Competition and the State

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Chapter 7

International Law and Competition Policy

Paul B. Stephan

States approach the regulation of international commerce with mixed motives. In a static world motivated exclusively by material interests, every state would like its producers to get monopoly rents from their foreign sales and its consumers to benefit from full competition. To the extent an industry has the characteristics of a natural monopoly, due either to positive returns to scale or declining marginal costs, each state would like to host the producer. But in a dynamic world where states can respond to the actions of others, it becomes much more difficult either to predict or prescribe the pattern of international competition regulation that will or should emerge.

The range of possible dynamic responses is great. Only a few narrow international commitments limit what states can do. A pro-competition importing state can go after foreign producers who collude in restricting sales in its import market to raise prices. Alternatively, a state might try to open up foreign export markets for its producers. In either case, it may impose sanctions on foreign firms to further its policy. But what happens if the foreign firms act in coordination with, or under the control of, a foreign state?

As this question indicates, competing competition policies can lead to international conflict. It is the job of public international law to address such sources of tension. Several general international law doctrines apply to competition law conflicts. None, however, has great clarity or definiteness. There
remains plenty of room to link arguments for application of these doctrines to claims about optimal international competition policy.

This chapter explores the concepts of territoriality, sovereign immunity, and act of state as used in international law and applied to competition law conflicts. It focuses on U.S. practice, because the United States has been the principal exporter of competition policy and thus has generated the most international conflicts. It argues that current trends in U.S. law bolster these traditional international law doctrines and thus reduce the likelihood of disagreements over competition policy. Whether these developments will bring us closer to an optimal international competition regime is more debatable.

I. Territoriality and National Competition Law

Traditionally, international law stood on two foundations: territoriality and sovereign consent. Both concepts presupposed states as indispensable lawmakers. States function as the ultimate source of authority over particular territory. Endowed with state authority, sovereigns may consent to obligations through agreements with other states. Two hundred years ago, Chief Justice Marshall provided the canonical statement of the doctrine:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. 3

Accordingly, the traditional conception of international law allocated authority to sovereigns on the basis of territory and then facilitated reallocations of authority that flow from agreements among sovereigns. These agreements could be express, as with treaties, or implied, as with customary international law. The concept of “exclusive and absolute” sovereign authority over its territory itself rested on customary law, although Article 2(1) of the UN Charter ratifies the concept. 4

Over the last 30 years, advocates and scholars have challenged both of these foundations. Territoriality, they argue, has become obsolete in an increasingly
interconnected world. State consent similarly has become less important as coalitions of interested persons take shape across state borders to formulate and implement international norms. These jurists envision a new international law that focuses on human interests without mediation by states or the territory that they occupy or control.

This vision, however, outstrips reality. States remain indispensable to the formation of international law, and the mapping of state authority onto state territory remains central to the international legal system. Recent evidence of the enduring importance of territoriality can be found in the International Court of Justice's decision in Jurisdictional Immunities of the State. The Court considered a claim that the traditional immunity enjoyed by one sovereign in another's courts must give way when a state is responsible for war crimes. The prohibition of fundamental norms of international law, the argument went, rests on a higher authority than state consent and thus requires the suspension of the normal privileges that one sovereign accords another.

The Court categorically rejected this argument. It instead ruled that exceptions to immunity always must rest on consent, either express or implied by custom. No such exception exists for even grave breaches of that part of international law that protects individual, rather than state, interests.

Of course, just because the International Court of Justice believes this to be true, it does not make it a fact. International law lacks an authoritative arbiter. But it remains clear that the significance of states and their borders still matters in the international system, changes in the structure of international communication, transportation, and the structure of the world economy notwithstanding.

