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A Comparative Look at Foreign State Compulsion as a Defence in Antitrust
Litigation*Marek Martyniszyn**

This paper presents and investigates foreign state compulsion as a defence in transnational antitrust cases. It takes a comparative approach by looking at the doctrine and its developments in the United States and in the European Union. To illustrate the relevance of the defence and the difficulties of its applicability, this paper analyses the new antitrust case law emerging in the US involving Chinese export cartels. It is argued that at present the standard required to prove compulsion is too high to serve its function.

INTRODUCTION

Internationally varying levels of state involvement in economic affairs mark international trading. This poses multiple challenges for the global regulatory framework, especially in such fields as competition law, which are not formalised through binding agreements at the multilateral level. Competition laws and policies while being generally consistent and self-contained domestically or regionally (as in the case of the European Union), lack coherence internationally. One of the weaknesses unveils itself in transnational cases involving or implicating foreign states. Fundamentally, the issue of foreign state responsibility for anticompetitive conduct in such a context remains largely *terra incognita*. It is not well addressed within the WTO framework, while domestic institutions seem ill-equipped to deal with it.¹ From a more practical perspective, the availability of various state-related defences significantly limits the power of antitrust in such cases.²

Foreign state compulsion is one such state-related defence, or to better reflect their common effect: avoidance techniques.³ It is a valid defence in antitrust cases,

* Doctoral Student, Ad Astra Scholar, University College Dublin School of Law. This article is an edited part of a larger piece of research presented at the 18th CLaSF Workshop on 22 September 2011, drawing from M. Martyniszyn, 'Avoidance Techniques: State Related Defences in International Antitrust Cases' (CCP Working Paper No. 11-2, 2011). Thanks to Imelda Maher, Joseph McMahon, Spencer Weber Waller and the CLaSF Workshop participants for helpful comments. The usual disclaimer applies.

¹ See, for example, DD Sokol, 'Limiting Anti-Competitive Government Interventions that Benefit Special Interests', 17 *Geo. Mason L. Rev.* 119 (2009).

² For analysis of state-related defences available in antitrust litigation see M Martyniszyn, 'Avoidance Techniques: State Related Defences in International Antitrust Cases' (CCP Working Paper No. 11-2, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1782888; SW Waller, et al, *Special Defenses in International Antitrust Litigation* (ABA Antitrust Section, 1995).

³ Fox used this term to refer to state immunity, act of state doctrine and non-justiciability. I argue that foreign state compulsion fits well into this category. Compare H Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' in MD Evans (ed), *International Law* 363-65 (Oxford University Press, 2nd ed, 2006).

potentially fully removing liability from the party invoking it. Although widely recognised,⁴ it is a rule of domestic law, not a principle of international law. Foreign state compulsion is usually treated as a *sui generis* defence, peculiar either to the international context or even to the antitrust area.⁵ The rationale behind it is at least twofold and includes comity and fairness considerations.⁶ Comity among nations calls for a domestic court to give due deference to the governmental (*de jure imperii*) acts of a foreign sovereign. Fairness requires not holding an entity liable for a conduct which it did not undertake of its own free will. Unfortunately that is where clarity ends. Despite the reasonably straightforward logic behind it, the foreign state compulsion doctrine remains a rather poorly defined legal tool, offering little predictability in terms of possible outcomes in both leading competition law regimes: the US and the EU. This is unsatisfactory especially as strong industrial policies and state regulation in economic affairs are not reminiscences of the past, but still a feature of important economies, for example in the BRIC states.⁷

This paper offers a new contribution to the extensive literature on the international aspects of competition laws. It aims to partly fill the existing gap by providing a comparative perspective on the issue of foreign state compulsion as a defence in antitrust cases in the US and in the EU. It also attempts to indicate the present contours of the defence, in light of the most recent and still emerging US case law, underlining the aspects of the doctrine requiring further consideration. This paper argues that at present the standard required to prove compulsion is set too high to make it a workable and reliable legal tool, serving its purpose.

Part I of this paper presents and explores the development of the defence in the US, a jurisdiction which led in extraterritorial application of antitrust laws and seems to have first recognized this defence. Part II presents US domestic state action, a defence available in intra-US antitrust cases involving an action of a US state. Despite similarities, both doctrines use different standards, with the former being much more narrowly framed and being often criticised. In Part III this article analyses foreign state compulsion as a defence in the EU regime: the state action doctrine. Part IV looks at the recently emerging case law involving the issue of foreign state compulsion in the US. The conclusions suggest that the standard required to prove foreign state compulsion is set too high. An approach more in line with the US domestic state action

⁴ For example in the US, EU, Japan, Australia, New Zealand. Compare C. Noonan, *The Emerging Principles of International Competition Law* 335-37 (Oxford University Press, 2008).

⁵ Waller, et al, see supra note 2, at 78.

⁶ Compare Waller, *Antitrust and American Business Abroad* § 8:22 (West Group, 3rd ed, 1997-2010); The Department of Justice, The Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* (1995), 68 *Antitrust & Trade Reg. Rep. (BNA)* No. 1707, § 3.32.

⁷ BRIC is an acronym referring to the dynamically developing economies of Brazil, Russia, India and China. It seems to have been introduced by O'Neill, who underscored the growing importance of BRIC in the world economy. Compare J O'Neill, 'Building Better Global Economic BRICs' (Goldman Sachs Global Economics Paper No. 66, 2001), available at <http://www2.goldmansachs.com/our-thinking/brics/brics-reports-pdfs/build-better-brics.pdf>.

doctrine would serve the issue of predictability better. It would also create incentives to look for an international forum better fitted to address such concerns.

1. FOREIGN SOVEREIGN COMPULSION IN THE UNITED STATES

The foreign sovereign compulsion doctrine is recognized in the US as a defence on the merits in antitrust litigation. Private firms compelled by a foreign government may be relieved from liability for their anticompetitive conduct. The Supreme Court acknowledged, without further deliberations, its existence in *Hardford Fire*, referring to it as a 'true conflict'.⁸ Despite rather broad recognition of this principle by the courts, *Texaco Maracaibo*⁹ decided in 1970 remains the only case where reliance on it was successful. The US authorities recognized foreign sovereign compulsion as a self-standing legal defence only in 1988.¹⁰

Texaco Maracaibo dealt with an alleged concerted boycott by companies exploring for and extracting crude oil in Venezuela, who refused to sell to the plaintiff, whose business was based on those deliveries. When the supplies stopped despite numerous efforts of the plaintiff, he brought the action for treble damages for violation of US antitrust law (on a refusal to deal basis). The defendants claimed that the decision to stop supplies was not autonomous, but forced by the Venezuelan government who forbade them to deal with the plaintiffs. They did not deny the refusal to deal, or the fact of damages. The court found in favour of defendants.

The business of oil extraction by foreign companies was tightly-regulated in Venezuela. A special office (the Coordinating Commission) laid down rules regarding the sale of the extracted oil and supervised all the concessionaires. The sanctions for non-compliance were severe, including a suspension of the right to export the oil. The Commission instructed the defendants by phone that no further deliveries were to reach the plaintiff, who was subsequently duly notified about the situation by the defendants.¹¹

The court held that the defendants were compelled by the authorities to boycott the plaintiff. More generally, it held that compulsion is a complete defence to an antitrust action.¹² It considered its form irrelevant. In the instant case there was no special legislation, or written order. The fact of compulsion was established on the basis of an informal oral instruction.¹³ Moreover, responding to the argument that in cases of

⁸ *Hardford Fire Insurance Co. v California*, 509 U.S. 764, 798 (1993). For different ways of interpreting this statement see Waller, et al, see supra note 2, at 84-85.

⁹ *Interamerican Refining Corp. v Texaco Maracaibo, Inc.* (Texaco Maracaibo), 307 F. Supp. 1291 (D. Del. 1970).

¹⁰ The Department of Justice, Antitrust Enforcement Guidelines for International Operations (1988), 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391, § 6. Compare 'Report: Analysis of Department of Justice Guidelines- International Operations- Antitrust Enforcement Policy', 57 Antitrust L. J. 957, 966 (1988).

¹¹ *Texaco Maracaibo*, see supra note 9, at 1294-95.

¹² *Id.* at 1296.

¹³ *Id.* at 1295-96.

compulsion, the compelling acts must be valid under the law of the country involved, the court referring to the act of state doctrine and *Sabbatino*, held that validity is not to be investigated.¹⁴ It should be also pointed out that in *Texaco Maracaibo* the reliance on the foreign sovereign compulsion doctrine was upheld by the court without territorial limitation. The defence was recognised despite the fact that Venezuelan authorities compelled the defendants not to deal in the US. This issue was not even raised in the case.

