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The Sovereign Compulsion Defense in Antitrust Actions and the Role of Statements by Foreign Governments

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THE SOVEREIGN COMPULSION DEFENSE IN ANTITRUST ACTIONS AND THE ROLE OF STATEMENTS BY FOREIGN GOVERNMENTS

Large numbers of export cartels[1] and increasing governmental involvement in commerce present the potential for greater conflicts between United States antitrust law and the decrees of foreign governments. Sovereign compulsion as a defense to antitrust complaints is one method for dealing with the contradictory obligations imposed on private parties where such conflicts exist. Sovereign compulsion has been discussed by courts and commentators many times in recent years, yet the limits of the defense and the requirements for its application remain unclear.

To demonstrate a sovereign compulsion defense, defendants must show that their actions, although possibly in violation of United States antitrust law, were done in compliance with the directives of a foreign government and, therefore, should not be subject to liability under United States law. A special problem arises in this context when a foreign government submits a statement on behalf of a party that is asserting a sovereign compulsion defense. The response of United States courts to such statements has ranged from deference to disregard.

Although a sovereign compulsion defense has been acknowledged by several courts and actually applied by one,[2] controversy remains over its scope and the prerequisites for its application. The participation of foreign governments adds significantly to the complexity of these cases. The policy reasons for recognizing the sovereign compulsion defense lead to the conclusion that a defense of sovereign compulsion should be based on de facto compulsion, rather than de jure compulsion, but should not extend to any action taken within the territory of the United States. Examination of the role of foreign government statements in establishing a sovereign compulsion defense compels finding that statements of sufficient clarity and detail merit conclusive weight in establishing the existence of sovereign compulsion, but such statements should not be a basis for expanding the limits of the defense.

1. OECD REPORT OF THE COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES: EXPORT CARTELS 24–25, tables 1–2 (1974) [hereinafter EXPORT CARTELS].

2. *See infra* note 15 and accompanying text.

I. BACKGROUND

A. *Relationship Between United States Antitrust Jurisdiction and the Policies of Foreign Governments*

The United States bases antitrust jurisdiction on an "effects test,"[3] rather than on the situs of the alleged unlawful activities.[4] This allows United States antitrust law to be applied to conduct that takes place outside the United States,[5] raising the possibility of conflict with the laws and policies of foreign governments. Use of United States domestic law to regulate conduct abroad has evoked a considerable number of hostile responses from foreign governments.[6] The potential for a hostile foreign

3. This jurisdictional test, expounded in United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945), gives United States courts jurisdiction over conduct abroad that is intended to and does in fact have effects within the United States.

4. The decision to exercise extraterritorial jurisdiction is due in part to the realization that without some ability to reach extraterritorial conduct, it would be difficult, if not impossible, to control the commercial conduct of multinational corporations. Statement of Shenefield, in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 12, 15–16 (J. Griffin ed. 1979) (hereinafter PERSPECTIVES); *accord* OECD REPORT OF THE COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES: RESTRICTIVE BUSINESS PRACTICES OF MULTINATIONAL ENTERPRISES 35 (1977) [hereinafter RESTRICTIVE BUSINESS PRACTICES]; The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 35 U.N. GAOR Annex (Agenda Item 61(c)), 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) [hereinafter U.N. Rules and Principles]. For these reasons, the United States Department of Justice has adopted the position that such jurisdiction will continue to be exercised. *See* Statement of Shenefield, in PERSPECTIVES at 13; U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6–7 (1977) [hereinafter ANTITRUST GUIDE].

5. There is some controversy over this exercise of extraterritorial jurisdiction. The exercise of jurisdiction to compel conduct within another country (enforcement jurisdiction) may be seen as a direct violation of that other nation's sovereignty, *see, e.g.*, British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd., 1953 Ch. 19 (CA 1952), 1955 Ch. 37 (1954), refusing to enforce decree of United States v. Imperial Chem. Indus., Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952), and a violation of international law, *see, e.g.*, H. KELSEN, GENERAL THEORY OF LAW AND STATE 209 (A. Wedberg trans. 1945). However, the imposition of sanctions for conduct that takes place outside the borders of a nation is not a violation of international law. *Id.* Indeed, the exercise of jurisdiction over foreign acts that have direct and foreseeable domestic effects has gained support, at least in principle, in fourteen countries and from the European Communities. *See* RESTRICTIVE BUSINESS PRACTICES, *supra* note 4, at 37.

6. These responses have ranged from diplomatic protests, *see, e.g.*, United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. 1962), *order modified*, 1965 Trade Cas. ¶ 71,352 (S.D.N.Y. 1965) (order modified after strong diplomatic protest over scope of court order), to the enactment of hostile legislation, *see, e.g.*, Protection of Trading Interests Act, 1980, ch. 11 (British law blocking production of evidence, enforcement of foreign judgments, and creating a statutory cause of action for those doing business in the United Kingdom to recover two-thirds of foreign antitrust judgments where that judgment is not based exclusively on conduct occurring within the territory of the country imposing judgment); Foreign Extraterritorial Measures Act, ch. 49 (Feb 14, 1985), *reprinted in* 24 I.L.M. 794 (1985) (Canadian law empowering Canadian Attorney General to issue blocking orders and to declare foreign judgments unenforceable). *Id.* § 3(1). The result of a declaration of unenforceability is to permit suit to recover from the foreign plaintiff 100% of the amount of the judgment to the extent that it has been declared unenforceable. *Id.* § 9(1). *See generally* 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 100–05 (2d ed. supp. 1985).

response increases significantly where sovereign compulsion is involved, because the plaintiff is challenging conduct imposed by a foreign government, for political, economic, or national security reasons.[7]

The means adopted by a foreign government to regulate commercial conduct may affect both American and foreign enterprises and may involve the foreign country's domestic, import, or export markets. For example, countries reliant on a single export commodity may require exporters, regardless of nationality, to form a cartel to regulate prices and quantities of exports.[8] In other circumstances, a government may order that its exports not reach certain destinations or customers.[9] Without a sovereign compulsion defense, private parties that complied with these kinds of regulation would be guilty of violating United States antitrust law.[10]

B. Status of the Sovereign Compulsion Defense

Sovereign compulsion is a substantive defense,[11] distinguishable from jurisdictional defenses such as sovereign immunity.[12] Acknowledgment of the defense has usually taken the form of dicta stating that if the defendant's conduct had in fact been compelled by a foreign government, the court would be powerless to impose liability.[13] In describing what constitutes

7. Given the vehemence with which foreign governments have responded to antitrust investigations that involved conduct in their territories, it is not difficult to imagine the potential damage to United States foreign relations that could result from challenging conduct that was commanded by those governments. *See infra* note 53.

8. This is essentially the situation presented in International Ass'n of Machinists v. Organization of Petroleum Exporting Countries, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). This case might have had greater relevance to the sovereign compulsion doctrine had the OPEC organization itself not been dismissed for improper service of process. *Id.* at 1356. That dismissal left only foreign governments, for whom the act of state doctrine and sovereign immunity were available, as defendants. If OPEC itself had remained a party and the court had determined OPEC to be an entity separate from the member governments, OPEC's defense may well have involved a claim of sovereign compulsion.