What does all this mean for competition policy? A wooden application of the principles of territoriality and sovereign consent would seem to lead to an absolute prohibition of any regulation by a state of conduct taking place on another sovereign's territory, absent some agreement to the contrary. Indeed, the United States once embraced this position. The Supreme Court, however, rethought the issue long ago. By the 1920s it approved sanctions imposed on an international price-fixing scheme involving foreign participants because a key meeting of the participants took place in the United States. At the end of World War II, the government argued that international law had evolved to the point where a state could regulate extraterritorial anticompetitive conduct that had a substantial, direct, and intentional effect on the U.S. market. Many other states took serious exception to this position, but the Supreme Court endorsed it in a somewhat careless manner in 1993. At about the same time, the
European Court of Justice did effectively the same thing, holding that the European Economic Community then (now the European Union) could regulate a price-fixing conspiracy among foreign producers that used local agents in its implementation.\(^\text{14}\)

All of these cases involved foreign producers who sought to collect monopoly rents from domestic consumers. When the victims of anticompetitive behavior are foreign consumers, different standards have applied. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Court gave the back of its hand to the argument that the Sherman Act provided a remedy to a plaintiff who sought compensation for its exclusion from the Japanese domestic market. U.S. antitrust laws, the Court declared, “do not regulate the competitive conditions of other nations' economies.”\(^\text{15}\) More recently, the Court in *F. Hoffman-La Roche v. Empagran S.A.* ruled that the Sherman Act does not apply to anticompetitive conduct that causes only foreign injury.\(^\text{16}\) Exceptionally, the *Hoffman-La Roche* opinion makes much of the customary international law of territoriality, which it invoked to justify its interpretation of the relevant statute. This interpretive tool, the Court argued, “helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world.”\(^\text{17}\)

The last, cryptic signal from the Court on the question of antitrust extraterritoriality is lodged in a footnote in *Morrison v. National Australia Bank Ltd.*, a recent pronouncements on the presumption against extraterritoriality in U.S. economic regulation.\(^\text{18}\) The case is significant both because it involved securities regulation, an area of great importance to international business, and because it repudiated nearly half a century of lower court practice. In distinguishing its earlier antitrust decisions, the Court noted simply that the Sherman Act applied extraterritorially, without explaining why.\(^\text{19}\)

Taken together, these cases convey a sense of unease, if not confusion. In other regulatory fields, the Court has seized on territoriality as a means of providing a bright line for managing transnational problems. Congress, the Court seems to believe, may manage international regulatory conflicts as it chooses, but it must take the initiative in doing so. Absent explicit legislative action, the default will be a lack of U.S. supervision of foreign transactions, whatever their effect on U.S. interests.\(^\text{20}\) But in the field of antitrust, a different baseline applies. Its dimensions and the reasons for the difference remain murky. Doubtlessly the Justices do not agree among themselves as to these matters.

Looking back at the emerging doctrine, one can detect two competing impulses framed by a structural problem. The structural problem is the cryptic
language of the Sherman Act, which forbids collusive actions “in restraint of trade or commerce” but provides no clear guidance as to what this means. Faced with this challenge, the U.S. courts have taken it upon themselves to develop a common law of fair trade that changes with time and fashion. Unlike (perhaps) other regulatory fields, Congress already has taken the initiative in delegating to the courts the responsibility for devising the substantive standards in antitrust.

In developing this common law, the Court has tried to accommodate two competing insights. On the one hand, in a world of international commerce, foreign conspiracies can impose significant harm on U.S. consumers and presumptively should face regulation. On the other hand, judicial assaults on the choices that foreign states make about the organization of their own markets seem quixotic as well as dangerous. The Court plausibly could insist on further direction from Congress before taking on other countries.

A focus not on the location of conduct but rather on the place of harm, to some extent, balances these impulses. If foreign states choose to submit people on their territory to monopoly rents, the case for U.S. courts coming to the rescue of these victims seems especially weak. Thus, territoriality comes back in as a constraint on national regulation, only more loosely than other areas. The “place of harm” standard is necessarily more indefinite, and therefore more debatable, than the “place of sale” rule imposed in *Morrison*.

