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)

REPLY 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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The central issue in this case is whether the Chinese Government required Defendants' alleged conduct. The Chinese Ministry of Commerce has answered that question thrice over: "We compelled Defendants to do what they did." The Ministry also has explained how and why that compulsion was carried out, albeit in terms that describe a uniquely Chinese form of regulation: government-mandated and supervised self-discipline.

Nonetheless, in its Order,[1] the Court declined to defer to the Chinese Government's statements because it concluded, based on its own reading of Chinese law (using what it referred to as "more traditional" sources of foreign law, Order at 44), that the self-discipline process cannot be found in the language of statutory texts or regulations and is contrary to statements made in other contexts. That led the Court to conclude that China is simply trying to protect its vitamin C manufacturers by conjuring a "*post-hoc* attempt to shield defendants' conduct from scrutiny" rather than offering "a complete and straightforward explanation of Chinese law during the relevant time period in question." Order at 47.

The immediate question is whether the Court's determination of that issue of law, which resolved a critical and central issue in this litigation, should be reviewed now pursuant to 28 U.S.C. § 1292(b).[2] Plaintiffs, predictably, say "No." However, they justify that answer only by misstating the relevant statutory appeal standard and mischaracterizing the nature of both the issues to be reviewed and the Court's analysis.

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[1] Defined terms have the same meaning as used in Defendants' Motion for Certification.

[2] Plaintiffs argue that Defendants' motion for certification is untimely, but concede that § 1292(b) does not specify a deadline and that delay is judged on a reasonableness standard. Plaintiffs rely on Seventh Circuit cases involving attempts to circumvent specific deadlines under other rules permitting interlocutory appeals, and on district court cases that rely on that Seventh Circuit authority. Given the complex issues in this case, and the need to translate the Court's opinion and report to and consult with Defendants in China, the timing of Defendants' motion was reasonable, especially in the absence of any prejudice to Plaintiffs. *See, e.g., Am. Geophys. Union v. Texaco, Inc.*, 802 F.Supp. 1 (S.D.N.Y. 1992) (motion granted where docket shows over two month delay); *Vereda Ltda. v. U.S.*, 46 Fed. Cl. 569 (Fed. Cl. 2000) (three month delay).

1. Plaintiffs cite numerous generalized and contextually inapposite quotations about the "extraordinary" character of 1292(b) review and the breadth of this Court's discretion in addressing that issue.[3] Defendants do not dispute that the decision to certify is within this Court's discretion or suggest that interlocutory appeals are the norm. However, the proposition that a case must be sufficiently "extraordinary" to warrant interlocutory consideration is merely a way of restating the three statutory elements. *See, e.g.*, *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990).[4] Further, to the extent that other considerations apply, the importance of the issue, whether as a matter of precedent, public interest or otherwise, counsels in favor of intermediate appellate review, particularly where the issue is one of first impression. *Baumgarten v. County of Suffolk*, No. 07-CV-0539, 2010 WL 4177283, at *1 (E.D.N.Y. Oct. 15, 2010) (substantial ground exists where there is conflicting authority or issue is particularly difficult and of first impression for the Second Circuit; certification denied where movant did not address statutory requirements).[5] This is all the more so where a sovereign government has stated that the matter involves a question of fundamental economic regulation and policy.

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[3] For example, *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) was not a 1292(b) case, and the *Coopers* Court made clear that the district court simply performs a basic "screening procedure" by limiting 1292(b) certification to the statutory elements.

[4] "[E]ven a casual survey of the hundreds of appeals cited under § 1292(b) suggests that it is often used in cases that do not meet the 'exceptional' test." Wright & Miller, Federal Practice & Procedure, § 3929. A "flexible approach to § 1292(b) is far superior to blind adherence to a supposed need to construe strictly any permission to depart from the final judgment rule. The statute is not limited by its language to 'exceptional' cases." *Id.* *See also In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996); *Fisons Ltd. v. U.S.*, 458 F.2d 1241, 1245, 1248 (7th Cir. 1972), ("exceptional circumstances" referring to statutory elements; legislative history indicates 1292(b) intended to apply to antitrust cases) (quoted in *Coopers & Lybrand*).

[5] *See also Am. Geophysical Union*, 802 F. Supp. at 30 ("strong public interest" in "prompt appellate review" where uncertainty as to law affected more than individual litigants); *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 890 F.Supp. 322, 329 (S.D.N.Y. 1995), *aff'd* 85 F.3d 44 (2d Cir. 1996); *Lechner v. Nat'l Benefit Fund for Hosp. & Health Care Emps.*, 512 F. Supp. 1220, 1222 (S.D.N.Y. 1981) (*sua sponte* certifying issue "involv[ing] a significant matter of public interest and importance").