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

10. *See, e.g.*, Klors v. Broadway-Hale Stores, 359 U.S. 207 (1959); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, *reh'g denied*, 310 U.S. 658 (1940).

11. *See, e.g.*, Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1 (1976).

12. Because a defense based on sovereign compulsion denies neither the challenged conduct nor its effects, it cannot be a defense to United States jurisdiction. *See supra* note 3. This Comment will not discuss other defenses, except in their relation to the sovereign compulsion defense.

13. *See, e.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238, 315 (7th Cir. 1983) ("We may assume, without deciding, that a government mandated export cartel would be outside the ambit of section 1 of the Sherman Act."); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 606 (9th Cir. 1977) ("[C]orporate conduct which is compelled by a foreign sovereign is also protected from antitrust liability . . . ."); United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. ¶ 70,600, 77,456 (S.D.N.Y. 1962) ("If, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing."). *But see* Sabre Shipping Corp. v.

"compulsion," most courts and commentators have suggested a strict standard requiring foreign legislation directing the conduct.[14] On the other hand, in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*,[15] the only decision actually applying the defense, the court held that the oral statement of an official of a Venezuelan regulatory agency constituted sufficient compulsion to invoke the protection of the defense.[16]

Such government regulatory action does not rise to the level of legislative compulsion.

1. Proof of Sovereign Compulsion in Interamerican

The court in *Interamerican* attached great significance to the statements of officials of a foreign government's regulatory agency regarding restrictions imposed on exporters doing business in that country. The plaintiffs in *Interamerican* were Venezuelans who had contracted to lease a bonded refinery in New Jersey, hoping to process Venezuelan crude oil into fuel for sale to ships leaving New York. Due to a change in the political climate in Venezuela, the Venezuelan export authorities decided to terminate shipments to plaintiffs and instructed all exporters of Venezuelan oil that no further oil was to reach plaintiffs.[17] The exporters' discrimination in refusing to sell to Interamerican constituted a prima facie antitrust violation.[18]

In holding that the exporters were protected by a sovereign compulsion defense, the district court relied on newspaper interviews with and telephone instructions to exporters from the Venezuelan Coordinating Commission for the Conservation of Commerce and Hydrocarbons as evidence of compulsion.[19] The court's reliance on statements of policy by officials of a foreign administrative agency as evidence of compulsion is very relevant to the analogous situation where such a statement is made directly to a United States court.

American President Lines, 285 F. Supp. 949, 954 (S.D.N.Y. 1968), *cert denied*, 407 F.2d 173 (2d Cir.), *cert denied sub nom.* Japan Line, Ltd. v. Sabre Shipping Corp., 395 U.S. 922 (1969) (Foreign government directive "would not necessarily immunize defendants from prosecution or civil responsibility for acts done in United States commerce.").

14. *See, e.g., Watchmakers of Switz.*, 1963 Trade Cas. at 77,456 ; Note, *Development of the Defense of Sovereign Compulsion*, 69 MICH. L. REV. 888 (1971). *But see Timberlane Lumber Co.*, 549 F.2d 597 (9th Cir. 1977).

15. 307 F. Supp. 1291 (D. Del. 1970).

16. *Interamerican*, 307 F. Supp. at 1295–96.

17. *Id.* at 1295.

18. *Id.* at 1294 & n.6.

19. *Id.* at 1295.

2. *Treatment by Other Courts of Foreign Government Statements as Proof of Compulsion*

Unfortunately, *Interamerican* stands as an anomaly. Despite precedents for giving conclusive effect to statements by foreign sovereigns explaining their law, policy, or actions,[20] where such statements have been submitted in antitrust cases, the statements have generally been ignored, questioned, and disparaged by the courts.[21]

The most recent case raising a sovereign compulsion defense was the Japanese Electronic Products Antitrust Litigation.[22] In that case, the defendants, Japanese manufacturers of consumer electronic products, argued, inter alia, that the antitrust complaints should be dismissed because their minimum price agreements and "five-company rule"[23] were adopted in compliance with directives from the Japanese Ministry of International Trade and Industry (MITI).

In *Zenith,* MITI submitted a statement to the district court asserting MITI's authority to regulate Japanese exports and stating that the minimum price agreements and five-company rule were indeed mandated by MITI in its role as a regulatory authority. The district court considered the statements, but granted the defendants' summary judgment motion on other grounds.[24] The Court of Appeals for the Third Circuit, after reversing several of the district court's evidentiary rulings, remanded the action. In so doing, the court of appeals stated that on remand it would be possible for the finder of fact to reach conclusions directly contrary to the assertions of MITI.[25]

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20. *See* United States v. Pink, 315 U.S. 203 (1942); *infra* note 99 and accompanying text.

21. *See In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 310 (3d Cir. 1983) (the trier of fact could find that the minimum price agreement was not mandated by the Japanese government in direct contradiction to the statement of the Japanese Ministry of International Trade and Industry (MITI)); United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. 1962), *order modified,* 1965 Trade Cas. ¶ 70,352 (S.D.N.Y. 1965) (no reference to the amicus curiae brief of the Swiss Federation). *Compare* statement of Ministry of Int'l Trade and Industry at 3–4, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 513 F. Supp. 1100 (E.D. Pa. 1981) [hereinafter MITI Statement]; In Re Uranium Antitrust Litigation, 617 F.2d 1248, 1256 (7th Cir. 1980) ("[S]hockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction."); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 574 F. Supp. 1453, 1465 n.31 (N.D. Cal. 1983) (declining to give a statement by the Honduran government any independent significance because of its relatively mild content in comparison with other foreign government protests).

22. This litigation encompasses a dozen or more reported opinions, but this Comment will only deal with three: Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 513 F. Supp. 1100 (E.D. Pa. 1981); *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (7th Cir. 1983); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986).

23. The "five-company rule" prohibited each Japanese manufacturer from selling its products to more than five companies that would export the products to the United States. *In re Japanese Elec. Prods.,* 723 F.2d at 310. For each manufacturer, one of the five companies was its own United States subsidiary.

24. *Zenith,* 513 F. Supp. 1100, 1180–1329 (E.D. Pa. 1981) (dismissing Sherman Act claims for lack of admissible evidence of conspiracy).

25. *In re Japanese Elec. Prods.,* 723 F.2d at 310, 315.

II. ELEMENTS OF THE DEFENSE

The sovereign compulsion defense has, with one exception,[26] been recognized only in dicta. Therefore, it is difficult to define the substantive elements of the defense. However, a doctrine is shaped by the policy considerations that give it life.[27] By exploring policy considerations, it is possible to formulate a rational and pragmatic definition for the sovereign compulsion defense. These policy considerations dictate that the conduct protected by a sovereign compulsion defense be limited to activities that (1) take place within the jurisdiction of the compelling sovereign, (2) are undertaken in compliance with the express policy of the foreign government (de facto compulsion), and (3) are actively supervised by that government.