To be clear, the cases do not explicitly invoke a territorial “place of harm” limit on the Sherman Act. Rather, the courts’ behavior and the somewhat confused accounts they give of their conduct seems to fit with such a rule. Thus, one can used territoriality to predict judicial behavior, even if the courts themselves talk about the concept obliquely when they do so at all. 22

But this modified use of territoriality does not help with one important problem. In many instances, the foreign producers seeking monopoly rents in the United States are arms of a foreign state or otherwise act under state control. Here the economic injury to U.S. consumers results from a direct international conflict based upon opposing state policies. For a court to do nothing would leave the supposed beneficiaries of the Sherman Act without a cause of action. But to allow litigation would put the courts in the position of attacking foreign governments without the clear backing of Congress. If territoriality were the only limit on the Sherman Act, then these suits should proceed. Yet, courts understandably have been queasy about taking on other states directly.

Because territoriality offers no help here, the courts have looked to other doctrines to limit litigation against foreign states and their competition policies.
International law offers two more doctrines of possible relevance—namely, sovereign immunity and the act of state doctrine. Each is relevant, even if only the first reflects a clear obligation imposed by international law.  

II. Sovereign Immunity as a Limit on Regulation

Historically international law has blended the concepts of exclusive sovereign control over its territory and of sovereign consent by presupposing that sovereign acts performed on another state’s territory rest on the host state’s permission and that a promise not to hold the acting state responsible in the host state’s courts accompanies this permission. Under traditional doctrines of international law, a state that invades another’s territory without consent commits an international wrong, for which retaliation up to and including armed attack was permissible. If the state’s presence came with consent, by contrast it would be assumed that the host state’s consent embraced a promise not to interfere with the acting state’s conduct to any greater degree than the acting state had agreed to at the outset. Out of these implied promises arose a doctrine of sovereign immunity, which instructed domestic courts not to exert their authority against a foreign sovereign without the consent of that sovereign or a command of its own state.

During the twentieth century, this doctrine evolved. After World War II, the United States took the lead in arguing for an exception to a general rule of immunity in cases where a sovereign mimicked a private actor (acta jure gestionis), such as by engaging in commercial activity. Congress in 1976 replaced, as to sovereigns but not government officials, the common law of immunity with the Foreign Sovereign Immunities Act (FSIA). This statute constitutes U.S. law, but it does not reflect international practice in all respects, and in a few instances, it may even violate international law.

Under the FSIA, a foreign sovereign, or a legal entity controlled by a foreign sovereign, enjoys immunity from suit only if it satisfies several requirements. First, in the case of a sovereign-owned legal entity, the firm must not be formed under U.S. law. Second, it must be directly owned by a foreign state at the time of the suit. Third, the sovereign or entity must not have consented to the suit. Fourth, the suit must not be based on commercial activity that is either carried on in the United States or has a direct effect in the United States.

The recent OPEC litigation illustrates how these rules apply to a foreign price-fixing cartel aimed at the U.S. market. U.S. subsidiaries of foreign na-
national oil companies (NOCs) enjoy no immunity because they are formed under U.S. law. The NOCs also are subject to suit to the extent that they are responsible for the sale of products in the United States, because this activity fits within the statutory exception for commercial activity. Neither the states that make up OPEC nor the organization itself was a named defendant, even though the organization and its state members made up the heart of the conspiracy.

From a rational plaintiff’s perspective, joining OPEC and the member states to the litigation would have been pointless. Both the U.S. subsidiaries and the NOCs were likely to have significant attachable assets in the United States. OPEC has no U.S. presence, and foreign states normally do not own outright attachable assets in foreign states. To the extent that the plaintiffs wanted to make money from the litigation, the available exceptions to foreign sovereign immunity gave them everything they could have wanted.

The U.S. stance on sovereign immunity is not the only one, of course. Some states, including China, still take the position once embraced by the United States that all state acts have a sovereign character and thus enjoy immunity. The International Court of Justice expressly refused to decide whether customary international law still embraces this rule. Even if the old position no longer reflects the international consensus, those states that adhere to it may implement this all-encompassing immunity within their own legal systems.

The practical consequence of broader sovereign immunity outside the United States is limits on enforcement of any judicial awards obtained domestically. A beneficiary of a U.S. judgment would have no ability to reach state-owned assets (including the assets of state-owned companies) located in jurisdictions that embrace the traditional approach. This adds to the already considerable difficulty of enforcing judgments against foreign sovereigns.

