UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE **VITAMIN C ANTITRUST LITIGATION** **This Document Relates To:** **ALL CASES**	MASTER FILE 06-MD-1738 (BMC)(JO)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR CERTIFICATION OF THE COURT'S SEPTEMBER 1, 2011 ORDER FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. §1292(b)

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PRELIMINARY STATEMENT

Defendants respectfully request the Court to amend its September 1, 2011 Memorandum Decision and Order ("Order") (D.E. 440) to include a statement that the Order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation. In particular, Defendants submit that there is substantial ground for difference of opinion as to the following controlling legal issues:

(i) Whether it is error, as a matter of law, for a court to decline to accept the statements of a foreign government regarding the nature of its regulatory system and the existence of sovereign compulsion, particularly where the refusal to do so results from the court rejecting the veracity or completeness of official representations of the foreign government regarding the purpose, nature and operation of its domestic laws and regulations;

(ii) Whether, in this case, it was error, as a matter of law, for the Court to reject the defense of foreign sovereign compulsion based upon the Court's view of the "plain meaning" of Chinese law and its review of the factual record, rather than deferring to the statements of the Chinese Government (and other information in the record regarding the nature and operation of Chinese regulatory policies), particularly in light of the admittedly unique characteristics of Chinese law including the system of self-disciplinary regulation under the supervision of a Chinese Government agency; and

(iii) Whether the Court should have dismissed the litigation pursuant to principles of international comity, particularly in light of the availability of potential redress on a government-to-government basis through diplomacy or in proceedings before the World Trade Organization ("WTO").

On September 1st, the Court decided, as a matter of law, pursuant to Federal Rule of Civil Procedure 44.1, that the actions challenged by Plaintiffs in this case were not taken as a result of foreign sovereign compulsion by the People's Republic of China notwithstanding the directly contrary statements of China's Ministry of Commerce. That decision effectively resolved the issue of liability in this case because, as the Court correctly notes, the existence of the underlying conduct in question is not disputed.

Defendants respectfully disagree with that determination and, further, believe that it was based on an erroneous approach to the issue by the Court. However, it is not our purpose here to persuade the Court that it erred; the Court, obviously, has considered its ruling with great care and has rendered an opinion which (however much Defendants may disagree with it) is thorough and clear in laying out the basis for the Court's conclusions. Rather, our purpose is to urge the Court to permit its ruling to be reviewed on an interlocutory basis pursuant to 28 U.S.C. §1292(b).

As more fully set forth below, Defendants believe that this case meets the standard for interlocutory review, in that there is both substantial ground for difference of opinion with respect to the purely legal issues enumerated above and resolution of those issues has the potential to materially advance the ultimate termination of this litigation. If the Court of Appeals were to accept Defendants' arguments, the cases would be dismissed. Further, in light of the Chinese Government's central role in this litigation and its representation to the Court that it "has attached great importance" to these cases, there is little doubt that the Court's ruling has potentially important implications for relations between the United States and China—a point which this Court has forthrightly acknowledged. *See* Order at 34. Although the role of the judiciary, of course, is to decide cases based on the court's view of the law and facts, numerous cases (indeed, the doctrine of international comity itself) recognize that foreign relations issues are a legitimate subject for consideration, at least in terms of the process of adjudication. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc.*, 473 U.S. 614 (1985) (considering international comity and foreign relations issues in determining whether to enforce arbitration clause); *F. Hoffman-LaRoche v. Empagran*, 542 U.S. 155 (2004) (claims involving solely foreign harm dismissed based in part on considerations of international comity); *see also Karaha*

Bodas Co., LLC v. Perusahaan Pertambagan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 81 (2d Cir. 2002) (accepting appellate jurisdiction pursuant to 1292(b) certification where interaction of domestic and foreign law "posed a substantial ground for difference of opinion" and resolution of the issue would advance the ultimate termination of the litigation). In this case, Defendants respectfully submit that it would be particularly appropriate for the Court to allow its ruling, which turns directly upon the Court's appraisal of the role of the Chinese Government and its statements to the Court, to be considered definitively on appeal at the earliest appropriate time. With the Court now having resolved the issue of foreign sovereign compulsion as a matter of law, Defendants respectfully submit that that time is now.

DISCUSSION

I. There Is Substantial Ground for Difference of Opinion with Respect to the Deference To Be Afforded the Statements of a Foreign Government Regarding the Existence of Foreign Sovereign Compulsion.

Defendants submit that there is a controlling question of law with respect to the effect to be given to the statements of the People's Republic of China regarding the nature of its regulation of vitamin C exports in light of the Chinese Government's unequivocal representations that the conduct described in Plaintiffs' complaint was compelled. In its recent decision, the Court declined, as a matter of law, to defer to the statements submitted by the Chinese Government. The Court further stated that it regarded such statements as being a "*post-hoc*" rationalization by the Chinese Government intended simply to protect Defendants in this case. Order at 47.