The recognition of foreign sovereign compulsion as a defence can be traced back to the much earlier *Sisal* case,¹⁵ dealing with the monopolization of the sisal imports from Mexico. In this case the court held that when a private party solicited the government to enact the legislation that led to the private anticompetitive acts, foreign sovereign compulsion as a defence does not apply. The compulsion was given further recognition in *Swiss Watchmakers*,¹⁶ where the court acknowledged that the compulsion would remove liability from the compelled companies.¹⁷ The case dealt with state-approved and state-facilitated regulation of the watch-making industry, which aimed at keeping the know-how, machinery and watch parts in Switzerland, so as to protect the Swiss watch industry from potential competition. Although the regulation was recognised and approved by the government, it was still considered a private agreement, subject to the antitrust rules and the claim of foreign sovereign compulsion was not successful. Despite the state's engagement, the direct foreign government action compelling the defendant's activities was missing. The issue of state engagement was further clarified in *Mannington*,¹⁸ where it was held that the party asserting the defence must prove that the foreign state's involvement was more than merely peripheral to the anticompetitive conduct involved. Therefore simple approval of the state does not meet the threshold necessary for the doctrine to apply. Moreover, the defence was considered not applicable if the defendant could have legally refused the state's wishes.¹⁹

¹⁴ Id. at 1299.

¹⁵ *United States v Sisal Sales Corporation* (Sisal), 274 U.S. 268 (1927). Later *Sisal* was referred to in *Continental Ore* where American and Canadian companies were accused of monopolizing trade in vanadium. In this case a particular company was appointed by the Canadian authority as the exclusive agent responsible for vanadium for Canadian industry in wartime. It helped the main defendant by refusing to buy from the plaintiff. The defendants claimed that they should be released from liability as they acted pursuant to the orders of the government agency. In this respect the court relied on the *Sisal* authority and noted that a company violating antitrust rules may be held liable for its conduct, even if aided by the foreign government. In the instant case, the court found no evidence indicating that the government agency approved or would have approved of the efforts to monopolize the market. See *Continental Ore Co. v Union Carbon & Carbide Corp.* (Continental Ore), 370 U.S. 690, 705-07 (1962).

¹⁶ *United States v Watchmakers of Switzerland Information Center, Inc.* (Swiss Watchmakers), 1963 Trade Cases (CCH) 70,600 (S.D.N.Y. 1962), modified, 1965 Trade Cases (CCH) 71,352 (S.D.N.Y. 1965).

¹⁷ 'If, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another sovereign nation.' id. at XLVI.

¹⁸ *Mannington Mills, Inc. v Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979).

¹⁹ Id. at 1293. It is worth pointing out that the defence was also recognized in various consent decrees and judgments settling government cases. For example in *GE Incandescent Lamp* it was established that the foreign

A major policy consideration underlying the compulsion defence is one of fairness to the defendant. The other rationale usually provided in this respect is the comity consideration.²⁰ Fairness requires allowing the defendants to justify or excuse the compelled conduct, whereas comity helps determine whether the conduct is justified, excused or rather subject to the full range of sanctions, depending on the context.²¹ Moreover, apart from those two principal considerations further grounds are suggested, among them the analogy to the domestic state action doctrine,²² which is important.²³

The US Third Restatement of Foreign Relations Law addresses the issue of the foreign sovereign compulsion in section 441.²⁴ Contrary to the court in *Texaco Maracaibo* it generally recognises the defence only when the compulsion was ‘embodied in binding laws or regulations subject to penal or other severe sanctions’.²⁵ It is explicitly acknowledged that the defence is not available when the state’s orders are given in the form of guidance, informal communications, or the like. It is fair to conclude that the Restatement would not allow recognising compulsion in a case factually similar to *Texaco Maracaibo*, thus limiting its general availability. Moreover, the real threat of penal or other ‘severe sanctions’ is crucial and the danger of termination of the business, by revocation of the necessary license, is provided as an example thereof. The loss of future opportunities does not meet the standard.²⁶ In the case of contradictory commands of two states, preference is given to the law of the state where the act is to

defendant would not be in contempt of the judgment for doing anything outside the US which was required by, or for not doing anything outside the US which was unlawful under the laws where he was incorporated or doing business. *United States v General Electric Co.* (GE Incandescent Lamp), 115 F.Supp. 835, 878 (D.N.J. 1953). In the *Oil Cartel* case it was provided that not only the conduct required by foreign law would be exempt, but also conduct pursuant to ‘request or official pronouncement of policy’ of the foreign state (subject to ‘the risk of present or future loss of the particular business in the foreign state’). *United States v Standard Oil Co.* (N.J.), 1969 Trade Cas. (CCH) P72,742, 72,743 (S.D.N.Y. 1968). Compare Waller, et al., see supra note 2, at 95-96; W.L. Fugate, *Foreign Commerce and Antitrust Laws* § 3.19 (Aspen Publishers, 5th ed, 1997).

²⁰ Waller, et al, see supra note 2, at 79; 1995 Antitrust Enforcement Guidelines for International Operations, see supra note 6, at 3.32; B.E. Hawk, ‘Special Defenses and Issues, Including Subject Matter Jurisdiction, Act of State Doctrine, Foreign Government Compulsion and Sovereign Immunity’, 50 Antitrust L. J. 562, 571 (1981).

²¹ Waller, et al, see supra note 2, at 81.

²² Id. at 79.

²³ See infra Part 2, at p 151. Some scholars claim that recognizing the fairness rationale of the foreign state compulsion implies finding its origin in the state action doctrine. See J Leidig, ‘The Uncertain Status of the Defense of Foreign Sovereign Compulsion: Two Proposals for Change’, 31 Va. J. Int’l L. 321, 328 (1991).

²⁴ American Law Institute, Restatement of the Law (Third): Foreign Relations Law of the United States § 441 (American Law Institute Publishers, 1987):

(1) In general, a state may not require a person (a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or (b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.

(2) In general, a state may require a person of foreign nationality (a) to do an act in that state even if it is prohibited by the law of the state of which he is a national; or (b) to refrain from doing an act in that state even if it is required by the law of the state of which he is a national.

²⁵ Id. at § 441 cmt. c.

²⁶ Id. at § 441 cmt. c, n. 3.

be performed.²⁷ At the same time, in cases where the conduct at stake has direct effects in both the territorial state and the state of nationality, the preference is not as strong.²⁸

Similar to the Restatement,²⁹ the 1995 Antitrust Enforcement Guidelines of the DOJ and FTC³⁰ consider the threat of penal or other severe sanctions indispensable for the applicability of the compulsion defence. The issue of the form of compulsion is not discussed, therefore it may be that informal pressure suffices. However measures short of compulsion will not be able to fall within the scope of the defence.³¹ No strict limits are recognised with respect to territorial reach of the doctrine, nevertheless it is clarified that the defence is available ‘normally only’ in cases, where the compelled conduct was accomplished ‘entirely’ within the compelling state’s territory.³² It is pointed out that in cases, where the conduct occurs in the US, the defence is not available. The Guidelines also clarify that the defence does not apply in cases falling within the Foreign State Immunities Act’s commercial activity exception.³³ Therefore, it is considered that the defence is not applicable to the commercial dealings of a state.

As Crampton³⁴ points out the Guidelines narrowed down the applicability of the doctrine in comparison with the Guidelines issued in 1988.³⁵ The older document did not talk about sanctions but ‘the imposition of significant penalties or to the denial of specific substantial benefits’.³⁶ Moreover, the 1988 Guidelines noted that the defence will not be *generally* available if the conduct took place wholly or primarily in the US.³⁷

The compulsion defence is weakened when so-called blocking statutes are involved,³⁸ i.e. legislation prohibiting providing foreign authorities with documents and information, subject to sanctions, when this would impair home state essential

²⁷ Id. at § 441 cmt. a.

²⁸ Id. at § 441 cmt. b.

²⁹ Comparing these documents one should keep in mind that the Restatements, however extremely influential in practice, are the effect of a private codification of law in particular fields (*de lege lata*) undertaken by the American Law Institute, whereas the DOJ and FTC Guidelines express the view of the government agencies on the matter. For more on the Restatements see <http://www.ali.org/index.cfm?fuseaction=projects.main>.

³⁰ 1995 Antitrust Enforcement Guidelines for International Operations, see supra note 6, at § 3.32, 2.

³¹ Id.

³² Id. at § 3.32, 3.

³³ Id. Compare Waller, see supra note 6, at § 8:25.

³⁴ PS Crampton, ‘The 1995 US Antitrust Enforcement Guidelines for International Operations: A Foreign Perspective’, 1 IBLJ 99, 103-04 (1996). For analysis of the 1988 Guidelines see ‘Report: Analysis of Department of Justice Guidelines- International Operations- Antitrust Enforcement Policy’, see supra note 10, at 996-98.

³⁵ 1988 Antitrust Enforcement Guidelines for International Operations, see supra note 10.

³⁶ Id. at § 6, 2.

³⁷ Id. at § 6, 3.