At the end of the day, however, sovereign immunity is not a significant constraint on the use of competition law to attack state-organized export cartels. As a general rule, the territoriality principle allows states to impose their own rules on assets invested in, as well as transactions taking place on, that state’s territory. This means that retaliation against foreign cartels works only to the extent that the foreign actor has put its people or property at risk in the retaliating state. This fundamental characteristic of the international system is as true for private cartels as those organized by states. But where foreign actors do enter the U.S. market, sovereign immunity does nothing to prevent the full-throated application of U.S. competition rules.
III. The Puzzling Persistence of the Act of State Doctrine

Sovereign immunity is not, however, the end of the story. Other doctrines, emanating from, if not strictly required by, international law also allow courts to manage conflicts between cartel-promoting and consumer-protecting states. In the United States, three overlapping doctrines provide some latitude to courts seeking to avoid confrontations with foreign governments: the act of state doctrine, the foreign sovereign compulsion defense, and the political question doctrine.

The act of state doctrine is, in the United States, one of the more complex and confused bodies of judicially constructed law. It is not a product of international law as such but rather an independent response by some states to problems raised by the territoriality principle. The leading U.S. decision *Banco Nacional de Cuba v. Sabbatino* took great pains to state that neither international law nor the Constitution compels the doctrine. Rather, courts apply the doctrine to avoid judicial interference in decisions best made by the political branches. But unlike the political question doctrine, the matters covered by the doctrine are not inherently incapable of judicial resolution. Thus, the courts accept that Congress can override the doctrine and require them to address particular disputes involving foreign sovereign acts.

Where the act of state doctrine applies, it requires a court to accept the validity of an act of foreign state. Acts by a sovereign of a sovereign nature within its own territory trigger the doctrine. What suffices to override the doctrine, as well as a precise demarcation of its boundaries, remains controversial. But the Supreme Court has passed up at least one opportunity to denounce the doctrine altogether, and the lower courts continue to apply it in a variety of contexts, including antitrust cases.

At first blush, the role of the doctrine in antitrust is puzzling. It is, after all, only a default rule that courts may apply in the absence of any clear instruction from the legislature. Act of state issues typically arise in disputes over property rights, including mining and drilling concessions. Lacking constitutional stature, the doctrine cannot survive a contradictory statutory command. The Sherman Act is just such a command, instructing the courts to address anticompetitive behavior affecting U.S. commerce. One might think that the mandate of Congress would supplant whatever discretion ary considerations that motivate the doctrine. And the antitrust laws make no distinction between private and foreign-sovereign acts.

An explanation for the persistence of act of state in this field can be found in a feature noted above: The U.S. courts have understood the antitrust laws as
effecting a delegation of common-law powers to the judiciary.\textsuperscript{39} The legislative instruction in essence is no instruction, leaving the judiciary vested with the responsibility to grapple with anticompetitive conduct but otherwise without legislative guidance. Congress has neither overridden common-law doctrines, of which act of state is an example, nor expressly endorsed departures from international practice, the territoriality principle in particular. The nature of the statutory delegation thus invites reference to a doctrine that, while not applying of its own force, remains useful as an interpretive template.\textsuperscript{40}

By way of comparison, the Supreme Court has found the act of state doctrine and its converse, the revenue rule, irrelevant in two cases involving the scope of criminal fraud. In \textit{W.S. Kirkpatrick & Co. v Environmental Tectonics Corp., International}, the Court allowed a firm to bring a civil suit against a competitor under the Racketeering Influenced and Corrupt Organizations Act (RICO) for obtaining a government contract through bribery.\textsuperscript{41} The Court deemed the relevant question to be whether the payment of a bribe to obtain a governmental favor constituted fraud under federal law, not whether the bribe invalidated the contract under Nigerian law.\textsuperscript{42} Accordingly, the act of state doctrine did not apply.

