COMMENTARIES

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The Restatement and Foreign Sovereign Compulsion: A Plea for Due Process

In certain circumstances actions of individuals or entities compelled by foreign governments may be protected from liability under the foreign sovereign compulsion (FSC) doctrine. This relatively new doctrine has become more important as transnational activity has increased. The *Restatement (Third) of Foreign Relations Law* devotes two sections to foreign sovereign compulsion.

§ 441. Foreign State Compulsion

(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 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.

§ 442. Requests for Disclosure: Law of the United States

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(1) (a) A court or agency in the United States, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the United States.

(b) Failure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including finding of contempt, dismissal of a claim or defense, or default judgment, or may lead to a determination that the facts to which the order was addressed are as asserted by the opposing party.

(c) In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

(2) If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national:

(a) a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available;

(b) a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);

(c) a court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

The foreign sovereign compulsion doctrine is used to avoid punishing conduct compelled by a foreign government. The distinct doctrinal rationales supporting FSC have caused considerable confusion. Foreign sovereign compulsion is based on both international comity and due process/fairness components. The Restatement focuses on the international law aspect of the doctrine and all but ignores

the due process aspect. This incomplete perspective sometimes leads to a blurring of the foreign sovereign compulsion and the act of state doctrine.[1] Even though the Restatement contains separate sections on foreign sovereign compulsion and act of state, it does not adequately distinguish the two doctrines in the respective comments and notes.

Both doctrines appear in the chapter entitled "Jurisdiction and the Law of Other States." Although this classification is an improvement over the previous draft of the Restatement,[2] it still misleads the reader into thinking that foreign sovereign compulsion is essentially a jurisdictional question. While the foreign sovereign compulsion doctrine is relevant in a jurisdictional analysis, it also has been deemed to be an affirmative defense similar to duress[3] and force majeure.[4]

The jurisdictional aspect of foreign sovereign compulsion is very similar to the act of state doctrine. Both doctrines are concerned with international comity and the political questions raised by one sovereign adjudicating the acts and/or laws of another. These doctrines raise two questions: whether jurisdiction exists over

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1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443(1) (1987) [hereinafter RESTATEMENT (THIRD)] defines the act of state doctrine:

> In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.

For the origins of this doctrine, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), and Underhill v. Hernandez, 168 U.S. 250 (1897).

Both the act of state and the foreign sovereign compulsion [FSC] doctrines are very American doctrines. The comity and political question component of both doctrines are established themes in American law. FSC is even more uniquely American in that it weaves the strong U.S. commitment and concern for fairness/due process into international considerations.

2. The previous draft had both doctrines in a chapter entitled "Conflicts of Jurisdiction." RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW (Tent. Draft No. 6, 1985).

3. The concept of duress is used in contract law to deny the existence of a valid contract or to void a valid contract that was created under duress. RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981) provides: "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."

The next section of the Restatement defines "improper threat" to include threat of criminal prosecution, *id.* § 176(1)(b), and exchanges not made on fair terms and that are a use of power for illegitimate ends, *id.* § 176(2)(c).

Underlying the Restatement's discussion of duress is the unfairness of forcing an individual to honor a contract into which the individual was forced. The compulsion by a foreign sovereign has many similarities with the concept of duress. The sovereign usually has more "bargaining power" than the individual and often enforces its will with the threat of sanctions. If an individual is not held legally liable for a contract formed under duress it seems equally reasonable that an individual cannot be prosecuted for conduct compelled by a foreign state.

4. Force majeure describes a superior or irresistible force. Force majeure clauses in contracts are used to protect individuals from causes that are out of their control and that could not have been avoided by the exercise of due care.

The concept of force majeure promotes fairness by not holding an individual liable for unavoidable events caused by a superior force. Similarly, foreign sovereign compulsion protects an individual from conduct compelled (unavoidable) by a sovereign state (superior force).

the acts of a foreign sovereign; and, if so, whether it should be exercised. This is significantly different from a conflicts of law approach, which resolves conflicts through the application of law—albeit possibly a hybrid of the conflicting laws.[5]

The due process/fairness component of the foreign sovereign compulsion doctrine is most clearly seen in the compulsion requirement. The courts have devoted much time distinguishing "compulsion" from acquiescence and have repeatedly decided true compulsion is required.[6] It is generally accepted in American law that persons should not be held responsible for something they were forced to do.[7] This classic pursuit of fairness requires close inspection of a compulsion claim to ensure that this doctrine does not cloak illegal acts willfully done. The injustice created by punishing a person caught between conflicting laws of sovereign states was one of the reasons for the emergence of the foreign sovereign compulsion doctrine.