In all events, generalities about the applicable legal standard do not help. What matters, instead, is whether the three statutory criteria are met *in this case*. *See, e.g., Red Bull Assocs. v. Best Western Int'l, Inc.*, 862 F.2d 963, 966 (2d Cir. 1988); *see also* § 1292(b) (inquiry based on order at issue). The answer to that question lies in the nature of the issue to be reviewed, the state of the law concerning it and the effect of a decision on future proceedings.

In that regard, it is instructive that both *Matsushita* and *Karaha Bodas* involved discretionary interlocutory review and that a number of 1292(b) cases involve review of decisions denying summary judgment where the court's determination turned on resolution of a controlling, and debatable, issue of law.[6] *Matsushita* is particularly pertinent because the relevant issue was essentially identical to the issue here. In its *amicus* brief supporting *certiorari*, the United States noted that the case "comes to the Court in an interlocutory posture," but observed that "[i]n our view…this is one of those unusual cases that warrant plenary review in such a posture." *Cert.* Br., at 6-7. Specifically, the United States emphasized that "the 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." *Id.* at 7; *see also Karaha Bodas*, 313 F.3d 70, 81 (2d Cir. 2002) (Second Circuit accepted 1292 (b) appeal in light of important interplay of U.S. and Indonesian law on resolution of case).[7]

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[6] *McMahan & Co v. Wherehouse Entm't. Inc.*, 65 F.3d 1044, 1047 (2d Cir. 1995); *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458, 460 (2d Cir. 1999); *see also Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 36 (1995) (1292(b) "confers on district courts … discretion to certify … orders deemed pivotal and debatable.").

[7] The *Vitamin C* litigation presents an even stronger case for immediate review. In *Matsushita*, the court of appeals merely decided that additional evidence needed to be taken on the issue of compulsion, and there were independent substantive grounds for deciding the liability issue. This Court, by contrast, purported to resolve the issue as a matter of law under Federal Rule of Civil Procedure 44.1 while at the same time acknowledging that Second Circuit precedent on the question is less than clear. *See* Order at 28, 44-45, 62-64.

2. There is no debate about the first and third statutory elements. The Court has ruled that the issue of sovereign compulsion involves a question of law and it has determined that question in a decision that carefully sets forth its reasoning. There also can be no dispute that, within the context of this case, the Court's determination involved a controlling legal issue. *See* Motion for Certification at 10 & n.4.

Similarly, there is no doubt that resolution of this question could materially affect the course of future proceedings in this case. If the Second Circuit were to accept Defendants' position, the litigation would be dismissed.[8] Moreover, the many cases involving the use of § 1292(b) to review denials of summary judgment or similar orders demonstrate that this case readily satisfies the criteria of "material advancement." *See, e.g., In re Enron Corp.*, No. 01-16034, 2006 U.S. Dist. LEXIS 63223, at *37-38 (S.D.N.Y. Sept. 5, 2006) (requirement "easily met" where appeal could result in disposition of proceedings); *see also supra*, p. 3 n.6.

3. The only issue that merits extended discussion is whether there are reasonable grounds for disagreement about whether the Court's decision is correct. Defendants do not expect to persuade the Court to reverse itself. But, that is not the relevant standard. Rather, Defendants seek to persuade the Court that there is a sufficient possibility that another court will disagree to justify interlocutory review. That standard is readily met, for the reasons stated in Defendants' earlier brief. Nothing in Plaintiffs' Opposition suggests a contrary conclusion.

(a) Plaintiffs argue that the Second Circuit resolved the issue in this case in *Karaha* and *Villegas Duran v. Arribada Beaumont*, which, Plaintiffs claim, rejected "conclusive" deference in favor of a less stringent "substantial" deference standard. That misses the point. As

[8] The fact that if the court's ruling is affirmed there will need to be further proceedings cannot be a basis for declining interlocutory review under the "materially advance the determination" element. Section 1292(b) certification is not limited to situations where an appellate decision *either way* would result in the effective termination of the case.