³⁸ SW Waller, ‘Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond’, 14 Law & Pol’y Int’l Bus. 747, 780-81 (1982).

interests.³⁹ The Restatement notes that while the compulsion generally entitles the defendant to be completely freed from liability, when blocking statutes are involved ‘a variety of adverse inferences are permissible’ and the statutes ‘need not be given the same deference (...) as differences in substantive rules of law.’⁴⁰ Waller points out that blocking statutes constitute a form of negative compulsion, and are ‘usually not geared to advancing any affirmative policy’ of a foreign state.⁴¹ Such restrictions are in any case not absolute. The efforts of a defendant to secure, domestically, permission to comply with foreign discovery orders will in practice play a role.⁴² The courts are likely to engage in a balancing exercise in cases raising this issue.⁴³

It is worth noting that in the early eighties, the US car industry faced a significant crisis, unable to cope with the import competition, especially from Japanese cars. This led to the introduction of a system of oversight and reporting by the Japanese authorities so as to limit exports. The issue of possible application of US antitrust was identified at the very onset by both governments as a possible obstacle to the approach of addressing the problem.⁴⁴ Japanese authorities unilaterally set export quotas for individual companies, by means of *de jure* non-binding directives, and imposed a reporting obligation to monitor exports. In case of non-adherence with the policy the Japanese government intended to introduce export licensing, subject to fines, penalties and other sanctions.⁴⁵ The US Attorney General in its answer to the Japanese letter on the matter provided that the DOJ considered that the adopted measures did not give rise to the violation of US antitrust laws, as the companies compliance with the export limitations were compelled by the Japanese governments, acting within its sovereign powers.⁴⁶ The DOJ assurance was rather surprising, especially taking into consideration that the sanctions for noncompliance with the Japanese scheme *were only promised to be introduced* if the issue arose.⁴⁷ This last issue of the form by which the compulsion is achieved is of practical importance. As Waller puts it, ‘to put a premium on the form

³⁹ Blocking statutes were enacted in many countries in response to the expansive extraterritorial application of US antitrust. Compare RE Price, ‘Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of the US Economic Laws Abroad’, 28 Geo. Wash. J. Int’l L. & Econ. 315 (1994).

⁴⁰ American Law Institute, see supra note 24, at § 442, n. 5.

⁴¹ Waller, see supra note 38, at 780-81.

⁴² American Law Institute, see supra note 24, at § 442, n. 5. Compare *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 998 (10th Cir. 1977).

⁴³ American Bar Association, Section of Antitrust Law, *Obtaining Discovery Abroad* 61-62 (ABA Section of Antitrust Law, 2nd ed, 2005).

⁴⁴ For an in-depth analysis of this case in the broader trade context and with the special regard to the foreign state compulsion as a defence in antitrust see Waller, see supra note 38.

⁴⁵ ‘Correspondence Between the U.S. Attorney General and Ambassador of Japan on U.S. Antitrust Laws and Japan’s Restraints on Automobile Exports’, reprinted in U.S. Import Weekly (BNA) (May 13, 1981), at M-1.

⁴⁶ Opinion of the United States Attorney General Addressed to Ambassador Yoshio Okawara of Japan (May 7, 1981), 1981-1 Trade Cas. (CCH) 63,998. Compare Brief for the United States as Amicus Curiae Supporting Affirmance, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (Matsushita), No. 83-2004 (U.S. Jun. 17, 1985).

⁴⁷ Compare Waller, see supra note 38, at 812.

rather than on the degree of government involvement is to ignore the realities of a complex business world'.⁴⁸ This is particularly so as the way the compulsion is framed may reflect different styles of governing, rather than the actual involvement of a particular state.⁴⁹

The issue of the foreign state compulsion was also raised in *Matsushita*, another case involving Japanese defendants: TV manufacturers were accused of price fixing and market allocation. The defendants alleged that the unlawful conduct was compelled by the Japanese authorities, as a part of its trade policy. While the district court did not address this issue after finding that the plaintiffs lacked the required injury for standing, the Court of Appeals noted that 'a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of section 1 of the Sherman Act',⁵⁰ yet it remained unconvinced that the conduct at stake was government-mandated. It *inter alia* observed that it was possible that the Japanese government provided just 'an umbrella under which the defendants gained an exemption from Japanese antitrust law', and then subsequently fixed prices themselves.⁵¹ It also found no evidence supporting the claim that other aspects of the conduct at stake, regarding market allocation, originated within the Japanese authorities.⁵²

The decision of the Third Circuit met with criticism. Not only did the Japanese government, in a diplomatic note, in a straightforward way underline and explain its compulsion, but for some the evidence itself suggested likewise.⁵³ The Supreme Court granted certiorari. In its *amicus* submission the Japanese government supported the defendants, stating that the measures at stake 'came into existence pursuant of the direction of the Government of Japan (...) and constituted an integral aspect of [its] foreign economic and trade policy.'⁵⁴ The US government in its brief supported this position. It recognised, in general, that 'anticompetitive private conduct should not lead to liability in a private antitrust suit when that conduct is directed by a foreign sovereign.'⁵⁵ It advised that the Japanese statement should be accepted 'at face value; government's assertions concerning the existence and meaning of its domestic law generally should be deemed "conclusive."⁵⁶ The Supreme Court did not, unfortunately,

⁴⁸ *Id.* at 794.

⁴⁹ Compare Waller, see *supra* note 6, at § 8:19, n. 6.

⁵⁰ *In re Japanese Elec. Prods Antitrust Litig.*, 723 F.2d 238, 315 (3th Cir. 1983).

⁵¹ *Id.*

⁵² *Id.*

⁵³ See, for example, JW Perkins, 'In Re Japanese Electronic Products Antitrust Litigation: Sovereign Compulsion, Act of State, and the Extraterritorial Reach of the United States Antitrust Laws', 36 *Am. U. L. Rev.* 721, 757-60 (1986).

⁵⁴ Brief of the Government of Japan as Amicus Curiae in Support of the Petition for A Writ of Certiorari, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (Matsushita), No. 83-2004, 3 (U.S. Jul. 6, 1984).

⁵⁵ Brief for the United States as Amicus Curiae Supporting Affirmance, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (Matsushita), see *supra* note 46, at 16.

⁵⁶ *Id.* at 23. The support of the US reflected the change in its foreign policy and the outcome of the intergovernmental negotiations with Japan. Compare A. Ganjaei, 'Matsushita Electric Industrial Co., Ltd. v.

address the issue of compulsion after establishing that the alleged conduct did not cause injury to the plaintiffs.⁵⁷

2. US DOMESTIC STATE ACTION DOCTRINE

The state action doctrine⁵⁸ is a defence available in US domestic antitrust cases for private anticompetitive conduct that was undertaken pursuant to and under supervision of a state of the US, as well as the conduct compelled by a state. It was recognised by the Supreme Court in *Parker* (therefore it is sometimes called the Parker doctrine), where it observed that ‘(t)here is no suggestion of a purpose to restrain state action in the Act’s legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only “business combinations.”’⁵⁹ The Parker doctrine holds that anticompetitive action by state governments and private conduct in compliance with it are immune from the liability under the Sherman Act.

In *Parker* the issue at stake was a Californian state-established regulatory scheme fixing prices of raisins. The case was brought by a producer who wanted to sell more raisins and at lower prices. While the Court found that the scheme, imposed by the state in its legislative authority and enforced with penal sanctions, was not prohibited under the Sherman Act, it also observed that ‘a state does not give immunity to those who violate the Sherman Act by authorising them to violate it, or by declaring that their action is lawful.’⁶⁰ The doctrine was further clarified in *Midcal*,⁶¹ where the Court introduced a two-prong test for private parties immunity under the state action doctrine: ‘first, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself.’⁶² The case at stake concerned a Californian retail price maintenance scheme for wines, which while satisfying the first prong of the test, failed the second. Although the policy was clearly articulated, the state did not establish prices, review their reasonableness, or engage in any further examination of the program.⁶³

The DOJ’s Antitrust Division disagreed with the American Bar Association on the point whether the state action doctrine should be made applicable internationally, i.e.

Zenith Radio Corp.: The Death Knell for Predatory Price Fixing and the Avoidance of a Standard for the Foreign Sovereign Compulsion Defense’, 15 Denv. J. Int’l L. & Pol’y 395, 407-08 (1986).

⁵⁷ *Matsushita Electric Industrial Co. v Zenith Radio Corp.* (Matsushita), 475 U.S. 574, 598 (1986).

⁵⁸ For more details on the US domestic state action doctrine see S. Semeraro, ‘Demystifying Antitrust State Action Doctrine’, 24 Harv. J.L. & Pub. Pol’y 203 (2000); J.E. Lopatka and W.H. Page, ‘State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints’, 20 Yale J. on Reg. 269 (2003). Compare the ABA Antitrust Section ‘Committee Resources’ at <http://apps.americanbar.org/antitrust/at-committees/at-exemc/main-exemptions/state-action.shtml>.

⁵⁹ *Parker v Brown*, 317 U.S. 341, 351 (1943).

⁶⁰ Id. at 351-52.

⁶¹ *California Retail Liquor Dealers Ass’n v Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

⁶² Id. at 105.

⁶³ Id. at 105-06.