That conclusion presents a controlling issue of law as to which, Defendants respectfully submit, there is reasonable ground for disagreement. The grounds for such a difference of opinion exist in light of (a) decisions of the Supreme Court and the U.S. Court of Appeals for the Second Circuit, (b) the position taken by the United States as *amicus curiae* in the *Japanese*

Consumer Electronics Products Litigation ("*Matsushita*") and (c) the Antitrust Division's *Guidelines for International Operations*. Those authorities support the proposition that definitive statements of a foreign sovereign government regarding the nature of its domestic law and, in particular, the existence of compulsion in an antitrust case, should be accepted as conclusive by courts of this country or, at a minimum, be accorded "substantial deference." In this case, by contrast, the Court gave no deference to the statements of the Government of China based upon its determination that such statements involved a "*post-hoc* attempt to shield [D]efendants' conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period in question." Order at 47. The Court's refusal to accept the statements of the Chinese Government, as well as its questioning of the motives and candor of the Government's statements, also implicate serious and sensitive issues of foreign relations between the United States and China and raise concerns about the separation of powers and the delegation of the conduct of foreign affairs to the Executive Branch.

As the Court's opinion notes, there is some uncertainty as to the exact degree of deference to be accorded to the statements of a foreign sovereign regarding the nature and operation of its domestic laws, both as a general matter and in antitrust cases in which foreign sovereign compulsion is asserted as a defense. *See* Order at 28 ("When a foreign government submits a statement regarding its law, courts have taken different approaches as to the weight that should be afforded to such statements.") Thus, as the court acknowledged, cases in both the Supreme Court and the Second Circuit have held that such statements are entitled to conclusive weight. *Id.* However, more recent decisions in the Second Circuit have suggested that such statements are entitled to slightly less, though still "substantial," deference. *Compare U.S. v.*

Pink, 315 U.S. 203, 218-20 (1942) and *Agency of Canadian Car and Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919) with *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002); s*ee also* Order at 28-31. In addition, where the issue is not the content of foreign law, but whether the defendants took particular acts as the result of compulsion by a foreign sovereign, the United States Government has taken the position that such statements should be regarded as "conclusive" on that issue. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, No. 83-2004, Brief for the United States as *Amicus Curiae* Supporting Petitioners, 1985 WL 669667, at 23 (U.S. June 17, 1985) ("U.S. Br.").

The issue in this case, however, does not merely implicate what the Court correctly characterized as a distinction "of degree" between "conclusive" and "substantial" deference. Order at 30.[1] Rather, the Court declined to defer at all to the views of the Chinese Government.

[1] Moreover, that "degree" is a modest one. As the Court observed in its Order, both the *amicus* briefs of the United States in the *Matsushita* litigation, as well as the Antitrust Division's *Antitrust Enforcement Guidelines for International Operations*, recognize that there are narrow circumstances in which the statements of a foreign government might not be accepted as "conclusive." Order at 29-31. Those caveats mimic the concept of "substantial deference" as it has been defined and applied in cases involving deference to the interpretations of statutes and regulations by United States administrative agencies responsible for applying the rules in question. Thus, for example, in *Chevron v. NRDC*, 467 U.S. 837, 844 (1984), the Supreme Court held that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" that is responsible for enforcement of the statute. Or, in the words of the Second Circuit, "substantial deference" means that a court can "reject [an agency's] interpretation only if it is 'arbitrary, capricious or manifestly contrary to the statute.'" *Singh v. Gonzalez*, 468 F.3d 135, 138-39 (2d Cir. 2006) (quoting *Evangelista v. Ashcroft*, 359 F.3d 145, 150 (2d Cir. 2004) and *Chevron*, 467 U.S. at 844).

This same approach was applied in the context of a foreign government's statement with respect to its law in *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992). In that case, the Seventh Circuit observed that as a matter of providing "substantial deference," American courts "routinely accept plausible constructions of laws by the agencies charged with administering them…. Giving the conclusions of a sovereign nation less respect than those of an administrative agency is unacceptable."

See, e.g., Order at 44 ("I respectfully decline to defer to the Ministry's interpretation of Chinese law….").

In reaching its conclusion, Defendants submit that the Court misinterpreted both the nature of the pertinent law as well as the scope of its discretion under Rule 44.1. Defendants agree with the Court that the determination of foreign law involves an "issue of law" and that the Court may consider "any material or source" in making that determination. Fed. R. Civ. P. 44.1. But that procedural rule does not address, let alone determine, the degree of deference required when one of the sources of information available to the court is an official statement of the highest relevant level of the foreign government describing the nature and operation of its own laws. In that situation, Defendants submit that the Court's view that it was free to disregard such statements based upon its own independent opinion of how the relevant law operated or on its subjective assessment of the credibility of the foreign government's statements is a conclusion that is at least open to significant debate. *See* Order 28; *id.* at 36 ("I disagree with the approach taken in *Animal Science* [702 F. Supp. 2d 320, 424-25, 438 & n.119 (D.N.J. 2010), *vacated on other grounds* at 654 F.3d 462 (3d Cir. 2011)].").