Defendants' motion stated, the critical issue is not the difference of "degree" between "conclusive" and "substantial" deference, but whether either of those standards allows a court not to accept (*i.e.*, "defer" to) the unequivocal statements of a foreign government regarding the nature and operation of its own law based on the court's independent analysis and its conclusion that the government in question has not provided a "complete" or "straightforward" statement of its own law. *See* Motion for Certification at 5-6.[9]

As the Court aptly observed in its Order, the distinction between "conclusive" and "substantial" deference is merely a matter of degree. Order at 30. Under either of those standards, courts are expected to accept the statement of a foreign government regarding the nature and application of its domestic laws and regulations unless such a statement is unreasonable "on its face" or is contrary to the plain and unambiguous language of relevant statutes or regulations. *See* Points 3(b)-(c), *infra.*

Although Defendants believe that the correct standard is "conclusive" deference in the manner advocated by the United States in *Matsushita* and set forth in the Antitrust Division's *International Guidelines,* the concept of "substantial deference" is well-established both generally under U.S. law and in the Second Circuit, which has articulated two somewhat separate tests—so-called *"Chevron"* deference, and the even more deferential *"Auer"* standard. *Chevron v. NRDC*, 467 U.S. 837, 844 (1984); *Auer v. Robbins*, 519 U.S. 452 (1996). In both situations, the degree of deference is quite close to the standard advocated by the United States in *Matsushita*. *See* Motion for Certification at 5 n.1. However, under *Auer*, where a U.S. agency is interpreting its own regulations (as here, where the Ministry adopted and implemented the

[9] Defendants further note that while Rule 44.1 provides that the Court "may consider any material or source" in making a determination of foreign law, the 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.

system of control over Chinese vitamin C exports), the degree of deference is even greater and *overrides even plain language that might, on its face, appear clearly contrary to the agency's interpretation. See Linares Huaracaya v. Mukasey*, 550 F.3d 224, 230 (2d. Cir. 2008).

Defendants respectfully submit that under any recognized concept of "substantial," let alone "conclusive," deference, the Court's Order is open to significant question. Indeed, the Court, itself, stated that the task of understanding and interpreting the content of Chinese law is akin to putting a "round peg" into a "square hole." Order at 44. Chinese law developed and operates against the backdrop of a different cultural and economic history, and involves not merely written statutes and regulations, but oral directives and other non-transparent sources of law and regulation which, the Court further recognized, are essential to determining the content of China's regulatory system. Order at 43-44. The particular system of compulsion at issue in this case also involves a method of regulation—self-discipline under government oversight—that is distinctly Chinese. All of those factors demonstrate why deference to the statements of the Chinese government is appropriate or, at least, why there is a substantial ground for difference of opinion on that issue.

(b) In that regard, Defendants maintain that the position of the United States in *Matsushita* is highly probative. *See* Motion for Certification at 7-9. The parallels between the *Vitamin C* litigation and *Matsushita* are not limited to general principles. In both *Matsushita* and the instant litigation, the courts declined to accept unqualified representations of compulsion by the Japanese and Chinese Governments, respectively, based upon the assumption that it was appropriate for the court (*Vitamin C*) or a "fact-finder" (*Matsushita*) to determine the existence of compulsion *based on an independent assessment of the persuasiveness of the foreign government's statements*. Thus, for example, the United States observed that the Third Circuit

questioned "whether the [mandated] prices 'were in fact determined by the Japanese Government' and asserted that there was 'no record evidence suggesting that the five-company rule originated with the Japanese Government'." *Cert.* Br. at 5. The United States further noted that, in remanding the case for trial, the court of appeals had suggested that a "fact finder" might determine that there had not actually been compulsion, the contrary representations of the Japanese government notwithstanding. *Id.* at 18 n.20 ("The court of appeals held that a fact-finder could conclude that the Government of Japan did not 'determine' the minimum price levels under the check price agreement and apparently rejected petitioners' sovereign compulsion defense on that basis.").

The United States disagreed with that approach. *See Cert.* Br., at 17-18; U.S. Br., at 7-9, 23. It said that once a foreign government "unambiguously" asserts the existence of compulsion under its domestic laws, that statement must be given dispositive weight. *Cert.* Br., at 6, 17; U.S. Br., at 8, 23. That view is consistent with Defendants' position, but is contrary to the Court's Order. Here, the Court concluded that the Chinese Government supported Defendants' efforts to coordinate price and output and provided a forum for them to do so through the Vitamin C Subcommittee, although without compelling any particular conduct. *See* Order at 45 n.37, 47. That determination parallels the Third Circuit's suggestion that a fact-finder should have been permitted to conclude, based on its assessment of the evidence, that "the [Japanese] government merely provided an umbrella under which [petitioners] gained an exemption from Japanese antitrust law, and fixed their own export prices." 723 F.2d at 315. Disagreeing, the United States noted that "*[t]his analysis misstates…the nature of the sovereign compulsion defense*…. If the court meant to suggest that the [minimum] prices charged by petitioners were not in fact

compelled, its holding unjustifiably disregarded a clear *and dispositive* statement to the contrary by the Japanese government." U.S. Br. at 25-26 (emphasis added).[10]

(c) In their opposition, Plaintiffs try to avoid the pertinence of *Matsushita* on the issue of "difference of opinion" by suggesting that the United States was equivocal in its statement of the proper standard of deference. To that end, they quote a portion of a government brief that acknowledges that there can be an exception to the presumptive rule requiring unquestioning deference to the statements of a foreign government affirming the existence of sovereign compulsion. Similarly, in its Order, this Court observed that the approach advocated by the United States applies only "generally." *See* Order at 30-31. However, that assertion overstates the nature and breadth of the supposed exception.

