had made about its competition law to the WTO.\textsuperscript{70} It is inferred that MOFCOM’s position was a post-hoc attempt to shield the Chinese defendants’ conduct from antitrust scrutiny.\textsuperscript{71} Being inconsistent and self-serving, MOFCOM’s statement is due limited deference.\textsuperscript{72} The lack of consistency with earlier positions is not dispositive, however, it can compromise the reliability of the litigants’ position. As Godi said: “In fact, when a foreign government wishes to intervene as a third party to a dispute, its objective is rather clear: self-interest.”\textsuperscript{73} Opening the door to this kind of manipulation of American lawsuits would be self-evidently unwise.\textsuperscript{74} The Court should assess the extent to which the foreign sovereign’s litigation position is consistent with the positions it has taken in earlier briefs.\textsuperscript{75}

B. The Test of Reasonableness

A federal court should defer to reasonable positions taken by a foreign sovereign in private cases.\textsuperscript{76} Although the Second Circuit articulated that a foreign government’s interpretation of its own law must be “reasonable under the circumstances,”\textsuperscript{77} it did not elucidate what to do if the testimony was not reasonable. Neither is clear as to whether courts have any leeway on evaluating reasonableness.\textsuperscript{78} It is unreasonable in all cases to abstain on comity grounds from asserting jurisdiction at the motion to dismiss stage. To determine whether a court should abstain from asserting jurisdiction, a “comity balancing test” is normally applied, which was established in Timberlane.\textsuperscript{79} The balancing approach was reflected in the Restatement (Third) of Foreign Relations Law,\textsuperscript{80} which likely sparks complex foreign discovery.\textsuperscript{81} Apparently, open-ended abstention may supplant the narrower act of state doctrine and foreign-state compulsion defence.\textsuperscript{82} The Second Circuit’s conclusive deference standard is inconsistent

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\bibitem{69} Wang, supra note 44
\bibitem{71} Marek Martyniszyn, ‘Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law’ (2012) 15 (1) Journal of International Economic Law 181, 222
\bibitem{73} Matteo Godi, ‘A Historical Perspective on Filings by Foreign Sovereigns at the U.S. Supreme Court: Amici or Inimici Curiae?’ (2017) 42 (2) The Yale Journal of International Law 409, 443
\bibitem{74} Michael Kimberly and Matthew Waring, ‘A Proposed Approach for High Court in Vitamin C Case’ Law360 (18 May 2018)
\bibitem{75} Fahrenthold, supra note 67
\bibitem{79} Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 614-15 (9th Cir. 1976)
\bibitem{80} The Restatement (Third) of Foreign Relations Law s403; Timberlane Lumber Company v Bank of America 549 F.2d 597 (1976)
\bibitem{81} Gardner supra note 25
\end{thebibliography}
with analogous standards for treating submissions from U.S. states in construing state laws.\textsuperscript{83} Even within the US, such category of conduct cannot be shielded under, that is, a state may not order private price fixing and declare the conduct immune from the federal antitrust laws.\textsuperscript{84}

(1). Public Actors \textit{vis-à-vis} Private Actors

The act of state doctrine refers to a defence designed to avoid judicial inquiry into state officials’ conduct as opposed to private actors.\textsuperscript{85} The long-standing doctrine precludes courts from ruling on the validity of the public acts of a foreign sovereign within its own territory.\textsuperscript{86} In \textit{Vitamin C}, the privately-set price does not qualify as state action, and thus the doctrines of act of state should not bar plaintiffs’ suit. It may not meet the test of reasonableness, neither is the decision equitable. Otherwise, the effect would be to substantially impair antitrust enforcement and impose significant costs on U.S. consumers.\textsuperscript{87} In the case of a foreign government ordering its firms to fix prices, the victims are at the will of the foreigners’ power and have no recourse.\textsuperscript{88} In order to apply the foreign-state compulsion defence, the Restatement (Fourth) 2018 clarifies that, the sanctions for failing to comply with the foreign law must be severe, and the person in question must have “acted in good faith to avoid the conflict.”\textsuperscript{89} The threshold is unlikely to be met given the intertwining of public and private actions in China. In terms of the private actors’ price fixing, the defendants in \textit{Vitamin C} had strong incentive to maximise their profits at the expense of U.S. consumers, who have even benefited from the mandate.\textsuperscript{90} This happens when Chinese multinational companies (MNCs) operating in a hybrid state capitalism pursue conduct in violation of the U.S. antitrust laws.\textsuperscript{91} Such a scenario takes place more often in some key industries where the Chinese government controls firmly. It is rare in China for the government to use plausibly state-sanctioned coordination.\textsuperscript{92}