Perhaps the clearest demonstration of both the importance and the unsettled nature of this issue is found in the *Matsushita* case from the mid-1980s. In that case, the Third Circuit declined to accept as definitive the statements of the Government of Japan regarding the existence of compulsion in the pricing of exports of Japanese consumer electronics products. 723 F.2d 238, 315 (3d Cir. 1982). Defendants thereafter petitioned for a writ of *certiorari* on that issue and the United States Supreme Court agreed to consider that question, along with an unrelated issue going to the merits of the purported antitrust offense. As the Court is aware, the

Supreme Court ultimately decided the case on the latter ground, and did not reach the sovereign compulsion issue. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Nonetheless, the fact that the Supreme Court deemed the matter of sufficient importance to grant *certiorari* with respect to the issue is a strong indication that it presents an unsettled question of considerable importance. Although there have been a handful of subsequent lower court decisions that have addressed this issue in the intervening years, no appellate court has provided guidance with respect to it.

The existence of substantial grounds for difference of opinion regarding this issue is underscored further by the position of the United States in *Matsushita*. Speaking directly to the degree of respect to be accorded the statements of a foreign sovereign regarding the existence of compulsion under its domestic law, the United States observed that

> because the defense [of sovereign compulsion] is designed to forestall interference with foreign sovereign action and concomitant embarrassment in our dealings with foreign governments, claims of compulsion are most appropriately entertained when the foreign government…informs the court that the conduct at issue was in fact compelled. It is in such instances that the depth of the foreign government's concern and the possibility of diplomatic friction…will be most clearly expressed…. In the absence of such communication, the particular interests served by the defense…require that any claimed compulsion be demonstrated with clarity. *Once a foreign government presents a statement dealing with subjects within its area of sovereign authority, however, American courts are obligated to accept that statement at face value; the government's assertions concerning the existence and meaning of its domestic law generally should be deemed "conclusive."*

U.S. Br. at 22-23, citing *Pink*, 315 U.S. at 220 (emphasis added). The Antitrust Division has substantially reiterated this position in its subsequently issued *Antitrust Enforcement Guidelines for International Operations*, U.S. Dep't of Justice & Federal Trade Comm'n (April 1995) ("*International Guidelines*"), at section 3.32.

The appropriateness of having this issue resolved definitively at the earliest possible time is further, and independently, supported by the sensitive foreign policy implications that are

presented when a U.S. court declines to accept the representations of a high level department of a foreign government, particularly when those representations indicate that the issue involves a matter of importance to the foreign government. The United States' brief in *Matsushita* succinctly explained the delicate interplay between litigation and foreign relations and the particular concerns that are raised where a foreign government cares enough about a matter to make its views known to the Court through an official statement. Thus, the Government noted that the concerns that underlie the principles of comity,

> in particular the "strong sense" repeatedly expressed by the judiciary that its involvement in the resolution of questions directly touching on the interests of other nations may in some circumstances "hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere"…traditionally have been regarded as central features of American jurisprudence.

U.S. Br. at 17-18 (citations omitted). It also is worthy of note that *Matsushita* came to the courts as an "interlocutory appeal." Commenting on that particular aspect of the case in supporting the petition for a writ of *certiorari*, the Unites States advised the Supreme Court that while "this case comes to the Court in an interlocutory posture...this is one of those unusual cases that warrant plenary review in such a posture. … [T]he foreign trade policy concerns raised by the court of appeals' decision on the sovereign compulsion issue are of immediate and practical importance, regardless of the procedural posture of the case." *Matsushita Electric Indus. v. Zenith Radio Corp.*, No. 83-2004, Brief for the United States as Amicus Curiae on Petition for a Writ of *Certiorari*, 1995 WL 699663, at *6-7 (U.S. Jan. 4, 1985).

The Court's initial opinion in this case forthrightly acknowledged the importance of this case to China, and the Ministry of Commerce subsequently has reiterated that importance in its

August 31, 2009 Statement.[2] Thus, there is no doubt that the foreign relations considerations referenced by the United States in *Matsushita* are present here and that they underscore the appropriateness of permitting interlocutory appellate review in this case.

Those considerations are particularly significant in light of the fact that although section 4 of the Clayton Act allows private damage actions, primary responsibility for American antitrust enforcement rests with the Government. This is because the Government is in a position to, and does, weigh the competing policy considerations in circumstances where delicate foreign relations considerations are implicated. However, as the Supreme Court has noted, "private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. government." *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004) (quoting Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159.194 (1999)).[3]

In fact, the U.S. Government noted in its *Matsushita* brief that a decision by the United States to bring a case should prevent assertion of a compulsion defense, because a "governmental enforcement [decision] represents a judgment on the wisdom of bringing a proceeding, in light of the exigencies of foreign affairs." U.S. Br. at 23 (quoting *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 409 (9th Cir. 1983)). The converse should be equally true. The

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[2] *See In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 552 (E.D.N.Y. 2008); Statement in *In re Vitamin C Antitrust Litigation*, August 31, 2009 (hereafter "2009 Ministry Statement") at 1 (Newmark Decl., Ex. 1, D.E. 399-1) ("The Ministry has attached great importance to the antitrust litigation in the United States brought against Chinese vitamin C exporters.").

