



# **Avoidance Techniques: State Related Defences in International Antitrust Cases**

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## **CCP Working Paper 11-2**

**Abstract:** Despite its economic significance, competition law still remains fragmented, lacking an international framework allowing for dispute settlement. This, together with the growing importance of non-free-market economies in world trade require us to re-consider and re-evaluate the possibilities of bringing an antitrust suit against a foreign state. If the level playing field on the global marketplace is to be achieved, the possibility of hiding behind the bulwark of state sovereignty should be minimised. States should not be free to act in an anticompetitive way, but at present the legal framework seems ill-equipped to handle such challenges.

This paper deals with the defences available in litigation concerning transnational anticompetitive agreements involving or implicating foreign states. Four important legal doctrines are analysed: non-justiciability (political question doctrine), state immunity, act of state doctrine and foreign state compulsion. The paper addresses also the general problem of applicability of competition laws to a foreign state as such. This is a tale about repetitive unsuccessful efforts to sue OPEC and recent attempts in the US to deal with export cartels of Chinese state-owned enterprises.

*December 2010*

**ISSN 1745-9648**

**Acknowledgements:** Thanks to Imelda Maher and seminar participants at the Centre for Competition Policy and at the Royal Irish Academy 2010 Graduate Research Seminar for helpful comments on earlier drafts. This research was partly conducted during a research visit at the Centre for Competition Policy (UEA) in July 2010, funded by the CCP and UCD School of Law. Thanks to the CCP for hosting my visit and its kind support.

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## ***1.1 Introduction***

The widespread recognition of the importance of facilitating and managing growing global interdependence in trade led to the creation of the World Trade Organization at the end of the XX century. The commonly shared belief that international trade is mutually beneficial was the driving force behind the gradual abolition of public restraints to trade: the reduction of tariffs and non-tariff barriers to trade. The creation of the generally successful mechanism of addressing still-existing public barriers to trade and breaches of newly signed agreements, viz. the dispute settlement mechanism equipped with the *de facto* binding force of the Panel and Appellate Body reports, placed private restraints on trade in the limelight, with anticompetitive arrangements being the focus of attention. Nevertheless, neither the WTO, nor any other multilateral intergovernmental organization became equipped with the tools and necessary mandate to deal with visibly outstanding international anticompetitive concerns. International competition law did not come into existence, an international competition authority was not created, despite the recurrent efforts in that respect.<sup>1</sup>

Yet, the pressing need to manage cross-border anticompetitive arrangements fuelled the development of principles of public international law, gradually leading to redefinition and expansion of doctrines and theories providing the basis for the jurisdiction of national courts in cases involving foreign, and sometimes only foreign, parties and conduct. Extraterritorial jurisdiction gradually and not without difficulties become the leading and in many cases possibly the only effective tool in the fight with international anticompetitive restraints.<sup>2</sup>

With all its shortcomings and limitations, the extraterritorial application of national competition laws has the potential to substantially address the problem of international anticompetitive arrangements, at least for the most important and powerful states/ regions. However, this tool becomes significantly impaired in cases involving or implicating foreign states. This piece aims to present and analyze this issue in light of the developments in the doctrine of international law and parallel, inseparable developments of national laws and practices of selected states.

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<sup>1</sup> For more on this issue see Chapter 2: 'Global Competition Law: A Project Conceived and Abandoned' in: DJ Gerber, *Global Competition: Law, Markets, and Globalization* (OUP, Oxford 2010), p. 19 et seq.

<sup>2</sup> JG Castel, 'The Extraterritorial Effects of Antitrust Laws' (1983) 179 *Recueil des Cours* 9, JP Griffin, 'Extraterritoriality in U.S. and EU Antitrust Enforcement' (1999) 67 *Antitrust L.J.* 159, D Geradin, M Reysen and D Henry, *Extraterritoriality, Comity and Cooperation in EC Competition Law* (2008), B Sweeney, 'Combating Foreign Anti-competitive Conduct: What Role for Extraterritorialism?' (2007) 8 *Melbourne Journal of International Law* 35.

## ***1.2 Possible responses of a municipal court faced with proceedings concerning or implicating acts of a foreign state***

The avoidance techniques, as the name suggests itself, come into play only when a state or states are somehow involved in a case. Therefore it is of paramount importance to address the general question of actionability of anticompetitive conduct of states. In competition law regimes where only firms are the addressees of competition laws, the case against states has no grounds. This issue itself would suffice as a subject of an independent study. Within the framework of this piece, it is outlined with reference to US antitrust and EU competition law.

When faced with an attempt to institute proceedings concerning or implicating acts of a foreign state, a court, depending on jurisdiction, may respond in a number of ways. There are at least four possible responses and all of them allow either to block initiation of the proceedings or serve as defences in a particular case. Because of their similar effect they can be referred to as avoidance techniques.<sup>3</sup>

Firstly, the court may declare the issue at stake non-justiciable. This places a particular case outside the realm of adjudication, awaiting a more appropriate diplomatic or more generally political settlement. In case of a non-justiciable dispute, the court declares itself lacking competence to deal with the matter. Non-justiciability is a principle of national law, especially present in Anglo-American jurisprudence. Its origin and development are discussed in context of those two jurisdictions.

Secondly, according to international law parties involved in a case, be it a state, a state-owned company or a state's instrumentality, may be protected by state immunity, which would block further proceedings. The origin, understanding and development of the theory of state immunity is discussed later in this text, with special focus on the gradual departure from the absolute doctrine of immunity, in favor of the restrictive theory, in principle making immunity unavailable in cases involving commercial dealings.

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<sup>3</sup> It seems that it was Hazel Fox who introduced this term to the scholarly literature. She used it with regard to state immunity, act of state doctrine, and non-justiciability, but in the context of this text it is not incorrect to include in this category also the foreign state compulsion. Compare: H Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' in MD Evans (ed) *International Law* (2nd edn, OUP, Oxford 2006), pp. 363-365.

The third possible reaction of a court in a case involving or implicating a foreign state is the application of the act of state doctrine. It is particularly recognized in common law countries, and it earned its salience especially in the US. In case of act of state, in contrast to the doctrine of immunity, the proceedings as such are instituted. The respondent, but also the plaintiff, may base its substantive defence or claims on the argument that an act involved in the case was an act of state and as such it should be recognized as valid and respected by the municipal courts in the forum state. The act of state doctrine is discussed in context of US and UK jurisdictions.

Last but not least, firms brought to court for antitrust violations may claim, as their substantial defence, that they were forced to act in anticompetitive manner by the foreign state. Foreign sovereign compulsion as a defence is internationally widely recognized, *inter alia* in the US and in the EU. It has the potential of fully removing the liability of private firms in a particular case if the fact of compulsion is proven. In this text the intricacies of this doctrine are analyzed in the two most influential competition law regimes: the US and in the EU.