From the view of the Second Circuit, foreign sovereign briefs are likely a superior source on foreign law than the Court undertaking its own analysis.\textsuperscript{93} The overwhelming limitations on the court’s jurisdiction may create a substantial loophole in dealing with foreign deference.\textsuperscript{94}

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83 Michael Scarborough, Dylan Ballard, et al., ‘Between a Rock and a Hard Place: \textit{Vitamin C} and the Future of U.S. Antitrust Enforcement against Chinese Companies’ \textit{The Inhouse Lawyer} (Summer 2019)
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89 Restatement (Fourth) of the Foreign Relations Law of the United States 2018 §442
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90 Qingxiu Bu, ‘Neither Rock nor Hard Place? The Foreign Sovereign Compulsion Defence in Antitrust Litigation’ (2015) 6 (2) Journal of International Dispute Settlement 427 453
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93 Allison Orr Larsen, ‘Confronting Supreme Court Fact Finding’ (2012) 98 (6) Virginia Law Review 1255, 1312
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With the defendants’ conduct immunised, those Chinese firms’ interests have been outweighed over their U.S. counterparts. Requiring absolute deference would virtually allow MOFCOM to shield the Chinese defendants beyond the reach of US antitrust law. In this vein, a conclusive deference standard makes it easier for defendants to prove foreign sovereign compulsion. It would be difficult for the U.S. plaintiffs to gain remedies if a federal court stuck to a “bound to deference” approach.

(2). Foreign Entities vis-à-vis Domestic Entities

Comity does not mean a negative doctrine of forbearance, but sometimes refers to positive approaches. A foreign entity is generally entitled to sue and to be sued in the U.S. courts upon the same basis as a domestic one might do. To deny a person this privilege would manifest the spirit of the doctrine of international comity. As Justice Ginsburg observed: “an overly strict presumption against extraterritoriality “might spark, rather than quell, international strife,” for “[m]aking such litigation available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests.”

It requires a federal court to consider whether and when their own domestic law should give way to the legislative interests of a foreign sovereign. The Supreme Court’s new standard provides a judge with sufficient discretion to decide whether the element of foreign relations should be heightened. It remains to be seen whether the Supreme Court’s ruling could open the floodgate to U.S. antitrust litigation against Chinese defendants. Even though the ultimate resolution of the Vitamin C case still takes time, a new legal landscape seems to come in shape.

IV. Reshaping the Landscape of Deference Practice?

U.S. courts should show appropriate respect to foreign governments, but how much deference will depend on the circumstances. A foreign sovereign’s interpretation of its laws

95 Zang, supra note 65
100 Gardner supra note 25
102 Childress, supra note 63
is not automatically entitled to conclusive deference, but still carry significant weight.\textsuperscript{104} The Supreme Court’s ruling does not provide an absolute rule of judicial obligation, but immense discretion for a federal court to determine foreign law.\textsuperscript{105} Due to the ill-defined concept of respectful consideration, it remains uncertain as to how the newly-established standard will be applied. Adoption of the less deferential approach would create greater uncertainty as to whether the views expressed by a foreign government will be accepted by U.S. courts.\textsuperscript{106} Furthermore, in discerning the meaning and credibility of a foreign law, the transparency of the foreign legal system is one relevant consideration in evaluating the foreign sovereign’s interpretation.\textsuperscript{107} This inevitably creates a \textit{de facto} hierarchy between foreign legal regimes.\textsuperscript{108} The Supreme Court’s ruling could heighten the current tensions, which could also facilitate more sophisticated laws to mitigate future litigation risks.\textsuperscript{109}