[3] Defendants suggest that this observation applies with even greater force in a class action in which, as here, the supposed "representative" Plaintiffs are, at best, *de minimis* purchasers of the product in question whose interest in pursuing this lawsuit was the result of solicitation by counsel. *See* Defs.' Mem. in Opp. to Motion of Animal Science Products, Inc. to Certify an Injunctive Class at 13-14 (filed under seal); Defs.' Mem. in Opp. to Motion of The Ranis Company For Class Certification at 31-35 (filed under seal); Defs.' Amended Supp. Mem. in Opp. to Class Certification at 19-23 (filed under seal).

fact that the United States Government has not proceeded with an investigation of or initiated litigation involving the Chinese vitamin C industry, notwithstanding its undoubted awareness of the existence of the allegations made by Plaintiffs, furnishes further support for following the approach suggested by the United States in *Matsushita*.

II. There Is Substantial Ground for Difference of Opinion Whether, as a Matter of Law, the System of Regulation Described by the People's Republic of China Involved Foreign Sovereign Compulsion.

Interlocutory appeal also should be granted to review the Court's conclusion that there was no compulsion in this case based upon its view of the "plain meaning" of Chinese law and its review of the factual record. That determination is the central issue in the litigation as to liability because, as the Order correctly notes, the existence of the Defendants' underlying conduct is not generally disputed.[4] Further, because the Court addressed and resolved the issue of compulsion as a matter of law pursuant to Rule 44.1, its determination presents solely an issue of law that is subject to *de novo* consideration on appeal.

Defendants respectfully submit that there also is a substantial ground for difference of opinion with regard to the Court's approach to resolution of the foreign sovereign compulsion issue. Specifically, Defendants submit that the Court failed to consider the essential nature of the particular form of Chinese regulatory system that was in effect during the relevant period and, therefore, reached an incorrect conclusion regarding the existence of compulsion through a

[4] In noting that Defendants do not dispute the existence of various meetings and agreements regarding price and output under the direction of the Chamber, Defendants do not, of course, concede the specific nature or effect of their conduct. Indeed, one of the things that led the Court to conclude that there was no compulsion is that the record reflects a number of instances where agreements were not reached as well as many occasions where prices were below levels discussed or agreed upon and production cutbacks were not implemented, at least as an initial matter. *See* Order at 25-27, 48-52, 69. Those facts bear upon whether a class is appropriate in this case as well as upon the extent of any damages allegedly caused by Defendants' conduct. However, if there was foreign sovereign compulsion, as Defendants contend, there is no need to reach those additional issues.

mandatory process of self-disciplinary regulation carried out with the active participation, and under the consistent control and guidance, of the China Chamber of Commerce for Medicine and Health Products Importers & Exporters (the "Chamber").

The nature of the Chinese regulatory structure is described at length by China in its *amicus* submission, as well as in its supplemental Statements. The basic point is captured in the Chinese Government's first supplemental Statement, submitted in 2008:

> As explained in the Ministry's *amicus* brief, the system of regulation imposed on China's export industry *centered around a process and not a price*…. In this case, the Ministry specifically charged the [Chamber] with the authority and responsibility, subject to Ministry oversight, *for regulating, through consultation*, the price of vitamin C manufactured for export from China *so as to maintain an orderly export.*

Statement in *In re Vitamin C Antitrust Litigation*, dated June 9, 2008 ("2008 Ministry Statement"), D.E. 306-3, at 2 (emphasis added). As the Chinese Government further observed, the regulatory system described in the Ministry's statements to the Court does not involve a top-down mandate to set particular "collective prices," but, rather, is a mandatory "process" of "coordination" among private firms acting pursuant to, and under, Government regulatory oversight.

Elaborating on that point, China's initial *amicus* brief refers repeatedly to its regulatory process during the relevant period as a matter of "coordination," and further explains the roles played by the Ministry of Commerce (as the ultimate source of regulation), the Chamber (as the body charged with exercising oversight authority) and the manufacturers that operated within this coordinated system of consultation and self-discipline. Thus, for example, the Ministry was careful to point out that "while the [G]overnment did not, itself, determine specific prices or quantities, it most emphatically did insist on those matters being determined *through industry coordination.*" 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 ("Ministry Br."), D.E. 69, at 18 (emphasis added). To the same effect, the Chinese Government noted that the "decision to control export quantities and require coordinated export prices was made by the Ministry. Defendants were *compelled* to implement these decisions *through participation in the Vitamin C Sub-Committee*." *Id.* (emphasis added).

As the Chinese Government also was careful to explain, its regulatory system has evolved over time as part of the broader transition of the industry from a command to a market structure:

> *What the complaint describes* as a "cartel," and an "ongoing combination and conspiracy to suppress competition through price-fixing…*is a regulatory pricing regime mandated by the [G]overnment of China* – a regime instituted *to ensure orderly markets* during China's transition to a market-driven economy and to promote, in this transition period, the profitability of the industry through coordination of pricing and control of export volumes. *Most importantly, this regime was established to safeguard the national interests of China.*

Ministry Br. at 5-6 (emphasis added).