This study draws extensively on case law from outside of the area of antitrust. This is indispensable to fully present the nature of problems involved. Some of the doctrines discussed until recently have never been tested in antitrust litigation, yet new developments and sound arguments exist to suggest that they have potential to play a significant role also in this field. Moreover, not all available defences, theories and principles available in cases involving or implicating foreign states are discussed. Some of them, like *forum non conveniens* or international comity, are either too general for this piece, or too political for legal determination and therefore lie beyond this study. This piece aims to accomplish an uneasy task: to address internationally recognized, state-related defences in antitrust litigation with relevance beyond a single jurisdiction. It combines different branches of law, substantially drawing on public international law, common law, EU law, and quite significantly on national competition laws. This characteristic dictated the selection of investigated doctrine.

In the final part I provide an analysis of a possible interaction between the discussed defences. This part shows the existing gaps in the regulatory framework and how it is ill-equipped to handle international cases involving and implicating foreign states.

### ***1.3 Applicability of competition laws to states***

The essential and at the same time the very basic question that needs to be answered when thinking about the possibility of bringing an action against a foreign state is whether the competition laws are at all applicable in such a case. If the answer is in the negative, then there is no need to discuss the matter any further because the conduct is simply not regulated. Such conclusion would mean that particular competition regimes implicitly permits foreign public cartels. This issue itself is of paramount importance, but in each case the answer depends on particular formulations of national competition law provisions and their subsequent interpretation by the national courts. Full investigation of this legal problem calls for a self-standing study, yet a brief analysis of this issue in the light of US and EU competition rules is provided below.

#### **1.3.1 US antitrust**

The US antitrust provisions of Sherman and Clayton Act make all the cartel-like agreements illegal. Both acts use a term ‘person’ as the addressee of the prohibition.<sup>4</sup> The issue arises whether a foreign government fits that notion.

The issue whether a foreign state is a ‘person’ under Sherman and Clayton Acts arose in *Pfizer*,<sup>5</sup> where a foreign state was recognized as a plaintiff in antitrust case. The Supreme Court acknowledged that ‘no statutory provision or legislative history that provides a clear answer’. This observed, it concluded that the definition of a ‘person’ is ‘inclusive rather than exclusive, and does not by itself imply that a foreign government, any more than a natural person, falls without its bounds.’<sup>6</sup>

Until now *Pfizer* remains the only Supreme Court’s statement on the matter. Whether a foreign state can be a defendant in an antitrust case remains unsettled, yet the textual basis allowing for such an interpretation is available. Nevertheless, the District Court in *OPEC* found itself bound to hold narrowly, notwithstanding *Pfizer*, that a foreign state is not to be considered a ‘person’ under the Sherman and Clayton Acts.<sup>7</sup> It referred to two cases: *Texaco*<sup>8</sup>

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<sup>4</sup> ‘The word “person”, or “persons”, wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.’ 15 USC §§7, 12(a).

<sup>5</sup> *Pfizer Inc. v. Government of India (Pfizer)* 434 US 308 (US Supreme Court 1978).

<sup>6</sup> *Ibid.*, p. 312.

<sup>7</sup> *International Ass'n of Machinists v. OPEC (OPEC- District)* 477 F.Supp. 553 (C.D.Cal. 1979), pp. 570-572.

<sup>8</sup> *Interamerican Refining Corp. v. Texaco Maracaibo, Inc. (Texaco)* 307 F. Supp. 1291 (D. Del. 1970).

and *Hunt v. Mobil Oil Corp.*<sup>9</sup> Yet, in neither of those cases a state was named as a defendant. In *Texaco*, where foreign state compulsion was recognized as a defence in antitrust case, the court observed that the Sherman Act does not apply to acts of foreign sovereigns explicitly in analogy to *Parker*<sup>10</sup> where the Supreme Court declared inapplicability of the Sherman Act to actions of a domestic state (*the US* were considered not a ‘person’ under the Sherman Act).<sup>11</sup> In *Hunt v. Mobil Oil Corp.*, dealing with Libyan expropriation of oil companies, the court referred to the issue of a ‘person’ only marginally in a note, stating that “[Libya] could not be [a defendant] because it is not a person or corporation within the terms of the Act but a sovereign state” referring back to the above mentioned note in *Texaco*.<sup>12</sup>

In a recent *Flamingo Industries* case,<sup>13</sup> which itself dealt with another issue of liability of a US Postal Service as an arm of a federal government under the Sherman Act, the Supreme Court observed in general that ‘corporate or governmental status in most instances is not a bar to the imposition of liability on an entity.’<sup>14</sup> If a foreign state falls under the notion of a ‘person’ under Sherman and Clayton Acts, then any such case would be settled based on the procedural and substantive rules concerning the antitrust litigation, with special regards given to the doctrines available as a potential defence in cases involving states, discussed in this piece.

### 1.3.2 EU competition law

Within the EU competition law regime, the anticartel provision- article 101 TFEU- prohibits various anticompetitive arrangements between ‘undertakings’ and ‘associations of undertakings’. The Court of Justice takes a functional approach in determining the addressees of the prohibitions. It is concerned with the activity at stake rather than with the nature of the entity involved. It should be an *economic activity* to make the provisions applicable.<sup>15</sup> In this context Odudu discerns three cumulative elements necessary to consider an activity

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<sup>9</sup> *Hunt v. Mobil Oil Corp.* 550 F.2d 68 (2d Cir. 1977).

<sup>10</sup> *Parker v. Brown (Parker)* 317 US 341 (US Supreme Court 1943). For more on Parker doctrine (state action doctrine) see: p. 74.

<sup>11</sup> *Interamerican Refining Corp. v. Texaco Maracaibo, Inc. (Texaco)*, p. 1298.

<sup>12</sup> *Hunt v. Mobil Oil Corp.*, p. 78, n. 14.

<sup>13</sup> *United States Postal Service v. Flamingo Industries (Flamingo Industries)* 540 US 736 (US Supreme Court 2004).

<sup>14</sup> *Ibid.*, pp. 744-745.

<sup>15</sup> In details on this issue: O Odudu, 'The Meaning of Undertaking within Article 81 EC' (2005) 7 CYELS 209, O Odudu, 'Economic Activity as a Limit to Community Law' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Hart Pub., Oxford 2009).

commercial: the offer of goods or services, the bearing of risk and the potential to make profit.<sup>16</sup>

If then we deal with a public cartel, like OPEC, it remains unclear whether the court would consider its operations as commercial in nature, and not as the exercise of public power. In the latter case they would fall outside the scope of the EU competition law.<sup>17</sup> In the literature there is no agreement on this matter<sup>18</sup> and the Court of Justice has never been asked to pronounce on it. Taking into consideration that EU law should be interpreted in line with international law, it may be argued that so long as there will be no broader consent on condemnation of public cartels, such agreements may still fall outside the scope of EU competition law.

