# NOTES

## RESPECTFUL CONSIDERATION: FOREIGN SOVEREIGN AMICI IN U.S. COURTS

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*In June 2018, the Supreme Court decided* Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. *and resolved a circuit split regarding the amount of deference courts must give to amicus briefs filed by foreign sovereign governments. The Court articulated a new standard of deference, "respectful consideration," but did not take the opportunity to give weight or meaning to it. This Note argues that more must be done to develop the respectful consideration standard. Foreign governments unequivocally demonstrate their interest in a case when they file an amicus brief with a U.S. court. If a court comes to a determination contrary to foreign interests, this can have foreign policy effects that spread far beyond the litigation at hand. Even so, courts must decide the cases before them and resist misrepresentations or undue influence from foreign governments. A more structured respectful consideration standard would serve as a transparent and reliable method to bring together the competing interests that arise when foreign sovereigns participate in U.S. proceedings.*

### INTRODUCTION

On February 3, 1999, the U.S. National Marine Fisheries Service received an anonymous fax message that the *M/V Caribbean Clipper* would soon arrive in Alabama laden with the tails of Caribbean spiny lobsters.[1] These lobsters, according to the fax, had been exported from Honduras in violation of Honduran law.[2] Acting on this message, the Fisheries Service seized the shipment, and the operators of the *Caribbean Clipper* were eventually convicted of smuggling, money laundering, and violations of the Lacey Act,[3] which prohibits the import of "fish or wildlife taken, possessed, transported, or sold in violation of" any foreign law.[4]

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1. United States v. McNab, 331 F.3d 1228, 1232 (11th Cir. 2003).
2. Id.
3. Id. at 1233–35 & n.10.
4. 16 U.S.C. § 3372(a)(2)(A) (2012).

They were sentenced to up to eight years in prison.[5] Several agencies of the Honduran government participated closely in the prosecution, repeatedly reaffirming that the defendants' actions were unlawful under the three Honduran laws that predicated the Lacey Act offense.[6] The highest-ranking legal officer in the Honduran agricultural ministry appeared in the U.S. district court to personally confirm that the Honduran laws were valid.[7]

As it turned out, however, the laws were not valid. One of the relevant laws had been declared void ab initio by the Honduran courts before the defendants were even convicted, another was repealed years before the incident, and the last was officially interpreted to exclude the defendants' conduct with retroactive effect.[8] On appeal, the defendants in *United States v. McNab* raised all of these points,[9] as did the Honduran government itself—this time participating officially through its foreign ministry—in an amicus curiae brief it submitted.[10] The Honduran government pointed out that none of the various Honduran officials who testified before the district court were permitted to authoritatively interpret Honduran law.[11] Even so, the Eleventh Circuit concluded in the name of "consistency and reliability" that the Honduran government's invalidation of the laws was "not determinative" and upheld the convictions.[12] The court of appeals let the convictions stand based on invalid foreign laws when, had it been U.S. laws that were invalidated, "the case would easily [have been] resolved in the defendants' favor."[13] Indeed, as the Honduran government made clear, the defendants' conduct would "not properly be deemed even an administrative violation, much less a crime, in Honduras."[14]

*McNab* illustrates the complexity courts face when interpreting foreign law. A court might need to consider a variety of materials, from foreign statutes to judicial decisions to constitutional provisions: a

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5. *McNab*, 331 F.3d at 1235.

6. See id. at 1232–35.

7. Id. at 1234.

8. See Brief for the Republic of Honduras Through its Embassy as Amicus Curiae in Support of Petitioner at 5, 7–11, McNab v. United States, 540 U.S. 1177 (2004) (No. 03-622), 2003 WL 23119192 [hereinafter Honduras *McNab* Brief].

9. See *McNab*, 331 F.3d at 1239–40.

10. See Brief Amicus Curiae of the Embassy of Honduras and the Asociacion de Pescadores del Caribe in Support of Defendant-Appellant David Henson McNab at 12–28, *McNab*, 331 F.3d 1228 (No. 02-11264-JJ), 2002 WL 32919784.

11. Id. at 16–19, 22.

12. *McNab*, 331 F.3d at 1242, 1247. The Eleventh Circuit insisted that deferring to a foreign government's interpretation of its own laws would so undermine the statute that there would "cease to be *any reason* to enforce the Lacey Act." Id. at 1242 (emphasis added).

13. Id. at 1248 (Fay, J., dissenting).

14. Honduras *McNab* Brief, supra note 8, at 20.

daunting task for a judge faced with the law of a foreign jurisdiction for the first time.[15] *McNab* also demonstrates the risks at stake if an interpretation is mistaken. The involvement of a foreign sovereign can further complicate this difficult process. Until recently, courts had no definitive guidance from Congress or the Supreme Court as to what level of deference they should give to foreign sovereigns' representations. At least in theory, a foreign government is the best expert in its own law—it created the law and applies it every day. On the other hand, a foreign sovereign will likely come into the court with a bias in favor of a particular party[16] and can make false or inconsistent representations to U.S. courts without expecting much impact back home.[17] These conflicting concerns had led courts to diverge in what deference they gave to foreign sovereigns.

In June 2018, in the midst of this confusion, the Supreme Court decided *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*[18] Originating in the Eastern District of New York, *Animal Science Products* was a class action antitrust case brought against Chinese vitamin manufacturers that together controlled nearly seventy percent of worldwide vitamin C production.[19] The defendants mounted a foreign sovereign compulsion defense, arguing that their price coordination was mandated by Chinese law and therefore excused from antitrust liability.[20] In a first for the Chinese government, the Chinese Ministry of Commerce filed an amicus brief with the district court in support of the defendants.[21] The district and circuit courts disagreed on the amount of deference due to

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15. Justice Holmes, interpreting the Puerto Rican Civil Code in *Diaz v. Gonzalez*, described the difficulty of interpreting and applying foreign law thus:

> When we contemplate such a [foreign legal] system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have gotten from the books.

Diaz v. Gonzalez, 261 U.S. 102, 106 (1923).

16. See Kristen E. Eichensehr, Foreign Sovereigns as Friends of the Court, 102 Va. L. Rev. 289, 362–63 (2016) ("All amici who file before the Court self-select, and those who file tend to have the biggest stake in the case or the legal rules on which the case turns.").

17. But see id. at 357 (arguing that foreign sovereigns are often "repeat litigants" with credibility to maintain before U.S. courts). There is also the remote possibility that a state's submission could be considered a unilateral act with binding effect on it under customary international law. See Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, ¶¶ 43–46 (Dec. 20).

18. 138 S. Ct. 1865 (2018).

19. In re Vitamin C Antitrust Litig. (*Vitamin C I*), 584 F. Supp. 2d 546, 548 (E.D.N.Y. 2008).

20. Id. at 550.

21. In re Vitamin C Antitrust Litig. (*Vitamin C II*), 837 F.3d 175, 180 & n.5 (2d Cir. 2016).

the Chinese government's interpretation of its domestic law, with the circuit court determining that the Chinese government's submissions "should be credited and accorded deference."[22] In resolving the question, the Supreme Court articulated a new standard for deference to foreign sovereign submissions: "respectful consideration."[23]

The Court did not take the opportunity to elaborate what respectful consideration means, however, and it remains ill-defined. To the extent the standard gives guidance to courts, it is primarily by establishing what is *not* appropriate. It is clear that courts should neither defer to, nor ignore, foreign sovereign submissions. While the respectful consideration standard has been used in other contexts—perhaps most notably as the standard of deference for International Court of Justice judgments[24]—the Court has yet to elaborate a particular methodology or test to guide district or circuit courts faced with foreign sovereign participation.

This Note argues that such a lacuna is unwise. Foreign governments commonly take an interest in U.S. litigation, and they unequivocally demonstrate that interest when they file amicus briefs or other submissions with U.S. courts. If a U.S. court comes to a determination contrary to foreign interests, this can have foreign policy effects that spread far beyond the litigation at hand. Longstanding principles of international comity, such as the act of state doctrine, are evidence that courts do not claim to be arbiters of U.S. foreign policy. Greater structure within the respectful consideration standard is needed to ensure that courts can consistently and transparently navigate the foreign policy concerns that arise when foreign sovereigns participate in U.S. proceedings.

Part I of this Note describes how foreign law and foreign sovereigns enter U.S. courts, the rule by which U.S. courts analyze and apply foreign law, and the Supreme Court's recent determination in *Animal Science Products* that foreign sovereign amicus briefs regarding their domestic law are due "respectful consideration." Part II identifies the risks of this standard. It first focuses on the significant uncertainty surrounding respectful consideration and the poor reception it has received from commentators when used in other contexts. Second, it addresses how such an uncertain standard might conflict with the position courts have traditionally adopted, through international comity, toward U.S. foreign policy. Finally, Part II illustrates how these concerns might manifest in practical terms, by considering areas of the law where U.S. courts might inadvertently harm U.S. foreign relations. To address these concerns, Part III proposes a more robust framework within the respectful

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22. Id. at 189–91; see also *Vitamin C I*, 584 F. Supp. 2d at 557.

23. *Animal Sci. Prods.*, 138 S. Ct. at 1869.

24. See Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam) ("[W]e should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such . . . .").

consideration standard to better equip courts to address the foreign policy concerns presented by foreign sovereigns.

## I. FOREIGN LAW AND FOREIGN SOVEREIGNS IN U.S. COURTS

This Part examines how U.S. courts apply foreign law and how they have responded to submissions from foreign sovereigns. Section I.A discusses how foreign law becomes important in U.S. litigation and how U.S. courts identify and apply foreign law under Federal Rule of Civil Procedure 44.1. Section I.B examines the circumstances in which foreign sovereign governments enter U.S. litigation as amici curiae and the circuit split that developed around the degree of deference due to foreign sovereign amicus briefs. Lastly, section I.C discusses *Animal Science Products* and *In re Vitamin C Antitrust Litigation*, in which the Supreme Court resolved the circuit split by applying the respectful consideration standard.

### A. *U.S. Courts and Foreign Law*

1. *How Foreign Law Enters U.S. Courts.* — United States courts regularly apply foreign law.[25] The modern ease of traveling, doing business, and communicating across borders means that foreign law is applied every day by courts.[26] The situation may be as simple as tortious conduct occurring abroad between U.S. persons, one of whom files suit when they return to the United States.[27] In such a case, it is uncontroversial that foreign tort law may govern all or part of the incident.[28] Contract law is similarly unsurprising, as choice of law provisions in contracts frequently require courts to apply foreign law.[29] Foreign law

25. See 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).

26. Id. at 888–89 ("The increasing interaction among parties from different countries in both conventional and cyber settings has naturally resulted in more civil disputes on an international scale. . . . National courts and arbitration bodies frequently find it necessary to apply foreign law due to the explosion of international disputes.").

27. See, e.g., Mathews v. ABC Television, Inc., 776 F. Supp. 821, 827–28 (S.D.N.Y. 1991) (examining Kenyan law in the context of a rhinoceros attack on the plaintiff safari guide).

28. See Stephen P. Mulligan, Cong. Research Serv. Legal Sidebar, LSB10166, Who Interprets Foreign Law in U.S. Federal Courts? 1 (2018), https://fas.org/sgp/crs/misc/LSB10166.pdf [https://perma.cc/3DD6-M86R] (noting that U.S. courts apply foreign law "in a variety of contexts," including in "routine breach of contract and tort claims").

29. See, e.g., World Fuel Servs. Sing. Pte, Ltd. v. Bulk Juliana M/V, 822 F.3d 766, 772 (5th Cir. 2016). In some cases, however, courts have found that parties have "acquiesced" to the application of forum law by failing to advocate sufficiently for the application of foreign law. See Roger J. Miner, The Reception of Foreign Law in the U.S. Federal Courts, 43 Am. J. Comp. L. 581, 582–83 (1995) (citing Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 860 (2d Cir. 1981), cert. denied, 459 U.S. 976 (1982); Kleartex

may also be relevant in international corporate disputes, as when the beneficial owners of a corporation are foreign[30] or when a corporation is subject to foreign rules of procedure.[31] Some U.S. statutes even *require* U.S. courts to interpret and apply foreign law, such as the Lacey Act,[32] under which the Eleventh Circuit affirmed the convictions of the defendants in *McNab*.[33]

Efficient dispute resolution in an interconnected world requires the application of foreign law. Given this necessity, federal courts must interpret foreign law in a manner that reliably avoids disturbing U.S. foreign policy.