\textbf{A. Potential Reciprocal Concern in the Context of Trade War}

It is reciprocity that makes comity work. As Weinberg said: “if comity is reciprocal, both states are better off than they would have been if each simply applied its own law.”\textsuperscript{110} The U.S. Supreme Court is less vulnerable to the politics of foreign relations than the other U.S. government branches.\textsuperscript{111} Its decision in \textit{Vitamin C} is a reassertion of U.S. judicial sovereignty to affirm that a federal court reserves the right to disregard foreign regimes’ characterisation of their law as it sees fit.\textsuperscript{112} The ruling itself raised considerable controversy in declining to defer to MOFCOM’s interpretation. The decision may have implications of reciprocity for the U.S. when appearing before a foreign court. It may impact international litigation as well as U.S. foreign relations for many years to come.\textsuperscript{113} In addition, the Supreme Court leaves open an inquiry of whether foreign courts’ interpretation of their nations’ laws will be differentiated from those interpreted by their governmental agencies.

(1). A Variable of Foreign Relations

The \textit{Vitamin C} ruling has broader ramifications, since the Supreme Court provided less than full deference to China’s interpretation of its own laws. The application of the standard of

\textsuperscript{104} Symeon C Symeonides, ‘Choice of Law in the American Courts in 2018: Thirty-Second Annual Survey’ (2019) 67 (1) The American Journal of Comparative Law 1, 97
\textsuperscript{107} Zimmerman, supra note 94
\textsuperscript{109} Dodge, supra note 18
\textsuperscript{111} Gary Born, ‘Customary International Law in United States Courts’ (2017) 92 Washington Law Review 1641, 1720
respectful consideration may be detrimental to the US’ foreign relations,¹¹⁴ which could have serious consequences.¹¹⁵ Foreign law could compel the very conduct that U.S. law prohibits, and judicial interference may infringe on the executive function to handle international relations.¹¹⁶ Inevitably, there is an impact on foreign diplomacy and trade relations.¹¹⁷ As Eichensehr observed:

“It would be a mistake for the Court to view the brief as a representation that disagreement with the foreign sovereign’s view of international law would provoke serious foreign policy consequences for the United States.”¹¹⁸

This landmark case of *Vitamin C* arises during a period of uncertainty and instability in Sino-U.S. relations. The Supreme Court’s decision is sensitive amid the current climate, which could escalate trade tension.¹¹⁹ Given the current ongoing *tit-for-tat* trade disputes, the possibility exists that the court judgment can serve as a trigger.¹²⁰

According to a decision in *EEOC*, U.S. courts should tread carefully in a transnational context to “protect against unintended clashes between our laws and those of other nations which could result in international discord.”¹²¹ Justice Kennedy in *Jesner* stressed judicial restraint in the treatment of foreign corporations in order to encourage similar treatment of U.S. corporations abroad.¹²² Posner and Sunstein even proposed that courts should defer to the executive in dealing comity because “the executive branch is in a better position to understand the benefits of foreign reciprocation or the likelihood and costs of retaliation than the judiciary.”¹²³ The Supreme Court once held that it is “[T]he political branches, not the Judiciary, that have the responsibility and institutional capacity to weigh foreign-policy concerns.”¹²⁴ The *Vitamin C* decision on the reach of a U.S. law may have repercussions for the treatment that U.S. companies receive abroad.¹²⁵ However, a foreign sovereign’s interest should never outweigh the general national interest of a home state in the conduct of foreign relations.¹²⁶

(2). Reciprocal Asymmetry of Deference

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¹¹⁵ Godi, supra note 73
¹¹⁹ Scarboroug and Ballard, supra note 83
¹²³ Posner and Sunstein, supra note 76
¹²⁵ Martyniszyn, supra note 64
¹²⁶ Gardner supra note 25
It is vital to ensure that federal courts can independently interpret China’s relevant regulatory regime and take other factors into consideration in determining whether to credit such defences. Sitaraman and Wuerth argued that the Supreme Court has moved away from foreign affairs exceptionalism steadily.\(^\text{127}\) It held that “United States, historically, has not argued that foreign courts are bound to accept its characterisations or precluded from considering other relevant sources” when interpreting U.S. law.\(^\text{128}\) Foreign courts do not normally regard a foreign government’s characterisation of its own law as legally binding. The Court does not agree that a principle of reciprocity has ever been applicable with the federal judicial system.\(^\text{129}\) They are likely to give little deference to U.S. authorities’ interpretation of U.S. laws and regulations when U.S. companies are subject to investigations and litigation abroad.\(^\text{130}\) Second Circuit’s binding deference standard would give interpretation of a foreign sovereign greater weight in the US court than the US’s submission receives in foreign courts.\(^\text{131}\)