#### ***1.4 Principle of non-justiciability***

Non-justiciability is a principle of uncertain scope,<sup>19</sup> although its essence is fairly simple: an issue may be declared non-justiciable if there is no legal standard allowing for its determination. Therefore, an issue falling within the competence of the executive may be considered non-justiciable. Shaw underlines that the concept of non-justiciability applies to both domestic and foreign executive acts.<sup>20</sup> The former category includes such acts as making of war, signing an international treaty or ceding territory. The latter, encompasses transactions of foreign governments. What is of paramount importance is that the non-justiciability as such is not a matter of discretion, but is inherent in the nature of the judicial process.<sup>21</sup> It may be raised both as a preliminary plea, or at the later stage of substantive determination.<sup>22</sup>

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<sup>16</sup> Odudu, 'The Meaning of Undertaking within Article 81 EC', p. 214 et seq.

<sup>17</sup> *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten (Wouters)*, Case C-309/99 [2002] ECR I-1577.

<sup>18</sup> For example Ryngaert, relying on *Wouters*, claims that OPEC and members of OPEC would be outside the scope of Article 81, whereas Terhechte, relying on the concept of economic activity, considers that they fall within the scope of thereof. Compare: C Ryngaert, 'Domestic Remedies against OPEC' K.U.Leuven Institute for International Law Working Paper No 145 – January 2010; JP Terhechte, 'Applying European Competition Law to International Organizations: The Case of OPEC' 2010 EYIEL 179.

<sup>19</sup> In this vein: Fox, p. 384.

<sup>20</sup> MN Shaw, *International Law* (6th edn Cambridge University Press, Cambridge 2008), pp. 180-181.

<sup>21</sup> *Ibid.*, p. 182.

<sup>22</sup> Fox, p. 384.

Moreover, the concepts of non-justiciability and immunity from jurisdiction are significantly different.<sup>23</sup> Non-justiciability acts as a bar. The issue raised is simply beyond the competence of a municipal court.<sup>24</sup> In cases where immunity is present, the court finds jurisdiction, but it cannot exercise it. It is possible that the state involved waives its immunity, making the further proceedings possible, but the non-justiciability simply cannot be waived. Furthermore, the issue of non-justiciability typically arises in cases between states, or private actions that lead to an inter-state issue, whereas the doctrine of immunity comes into play usually in actions brought by a private party against a state. Nevertheless, even in the literature the differences between both concepts are sometimes disregarded and their practical effects are often the same: making it impossible for a party to successfully bring a case.

The principle of non-justiciability is distinguished also from the act of state doctrine, although in this case the picture became significantly blurred both in the jurisprudence and in the academic scholarship.<sup>25</sup> What remains beyond doubt is that, if an issue is non-justiciable then neither courts nor the executive can make it justiciable.<sup>26</sup> Whereas in a case of the act of state doctrine, it seems possible that the executive may lift the restraint and allow for further development of the proceedings.<sup>27</sup> The relation between the doctrines is often described in the following way for example by Shaw, who says that ‘non-justiciability (...) includes but goes beyond the concept of act of state’.<sup>28</sup> The picture becomes clearer only when one familiarizes oneself with the relevant case law, as done below. Both doctrines despite similar underlying logic and potential, remain different.

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<sup>23</sup> Compare: I Sinclair, 'The Law of Sovereign Immunity: Recent Developments' (1980) 167 *Recueil des Cours* 113, pp. 198-199.

<sup>24</sup> Shaw, p. 699.

<sup>25</sup> This was the case *inter alia* in *OPEC*, see: *International Ass'n of Machinists v. OPEC (OPEC)* 649 F.2d 1354 (9th Cir. 1981), p. 1358, and compare p. 52 of this piece. In the literature for example Vertigan writes that the act of state doctrine is essentially the international version of the political question doctrine (the US variant of the British principle of non-justiciability). See: KE Vertigan, 'Foreign Antisuit Injunctions: Taking a Lesson from the Act of State Doctrine' (2007) 76 *Geo. Wash. L. Rev.* 155, p. 175.

<sup>26</sup> *Kuwait Airways Corp. v. Iraqi Airways Co. (Kuwait Airways- No. 1)* (1995) CLC 1065, p. 1081 per Lord Goff. “No doubt it derives from the fact that, unlike (for example) the privilege embodied in the principle of state immunity, a principle derived from a policy of judicial restraint or abstention from adjudicating upon certain affairs of sovereign states cannot sensibly be subject, as a matter of law, to any such rule, under which a person who would not otherwise be subject to the jurisdiction of the court may by his own conduct confer on the court an authority over him which otherwise it would not possess”.

<sup>27</sup> Compare: FA Mann, 'The Foreign Act of State' (1986) 11 *Holdsworth L. Rev.* 15, fn. 4.

<sup>28</sup> Shaw, p. 186.

The principle of non-justiciability is recognized in some common law systems,<sup>29</sup> especially in the US and in the UK, and is applicable in cases involving transactions between foreign states governed by international law.<sup>30</sup> Some civil law jurisdictions recognize doctrines broadly similar to non-justiciability. French law recognizes *acte de gouvernement*, whereas German law provides for *justizfreier Hoheitsakt* or *Regierungsakt*.<sup>31</sup> Both doctrines seem to consider certain acts of their own national governments, but the extent to which they apply to foreign governments is unclear. In this respect they differ importantly from non-justiciability as understood in the US and in the UK.

#### 1.4.1 Non-justiciability in the US: the political question doctrine

A similar concept to the principle of non-justiciability in English law is also known in the US, under the name of the political question doctrine. It imposes a constitutional limitation on the federal courts not to resolve matters that raise issues more suitable for resolution by the legislature or the executive.<sup>32</sup> The doctrine itself dates back to the landmark *Marbury v. Madison* case,<sup>33</sup> where it was established that '(q)uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.'<sup>34</sup>

In the landmark case *Baker v. Carr*<sup>35</sup> dealing with the appointment of voting districts the Supreme Court recognized the political question doctrine as a function of the separation of powers. It also identified six noncumulative factors determining whether a question is political: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) a lack of judicially discoverable and manageable standards for resolving it, (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion, (4) the impossibility of a court's undertaking independent

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<sup>29</sup> For example in Australia and Canada. In this context see: C Sim, 'Non-justiciability in Australian Private International Law: A Lack of 'Judicial Restraint'? ' (2009) 10 Melbourne Journal of International Law 102 and G Cowper and L Sossin, 'Does Canada Need a Political Questions Doctrine?' (2002) 16 S.C.L.R. 343.

<sup>30</sup> H Fox, *The Law of State Immunity* (2nd edn Oxford University Press, Oxford 2008), pp. 36-37.