2. *Treatment of Foreign Law in U.S. Courts: Foreign Law as Fact.* — Historically, U.S. courts were required to treat foreign law as an issue of fact.[34] This applied not only to foreign law in the international sense but also to the "foreign" law of other U.S. states.[35] Litigating parties had to prove foreign law as they did any other facts, and in many cases the question would ultimately be decided by a jury.[36] This practice is "trace-

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(U.S.A.), Inc. v. Kleartex SDN BHD, No. 91 CIV. 4739 (LAP), 1994 WL 733688, at *7 n.5 (S.D.N.Y. June 9, 1994) (mem.)).

30. See, e.g., Twohy v. First Nat'l Bank of Chi., 758 F.2d 1185, 1193 (7th Cir. 1985) (inquiring into the Spanish law relevant to a shareholder's right to sue for injury to a corporation).

31. See, e.g., Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1101–02 (2d Cir. 1995) (reversing a district court judgment that denied a request for discovery in aid of foreign litigation because it would run contrary to more limited rules of discovery in French courts); Grand Entm't Grp., Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 488–89 (3d Cir. 1993) (examining Spanish law to determine how service of process must be carried out in Spain).

32. 16 U.S.C. §§ 3371–3378 (2012) (making it unlawful "to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife . . . taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law"); see also Bettina Bammer-Whitaker, Note, The Lacey Act and Proof of Foreign Law in Domestic Criminal Proceedings: A Critical Look at the Seventh Circuit's Approach in *Bodum USA v. La Cafetière*, 25 Geo. Int'l Envtl. L. Rev. 175, 180–84 (2012).

33. United States v. McNab, 331 F.3d 1228, 1234 (11th Cir. 2003).

34. See Restatement (First) of Conflict of Laws § 621 & cmt. b (Am. Law Inst. 1934) ("[F]oreign law must be alleged in pleading and proved by evidence . . . . Although the trier of fact may disbelieve the evidence offered as proof of foreign law[,] . . . such trier of fact is not at liberty . . . to find the law of a foreign state to be contrary to . . . the evidence offered.").

35. See Arthur Nussbaum, The Problem of Proving Foreign Law, 50 Yale L.J. 1018, 1020 (1941) (explaining that innovations in communications and improved publication of legal materials helped U.S. courts better understand laws across states). In the 1930s, many states began to replace this rule with one requiring treatment of sister states' laws as an issue of law. Id. at 1020–21 & nn.18–19.

36. Miner, supra note 29, at 584; see also Carolyn B. Lamm & K. Elizabeth Tang, Rule 44.1 and Proof of Foreign Law in Federal Court, 30 Litigation 31, 31 (2003) (explaining that "juries composed of individuals without legal training . . . often were left to wrestle with complex questions of foreign law simply because factual questions are for juries to decide").

able back at least to the eighteenth century" and rested on the assumption that courts could not be expected to know the law of other countries or states and should not be required to learn it.[37]

This rule presented several difficulties. First, the use of foreign law was burdened by "cumbersome courtroom rules of evidence."[38] Second, proving foreign law relied entirely on the parties' actions[39] and would not infrequently lead to courts applying U.S. law simply because the parties had not argued, or adequately proven, the applicable foreign law.[40] A court was unable to research foreign law on its own account, as it would for any other issue of law.[41] Last, and most importantly, determinations of foreign law were treated as findings of fact: On appeal, they were not reviewed de novo and could not be revised unless clearly erroneous.[42] All of these difficulties were especially vexing when applying the law of other U.S. states, which arose in U.S. litigation much more frequently than foreign law.[43]

3. *Foreign Law as Law: Federal Rule of Civil Procedure 44.1.* — To address these deficiencies, the Supreme Court promulgated Federal Rule of Civil Procedure 44 in 1966.[44] Under Rule 44.1, a determination of foreign law is "a ruling on a question of law," not of fact.[45] A party intending to raise an issue of foreign law "must give notice" of such intention, but it need not be in the pleadings.[46] The court is empowered to consider "any relevant material or source" to determine foreign law, including those "not submitted by a party or admissible under the Federal Rules of Evidence."[47] A reviewing court is not bound to accept a district court's determination of foreign law and may reexamine it de novo.[48] Although there appeared to be some initial confusion on the proper

37. See Nussbaum, supra note 35, at 1018. Another basis for this rule is that English courts traditionally refused to apply foreign law and would decline jurisdiction instead, the effect being that foreign law could only be relevant as an issue of fact, not a rule of decision. Id. at 1019.

38. Id. at 1020. This was an especially acute problem when applying the law of other U.S. states.

39. See Lamm & Tang, supra note 36, at 31 (noting that, historically, "a party wishing to raise the issue of foreign law had to do so in the pleadings").

40. See Miner, supra note 29, at 585–87.

41. See Lamm & Tang, supra note 36, at 31.

42. Miner, supra note 29, at 584.

43. See Nussbaum, supra note 35, at 1020.

44. Miner, supra note 29, at 584; see also Lamm & Tang, supra note 36, at 31.

45. Fed. R. Civ. P. 44.1.

46. Id.

47. Id.

48. See Fed. R. Civ. P. 44.1 advisory committee's note on 1966 adoption ("[A]ppellate review will not be narrowly confined by the 'clearly erroneous' standard of Rule 52(a).").

treatment of foreign law after the rule took effect,[49] it is now well settled that Rule 44.1 gives courts at all levels wide discretion to determine and apply foreign law.[50]

### B. *International Comity and Foreign Sovereigns in U.S. Courts*

1. *How Foreign Sovereigns Enter U.S. Courts.* — Before 1978, if foreign sovereigns took an interest in U.S. litigation, they would typically communicate directly with the U.S. State Department through diplomatic channels.[51] This process changed with *Zenith Radio Corp. v. United States*.[52] In *Zenith*, the Japanese government took issue with the United States levying duties on goods imported by a Japanese company. Japan sent a note through diplomatic channels supporting the U.S. petitioner.[53] The note eventually reached the Solicitor General, who submitted it to the Supreme Court despite it being written *against* his arguments.[54] This submission caused some confusion,[55] and the Clerk of

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49. See, e.g., Weiss v. Glemp, 792 F. Supp. 215, 229 (S.D.N.Y. 1992) (stating, more than twenty-six years after Rule 44.1 took effect, that "[f]oreign law is a question of fact which must be proved").

50. See Lamm & Tang, supra note 36, at 32.

51. Marek Martyniszyn, Foreign States' Amicus Curiae Participation in U.S. Antitrust Cases, 61 Antitrust Bull. 611, 614–16 (2016); see also Matteo Godi, Note, A Historical Perspective on Filings by Foreign Sovereigns at the U.S. Supreme Court: Amici or Inimici Curiae?, 42 Yale J. Int'l L. 409, 415 (2017) ("The foreign government that wished to make a claim in front of the Court had to rely on diplomatic channels."). In some early instances, however, foreign sovereigns did file briefs directly with a court rather than through diplomatic processes, especially in the context of in rem and prize proceedings. See, e.g., Strathearn S.S. Co. v. Dillon, 252 U.S. 348, 351 (1920) (permitting arguments to be made by the "British Embassy, by special leave"); The Anne, 16 U.S. (3 Wheat.) 435, 445 (1818) (considering whether the Spanish consul was permitted, "merely by virtue of his office and without the special authority of his government, to interpose a claim" as a third party).

52. 437 U.S. 443 (1978).

53. Eichensehr, supra note 16, at 299; Martyniszyn, supra note 51, at 614.

54. Eichensehr, supra note 16, at 299.

55. This confusion was apparent at oral argument, where the Justices questioned the Solicitor General's intent in submitting the Japanese government's note:

> QUESTION: Mr. Solicitor General . . . at the request of the Department of State you distributed a communication from the government of Japan in this matter . . . . What does that mean vis-a-vis this case? . . .
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> . . .
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> MR. [WADE H. McCREE, Solicitor General]: . . . I certainly circulated it only because it had been forwarded to us from the Department of State and we circulated it for what it was worth. We don't suggest that this Court should be responsive either to any threat or any apprehension of apocralyptic [sic] consequences in the field of international trade. . . .
>
> QUESTION: In any event, you are here in good-faith doing your best to uphold the position espoused by the government of Japan anyway?
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> MR. McCREE: Well, if the Court please, I regard my role here as seeking to uphold the construction that Congress, that the Secretary of the

the Supreme Court notified the Department of Justice that the transmission of notes in this way was contrary to the Court's rules.[56] The State Department then informed the embassies of foreign governments that it would no longer transmit diplomatic notes to courts and invited foreign governments to file briefs as amici curiae in any litigation that they wished to affect.[57]

Between 1978 and 2013, forty-six countries filed sixty-eight amicus briefs with the Supreme Court alone.[58] In most cases, the U.S. government will also file an amicus brief,[59] but in some instances the foreign sovereigns provide the only amicus briefs filed by a government in the litigation.[60] A subdivision of a foreign sovereign may file the brief, rather than the national government itself,[61] as was the case in *Animal Science Products*.[62]

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> Treasury has placed upon the statute committed to you to administer, and the client of the government here is the Secretary of State and not a foreign prince or potentate.

Transcript of Oral Argument at 32–34, *Zenith*, 437 U.S. 443 (No. 77-539), https://www.supremecourt.gov/pdfs/transcripts/1977/77-539_04-25-1978.pdf [https://perma.cc/SN4A-VSKS].

56. Eichensehr, supra note 16, at 299–300.

57. Id. at 300–01. The State Department seemed also inclined to disentangle itself from the awkward situation of having to advocate for a foreign government's position in a suit, for diplomatic reasons, when it in fact opposed that government's position. Martyniszyn, supra note 51, at 615–16.

58. Eichensehr, supra note 16, at 302, 306.

59. See, e.g., JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure, 536 U.S. 88, 90 (2002); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 768 (1993); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 430 (1989).

60. See, e.g., Rivendell Forest Prods., Ltd. v. Canadian Forest Prods., Ltd., 810 F. Supp. 1116, 1117 (D. Colo. 1993) ("Extensive briefs and additional papers have been filed by the parties and the court has accepted a brief *amicus curiae* of the Government of Canada."); Martyniszyn, supra note 51, at 621 tbl.2. This may be a result of differing strategies by the U.S. and foreign governments. Foreign sovereigns file amicus briefs at the district court level more often than in appellate courts, in part because the submissions often attempt to resist discovery, which occurs early in the litigation process. See Martyniszyn, supra note 51, at 618. This trend may also indicate that foreign sovereigns expect to have more impact in the district court than they might in an appellate court. The U.S. government, on the other hand, "rarely files amicus briefs in the lower courts," id., most likely because of the sheer weight of litigation in U.S. courts.

61. The filing party might be, for example, a ministry of the foreign government or a subnational entity such as a state or province. See, e.g., 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 WL 6706582; cf. Brief for the Japan External Trade Organization as Amicus Curiae at 2, Sumitomo Shoji Am., Inc. v. Avigliano, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24), 1982 WL 608724 (identifying the amicus as "a non-profit organization incorporated under the laws of Japan and owned by the Government of Japan").

62. See Brief of Amicus Curiae the Ministry of Commerce of the People's Republic of China in Support of the Defendants' Motion to Dismiss the Complaint, *Vitamin C I*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008) (No. 06-MD-1738 (DGT)(JO)), 2006 WL 6672257 [hereinafter China *Vitamin C* Brief].