‘foreign government-regulated conduct’, *ergo* the actions of foreign states and the private conduct pursuant to such actions and supervision of a foreign state. The ABA was in favour of such a solution. In its Report on the 1988 Draft Guidelines the ABA similar to the court in *Parker* found nothing in the legislative history of the Sherman Act indicating that it should apply to foreign government-regulated conduct. Moreover, it was pointed out that ‘(s)overeign foreign states, entitled as a matter of international law to equal status with the United States federal government, deserve at least as much respect for their regulatory actions as semi-sovereign states within our federal system.’⁶⁴ In the final version of the 1988 Guidelines the DOJ did not share this logic and considered application of the state action doctrine inappropriate in international cases, citing the federalist concepts behind it and difficulties in applying such a standard in an international context.⁶⁵ The ABA in response noted that its comments ‘appear to have fallen on deaf ears’.⁶⁶ The 1995 Guidelines mention the doctrine only briefly in a footnote, distinguishing it from foreign sovereign compulsion. Yet, this distinction is somewhat ambiguous and not particularly enlightening: ‘(t)he state action doctrine applies not just to the actions of states and their subdivisions, but also to private anticompetitive conduct that is both undertaken pursuant to clearly articulated state policies, and is actively supervised by the state.’⁶⁷

Were the Parker doctrine available also in cases involving foreign states and foreign companies, it would systematically solve a number of issues. First of all, it does not require compulsion as such to remove liability from private companies acting in accordance with a state prescription. Generally speaking it is sufficient that they act pursuant to a clearly established policy of a state, under its supervision. This is significantly less demanding standard to meet and it has the potential to better accommodate foreign regulatory frameworks where the role of formal law differs from the role it plays in free-market-economy jurisdictions. Particularly, it seems better equipped to handle regimes with more both direct and indirect state involvement in economic affairs. Making the state action doctrine available in the international context would bring more transparency into US antitrust. It would, arguably, contribute to development of the international trade law in this area, as parties affected by anticompetitive conduct unable to bring private actions in US courts would most probably lobby the US government to bring more actions in the WTO. Furthermore, it would also answer in the negative the outstanding question concerning the possibility

⁶⁴ ABA Section of Antitrust Law & Section of International Trade and Practice, ‘Report to the House of Delegates [on Draft Antitrust Guidelines for International Operations]’, 57 Antitrust L. J. 651, 668-69 (1988).

⁶⁵ ‘(...) Given the complexity and novelty of foreign legal systems and the difficulty of obtaining foreign-located evidence, defendants would have many opportunities to attempt to evade legitimate application of the U.S. antitrust laws wherever there was an arguable foreign national policy underlying anticompetitive conduct. The use of an active supervision standard of the sort applied in state action cases would also require difficult inquiries into the foreign sovereign’s conduct of its own affairs.’ 1988 Antitrust Enforcement Guidelines for International Operations, see supra note 10, at § 6, 4, n. 179.

⁶⁶ Compare ‘Report: Analysis of Department of Justice Guidelines- International Operations- Antitrust Enforcement Policy’, see supra note 10, at 967-68.

⁶⁷ 1995 Antitrust Enforcement Guidelines for International Operations, see supra note 6, at n. 93.

of an antitrust suit in the US court against a foreign sovereign. This itself would be a very welcome development from the perspective of international relations and it seems, in light of its recent position in *RPP*, that the DOJ is in favour of settling sensitive transnational commercial disputes involving a foreign state, and not falling under the WTO regime, through international negotiations rather than in the courtrooms in the US.⁶⁸ Were the state action doctrine made applicable in an international context in antitrust cases, the avoidance doctrines would become largely irrelevant in this field.

It is worth noting that there may be parallels also between the US state action doctrine and the EU foreign sovereign defence known also under the state action doctrine name. The latter seems to apply also in situations where the regulatory framework in a particular state eliminates the competition.

3. THE COMPULSION IN THE EU: THE STATE ACTION DOCTRINE

In the EU context the European Commission and the Court of Justice recognised the foreign state compulsion as a defence, narrowly applied, in cases where companies were left with no margin of freedom for autonomous action allowing for competition. The terminology in this case is different than in the discourse in international law, as the defence is called the state action doctrine.⁶⁹ In most cases it was recognised as a jurisdictional rule. Although it was raised mostly in the intra-EU context, there is no reason why it could not be relied on by a non-EU company, in the case of extraterritorial application of EU competition law. In scenarios where no autonomous conduct can be found on the part of the undertakings involved in anticompetitive conduct, Articles 101 and 102 TFEU do not apply.⁷⁰ No distinction is drawn between private and public undertakings. What matters is the presence or the lack of the autonomous conduct on their side. In the latter case, when Articles 101 and 102 TFEU are inapplicable, in the EU context a member state compelling companies to act in an anticompetitive manner could be found in breach of its obligations under the TFEU.⁷¹

⁶⁸ In this case, brought by US gasoline retailers against various producers of refined petroleum products for price-fixing of crude oil and refined petroleum products in conspiracy with OPEC, the US government in its *amicus* submission supported the defendants and argued that the case raised non-justiciable political questions ousting the jurisdiction of the court. See Brief of the United States as Amicus Curiae Supporting Affirmance, *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, No. 09-20084 (5th Cir. Aug. 16, 2010). Compare Martyniszyn, see supra note 2, at 11-12.

⁶⁹ Compare: OECD, *Working Party No. 3 on Co-operation and Enforcement- Roundtable on the Application of Antitrust Law to State-Owned Enterprises- European Commission*, DAF/COMP/WP3/WD(2009) 42, 11-14 (Sept. 28, 2009), available at <http://ec.europa.eu/competition/international/multilateral/antitrustlaw.pdf>.

⁷⁰ For the sake of clarity I consistently refer to the EU competition provisions under their current numbering.

⁷¹ The EU member states undertook an obligation under Art. 4(3) TEU (so-called 'loyalty clause') to facilitate the achievement of the Union's tasks. This provision prohibits EU member states to take any measures jeopardizing such endeavours, and read in conjunction with the Protocol 27 on the Internal Market and Competition, annexed to TEU and TFEU (providing that EU 'includes a system ensuring that competition is not distorted'), and with the substantive provisions of Article 101 and 102, offers additional basis for challenging anticompetitive measures, including legislation, of a EU member state. Yet this route has only been used once to date. See Case C-35/96, *Commission v Italy*, [1998] ECR I-3851. Pace identifies four types of scenarios in which the EU member state could be found in breach of Article 101 read in conjunction with

If the compelling state is not a member of the EU, the situation is more complicated and EU law seems not to offer a remedy.

*Ladbroke Racing*⁷² was the first case when the Court of Justice clarified the position of the EU competition law on the issue of compulsion. It noted that the core EU competition law provisions, Articles 101 and 102 TFEU, apply only to anticompetitive conduct of undertakings carried out on their own initiative. The court expressly noted that if the conduct is required by legislation, or if the legislation creates a legal framework eliminating competition on the part of the undertakings, then the restrictions of competition are not attributable to the undertakings.⁷³

Van Bael suggests that compulsion as a defence had been already recognised by the Commission with respect to voluntary restraint agreements.⁷⁴ The Commission noted that Article 101 does not apply to export agreements imposed on firms in non-member states by their governments, apart from scenarios when there was an agreement or concerted practice among firms independent thereof. At the same time, it was underlined that Article 101 applies in cases when the government only authorised the export agreements, *ergo* does not force their creation.⁷⁵ In its decision in *Ball-Bearings*,⁷⁶ the Commission explicitly recognised that the state (in this case a non-EU member state) compulsion removed the measures outside the scope of applicability of the prohibition, which still remained applicable to any anticompetitive measures undertaken by the companies themselves, on top of the compelled conduct.⁷⁷ It also again pointed out that the mere authorisation of the conduct by state authorities does not make the provisions of Article 101 inapplicable.⁷⁸ Similarly, in its decision in *Aluminium Imports*⁷⁹ the Commission noted that even if a government supported a contract in violation of

the loyalty clause. This would happen when a state would (a) require adoption of anticompetitive agreement (compel them), (b) reinforce their effects, (c) encourage/ favour their adoption, (d) deprive 'its own rules of the character of legislation by delegating to private economic operators responsibility for their decisions affecting the economic sphere'. L.F. Pace, *European Antitrust Law: Prohibitions, Merger Control and Procedures* 157-58 (Edward Elgar, 2007).

⁷² Joined cases C-359/95 P and C-379/95 P, *Commission of the European Communities and French Republic v Ladbroke Racing Ltd.* (Ladbroke Racing), [1997] ECR I-6265.

⁷³ *Id.* at 33.

⁷⁴ I. Van Bael and Van Bael & Bellis (eds), *Competition Law of the European Community* 48 (Kluwer Law International, 5th ed, 2010).

⁷⁵ European Commission, Third Report on Competition Policy 27, 20, n. 3 (Office for Official Publications of the European Communities, 1974).

⁷⁶ Decision 74/634/EEC of the Commission, of 29 November 1974, IV/27.095, *Ball-Bearings*, OJ L 343, 19 (Dec. 21, 1974).

⁷⁷ *Id.* at 23, § II, 1(b).

⁷⁸ *Id.* at 23, § II, 1(c).