<sup>31</sup> Biehler refers to them as a version of the act of state doctrine, but this is so because he conflates the act of state doctrine with the principle of non-justiciability: Compare: G Biehler, *Procedures in International Law* (Springer, Berlin 2008), pp. 161, 164-166. For more information on the French *acte de gouvernement* see also: P Avril, 'Political Questions in France' in N Mourtada-Sabbah and BE Cain (eds), *The Political Question Doctrine and the Supreme Court of the United States* (Lexington Books, Lanham 2007).

<sup>32</sup> Fox, *The Law of State Immunity*, p. 110.

<sup>33</sup> *Marbury v. Madison* 5 US (1 Cranch) 137 (1803).

<sup>34</sup> *Ibid.*, p. 170.

<sup>35</sup> *Baker v. Carr* 369 US 186 (US Supreme Court 1962).

resolution without expressing lack of the respect due to coordinate branches of government, (5) an unusual need for unquestioning adherence to a political decision already made, (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>36</sup> If any of those factors is present in a case and only if it is inextricable, *ergo* cannot be separated from the proceedings, the case should be dismissed for non-justiciability on the ground of the political question doctrine. The court made it clear that non-justiciability is limited to political questions and it does not reach to all political cases. Not all questions involving foreign relations are political ones.<sup>37</sup>

The issue of the political question doctrine was quite recently discussed by the Court of Appeals for the Ninth Circuit in *Sarei*.<sup>38</sup> The case was brought by residents of Papua New Guinea (PNG) under the Alien Tort Claims Act against Rio Tinto, an international mining group. The mining operations were said to have polluted the waterways and the atmosphere, undermining the health of the island's residents. Moreover, there were strong racial discrimination claims.<sup>39</sup> The growing tension led to a situation where residents engaged in acts of sabotage that forced the mine to close. Rio Tinto sought help from the PNG government. The army attack led to the killing of many civilians and subsequently led to a ten-years long civil war. The plaintiffs sought damages, injunctive relief and the disgorgement of profits earned.

The district court dismissed all the claims as non-justiciable on the basis of the political question doctrine. Alternatively, it dismissed the racial discrimination claim and the claim of the violation of the United Nations Convention on the Law of the Sea (UNCLOS) under the act of state and international comity doctrines, respectively.<sup>40</sup> The appeal court reversed the dismissal on the basis of the political question.<sup>41</sup>

Discussing the political question doctrine, the court referred to the factors listed in *Baker*. The lower court in its decision relied on factors four and six, whereas Rio Tinto claimed that in

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<sup>36</sup> *Ibid.* at 217.

<sup>37</sup> *Ibid.* at 212, 217.

<sup>38</sup> *Sarei v Rio Tinto (Sarei)* 487 F.3d 1193 (9th Cir. 2007).

<sup>39</sup> It was argued that the black islanders working for Rio Tinto were paid much less than the white workers recruited off-island, and that they lived in slave-like conditions. *Ibid.*, p. 1198.

<sup>40</sup> *Ibid.*, p. 1199.

<sup>41</sup> The court reversed also dismissal of the racial discrimination claim on act of state grounds, vacated for reconsideration the dismissals of the racial discrimination claim based on comity and the violation of UNCLOS claim based on the act of state and comity grounds. *Ibid.*, pp. 1223-1224.

addition factors first and fifth are present.<sup>42</sup> Before deciding with respect to the presence of factors fourth to sixth (the presence of factor five was asserted by Rio Tinto), the court recognized it should first determine how much weight it should give to the Department of State's Statement of Interests (SOI).<sup>43</sup> It recognized, referring to *Vatican Bank*,<sup>44</sup> that the view of the Department of State carries weight, but it did not find it 'controlling' on the courts' determination. The court regarded it its responsibility to determine whether a political question is present.<sup>45</sup> In the instant case, it considered that the claims related to foreign conflict in which the US had little involvement, and that therefore they merely concern foreign relations, so there was no real risk that the court would infringe on the prerogatives of the executive. Ultimately, the court found the political question doctrine inapplicable<sup>46</sup> and the future litigation focused on other aspects of the case.<sup>47</sup>

The full potential of the doctrine seems to be rediscovered in a pending *RPP* litigation.<sup>48</sup> The case consolidates a number of complaints against companies operating in the US, but also against state-owned foreign companies for their price-fixing of oil and oil-related products.<sup>49</sup> In January 2009 the district court dismissed the case on the basis of the act of state and the political question doctrines. It was the first antitrust case where the latter doctrine played such an important role. The defendants invoked it, arguing that the case requires the court to rule on the legality of decisions of oil-producing nations. The plaintiffs countered that their claims do not raise political questions, as they do not challenge the decisions of foreign states, but only the existence of a price-fixing conspiracy on the US market.<sup>50</sup> The court after finding that the alleged price-fixing was caused by the decisions and agreements of foreign states, recognized that the claims raise a non-justiciable political question.<sup>51</sup>

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<sup>42</sup> The first factor (the constitutional commitment to another branch) was considered not present. The court referred to its earlier opinion in *Alvarez-Machain v. United States* 331 F.3d 604 (9th Cir. 2003), rev'd on other grounds, *Sosa v. Alvarez-Machain (Sosa)* 542 US 692 (US Supreme Court 2004) where it held that claims brought under the ATCA has been constitutionally entrusted to the judiciary. See: *Ibid.*, pp. 1203-1204.

<sup>43</sup> In the SOI it was argued that the adjudication of the claims would risk serious adverse impact on the peace process in PNG, and that the impact on the US-PNG friendly relations would be grave.

<sup>44</sup> *Alperin v. Vatican Bank (Vatican Bank)* 410 F.3d 532 (9th Cir. 2005).

<sup>45</sup> *Sarei v Rio Tinto (Sarei)*, p. 1205.

<sup>46</sup> *Ibid.*, pp. 1206-1207.

<sup>47</sup> With special regard focused on an exhaustion of local remedies requirement on the foreign residents. See: *Sarei v Rio Tinto (Sarei, 2nd)* 550 F.3d 822 (9th Cir. 2008), *Sarei v Rio Tinto (Sarei, 3rd)* 650 F. Supp. 2d 1004 (C.D. Cal. 2009).

<sup>48</sup> *In re Refined Petroleum Products Antitrust Litigation (RPP)* 649 F.Supp.2d 572 (S.D. Tex. 2009).

<sup>49</sup> For more detailed description of the factual background of the case and its analysis in light of the act of state doctrine see: p. 55.

<sup>50</sup> *In re Refined Petroleum Products Antitrust Litigation (RPP)*, p. 596.

<sup>51</sup> *Ibid.*, p. 597.