In sum, what was compelled was not charging particular prices, or adhering to particular levels of output, but *participation in a coordination process* designed to result in agreements on price and output in order to implement affirmative State policy objectives. The fact that the vitamin C manufacturers played an active role in that process, including participation in an interactive dialogue with each other and with the Chamber, in no way derogates from the critical facts: (a) that this process took place with the active involvement, and under the continuing supervision, of the Chinese Government; and (b) that the manufacturers were not free to ignore or withdraw from the Government's coordination process, as opposed to expressing

disagreement with various proposed courses of action that were raised as part of a process of "self-discipline."[5]

Viewing the record through the regulatory prism described by the Ministry removes any supposed inconsistency between the coordination regime that the Chinese Government explained

[5] Nor is there any question that this type of regulation qualifies for immunity. In fact, as Defendants noted in their moving papers, the principles applicable here are analogous to those applied to many regulated industries in the United States, in which industry participants are granted immunity from Sherman Act liability under the related state action doctrine. *See* Defs.' Reply Mem. in Support of Motion to Dismiss at 25-26 & n.81, D.E. 398. *See also* Report of Professor. James Speta (Chan Decl., Ex. 5, D.E. 394-2) ("Speta Report") at 4. An instructive analogy can be found in a leading Supreme Court state action decision, *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721 (1985). Much like the situation here, that case involved the regulation of motor carriers who participated in various state regulatory proceedings conducted by agencies that had been delegated oversight responsibility for rate setting under state law. Under those state systems, members were expected to consult and agree, if possible, on collective rates, although "every [member] remain[ed] free to submit [its own] rate proposals…." 105 S. Ct. at 1724.

The United States argued that without more direct compulsion there was no basis for antitrust immunity, and it prevailed on those arguments in the lower courts. The Supreme Court, however, rejected that proposition, holding that it had never been the intention of Congress to "compromise the States' ability to regulate their domestic commerce." 105 S. Ct. at 1726. So long as there was a clearly articulated state policy, the fact that private parties were both permitted and encouraged to act together independent of the Government, and even if the policy was "permissive" in the sense that individual carriers could choose to go their own way, the obligation to participate in the process was sufficient to confer immunity. Specifically, the Court held that it is perfectly acceptable for a state, in the exercise of its sovereign authority, to adopt an "anticompetitive" policy and that "[a] private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific detailed legislative authorization' for its challenged conduct." 105 S. Ct. at 1730. In fact, said the Court, "[i]f more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies.... Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness." *Id*. at 1730-31.

Regardless of whether "state action" principles technically apply in the international context – a subject that continues to be debated – the same *result* ought to follow here *a fortiori*. While the Supremacy clause gives Congress plenary authority to displace state regulation, accepted principles of international law suggest that it is far *less* appropriate for a United States court to impose oversight on the competition and trade policy of a co-equal sovereign than it is for it to impose control over the processes of a state regulatory commission. *See* James F. Rill and Joseph P. Griffin, *Am. Bar Ass'n Section of Antitrust Law and Section of Int'l Trade Pol. Report to House of Delegates on Antitrust Guidelines For International Operations*, 57 ANTITRUST L.J. 651, 668-69 (1988).

in its *amicus* statements and the various documents submitted and relied on by Plaintiffs. Indeed, it should come as no surprise that there are documents reflecting conversations among manufacturers about prices or possible production cutbacks, or that these matters were the subject of debates and, on occasion, votes. That type of behavior is inherent in (one might say the "essence" of) the process of industry self-discipline on which the People's Republic of China insisted and that it has described to this Court. *See* Ministry Br. at 11-13; 2009 Ministry Statement at 2. In fact, if there is anything pertinent about the various items of "evidence" that Plaintiffs have identified as proof of illegality, it is that virtually all involve discussions that occurred at meetings organized and presided over by the Chamber, which the Court acknowledged is a governmental entity that was performing governmental functions. *See* Defs.' Resp. to Pl.'s Supp. Opp. to Motion to Dismiss, D.E. 303, at 4. *See also* Order at 45 (n.37).

That, alone, strongly suggests that the Court has mis-perceived the nature of the Chinese regulatory system that operated here. A system that merely allows private companies to act collectively with regard to prices or output would not require, or be likely to involve, the presence and participation of Government representatives in the alleged "cartel" meetings, no less be the party responsible for convening such meetings. Moreover, the very fact that the Government, in the form of the Chamber, was so consistently and actively involved cannot, in our view, be reconciled with the Court's conclusion that the Ministry's interest here is the product simply of a "*post-hoc*" desire on the part of the Chinese Government to protect domestic firms that have been caught privately fixing prices.