The revenue rule is the logical counterpart of the act of state doctrine. Just as the doctrine requires a court to accept the validity of a sovereign act undertaken with the sovereign's territory, the rule requires a court to give no extraterritorial effect to a sovereign's revenue impost.\textsuperscript{43} In \textit{Pasquantino v United States}, the Court rejected the argument that this common-law rule should illuminate the interpretation of "property" for purposes of wire fraud liability.\textsuperscript{44} It accordingly held that an attempt to evade Canadian customs duties constituted criminal fraud because Canada's right to duties is a property interest within the meaning of the statute. The Court asserted that the United States had a legitimate interest in criminalizing fraud carried out on its own territory, even if the prosecution had the collateral effect of strengthening the sanctions for evasion of a foreign revenue law.

Although the concepts of fraud and property both have their roots in the common law, the Court has not understood the criminalization of fraud under federal law as constituting a delegation of general lawmaking power to the judiciary. As a result, common-law doctrines derived from the principle of territoriality do not have the same role to play in illuminating the scope and meaning of the statutes. The Court instead focuses on the purpose of the statute and the reprehensibility of the conduct involved, not on the effect of criminalization on foreign sovereign acts. Antitrust is different precisely because
the fact of the delegation of judicial lawmaking power is so clear, while the extent of this power is so undefined.

Even though antitrust in the United States rests on legislation, the courts legitimately may use the act of state doctrine as an interpretive tool. This basic point, however, does not resolve how the doctrine may function in specific cases. In particular, it leaves open the question of what limitations may constrain it. The Supreme Court has identified three possible exceptions, although it has embraced only two. First, an act of positive law can override the doctrine, including rules of international law based on a high degree of codification or consensus. Second, the Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba* held that state entities acting entirely within their civil law competence may do things that do not rise to the level of sovereign acts, and thus fall outside the doctrine. Third, a plurality of the *Dunhill* Court endorsed a commercial exception to the doctrine. In addition, the Court in *H.S. Kirkpatrick & Co.* indicated more generally that the doctrine did not apply when the object of a lawsuit is not to treat a foreign act as a legal nullity but rather to attach adverse consequences to it.

Unless and until international law embraces a norm condemning export cartels, either by treaty or by broad consensus constituting a binding customary norm, the first exception cannot apply. The only body of international law that comes close to creating such a norm is the Uruguay Round Agreements, which regulate trade law and arguably address anticompetitive refusals to export. But both U.S. and EU law expressly bar domestic courts from applying these agreements, instead relegating enforcement exclusively to state-to-state dispute resolution.

The *Dunhill* exceptions, however, have considerably greater purchase. In antitrust cases, courts without exception have rejected the argument that all acts of state-owned entities constitute sovereign acts for purposes of the act of state doctrine. Were the rule otherwise, all activities carried out within the foreign state's territory would enjoy immunity from judicial review, contrary to the clear implication of FSIA's commercial activity exception. The challenge instead is distinguishing sovereign acts from other behavior.

One line of argument focuses on the role of sovereign compulsion. As a formal matter, litigants and courts have treated foreign sovereign compulsion as an analytically distinct issue. As an analytical matter, however, these cases are better seen as applying *Dunhill*. Actions by foreign firms, whether state-owned or not, that comply with a mandatory rule on the territory of the state that issues the mandate are themselves extensions of the state's sovereign authority.
Attacks on those acts are simply assaults on the exercise of sovereign power. The compulsion cases thus distinguish the exercise of civil law rights, to which the doctrine does not apply, from the exercise of sovereign authority.

Another line of cases struggles with *Dunhill*’s commercial exception. In the most recent OPEC litigation, the Fifth Circuit ruled that a majority of the Supreme Court had not excluded commercial conduct from the doctrine and therefore refused to consider the issue.\(^5^3\) The Ninth Circuit reached the same outcome by treating limits on exports of natural resources as inherently non-commercial.\(^5^4\) Both decisions have the effect of giving conclusive effect to sovereign mandates carried out within the state’s territory, even when the mandate involves commercial transactions and results in direct harm to U.S. consumers.

Finally, there remains the general question of whether the act of state doctrine has any relevance to suits that seek compensation for the harm caused by a sovereign act, rather than nullifying the act outright. Read broadly, *W.S. Kirkpatrick & Co.* seems to limit the doctrine only to suits falling into the second category. If so, few if any antitrust suits ever would raise an act of state issue. But the *W.S. Kirkpatrick* opinion is deeply enigmatic, indicating at one point that imposing tort liability for a wrongful detention would constitute the invalidation of the official act of detention.\(^5^5\) Until the Court revisits the issue, it may be best to treat that case as resting on a narrower ground—namely, the inconsistency between the doctrine and the legislative purpose of regulating the payment of bribes to foreign officials.