Foreign sovereigns take an interest in domestic U.S. litigation primarily for two reasons: first, to protect their sovereignty, and second, to influence outcomes in favor of a party they support.[63] On the first ground, states are often interested in protecting aspects of their sovereignty, including the efficacy of their domestic legal systems.[64] This is most apparent in cases involving the extraterritorial application of U.S. laws. For example, Australia argued in *Morrison v. National Australia Bank* that extension of U.S. securities laws abroad would "interfere with the regimes that Australia and other nations have established to regulate companies and protect investors in their markets."[65] Similarly, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*[66] attracted considerable attention from sovereigns challenging the extraterritorial application of U.S. antitrust laws.[67] And many foreign states entered amicus briefs in *Sosa v. Alvarez-Machain*[68] to advocate against the extension of the Alien Tort Statute to conduct occurring abroad.[69] States advancing this interest will

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63. Although these are the two most common rationales, foreign states may take an interest in U.S. litigation for a variety of reasons unique to a particular case. For example, foreign sovereign submissions in Roper v. Simmons, 543 U.S. 551 (2005), seemed primarily motivated by a moral opposition to the execution of minors. See, e.g., Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent at 21–26, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1619203 [hereinafter E.U. *Roper* Brief].

64. See Martyniszyn, supra note 51, at 612 ("[F]oreign nations submit amicus briefs to protect various features of their sovereignty and related prerogatives . . . ."); Godi, supra note 51, at 430–34.

65. Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees at 2, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 723006.

66. 542 U.S. 155 (2004).

67. Martyniszyn, supra note 51, at 617. See, e.g., Brief of the United Kingdom of Great Britain & Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners at 12, *F. Hoffmann-La Roche Ltd.*, 542 U.S. 155 (No. 03-724), 2004 WL 226597, at *2 [hereinafter United Kingdom *Hoffmann-La Roche* Brief] (warning that extraterritorial application of U.S. antitrust law "contravenes basic principles of international law and may impede trade and investment as well as undermine public enforcement by [other] Governments of their competition laws"); Brief of the Federal Republic of Germany, United Kingdom of Great Britain and Northern Ireland, Japan, the Swiss Confederation, and the Kingdom of the Netherlands as Amici Curiae in Support of Defendants-Appellees, Empagran S.A. v. F. Hoffmann-La Roche Ltd., 417 F.3d 1267 (D.C. Cir. 2005) (No. 01-7115), 2005 WL 3873712 [hereinafter Germany *Hoffmann-La Roche* Brief] (arguing, on remand, for narrow extraterritorial application of U.S. antitrust law).

68. 542 U.S. 692 (2004).

69. See, e.g., Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner at 2, *Sosa*, 542 U.S. 692 (Nos. 03-339, 03-485), 2004 U.S. S. Ct. Briefs LEXIS 910, at *9 ("While the Governments recognize that those who commit human rights violations should be held accountable . . . any broad assertion of jurisdiction to provide civil remedies in national courts for such violations perpetrated against aliens in foreign places is inconsistent with international law and the practice of

commonly argue that good foreign relations favor one outcome over another.[70]

Second, foreign sovereigns enter U.S. litigation to influence outcomes in favor of a party they support.[71] Some experienced Supreme Court advocates have confirmed that they actively solicit the support of foreign sovereigns to bolster their cases.[72] This seems particularly true in antitrust cases, where states may be motivated by a desire to shield domestic industries from treble damages, a unique and "internationally contentious" aspect of U.S. antitrust law.[73] *Spectrum Stores*, a class action suit alleging that several foreign oil companies conspired with OPEC member states to fix crude oil prices,[74] attracted the widest attention from foreign sovereigns to date: Thirteen foreign governments filed amicus briefs with the Fifth Circuit.[75]

In any of these circumstances, foreign sovereigns may submit briefs regarding their own domestic law.[76] Sovereigns may raise issues of domestic law for a variety of reasons,[77] but of cardinal importance to this Note and to *Animal Science Products* is when they intend to convince a U.S. court of the effect domestic law would have on a party, or of the existence of a conflict of laws. The argument for deference to foreign

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other nations . . . ."). Courts similarly received amicus briefs in Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013), and in Sarei v. Rio Tinto, PLC, 550 F.3d 822 (9th Cir. 2008), other cases concerning the same issue.

70. Eichensehr, supra note 16, at 312–14 (referring to arguments related to foreign relations interests as "the most frequent topic in foreign sovereign [amicus] briefs").

71. See id. at 364 (noting the possibility that "a foreign sovereign might be recruited by a party, perhaps a company from their country, to file a supportive brief"); Martyniszyn, supra note 51, at 612; Godi, supra note 51, at 417 ("In fact, when a foreign government wishes to intervene as a third party to a dispute, its objective is rather clear: self-interest.").

72. See Eichensehr, supra note 16, at 303–04 & n.68 (describing correspondence to this effect with attorneys from Sidley Austin LLP, Goldstein & Russel, P.C., and "additional Supreme Court advocates who did not wish to be identified by name").

73. See Martyniszyn, supra note 51, at 639; see also, e.g., Germany *Hoffmann-La Roche* Brief, supra note 67, at *5 ("The Governments . . . have established penalties and private rights of action for antitrust violations. However, instead of adopting the United States system of treble damages, each has opted for a single damages regime. The Governments have substantial interests in protecting the integrity of their legal systems.").

74. Spectrum Stores Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 944 (5th Cir. 2011).

75. See id. at 946 n.11; Martyniszyn, supra note 51, at 619.

76. See Eichensehr, supra note 16, at 318–19 ("Of the 68 foreign sovereign amicus briefs filed on the merits since 1978 [until 2013], 30 (44%) addressed the foreign sovereign's domestic law."). Foreign sovereigns also frequently file briefs on purely international issues other than those pertaining to their domestic law, especially to put forth interpretations of treaty or customary international law. Id. at 312–14.

77. See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 167–68 (2004) (taking note of submissions by several foreign sovereigns that highlighted conflict of law concerns with U.S. antitrust law and their own); E.U. *Roper* Brief, supra note 63, at 8–11 (discussing the domestic criminal law of several countries to argue that execution of juveniles is "unusual" because it is prohibited by the laws of nearly every other country).

sovereigns is strongest here; the state's authoritativeness is at its highest when speaking about its own laws.[78]

Foreign sovereigns have been tremendously successful in U.S. litigation when interpreting their own law. Citation rates by the Supreme Court, to the extent they are indicative, seem to demonstrate substantial deference to their input.[79] Between 1986 and 1995, the Supreme Court cited more consistently to foreign sovereign amici in cases in which they were submitted than even to briefs submitted by the Solicitor General.[80] Justice Breyer himself has noted that the "justices are not experts on the practices of other nations"[81] and that it was "helpful to receive briefs from other nations."[82] Indeed, the Second Circuit remarked in *In re Vitamin C Antitrust Litigation* (*Vitamin C II*) that it "ha[d] yet to identify a case where a foreign sovereign appeared before a U.S. tribunal and the U.S. tribunal adopted a reading of that sovereign's laws contrary to that sovereign's interpretation."[83]

2. *International Comity in U.S. Courts.* — The influence of foreign sovereigns in U.S. litigation may be explained by more than just convenience and expertise, however; international comity also plays an important part. Comity refers loosely to a set of doctrines which together "mediate the relationship between the U.S. legal system and those of other nations."[84] The act of state doctrine, for instance, precludes courts from ruling on the validity of the public acts of a foreign sovereign within its own territory.[85] International comity is the guiding principle behind many commonly applied doctrines, including the presumption against extraterritoriality, foreign sovereign immunity, or forum non conven-

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78. See Eichensehr, supra note 16, at 354 ("The best explanation for the serious attention the Court appears to give foreign sovereigns on questions of foreign law is simple expertise.").

79. See id. at 319–24. An example of such deference is JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure, 536 U.S. 88 (2002). The Justices, while considering the nationality status of a British Virgin Islands corporation, asked particularly pointed questions of the plaintiff, whose position differed from that of the United Kingdom. See Transcript of Oral Argument at 19–20, *JPMorgan Chase Bank*, 536 U.S. 88 (No. 01-651), 2002 WL 753389, at *14–15.

80. Eichensehr, supra note 16, at 322. No doubt the rarity of foreign sovereign briefs accounts for much of their high citation rate.

81. Stephen Breyer, The Court and the World: American Law and the New Global Realities 163 (2015).

82. Id. at 133.

83. *Vitamin C II*, 837 F.3d 175, 189 (2d Cir. 2016).

84. William S. Dodge, International Comity in American Law, 115 Colum. L. Rev. 2071, 2071 (2015).

85. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964); see also Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.").

iens.[86] Each reflects the idea that 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."[87]

Several policy justifications underlie international comity. The most obvious is a desire to ensure that relations remain friendly between sovereign powers, which could take offense to intrusion in their domestic affairs.[88] Another is a concern for reciprocity; U.S. courts hope to ensure that, by giving deference to foreign sovereigns, other legal systems will accord the same deference to the United States.[89] Uniformity in interpretation is also a common justification for international comity,[90] especially in the treaty context,[91] but *McNab* suggests how these concerns could apply with equal force in the context of foreign domestic law.[92]

### C. *The Circuit Split and* Animal Science Products

1. *The Circuit Split on Deference to Foreign Sovereigns.* — Federal Rule of Civil Procedure 44.1 provides courts with great leeway in determining applicable foreign law. It does not, however, provide any guidance to courts on how to weigh contrary sources. In particular, Rule 44.1 "does not address the weight a federal court . . . should give to the views

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86. See Dodge, supra note 84, at 2079 tbl.1.

87. Equal Emp. Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

88. See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (noting the importance of avoiding "unreasonable interference with the sovereign authority of other nations"); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589 (1839) (describing comity as helpful not only "to promote justice between individuals" but also "to produce a friendly intercourse between the sovereignties to which they belong").

89. See Dodge, supra note 84, at 2081 n.49; cf. Louise Weinberg, Against Comity, 80 Geo. L.J. 53, 54 (1991) ("[T]he heart of the proposal is the suggestion that it is *reciprocity* that makes comity pay. The comity theorists argue that, if comity is reciprocal, both states are better off than they would have been if each simply applied its own law.").

90. See, e.g., El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 175–76 (1999) (stating that interpretations of a treaty rendered by courts of other signatory states are entitled to "considerable weight"); Brief for Amici Curiae Republic of Honduras & Other Foreign Sovereigns in Support of Petitioners at 13–15, Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (Nos. 04-10566, 05-51), 2005 WL 3597807 (arguing that the Supreme Court should defer to the International Court of Justice when interpreting the Vienna Convention on Consular Relations to "advance [state] parties' expectation of uniformity").

91. In *Olympic Airways v. Husain*, for example, Justices Scalia and O'Connor dissented "[b]ecause the Court offer[ed] no convincing explanation why" it rejected the English and Australian courts' interpretation of a treaty those countries were also parties to, reflecting a concern for consistent interpretation by treaty parties. 540 U.S. 644, 658–61 (2003) (Scalia, J., dissenting).

92. See Honduras *McNab* Brief, supra note 8, at 20 ("If Honduras' complex administrative code is open to reinterpretation by United States prosecutors and courts, Honduran citizens importing goods to this country can no longer be secure in statements by Honduran courts or the Honduran Congress that they have complied with ambiguous Honduran laws and regulations.").

presented by [a] foreign government."[93] No other rule or statute does either.[94] Some courts had looked to *United States v. Pink*,[95] a Supreme Court case decided in 1942, for guidance. In *Pink*, the Supreme Court was tasked with interpreting a Russian decree from 1918 that nationalized the Russian insurance industry.[96] Although the record contained substantial evidence regarding the meaning of the decree, the Supreme Court looked no further than an official declaration by the Soviet government attesting to the law's intended extraterritorial effect.[97] The Court found the declaration to be "conclusive."[98]

Some circuits, but not all, interpreted *Pink* as establishing that any official declaration by a foreign government regarding its own laws was binding. The Third and Fifth Circuits adopted this interpretation.[99] The Seventh Circuit, in contrast, adopted a somewhat less deferential view, giving "substantial deference," rather than conclusive effect, to the positions of a foreign government.[100] As the above discussion of *McNab* shows,[101] the Eleventh Circuit adopted a still less deferential approach,

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93. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1873 (2018).

94. Id. International comity provides scant guidance: Courts are to "carefully consider a foreign state's views about the meaning of its laws." Id. (citing Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 543 & n.27 (1987) (recognizing the "spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states")).

95. 315 U.S. 203 (1942).