The court, having referred to *Baker*'s six factors indicating the presence of a political question, recognized that the fourth factor is present in the instant case: the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government. It underlined that the adjudication of the claims would express a lack of respect to the executive because of its "longstanding foreign policy that issues relating to crude oil production by foreign sovereigns be resolved through intergovernmental negotiation."<sup>52</sup> It noted that the US government has always considered the matter of oil supplies to be an issue of national security and it has never brought antitrust sanctions against oil-producing states, always opting instead for a diplomatic solution.<sup>53</sup> The adjudication of the claims in the instant case, in the view of the court, would not only threaten the foreign relations of the US, but also undermine the constitutional responsibility of the executive to conduct foreign affairs.<sup>54</sup> Therefore, the reliance on the political question doctrine in *RPP* was successful. The appeal is pending, but the potential power of the doctrine as a defence in antitrust cases has been clearly recognized.

In August 2010 the DOJ submitted an amicus brief in the pending appeal, supporting the district court's finding of a presence of a political question in *RPP*, barring its adjudication.<sup>55</sup> First of all the DOJ underlined the long-standing policy of the executive to employ diplomatic and related measures for resolution of problems arising in the area of oil price fluctuations.<sup>56</sup> On this basis, the instant action is presented as a piecemeal approach leading to a direct confrontation with foreign states, with possibly 'unprecedented impact on the foreign affairs and national security arenas',<sup>57</sup> severely undermining the executive diplomatic endeavors to protect a reliable supply of oil, which is of paramount importance to US national security and its economy. It also emphasized that the issue of relations with oil-rich states is inextricably linked to 'wider questions of national security, military strategy, foreign relations, and economic stability.'<sup>58</sup> Such matters as the importance of Saudi Arabia in the Middle East, or of Russia in questions concerning Iran, Afghanistan and North Korea are

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<sup>52</sup> *Ibid.*, p. 597.

<sup>53</sup> *Ibid.*, p. 598.

<sup>54</sup> *Ibid.*, p. 598.

<sup>55</sup> *In re Refined Petroleum Products Antitrust Litigation- Brief of the United States as Amicus Curiae Supporting Affirmance* Case No. 09-20084, Document No 00511204616 (5th Cir. 2010).

<sup>56</sup> *Ibid.*, pp. 43-44.

<sup>57</sup> *Ibid.*, pp. 44-46.

<sup>58</sup> *Ibid.*, p. 47.

underscored. At the same time, the brief notes that the foregoing consideration should not immunize particular states from criticism, but the criticism should be expressed by the executive through the means available thereto, and not by the judicial branch.<sup>59</sup>

In the DOJ's view three of the six factors identified in *Baker* are present in the instant case: first ('a textually demonstrable constitutional commitment of the issue to a coordinate political department'), fourth ('the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government'), and sixth ('the potentiality of embarrassment from multifarious pronouncements by various departments on one question'). In its opinion the political question doctrine 'precludes judicial intrusion into the sensitive and politically fraught domain of foreign affairs and national security policy-making, in which the oil production practices and agreements of the foreign states involved lie.' This is so even if there exist a cause of action, in this case the Sherman Act, which deals with a similar conduct 'among private parties in a commercial setting.'<sup>60</sup> In the instant case, DOJ considers that the political question doctrine bars further adjudication and the judgment of the district court should be accordingly affirmed.

The appeal in *RPP* is pending. Taking into consideration the strong argument of the DOJ in its amicus it seems likely that the judgment will be largely confirmed. The political question doctrine manifests itself as a useful legal tool, helping to remove from the judicial orbit cases of paramount political significance and controversy in international affairs. Furthermore, the political question seems far more flexible than the other defence relied on in *RPP*, the act of state doctrine,<sup>61</sup> even if only because the US courts did not have yet enough opportunities to narrow and strip the political question down with exceptions. In any case, in the event of the litigation against OPEC it proves extremely handy and the fact that the DOJ decided to submit an amicus brief on the issue shows that the executive recognizes its potential and future usefulness.

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<sup>59</sup> Ibid., p. 48.

<sup>60</sup> Ibid., p. 54.

<sup>61</sup> More on the act of state doctrine in the US: p. 46.

### 1.4.2 Non-justiciability under English law

Non-justiciability is not a principle of international law, but a principle of common law. In English law it was recognized and formulated in the *Buttes Gas* case in 1981.<sup>62</sup> The case concerned a dispute between two corporations (Occidental and Buttes) regarding oil exploration and exploitation in the Gulf and it involved two Emirates (Umm al Qaiwain and Sharjah), the UK and Iran. Each firm was granted a concession: Occidental by Umm al Qaiwain and Buttes by Sharjah, for their respective territories, including *inter alia* the seabed close to Abu Musa island. At the same time Iran maintained its claim to the disputed area.

After Occidental discovered oil in that location, Sharjah seems to have issued a back-dated decree extending its territorial waters and claiming sovereignty over that area. Finally, after intervention by the UK, which at that time was responsible for the foreign relations of the Emirates, Buttes emerged as a rightful concessionaire. Thereafter, Occidental publicly accused Buttes of conspiring with the ruler of Sharjah to back-date the decree, and Buttes responded by suing Occidental for slander. This was met with the counterclaim by Occidental of fraudulent conspiracy, and led to Buttes claiming that the acts involved were acts of the Emirates and the British Government.

Before the case reached the House of Lords three decisions of the Court of Appeals were issued in the case. Occidental's application to have Buttes writ against it set aside was dismissed.<sup>63</sup> In its second decision the court refused to rely in the case on the act of state doctrine and declare the issues raised non-justiciable on that basis. Lord Denning noted that US courts 'carried' the doctrine further than English courts, who never extended it so widely<sup>64</sup> whereas Lord Roskill pointed out to the need of applying it sparingly.<sup>65</sup> Further developments with regard to the evidence led to another decision of the court.<sup>66</sup> Those judgments led an Appeal Committee of the House of Lords to grant leave to appeal.

Lord Wilberforce, speaking for the court, recognized the existence of the principle of non-justiciability in English law, as different from and broader than the act of state doctrine, and

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<sup>62</sup> *Buttes Gas and Oil Co. v. Hammer (Buttes Gas)* [1982] AC 888.

<sup>63</sup> *Buttes Gas and Oil Co. v. Hammer (Buttes Gas- Court of Appeal, 1st)* [1971] 3 All ER 1025.

<sup>64</sup> *Buttes Gas and Oil Co. v. Hammer (Buttes Gas- Court of Appeal, 2nd)* [1975] QB 557, pp. 572-573.

<sup>65</sup> *Ibid.*, pp. 579-580.