⁷⁹ Decision 85/206/EEC of the Commission, of 19 December 1984, IV/26.870, *Aluminium Imports from Eastern Europe* (Aluminium Imports), OJ L 92, 1 (Mar. 30, 1985).

the competition law, this does not alter the position of the companies involved, therefore it is not a valid defence.⁸⁰

If a state supports, encourages, or in any other way tries to convince an undertaking to engage in an anticompetitive conduct, the latter is left with no defence. In a similar vein in *Wood Pulp*⁸¹ a US export cartel attempted to rely on such a defence, claiming that it was a duly registered and officially recognized export association. The court noted that the US legislation (the Webb Pomerene Act) only exempts export cartels from the scope of application of US antitrust, but does not require their creation.⁸²

To be recognized as a defence state compulsion does not have to be achieved by formal law. In *Asia Motors III*⁸³ the court recognised that even in the absence of any binding regulatory provisions imposing the conduct in question, Article 101 will not be applicable if the conduct was unilaterally imposed by the authorities through the exercise of ‘irresistible pressure’.⁸⁴ The term was not defined by the court, but it was illustrated by a threat to adopt measures likely to cause substantial losses for the undertaking involved. This needs to be proven on the basis of objective, relevant and consistent evidence.⁸⁵

The lack of evidence to support the allegation of compulsion was an issue in *Stichting Sigaretenindustrie*.⁸⁶ The case dealt with various anticompetitive agreements in the tobacco business in the Netherlands. The applicants claimed that the Dutch authorities ‘decisively influenced’ the agreements and that they threatened to take otherwise unspecified ‘measures’ in case the applicants conduct did not comply with expectations.⁸⁷ Yet this claim was not supported by any evidence. The Commission was of the view that the documents available did not show that the agreements at stake were concluded ‘with the approval or at the instigation’ of the Netherlands, who denied such an allegation. The court established that the authorities held meetings with the undertakings involved and, in this forum, they were to ‘[indicate] certain objectives they wished to see achieved’.⁸⁸ Yet, there was no evidence proving that the ‘objectives’ were to be achieved by the conclusion of the anticompetitive agreements found in violation of the competition law.⁸⁹

⁸⁰ Id. at 10, 10.1, 10.2.

⁸¹ Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities* (Wood Pulp), [1988] ECR 5193.

⁸² Id. at 20.

⁸³ Case T-387/94, *Asia Motor France SA and others v Commission of the European Communities* (Asia Motor III), [1996] ECR II-961.

⁸⁴ Id. at 65.

⁸⁵ Id. at 61-65.

⁸⁶ Joined cases 240, 241, 242, 261, 262, 268 and 269/82, *Stichting Sigaretenindustrie and others v Commission of the European Communities* (Stichting Sigaretenindustrie), [1985] ECR 3831.

⁸⁷ Id. at 38.

⁸⁸ Id. at 40.

⁸⁹ Id.

The exclusions from the scope of the applicability of Article 101 apply restrictively.⁹⁰ Therefore, if despite the existence of national legislation or other state-driven means severely limiting competition, there is still scope for effective competition the provisions of Article 101 apply. This issue was raised in *Strintzis Lines*.⁹¹ The Commission fined shipping companies operating ferry services between Greece and Italy, after finding infringement of Article 101. The applicants claimed *inter alia* that the legislative and regulatory framework as well as the official policy decisively restricted their autonomy, by obliging them to contact each other to consult and negotiate the crucial parameters of their policy, including prices.⁹² The court recalled that Articles 101 and 102 apply only to anticompetitive conduct engaged in by an undertaking on their own initiative,⁹³ and it found that the companies enjoyed autonomy, and were therefore subject to the rules on competition.⁹⁴ It also reaffirmed, referring *inter alia* to *Ladbroke Racing*, that if the conduct at stake was required by the national legislation, or if a legal framework was such as to eliminate any possibility of competition, then Articles 101 and 102 do not apply.⁹⁵ Similarly, findings from *Asia Motors III* (irresistible pressure notion) were reaffirmed.⁹⁶ In the instant case the question was whether the cumulative effect of the regulatory framework and the state policy ‘robbed’ the parties involved of their autonomy in adopting a tariff policy on the investigated routes, removing any possibility of competition between them.⁹⁷ The court answered in the negative, finding that the undertakings enjoyed autonomy in setting pricing policy, and that there was no ‘irresistible pressure’ forcing them to conclude tariff agreements.⁹⁸

In *CIF* the Court of Justice suggested different underpinnings of the doctrine.⁹⁹ Here the Italian consortium of match manufacturers, called into existence by domestic legislation, allocated production quotas among companies. The price itself was fixed by the state. Membership of the consortium was obligatory for all producers. The Italian competition authority found the legislation in breach of Article 101 read in conjunction with the loyalty clause. It also established that the consortium itself and its members infringed Article 101. The court distinguished here two periods of time: until the membership in the consortium was obligatory, and after it became voluntary. So long as it was obligatory and the legislation prevented companies from engaging in autonomous conduct, the principle of legal certainty was not to be violated and the

⁹⁰ Joined cases 209 to 215, 218/78, *Heintz van Landenyeck SARL and others v Commission of the European Communities* (Van Landenyeck), [1980] ECR 3125, 130, 33.

⁹¹ Case T-65/99, *Strintzis Lines Shipping SA v Commission of the European Communities* (Strintzis Lines), [2003] ECR II-5433.

⁹² Id. at 123.

⁹³ Id. at 119.

⁹⁴ Id. at 135.

⁹⁵ Id. at 119.

⁹⁶ Id. at 122.

⁹⁷ Id. at 124.

⁹⁸ Id. at 138-41.

⁹⁹ Case C-198/01, *Consorzio Industrie Fiammiferi (CIF)*, [2003] ECR I-8055.

companies cannot be exposed to any penalties for their past conduct, which was required by the law concerned.¹⁰⁰ Therefore it was not a lack of infringement, *ergo* inapplicability of Article 101, as in the earlier case law, but in fact the principle of legal certainty that shielded defendants.¹⁰¹ The court also recognised that the national competition authority has a duty to disapply the anticompetitive law. Once such a decision is taken, it is binding upon the companies, who stop being shielded and their future conduct is liable to be penalised.¹⁰² Moreover, the court underlined that the defence is not applicable when the legislation merely encourages or makes it easier to engage in anticompetitive conduct,¹⁰³ yet it may be a mitigating factor at the penalty-setting stage.¹⁰⁴

Recently in *Deutsche Telekom* the court noted, referring to *Ladbroke*, that when anticompetitive conduct is required by a state, or if a state eliminates any possibility for competition among undertakings, Articles 101 and 102 do not apply, as the restriction of competition is not attributable to the autonomous conduct of the undertakings involved.¹⁰⁵ It pointed out that ‘the possibility of excluding anticompetitive conduct from the scope of Articles [101 and 102] on the ground that it has been required (...) by existing national legislation or that the legislation has precluded all scope for any competitive conduct on their part has thus been accepted only to a limited extent by the Court of Justice.’¹⁰⁶ Therefore it seems clarity is missing whether the court considers Articles 101 and 102 inapplicable in case of state compulsion, or if it considers it a defence shielding the undertakings involved from liability, as it suggested in *CIF*.

As de la Torre points out it is unclear what are the consequences of the defence in case of actions for damages.¹⁰⁷ In *CIF* the court pointed out that the companies acting under such compulsion are shielded from ‘all the consequences of an infringement (...) vis-à-vis public authorities and *other economic operators* [emphasis added],’¹⁰⁸ yet in the preceding paragraph the court mentioned only ‘any penalties, either criminal or administrative.’¹⁰⁹ At the same time, if the companies are shielded from damages, in the intra-EU context it is possible to bring an action for damages against a state, under the *Francovich*

¹⁰⁰ Id. at 53.

¹⁰¹ Compare F.C. de la Torre, ‘State Action Defence in EC Competition Law’, 28 *World Competition* 407, 417 (2005); Pace, see supra note 71, at 166-67.

¹⁰² *CIF*, see supra note 99, at 54-55.

¹⁰³ Id. at 56.

¹⁰⁴ Id. at 57.

¹⁰⁵ Case C-280/08 P, *Deutsche Telekom AG v European Commission*, [2010] ECR 0000, 80.

¹⁰⁶ Id. at 81, referring *inter alia* to Stichting Sigarettenindustrie and *CIF*.

¹⁰⁷ de la Torre, see supra note 101, at 419.

¹⁰⁸ *CIF*, see supra note 99, at 54.

¹⁰⁹ Id. at 53.

principle.¹¹⁰ It provides for a member state liability for losses caused to private parties as a result of a violation of EU law for which the state is responsible.

The EU state action doctrine can be seen either as a jurisdictional rule, rendering Articles 101 and 102 inapplicable to anticompetitive conduct compelled by a state, or as a defence on merits. It potentially fully frees undertakings from liability. It is applicable to explicit compulsion, as well as to scenarios when the state leaves companies no room for competitive conduct. This can be achieved explicitly through legislation, or by less legally obvious but similarly compelling means, where a state places an ‘irresistible pressure’ on the party to act in an anticompetitive way, under the threat of substantial losses, or other serious, but not necessarily penal sanctions. Compared to the US doctrines of foreign state compulsion and domestic state action, the EU state action doctrine seems to be less demanding than the former (for example, by not requiring such a presence of such a severe sanctions for non-compliance), but stricter than the latter (by, for example, requiring the parties to show that they were left with no margin for autonomous competitive conduct).