I. Origins and Identity

The foreign sovereign compulsion doctrine has been discussed in antitrust and discovery cases but it is not limited to those areas.[8] "Compulsion" was first mentioned in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[9] an antitrust case involving a government authorized monopoly purchase that allegedly discriminated in vanadium purchases. The lower court, in holding for Continental Ore, found that the defendants were acting as an arm of the Canadian Government. In reversing, the Supreme Court held that even though the defendant was acting with the permission of the Canadian Government, there was no Canadian law compelling the discriminatory purchases.[10] Similarly, in *United States v. Watchmakers of Switzerland Information Center*[11] the court reiterated the compulsion requirement. The court pointed out that the Swiss

5. The conflict of laws approach attempts to find the appropriate law to apply to foreign individuals or events not located entirely within the territory of the court. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 comment a (1971).

6. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293–94 (3d Cir. 1979); United States v. Watchmakers of Switz. Info. Center, 1963 Trade Cas. (CCH) ¶ 70,600, at 77,456 (S.D.N.Y. 1962).

7. This is seen in the doctrines of duress and undue influence in contracts, wills, and other settings, force majeure in contract and commercial law, self-defense in criminal and tort law, and generally throughout the law. *See supra* notes 3 and 4.

8. Many courts have avoided direct discussion of the doctrine. In Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574 (1968), all the briefs submitted addressed the foreign sovereign compulsion doctrine and yet the Supreme Court opinion resolved the case without discussing this doctrine. Griffin, *Zenith Leaves Major International Antitrust Questions Unanswered*, 14 INT'L BUS. LAW. 354 (1986).

9. 370 U.S. 690 (1962).

10. *Id.* at 707.

11. 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962).

Government's approval of a watch cartel did not provide a defense in a U.S. court. In dictum, the court said if, "the defendant's 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."[12]

In United States v. General Electric Co.[13] the defendants were accused of antitrust violations by setting up a worldwide lamp cartel. In an attempt to dismantle this cartel, the court was urged to eliminate a network of patent cross-licensing arrangements and division of markets among the defendants. The Netherlands Government protested the proposed relief as an infringement of sovereignty. The court resolved this conflict by declaring that the Dutch company would not be in contempt for any action or inaction done outside of the United States.[14] "Compulsion" is never mentioned in the decision.

The concept of foreign sovereign compulsion was first used as a central component of decision in *Société Internationale v. Rogers*.[15] A discovery order was entered for documents located in Switzerland. A good faith effort was made by Société General to comply with the order, but the Swiss Government prevented their release pursuant to its nondisclosure laws. The lower court acknowledged the good faith effort but held that compliance with the Swiss laws did not excuse the failure to comply with the discovery order. Consequently, Société General's complaint was dismissed. The Supreme Court reversed this dismissal, saying: "[P]etitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control. It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction."[16] The doctrine is most explicitly reflected in the holding of *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*[17] where the plaintiff claimed that the defendants

12. *Id.* at 77,456.

13. 82 F. Supp. 753 (D.N.J. 1949).

14. In section XI of the judgment that implemented this decision the court says: "[the defendant] shall not be in contempt of this Judgment for doing anything outside of the United States which is required or for not doing anything outside of the United States which is unlawful under Dutch law or the law of any territory in which [the defendant] might be doing business." United States v. General Elec. Co., 115 F. Supp. 835, 878 (D.N.J. 1953); *see also* United States v. Imperial Chem. Indus., 105 F. Supp. 215 (S.D.N.Y. 1952) (Ryan, J.). In British Nylon Spinners, Ltd. v. Imperial Chem. Indus., [1954] 3 All E.R. 88, Judge Danckwerts refers to art. IV, para. 3 of Judge Ryan's July 30, 1952, *ICI* judgment:

> No provision of this judgment shall operate against [the defendant company] for action taken in compliance with any law of the United States Government, or of any foreign government or instrumentality thereof, to which [the defendant company] is at the time being subject, and concerning matters of which, under the law of the United States, such foreign government or instrumentality thereof has jurisdiction.

Id. at 92.

15. 357 U.S. 197 (1958).

16. *Id.* at 211.