As Frankel commented:

“adopter the Second Circuit’s binding dereference to foreign sovereigns would expose US courts to unscrupulous foreign governments angling to protect state-controlled defendants... A binding deference would also strip U.S. judges of the discretion they’re entitled to under federal evidentiary rules.”\(^\text{132}\)

An overly deferential standard unreasonably limits a court’s discretion, and the rule of binding deference would unduly tie the hands of US courts in deciding questions of foreign law.\(^\text{133}\) Federal courts should give due weight to a foreign sovereign’s interpretations of its laws.\(^\text{134}\)

(3). Judicial Deference vs. Governmental Deference

There are differences in the extent to which a US court should give weight to a government agency and a U.S. state’s highest court while interpreting its law.\(^\text{135}\) The Supreme Court noted that federal courts are bound by the rulings on state law made by a state’s highest court but not by the statements of state government officials.\(^\text{136}\) It is unclear whether this suggests that greater deference should be given to rulings by foreign courts as opposed to statements made


\(^{129}\) Dodge, supra note 18


\(^{131}\) Sienho Yee, ‘Binding Deference to a Foreign Government’s Authoritative Interpretation or Characterization of its Laws: Brief for China Chamber of International Commerce as Amicus in Support of Respondents in Animal Science Products in the US Supreme Court’ (2018) 17 (4) Chinese Journal of International Law 1003, 1015

\(^{132}\) Alison Frankel, ‘Trump DoJ Facing Showdown with China in U.S. Supreme Court Case’ Reuters (8 March 2018)


by foreign government agencies. Given their competence in policy-making and implementation, government agencies may be in a good position to understand what a law or regulation is intended to achieve. In certain circumstances, they exercise delegated legislative power as well, and seem to be more politically accountable than courts. Some commentators challenge whether MOFCOM has authority to interpret the relevant statutes, given it is clear in Chinese that ministries may not be the final arbiters of the validity of their own rules. This implies that federal courts would defer to a statement of foreign law by the highest court of the foreign jurisdiction as binding unless the highest court’s interpretation was in conflict with a foreign government’s statements. This reasoning was echoed by practitioners that:

“In circumstances where foreign companies are compelled by governmental agencies to act in ways that expose them to U.S. liability, these companies might be better served by obtaining court orders outlining their obligations under foreign law rather than relying on statements from government officials.”

In *FedEx vs. Department of Commerce*, the plaintiff has adopted such a strategy, which aimed to prove that had been put in a proverbial situation of between a rock and a hard place. It remains to be seen whether the Chinese government will be convinced that FedEx’s behaviour is not out of its own initiative, but compelled by the American government.

**B. New Uncertainties**

A federal court exercises the jurisdiction granted by Congress. As to Justice Ginsburg in *Sprint Communications*: “federal courts are obliged to decide cases within the scope of federal jurisdiction.” However, irrefutable presumptions are often viewed sceptically in U.S. jurisprudence. The U.S.’ global antitrust jurisprudence has been moving away from absolute presumptions toward permitting lower courts to consider all relevant facts. A sovereign approval could serve as a factor for consideration, which however does not bar jurisdiction of a U.S. court. U.S. courts should look at a variety of factors to determine whether the foreign government’s position can serve as a shield to antitrust liability.