4. RECENT DEVELOPMENTS IN THE US¹¹¹

The recent line of US case law involving Chinese export cartels heralds a revival of the reliance on the foreign state compulsion defence, the contours of which are not well defined. These new cases together with the related trade dispute within the WTO show that the law in this area calls for further clarification, leading potentially to better identification of liability for anticompetitive conduct. China, due to its economic and legal systems and its increasing importance in international trade provides new, legally challenging scenarios. One practitioner bluntly characterised any possible successful reliance by Chinese cartelists on foreign state compulsion defence as ‘a declaration of war on the market system.’¹¹²

The foreign compulsion defence was recently invoked in *Vitamin C*.¹¹³ Four Chinese manufacturers and their trade association were accused by US purchasers of fixing prices and limiting exports, *ergo* creation of an export cartel. The allegations themselves were not challenged. Instead, the defendants brought a motion to dismiss the case,

¹¹⁰See TC Hartley, *The Foundations of European Union Law* 248-55 (Oxford University Press, 7th ed, 2010); A Kaczorowska, *European Union Law* 365-84 (Routledge-Cavendish, 2nd ed, 2010). In a scenario when the companies are found in breach of competition law for limiting the competition further than required by the compelling legislation, it may be difficult, in terms of damages, to distinguish between theirs and the state responsibility. Compare de la Torre, see *supra* note 101, at 425.

¹¹¹This part draws on another text, where these recent developments are discussed in the context of export cartels. See M Martyniszyn, ‘Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law’, (2012) 15(1) J. Int’l Econ. L. 181.

¹¹²See A Longstreth, ‘U.S. Courts Confront China’s Involvement in Price Fixing’, Reuters Legal (Mar. 11, 2011), available at <http://www.reuters.com/article/2011/03/11/us-china-vitaminc-idUSTRE72A4XH20110311>.

¹¹³In re Vitamin C Antitrust Litigation, 584 F. Supp. 2d 546 (E.D.N.Y. 2008).

arguing that their conduct was compelled by the Chinese authorities.¹¹⁴ At an early stage the defendants' motion was denied as the court found the evidence too ambiguous.¹¹⁵

The Chinese government placed considerable importance on the case and submitted its first ever *amicus* brief in front of a US court.¹¹⁶ In the brief the Chinese authorities argued that the trade association (the Chamber of Commerce) operated under its direct and active supervision, fulfilling governmental functions. In 1997 China introduced a system of strict control of vitamin C production, carried by a specially created body in the Chamber. The right to export vitamin C was limited solely to its members. They were obliged to 'voluntarily adjust their production outputs' and to 'strictly execute [an] export coordinated price set by the Chamber and [to] keep it confidential', under a threat of revocation of the membership or ultimately cancellation of the export license. The Chinese defendants backed by the authorities claimed that they were compelled to export at a set price, and even though the price itself was not set by the authorities they were unable to export at a non-conforming price.¹¹⁷

The court considered that the Chinese submission was entitled to substantial deference, but it was not to be regarded as conclusive evidence on compulsion, especially as it was directly contradicted by the documentary evidence.¹¹⁸ The plaintiffs argued that there was no law or regulation compelling a price or price agreement at issue. The evidence demonstrated that the defendants at least once set the price by hand voting during a meeting. Moreover, it was argued that despite setting the minimum price, the defendants were undercutting each other.¹¹⁹ This part of the evidence suggested a complex interplay between the defendants and the involved institutions, clouding the degree of their independence with respect to price decisions.¹²⁰

As the court noted, in contrast to cases like *Texaco Maracaibo*, in this case the parties contested both the origin and the very fact of compulsion. Because of the non-transparent Chinese legal system, commonly relying on ministerial regulations, it was unclear 'whether defendants were performing governmental function, whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens'.¹²¹ Moreover, the court observed that a situation in which the defendants first formed the cartel and thereafter asked for the state recognition was also conceivable, but it refrained from commenting on the

¹¹⁴The defendants invoked also other state-related defences, such as the act of state and international comity, but the core of the defence rested on claim that the Chinese government required them to fix prices id. at 550-52.

¹¹⁵Id. at 559.

¹¹⁶Id. at 552.

¹¹⁷Id. at 552-54.

¹¹⁸Id. at 557.

¹¹⁹Id. at 555.

¹²⁰Id. at 556.

¹²¹Id. at 559.

availability of the defences raised in this case. Ultimately, the records were considered too ambiguous ‘to foreclose further inquiry into the voluntariness of defendants’ actions’ and the motion to dismiss was denied.¹²²

After further discovery the district court, in a well-crafted 72-page opinion, denied the defendants a motion for summary judgment based on the foreign compulsion defence.¹²³ It recognised that the defence¹²⁴ is applicable when a foreign party is placed ‘between the rock of its own local law and the hard place of U.S. law’, yet it found ‘no rock and no hard place’, *ergo* no compulsion, in the instant case.¹²⁵ In general terms, it noted that the defence applies only when the refusal to comply would lead to ‘the imposition of penal or other severe sanctions’,¹²⁶ and in any case it does not cover conduct ‘going beyond what the foreign sovereign compelled’.¹²⁷ The court found the defence non-applicable in cases, where the compulsion was procured by the defendant.¹²⁸ It disagreed with the court in *Animal Science*¹²⁹ which found the foreign sovereign compulsion defence applicable if the defendants were compelled to abide with the set minimum prices, considering it irrelevant how the minimum prices came about.¹³⁰ The *Vitamin C* court noted that if the defendants in *Animal Science* were not compelled to reach minimum price agreements in the first place, the fact that such agreements were enforced would not suffice to make the foreign state compulsion defence applicable.¹³¹ Furthermore, although not dispositive the compulsion seems unlikely in a scenario, like in the instant case, when ‘defendants enthusiastically embrace a legal regime that encourages, or even ‘compels,’ a lucrative cartel that is in their self-interest.’¹³²

As the case developed it transpired that the earlier Chinese regulatory framework changed significantly in 2002 (the case concerned conduct between December 2001 and December 2008). The membership in the relevant Chamber’s body became voluntary and it was no longer necessary in order to export.¹³³ Thus, the sanctions for

¹²²Id. The court dismissed the complaint with a leave to replead. The plaintiffs added new defendants in a second amended complaint and they were offered an opportunity to make allegations against them.

¹²³In re Vitamin C Antitrust Litigation, No. 06-MD-1738 (E.D.N.Y. Sept. 6, 2011).

¹²⁴The defendants raised also the doctrines of the act of state and the international comity, but the court found that these claims were in essence dependent on the establishment the compulsion in the instant case. Id. at 33-34, 39-42.

¹²⁵Id. at 2.

¹²⁶Id. at 35, citing 1995 Antitrust Enforcement Guidelines for International Operations, see supra note 6, at § 3.32, 2.

¹²⁷Vitamin C Ib, see supra note 123, at 35, citing Waller, see supra note 6, at § 8:23, n. 6.

¹²⁸Vitamin C Ib, see supra note 123, at 41, n. 33.

¹²⁹For discussion of this case see infra notes 148-166 and the accompanying text.

¹³⁰Vitamin C Ib, see supra note 123, at 36. See infra note 154 and the accompanying text.

¹³¹Id.

¹³²Id. at 41, n. 33, 46-47. The court called coercion in such a context a ‘paper tiger’, borrowing a Mao Tse-Tung metaphor.

¹³³Id. at 11-12.

noncompliance altered: the termination of the membership under the new regime played a different role as it was not indispensable for the sake of exportation.¹³⁴ In fact it seems there were no penalties for failing to follow the new ‘self-discipline’ system.¹³⁵

Moreover, in 2004 one of the cartel members deflected and refused to participate in a planned production stoppage and, as the other cartel member general manager described it ‘unilaterally tore[d] up the agreement [on the shutdown]’.¹³⁶ When the cartel scheduled another stoppage, it considered the chances of the previously deflecting member partaking as ‘not great’.¹³⁷ Although it was argued that the deflecting company was penalised for its behaviour and forced to participate in the next shutdown, the court did not find any documentary evidence supporting these claims.¹³⁸

The court refused to defer to the Chinese authorities interpretation of Chinese law, particularly in its 2009 statement.¹³⁹ The court noted it did not ‘read like a frank and straightforward explanation of Chinese law’ but rather ‘a carefully crafted and phrased litigation position’.¹⁴⁰ Besides, China’s position was contradicted both by the factual record¹⁴¹ and by China’s representations to the WTO.¹⁴² The court reached a conclusion that China’s assertion of compulsion was ‘a post-hoc attempt to shield defendants’ conduct from antitrust scrutiny.’¹⁴³

The court referred also to the on-going WTO trade dispute in a similar context (China is accused of introducing minimum price requirements for certain raw materials), where the panel found that the actions undertaken by the relevant Chamber of Commerce (setting and coordination of export prices) were attributable to China.¹⁴⁴ The court did not find its interpretations of Chinese law altered by the panel’s findings, especially as the only regulation possibly indicating compulsion concerned only the minimum price requirement so as to avoid the below-cost pricing and related anti-dumping challenges, and it was itself not relied upon by the Chinese authorities to establish compulsion in the instant case.¹⁴⁵

¹³⁴Id. at 12, 55.