<sup>66</sup> *Buttes Gas and Oil Co. v. Hammer (Buttes Gas- Court of Appeal, 3rd)* [1981] QB 223.

not a matter of discretion, but inherent in the nature of the judicial process.<sup>67</sup> He found authority in earlier British cases,<sup>68</sup> but also analyzed the US case law, with special attention given to the outcome of the very same dispute brought in the American courts, where the Fifth Circuit Court of Appeals underlined the lack of judicial or manageable standards to determine the case and declared the issue non-justiciable, according to the political question doctrine.<sup>69</sup> Lord Wilberforce accepted this conclusion as his own and pointed out that to do otherwise, the court would enter “a judicial no-man’s land” to review the transactions of foreign governments.<sup>70</sup> The House of Lords decided not to proceed with the case. Under the principle of non-justiciability in private litigation where such issues are raised the municipal court is to exercise judicial restraint and abstain from deciding the issues.<sup>71</sup> In the case at stake, if the court was to determine if Occidental had a right to the disputed location, a determination of the boundaries of the continental shelf between the Emirates and Iran would be necessary. If the answer was positive, then the issue would arise of how and why Occidental was deprived of its rights, and the answer to that question would require the examination of the motives of the Emirate issuing the back-dating decree, as well as evaluation of the legality of its actions under international law. There was no judicial standard allowing the House of Lords to address such questions. Those issues were beyond its competence. Ong claims, correctly it is submitted, that Lord Wilberforce developed non-justiciability by extrapolating from the act of state doctrine, relying partly on the US political question doctrine,<sup>72</sup> but without providing a rationale on which the principle is based.<sup>73</sup>

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<sup>67</sup> *Buttes Gas and Oil Co. v. Hammer (Buttes Gas)*, pp. 931G- 932A. It is noteworthy that Lord Wilberforce acknowledged existence of the more particular Moçambique rule, which he considered not decisive in the instant case. According to this principle English courts will not entertain claims, due to lack of jurisdiction, concerning title to or possession of foreign land and certain types of intellectual property. It was recognized in *British South Africa v. Companhia de Moçambique (Moçambique)* [1893] A.C. 602. For more on the Moçambique rule see: M Keyes, *Jurisdiction in International Litigation* (Federation Press, Sydney 2005), pp. 71-74.

<sup>68</sup> *Blad v. Bamfield* (1674) 3 Swans 604, 36 ER 992, *Duke of Brunswick v. King of Hanover* (1848) 2 HLC 1, 9 ER 993. Although those are cases typically considered as authority for establishment of the act of state doctrine, Lord Wilberforce made it clear he considered non-justiciability a separate principle: “Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle [of non-justiciability], if existing, not as a variety of “act of state” but one for judicial restraint or abstention.” See: *Buttes Gas and Oil Co. v. Hammer (Buttes Gas)*, p. 831G.

<sup>69</sup> *Occidental of Umm al Qaywayn Inc v A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis* 577 F.2d 1196 (5th Cir. 1978), at 1204.

<sup>70</sup> *Buttes Gas and Oil Co. v. Hammer (Buttes Gas)*, p. 938A-C.

<sup>71</sup> *Ibid.*, p. 890D-E.

<sup>72</sup> Discussed later in this part. See: Non-justiciability in the US: the political question doctrine, p. 9.

<sup>73</sup> E-L Ong, 'Non-justiciability in Private International Law: Principle or Discretion' (2002) 31 CLWR 35, p. 40.

The principle of non-justiciability was further developed and extended in the *Tin Council* case.<sup>74</sup> The case concerned the insolvency of the International Tin Council (ITC), an international organization established by a treaty (which was not incorporated in the UK, but the ITC had the legal status of a body corporate), or using antitrust language- a public international price-fixing cartel. After its collapse, the debtors brought actions against the UK and other ITC members. All those attempts were unsuccessful and the House of Lords found that the ITC alone, and not its members, was liable for its debts. Ultimately the issue was settled outside the court.<sup>75</sup>

In *Tin Council* the principle of non-justiciability was clearly reaffirmed.<sup>76</sup> Two limbs of non-justiciability were identified. The first one, similar to that established in *Buttes Gas*, provided that the municipal courts cannot challenge international treaties, intergovernmental transactions, nor issues arising therefrom.<sup>77</sup> The second one provided that unincorporated treaties, *ergo* treaties that were not incorporated into the municipal law, do not create rights and obligations enforceable in the English courts (this is also a mark of the UK's dualist approach to international law).<sup>78</sup> Responding to the argument that a rule of international law made the members of the ITO liable for its debts, Lord Templeman pointed out that even if such a rule existed, it could only be enforced under international law, therefore not by the English courts.<sup>79</sup> It may be inferred from *Tin Council* that all issues arising from transactions between states are *per se* non-justiciable, under either of the identified limbs of non-justiciability, allowing for potentially very broad application of the principle.

A rather similar approach was taken by the court in *Westland Helicopters*.<sup>80</sup> This case concerned the Arab Industrial Organization (AIO), established by a treaty between Egypt and the Gulf states, with headquarters in Egypt. The treaty accorded AIO legal personality and expressly provided that it should not be subject to the laws of any member state. After the signing of the peace treaty between Egypt and Israel, in 1979, the Gulf states decided to

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<sup>74</sup> *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry (Tin Council)* (1990) 2 AC 418.

<sup>75</sup> Ultimately the creditors agreed to drop all outstanding litigation, accepting about 35p in the pound.

K Gooding, 'Tin Council Dispute Ends with Payout' *Financial Times* March 31, 1990).

<sup>76</sup> *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry (Tin Council)*, p. 499 per Lord Oliver: "It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law."

<sup>77</sup> *Ibid.*, pp. 499-500, 519 per Lord Oliver.

<sup>78</sup> *Ibid.*, p. 500 per Lord Oliver and pp. 476-477, 482-483 per Lord Templeman.

<sup>79</sup> *Ibid.*, pp. 480-481.

<sup>80</sup> *Westland Helicopters Ltd. v. Arab Organisation for Industrialisation (Westland Helicopters)* (1995) QB 282.

liquidate AIO. Egypt refused and by means of domestic law it intended to continue its operations as an exclusively Egyptian organization. One of the cooperators of the original AIO, Westland, managed to obtain an arbitration award against AIO and secured garnishee orders against banks in London, holding AIO's deposits. The new Egyptian AIO attempted to intervene and set aside the orders, claiming it was the owner of the deposits, but it was unsuccessful.

By reference to *Buttes Gas*, Colman J. in the English High Court recognized the principle of non-justiciability as requiring the court not to determine issues of public international law if the outcome was likely to affect other states.<sup>81</sup> Moreover, he considered that the adjudication of the validity of the act of a foreign state under public international law is no more appropriate than adjudication of the validity of the acts of a foreign state within its own territory by reference to its own constitutional powers.<sup>82</sup> Then, after referring to *Tin Council*, Colman J. concluded that the English courts neither can determine if a foreign state has broken or effectively terminated a treaty, nor can they assess permissibility of such acts under public international law.<sup>83</sup>

Furthermore, Colman J. found that to apply English law, or the domestic law of Egypt to AIO would be against principles of international law. Firstly, an international organization, such as AIO, is a creature exclusively of public international law. Secondly, international law provides that inter-state issues are not amenable to resolution by application of domestic law. Finally, the opposite conclusion would be also contrary to the statute of the organization, which expressly insulated AIO from application of the domestic law of its member states.<sup>84</sup>

In the instant case, the Egyptian AIO could only clarify its status as the original AIO by reliance on Egyptian domestic law, but firstly it would have to prove that it was entitled to do so under the applicable law, namely public international law. That entitlement depended on the non-justiciable issue whether the Egyptian decree involved was a justifiable countermeasure under international law. This, in turn, depended on another non-justiciable issue whether the other Gulf states acted in breach of the treaty. In effect, once it was

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<sup>81</sup> Ibid., p. 292.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid., p. 294.