Defendants further submit that any question about the obligatory nature and operation of the Chinese Government's post-2001 regulation of vitamin C exports were answered by the 2009 Ministry Statement. That statement, which Plaintiffs did not even mention in their opposition to

Defendants' summary judgment motion, is directed almost entirely to explaining the nature of China's self-disciplinary system and the regulatory oversight function that the Chamber performs as an integral part of that system. Specifically, the 2009 Ministry Statement emphasizes: (a) that "self-discipline does not mean complete voluntariness of self conduct," but instead "refers to a system of regulation under the supervision of a designated agency acting on behalf of the Chinese [G]overnment;" (b) that "[v]itamin C exporters were…subject to… regulation by the Chamber…the very purpose of which was to coordinate each exporter's behavior;" (c) that the manufacturers were not free to "abstain from such coordination with regard to export price and production volume when asked to by the Chamber;" and (d) that such actions were taken "subject to the Chamber's direction" in furtherance of "the interest of the country as a whole." 2009 Ministry Statement at 2-3.[6]

In evaluating whether there are substantial grounds for difference of opinion with respect to this issue, Defendants further submit that the existence of a substantial body of scholarly

[6] The existence of an independent public policy interest on the part of the Chinese Government is important to the analysis. However, not only did the Court decline to credit the existence of such an interest, the Court asserts at several points in its Opinion that the fact that the "regulations" China describes were congruent with the interests of the Defendants casts doubt upon both the existence of compulsion and the veracity of the Ministry's submissions. *See* Order at, *e.g.*, 53-54.

With respect, the Defendants submit that it is not only possible, but common, for the state to have an independent interest in regulation that is consistent, at least to some extent, with the interest of the party or parties being regulated. To cite just one example, the laws allowing agricultural cooperatives to fix prices further the interest of the U.S. Government in a stable and profitable agricultural industry, while also enabling the members of such cooperatives to charge higher prices for their products. *See, e.g.*, Capper-Volstead Act, 7 U.S.C.A. § § 291-92. In fact, as Professor Speta points out in his expert report that was devoted entirely to this issue, "the initial stance in the United States was to define the scope of permissible economic regulation with respect to a category of industries that were 'affected with a public interest,' in the words of the Supreme Court's decision in *Munn v. Illinois*, [94 U.S. 113,130] (1876)." Speta Report, at 8.

In this case, the record is consistent both with a congruence of state and private interests and with conflicting interests necessitating state intervention.

commentary that is consistent with the views of the Chinese Government and Professor Shen also should weigh heavily in the balance. Thus, for example, a relatively recent article by Professor Bruce Owen of Stanford University emphasizes the Chinese Government's concern with what it considers "excessive" competition, and points out that "the [Chinese] [G]overnment has taken some measures to rein in [this] 'excessive competition.'" Bruce M. Owen, *et al.*, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 248-49 (2008) (Chan Decl., Ex, 12, DE 394-2). As Professor Owen then notes: "Most of these measures involve what is called 'industrial self-discipline,' adopted under the direct supervision of the government. Under the practice of 'industrial self-discipline'…companies …reach price agreements or other agreements to limit competition, in an effort to stabilize the market. The trade associations [*i.e.*, Chambers of Commerce] that were converted from government ministries played important roles in the adoption of this 'industrial self-discipline.'" *Id.*

Another recent article, by Professor Eleanor Fox of New York University and Judge Dennis Davis, observes that in the post-WTO era (that is, beginning in 2001), China imposed "government mandates that [Chambers of Commerce] of various industries regulate price and output levels." Professor Fox and Judge Davis conclude: *"Compliance with the self-regulatory price/output levels is mandatory…."* Eleanor Fox & Dennis Davis, *Industrial Policy and Competition – Developing Countries as Victims and Users*, 2006 FORDHAM COMP. L. INST. 000, 156 (Barry Hawk ed. 2007) (Chan Decl., Ex. 52, D.E. 394-8).

The same point is made yet again by a noted Chinese legal scholar, Professor Huang Yong, who has written that Chinese officials distinguish between "the good and the bad" forms of competition and believe that the latter "is a race to the bottom [which] harms Chinese

enterprises…." Accordingly, the Chinese Government believes that "trade associations ought to promote 'self-discipline' among competitors and avoid such price wars." Yong Huang , *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 ANTITRUST L.J. 117, 129-30 (2008) (Chan Decl., Ex. 7, D.E. 394-2).[7]

Had the Court accepted the foregoing statements, we believe that it would have had little choice but to conclude that the actions taken by the Defendants were the product of compulsion, as asserted by the Defendants and by the Chinese Government. Defendants, thus, submit that the Court's failure to credit the nature and importance of this regulatory system is a legal issue as to which there is substantial ground for difference of opinion. That is true not only in light of the record before the Court, but in light of the Order's candid and critical recognition that "the Chinese law and regulatory regime that [D]efendants rely on is something of a departure from the concept of 'law' as we know it in this country," and that "in some circumstances asserting a claim of compulsion under a foreign regime that so differs from our own concept of law can be akin to trying to fit a round peg into a square hole." Order at 43-44.