¹³⁵Id. at 53-55.

¹³⁶Id. at 12.

¹³⁷Id. at 22-23. In the end the latter joined, but allegedly due to its own technical problems. *Id.* at 23.

¹³⁸Id. at 23-24, 67-68.

¹³⁹The 2009 statement ‘conspicuously’ did not cite any of the sources (laws, regulations) supporting the broad assertions about the regulatory regime in place. Furthermore, it made no distinction between the 1997 and 2002 regimes, which clearly differed. *Id.* at 46.

¹⁴⁰Id.

¹⁴¹Id. at 47.

¹⁴²Id. at 15-16, 46.

¹⁴³Id. at 47.

¹⁴⁴WTO Panel Report, *China- Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, adopted Jul. 5, 2011, 7.1096. See *infra* notes 170-176 and the accompanying text.

¹⁴⁵Vitamin C *Ib*, see *supra* note 123, at 58-60.

Furthermore, even if the 2002 regime and the related regulations introduced the minimum price requirement coupled with sanctions for non-compliance, the court was not convinced that the authorities would interfere if the price and output levels were set at the point allowing avoiding anti-dumping actions and below-cost pricing.¹⁴⁶ It noted that setting the prices above that level exceeded the scope of any compulsion and would not be immunised.¹⁴⁷

While *Vitamin C* was ongoing two similar antitrust cases were brought in the US courts against Chinese export cartels: *Animal Science*¹⁴⁸ and *Resco*.¹⁴⁹ In *Animal Science* the plaintiffs, US companies, brought a class action against a number of Chinese exporters of magnesite-based products for alleged price-fixing in violation of the Sherman Act. The defendants brought a motion to dismiss the complaint, *inter alia* on the foreign state compulsion defence basis.¹⁵⁰

Discussing more generally the characteristics of compulsion, the district court ‘distilled’ from *Mannington* a three-points test whereby the defendant invoking compulsion should show:¹⁵¹ (a) the existence of an entity in the defendant’s state qualifying as an arm of the state by enjoying governmental or quasi-governmental powers that are ‘either uniquely peculiar to sovereigns or of essentially sovereign nature’, (b) a direct link between the entity’s powers and the defendant, allowing the entity to compel the defendant, subject to a significant negative repercussions for non-compliance, and (c) the compulsion is the fundamental force causing the defendant’s act, challenged as a violation of US law. Moreover, the court noted that the compulsion does not have to stem from a black-letter law, underlining that a formal law as such is not a condition *sine qua non* of the compulsion.¹⁵² Furthermore, it pointed out that the ‘non-compulsory connotations to an American ear’ of the literal translation of foreign government directions should not automatically qualify them as non-mandatory.¹⁵³ Besides, the court underlined that defendants’ participation in the ‘coining’ of the governmental prescript, does not exempt them from compulsion. Therefore, in principle, it confirmed availability of the defence even if a party participated in the creation of the compelling act.¹⁵⁴ Later the court in *Vitamin C* explicitly disagreed with this holding.¹⁵⁵

¹⁴⁶Id. at 60. This was corroborated by the Chinese counsel representations as well as by the Chinese submission in the WTO proceedings. Id. at 61-62, referring to Panel Report, see *supra* note 144, at 7.998.

¹⁴⁷*Vitamin C* Ib, see *supra* note 123, at 60.

¹⁴⁸*Animal Science Products v China Nat. Metals & Minerals Import & Export Corp.* (*Animal Science*), 702 F. Supp. 2d 320 (D.N.J. 2010).

¹⁴⁹*Resco Products v Bosai Minerals Group*, 2010-1 Trade Cases P 77,061 (W.D. Pa. 2010).

¹⁵⁰The action was brought in 2005. Within the first two years the litigation concerned issues relating to the service of process. In 2008 the further proceedings took place. The complaint was repleaded, leading to the discussed court’s opinion on the motions to dismiss.

¹⁵¹*Animal Science*, see *supra* note 148, at 394.

¹⁵²Therefore parting from the position of the Restatement, following perhaps the implicit approach of the 1995 Guidelines. Compare *supra* notes 24-31 and the accompanying text.

¹⁵³*Animal Science*, see *supra* note 148, at 425.

¹⁵⁴Id. at 424-25, 38.

In *Animal Science* the court also addressed the issue of the weight of a foreign government submission.¹⁵⁶ It considered that a foreign state's brief warrants a high, 'nearly binding' degree of deference¹⁵⁷ and in the instant case it decided to treat the Chinese authorities interpretations as 'the final authority unless the Courts detect a Chinese legal provision or an alternative [ministry's] statement that clearly and convincingly establishes the incorrectness of these interpretations.'¹⁵⁸

In the instant case the court faced a very similar problem to the one in *Vitamin C*. The relevant Chamber of Commerce, empowered to administer the export licenses, was involved in setting the minimum prices for the exported products. Having analysed the evidence the court reached a conclusion that the Chamber was a 'governmental appendage'.¹⁵⁹ It found also the existence of sufficiently severe possible punishment for non-compliance.¹⁶⁰ It noted, distinguishing the case from *Texaco Maracaibo*, that the government compulsion lasted for a long time and was achieved not by a particular act, but was rather created by a legal regime, employing 'various regulatory mechanisms producing a composite effect of a never-ceasing correlation between the minimum price requirement and punitive measures for non-compliance with it'.¹⁶¹ In effect the court found that the Chinese authorities compelled the companies, forcing upon them 'a' minimum price.¹⁶²

This said, two issues remained unresolved. Firstly, the price figures are to be established. If they were never set, or set but left unknown to the defendants and to the authorities enforcing the minimum price requirement, then from the practical perspective there are to be treated as equal to zero,¹⁶³ and any agreement to comply with a price above it is to be considered a private agreement, outside the scope of the state compulsion. Secondly, if the prices were set and known to the defendants, it is conceivable that the companies entered into supra-minimum price agreements. If so, such agreements, added on top of the compelled anticompetitive conduct, could be illegal under US antitrust rules, regardless of the authorities position in terms of their enforcement.¹⁶⁴ The complaint was dismissed as the court found that the plaintiffs failed to establish court subject-matter jurisdiction, but leave to amend the complaint

¹⁵⁵ See supra text accompanying notes 130-131.

¹⁵⁶ The issue concerned the amicus brief submitted in the *Vitamin C* case.

¹⁵⁷ *Animal Science*, see supra note 148, at 426.

¹⁵⁸ Id. at 429.

¹⁵⁹ Id. at 437.

¹⁶⁰ Id. at 441.

¹⁶¹ Id. at 449.

¹⁶² Id. at 462.

¹⁶³ The court established that 'a' price was compelled by the Chinese government. Two options remained: (1) the actual price ('the' price) could have never been set, or (2) it was set, but the defendants were never informed about it. In any of the scenarios, an agreement among defendants fixing price on any level would not allow them to rely on the defence. Id.

¹⁶⁴ Id. at 462-63.

was granted.¹⁶⁵ The plaintiffs declined this invitation and appealed. The Third Circuit vacated the district court decision on jurisdictional issues and the case was remanded for further proceedings on merits.¹⁶⁶

In *Animal Science* the district court took a much more elaborate approach compared to *Vitamin C*, being much more sensitive to the peculiarities of the Chinese system, and the role of formal law in it. This development could bring more in-depth understanding of the Chinese regulatory framework as such, leading to a more just and consistent application of US law in such cases. It remains to be seen how the court addresses the issue of foreign sovereign compulsion on remand, especially in light of the intervening opinion in *Vitamin C*. Although in the latter case no compulsion was found, the court envisaged the possibility of the Chinese authorities compelling a minimum price at the level preventing foreign anti-dumping actions, and underlining that an agreement on a price above that level would move the agreement outside the realm of the defence.¹⁶⁷ It may well be that the court in *Animal Science* reaches such a conclusion in its future evaluation of the matter, as it was one of the scenarios it indicated.¹⁶⁸

The issue of foreign government compulsion was also raised in *Resco*,¹⁶⁹ where a US company sued Chinese bauxite exporters for their alleged price-fixing in violation of the Sherman Act, in a similar context to the one in *Vitamin C* and *Animal Science*. Likewise, the foreign state compulsion doctrine was the pivot of the defence. In June 2010 the court decided to stay the proceedings in the anticipation of the outcome of the WTO trade dispute brought by the US against China, concerning export restrictions on various raw materials, including bauxite. The US raised, *inter alio*, the issue of price requirements,¹⁷⁰ contending that these were Chinese government actions. While the outcomes of the WTO disputes are not binding upon US courts, the findings of the WTO panel may be helpful.