96. Id. at 218–19 & n.3.

97. Id. at 220.

98. Id.

99. In *D'Angelo v. Petroleo Mexicanos*, for example, the Delaware District Court considered whether a 1938 expropriation decree by the Mexican government extinguished the royalty rights of a Delaware corporation. 422 F. Supp. 1280, 1281 (D. Del. 1976), aff'd, 564 F.2d 89 (3d Cir. 1977). Upon request of the defendant, the Mexican Attorney General rendered an official interpretation of the expropriation decree; the district court then determined that it was "require[d] . . . to accept the opinion" as binding, a decision the Third Circuit affirmed. Id. at 1284; see also Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1362–65 & n.100 (S.D. Tex. 1995), aff'd, 231 F.3d 165 (5th Cir. 2000) (finding an official opinion submitted by the Philippine Attorney General to be "conclusive" as to the relevant Philippine law).

100. See In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1312 (7th Cir. 1992). When considering litigation arising out of the sinking of the *Amoco Cadiz* supertanker off the coast of Brittany, the Seventh Circuit examined an ambiguous French statute that referred to the "Brussels Convention of 29 November 1969." Id. at 1311. The difficulty was that two international conventions were signed in Brussels on that date in 1969. Id. at 1311–12. The court deferred to the French government's interpretation of which convention the statute referred to but noted that it would give only "substantial deference," rather than conclusive effect, to the French government's position. Id. This at least acknowledged the possibility, unlike the Third and Fifth Circuit interpretations, that a foreign government's interpretation could be rejected.

101. See supra notes 1–15 and accompanying text.

determining that a court could discount the representations of a foreign sovereign when it had, in the court's eyes, "reversed its position."[102] And the Second Circuit adopted *still another* level of deference: It would defer to any *reasonable* interpretation forwarded by a foreign sovereign.[103] It was this new standard which led to *Animal Science Products*, and to the Supreme Court's definitive resolution of the circuit split.

2. Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. — *Animal Science Products* began in 2005 in the Eastern District of New York as *In re Vitamin C Antitrust Litigation* (*Vitamin C I*).[104] The plaintiffs were a class of direct and indirect purchasers of vitamin C who alleged that the defendants, four Chinese vitamin C manufacturers and two California sellers, conspired to form a cartel beginning in December 2001.[105] According to the plaintiffs, the defendants together controlled sixty percent of worldwide vitamin C production capacity.[106] Using their "trade association" in China, the Chamber of Commerce of Medicines and Health Products Importers and Exporters, the defendants allegedly coordinated their pricing to ensure market stability and help undercut European manufacturers that had much higher production costs.[107] The defendants moved to dismiss the complaints based on three doctrines: act of state, foreign sovereign compulsion, and international comity.[108]

The Chinese Ministry of Commerce filed a brief as amicus curiae in an attempt to clarify the role of the manufacturers' trade association in export regulation.[109] The Ministry's brief described the regulatory scheme established around vitamin C export and, in particular, its changes following China's entry into the World Trade Organization in 2002.[110] In effect, the Ministry argued that "defendants were compelled under Chinese law to collectively set a price for vitamin C exports."[111] The plaintiffs challenged the Ministry's argument, noting in particular the directly contrary statements the defendants' trade association had published in the past.[112]

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102. United States v. McNab, 331 F.3d 1228, 1232 (11th Cir. 2003).

103. *Vitamin C II*, 837 F.3d 175, 189 (2d Cir. 2016) ("[W]hen a foreign government . . . provid[es] a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements.").

104. *Vitamin C I*, 584 F. Supp. 2d 546, 548–49 (E.D.N.Y. 2008).

105. Id.

106. Id. at 549.

107. Id. at 548–49, 552.

108. Id. at 550.

109. Id. at 552–54; see also China *Vitamin C* Brief, supra note 62.

110. *Vitamin C I*, 584 F. Supp. 2d at 552–54.

111. Id. at 554.

112. Id. at 554–56.

Citing *Pink*, the defendants argued that the Ministry's interpretation of Chinese law must be conclusive.[113] However, the district court relied on the broad language of Federal Rule of Civil Procedure 44.1, and recent Second Circuit decisions, to find that the circuit had adopted "a softer view toward the submissions of foreign governments."[114] Accordingly, the district court determined that it owed "substantial deference" to the Ministry's brief but that it was not "conclusive evidence of compulsion."[115] The suit proceeded to trial and the district court awarded the plaintiffs approximately $147 million.[116] The defendants appealed.[117]

On appeal, the Second Circuit determined that a different standard of deference applied to the Ministry of Commerce's submission. First, it determined that Rule 44.1 was adopted to create "a uniform procedure for interpreting foreign law," but not to "alter the legal standards by which courts analyze foreign law,"[118] and would thus have no effect on the standard established in *Pink*.[119] Distinguishing the Second Circuit decisions the district court had relied on, the court reaffirmed "the principle that when a foreign government . . . directly participates in U.S. court proceedings . . . regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements."[120] The circuit court found jurisdiction in this case inappropriate on international comity grounds, vacated the judgment, and remanded the case with instructions to dismiss the plaintiffs' claims.[121]

The plaintiffs appealed, and the Supreme Court granted certiorari in January 2018.[122] The Second Circuit's reasonableness standard is justifiable in light of the then-prevalent interpretation of *Pink*—which many circuit courts understood to require strong deference to foreign sovereigns[123]—and the international comity interests that are tradition-

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113. Id. at 556.

114. Id. at 557 (citing Villegas Duran v. Arribada Beaumont, 534 F.3d 142, 148 (2d Cir. 2008); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 92 (2d Cir. 2002)).

115. Id.

116. *Vitamin C II*, 837 F.3d 175, 178 (2d Cir. 2016).

117. Id.

118. Id. at 187–88.

119. Id. at 188.

120. Id. at 189.

121. Id. at 179, 194 ("[W]e hold that the district court abused its discretion by failing to abstain on international comity grounds from asserting jurisdiction . . . ."). The Second Circuit emphasized that "[t]he Chinese Government has repeatedly made known to the federal courts, as well as to the . . . Department of State . . . that it considers the lack of deference it received, . . . and the exercise of jurisdiction over this suit, to be disrespectful and that it 'has attached great importance to this case.'" Id. at 193–94.

122. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 734 (2018) (granting certiorari).

123. See supra notes 95–103 and accompanying text.

ally implicated when courts deal with foreign law.[124] As it turned out, however, the Supreme Court disagreed with the Second Circuit, and indeed all other circuit courts, and established a new standard for deference to foreign governments: "respectful consideration."[125]

The Court first recognized that there was "competing authority" on the question of how much deference was owed to a foreign government,[126] though it did not make specific reference to any of the standards set by other circuit courts on the question. It disagreed with the Second Circuit's characterization of the effect of Rule 44.1 and described it as having "changed the mode of determining foreign law in federal courts."[127] The Supreme Court also rejected the Second Circuit's interpretation of *Pink*, denying that it stood for the proposition that "all submissions by a foreign government are entitled to [conclusive] weight."[128] If Rule 44.1 instructed courts to "consider any relevant material or source"[129] and to come to their own conclusions, a spirit of international comity still counseled courts to "carefully consider a foreign state's views about the meaning of its own laws."[130]

The proper balance, in the Court's eyes, was to give "respectful consideration," but not conclusive weight, to a foreign government's submission.[131] Although the appropriate weight to be given to a foreign sovereign's submissions under this standard will "depend upon the circumstances," relevant considerations include the submission'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."[132] After hearing argument from the Chinese corporate defendants and the Chinese government itself, which had

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124. See infra section II.B.

125. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1869 (2018).

126. Id. at 1872 (internal quotation marks omitted) (quoting *Vitamin C II*, 837 F.3d at 186).

127. Id. at 1873.

128. Id. at 1874–75. The Court emphasized, as particular distinguishing facts in *Pink*, that the U.S. government had expressly obtained the Soviet government's submission through diplomatic channels and that the Soviet government had not contradicted itself on the effect of the expropriation decree in the past. Id. at 1875.

129. Id. at 1873 (internal quotation marks omitted) (quoting Fed. R. Civ. P. 44.1).

130. Id. (citing Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 543 n.27 (1987); Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 638–39 (7th Cir. 2010) (Wood, J., concurring); United States v. McNab, 331 F.3d 1228, 1241 (11th Cir. 2003)).

131. Id. at 1869.

132. Id. at 1873–74. Although these factors provide some guidance on how courts should treat foreign sovereign submissions, they engage only with the probative value of the submission itself. They do not address the concerns outlined in Part II, in particular the risk of harm to U.S. interests and foreign policy.

received special leave to participate in oral argument,[133] the Court avoided any conclusion on the meaning of the Chinese laws in dispute and remanded the case to the trial court to decide under the proper standard.[134] Ultimately, then, the Supreme Court rejected all of the rules set by the circuit courts in favor of a loose, fact-sensitive standard.

## II. THE DANGERS OF RESPECTFUL CONSIDERATION

This Part addresses the possible harms that could arise out of the new standard established in *Animal Science Products*. It argues that this standard is so uncertain that it risks a break from the historic position the courts have occupied in U.S. foreign relations, a position traditionally animated by international comity and deference to the executive branch. Without giving more voice to comity principles, the respectful consideration standard risks injury to U.S. foreign relations and may vitiate the usefulness of many foreign sovereign submissions that help courts to interpret foreign law.[135]

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133. See Transcript of Oral Argument at 38–55, *Animal Sci. Prods.*, 138 S. Ct. 1865 (No. 16-1220), 2018 WL 1932827. Permitting a foreign sovereign to participate in oral argument as a nonparty is rare, though not unprecedented. See, e.g., Monday, December 16, 1918, 1918 J. Sup. Ct. U.S. 81, 82 (allowing oral argument by the British Embassy in In Re Muir, 253 U.S. 522 (1921)).

134. *Animal Sci. Prods.*, 138 S. Ct. at 1875 ("The correct interpretation of Chinese law is not before this Court, and we take no position on it.").

135. Courts have drawn criticism for their allegedly cavalier approach to applying foreign law before. Take, for example, Bodum v. LaCafetiere, 621 F.3d 624 (7th Cir. 2010). In *Bodum*, the Seventh Circuit was faced with the question of whether parol evidence could be introduced in a contract dispute regarding the sale of French press coffee pots in the United States. The plaintiff attempted to introduce evidence of precontractual negotiations, which would demonstrate that the contract between the parties prohibited the sale of coffee pots in the United States; the defendant claimed that such evidence was inadmissible. While all three judges (Chief Judge Frank Easterbrook, Judge Richard Posner, and Judge Diane Wood) ultimately sided with the defendant to find the extrinsic evidence inadmissible, they split on the question of which sources were sufficient to ascertain foreign law. Chief Judge Easterbrook determined that the correct interpretation of foreign law could easily—and indeed, more accurately—be obtained with reference to exclusively English-language sources, rather than with the assistance of any experts in foreign law. See id at 628–29. Judge Posner wrote a separate concurring opinion to "express emphatic support" for Judge Easterbrook's position. Id. at 631–34. Judge Wood, though concurring in the judgment, wrote separately to argue that expert testimony could be very useful in interpreting foreign law and that the majority overstated the sufficiency of English-language published materials to capture all of the nuances of foreign law. Id. at 638–40. Many commentators criticized the majority's approach to proving foreign law. See, e.g., Pierre Legrand, Proof of Foreign Law in U.S. Courts: A Critique of Epistemic Hubris, 8 J. Comp. L. 343, 386 (2014) (arguing that judges should use expert witnesses who have "first-hand cognitive authority" of the law and culture of foreign jurisdictions); Louise Ellen Teitz, Determining and Applying Foreign Law: The Increasing Need for Cross-Border Cooperation, 45 N.Y.U. J. Int'l L. & Pol., 1081, 1090 (2013) (describing the Seventh Circuit's approach to determining which foreign law to apply in *Bodum* and other cases); Frederick Gaston Hall, Note, Not Everything Is as Easy as a French Press: The Dangerous

Foreign sovereign submissions address a wide variety of important issues, many of which courts have traditionally left to the political branches. In any case involving the act of state doctrine, for example, ignoring another country's submissions may entail "inquiring into the validity of the public acts a recognized sovereign power committed within its own territory," an action courts have long avoided because a decision, "if wrongly made, would be likely to be highly offensive to the state in question."[136] Even when a foreign government simply submits an amicus brief, it can give rise to sensitive decisions and potentially offensive questions—such as whether to trust the foreign government at all.[137]

The discomfort of foreign sovereign amici arises from the conflicting demands of international comity, on one hand, and the facts and law of a particular case, on the other. Federal Rule of Civil Procedure 44.1 suggests that courts take a wide-ranging approach to finding foreign law, and ordinarily a court would expect to make a final determination on foreign law on its own. A foreign government's submission can be helpful in guiding the court to its ultimate conclusion,[138] especially for foreign bodies of law that are particularly alien to the U.S. system. But, when a foreign sovereign becomes involved, it can trigger the same concerns regarding a disruption to foreign relations that underlie international comity doctrines. These concerns remain even for cases in which, on the particular facts of the case, the foreign sovereign can be shown to be dishonest or incorrect. The result is that courts are left in a contradictory position that pulls them toward absolute discretion (suggested by Rule 44.1), deference based on the context and circumstances of the case (suggested by the subject-matter expertise of foreign governments), and complete, unquestioning deference (suggested by international comity principles such as the act of state doctrine).