<sup>84</sup> Ibid., pp. 304-305.

accepted that the proper law was international law, the Egyptian AIO could not prove it was the original AIO and therefore the owner of the bank deposits.<sup>85</sup>

In *Buttes Gas*, it was the no-man's land of the lack of the judicial or manageable standards to review the transaction of foreign governments that made Lord Wilberforce declare the issue non-justiciable. In *Tin Council* two limbs of non-justiciability were identified: first one providing that the municipal courts cannot challenge international treaties, intergovernmental transactions and issues arising from them, and the second one providing that the unincorporated treaties do not create rights and obligations enforceable in the English courts. It seems that the first limb of non-justiciability was applied in *Westland Helicopters*, where it was stated that the municipal courts cannot determine issues of public international law. The lack of the judicial or manageable standards from *Buttes Gas* was not even mentioned in *Tin Council* and *Westland Helicopters*. It was rather the supranational, intergovernmental nature of the issues involved that barred the court from adjudication. Those two last cases represent a high-mark of the non-justiciability principle.<sup>86</sup>

A significant change in the approach of English courts towards non-justiciability presented itself in the *Kuwait Airlines* litigation. It arose from the Iraqi invasion of Kuwait and the purported annexation of Kuwait in 1990. After the invasion Iraq removed ten aircrafts, property of Kuwait Airways (KAC), from Kuwait to Iraq, and then purported, by means of a resolution, to dissolve KAC and transfer its property to Iraqi Airways (IAC). The invasion itself was condemned by the UN, and after the military action Iraq withdrew from Kuwait and was forced to repeal all the post-invasion resolutions. Only six planes had been returned to Kuwait, as the rest had been destroyed in air raids on Iraq. KAC brought an action against IAC and Iraq in the English courts for wrongful interference with the aircrafts.

IAC and Iraq challenged the jurisdiction of English courts, claiming that they were not properly served, that they were entitled to state immunity, and finally that the proceedings raised non-justiciable issues. The House of Lords found that the IAC was properly served, but not Iraq.<sup>87</sup> Moreover, it found IAC entitled to immunity, but only with respect to the taking and removal of the aircrafts, but not with respect to further acts, ie retention and use of the

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<sup>85</sup> Ibid., p. 312.

<sup>86</sup> In this vein: Ong, p. 48.

<sup>87</sup> *Kuwait Airways Corp. v. Iraqi Airways Co. (Kuwait Airways- No. 1)*, pp. 1068-1070, 1070-1071 respectively per lord Goff.

aircrafts.<sup>88</sup> In relation to non-justiciability it was stated that due to the lack of a defence it was impossible to determine the nature of the issues involved (the submission on justiciability was raised before the case was pleaded out).<sup>89</sup> The case was remitted to proceed with respect to issues not subject to immunity.

On remitter, Mance J. referred only to *Buttes Gas* and stated that apart from this case there is little authority to assist the scope or application of the principle of non-justiciability.<sup>90</sup> Moreover, he pointed out that Lord Wilberforce in *Buttes Gas* did not proceed on or from any automatic assumptions that issues are necessarily non-justiciable when they concern international law or transactions between states.<sup>91</sup> In his opinion non-justiciability is not an absolute bar to the examination of the conduct of a foreign state.<sup>92</sup> It is a flexible and responsive principle and its application requires a close analysis of the circumstances involved in a particular case.<sup>93</sup> Such considerations should clarify *inter alia* whether the lack of adjudication is an effect of the missing judicial or manageable standards applicable, or just an effect of difficulty or sensitivity of issues raised, or whether the domestic adjudication could result in an affront to comity or international relations.<sup>94</sup>

In the case at stake, Mance J. did not find any absence of judicial or manageable standards, nor did he found himself in a judicial no-man's land. He refused to declare the issues involved non-justiciable. In Mance's view, by adjudicating in this case, the court would not be placing itself as an arbiter of disputed and sensitive issues. On the contrary, by refusing to acknowledge fundamental and incontrovertible wrongdoings at the international level, it would be more likely to imperil amicable relations between states or vex the peace of nations. This was especially so as the British government in a letter clarified that the instant case involved clear and fundamental breaches of international law and of the UN Charter.<sup>95</sup>

The judgment of Mance J. was upheld on the appeal.<sup>96</sup> The Court of Appeal identified three insights that English law is trying to balance, concerning the role of national courts when

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<sup>88</sup> *Ibid.*, pp. 1077-1078 per Lord Goff, representing majority.

<sup>89</sup> *Ibid.*, pp. 1081-1082 per Lord Goff.

<sup>90</sup> *Kuwait Airways Corp. v. Iraqi Airways Co. (Kuwait Airways- No. 2)* (1999) CLC 31, p. 58.

<sup>91</sup> *Ibid.*, p. 61.

<sup>92</sup> *Ibid.*, p. 71.

<sup>93</sup> *Ibid.*, pp. 63, 71.

<sup>94</sup> *Ibid.*, p. 71.

<sup>95</sup> *Ibid.*, p. 74-75.

<sup>96</sup> *Kuwait Airways Corp. v. Iraqi Airways Co. (Kuwait Airways- No. 3)* (2001) CLC 262.

faced with a defense based on reliance on legislative or executive acts of a foreign state. Firstly, was the *prima facie* rule that a foreign sovereign is to be accorded the absolute authority within its territory to act as a sovereign (an affirmation of the act of state doctrine). Secondly, the principle of non-justiciability, which provides that certain class of sovereign acts, within the state's own territory or outside it, calls for judicial restraint on the part of the municipal courts. As the court said, it is or it leads to immunity *ratione materiae*. In its opinion the essence of the principle consists in distinguishing disputes involving foreign states which can be resolved only on a state-to-state level from disputes that are resolvable by judicial means, yet the court did not provide any advice on how to tell them apart. And finally, the third insight provided that the judicial restraint principle with respect to the sovereign acts within her own territory is only a *prima facie* rule, subject to exceptions. One such exception would be English public policy. This, by nature, is not hard edged, but is a route enabling the lack of recognition of discriminatory breaches of fundamental human rights.<sup>97</sup>

Furthermore, the court underlined that non-justiciability is not a principle of 'overwhelming applicability' and that it is sensitive to the issues involved in a particular case.<sup>98</sup> In the instant case their lordships concluded that the principle of non-justiciability was not applicable, as in their view there was nothing precarious or delicate, or subject to diplomacy that could be threatened by the adjudication, no possible embracement to diplomatic relations, or *casus belli*.<sup>99</sup>

This was not the end of the *Kuwait Airways* litigation. The case was appealed to the House of Lords.<sup>100</sup> This appeal was dismissed, although on slightly different grounds. The Lords, although acknowledging the merits of Mance J. and the Court of Appeal judgments, shifted the weight of argumentation from the problem of non-justiciability to the act of state doctrine, and I deal with those dicta in a separate section.<sup>101</sup> It seems that their Lordships were of the opinion that the act of state doctrine is a narrow case of a broader principle of non-justiciability. It must be pointed out that Lords used very unclear language, making it often difficult to see which doctrine they are applying or discussing.