17. 307 F. Supp. 1291 (D. Del. 1970) .

violated antitrust laws by refusing to sell them oil. The defendants claimed that their actions were compelled by the Venezuelan Government. The court held that

> [w]hen a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. . . .
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> . . . .
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> . . . Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far.[18]

A more recent and comprehensive discussion of foreign sovereign compulsion appears in *Mannington Mills, Inc. v. Congoleum Corp.*,[19] in which the plaintiff claimed that the defendant secured foreign patents by fraud. The defendant claimed that the granting of a patent by a foreign government is the functional equivalent of governmental approval of its patent right and is therefore not subject to judicial review under the foreign sovereign compulsion doctrine. The court denied that this governmental approval rose to the level of compulsion, thus the FSC defense failed.[20] In describing FSC, the court held:

> One asserting the defense must establish that the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct. . . .
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> Where governmental action rises no higher than mere approval, the compulsion defense will not be recognized. It is necessary that the foreign law must have coerced the defendant into violating American antitrust law. . . . The defense is not available if the defendant could have legally refused to accede to the foreign power's wishes.[21]

II. Requirements and Limitations

Compulsion must be proven to claim foreign sovereign compulsion successfully. The party invoking the doctrine must have had no legal alternative and no bad faith/scienter.

Much argument has occurred over what exactly constitutes compulsion. A bright-line test would be too limiting. Compulsion is more than mere governmental approval,[22] and more than a delegation of authority.[23] True compulsion requires more than mere favorable government action.

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18. *Id.* at 1298.
19. 595 F.2d 1287 (3d Cir. 1979).
20. *See* Continental Ore v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).
21. *Mannington Mills*, 595 F.2d at 1293.
22. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).
23. In *Continental Ore*, the Canadian Government delegated to the defendant, Union Carbide, the control over the importation of vanadium oxide into Canada. Union Carbide's role as the Canadian Government's agent was insufficient to invoke the FSC doctrine to shield antitrust violations committed by Union Carbide pursuant to the authority delegated by the Canadian Government. 370 U.S. at 704-05.

One way of determining whether compulsion exists is by looking at the legal obligations with respect to the activity and/or the sanctions for the nonperformance of the activity.[24] In *United States v. Watchmakers of Switzerland* there was no legal requirement to form the cartel. The Swiss Government's approval of an American antitrust violation was found not to be compulsion.[25] Furthermore, the governmental order must also be a significant aspect of the illegal action and not merely peripheral.[26]

Another facet of compulsion is the threat of tangible sanctions upon the party being compelled.[27] These sanctions can be either civil,[28] economic,[29] criminal,[30] or some substantial equivalent.[31] In discovery cases the court may order a party to produce documents located abroad. The court may decline to impose sanctions, however, if the documents are not produced and the failure to do so is caused by a foreign sovereign.[32] Foreign sovereign compulsion also requires good faith by the party invoking the doctrine. If the compulsion was solicited by the person compelled then FSC may not provide relief. Bad faith/scienter can be manifested by lobbying a foreign government to pass a law or issue an order[33] or by purposely placing documents in a country with nondisclosure laws in an attempt to remove the documents from the reach of U.S. discovery.[34] Discovery cases additionally require a good faith effort to obtain the requested

24. The courts have also found that the threat of severe sanctions can create compulsion. Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970). Whether a sanction is "severe" enough to create compulsion is a subjective test. Compulsion is easier to prove if violation of the law or order resulted in a legal sanction (i.e., criminal or civil liability).

25. *Watchmakers of Switz.*, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962).

26. If a foreign sovereign requires more harmonious interaction in a certain economic market, FSC cannot be used to excuse the formation of a cartel in response to the governmental order. *See* United States v. Sisal Sales Corp., 274 U.S. 268 (1927); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

27. United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968); *Interamerican Ref. Corp.*, 307 F. Supp. at 1291.

28. *First Nat'l City Bank*, 396 F.2d at 897.

29. *Interamerican Ref. Corp.*, 307 F. Supp. at 1291.

30. Société Internationale v. Rogers, 357 U.S. 197 (1958).

31. *First Nat'l City Bank*, 396 F.2d at 897.

32. *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977).

RESTATEMENT (THIRD) § 442(2)(c) allows for a negative inference to be drawn from the nonproduction even when a good faith effort was made. This controversial provision gives the court discretion to hold a person responsible for something completely beyond that person's control.

33. The courts are split on whether the Noerr-Pennington doctrine protects lobbying foreign governments for favorable legislation or governmental orders. Even if such lobbying is permitted, it can be proof that the law or order was not compelled but rather actively sought by the party raising FSC. *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965); California Motor Trans. Co. v. Trucking Unltd., 404 U.S. 508 (1972).