As noted above, the Supreme Court has yet to consider whether foreign sovereign compulsion constitutes a valid excuse for conduct that otherwise would be actionable under the antitrust laws.\(^5^6\) A number of lower courts have applied the defense in instances where the compulsion is transparent and emanates from government policy makers, as opposed to the managers of state-owned enterprises. The prevalence of the defense may indicate that it will endure and ultimately gain the endorsement of the Supreme Court.

Simply as a matter of analytic clarity, however, it does not appear that the foreign sovereign compulsion defense does any useful work.\(^5^7\) Compulsion requires a credible threat, which as a practical matter involves proposed action or inaction with respect to people or assets on the territory of the threatening sovereign. Anything that should count as foreign sovereign compulsion, accordingly, also would meet the territorial and sovereign-act components of the act of state doctrine as limited by the *Dunhill* majority.

In the recent OPEC lawsuit, the Fifth Circuit invoked an alternative ground for dismissing the complaint, holding that consideration by a court of a claim...
that maintenance of the OPEC cartel violated the Sherman Act would violate the political question doctrine. In doing this, the Fifth Circuit embraced the position of the Department of Justice in its amicus brief. On its face, however, the holding seems nonsensical.

The political question doctrine, however murky in detail, rests on a bedrock constitutional principle. Due either to an express constitutional assignment of responsibility or the inherent nature of the judicial process, some issues as a constitutional matter may not be resolved by the courts. The doctrine thus delineates an area where courts lack the capacity to adjudicate. But what does an attack on a government-organized cartel have to do with judicial incapacity? Is it plausible that, were Congress to adopt a law that expressly extends the Sherman Act to cartels managed by foreign states, the judiciary would refuse on constitutional grounds to carry out this mandate? If the answer is no, then surely the judiciary has the constitutional capacity to do the same under the currently vague standards of that statute. Accordingly, talk about the doctrine seems more of a distraction than useful in international antitrust litigation, notwithstanding the arguments of the government and the occasional inclination of the lower courts to embrace them.

* * *

In a world where optimal global consumer welfare dominated all other policy objectives, competition authorities probably would not distinguish between private and governmental conspiracies in restraint of trade. But in a world where states pursue other objectives and embrace strategic trade objectives, unilateral pursuit of aggressive proconsumer competition objectives invites trade wars rather than cooperation. In some instances, the risk is worth it, because a risk of sanctions may produce market liberalization. In such conflicts, the court may become useful instruments. But rarely do states regard their judiciary as the best place to locate the decision as to when to go to war.

One can imagine a world where the U.S. judiciary, out of an abundance of caution, fully embraced the territoriality principle and insisted that Congress mandate expressly any imposition of antitrust liability on conduct taking place outside the United States. Instead the courts have taken the riskier course of presumptively allowing lawsuits wherever the harm, rather than the conduct, occurs in the United States. But to ameliorate that risk, the courts, not always with a clear doctrinal basis, have withheld action when anticompetitive acts result directly from a transparent command of a foreign state. In such instances,
the willingness of the foreign state to take responsibility for the anticompetitive conduct relocates the dispute to the sphere of state-to-state negotiations. Where negotiations break down, the legislature still may enlist the courts in the battle, but the courts will not start hostilities on their own. This outcome is conservative in the sense that judicial inaction removes pressure that could goad the government to negotiate international agreements that more closely embrace global consumer welfare. But such conservatism is not necessarily a bad thing.
Notes to Chapter 7