A. Bases for a Sovereign Compulsion Defense

Five principal grounds have been advanced in support of a sovereign compulsion defense: (1) analogy to state action immunity under *Parker v. Brown*,[28] (2) analogy to the act of state doctrine, (3) statutory construction of the Sherman Act,[29] (4) international comity, and (5) fairness to the defendant. A synthesis of these fundamental principles produces a rational, workable definition for the defense.

1. State Action Immunity Under Parker

State[30] action immunity, as established in *Parker v. Brown*[31] and explained in subsequent cases,[32] provides support for a territorial limit on the

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

27. *Compare* Amicus Curiae Brief of the Government of the United States at 23–24, Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp., 106 S. Ct. 1348 (1986) (arguing that the sovereign compulsion defense is based on judiciary's desire not to interfere with executive's conduct of foreign policy, and, therefore, that the defense should not be available where the United States government has brought suit because such considerations are resolved by the exercise of prosecutorial discretion) *with* Meal, *Government Compulsion as a Defense Under United States and European Community Antitrust Law*, 20 COLUM. J. TRANSNAT'L L. 51, 57 (1981) (Inquiry, regardless of plaintiff, should be to identify "bona fide government compulsion" because defense is based on "sympathy for a helpless private party" that is lacking where the defendant was not truly compelled.).

28. 317 U.S. 341 (1943).

29. Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (1985).

30. It should be noted that the word "state" in the term "state action immunity" refers to states of the United States of America. This is in contrast to the use of the same word to indicate a nation in the context of international law. Thus the "state" referred to in "act of state doctrine" is a sovereign nation. In the interest of clarity this Comment will use the word "state" only to refer to states of the United States except in the phrase "act of state doctrine."

31. 317 U.S. 341 (1943).

32. *See infra* notes 42–46.

sovereign compulsion defense and for a de facto standard for determining compulsion. In *Parker,* the Supreme Court held that raisin producers were not liable under the Sherman Act for conduct required under California law, even though the conduct would have been a violation of the Sherman Act.[33] The Supreme Court reasoned that there was no evidence in the legislative history of the Sherman Act to indicate congressional intent to restrain state action.[34] The Court also employed a presumption against nullifying a state's control over its officers and agents in the absence of express congressional intent.[35]

a. Analogy to a Sovereign Compulsion Defense with Territorial Limits

Commentators have pointed out that the analogy between the compulsion of state government directives and that of foreign government directives is highly persuasive.[36] This analogy has been criticized, however, because the *Parker* doctrine is based on the unique relation between federal and state governments in the United States.[37] This criticism misinterprets the rationale of the decision in *Parker* and ignores the strong analogy between the problem of conflicting sovereignty in questions of federalism and the problem of conflicting sovereignty in questions of extraterritorial application of domestic law.[38]

The fundamental principle of the *Parker* decision lies not in its reference to federalism; instead *Parker's* fundamental principle is found in its holding that the purpose of the Sherman Act is to suppress combinations in restraint of trade formed by "individuals and corporations," not restraints on trade imposed by governments.[39] Although the Court's reference in *Parker* was

33. *Parker,* 317 U.S. at 350.

34. *Id.* at 351 (citing 21 CONG. REC. 2562, 2457, 2459, 2461 (1890)) & n.7.

35. *Id.* at 351.

36. 16 VON KALINOWSKI, BUSINESS ORGANIZATIONS—ANTITRUST LAWS AND TRADE REGULATION § 5.03[3], at 5-39 (1986); 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 (1982); Comment, *Foreign Sovereign Compulsion and the Arab Boycott: A State Action Analogy,* 65 GEO. L.J. 1001 (1977).

37. *See, e.g.,* Note, *supra* note 14, at 896 & n.47; Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law,* 7 VA. J. INT'L L. 100, 129–30 (1967).

38. In questions of federalism, there is a conflict between the sovereignty of the state and the sovereignty of the federal government. In the international context, the conflict is between the sovereignty of the United States and the sovereignty of a foreign nation. A major difference between the two situations is the presence in the domestic setting of the United States Constitution, which establishes the supremacy of the federal government in direct conflicts between the two sovereigns. In the international context, the same function should be served by the fundamental principles of sovereign equality (*see* U.N. CHARTER PREAMBLE) and territorial supremacy (*see,* RESTATEMENT (REVISED) FOREIGN RELATIONS LAW OF THE UNITED STATES TENTATIVE DRAFT NO.6 (April 12, 1985) § 436; H. KELSEN, *supra,* note 5 at 212; *accord* Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1970)).

39. *Parker,* 317 U.S. at 351.

specifically to state governments, it is irrational to infer that Congress intended to place greater restrictions on efforts by foreign governments to regulate trade than on efforts by subordinate states to regulate trade.[40] On the other hand, it would be equally irrational to infer that Congress intended to relinquish its own sovereign authority over commercial activity within the territory of the United States. Therefore, the proper conclusion to be drawn from the *Parker* court's interpretation of the Sherman Act is that the Act is not intended to apply when action is directed by a government and carried out within the territorial boundaries of that government's sovereignty.

The corollary to this conclusion is that the United States government intends that the Sherman Act be applied to actions directed by governments when those actions impinge on the sovereignty of the United States. Consequently, a sovereign compulsion defense, insofar as it is based on this interpretation of the Sherman Act, would logically be limited to actions that take place within the territory of the foreign government.

b. Standards for the Degree and Proof of Foreign Compulsion

Analogy to state action immunity also supports the use of de facto compulsion and active government supervision as standards for applying a sovereign compulsion defense. In *Parker,* the trade restraint was required by a state legislative act.[41] However, recent cases have held that there need not be direct statutory compulsion (per se compulsion), so long as the challenged restraint of trade is in accordance with "clearly articulated and affirmatively expressed . . . state policy" and is "actively supervised by the state."[42] In the most recent of these cases, *Southern Motor Carriers Rate Conference, Inc. v. United States,*[43] the Court held it improper to require per se compulsion before granting antitrust immunity, because to do so would deny states the flexibility necessary for the formation of regulatory programs.[44] By analogy, a per se compulsion requirement in a foreign government compulsion context should also be rejected.[45]

40. The conclusion drawn by one student commentator, *see* Note, *supra* note 14, at 896 n.47, that Congress did not intend to give foreign governments the discretion to "develop their own policies free from federal interference," either expresses a misconception of the bounds of what Congress is able to give, or is a poorly worded attempt to describe a limit on foreign government involvement in the development of United States policies.

41. *Parker,* 317 U.S. at 346.

42. Lafayette v. Louisiana Power & Light, 435 U.S. 389, 410 (1977); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980); Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721, 1729 (1985) (Stevens, J., dissenting).

43. 105 S. Ct. 1721 (1985).

44. *Southern Motor Carriers,* 105 S. Ct. at 1729.

45. The Court's reasoning is applicable to the sovereign compulsion defense because of the analogy

The state action immunity analogy also supports giving conclusive weight to government statements. In *Southern Motor Carriers*, the Supreme Court cited an amicus brief of the state of Mississippi to support its conclusion that the encouragement of collective ratemaking was an active exercise of the regulatory agency's discretion.[46] In a sovereign compulsion context, government statements merit conclusive weight in determining whether the exercise of delegated authority was in keeping with the policies of the delegating government, because no more authoritative voice can speak on the subject.[47]

2. *Analogy to the Act of State Doctrine*

Some courts have discussed the act of state doctrine and sovereign compulsion so closely as to imply a lack of distinction between the two.[48] Although they are distinct,[49] the two doctrines have similar foundations, and, therefore, an understanding of the act of state doctrine is important to an understanding of the limits of the validity of foreign decrees.