In *Animal Science Products* the Supreme Court seemed inclined to avoid the question of international comity altogether. The Court granted certiorari to only one of the three questions advanced by the petitioners—whether a court "is 'bound to defer' to a foreign government's legal statement, *as a matter of international comity*, whenever the foreign government appears before the court."[139] In its decision, however, the

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Reasoning of the Seventh Circuit on Proof of Foreign Law and a Possible Solution, 43 Geo. J. Int'l L. 1457, 1469–71 (2012).

136. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401, 415 n.17 (1964).

137. See Godi, supra note 51, at 415. The fact that the majority of circuit courts had developed fairly solicitous standards for foreign sovereign submissions before *Animal Science Products* demonstrates the position of deference courts traditionally viewed as appropriate.

138. Justice Breyer noted at oral argument in *Animal Science Products* that "the characteristic of a federal judge is he knows very little, if anything, about the law of 192 countries." Transcript of Oral Argument at 26, *Animal Sci. Prods.*, 138 S. Ct. 1865 (No. 16-1220), 2018 WL 1932827.

139. Petition for a Writ of Certiorari at i, *Animal Sci. Prods.*, 138 S. Ct. 1865 (No. 16-1220), 2017 WL 1353281 (emphasis added); see also Animal Sci. Prods., Inc. v. Hebei

Supreme Court reframed the question thus: "Is a federal court determining foreign law *under Rule 44.1* required to treat as conclusive a submission from the foreign government describing its own law?"[140] This recasting of the case into a question of civil procedure, rather than the admittedly more treacherous ground of international comity, aligns with how the United States presented the case in its amicus brief as well.[141] By further minimizing the importance, and even the relevance, of international comity in the calculus, *Animal Science Products* only heightens the risk that a court decision will give short shrift to a foreign sovereign. The standard of deference set out in *Animal Science Products*, then, should give the Supreme Court, and indeed every other branch of government, grounds for concern. A further-elaborated standard of deference would give courts a transparent and reliable method to bring together the competing interests present in cases involving foreign sovereigns and foreign law.

Section II.A outlines the uncertainty that has surrounded the respectful consideration standard in its other uses and the criticisms it has attracted. Section II.B identifies, in general terms, the risks of an unstructured standard of deference that fails to address a foreign government's interests in a case. Section II.C then concludes by considering how the risks of respectful consideration might manifest in practical terms, taking U.S. trade policy and international discovery rules as examples.

### A. *Criticisms of the Respectful Consideration Standard*

The respectful consideration standard is rare but not unheard of. It mirrors the deference given to state attorneys general regarding their interpretation of a state's law,[142] a connection the Supreme Court explicitly recognized in *Animal Science Products*.[143] The court did not acknowledge, however, that this is the same standard of deference it previously established for judgments of the International Court of Justice (ICJ) in *Breard v. Greene*.[144]

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Welcome Pharm. Co., 138 S. Ct. 734 (2018) (granting certiorari on question two of the defendants' petition).

140. *Animal Sci. Prods.*, 138 S. Ct. at 1872 (emphasis added).

141. See Brief for the United States as Amicus Curiae at I, *Animal Sci. Prods.*, 138 S. Ct. 1865 (No. 16-1220), 2018 WL 1181858 [hereinafter U.S. *Animal Science Products* Brief].

142. See, e.g., Arizonans for Official English v. Arizona, 520 U.S. 43, 76 & n.30 (1997).

143. *Animal Sci. Prods.*, 138 S. Ct. at 1868 (citing *Arizonans for Official English*, 520 U.S. 76 & n.30).

144. 523 U.S. 371, 375 (1998) (per curiam). The International Court of Justice, often referred to as the "World Court," is the main judicial body of the United Nations and is considered the premier tribunal for the development of public international law, including treaty law. It hears contentious cases between countries that have consented to its jurisdiction and issues advisory opinions on international legal questions at the request of select international organizations, mainly the United Nations General Assembly and

In *Breard* and again in *Sanchez-Llamas v. Oregon*,[145] the Supreme Court confronted appeals from death row convicts from foreign countries who claimed that their right to consular access under the Vienna Convention on Consular Relations had been denied.[146] In both cases, the Supreme Court, applying respectful consideration to the ICJ judgments interpreting the Convention, rejected the ICJ's conclusions and denied relief to the claimants.[147] To elide any reference to these cases in *Animal Science Products* seems strange, especially given the shared transnational context. It may have been intentional, however; the respectful consideration standard attracted widespread criticism by commentators after *Sanchez-Llamas* was decided in 2006. Many argued that the Court ignored the binding nature of ICJ judgments on the United States under the United Nations Charter and could lead the country to default on its obligations under international law.[148] Moreover, the United States has been widely criticized for its application of the Vienna Convention on Consular Relations,[149] demonstrating that the respectful consideration standard has been insufficient to keep the United States from international censure.

Much of the rationale for deference to the ICJ applies to foreign sovereign submissions as well. Just as the ICJ is a "natural point of

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Security Council. See generally Antonio Cassese, International Law 278–95 (2d ed. 2005) (describing the development and progression of the dispute settlement role of the International Court of Justice).

145. 548 U.S. 331 (2006).

146. The Vienna Convention on Consular Relations requires states party to notify the nationals of any other state party that they have a right to contact their consulate "without delay" when they are arrested, imprisoned, or detained. See Vienna Convention on Consular Relations art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The defendants in both *Sanchez-Llamas* and *Breard* argued, in habeas petitions, that their convictions were improper because they had never been informed of this right. See *Sanchez-Llamas*, 548 U.S. at 339–42; *Breard*, 523 U.S. at 373.

147. The Supreme Court found the habeas claims procedurally barred under state law for one of the defendants in *Sanchez-Llamas* and for the sole defendant in *Breard*, as they had not raised the issue at trial or on appeal. *Sanchez-Llamas*, 548 U.S. at 360; *Breard*, 523 U.S. at 375–76. For the other defendant in *Sanchez-Llamas*, his "extraordinary" request for suppression of incriminating statements gathered without his knowledge of his Convention rights was denied on the grounds that it had "little if any connection to the gathering of evidence." *Sanchez-Llamas*, 548 U.S. at 360.

148. See, e.g., Steven Arrigg Koh, Note, "Respectful Consideration" After *Sanchez-Llamas v. Oregon*: Why the Supreme Court Owes More to the International Court of Justice, 93 Cornell L. Rev. 243, 246 (2007); Michael J. Larson, Comment, Calling All Consuls: U.S. Supreme Court Divergence from the International Court of Justice and the Shortcomings of *Sanchez-Llamas v. Oregon*, 22 Emory Int'l L. Rev. 317, 318 (2008).

149. See Brief of Former United States Diplomats as Amici Curiae in Support of Petitioners Mario A. Bustillo & Moises Sanchez-Llamas at 12–13, *Sanchez-Llamas*, 548 U.S. 331 (No. 04-10566), 2005 WL 3543101 (describing criticisms and diplomatic protests from the Inter-American Commission on Human Rights, the European Parliament, the U.N. High Commissioner for Human Rights, and the European Union regarding U.S. application of the Vienna Convention on Consular Relations).

reference" for treaty interpretation, given its expertise in the subject,[150] a foreign government would naturally be the most authoritative source for determining the meaning of its own laws. The courts have recognized the value of deference to expert bodies, at least for domestic courts; the Supreme Court has acknowledged the importance of deferring to the Federal Circuit in the context of patent law, for example.[151] Thus, as with ICJ judgments, there are good reasons for relying on the valuable input of foreign sovereign governments when they interpret their laws, even if it is under a respectful consideration framework.

### B. *International Comity and the Separation of Powers*

The judiciary does not manage the country's foreign relations.[152] For this reason, the courts have adopted a number of doctrines to avoid entangling themselves in foreign affairs. International comity counsels courts to approach cases "touching the laws and interests of other sovereign states" in a "spirit of cooperation."[153]

The courts have expressed reluctance to pass judgment on questions of foreign relations. The Supreme Court conceded in *Banco Nacional de Cuba v. Sabbatino*, for instance, that courts are "hardly . . . competent to undertake assessments of varying degrees of friendliness or its absence" in relations between the United States and other countries.[154] In *Empagran* the Justices questioned the petitioners' counsel as to how they could determine which approach to U.S. antitrust law would be "consistent with not antagonizing our allies."[155] When the petitioners' counsel directed the Court's attention to the seven foreign sovereign amicus briefs filed by some of the United States' most significant trading partners,[156] Justice Scalia expressed dissatisfaction, wondering what the positions would be of "other partners who have not been heard from"[157] and whether they

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150. *Sanchez-Llamas*, 548 U.S. at 383 (Breyer, J., dissenting).

151. See, e.g., United States v. Fausto, 484 U.S. 439, 465 n.11 (1988) ("Because its jurisdiction is confined to a defined range of subjects, the Federal Circuit brings to the cases before it an unusual expertise that should not lightly be disregarded.").

152. See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (acknowledging the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

153. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 543 n.27 (1987); see also Thomas Schultz & Niccolò Ridi, Comity in US Courts, 10 Ne. U. L. Rev. 280, 354–56 (2018).

154. 376 U.S. 398, 410 (1963). That the Court was unwilling to pass on the warmth of the United States–Cuba relationship less than two years after the Cuban Missile Crisis shows its strong aversion to assessing foreign relations.

155. Transcript of Oral Argument at 5, F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724), 2004 WL 1047902, at *10 [hereinafter *Hoffmann-LaRoche* Oral Argument].

156. Id. at 13–14.

157. Id. at 14, 48.

would accord with the views of those states which had filed with the Court. Distant as they are from the bodies responsible for conducting U.S. foreign policy, courts have traditionally declined to make decisions that may harm the United States' relations with foreign powers absent more direct guidance.

The impact the courts can have on U.S. foreign relations is not merely hypothetical. The Supreme Court's decisions in *Breard* and *Sanchez-Llamas* have brought wide condemnation from the international community for failing to recognize individual rights under the Vienna Convention on Consular Relations and the procedural safeguards necessary to protect those rights.[158] In *McNab*, the Honduran government argued that the court's reinterpretation of Honduran law would "dramatically harm the trading relationship between Honduras and the United States" and could "only result in distrust that will produce less cooperation and less trade overall."[159] And the Chinese Ministry of Commerce in its amicus brief to the district court in *Vitamin C I* directly threatened that, if the court found jurisdiction, "[i]t cannot be denied that the possibility of insult to China is significant."[160] By lodging an amicus brief with the court in the first place, the foreign sovereign is unequivocally demonstrating that it takes a special interest in the outcome of the litigation. While some judges have argued that to decide cases based on the opinions of foreign sovereigns is itself "conducting foreign policy,"[161] the distinct possibility remains that a court decision can easily have unintended foreign policy implications—especially one imposing $147 million in damages, as in *Vitamin C I*.[162]

Take, for example, a still-ongoing dispute between Russia and the U.S.-based Chabad-Lubavitch Hasidic group. The group has been litigating claims in U.S. courts since 2004 seeking a collection of books and documents assembled by its historical leaders and held by the Russian government since World War II.[163] The District Court for the District of Columbia ordered Russia to turn over the books to the plaintiffs in 2006, rejecting its act of state, foreign sovereign immunity,

158. See Koh, supra note 148, at 270.

159. Honduras *McNab* Brief, supra note 8, at 20.

160. China *Vitamin C* Brief, supra note 62, at 22; see also *Vitamin C I*, 584 F. Supp. 2d 546, 557 n.10 (E.D.N.Y. 2008) (taking note of this threat in the Chinese Ministry's brief).