15. First, supra note 8, at 367.
17. Lemley, supra note 12.
20. Such a thorough analysis should be required for so-called actionable subsidies that, according to the WTO rules, can be prohibited when the complaining country shows that the subsidy has an adverse effect on its interests. Actionable subsidies can be prohibited when they seriously injure the importing country’s domestic industry, rival exporters in a third country trying to compete with a subsidized exporter, or exporters trying to compete with subsidized domestic firms.
22. In the interpretation of the rules, economic analysis should play a much more prominent role than in the EU.
25. In the Court of First Instance (CFI), judgment on the validity of the Commission decision that found that Deutsche Telekom had abused its dominant position by making it impossible for competitors to enter in the competitive segment of the market, the CFI claimed that there is an abuse “if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market.” The fact that Deutsche Telekom was subject to a price cap regulation would have made a difference only insofar as the regulation would have imposed on Deutsche Telekom the contested behavior. Alberto Heimler, Is Margin Squeeze an Antitrust or a Regulatory Violation?, 6 World Competition L. & Econ. 879 (2011).
27. See Case T-167/08.
29. Another aspect of the case that involves the bundling of Microsoft’s Media Player software with its operating system is not discussed in the paper.
30. See First, supra note 8.
32. See also on this Ravi Mehta, Imprecise Legal Concepts Are No Excuse, Competition Law View from Blackstone Chambers, available at http://competitionbulletin.com/.
34. See Chapter 2.

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8. See supra note 4.

9. The one dissent in the case did advance a theory of international law that marginalized state consent in favor of ethical values. Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), supra note 4 (Cançado Trindade, J., dissenting). The most noteworthy thing about that dissent, however, is that no other member of the Court joined it.


12. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). Because the Supreme Court lacked a quorum to consider this case, the court of appeals decision accepting the government's contention remained the final word for nearly half a century.

13. Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993). The Court expressly disavowed relying on the 1982 Foreign Trade Antitrust Improvements Act, which at least by negative inference might have supported the outcome. 509 U.S. at 796 n.23, 798. Evidence of the hostility of other states includes both clawback regimes that allowed defendants in U.S. courts to sue for restitution of the punitive component of antitrust damages and blocking statutes that forbade cooperation with civil or criminal cases brought in the United States. For a review of this legislation, see Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 680–83, 972–77 (5th ed. 2011).


15. 475 U.S. 574, 582 (1986). In a footnote, the Court clarified that "the Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce." Id. at 582 n.6. It then cited Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), a case where foreign and domestic producers colluded in a price-fixing cartel directed at the U.S. market. Nowhere in the opinion did the Court refer to the 1982 Foreign Trade Antitrust Improvements Act, which seemed to mandate an exclusion from Sherman Act coverage for foreign economic injuries. In a leading case decided not long after Matsushita, a court of appeals ignored this language altogether when considering a challenge to a state policy of limiting the carriage of bulk imported cargo to national
e state to challenge another’s competition and Trade or the Agreement on Techni-
der the General Agreement on Trade in open up a particular industry to discipline a little used U.S. antishipping statute. For v Marek Martyniszyn, Export Cartels: Is It and 15, J. Int'l Econ. 181 (2012); Florian tion and Protectionism, 3 J. Competition L. u About Export Cartels and What Is the Ap-


22. The Court also can avoid international conflicts by treating foreign state-managed conduct as not harmful and thus outside the scope of regulation altogether. In Mitsubishi, the Court ruled that U.S. law did not apply to a scheme, allegedly managed by the Japanese government, to capture market share in the United States through low prices absent credible evidence that the scheme, once successful, would create a durable barrier to entry. This ruling made unnecessary an inquiry into the availability of a foreign sovereign compulsion defense, the question on which the Court originally had granted certior-
ari. I discuss this defense and its relationship to the act of state doctrine below. European case law is less clear on this point and might allow government regulation of underpricing even in the absence of clear evidence of a stable barrier to entry. One complicating factor, however, is that many of the cases implic ate the separate doctrine under European law disallowing improper government subsidies (state aids). For a review of the cases, see D. Daniel Sokol, Competition Policy and Comparative Corporate Governance of State-Owned Enterprises, 2009 BYU L. Rev. 1713, 1788–92.


26. In particular, the refusal of the United States to recognize state immunity in certain cases invol veling torture seems inconsistent with the International Court of Justice’s understanding of the present state of customary international law.

27. 28 U.S.C. §§ 1603(b)(3).