34. Société Internationale v. Rogers, 357 U.S. 197 (1958); *see also* O.N.E. Shipping Ltd. v. Flota Mercante Grancolombia, 830 F.2d 449 (2d Cir. 1987) (Colombian cargo reservation laws constituted compulsion entitling the defendant to assert the FSC defense); RESTATEMENT (THIRD) § 442 (2)(b).

documents.[35] The good faith requirement finds its origins in the due process component of FSC's doctrinal roots. The burden of proof of good faith lies with the party invoking FSC.[36]

III. The Restatement's Approach to Foreign Sovereign Compulsion

Sections 441 and 442 of the Restatement (Third) of Foreign Relations Law attempt to define the scope of foreign sovereign compulsion. Section 441 deals with the general doctrine while section 442 addresses foreign sovereign compulsion in discovery cases. The rationale for dividing discussion of the doctrine is that discovery cases are the source of most international jurisdictional tension and have a flavor all their own.[37] This approach encourages confusion by creating the misleading distinction that discovery cases require a different application of FSC. The good faith element in section 442 denotes the due process component of FSC. It would not be fair to punish a person who made a good faith effort to produce the documents. The general section discussing FSC, section 441, does not contain such a good faith component. This omission implies that this element is unique to discovery cases, which is not the case. To determine whether compulsion existed, a good faith inquiry is not only logical but essential. Without such a good faith requirement, illegal actions can be hidden behind the facade of compulsion and thereby defeat one of the primary purposes of the doctrine, fairness. The confusion caused by this difference could have been avoided by greater harmonization of their doctrinal and structural content.

The Restatement also seems unable to liberate itself from the discussion of jurisdictional issues. While it is true that jurisdiction is an important aspect of the doctrinal milieu from which foreign sovereign compulsion originated, the Restatement's inability to move beyond that aspect limits the usefulness of its description.[38]

35. RESTATEMENT (THIRD) § 442(2)(a).

36. The burden of proof with regard to good faith in the discovery case lies with the party to whom the discovery order is directed. *Id.* § 442 (2)(a) comment h, reporters' note 8; *see also Société Internationale*, 357 U.S. at 197.

37. RESTATEMENT (THIRD) § 442, reporter's note 1.

38. Limits on a nation's jurisdiction to prescribe are discussed in § 403. Subsection 1 of this section subjects the exercise of jurisdiction to prescribe to a reasonableness test. Subsection 2 lists factors that can be used to determine reasonableness. Subsection 3 provides a resolution mechanism for a case of reasonable and conflicting exercises of jurisdiction that calls for a state to defer if the other state's interest is clearly greater.

This section's reconciliation scheme sets the stage for an FSC situation. Exercising jurisdiction over a person for conduct compelled by a foreign sovereign falls neatly into the unreasonableness category defined by subsections 1 and 2.

Comment e to § 441 limits FSC to situations where the compelling state was reasonably exercising its jurisdiction to prescribe. This limitation allows a state to decide the reasonableness of another sovereign's laws.

Comment a to § 441 asserts that FSC arises under a § 403(3) conflict. This incorrectly implies that if one state decides that the other state erroneously exercised its jurisdiction to prescribe that state's

The comments and notes to section 441 discuss the requirement of severe sanctions and the level of governmental involvement needed for FSC.[39] The comment on the territorial aspect of FSC,[40] however, incorrectly implies that the location of the sovereign and the compelled party is important in and of itself. A law or order need not be within a sovereign's territory to be compelling.[41] Geography does play a role in determining compulsion, but it is not as significant as the comment implies.

Reporter's note 1 to section 441 comes close to acknowledging the due process component when it cites *United States v. General Electric*, which says that it is reasonable to provide "protection from being caught between the jaws of this judgment and the operation of laws in foreign countries. . . ."[42] Unfortunately, the Restatement does not express the fundamental nature of the due process component. Therefore the discussion and description of compulsion lack the unifying theme of fairness.

One of the major shortcomings of the Restatement's treatment of the foreign sovereign compulsion doctrine is its failure to explicitly distinguish FSC from the act of state doctrine. The Restatement should have clarified the subtle but important distinctions. By treating FSC as a matter of jurisdictional conflict and comity, the Restatement ignores the important due process function performed by an FSC defense which elevates it above jurisdictional turf wars.