161. See, e.g., Patrickson v. Dole Food Co., 251 F.3d 795, 803–05 (9th Cir. 2001) ("Federal judges cannot dismiss a case because a foreign government finds it irksome . . . . If courts were to take the interests of the foreign government into account, they would be conducting foreign policy by deciding whether it serves our national interests to continue with the litigation . . . .").

162. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1871–72 (2018).

163. Spencer S. Hsu, U.S. Judge Fines Russia $43.7 Million in Diplomatic Feud over Jewish Collection, Wash. Post (Sept. 13, 2015), https://www.washingtonpost.com/local/crime/us-judge-fines-russia-437-million-in-diplomatic-feud-over-jewish-collection/2015/09/13/c6fce4f6-589e-11e5-abe9-27d53f250b11_story.html [https://perma.cc/WZ8M-H5KX].

and forum non conveniens arguments.[164] The D.C. Circuit affirmed,[165] and the Russian government then withdrew from the litigation altogether, believing that the "Court ha[d] no authority to enter Orders with respect to the property owned by the Russian Federation."[166] After Russia continued to ignore the district court's order, the plaintiffs moved for, and were granted, civil contempt sanctions of $50,000 per day.[167] Because Russia "continue[d] to disregard the Court's Order," the district court granted interim judgment on the accrued sanctions of $43.7 million in 2015.[168]

The United States government was not silent throughout the litigation. The Department of State entered a statement of interest opposing the sanctions, arguing that "litigation in this case has both had an adverse impact on relations between the United States and Russia and discouraged resolution of this dispute."[169] The district court rejected the Department of State's arguments, finding "such a vague concern" as injury to foreign relations to be unpersuasive and rejecting the idea that Russia's response to the litigation "should have any bearing on the Court's decision."[170] The Russian Foreign Ministry referred to the sanctions as "absolutely unlawful and provocative," and, as the State Department had warned, the Russian government responded to them with "tit-for-tat" litigation against the United States as well as a ban on all state-run museums in Russia loaning artwork to any museums in the United States.[171] The district court's opinion in *Agudas Chasidei Chabad* was that, once it had "considered the United States' position" on the foreign policy implications and granted the government "some measure of deference," it was free to dismiss the State Department's concerns about foreign policy risks.[172] The subsequent response of the Russian government shows the damage a court can work when it dismisses the foreign policy concerns at play in a judgment involving foreign sovereigns.

The respectful consideration standard is insufficient in light of these risks. Many commentators criticized the application of this standard to

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164. Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 466 F. Supp. 2d 6, 31 (D.D.C. 2006).

165. Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 528 F.3d 934, 955 (D.C. Cir. 2008).

166. Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 729 F. Supp. 2d 141, 144 (D.D.C. 2010).

167. Chabad v. Russian Fed'n, 915 F. Supp. 2d 148, 154–55 (D.D.C. 2013).

168. Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 128 F. Supp. 3d 242, 244, 249 (D.D.C. 2015); see Hsu, supra note 163.

169. *Agudas Chasidei Chabad*, 128 F. Supp. 3d at 247.

170. Id. at 248–49.

171. Hsu, supra note 163.

172. See *Agudas Chasidei Chabad*, 128 F. Supp. 3d at 249.

International Court of Justice rulings in *Breard* and *Sanchez-Llamas*.[173] Even some who supported the Court's ruling considered the respectful consideration standard to be cover for what was essentially a complete lack of deference.[174] The first cases to apply the new standard since *Animal Science Products* would seem to confirm this apprehension. In one case, the court appeared to consider deference to the foreign sovereign as optional altogether.[175] Courts have not deferred to foreign sovereigns in most of the cases applying respectful consideration since *Animal Science Products*.[176] "Respectful consideration" does indeed appear to be a

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173. See, e.g., Andreas L. Paulus, From Neglect to Defiance? The United States and International Adjudication, 15 Eur. J. Int'l L. 783, 804 (2004); Steven G. Stransky, *Sanchez-Llamas v. Oregon*: A Missed Opportunity in Treaty Interpretation, 20 St. Thomas L. Rev. 25, 27 (2007).

174. See Paulus, supra note 173, at 804 (referring to the respectful consideration standard as "an exercise in inconsequential politeness"); William E. Thro, American Exceptionalism: Some Thoughts on *Sanchez-Llamas v. Oregon*, 11 Tex. Rev. L. & Pol. 219, 227 (2006) ("'[R]espectful consideration' has no substantive significance beyond mere courtesy.").

175. Petersen Energía Inversora S.A.U. v. Argentine Republic, 895 F.3d 194, 209 (2d Cir. 2018) ("[*E*]*ven if we were to accord deference* to Argentina's legal expert pursuant to *In re Vitamin C Antitrust Litigation*, we conclude that his opinion does not establish what Argentina says it does." (emphasis added)). *Petersen Energía* concerned a claim by a shareholder of a petroleum company that the Argentine government had nationalized. Id. at 199–203. The plaintiff alleged that the nationalization was done in violation of the company's bylaws, which Argentina itself had written when it first privatized the company in the 1990s. Id. Argentina introduced expert testimony in an attempt to demonstrate that, under Argentine law, its decision to nationalize the company was a sovereign action and that corporate bylaws could not limit its discretion to carry out such an action. Id. at 208. Accordingly, Argentina claimed immunity from U.S. court jurisdiction under the Foreign Sovereign Immunities Act (FSIA). Id. at 205–06; see also 28 U.S.C. §§ 1604–1605 (2012). Ultimately, the Second Circuit rejected Argentina's arguments, finding that it was not protected by either the FSIA or the act of state doctrine, and remanded the case to the Southern District of New York for consideration on the merits. See *Petersen Energía*, 895 F.3d at 212. Deference to the Argentine government's arguments is arguably inappropriate altogether, given that Argentina was a party to the suit itself. The court referenced the *Animal Science Products* standard but did not explain how it would interpret or apply the standard to Argentina's arguments. Id. at 208. The court's somewhat cursory treatment of the question of deference suggests, unsurprisingly, a markedly less deferential approach to foreign sovereign submissions under the *Animal Science Products* standard.

176. See, e.g., Funk v. Belneftekhim, 739 F. App'x 674, 678 (2d Cir. 2018) (refusing to consider the defendant's foreign sovereign submission on the grounds that "a federal court is neither bound to adopt a foreign government's characterization [of its laws] nor required to ignore other relevant materials" (internal quotation marks omitted) (quoting Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1873 (2018))); A.O.A. v. Rennert, 350 F. Supp. 3d 818, 850–51 (E.D. Mo. 2018) (declining to defer to defendants' submissions regarding the government of Peru, finding that they were "not persuasive either way regarding Peru's interest in this case"), appeal docketed, No. 18-3552 (8th Cir. Nov. 30, 2018). But see Liuksila v. Turner, 351 F. Supp. 3d 166, 182 (D.D.C. 2018) (deferring to the foreign sovereign's interpretation of its laws because the "[p]etitioner offer[ed] no evidence, in the form of a legal opinion or otherwise, that would allow the court to reach a different conclusion than the Finnish court did about its own law").

low standard of deference, particularly in light of the higher standards the varying circuit courts had developed before *Animal Science Products*.

### C. *Areas of Concern for the Respectful Consideration Standard*

The concerns the international comity doctrine seeks to address can seem unimportant in abstract terms. Section II.C provides examples of legal areas in which courts may be most likely to encounter tension between the United States and foreign nations. These areas illustrate the importance of a more robust respectful consideration standard that will consistently and transparently ensure that comity is given to foreign sovereigns in U.S. courts.

1. *U.S. Trade Policy.* — The United States' international trade policy is one area in which the risks of disregarding foreign sovereigns, and the corresponding importance of deference to their submissions, are plainly illustrated. Extraterritorial application of U.S. antitrust law attracts foreign sovereign amicus submissions more than perhaps any other body of law,[177] and it is closely connected with the trade policies of both the United States and foreign countries.[178]

As *Animal Science Products* itself demonstrates, antitrust law can be treacherous grounds for courts applying foreign law. Since *Hartford Fire*, antitrust law has frequently been applied extraterritorially, a move that many countries find distasteful.[179] Foreign sovereigns often become involved in order to protect domestic industries from treble damages, an "internationally contentious" practice in U.S. antitrust cases,[180] or simply to resist interference with their own competition law. The foreign sovereign compulsion defense to antitrust liability leads foreign governments to submit arguments based on their own domestic law,[181] as was the case in *Animal Science Products*. A foreign government has a natural incentive to protect its industries when they are targeted in antitrust cases given that, in order to have become the target of antitrust litigation in the first place, defendant corporations must be successful outfits in their

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177. See Martyniszyn, supra note 51, at 611–13.

178. Dingding Tina Wang, Note, When Antitrust Met WTO: Why U.S. Courts Should Consider U.S.-China WTO Disputes in Deciding Antitrust Cases Involving Chinese Exports, 112 Colum. L. Rev. 1096, 1111–12 (2012) ("[World Trade Organization (WTO)] law continues to focus on state [anticompetitive] conduct while antitrust law mostly targets private anticompetitive conduct. But national antitrust law and WTO law interact and are likely to conflict when private anticompetitive conduct is mixed with state conduct.").

179. See Martyniszyn, supra note 51, at 630–31; see also United Kingdom *Hoffmann-La Roche* Brief, supra note 67, at 12 ("[T]he Governments in general are opposed to assertions of extraterritorial jurisdiction in private antitrust cases where foreign claimants seek to recover from foreign defendants solely for foreign injuries not incurred in the country in which the private suit is filed.").

180. Martyniszyn, supra note 51, at 612.

181. Qingxiu Bu, Neither Rock Nor Hard Place? The Foreign Sovereign Compulsion Defence in Antitrust Litigation, 6 J. Int'l Disp. Settlement 427, 431–36 (2015).

country of origin almost by definition.[182] Thus the risk of offending foreign sovereigns becomes acute when that sovereign has entered an antitrust case to make its views and interests known.

These concerns are heightened in the current atmosphere around international trade, as the issue has moved into the political mainstream in many countries. As tit-for-tat trade disputes arise between the United States and countries around the world,[183] the possibility exists that a court judgment can serve as the trigger for an unintended trade dispute. Under the respectful consideration standard, even if a foreign sovereign strenuously objects to ongoing litigation, no great weight is given to the possibility of setting off an international incident; that concern is just one factor among many, if it is one at all.[184]

Although the proper balance between executive and congressional control over trade policy has come under question in recent years,[185] the President, not the courts, has traditionally been considered the main arbiter of trade policy since at least the mid-twentieth century.[186] Because antitrust and trade law are interconnected,[187] courts may create unintended ramifications in trade law as a result of their judgments in antitrust contexts if the respectful consideration standard remains so open ended. Any administration undoubtedly retains the authority to align U.S. trade policy as it wishes, but should courts be perceived as part of a general effort, alongside the political branches, to combat the

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182. Countries are generally incentivized to tolerate internationally anticompetitive behavior by companies in their territory because gains accrue to domestic companies while losses are felt only by foreign purchasers. See Brendan Sweeney, Export Cartels: Is There a Need for Global Rules?, 10 J. Int'l Econ. L. 87, 88, 92–93, 95 (2007); Wang, supra note 178, at 1111–12. This would be true a fortiori for state-owned enterprises. See, e.g., D. Daniel Sokol, Competition Policy and Comparative Corporate Governance of State-Owned Enterprises, 2009 BYU L. Rev. 1713, 1774 (describing the many forms "bias by the government to protect [state-owned enterprises] may take," including exemption from taxes or immunity from local antitrust law).