29. 1605(a)(1). Consent can be implied by failure to object to jurisdiction at the first opportunity.
30. 28 U.S.C. § 1605(a)(2). I ignore for present purposes other statutory exceptions to state immunity, which do not seem relevant to antitrust issues.
31. Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938 (5th Cir. 2011).
33. See Simon N.M. Young, Immunity in Hong Kong for Kleptocrats and Human Rights Violators, 41 Hong Kong L.J. 421 (2011).
34. See Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), supra note 4, at ¶ 59.
37. Immediately after the Supreme Court decided Sabbatino, Congress overruled the case as to expropriations of the property of foreign investors. 22 U.S.C. § 2370(e)(2). The Supreme Court has not found an opportunity to consider a case where that statute applied, but the lower courts have accepted the congressional mandate.
39. See supra note 21.
40. The U.S. government accepts that the doctrine applies in antitrust cases, “if the facts and circumstances indicate that: (1) the specific conduct complained of is a public act of the sovereign, (2) the act was taken within the territorial jurisdiction of the sovereign, and (3) the matter is governmental, rather than commercial.” U.S. Department of Justice & Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations, Antitrust Enforcement Guidelines for International Operations, Antitrust Enforcement Guidelines for International Operations § 3.33 (1995) [hereinafter Antitrust Enforcement Guidelines].
42. RICO does not independently criminalize conduct but rather enhances penalties and provides for civil treble damages suits for specific crimes, if carried out in an organized fashion within the meaning of the statute. The predicate offenses in W. S. Kirkpatrick were mail and wire fraud under 18 U.S.C. §§ 1341, 1343. Environmental Tectonics Corp. v. W. S. Kirkpatrick & Co., 659 F. Supp. 1381, 1391 (D.N.J. 1987).
43. The United States recognized the revenue rule in The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).
44. 544 U.S. 349 (2005).
45. The existence of a fourth exception, where the Executive Branch seeks to override the doctrine without relying on a statute or treaty, is not clear. In First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), a three-justice plurality asserted that the Executive Branch had this discretion. Five members of that Court rejected the claim. In W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International, 493 U.S. 400 (1990), the Court suggested that factors such as the views of the Executive might justify constriction of the doctrine but in no event could justify expansion of its scope.
46. 376 U.S. at 428. At least one lower court has expanded this point by treating all so-called jus cogens norms of international law as overriding the doctrine. Sarei v. Rio Tinto PLC, 671 F.3d 736, 757 (9th Cir. 2011), vacated and remanded, 133 S. Ct. 1995 (2013), reversed on other grounds, 722 F.3d 1109 (9th Cir. 2013). For criticism of such a use of the jus cogens concept, see Paul B. Stephan, The Political Economy of Jus Cogens, 44 Vand. J. Transnat’l L. 1073 (2011). In essence, this supposed exception rests on confusion about the doctrine’s role as an interstitial rule, rather than as an independent source of legal authority.
Agreements Act. At least two lower court cases have intimated that a violation of the Agreements might negate a sovereign compulsion defense to an antitrust claim. Resco Products, Inc. v. 

Legation that defendant induced foreign governments not to deal with plaintiff does not trigger act of state doctrine); Williams v. Curtiss-Wright Corporation, 694 F.2d 300, 304 (3d Cir. 1982) (allegation that defendant induced government agency to withhold license does not trigger act of state doctrine); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293-94 (3d Cir. 1979) (allegation that defendant induced foreign governments not to buy plaintiff's product does not trigger act of state doctrine). Bosai Mineral Group Co., Ltd., 2010-1 Trade Cas. (5th Cir. 1979) (allegation that defendant induced government agency to withhold license does not trigger act of state doctrine); Industrial Investment Development Corp. v. Mitsui & Co., Ltd., 594 F.2d 48, 53 (5th Cir. 1979) (allegation that defendant induced foreign government agency to withhold license does not trigger act of state doctrine); Sage International, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896 (E.D. Mich. 1981) (allegation that defendant induced foreign governments not to buy plaintiff's product does not trigger act of state doctrine).


53. 632 F.3d at 462 (3d Cir. 2011).

Chapter 8

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