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between the resolution of conflicts in sovereignty between states and the federal government and the resolution of conflicts in sovereignty between the United States and other nations. *See supra* note 38. Assuming one accepts the analogy, one can see the argument against a per se compulsion requirement by substituting in the Court's language in Southern Motor Carriers Rate Conference, Inc v. United States, 105 S. Ct. 1721 (1985), the words "sovereign compulsion," "national sovereignty," and "foreign government" for their analogical counterparts in the domestic context—"*Parker*," "federalism," and "State," respectively:

> The [sovereign compulsion] doctrine represents an attempt to resolve conflicts that may arise between principles of [national sovereignty] and the goal of the antitrust laws, unfettered competition in the marketplace. A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available to the [foreign government]. At the same time, insofar as it encourages [foreign governments] to require, rather than merely permit, anticompetitive conduct, a compulsion requirement may result in *greater* restraints on trade. We do not believe that Congress intended to resolve conflicts between two competing interests by impairing both more than necessary.

Id. at 1729 (context altered).

46. *Southern Motor Carriers*, 105 S. Ct. at 1730.

47. This question arose in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). In that case, a Canadian company used its position as exclusive buying agent for the Canadian government to give its United States parent company a monopoly on sales in Canada. *Id.* at 695. The Court refused to allow a sovereign compulsion defense, in part because there was no evidence that the Canadian government approved of or had directed that practice. *Id.* at 706. In this situation, a statement by the delegating government that its agent's exercise of authority was in accord with its national policy should bring that exercise of authority within the protection of the sovereign compulsion defense.

48. *See, e.g.*, Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 606 (9th Cir. 1977); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1324 (D. Conn. 1977).

49. *See* Timberg, *supra* note 11, at 21–22; Waller, *supra* note 36, at 789–92. Both argue that simultaneous discussion of act of state and sovereign compulsion creates unhelpful confusion as to the proper function of each.

The classic statement of the act of state doctrine is found in dictum in *Underhill v. Hernandez*.[50] The Supreme Court in *Underhill* stated that United States courts will not judge the acts of foreign governments done within their own territory.[51] Although the doctrine was originally based on considerations of sovereignty[52] and international comity,[53] the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*[54] stated that the doctrine was in fact based on the primary responsibility of the executive, rather than the judicial, branch for United States foreign policy.[55] Nonetheless, the principle that United States courts will not inquire into the validity of territorial acts of foreign governments survived the shift in bases for the doctrine.[56] Therefore, under the act of state doctrine, inquiry into the validity of a foreign government directive is barred where the foreign government affirms or presents other evidence to show that the foreign government acted to direct conduct within its territory. Logically, the same reasoning must apply whether questioning the foreign government or attacking those who follow the directive.

3. *Statutory Construction of the Sherman Act*

Two different approaches to statutory interpretation of the Sherman Act support the sovereign compulsion defense. First, the Supreme Court has

50. 168 U.S. 250 (1897).

51. *Underhill*, 168 U.S. at 252.

52. *Id.* at 258.

53. Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918) (failure to accept the acts of foreign states would "certainly imperil the amicable relations between governments and vex the peace of nations").

54. 376 U.S. 398 (1964).

55. *Sabbatino*, 376 U.S. at 423. The United States Government has argued that this division of foreign policy responsibility is the basis for the act of state doctrine and, therefore, is also grounds for denying the sovereign compulsion defense in actions brought by the United States. Brief of United States as Amicus Curiae at 23, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 106 S. Ct. 1348. The Solicitor General and the Department of Justice argued that the exercise of prosecutorial discretion by the Department of Justice amounts to a resolution of the foreign policy questions involved. Consequently, there would no longer be a need for the courts to defer to the executive and no purpose would be served by allowing a sovereign compulsion defense. *Id.* However, this argument fails to take into account any of the other considerations underlying the sovereign compulsion defense such as international comity. Moreover, such a position would permit the executive branch to arrogate the power to make a conclusive determination of law (the conclusion that a valid defense applies in a given factual setting) and would subject potential defendants to the vagaries of the United States administration's foreign policy. *See* discussion of fairness to defendant, *infra* Part II.A.5.

56. *Sabbatino*, 376 U.S. at 398. This decision was followed in Interamerican Refining Corp v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1299 (D. Del. 1970). *See also* Timberlane Lumber Co., v. Bank of Am., N.T. & S.A., 549 F.2d 597 615 n.34 (9th Cir. 1977) (questioning the validity of foreign law or policy is a task which the act of state doctrine prohibits courts from undertaking). *But see* ANTITRUST GUIDE, *supra* note 4, at 54 ("The act upon which the defense is based must be the act of a truly sovereign entity acting within the scope of its powers under the law of its nationality."). This statement was repudiated by one of its authors. *See* Statement of D. Rosenthal, in PERSPECTIVES, *supra* note 4, at 91.

determined that the Sherman Act was not intended to apply to restraints imposed by governments.[57] The second statutory approach is a pragmatic interpretation of "commerce" as it is used in the Sherman Act.[58] Where a restriction is an essential prerequisite for doing business, compliance with that restriction cannot be a restraint of trade because there would be no trade without the restriction.[59] In other words, if a party is punished for complying with such a restriction, enterprises would have to choose one or the other country in which to do business; the result would be the elimination rather than the promotion of United States commerce.[60] This would defeat the goals of the Sherman Act.[61]

This statutory approach supports, as a condition for granting a sovereign compulsion defense, a requirement that the challenged conduct be compelled by a foreign government as part of its national policy. However, this interpretation does not support going so far as to require a statutory basis for the compulsion. A foreign sovereign might well insist on noncompetitive conduct without a specific statutory enactment.[62] Yet that sovereign retains the power to punish or exclude from its commerce those who do not comply with its policies. Therefore, the risk of being forced to choose between one or another country in which to do business is equally present where foreign national policies are not expressed in legislation.

4. International Comity

International comity supports the use of a priori rules and a territorial limitation to the sovereign compulsion defense. International comity also provides an additional basis for accepting statements of foreign sovereigns on the nature, intent, and effects of their domestic actions. International comity has been defined as "[t]hat body of rules which states observe

57. Parker v. Brown, 317 U.S. 341, 351 (1943). This is the basis for the state action immunity doctrine. See discussion of this interpretation and state action immunity, *supra* Part II.A.1.

58. Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (1985).

59. *Interamerican*, 307 F. Supp. at 1298 (quoting K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 94 (1st ed. 1958)).

60. *See, e.g.*, Competitive Impact Statement for Proposed Consent Judgment in United States v. Bechtel Corp., 42 Fed. Reg. 3716, 3723 (1977), *decree entered*, 1979-1 Trade Cas. (CCH) ¶ 62,429 (N.D. Cal. 1979) [hereinafter Competitive Impact Statement] (entering judgment without allowing for compliance with foreign regulations in those countries "would have jeopardized the continued conduct of any business by the defendants (and possibly others) in Arab Countries").