183. See, e.g., Thomas Duesterberg, The Importance of the Truce in U.S.-EU Trade Disputes, Forbes (July 26, 2018), https://www.forbes.com/sites/thomasduesterberg/2018/07/26/the-importance-of-the-truce-in-u-s-e-u-trade-disputes/ [https://perma.cc/WAG2-J5GA].

184. Certainly in many cases a court will consider the risk to foreign relations as an important factor and emphasize it when it is relevant; the respectful consideration standard gives a court that freedom. Without a more carefully structured standard, however, it remains entirely up to a judge's discretion, and often their acuity, to decide when the foreign relations concerns are sufficiently heightened.

185. See, e.g., Siobhan Hughes & Vivian Salama, Senate Takes Symbolic Step to Assert Power on Trade, Wall St. J. (July 11, 2018), https://www.wsj.com/articles/senate-takes-step-to-assert-power-on-trade-1531328759 (on file with the *Columbia Law Review*).

186. See John Linarelli, International Trade Relations and the Separation of Powers Under the United States Constitution, 13 Dick. J. Int'l L. 203, 205 (1995); Theresa Wilson, Note, Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power, 47 Drake L. Rev. 141, 142, 166–69 (1998).

187. See supra note 178 and accompanying text.

"predatory" trade policies of particular countries,[188] this may serve to undermine the legitimacy of U.S. courts as independent and unbiased in some countries' views.[189]

The United States government has itself recognized the importance of proper deference to its own interpretation of U.S. trade laws. The current U.S. administration has refused to permit appointment of new judges to the World Trade Organization's (WTO) Appellate Body, which will leave the WTO unable to enforce international trade law.[190] The United States argued that the Organization has "consistently overstepped its authority . . . by interpreting WTO members' domestic laws."[191] Reciprocity is one of the key objectives of international comity;[192] if the United States wishes for other countries to defer to its interpretation of its domestic law, it should ensure that other countries' interpretations are treated with a similar degree of deference in its own courts.

2. *International Discovery Rules.* — Another area of U.S. law prone to draw the ire of foreign countries is discovery.[193] United States discovery rules are alien to most jurisdictions, which adopt far less permissive approaches to evidence gathering by private litigants.[194] Some jurisdictions

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188. See Lesley Wroughton, Pompeo Says China Trade Policies 'Predatory,' Reuters (June 18, 2018), https://www.reuters.com/article/us-usa-trade-pompeo/pompeo-says-china-trade-policies-predatory-idUSKBN1JE2QK [https://perma.cc/EJN3-QH25].

189. This could be particularly damaging if the current administration's trade policy continues to attract widespread criticism from other countries. See, e.g., Tom Miles, U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms, Reuters (Aug. 27, 2018), https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O [https://perma.cc/Q64A-YVTV] (noting that the U.S. position toward the WTO has attracted repeated petitions from sixty-seven WTO member states requesting that the United States change its policy).

190. See id.; see also Nikos Chrysoloras & Bryce Baschuk, EU Seeks to Break U.S. Stranglehold on WTO, Bloomberg (May 27, 2019), https://www.bloomberg.com/news/articles/2019-05-27/eu-eyes-end-run-around-u-s-action-set-to-hobble-wto-influence [https://perma.cc/7HWB-HA9P].

191. See Miles, supra note 189.

192. See supra Part I.B.2.

193. See Restatement (Third) of Foreign Relations Law of the United States § 442 Reporters' Notes 1 (Am. Law Inst. 1987) (describing requests for documents and evidence for use in U.S. litigation as a major source of friction with foreign countries); Andrew N. Vollmer, Revive the Hague Evidence Convention, 4 ILSA J. Int'l & Comp. L. 475, 476 & n.4 (1998) (describing foreign countries' resentment to U.S. discovery rules as background to the ratification of the Hague Evidence Convention); Diego Zambrano, A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery, Berkeley J. Int'l L., no. 1, 2016, at 157, 157 ("No feature of U.S. law has rankled foreign nations more than the supposed 'legal imperialism' of discovery requests . . . . China, France, Germany, and Switzerland have threatened the stability of bilateral relations with the United States due to overbroad transnational discovery requests.").

194. See Zahava Moerdler, A Home-Court Advantage?: International Discovery in a Global Economy, Pretrial Prac. & Discovery, Summer 2018, at 16, 16.

resist the application of U.S. discovery rules,[195] often through "blocking statutes" or secrecy laws,[196] and many governments reserve an active role for themselves in the approval or denial of discovery requests sent by U.S. litigants or courts.[197]

The United States has ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which the parties drafted with the purpose of harmonizing international discovery procedures among signatory states.[198] The Supreme Court has determined, however, that U.S. courts are able to compel foreign parties to provide evidence in accordance with ordinary U.S. rules of discovery, rather than through the Convention procedures, even if this means overriding the foreign country's domestic law.[199] Not surprisingly, foreign sovereigns have found this rule somewhat disturbing. The Swiss government, for instance, strongly opposed this interpretation of the Hague Evidence Convention and threatened that enforcement of U.S. discovery rules would jeopardize the future of Swiss compliance with the Convention.[200]

A decision to ignore a country's blocking statute or secrecy law and order discovery is subject to a balancing test, however. The Court has emphasized the importance of looking at the extent to which compliance with discovery would undermine the interests of the foreign state involved (as well as where noncompliance with discovery would under-

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195. Id. at 19. Germany, for example, does not allow discovery of documents and permits only limited deposition of witnesses, consistent with its own model of strictly limited pretrial discovery. See Jan W. Bolt & Joseph K. Wheatley, Private Rules for International Discovery in U.S. District Court: The U.S.-German Example, 11 UCLA J. Int'l L. & Foreign Aff. 1, 20 (2006).

196. Monica Hanna & Michael A. Wiseman, Discovering Secrets: Trends in U.S. Courts' Deference to International Blocking Statutes and Banking Secrecy Laws, 130 Banking L.J. 692, 693 (2013). Blocking statutes prohibit the production of certain documents for litigation in foreign countries. Id. at 692–93. Some countries, notably Switzerland, enforce such statutes with criminal penalties. See, e.g., Motorola Credit Corp. v. Uzan, No. 02 Civ. 666(JSR)(FM), 2003 WL 203011, at *7 (S.D.N.Y. Jan. 29, 2003) (finding that the defendant and its employees would be exposed to criminal sanctions in Switzerland if it responded to the plaintiffs' subpoena).

197. See Hanna & Wiseman, supra note 196, at 693 (describing French Penal Code Law No. 80-358, which subjects discovery requests to the approval of the French Ministry of Justice); David E. Teitelbaum, Strict Enforcement of Extraterritorial Discovery, 38 Stan. L. Rev. 841, 847–48 (1986) (discussing the British approach to transnational discovery under one 1980 statute, which gave the British Secretary of State broad power to block foreign discovery requests).

198. See Vollmer, supra note 193, at 476–77.

199. See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 542 (1987) (declining to adopt a "rule of law that would require first resort to Convention procedures whenever discovery is sought from a foreign litigant"); Hanna & Wiseman, supra note 196, at 694.

200. See Marc G. Corrado, Comment, The Supreme Court's Impact on Swiss Banking Secrecy: *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 37 Am. U. L. Rev. 827, 835 (1988).

mine important interests of the United States);[201] this factor "directly addresses the relations between sovereign nations."[202] Foreign sovereigns often enter amicus briefs to resist discovery orders and to underline the importance of their government interests in the litigation.[203] A court's ruling that gives weak deference to foreign sovereigns in this area risks upsetting the foreign government and jeopardizes reciprocity in international discovery rules.[204] A court's disregard of arguments pertaining to foreign criminal law might also, not unlike *McNab*, leave those subject to U.S. discovery orders stuck between the threat of foreign prosecution and contempt orders from U.S. courts.

The respectful consideration standard does little to inform courts faced with these foreign policy risks on what the Supreme Court and the executive view as the relevant concerns. To the extent *Animal Science Products* minimizes the connection between foreign sovereign amicus briefs and international comity,[205] the new standard may even aggravate the risks. An unstructured standard of deference creates an unnecessary risk that a foreign nation will take offense to a court's judgment and endangers U.S. foreign policy interests as a result.

## III. TOWARD AN ELABORATION OF RESPECTFUL CONSIDERATION

In light of these risks, it is critical that respectful consideration be reformed to ensure a consistent and formalistic treatment of foreign sovereign submissions. If the Supreme Court were to elaborate a more substantive respectful consideration standard using a multistep deference

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201. See *Société Nationale*, 482 U.S. at 544 & n.28 (citing Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Am. Law Inst., Tentative Draft No. 7, 1986)); Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429, 438 (E.D.N.Y. 2008) (citing *Société Nationale* when emphasizing the importance of conflict between foreign and U.S. interests). Other relevant factors include (i) "the importance to the . . . litigation of the documents or other information requested;" (ii) "the degree of specificity of the request;" (iii) "whether the information originated in the United States;" and (iv) "the availability of alternate means of securing the information." *Société Nationale*, 482 U.S. at 544 n.28 (alteration in original).

202. *Strauss*, 249 F.R.D. at 439 (internal quotation marks omitted) (quoting Reino de Espana v. Am. Bureau of Shipping, No. 03CIV3573LRSRLE, 2005 WL 1813017, at *3 (S.D.N.Y. Aug. 1, 2005)).

203. See, e.g., Brief of Amicus Curiae, Federal Republic of Germany in Support of Appellants' Position that the Hague Convention Should Be Used for Jurisdictional Discovery at 1, In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288 (3d Cir. 2004) (No. 02-4272), 2003 WL 24136399 (referring to U.S. discovery rules applied abroad as an "intrusion into [Germany's] sovereignty"); Amicus Brief of Government of Switzerland at 1–2, 13–15, United States v. UBS AG, No. 09-20423-CIV, 2009 WL 2241122 (S.D. Fla. July 7, 2009), 2009 WL 1612394 (noting that because Switzerland "considers the taking of evidence within its territory to be a domestic judicial function," any unilateral order by a U.S. court demanding the release of confidential information would "violate Swiss sovereignty and international law").

204. See Zambrano, supra note 193, at 157.

205. See supra notes 139–141 and accompanying text.

analysis, district and circuit courts would have helpful guidance on what international comity factors the Court believes are relevant to the analysis, while still retaining ultimate discretion in any particular case.[206]

This Note does not advocate that foreign sovereign submissions be accorded conclusive deference, or that the Supreme Court was wrong in *Animal Science Products* to reject the more deferential approaches the courts of appeals had taken when considering foreign sovereign submissions. In many cases it will be inappropriate to side with a foreign sovereign. In *Animal Science Products*, for instance, China's submission directly contradicted previous statements China had made about its competition law to the WTO.[207] There is always a risk that a foreign sovereign could abuse a position of absolute deference. Moreover, the

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206. A multifactor analysis is a common approach to weighing interests in international comity issues. For example, when a U.S. court considers whether it should abstain from rendering a judgment on comity grounds, it will generally consider ten factors derived from the Ninth Circuit's *Timberlane* and the Third Circuit's *Mannington Mills* cases. These include:

> 1. Degree of conflict with foreign law or policy; 2. Nationality of the parties; 3. Relative importance of the alleged violation of conduct here compared to that abroad; 4. 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); see also Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 614–15 (9th Cir. 1976) (laying out similar factors); Benjamin G. Bradshaw, Stephen McIntyre & Scott Schaeffer, Extraterritoriality After *Vitamin C*: Are We Between a Rock and a Hard Place?, Antitrust, Fall 2018, at 50, 51–52.

No single factor is decisive in the analysis. See Trader Joe's Co. v. Hallatt, 835 F.3d 960, 972–73 (9th Cir. 2016) (setting out several of the comity factors and noting that "[n]o one factor is dispositive; each factor 'is just one consideration to be balanced'" (quoting Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 428 (9th Cir. 1977))). The Supreme Court has hinted, however, that the first factor—the degree of conflict with a foreign country's laws or policy—is the most important. See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798–99 (1993) ("The only substantial question in this litigation is whether 'there is in fact a true conflict between domestic and foreign law.' . . . We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." (quoting *Société Nationale*, 482 U.S. at 555 (Blackmun, J., concurring in part and dissenting in part))). Conflict with a foreign country's laws or policies is directly implicated when a foreign government enters an amicus brief regarding its own laws—illustrating the importance of a court treating such a brief with deference.