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140 Donald Clarke and Nicholas Howson, ‘Brief of Amici Curiae in Support of Petitioners’ (5 March 2018)

141 Scarborough and Ballard, supra note 83

142 ‘U.S. Supreme Court, supra note 137

143 *FedEx Corp. v. Department of Commerce et al.*, case number 1:19-cv-01840, (U.S. District Court for the District of Columbia. 06/24/2019)

144 *Sprint Communications, Inc. v. Jacobs* 571 U.S. 69 (2013) at 72


146 Eric Mahr, ‘China’s Firms Could End Up Trapped between U.S. Law’ *Caixin* (5 April 2018)

147 Daniel Lim, ‘State Interest as the Main Impetus for U.S. Antitrust Extraterritorial Jurisdiction: Restraint Through Prescriptive Comity’ (2017) 31 (3) Emory International Law Review 415, 448

(1). The Creation of New Standard of “Respectful Consideration”

Foreign sovereign’s interpretation has every relevance to a defence against antitrust liability.149 It remains unclear as to the extent to which a federal court may accord “respectful consideration” to the statements. The Supreme Court addressed a split between the courts of appeals and reversed an opinion of the Second Circuit that had given conclusive effect to MOFCOM’s statement.150 A federal court should accord “respectful consideration,” but not necessarily accord conclusive effect to a foreign government’s, views.151 The approach gives a foreign sovereign’s opinion nothing more than “respectful consideration,” which requires the U.S. courts to constantly second guess the opinions of foreign sovereigns.152 The “specific-case-test” approach accords with “international practice” as evidenced by the European Convention on Information on Foreign Law and the Inter-American Convention on Proof of and Information on Foreign Law.153 With deference inquiries designed more pertinently, it would accord more sensible respect to foreign regimes and their legal systems.154 How much weight a court should accord a foreign government’s representations is a context-dependent inquiry.155 Judges have the leeway to consider several factors in determining how much weight to accord a foreign government’s statements on a case-by-case basis.

(2). Cement Trial Judges’ Role and Gives Substantial Discretion

Courts review relevant sources beyond the statements of foreign governments in considering questions of foreign law. As to a Brief from the Department of Justice (DoJ):

“The ultimate responsibility for determining the governing law lies with the court, which is neither bound to adopt the foreign government’s characterisation nor barred from considering other materials that support a different interpretation,”156 The respectful consideration standard leaves ample room for subjectivity.157 The courts are vested with substantial discretion when determining what weight to accord to a foreign government’s submissions.158 As Dodge observed: “the resulting flexibility and discretion hold considerable appeal for lower courts, as it can give them room to manoeuvre in particular circumstances.”159 The ruling cements the trial judge as the pivotal actor in determining how to weigh a foreign government’s submissions.160 This leads federal courts to assume a more

149 Schmidt, supra note 99
150 Eichensehr, supra note 78
151 Clarke, supra note 108
152 Godi, supra note 73
153 European Convention on Information on Foreign Law, opened for signature 7 June 1968, ETS No. 062
154 Colangelo, supra note 47
158 Eichensehr, supra note 118
159 Dodge, supra note 18
160 Sean M. Tepe, ‘Supreme Court Cautions Courts on Deference to Foreign Governments’ BloombergLaw (20 July 2018)
active role in determining the meaning of foreign law. It reemphasises on a court’s presumptive jurisdictional obligation.\(^{161}\) However, it is a substantial challenge to apply the new respectful consideration standard, since the Supreme Court in *Vitamin C* provides little guidance upon what evidence shall be considered as adequate.\(^{162}\) Such intangible subtleties are often embodied within an interwoven social, cultural and political subtext.\(^{163}\) The Supreme Court’s decision is likely to facilitate the use of foreign law specialist, so as to discern characterisation of the foreign government’s position. The diverse way in which different court evaluate these variables will inevitably belie the degree of cohesion.\(^{164}\) These include how to secure adequate information about foreign laws and how to interpret them proficiently.\(^{165}\)

(3). A Concomitant Hierarchal Issue from the Consideration of Transparency

The transparency of the foreign legal system is one of the variables in evaluating the substance of foreign law.\(^{166}\) The Supreme Court lists “transparency of the foreign legal system” as a factor,\(^{167}\) but provides no indication as to whether the weight accorded to a foreign sovereign varies dependant upon the degree of transparency of its regime.\(^{168}\) A subsequent inquiry arises as to whether more transparency of a foreign legal system would entail more deference to the foreign sovereign’s representations.\(^{169}\) Due to the lack of clarity surrounding how to apply the transparency factor, a new challenge is whether a federal court should treat different countries differently based on the nature of their legal systems.\(^{170}\) It likely leads to inconsistent results due to the lack of indication of its relative weight compared with other criteria.\(^{171}\) Examining the level of transparency in a country’s regulatory regime potentially creates a hierarchy based on the ease of interpretation of foreign legal regimes.\(^{172}\) This inevitably results in a concomitant hierarchy in the deference offered to a foreign government statement, which further disturbs principles of international comity.\(^{173}\)