[7] In addition to the articles cited in text, *see, e.g.*, Howell, *et al.*, *China's New Anti-Monopoly Law: A Perspective from the United States*, 18 PAC. RIM L. & POL'Y 53, 87 (Newmark Decl., Ex. 12, D.E. 399-12) ("Since the 1990's, Chinese trade associations, encouraged by the government have played a major role in facilitating industry-wide price stabilization measures, suggesting that notwithstanding enactment of the [Chinese Anti-Monopoly Law] they will continue to play such a role"); Wang Xiaoye, *The Prospect of Anti-Monopoly Legislation in China*, 2002 WASH. U. GLOB. STUD. L. REV. 201, 208-09 (2002) ("One always should view 'industrial self-discipline prices' as a synonym for government intervention in price competition among enterprises…. 'Industrial self-discipline prices' operate as a type of compulsory price cartel…."); Scott Kennedy, *The Price of Competition: Pricing Policies and the Struggle to Define China's Economic System*, THE CHINA JOURNAL No. 49, at 29 (2003) (Milici Decl., Ex. SS, D.E. 397-17) ("Despite… changes [in China's regulatory structures] the self-discipline prices story reveals a high level of ambivalence regarding whether inter-firm coordination of prices and production is legitimated and, if so, under what circumstances. The persistence of such views and a legal framework that permits cooperation under certain circumstances…shows that China's march away from a planned economy does not lead inevitably in a free market direction").

Defendants, with respect, believe that the failure of the Court to heed its own recognition was erroneous and highlights the reasons why (as discussed in the preceding section of this Memorandum) it is important for courts to defer to the official statements of foreign governments regarding the nature and operation of their domestic laws even where the court might otherwise be inclined to reach a different conclusion based upon its independent view of how the relevant system was meant to function.

Obviously, Defendants do not expect to persuade this Court that it erred in reaching a different conclusion or, more fundamentally, in taking a different approach based on what it referred to as the "more traditional sources of foreign law." Order at 44. However, that is not the standard required for interlocutory review. The only thing that the Court need conclude is that there is a substantial ground for difference of opinion on this issue and that it will serve the interests of justice for the matter to be addressed and resolved now by the Court of Appeals because that would lead to the early termination of this litigation. Defendants respectfully submit that they have made that case. *See Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amministrazione Straordinaria*, 921 F.2d 21, 23-25 (2d Cir. 1990); *Klein v. Vision Lab Telecomms., Inc.*, 399 F. Supp. 2d 528, 536-537 (S.D.N.Y. 2005).

III. There Is Substantial Ground for Difference of Opinion Whether This Litigation Should Have Been Dismissed Based Upon Principles of International Comity.

Defendants' motion for summary judgment was based not only on foreign sovereign compulsion, but on principles of international comity. Chinese regulatory policy bears on both issues, although compulsion, as such, is not required for United States courts to decline to exercise jurisdiction under the latter principle. *See International Guidelines*, at §3.32 ("Foreign government measures short of compulsion...can be relevant in a comity analysis.")

The point of international comity is to prevent U.S. courts from second-guessing or passing judgment upon the legitimacy of conflicting regulatory policies of a foreign nation or from acting in circumstances where there is a more appropriate forum for the consideration of issues touching directly upon sensitive questions of international relations. This principle traces its roots to the earliest days of our Republic. Thus, in 1812, Chief Justice Marshall noted that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *Schooner Exchange v. McFadden,* 11 U.S. (7 Cranch) 116, 136 (1812).

This principle has had an uneven history of application in antitrust cases.[8] However, it remains a core notion of American jurisprudence that courts in this country should be sensitive about applying American views regarding appropriate competition policy to conduct that occurs abroad. Recognizing that different nations choose to operate under different economic principles—or under wholly different economic models—it is exceedingly important for U.S. courts to provide substantial deference to those different approaches and to defer to the Executive Branch in situations involving the validity, purpose or operation of a foreign nation's laws and regulations. These principles apply with even greater force where, as here, the country in question has objected to U.S. judicial involvement.

Before initiating an enforcement proceeding, the United States Government, which is the primary enforcer of American competition policy, undertakes a separate "comity" analysis which balances domestic enforcement interests against the potential effect of such an action on foreign relations and other appropriate prudential considerations. *See International Guidelines*, at § 3.2. Private litigants, by contrast, have no incentive to take such considerations into account.

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[8] For example, *compare American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356-59 (1909) *with United States v. Aluminum Co. of America (Alcoa),* 148 F.2d 416, 443-44 (2d Cir. 1945).

Therefore, if any discretion is to be exercised regarding the assertion of jurisdiction, it can be accomplished only through the application of a comity analysis by the courts.

The appropriateness of dismissal based on principles of comity is in no way foreclosed by the Supreme Court's decision in *Hartford Fire*. Although the Court in that case focused on the existence of what it termed a "true conflict" as a condition precedent to comity analysis in antitrust cases, it explicitly noted (and specifically declined to address) the potential for invoking a comity analysis based on different factors. *See* 509 U.S. at 799. This Court, in turn, noted that statement in its Opinion (Order at 33), and further acknowledged that the nature of the comity inquiry "is *unclear* after [*Hartford Fire*]." Order at 32 (emphasis added).