61. *See Interamerican*, 307 F. Supp. at 1298; J. ATWOOD & K. BREWSTER, *supra* note 6, at 266–67.

62. An example of such a situation could be a nation, heavily dependent on exports, that creates an agency and authorizes that agency to regulate exports without giving specific statutory instructions as to how that authority is to be exercised. In such a situation, there would be no express statutory authority for any given anticompetitive restriction on exports (there might even be inconsistent domestic regulations), and as a result, one could argue that there is no "legal" basis for compliance with the restriction. Nonetheless, that government may view the restriction as being vital to its national interests.

towards one another from courtesy or mutual convenience, although they do not form part of international law."[63] International comity is said to require the consideration or "balancing"[64] of the interests of the nations involved.[65]

A recent example of the application of this kind of policy-balancing approach can be found in *Timberlane Lumber Co. v. Bank of America,*[66] which involved an act of state defense. In *Timberlane,* the Court of Appeals for the Ninth Circuit offered a three point test:

> Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be recognized as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?[67]

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63. Hilton v. Guyot, 159 U.S. 113 (1895).

64. *See, e.g.,* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 605–06 (9th Cir. 1977); Waller, *supra* note 36, at 787–88; Note, *supra* note 14, at 904–05.

65. It has been suggested that mutuality or reciprocity is also a necessary component of the sovereign compulsion defense. *See, e.g.,* Brief of the Semiconductor Industry Ass'n as Amicus Curiae at 10–11, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986); Statement of Shenefield in PERSPECTIVES, *supra* note 4 at 25; British Nylon Spinners, Ltd. v. Imperial Chemical Indus., Ltd., 1953 Ch. 19, 24 (C.A. 1952) (remarks of Evershed, M.R.). There seems to be sufficient international recognition, at least in principle, that the availability of the defense abroad need not be questioned on a case by case basis. The European Community has stated that it will not prosecute "export agreements imposed on firms in non-member countries by their governments." COMMISSION OF THE EUROPEAN COMMUNITIES, THIRD REPORT ON COMPETITION POLICY 27 (1974); *accord* Franco-Japanese Ball-Bearings Agreement, [1974] O.J. Eur. Comm. (No. L 343) 19, [1973-1975 New Dev. Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9697 (1974) (measures imposed on Japanese acts by Japanese government were outside scope of article 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* Mar. 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. *See* Meal, *supra* note 27, at 102 n.196.

The United Nations also seems to have accepted the principle of a sovereign compulsion defense to charges of engaging in restrictive trade practices. *See* U.N. Rules and Principles, *supra* note 4, at 6, which states "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."

66. 549 F.2d 597 (9th Cir. 1977).

67. *Timberlane,* 549 F.2d 597 at 615. Answering this third question requires assessing a host of considerations: the degree of conflict with foreign law or policy, the nationality or allegiance of the parties, the locations of principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. *Id.* For an elaboration of the analysis under this third question, *see* Timberlane Lumber Co., v. Bank of Am., N.T. & S.A., 749 F.2d 1378, 1384–85 (9th Cir. 1984), *cert. denied,* 53 U.S.L.W. 3895 (June 24, 1985) (No. 84-1761).

Timberlane applied this balancing test to an act of state question, but commentators have suggested that it should also be applied to the sovereign compulsion defense.[68] At least one court has already applied this test to a sovereign compulsion defense.[69] However, application in either context is objectionable for two reasons.[70] First, attempting to measure and compare the interests of countries would force courts to enter into political areas; the act of state doctrine, however, is intended to prevent political involvement.[71] Second, courts,[72] commentators,[73] and even the Justice and State Departments[74] have questioned the ability of courts to weigh such policy considerations. Moreover, in a sovereign compulsion context, answering the first two *Timberlane* questions will be academic because the answer to the third question will invariably be negative.[75] In light of these objections,

68. *See* Note, *supra* note 14; J. ATWOOD & K. BREWSTER, *supra* note 6, at 267–68.

69. Airline Pilots Ass'n Int'l v. TACA Int'l Airlines, S.A., 748 F.2d 965, 971–72 (5th Cir. 1984) (applied test without discussion of reasons and without citations supporting application to sovereign compulsion defense).

70. An objection can also be made on procedural grounds, that is, policy balancing would require extensive pretrial discovery unrelated to the merits. *See* Sennett & Gavil, *Antitrust Jurisdiction, Extraterritorial Conduct and Interest-Balancing*, 19 INT'L LAW. 1185, 1212 (1985).

71. *See* FUGATE, INTERNATIONAL ASPECTS OF AMERICAN ANTITRUST LAW 152 (3d ed. 1982). This question has also been addressed in terms of a court's constitutional authority to hear such questions. *See, e.g.*, Sennett & Gavil, *supra* note 70, at 1208–11.

72. *See, e.g., In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) ("Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable. . . . [where] [t]he competing interests . . . display an irreconcilable conflict on precisely the same plane of national policy."); Laker Airways, Ltd. v. Sabina, Belg. World Airlines, 731 F.2d 909, 949 (D.C. Cir. 1984) ("Pursuing these inquiries . . . does not suggest the best avenue of conflict resolution. These types of factors are not useful in resolving the controversy."). *See also* Thomas v. Washington Gas Light Co., 448 U.S. 261, 289 (1980) (White, J., concurring) (expressing concern that courts will "give controlling weight to [their] own parochial interests" in balancing state interests for defenses based on the Full Faith and Credit Clause). *But see* Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 869 (10th Cir. 1981) (approving *Timberlane* approach).

73. *See, e.g.*, Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 N.W.J. INT'L L. & BUS. 336, 363-64 (1980); *Task Force Report: The Antitrust Guide for International Operations Revisited*, 1984 A.B.A. SEC. OF ANTITRUST L. 7; Sennett & Gavil, *supra* note 70, at 1208–11.

74. *See Foreign Trade Antitrust Improvements Act of 1985: Hearings on S. 397 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (statement of Abraham D. Sofaer, Legal Advisor, Department of State, at 10; statement of Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, at 9–10).

75. Where a foreign government has directed an action within its own territory, the interest of the United States in the extraterritorial application of United States law to conduct in that foreign country must be weighed against the interest of that foreign country in the territorial application of its own law. No nation has a greater or equal interest in the application of its law to conduct within, for example, Mexico than Mexico has in the application of its own law to that conduct. There is no question that a nation has the right and authority to regulate its exports, *see* C. BERGSTEN, COMPLETING THE GATT: TOWARD NEW INTERNATIONAL RULES TO GOVERN EXPORT CONTROLS 1–10 (1974), nor is there any doubt about a sov-

the formulation of a priori rules for the application of the defense is a preferable approach.[76]

The principles of international comity also support finding a strict territorial limit on the reach of the sovereign compulsion defense. The same considerations that should prevent American law from interfering with the internal decrees of foreign sovereigns should prohibit foreign sovereigns from ordering violations of American law outside their territory.[77]

Finally, international comity suggests that proper respect be given to the statements of foreign sovereigns as to the intent, effect and purpose of their actions. This was the consideration that first gave rise to the act of state doctrine.[78] Experience has shown that foreign governments are not reluctant to respond vigorously to what they perceive as violations of their sovereignty.[79]

5. *Fairness to the Defendant*

Principles of fundamental fairness suggest that de facto rather than de jure compulsion be the standard for application of the sovereign compulsion defense. Fairness provides a further reason for a territorial limit to the

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ereign's authority to regulate commerce within its territory. *See* Interamerican Refining Corp v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1970).