\(^{161}\) Gardner supra note 25  
\(^{162}\) Fahrenthold, supra note 67  
\(^{164}\) Wang, supra note 44  
\(^{166}\) Jeffrey Lubbers, ‘Skidmore, Not Auer, Deference for Foreign Governments’ Views of Their Own Law’ *Yale Journal on Regulation Blog* (15 June 2018)  
\(^{168}\) Clarke, supra note 108  
\(^{172}\) Saperstein and Kornfield, supra note 170  
The hierarchy may systematically advantage the effect given to Western legal rules merely because they are more familiar to American courts.\(^{174}\) The limb of the Supreme Court decision is intended to address the concerns by those unallied countries. European Commission interventions might be procedurally subject to the same test, while it will not substantially change the status quo in this scenario. In practice, the U.S. courts would be more respectful of Commission submissions on EU law vis-à-vis Chinese law. As discussed above, the degree of the respectful deference is based on the deep-rooted recognition of rule of law and judicial independence of the U.S.’ counterparts. As a landmark case to deal international deference, it will inevitably influence EU courts when they deal with comity issues, despite the divergency between the civil and common law systems. The common law rules and equitably principles enshrined in this case would play a complementary role in EU’s judicial practice, which may be imperceptible though. In certain circumstances, a mismatch resulting from different social, political and cultural settings constitutes a substantial challenge of evaluating factors relating to foreign judicial systems.\(^{175}\) As Gardner observed that: “It leaves a court trying to evaluate factors that do not fit the problem under process resulting in more of a Rorschach test than an analytical guide.”\(^{176}\) Admittedly, this is a normal ecology of jurisprudence given that Congress is unlikely to draw clear jurisdictional lines ex ante.\(^{177}\) There is potential risk that U.S. courts will reach inconsistent and even contradictory decisions resulting from their broad exercise of discretion.\(^{178}\)

C. Catalyse China’s Legal Reform and Transform Chinese MNCs’ Behavioural Changes

Vitamin C has important repercussions for any transnational business undertaken across jurisdictions.\(^{179}\) The Supreme Court’s fact-specific analysis for determining the weight to accord a foreign sovereign’s interpretation of its own laws underscores the uncertainty Chinese MNCs face when doing business in the U.S.\(^{180}\) This holds particularly true in the Chinese context where division between public and private sectors are often blurred.

(1). Improvement of China’s Law

Private litigation can catalyse and reversely transform the legislative change although it is unlikely to resolve macroeconomic disputes.\(^{181}\) Some of Chinese old legislations have even legalised anti-competitive conduct, which was in direct conflict with U.S. antitrust principles at issue in the Vitamin C case.\(^{182}\) Similar cases may be less likely to arise going forward because

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174 Saperstein and Kornfield, supra note 170
175 Rasmussen, supra note 134
176 Gardner supra note 25
178 Wang, supra note 44
181 Andrew Rhys Davies, ‘Vitamin C Case to Determine How Much Deference Foreign Governments Are Due in U.S. Court’ (The United States Law Week, 86 U.S.L.W. 1497, 26 April 2018)
182 Fox, supra note 21
the development of China’s antitrust regime and its continued emphasis on market-oriented reforms have reduced state-compelled price fixing. It is noteworthy that antimonopoly law (AML 2008) regulates not only private actors but also government agencies when they get involved in the price fixing. This means that executive branches could constitute an abuse of administrative monopoly. Institutionally, antitrust agencies have been consolidated under the State Administration for Market Regulation (SAMR). In the wake of the Vitamin C ruling, Anti-Monopoly Bureau is committed to advise Chinese MNCs on compliance with foreign laws. Accordingly, a proverbial rock and a hard place situation will be on decline, which makes it impossible for an entity to comply both conflicting sets of laws. Given the limited deference accorded to the MOFCOM, Chinese government agencies may thus be incentivised to avoid any potential inconsistency and even conflicts through ex ante coordination. Given the development of antitrust laws in China, U.S. courts are less likely to encounter similar issues with Chinese MNCs in the future. Although significant differences between AML 2008 and the antitrust laws of the US persist, a true conflict between the Sherman Act and Chinese law is far less likely now than two decades ago.