¹⁶⁵The complaint was dismissed with prejudice with regard to the claims based on the Foreign Trade Antitrust Improvements Act (FTAIA) 'effects' exception (the plaintiffs did not meet the 'jurisdictional bar' requiring the direct, substantial, and reasonably foreseeable effect on US commerce), but without prejudice to claims invoking court jurisdiction under the introductory clause of the FTAIA (making the FTAIA 'jurisdictional bar' inapplicable in cases where defendants are importers). *Id.* at 362-63, 83.

¹⁶⁶The Third Circuit held that the FTAIA does not impose a jurisdictional bar (referring to adjudicative jurisdiction, *ergo* jurisdiction of the courts), but rather a substantive merit limitation. *Animal Science Products v China Nat. Metals & Minerals Import & Export Corp.*, 2011-2 Trade Cas. (CCH) P77,566 (3rd Cir. 2011).

¹⁶⁷See *supra* text accompanying notes 146-147.

¹⁶⁸See *supra* text accompanying note 164.

¹⁶⁹*Resco*, see *supra* note 149.

¹⁷⁰'China also imposes quantitative restrictions on the exportation of the materials by requiring that prices for the materials meet or exceed a minimum price before they may be exported. Further, through its ministries and other organizations under the State Council as well as chambers of commerce and industry associations, China administers the price requirements in a manner that restricts exports and is not uniform, impartial, and reasonable.' *China- Measures Related to the Exportation of Various Raw Materials. Request for the Establishment of a Panel by the United States*, WT/DS394/7, 6 (Nov. 9, 2009). In December 2009 a single panel was established to examine the US complaint together with similar complaints brought against China by the EU and Mexico.

The panel found only six measures related to the minimum export price (MEP) requirement within its frame of reference, including charters or regulations of chambers of commerce which were referred to in *Vitamin C*.¹⁷¹ The complainants argued that MEPs were enforced through a system of ‘self-discipline’ under the threat of penalties (imposed both on non-conforming exporters and on bodies granting licenses to non-conforming exporters).¹⁷² It directed the panel’s attention to proceedings in *Vitamin C*, *Animal Science*, and *Resco* and cited the Chinese *amicus* submission in *Vitamin C* establishing the state compulsion.¹⁷³ The panel found the measures at stake attributable to China¹⁷⁴ and challengeable under Article XI:I GATT.¹⁷⁵ Ultimately China was found in violation of its WTO obligations.¹⁷⁶ Interestingly, as already noted¹⁷⁷ the court in *Vitamin C*, which found no involvement of foreign state compulsion, expressly did not consider its interpretations of the Chinese law affected by the panel’s findings.

China appealed the panel’s findings.¹⁷⁸ The Appellate Body, after some delay,¹⁷⁹ recently delivered its report.¹⁸⁰ It found that the panel erred in finding that the section III of the complainants’ panel requests, which dealt with the minimal price requirements, complied with requirements of Article 6.2 of the Dispute Settlement Understanding.¹⁸¹ In the Appellate Body’s view the requests, in the section III, did not

¹⁷¹ Panel Report, see *supra* note 144, at 7.991, 7.995, 7.1001.

¹⁷² *Id.* at 7.997.

¹⁷³ *Id.* at 7.1002, n. 1419.

¹⁷⁴ *Id.* at 7.1006.

¹⁷⁵ *Id.* at 7.1074.

¹⁷⁶ The panel considered the authority to determine the export prices and require exporters to adhere to them, under the threat of strict penalties or export license revocation, as potentially trade restrictive and found ‘the very *potential* to limit trade’ [emphasis in the original] sufficient to constitute a restriction prohibited under Article XI:1. *Id.* at 7.1081-7.1082. Article XI:1 of GATT: ‘No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.’

¹⁷⁷ See *supra* notes 144-147 and the accompanying text.

¹⁷⁸ *China- Measures Related to the Exportation of Various Raw Materials. Notification of an Appeal by China under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review*, WT/DS394/11, WT/DS395/11, WT/DS398/10 (Sept. 2, 2011), available at <http://www.worldtradelaw.net/na/ds398-10%28na%29.pdf>.

¹⁷⁹ The report of the Appellate Body should be circulated within 60-90 days from the date when the appeal was notified. See Art. 17:5 of the Dispute Settlement Understanding. As China appealed on Aug. 31, the report was to be expected in Nov. 2011, yet due to the complexity of the matters involved, the Appellate Body informed that the report would be circulated by Jan. 31, 2012. Compare WTO Appellate Body, *China- Measures Related to the Exportation of Various Raw Materials*, WT/DS394/13, WT/DS395/13, WT/DS398/12 (8 December, 2011).

¹⁸⁰ WTO Appellate Body Report, *China- Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted Jan. 30, 2012.

¹⁸¹ Art. 6.2 of the DSU provides: ‘The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly* [emphasis added]. In case the applicant requests the

‘provide sufficiently clear linkages between the broad range of obligations [referred to by the complainants] and the 37 challenged measures.’¹⁸² Consequently, the panel’s findings regarding claims identified under section III of the requests, including these concerning minimum price requirements, were declared ‘moot and of no legal effect’.¹⁸³ It is rather unfortunate that the panel requests did not meet the DSU procedural requirements. This dispute was a rare opportunity to clarify the scope of the applicability of the WTO regime to cases involving state compulsion in particular and public cartels in general. While the Appellate Body report did not rule out such possibility, it brought us back to square one, with the substantive arguments in favour of such interpretation remaining valid and perhaps even somewhat reinforced by the panel’s analysis, which although having no legal effect indicates how panellists could apply the WTO rules in similar circumstances. That said, the parties’ submissions in this case will clearly prove useful in the final resolution of the antitrust actions pending in the US.

The recent antitrust cases show that the foreign state compulsion doctrine requires further clarification. The divergent views of the courts point out to the lacking clarity with regard to the applicable test. The problems of addressing the Chinese regulatory system suggest that the benchmark is perhaps set too high, further contributing to the rather poor predictability of the doctrine as a legal tool. The analysis employed in the panel report in the related trade dispute allows hope that the issue of state compulsion will be better addressed in the multilateral framework, which may be more attuned to significant regulatory differences. If state compulsion could be addressed in the trade framework, and if the courts in antitrust cases would align their opinions respectively, we could actually see a liability gap closed: in cases where reliance on the defence is unsuccessful, the liability would remain with the defendants; in cases where the reliance is successful, a government could be lobbied to seek a resolution at the multilateral level, benefiting from the binding nature of the WTO dispute settlement system. That said, one should keep in mind that remedies in both cases would be different, as no damages can be awarded in a trade dispute.

CONCLUSIONS

The foreign state compulsion doctrine remains important in competition law. Depending on the system it can be seen as a defence on merits (as in the US) or as a jurisdictional rule excluding the anticompetitive conduct from the applicability of substantive antitrust provisions (like in the EU). In either case it has the power to potentially fully free the defendants subject to state compulsion from liability, although the issue of the scope of the defence (limiting v. ousting liability) remains open. Fairness considerations offer strong underpinnings for the doctrine.

establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.’

¹⁸²Id. at 234-35.

¹⁸³Id. at 235.

At the same time both in the US and in the EU reliance on the defence is hardly ever successful. The standard of what constitutes compulsion seems to be set too high. This is particularly visible in cases arising across different economic systems, like the recent Chinese export cartels challenged in the US, or the earlier US-Japanese friction. It is one thing to ask the court to address state involvement in a foreign but broadly similar system and a very different exercise to ask the judge to do the same in a legal and socio-economic context poles apart. The recent cases illustrate that different courts, even within the same jurisdiction, may take diverse approaches, leading to less predictability and potentially to international controversy.

It is telling that in the EU regime such transnational cases possibly involving foreign (non-EU) state compulsion are lacking. Although it may be explained in various ways, the lack of treble damages in private enforcement in the EU being probably one of the crucial arguments, it demonstrates that the European Commission is reluctant to address such concerns, involving foreign states, through extraterritoriality in competition law. The fact that *Vitamin C*, *Animal Science* and *Resco* are all private actions, and that the US administration brought its own case not against the companies for breach of antitrust, but against China in the WTO framework, raising *inter alia* issues being at the centre of the antitrust actions, shows that the US administration opted for multilateral means of addressing antitrust concerns. This is a welcome development, strengthening the international regulatory system. It supports an argument that antitrust concerns involving foreign state compulsion could be challenged under the WTO regime. From this perspective, it is disappointing that the Appellate Body in its report in *China- Measures Related to the Exportation of Various Raw Materials* did not provide guidance on the matter. Was the trade regime found applicable in such cases, the standard of foreign state compulsion in antitrust cases should be lowered, possibly to the level comparable to the one applicable to the US domestic state action doctrine. Such a step would offer more clarity in terms of who is liable in such context under antitrust laws, leading also to fewer controversies across jurisdictions. Otherwise, if multilateral means of addressing this issue do not present themselves in a foreseeable perspective and the reliance on the compulsion defence will not be successful in a number of similar cases, the international tension is bound to grow. In any case, the foreign state compulsion defence was recognised for a good reason and courts and competition authorities should not, by pushing the standard too high, rule it out, especially when the claims arise in a wider context on the verge of international trade and competition.