IV. Department of Justice—Antitrust Cases

When the Department of Justice first addressed the foreign sovereign compulsion doctrine it took a wary stance.[43] Seeing this defense as a potential excuse for a barrage of illegal activity and as a threat to executive control over

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order would be less compelling upon the individual caught between two sovereigns. Compulsion does not need to be morally or legally correct to exist.

39. *Id.* § 441 comment c discusses the severe sanction requirement and *id.* reporter's note 4 to § 441 discusses the degree of foreign government involvement (i.e., legislative act, licensing structure, administrative decision, etc.).

40. *Id.* § 441 comment b.

41. This is best demonstrated by Interamerican Ref. Co. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970), where the Venezuelan Government ordered a corporation located in New Jersey not to deal with another U.S. corporation. This case was mentioned in RESTATEMENT (THIRD), § 441 reporter's note 5, as an exception to the general rule that the Reporter's claim is demonstrated by United States v. Bechtel Corp., 1979-1 Trade Cas. (CCH) ¶¶ 62,429, 62,430 (N. D. Cal. 1979), *aff'd*, 648 F.2d 660 (9th Cir. 1981). Here, Bechtel, an international corporation based in the United States, was accused of refusing to deal with blacklisted persons in observance of an Arab League boycott against persons doing business with Israel. The final consent decree discussed what activity was not allowed within the U.S. and what activity was permitted abroad. The case did not progress to the point where FSC needed to be invoked.

42. 115 F. Supp. 835, 878 (D.N.J. 1953).

43. *See* U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977); A.B.A., Section of Antitrust Law, *Task Force Report: The Antitrust Guide for International Operations Revisited*, 54 ANTITRUST L. J. 839 (1985).

political questions, it sought to ascribe territorial, legal, and commercial limitations to the defense. First, the defense would not apply if the allegedly illegal conduct took place entirely "within" the United States. This limitation, if taken seriously, would decimate the doctrine almost entirely. Second, the doctrine would not apply if the foreign sovereign was acting in its commercial capacity, rather than its public capacity, when the compulsion occurred. Third, the defense would not apply when the compulsion order was not lawful under the foreign sovereign's own laws.

The final version of the *Department of Justice Antitrust Enforcement Guidelines for International Operations (Guidelines)* recognizes an FSC defense to an antitrust suit when two conditions have been met. First, the anticompetitive conduct must be compelled by a foreign sovereign in circumstances "in which a refusal to comply . . . would give rise to the imposition of significant penalties or to the denial of specific substantial benefits." Second, the compelled conduct must not have "plainly . . . occurred wholly or primarily in the United States."[44]

The Department concedes that "territorial tests are often difficult to apply"[45] and offers as an example a situation in which it would not recognize a foreign sovereign compulsion defense in which a foreign government required the U.S. subsidiary of a foreign firm to organize a cartel in the United States to fix the price at which products would be sold in the U.S. marketplace. This territorial limitation is in accordance with the weight of opinion on the issue,[46] but it may be inconsistent with the decision in *Texaco Maracaibo*.[47]

The *Guidelines'* approach to foreign sovereign compulsion is an improvement over the approach taken in the draft *Guidelines*, which were revised after strong criticism from the American Bar Association.[48]

44. U.S. Department of Justice Antitrust Enforcement Guidelines for International Operations (CCH) Nov. 10, 1988).

45. *Id.*

46. RESTATEMENT (THIRD) § 441 comment b; *see* Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1324–25 (D. Conn. 1977) (Canadian Government compulsion order may not shield a boycott of a hockey league, implemented in the United States, of players under twenty years of age); United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231, 263 (1980), *appeal dismissed*, 451 U.S. 901 (1981) ("We cannot agree with the proposition that if a foreign state compels an American corporation to take actions in the United States which are intended to and do have severe adverse consequences to free and fair trade in the United States, the American corporation is thereby immunized from the full force of the laws of its own sovereign.").

47. 307 F. Supp. at 1291. Although the issue was not discussed directly, the defense was upheld as to a refusal to sell oil to a particular company after the oil had been processed in a bonded refinery in the United States.

48. The American Bar Association Sections of Antitrust Law and International Law and Practice criticized the Department of Justice's draft *Guidelines* in a joint report to the ABA House of Delegates. The House of Delegates adopted as ABA policy the report that is critical of the draft *Guidelines'* unorthodox application of comity and act of state to limit FSC to a defense subject to prosecutorial discretion. The report points out the conflicts between the draft *Guidelines* and the existing case law and calls on the Department of Justice to

V. Issues Not Resolved by Restatement

Since different cultures, governments and societies define "compulsion" differently, a definition based on strictly western models may produce unfair results. A foreign sovereign need not use formal legislation or administrative/judicial orders to be compelling.[49] The fairness rationale for FSC would be frustrated if an improperly narrow definition of compulsion were applied. The ABA guidelines suggest that an FSC analysis focus on "the fact of compulsion not its form."[50] If there is no clear definition of compulsion, however, FSC will be difficult to apply.