The United States has made abundant exercise of such authority. *See, e.g.*, Mutual Defense Assistance Control Act of 1951, §101, 22 U.S.C. § 1611 (1970) (export of strategic commodities to nations threatening United States security prohibited; no assistance to countries refusing to comply with embargo); Foreign Assistance Act of 1961, § 620(a), 22 U.S.C. § 2370(a) (1970) (trade with Cuba prohibited; aid to countries giving assistance to Cuban government prohibited absent presidential approval); Trading with the Enemy Act, § 3, 50 U.S.C. app. 3 (1970) (trading with the enemy either directly or through others is prohibited); Export Administration Act of 1969, 50 U.S.C. app. 2401–13 (1970 & Supp. IV 1974) extended by Exec. Order No. 11,940, 41 Fed Reg. 43,707 (1976), *reprinted in* 50 U.S.C. app. at 2149 (statute rejected prohibition on cooperation with Arab boycott of Israel in favor of encouraging noncompliance and requiring reporting of boycott requests). *See Hearings on S.948 to Amend Section 2 of The Export Control Act of 1949 Before the Senate Comm. on Banking & Currency*, 89th Cong., 1st Sess. 3 (1965).

In addition, much of American trade policy is based on the availability of a sovereign compulsion defense in the United States. *See, e.g.*, Letter from Attorney General William French Smith to the Ambassador of Japan (May 7, 1981) (quoted in Matsushita & Repeta, *Restricting the Supply of Japanese Automobiles: Sovereign Compulsion or Sovereign Collusion?*, 14 CASE W. RES. J. INT'L L. 47, 81 (1982)).

76. *See* Sennett & Gavil, *supra* note 70, at 1204–13 (1985); Waller, *supra* note 36, at 788. For a discussion of appropriate a priori rules, see *infra* Part II.B.

77. *See* H. KELSEN, *supra* note 5, at 207–12 (principles of international law limit the extraterritorial reach of nations); R. KLEIN, SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA 57–59 (1974) (principle of sovereign equality limits the extraterritorial reach of nations). *But see id.* at 167–68; Schwarzenberger, *The Forms of Sovereignty*, in IN DEFENSE OF SOVEREIGNTY 160, 190 (W. Stankiewicz, ed. 1969) (sovereign equality does not really exist in superpower relations). However, it would be disingenuous to subscribe formally to the principle of sovereign equality, as the United States has done in signing the U.N. Charter (*see* U.N. CHARTER art. 2, para. 1), while insisting on the authority to apply one's own law within the territory of a foreign sovereign in opposition to the law of that sovereign.

78. *See supra* note 53.

79. *See supra* note 6.

reach of sovereign compulsion. Fairness requires that private parties not be subjected to conflicting demands in different jurisdictions. It is inequitable to punish a party in this country for conduct in another country that was compelled by the laws of that country.[80] Without the protection of a sovereign compulsion defense, enterprises would frequently be faced with the choice of either violating the laws of one or another country or ceasing to do business with one of the countries.[81] Moreover, culpability in such a situation lies with the foreign government; therefore punishing the private party through treble damage actions is not an appropriate means of seeking redress.[82]

The desire not to subject defendants to court orders that require violation of foreign law has led to the inclusion of "saving clauses" in many of the judgments involving jurisdiction over extraterritorial conduct.[83] The effect of a saving clause may well be that the conduct, against which sanctions were intended to be applied, escapes the application of sanctions altogether.[84] Because a protective mechanism is available for conduct taken

80. *See* J. ATWOOD & J. BREWSTER, *supra* note 6, at 265; Meal, *supra* note 27.

81. Ironically, enforcement of sanctions for anticompetitive behavior could have an anticompetitive effect. *See, e.g.*, Competitive Impact Statement, *supra* note 60, at 3723 (consent decree limited in order to protect conduct of business in Arab League countries).

82. *See* Sennett & Gavil, *supra* note 70, at 1213–14.

Other avenues for redress include bilateral negotiations and agreements, (*see, e.g.*, Memorandum of Understanding between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation With Respect to the Application of National Antitrust Laws, Mar. 9, 1984, ——— U.S.T. ———, T.I.A.S. No. ———, *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,440; Agreement on Antitrust Cooperation, United States-Australia, June 29, 1982, ——— U.S.T. ———, T.I.A.S. No. 10365, *reprinted in* [1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,440; Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, United States-Federal Republic of Germany, June 23, 1976, 27 U.S.T. 1956, T.I.A.S. No. 8291, *reprinted in* [1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,238), and other dispute resolution procedures authorized under international agreements. *See generally* Sandler, *Primer on United States Trade Remedies*, 19 INT'L LAW. 761 (1985).

83. A saving clause is a provision in a judgment that excuses a party from compliance with the terms and conditions of the judgment where compliance would involve a violation of the laws of another country. *See, e.g.*, United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962), *order modified*, 1965 Trade Cas. (CCH) ¶ 70,352 (S.D.N.Y. 1965) (order exempted actions required or forbidden under Swiss law.); United States v. United Fruit Co., 1978-1 Trade Cas. (CCH) ¶ 62,001 § VII (E.D. La. 1978) (defendant not in contempt of judgment where action taken abroad is required by foreign country); Competitive Impact Statement, *supra* note 60, at 3723 (effect of consent judgment limited to United States to prevent loss of trade with Middle Eastern countries).

84. *See, e.g.*, British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd., 1955 Ch. 37, 53 (1954) (portion of judgment of United States court exempting conduct that would violate foreign law asserted as grounds for denying enforcement of that judgment). Because United States courts have recognized territoriality as a basis for limiting the application of antitrust judgments, it seems unwise to do so in a manner that provides an opportunity for offending the foreign sovereign before limiting the judgment. By making it clear from the outset that conduct required by a foreign government will not be subjected to sanction, this potential political embarrassment can be avoided.

within a foreign country pursuant to the direction of the government of that foreign country, it is unfair to require that defendants engage in extensive discovery and a full trial before obtaining saving clause protection. The same result can be achieved more economically through an affirmative defense based on sovereign compulsion.[85] In addition, because there can be no reasonable expectation that conduct taken within the territory of the United States will be protected, territoriality is also a component of fairness.

Finally, national governments can compel actions by means other than the enactment of or prosecution under law. The threat of prosecution or other sanctions alone can be compulsive.[86] Therefore, although the questioned conduct must truly be compelled by the foreign government, fairness dictates that the compulsion test be practical rather than formalistic; that is, the test should be de facto rather than de jure compulsion.