The relevant text can be found at page 19 of the United States' "merits" brief. There, the government began by restating its view of the applicable principle that:

> Once a foreign government presents a statement dealing with subjects within its area of sovereign authority…American courts are obligated to accept that statement *at face value*; the government's assertions concerning the existence and meaning of its domestic law generally should be deemed "conclusive."

U.S. Br., at 23 (emphasis added), citing *United States v. Pink*, 315 U.S. 203, 220 (1942). Having thus stated its view of the relevant standard, the government went on to explain what it intended by its use of the word "generally," observing that the conclusive deference standard is inapplicable only in "extraordinary circumstances" where "concern for the integrity of the

[10] In assessing the record, the Court also rejected the Ministry's statements because, *inter alia*, the Ministry failed to expressly address all of the relevant regulations and practices (Order at 45-46) and there was evidence of behavior that was inconsistent with the conduct that the Chinese Government allegedly compelled. Order at 47 n.40, 67-68. Those circumstances also were present in *Matsushita*, but the United States still asserted that the statements of the Japanese authorities were entitled to conclusive weight on the issue of sovereign compulsion. *See* U.S. *Cert.* Br., at 18 n.22 ("The MITI Statement did not explicitly single out the five-company rule as an example of conduct required by MITI."); U.S. Br., at 25 (court of appeals found "abundant evidence suggesting that many [petitioners] departed from the agreed upon minimums.").

judicial process may obligate a court to inquire into the underlying circumstances if it believes that it has been presented with a statement that is *incredible on its face*." *Id.* (emphasis added). Far from inviting courts to engage in a free-ranging inquiry into the correctness, let alone the motivation, of a foreign government's statement of compulsion, the view of the United States is that such statements must be taken "at face value" unless the statement, within its four corners (to wit, "on its face") is not merely ambiguous, leaves unanswered questions or is open to doubt but, instead, is "incredible."

(d) *Matsushita* also answers Plaintiffs' attempt to create a semantic distinction between a "question of law" and a "*pure* question of law," and to rely upon that supposed distinction to assert that interlocutory review is inappropriate where a legal ruling depends, as they say it did here, on the Court's review of an elaborate factual record. Pls.' Opp. at 10-11. That distinction is without authority, and is answered directly by the United States' explanation that it is inappropriate to inquire into circumstances outside the four corners of a foreign government's statements except in those "extraordinary circumstances" where the foreign government presents the Court with a *facially incredible* statement. U.S. Br. at 23.

(e) Plaintiffs also suggest that any limitations on the Court's power to freely accept or reject the statements of a foreign government would be contrary to Rule 44.1, which provides that in determining the content of foreign law, a court may consider any information it deems appropriate. That argument is contrary to every decision discussing the deference to be given the statements of a foreign government, including *Karaha.*

We are aware of no case that suggests that Rule 44.1 determines the degree of deference to be afforded to the statements of a foreign government. If the standard of deference is even linked to Rule 44.1, it is simply because that rule provides a process for adjudicating the meaning

of foreign law. However, the standard to be applied where a foreign government has submitted a statement describing its law, or, as here, unambiguously asserting the existence of sovereign compulsion, presents a separate issue that is governed by the decisions that Defendants cite, which require a high degree of deference to such statements.

(f) With respect to comity, Defendants rest on the point made in their opening brief, that the Court was correct in noting that the contours of the comity principle in antitrust cases remain "unclear" following *Hartford Fire* and *Empagran* (*see* Motion for Certification at 20-21), and the potential for this dispute to be addressed in government-to-government discussions or WTO proceedings suggests that the Second Circuit (which will exercise *de novo* review) might deem this a case in which declining to exercise jurisdiction as a matter of discretion truly is the better part of valor. Nothing in Plaintiffs' brief contradicts the fact that the Court in *Hartford Fire* left open the possibility that other considerations might justify such a result and the United States, as "primary" enforcer of United States antitrust policy (*see Cert* Br., at 1), has not backed away from its statement in its *International Guidelines* that it continues to conduct a "comity" analysis that is separate from consideration of "sovereign compulsion" before bringing an antitrust case with obvious foreign policy implications.

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Respectfully Submitted,

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