That assessment is plainly correct, and suggests yet a further reason for allowing an interlocutory appeal under § 1292(b). In fact, not only did four Justices strongly disagree with the majority's fundamental approach to the comity analysis in *Hartford Fire*, but the Supreme Court subsequently embraced the dissent's approach in its decision in *Empagran*. *See* Mark Popofsky, *Extraterritoriality in U.S. Jurisprudence*, 3 Issues in Competition Law and Policy 2417, 2443 (W. Dale Collins ed. 2008) ("In *Empagran*, the Court embraced the very analysis that it denigrated in *Hartford Fire*. Without dissent, the Court readily accepted that the Sherman Act's language…must be read 'to avoid unreasonable interference with the sovereign authority of other nations.'" (citation omitted)). *See also* Spencer Weber Waller, Antitrust and American Bus. Abroad, §6.21 (3d ed.) (noting the existence of post-*Hartford* decisions dismissing antitrust cases on comity grounds, including *Trugman-Nash, Inc. v. New Zealand Dairy Board*, 954 F. Supp. 733, 736-37 (S.D.N.Y. 1997) in which the court observed that *Hartford Fire* had

expressed no views as to the "other *Timberlane* factors and these additional factors supported dismissal for lack of jurisdiction to prescribe.").[9]

In view of the acknowledged lack of "clarity" regarding the continuing role of comity in antitrust cases, as well as the position taken by the United States in its *International Guidelines*, there is a strong case for certifying the comity issue for interlocutory review. Plaintiffs' argument that the Court ought to reject the Chinese Government's considered, and expressed, views regarding the nature of its regulation of vitamin C exports presents a direct challenge to the validity of that system and the prerogatives of the People's Republic of China in adopting it. It also has put this Court in the position of questioning the candor of the Chinese Government's statements to the Court.

Whatever steps the Chinese Government may have taken to further its regulatory policy, there is no dispute that China wanted its vitamin C industry to operate in a certain way in order to enhance its profitability in the national interests of China as it transitions from a command to a market economy. *See* Ministry Br. at 13.[10] To declare that such an economic policy choice is beyond China's powers to promulgate and enforce without running afoul of U.S. law would be inappropriate under recognized notions of international comity, notwithstanding anything held

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[9] It is also noteworthy that in its *amicus* brief in *Hartford Fire*, the United States stated the following alternative grounds for establishing the existence of a "true conflict" between U.S. and foreign law: "[I]f (1) a foreign government has directed the defendants to engage in the disputed conduct *or* (2) the defendants would have *frustrated clearly articulated policies of the foreign government if they had not engaged in the disputed conduct.*" Brief for the United States as *Amicus Curiae* Supporting Respondents, *Hartford Fire Ins. Co. v. State of California*, 1992 U.S. S. Ct. Briefs LEXIS 893, at *18 ("U.S. *Hartford Fire* Br.") (emphasis added). The United States then pointed out that although a defense of "foreign sovereign compulsion" could be asserted only in the first of those two situations, dismissal on comity grounds could be appropriate in the latter situation as well. *See* U.S. *Hartford Fire* Br. at *46, n.24. As discussed in Section II, *supra*, there is little room for doubt that it would have "frustrated" strong policies of the Chinese Government regarding vitamin C exports if Defendants "had not engaged in the disputed conduct."

[10] *See also* footnote 2, *supra*.

by the Supreme Court in *Hartford Fire*. Again, while this Court might have a different view, Defendants submit that the issue is at least open to substantial doubt. It also is sufficiently central to resolution of this litigation that interlocutory review should be granted.

Although comity is, of course, a matter of discretion, that does not make the issue any less appropriate for appellate consideration given the unsettled status of the law, and—more important—the highly sensitive nature of this case from both a legal and foreign relations standpoint. Moreover, the appropriateness of American courts dismissing this case on comity grounds is particularly strong in light of the fact that this is the kind of dispute that is better suited to consideration and resolution on a government-to-government basis through diplomacy or in the WTO as opposed to private class action litigation. In fact, the Court's opinion repeatedly refers to statements made by China to the WTO and discusses various WTO proceedings in which analogous questions of Chinese regulation have been addressed directly. *See, e.g.*, Order at 58-59 & n. 48-49. It also is notable that the United States has asserted in the WTO that China continues to exercise inappropriate levels of regulatory control over certain segments of its economy and has further questioned the extent to which China has made adequate progress towards establishing a market economy.

Those are fair subjects for discussion and debate. However, with the United States having taken no action against the Defendants here and with the WTO available as an alternative forum, there is, at a minimum, good reason to consider whether the current action should be abated on grounds of comity and the issues in this case remitted for consideration at a diplomatic level or in proceedings before the WTO.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court certify the questions set forth in the Preliminary Statement (at page 1) for appeal pursuant to 28 U.S.C. §1292(b).

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Respectfully Submitted,

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