B. Conduct Protected by the Defense

The policy rationales behind the sovereign compulsion defense can be used to delineate the elements of the defense. First, the compelled conduct must occur within the territory of the compelling sovereign. This follows from all five of the policies supporting the defense.[87] Conduct within the territory of the compelling sovereign should include obedience to controls on imports,[88] domestic commerce, and exports.[89] Under no circumstances

85. Where a legitimate claim of sovereign compulsion is made, the focus of discovery will initially be on the facts surrounding the compulsion. If compulsion is successfully demonstrated, further laborious discovery will not be necessary.

86. *See, e.g.*, Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 980 (5th Cir. 1976) ("jawboning" and threats of official action by United States government officials constituted sufficient compulsion to excuse liability for damages for delayed delivery to other customers).

87. *See supra* notes 35–39, 50–56, 76, 80 and accompanying text.

88. Such controls should include restrictions on source or destination, quantity, quality or customers. International agreements impose limitations on the extent to which these measures may be employed. *See generally* Sandler, *supra* note 82.

Compliance with import and export controls should be interpreted to include participation in "primary" but not "secondary" boycotts, which are in fact conduct within the United States. An example of a "primary boycott" is the refusal of the Arab League countries to do business with firms that also trade with Israel. A catalogue of "black listed" firms was produced and imports of items purchased from these firms was prohibited. The "secondary boycott" is the refusal by American merchants to deal with those "black listed" firms in matters unrelated to export to the boycotting countries for fear of losing future business opportunities. *See* Baker, *Antitrust Remedies Against Government-Inspired Boycotts, Shortages, and Squeezes: Wandering on the Road to Mecca*, 61 CORNELL L. REV. 911, 938–42 (1976). *See generally* Timberg, *supra* note 11. A variation of the secondary boycott would be a requirement that United States manufacturers not purchase from certain suppliers within the United States. This would not be protected because it purports to direct the conduct of business within the United States and would be a violation of United States sovereignty. *See, e.g.*, Competitive Impact Statement, *supra* note 60, at 3723.

89. A special problem is presented by controls on international shipping. Unlike other aspects of

would any restraint on further sales or transfers of goods by an exporter, subsidiary or branch office in the United States be protected.

Second, there must have been de facto compulsion in order for a defendant to use sovereign compulsion. This is necessary out of fairness to defendants[90] and also follows from an analogy to state action immunity.[91] In many situations, the threat of severe sanctions by a foreign government may not be required in order to achieve compliance from commercial enterprises.[92] In such a situation, the requirement of such sanctions can only be seen as an irrational attempt to mold other countries' regulatory action after our own.[93] Moreover, a requirement that foreign government compulsion take the form of legislative enactments would hamper American foreign policy. The United States has, in general, espoused a procompetitive policy toward international trade.[94] Requiring formal legislative action may severely impede the repeal of trade restrictions, thus making it more difficult for America to achieve its goal of competitive markets. Requiring formal legislation could be especially vexing where trade restraints are imposed temporarily, perhaps in response to currency fluctuations, temporary shortages, or even in response to a request by the United States government. There is a risk that legislative inertia may prevent their repeal after conditions have normalized.

A third element of this criterion is that the challenged conduct must not have exceeded what was compelled. For example, if a foreign government decrees that its domestic producers may not sell to more than five exporters who intend to export to the United States,[95] neither the producers nor the exporters may use that decree in defense of further restrictions on customers or territories within the United States. Neither would the defense protect an agreement by all foreign producers to sell to fewer than five or to a single exporter, nor would it protect an agreement by producers to each sell to the same five exporters to the exclusion of others.[96] In dealing with

international commerce, shipping is both one nation's export and another nation's import simultaneously. Several countries have resolved this by exempting shipping from their competition laws. Comment, *The Shipping Act of 1984: Bringing the United States in Harmony with International Shipping Practices*, 3 DICK. J. INT'L L. 197, 201 & n.26 (1985).

90. *See supra* Part II.A.5.

91. *See supra* Part II.A.1.

92. *See supra* note 86.

93. *See* J. ATWOOD & K. BREWSTER, *supra* note 6, at 281 ("Respect given by American courts should not depend on how foreign procedures stack up under United States constitutional system.").

94. Seeking voluntary restraint agreements is a notable exception to this policy. *See* Matsushita & Repeta, *supra* note 75, at 50–51.

95. *See supra* note 22 and accompanying text.

96. The practical effect of the sovereign compulsion defense in this latter situation would be to exclude all reference to the government decree as evidence of conspiracy but to allow as evidence the agreement as to which five exporters would get all that nation's business. Reference to the exclusion of all but five exporters would be admissible as evidence of actions in restraint of trade.

United States commerce, private parties must compete to the extent they are not otherwise compelled by the government.

C. *Use of Statements by Foreign Governments as Proof of Compulsion*

When analyzing the treatment by American courts of foreign government statements, it is important to distinguish between those statements regarding foreign law or a foreign sovereign's intent, and those that merely suggest the belief of a sovereign as to facts or an interpretation of international law. The latter situation has arisen most commonly in admiralty, where a foreign sovereign has asserted that a libelled ship was in government service and therefore entitled to sovereign immunity.[97] These "suggestions" are properly treated as the sovereign's position on the contested facts, and deserve no more weight than the statements of any other party to litigation.[98]

On the other hand, in contexts other than sovereign compulsion, statements by foreign sovereigns regarding the effect and intent of their domestic law and their official intentions and policies, have been given deference by United States courts.[99]

Despite this precedent, in two recent cases, *In re Uranium Antitrust Litigation*,[100] and *In re Japanese Consumer Electronic Products Antitrust Litigation ("Zenith")*,[101] participation by foreign governments on behalf of

97. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); *Ex parte* Republic of Peru, 318 U.S. 578 (1943).

98. Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682, 694–95 (1976). *But see* The Carlo Poma, 259 F. 369, 370 (2d Cir. 1919) ("suggestion" by the Italian ambassador accepted as "verity"); The Clavaresk, 264 F. 276, 279–80 (2d Cir. 1920) (certification by an ambassador stated to be a "verity" although in light of other evidence presented, reliance on such certification was unnecessary).

99. This position has been taken by the Supreme Court in United States v. Pink, 315 U.S. 203, 218–21 (1942) (Soviet Commissariat for Justice statement that nationalization decrees were intended to have extraterritorial effect deemed "conclusive.") and by the Second Circuit in Agency of Canadian Car & Foundry Co. v. American Can Co., 258 F. 363, 368–69 (2d Cir. 1919) ("an authoritative representation by the Russian government" through its ambassador was held "binding and conclusive in the courts of the United States . . . ."). *See also* The Carlo Poma, 259 F. 369, 370 (2d Cir. 1919); The Clavaresk 264 F. 276, 279–80 (2d Cir. 1920); D'Angelo v. Petroleos Mexicanos, 422 F. Supp. 1280, 1285 (D. Del. 1976), *aff'd per curiam*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978) (opinion of Mexican Attorney General "precludes this court from reexamining the question"); United States v. Melekh, 190 F. Supp. 67, 87 (S.D.N.Y. 1960) (letter of Soviet ambassador held to be "conclusive"). In each of these cases, a statement by a foreign government regarding the intent or effect of its actions was given conclusive effect.