207. See Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1871 (2018).

respectful consideration standard reflects the views of the U.S. Justice and State Departments, which advocated for this standard in an amicus brief to the Court in *Animal Science Products*.[208] The problem with the respectful consideration standard is not that it is *wrong*, but that it is *incomplete*. A robust multistep framework under the standard would ensure that courts consistently identify and analyze the relevant considerations. Even if a court ultimately concludes that the foreign sovereign submission is not to be credited, a less vague standard would assure all parties—including the court itself—that the decision has been properly considered.

When faced with the question of deference to foreign sovereigns in the past, scholars and courts have commonly turned to the *Chevron* and *Skidmore* schemes in U.S. administrative law to provide a domestic analogy.[209] Many of the same rationales for *Chevron* deference are equally present for foreign sovereigns, especially subject-matter expertise and a desire to avoid infringing on a legislative or regulatory scheme created by the foreign country.[210] But important rationales are missing for foreign sovereigns as well. For example, U.S. courts cannot supervise the regulatory and adjudicatory processes of foreign sovereigns in the way they can for U.S. administrative agencies.[211] Ultimately, the fact that the Supreme Court did not cite to any U.S. administrative law decision in *Animal Science Products* despite the petitioners' and the respondents' *Chevron*-based arguments in their briefs seems to indicate that the Court does not

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208. See U.S. *Animal Science Products* Brief, supra note 141, at 16–21 ("Federal courts deciding questions of foreign law . . . are sometimes presented with the views of the relevant foreign government. Those views always warrant respectful consideration, and they will ordinarily be entitled to substantial weight. But the appropriate weight in each case will depend on the circumstances."). Although the Supreme Court did not cite to the United States' brief in its opinion aside from a minor factual point, see *Animal Sci. Prods.*, 138 S. Ct. at 1875 n.6, the Court explicitly noted the connection between the respectful consideration standard and deference to interpretations of state law by state attorneys general, which are also accorded respectful consideration; this was one of the United States' principal arguments in its brief. See *Animal Sci. Prods.*, 138 S. Ct. at 1874 (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 76 n.30 (1997), to note that respectful consideration is given to state attorneys general when interpreting the laws of their own states); U.S. *Animal Science Products* Brief, supra note 141, at 26–27 (same).

209. See, e.g., Eichensehr, supra note 16, at 364; see also U.S. *Animal Science Products* Brief, supra note 141, at 19–20.

210. See Chevron v. NRDC, 467 U.S. 837, 865–66 (1983) (observing that Congress may have "consciously desired [administrative agencies] to strike the balance" between conflicting policies, "thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so"); see also, e.g., Michael Herz, *Chevron* Is Dead; Long Live *Chevron*, 115 Colum. L. Rev. 1867, 1881 (2015).

211. See Herz, supra note 210, at 1881.

find such analogies persuasive.[212] At any rate, one need not look so far afield to find analogous cases that could guide the elaboration of the respectful consideration standard.

### A. *Justice Breyer's Dissent in* Sanchez-Llamas

Justice Breyer dissented in *Sanchez-Llamas v. Oregon* and, in doing so, gave a much more thorough "respectful consideration" to the *Avena*[213] and *LaGrand*[214] decisions of the International Court of Justice.[215] In considering whether the Vienna Convention on Consular Relations created judicially enforceable individual rights and could justify setting aside Oregon and Virginia procedural default rules, Justice Breyer approached the question in several steps. First, he looked to the text and drafting history of the Vienna Convention to derive an initial understanding of its meaning.[216] Second, he compared this tentative understanding to the ICJ's interpretation of the treaty to determine whether they were incompatible.[217] Third, he considered what factors militated in favor of giving more or less weight to the ICJ's interpretation.[218] Last, he suggested that the Court should make a good faith effort to rule in accordance with the ICJ's judgment unless conflict between the two interpretations was inevitable.[219]

It is possible to derive rules of general application from Justice Breyer's treatment of ICJ opinions in *Sanchez-Llamas*. These rules could provide the framework of a structured multistep test that would ensure that international comity concerns are fully addressed when considering foreign sovereign submissions. Under this framework, a court would first carry out its own interpretation of the foreign law, looking to any factors that might be helpful under Federal Rule of Civil Procedure 44.1. Having

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212. See *Animal Sci. Prods.*, 138 S. Ct. 1865; Reply Brief for Petitioners at 4, *Animal Sci. Prods.*, 138 S. Ct. 1865 (No. 16-1220), 2018 WL 1846870; Brief for Respondents at 31–32, *Animal Sci. Prods.*, 138 S. Ct. 1865 (No. 16-1220), 2018 WL 1605599.

213. Avena and Other Mexican Nationals (Mex. v. U.S.), Order, 2003 I.C.J. 99 (May 22).

214. LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. 466 (June 27).

215. Sanchez-Llamas v. Oregon, 548 U.S. 331, 365–98 (2006) (Breyer, J., dissenting).

216. See id. at 387 (looking to the treaty text and history to understand the import of the *Avena* and *LaGrand* decisions).

217. See id. (determining that, to show respectful consideration, the Court "must read the [ICJ] opinions in light of the Convention's underlying language and purposes and ask whether, or to what extent, they require modification of a State's ordinary procedural rules").

218. See id. at 382–84 (underlining, for example, the importance of "the ICJ's expertise in matters of treaty interpretation, a branch of international law").

219. See id. at 397–98 ("I would seek to minimize the Convention's intrusion . . . into the workings of state legal systems while simultaneously keeping faith with the Convention's basic objectives. . . . The interpretation of the Convention that I would adopt is consistent with the ICJ's own interpretation . . . .").

arrived at an interpretation, the court would then look to whether the foreign sovereign's submission was compatible with this interpretation. If it were not, the court would then examine the credibility of the foreign sovereign's submissions and the reasons for deferring to them. At this stage, the court could incorporate many of the factors that the Supreme Court proffered in *Animal Science Products*, including "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."[220] The court could then reconcile its interpretation with that given by the foreign government, to the extent warranted by the submission's credibility.[221]

This structured analysis will help to achieve the proper balance between a court's autonomy under Rule 44.1 and the respect owed to a foreign sovereign. Requiring a court to undertake its own analysis grounded in the text of the statute will ensure that it does not defer blindly to the foreign government, as some circuit courts had done before *Animal Science Products*. And while the court will still need to evaluate the credibility of a foreign government—with all the accompanying risk of insult—the second and fourth steps of this analysis, requiring the court to consider the compatibility of the interpretations and ultimately reconcile them to the extent possible, will ensure that the foreign sovereign's submission is not dismissed outright for interests such as consistency or finality.[222]

### B. *Deference to the Executive*

Under any framework, however, the executive branch should receive considerable deference. Courts have long recognized that the executive plays the central role in forming foreign policy[223] and is best positioned to advise a court on whether the risk of offense is negligible enough that the sovereign need not be deferred to.

Revisiting its ruling in *Pink*, the Court in *Animal Science Products* distinguished the conclusive effect given to a foreign sovereign's submis-

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220. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1868 (2018).

221. If the two interpretations were entirely incompatible, the factors commonly considered in the international comity analysis—and especially the relative interests of the United States and the foreign government in question, consistently identified as the most important factors in the analysis—could guide the court's determination of whether deference to the foreign government is appropriate. See supra note 206; see also supra notes 201–202 and accompanying text.

222. Cf. United States v. McNab, 331 F.3d 1228, 1242 (11th Cir. 2003) (rejecting the views of the Honduran government in favor of "consistency and reliability from foreign governments with respect to the validity of their laws").

223. See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 321 (1936); supra notes 152–157 and accompanying text.

sion in that case from the general rule of respectful consideration based on the reasoning that the declaration in *Pink* "was *obtained by the United States* through official 'diplomatic channels.'"[224] This seems to suggest, unsurprisingly, that the Supreme Court expects lower courts to give the U.S. government essentially conclusive authority when it is involved in foreign sovereign amici. Whenever the United States actively solicits the amicus, or enters its own amicus to the same effect, the court should consider it conclusive. In contrast, the relevant executive agency—most likely the Department of Justice or State—could eliminate any deference due to a foreign sovereign amicus by disagreeing with it in an amicus of its own.[225]

This would ensure that foreign policy concerns remain with the political branches. The courts already appear to follow this policy, albeit informally, in the context of treaty interpretation. Even after *Pfizer* and the shift to filing amicus briefs, the State Department continued to relay the positions of foreign governments in some cases involving treaty interpretation. In *Sumitomo Shoji America, Inc. v. Avagliano*, for instance, the Court cited to the views of the State Department conveyed in an amicus brief as well as diplomatic cables from the U.S. Embassy in Tokyo indicating that the Japanese and U.S. governments had reached an "identical position" as to the import of a treaty provision in the Friendship, Commerce and Navigation Treaty between Japan and the United States.[226] The Court found that these combined views were "entitled to great weight."[227] In *Abbott v. Abbott*, the Supreme Court similarly determined that a foreign sovereign's interpretation was due deference because it was "supported and informed by the State Department's view on the issue."[228] The participation of the executive branch in the litigation performs a "vetting" function, bolstering the court's confidence that a foreign sovereign can be trusted and that a particular course of action is in line with U.S. foreign policy goals.[229]

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224. *Animal Sci. Prods.*, 138 S. Ct. at 1874–75 (citing United States v. Pink, 315 U.S. 203, 218 (1942)).

225. The executive could also consider entering into a treaty, as other countries have done, that would permit the transfer of authoritative (though nonbinding) interpretations of domestic law between courts of different jurisdictions themselves, facilitating resolution of foreign law questions. See Inter-American Convention on Proof of and Information on Foreign Law art. 6, May 8, 1979, 1439 U.N.T.S. 107; European Convention on Information on Foreign Law art. 8, June 7, 1968, 720 U.N.T.S. 147.

226. 457 U.S. 176, 183–84 & n.10 (1982).

227. Id. at 184 n.10.

228. 560 U.S. 1, 15 (2010). The Court so deferred even though, as the dissent pointed out, the State Department's final interpretation "was possibly inconsistent with [its] earlier position" in the litigation. Id. at 41 (Stevens, J., dissenting).

229. See Godi, supra note 51, at 416 (describing the pre–*Zenith Radio* system of foreign participation by diplomatic notes as a "vetting process," "ensur[ing] that the Attorney General filtered and vetted foreign sovereigns' allegations before they reached the Court").

Courts would have to remain careful not to overinterpret the silence of the executive branch, however. The original decision to encourage foreign governments to file amicus briefs, rather than channel their grievances through the U.S. State Department, allowed the United States government to remain neutral and depoliticize litigation involving foreign sovereign interests while also enabling it to intervene when it so chose.[230] When noninvolvement became the norm, any affirmative act by the U.S. government came to appear more important.[231] Assuming that courts and the executive do not intend to return to a pre–*Zenith Radio* era where the executive is solely responsible for representing any government positions, this only underlines the importance of a respectful consideration standard that will ensure courts can autonomously give adequate weight to foreign government interests. A robust analysis under respectful consideration ensures the best of both situations: The executive can keep its conclusive authority when it chooses to intervene, but it can equally rest assured that the courts will treat foreign sovereigns with appropriate respect on their own.

## CONCLUSION

Giving more substance to the respectful consideration standard will help courts navigate the foreign policy dangers that arise whenever sovereigns enter U.S. litigation as amici. The respectful consideration standard should be elaborated to accord with the principle expressed in other doctrines, such as international comity, that courts should not unduly interfere with U.S. foreign policy or international trade relations. A robust multistep test would ensure that courts are mindful of international comity and foreign relations when interpreting foreign law and will better equip them to evaluate foreign sovereign amici.

230. Martyniszyn, supra note 51, at 615.

231. Id. at 615–16.