(2). Impact on Chinese Multinational Companies (MNCs)' Behavioural Change

The weight the U.S. court should give MOFCOM’s views is pivotal to determining whether the vitamin C manufacturers can escape liability for their anticompetitive conduct. The case has set the ground rules for a broad range of cross-border disputes. The implications of the Supreme Court’s decision reach well beyond the confines of antitrust doctrine. The ruling will have far-reaching implications on many other cross-border disputes, since similar issues of foreign deference in Vitamin C always arise in a wide context. Vitamin C sheds light on the

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183 Antimonopoly Law of China (AML 2008) was passed by the National People's Congress on 30 August 2007 and implemented as of 1 August 2008.
185 AML 2008 Art.13: “Price-fixing is a monopolistic activity”; AML 2008 Art. 36: “Agencies and government bodies in China “shall not abuse their administrative powers to compel undertakings to engage in monopolistic activities that are prohibited under this Law.”
187 In 2018 the antitrust enforcement functions of the three former antitrust agencies, i.e. the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC)) were consolidated into the newly-established State Administration for Market Regulation (SAMR)
188 Wendy Ng, The Political Economy of Competition Law in China (Cambridge, Cambridge University Press, 2018) 136-198
191 Zimmerman, supra note 94
Supreme Court’s stance on the application of the doctrine of international comity. Such presumption of jurisdictional obligation applies squarely to other kinds of transnational litigation as well. It does not necessarily mean that the adoption of respectful consideration would increase the exposure of Chinese firms to U.S. liability. The decision is likely to have an enormous impact on the way Chinese MNCs make business decisions on their access to the U.S. markets.

Instead of simply relying upon the Chinese government’s submission to avoid US antitrust liability, the MNCs will have to ensure that the interpretation take positions which can survive greater judicial scrutiny. They must conduct an adequate inquiry, and substantiate their position with convincing evidence when appearing in the U.S. court. In this regard, Vitamin C creates additional uncertainty for Chinese MNCs potentially facing conflicting demands from both the Chinese and U.S. authorities. The MNCs with cross-border transactions will need to navigate increasingly complicated legal regimes. To mitigate litigation risks, they are supposed to ensure that their behaviour can be justified properly when involved in antitrust enforcement in the U.S. court. Chinese MNCs engaged in trade with the U.S. must enhance capacity building with a regard to their compliance programmes. After all, conduct that is unlawful in the U.S. but permissible in China still exists in other areas of law, although the Supreme Court did not address specific differences between the Chinese and U.S. legal systems in its decision.

Conclusion

It is the first time that the U.S. Supreme Court in Vitamin C addressed the level of deference. The clarification that international comity does not require a court to give binding deference to a foreign sovereign’s interpretations of its own laws has far-reaching and significant consequences. The Supreme Court certified only a narrow question, and offered several criteria the courts should consider, which list is non-exhaustive. The standard of respectful consideration leaves open the possibility that federal courts may reach decisions that completely or partially reject positions of foreign governments on inconsistent grounds. The ruling is focused more on qualitative analysis, there is no much difference in procedures though. Such a multipronged balancing approach casts more uncertainty for litigation parties. Although it addresses the long-standing split in the deference level, this ruling will not change the federal court’s practice dramatically. In this vein, the ruling does not constitute a significant departure from the current approaches by the federal court. It is not something of revolution, but a milestone of the evolution of the deference standard.

196 Wilson, supra note 97
197 Fahrenthold, supra note 67
198 Igor Timofeyev, Joseph Profaizer, et al., “‘Respectful Consideration’: U.S. Supreme Court Clarifies Deference Due to a Foreign State’s Interpretation of Its Law” Paul Hastings Insights (27 June 2018)
199 Restatement (Third) of Foreign Relations Law (1987) §§ 441, 442
200 Wang, supra note 44
201 Hearing before the United States-China Economic and Security Review Commission, supra note 192
202 Murray, supra note 194