100. 617 F.2d 1248 (7th Cir. 1980). In this case, the submission by foreign governments of amici curiae briefs contesting jurisdiction was labelled "shocking" and "subservient" to the interests of foreign businesses. *Id.* at 1256. Perhaps the *Uranium* court's hostility can be excused in view of the fact that the named defendants had refused to present themselves to contest jurisdiction. This "recalcitrant attitude" and contumacity, *id.* at 1255 & n.30, may have provoked this inflammatory and unnecessary outburst.

101. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 513 F. Supp. 1100 (E.D. Pa. 1981), *rev'd in part sub nom. In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd*, 106

defendants has been received unfavorably by United States courts.[102]

However, because of the potentially adverse consequences of ignoring or disputing foreign governments in areas of their domestic policies,[103] this treatment should be extended to the statements of foreign sovereigns presented in antitrust litigation.

1. Function of Statements as Evidence of Compulsion

Companies compelled by foreign government policies to act in violation of United States antitrust laws risk sanctions by United States courts. This risk may encourage private parties to obtain objective evidence of the policies in question, possibly including a statement of the government, before engaging in anticompetitive activities that affect United States commerce. In light of the historical treatment of government statements, an ambassadorial certificate or properly authenticated statement of an officer or agency with regulatory authority should be conclusive evidence of foreign government policy, law, and intent.[104] Of course, where the compulsion is based on a statute or other ordinance, the existence of the statute itself should be sufficient evidence of compulsion, and further explanation by the government would be superfluous.[105]

Where a complaint alleges abuse of delegated authority, the requirements of a sovereign compulsion defense should be satisfied by a statement from the delegating authority that the conduct was in keeping with its policies.[106] If a defense of sovereign compulsion depends on precatory compulsion, a statement by the government of its intention that its suggestions have compulsive effect and of its willingness to take stronger measures in the event of a lack of compliance, should be sufficient to establish that the compulsion was not merely the subjective belief of the defendant.

Of course, a statement by a foreign government official is not the only method of proving actual compulsion, and there may be other objective

S. Ct. 1348 (1986). In this case, the court stated that it would be possible to find facts directly contradictory to those asserted by the Government of Japan. *See* Brief for the Government of Japan as Amicus Curiae at 5, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp. 106 S. Ct. 1348 (1986). However, the response in the district court is particularly surprising given the historical treatment of this type of statement.

102. *See also* United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600, 77,456 (S.D.N.Y. 1962) (protest by Swiss government ignored although scope of judgment modified).

103. *See supra* note 6.

104. *But see* Matsushita & Repeta, *supra* note 75, at 59–61 (arguing that statements by foreign sovereigns should be given no weight at all).

105. *See, e.g., Watchmakers of Switz.*, 1963 Trade Cas. (CCH) at 77,456 (compulsion under foreign law would provide a defense).

106. *See, e.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706–07 (1962) (no defense where there was no evidence that foreign government officials approved of manner in which delegated authority was exercised).

manifestations of policy sufficient to prove that the exercise of delegated authority to restrict trade[107] was carried out in accordance with the clearly articulated policy of the delegating government. It is, however, difficult to imagine what evidence might be produced that would qualify mere precatory compulsion for the defense without such a statement.[108]

2. *Form of Submission*

The interests of fairness and justice require that statements submitted by foreign governments meet certain minimum requirements. Although courts should give proper consideration to the statements made by foreign governments in the form of amici curiae briefs, it is suggested that a formal government statement, properly certified and submitted to the court in accordance with the procedures suggested by the Department of State, would be a more effective means of establishing the statement as evidence.[109]

First, the statement should specify the legal authority of the organ or agency that promulgated the order, and the means of enforcement or penalties for noncompliance; that is, the extent of government supervision over the activities of the defendant must be stated.[110] Second, the statement should give a clear articulation of the policies under which the conduct was directed. This would be of particular importance where the claim of sovereign compulsion is based on precatory compulsion. Finally, any such statement should give a description of the conduct compelled, sufficiently specific to allow a United States court to determine the extent of defendant's compliance. However, the statement need not be so detailed that the preparation of the statement becomes onerous.[111]

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107. *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706 (1962) (Antitrust liability was upheld where authority delegated to purchase and allocate vanadium for all Canadian industries and that delegated authority used to exclude certain parties from Canadian market and there was no indication that Canadian authorities "approved or would have approved."). *See also* J. ATWOOD & K. BREWSTER, *supra* note 6, at 262–64.

108. The fact that a course of conduct was recommended or suggested does not imply the existence of a "clearly articulated public policy." Therefore, where such a suggestion or recommendation is the only evidence of compulsion, a statement by the government of its policy, whether given publicly or directly to a court, would be the only method of proving compulsion.

109. Courts are not required to give any weight to or even consider briefs of amici. However, once a government statement has been introduced and made part of the record of the trial, it must be dealt with as such.

110. Verifying the authority of the issuing body will assure the court that the compulsion in question was in fact "sovereign," as well as establish "in fact" compulsion.

111. For example, in a minimum export price fixing case, it should suffice that the sovereign make a statement to the effect that it compelled setting a minimum price and that the price actually established was in accordance with the direction. However, in a customer allocation (boycott) case, the statement should state specifically the limitations that were placed on customer/supplier selection, and in no case should effect be given to secondary allocation or boycott orders. *See supra* Part II.A.4.

In view of these requirements, the statement submitted by MITI in the *Zenith* case[112] provides an example where this third requirement was not met. Item three of that document states that MITI directed an agreement on minimum prices "and other matters concerning domestic transactions relating to exports . . . ."[113] This failure to specify what other actions were directed might imply that the MITI statement was intended to protect any and all activities of the defendants that might be subject to sanction under United States law. Although it would be understandable if such were MITI's intent, a United States court could not in good conscience take cognizance of such a broad statement, not only out of consideration for the plaintiff's litigation, but in consideration that other means of redress may depend on an express statement of the foreign government's activities and policies.[114]

III. CONCLUSION

The defense of sovereign compulsion in antitrust actions is founded on criteria like those governing state action immunity in domestic law, with special provisions to insure strict territorial limitations in accordance with international comity. Conduct that is in fact compelled by another government deserves immunity from antitrust liability in this country, whether that compulsion takes the form of legislation or fiat.

The clearest evidence of foreign government compulsion is a statute. However, statements submitted by foreign governments merit conclusive weight in establishing the existence of government policies or intentions sufficient to support a sovereign compulsion defense, and in establishing the extent of that government's directives. Therefore, where a foreign sovereign has submitted a statement of sufficient clarity which demonstrates the requisite degree of compulsion, commensurate with the analytical bases for the sovereign compulsion defense, failure to recognize the defense disfavors not only the interests of justice but the international interests of the United States as well.

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112. MITI Statement, *supra* note 21.

113. *Id.* at 3.

114. For example, efforts to achieve redress through bilateral negotiations might be hampered by a foreign government's insistence that an interpretation given to a broad statement by a United States court was mistaken.