Another difficult issue is the weight assigned to statements by foreign sovereigns admitting compulsion. The Department of Justice argued in its amicus brief in *Matsushita Electric Co. Ltd. v. Zenith Radio Corp.*: "Once a foreign government presents a statement dealing with subjects within its area of sovereign authority, however, American courts are obligated to accept that statement at face value; the government's assertions concerning the existence and meaning of its domestic law generally should be deemed 'conclusive'."[51] While this is consistent with the act of state doctrine, it may in some cases

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take account of the substantial authorities indicating that (a) it is the fact of the compulsion, not its form, that should be the focus of the analysis; (b) inquiry into the validity of the foreign state's activity may be limited by the act of state doctrine; (c) the defense rests on fundamental fairness principles, and pragmatic judgments about the preservation of foreign commerce, as well as comity.

23 INT'L LAW. 326 (1989).

49. A foreign sovereign may compel activity through informal means, e.g., private meetings, unwritten policies, etc. Brief of the Governments of Australia, Canada, France, and the United Kingdom as Amici Curiae in Support of Petitions at 6, 8, 10, 12, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), *reprinted in* 24 I.L.M. 1293 (1985).

The European Community has stated that it will not prosecute "export agreements imposed on firms in nonmember countries by their governments. . . ." COMMISSION OF THE EUROPEAN COMMUNITIES, THIRD REPORT ON COMPETITION POLICY 27 (1974); *accord* Franco-Japanese Ball-Bearings Agreement, 17 O.J. EUR. COMM. (No. L 343) 19 (1974), *reprinted in* [1973–1975 New Dev. Transfer Binder] COMMON MKT. REP. (CCH) 9697 (1974) (measures imposed on Japanese acts by Japanese Government were outside scope of art. 85).

Further European recognition of such a defense may be found in art. 90(2) of the Treaty of Rome (Treaty establishing the European Economic Community), *done* March 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958). This article might provide an exemption from the rules of competition where application of those rules would obstruct the performance, in law or in fact, of particular tasks assigned to the enterprises.

The United Nations also appears to have accepted the principle of a sovereign compulsion defense to charges of engaging in restrictive trade practices. *See Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, 35 U.N. GAOR Annex (Agenda Item 61(c)) at 6, U.N. Doc. A/C.2/35/6 (1980) (adopted by G.A. Res. 35/63, 35 U.N. GAOR Supp. (No. 48) U.N. Doc. A/35/48 (1981)) ("In order to ensure the fair and equitable application of the Set of Principles and Rules, States . . . should take due account of the extent to which the conduct of enterprises . . . is required by States.")

50. 23 INT'L LAW. 326 (1989).

51. Brief for the United States as Amicus Curiae Supporting Petitioners at 23, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (No. 82-2004).

undercut the good faith requirement of compulsion by allowing a defendant to hide behind the statements of a foreign sovereign.

The courts have held that "true compulsion" requires more than governmental involvement or acquiescence. In *Southern Motor Carriers Rate Conference, Inc. v. United States*,[52] however, the Supreme Court recognized a state action defense for conduct that is "authorized and actively supervised" by a state government.[53] In their amici brief in *Matsushita* the Governments of Australia, Canada, France, and the United Kingdom contended that foreign sovereigns should receive at least the same degree of deference given to state governments in the U.S. federal system.[54]

VI. Conclusion

The diverse doctrinal origins of foreign sovereign compulsion should not become a barrier to its effective use. Instead of trying to fulfill all the requirements and goals of the doctrines that produced it, the focus should be limited to due process/fairness. Due process should protect persons from punishment for conduct in which they were forced to engage. Unduly broad interpretations and applications must be avoided. Compulsion must be more clearly defined so that this doctrine can play an effective role in international legal affairs.

52. 471 U.S. 48 (1985).

53. *Id.* at 64–65.

54. Brief of the Governments of Australia, Canada, France and the United Kingdom as Amici Curiae in Support of Petitioners at 10, *Matsushita Elec.*, 475 U.S. at 574, *reprinted in* 24 I.L.M. 1293 (1985).