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<sup>97</sup> Ibid., pp. 331-332.

<sup>98</sup> Ibid., p. 336.

<sup>99</sup> Ibid., pp. 335-336.

<sup>100</sup> *Kuwait Airways Corp. v. Iraqi Airways Co. (Kuwait Airways)* [2002] UKHL 19.

<sup>101</sup> See section on the act of state doctrine in general (p. 21).

For Lord Nicholls non-justiciability does not mean that the court should disregard a breach of an established principle of international law, committed by one state against another, when the breach is apparent. In such a case, like the instant case, there is no *Buttes*-like lack of standards, therefore the issue is justiciable.<sup>102</sup> Similarly Lord Steyn pointed out that Iraq accepted the illegality of its actions, which were gross breaches of international law, and on this basis he rejected the claim of non-justiciability.<sup>103</sup>

Taking into consideration the shift of the attention of the Lords from non-justiciability to the act of state doctrine, it is suggested that they interpreted non-justiciability in a rather narrow sense. They acknowledged that an issue may be non-justiciable. The principle applies to issues which adjudication would encounter a lack of judicial and manageable standards in *Buttes* understanding. Then they noted that in this particular case non-justiciability was not a question because there was no doubt with respect to legality of the issues at stake, and the standards applicable (the UN resolution) were undisputed. Therefore, having dealt with non-justiciability, they analyzed related defence: the act of state doctrine.

### **1.4.3 Final comments on non-justiciability**

The principle of non-justiciability or its American relation until very recently did not play any significant role in antitrust cases. As Noonan rightly points out the principle of non-justiciability potentially offers greater protection to inter-governmental anticompetitive arrangements, OPEC-like, than for example the US act of state doctrine. The missing clarity with respect to the scope of the principle and its applicability creates considerable risks from the legal perspective in relying on it as a defense.<sup>104</sup> Yet seen through a political lens it provides a valid legal argument, potentially allowing countries with clear anticompetitive agendas to defend their positions on international fora. Non-justiciability being inherent in the legal process and applicable to international public arrangements, seems to have the capacity to play a bigger role in the present international legal framework, at least in some common law jurisdictions, characterized by the lack of consensus on most competition issues. The current *RPP* litigation in the US, where the district court dismissed the case also on the

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<sup>102</sup> *Kuwait Airways Corp. v. Iraqi Airways Co. (Kuwait Airways)*, para. 26.

<sup>103</sup> *Ibid.*, para. 113.

<sup>104</sup> C Noonan, *The Emerging Principles of International Competition Law* (Oxford University Press, Oxford 2008), p. 328.

basis of non-justiciable political question doctrine, and the fact that the US DOJ submitted a strong amicus brief supporting that position possibly opens a new chapter in the life of this doctrine.

### ***1.5 The doctrine of state immunity***

State immunity is an evolving doctrine of international law, which is applied by national courts in accordance with the municipal laws.<sup>105</sup> Although the framework of the doctrine is governed by international law, the national courts are the authority applying it, defining its scope and breadth in particular cases. This is an evolving concept, undergoing significant redefinition in response to changing economic and political realities. It generally provides for immunity of a foreign state from jurisdiction of the local courts. Conceptually, forum state jurisdiction is a rule and foreign state immunity is an exception thereto. Therefore, any exception to the immunity can be seen as restoring the basic principle of absolute jurisdiction. Legally, there is a rebuttable presumption of foreign state immunity.

Initially the immunity was considered to be absolute, acting as a bar in cases involving foreign sovereigns. With time a shift took place: the adjudicative and enforcement immunities started to be distinguished, and although the enforcement immunity remains largely intact, the adjudicative immunity became restricted. Private parties started bringing cases against foreign states with whom they engaged in commercial activities. The state retained the adjudicative immunity only with regard to its non-commercial, sovereign activities. The restricted immunity doctrine, although it has not won universal recognition to date, has become widely and commonly recognized, leading to its incorporation in the first international convention on state immunity- the UN Convention on Jurisdictional Immunities of States and their Property (UNCSI).<sup>106</sup> The Convention itself, although not yet in force, is a strong authority confirming that the state immunity is a doctrine of international law. The fact that the restrictive approach was incorporated in it, shows that this is the trend followed worldwide in this field of law.

There is a conceptual distinction between sovereign immunity and state immunity, although as Sinclair points out, these are ‘regularly and almost indiscriminately confused’.<sup>107</sup>

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<sup>105</sup> In this vein Fox, *The Law of State Immunity*, p. 1.

<sup>106</sup> See: p. 41 below.

<sup>107</sup> Sinclair, p. 197.

Sovereign immunity *sensu stricte* refers to the immunity enjoyed by a personal sovereign or Head of State when present in a foreign state. This is primarily an immunity *ratione personae*. The immunities of a foreign sovereign are more analogous to the diplomatic immunities enjoyed by envoys than to the immunities enjoyed by states, and they are by and large broader.

The rule of the almost absolute immunity of a foreign state from enforcement reflects the lack of means of forcible enforcement. From an international law perspective the immunity from enforcement derives from the principle of non-intervention. Unilateral measures against another state can only be undertaken as countermeasures against violation of international law, which is best exemplified by the instrument of sanctions authorised the UN Security Council. From the practical perspective there is no peaceful means of forcible enforcement of a judgement against a foreign state. As Fox points out, in a situation when a foreign state has some assets in the forum state and their attachment is legally possible, the possible political consequences to the friendly relations between both countries may discourage the forum state from supporting the enforcement.<sup>108</sup>

The practical importance of state immunity remains significant, despite radical changes in political and economic systems after the collapse of the Iron Curtain. In fact, the rising volume of international trade and the growing involvement of non-Western countries, often marked by a significantly different organization of economic life, places state immunity in the spotlight. From a competition law perspective the still-operating OPEC cartel remains the best example of how state immunity has the potential of playing a crucial role in antitrust litigation. At the same time it suggests that the doctrine's scope seems to be ill-adjusted to economic realities of competition law and may require a special 'competition law' exception, at least in the case of hardcore cartels.

### **1.5.1 The origin and the understanding of the state immunity**

It is commonly believed that the early doctrine of state immunity is derived from an old maxim *par in parem non habet imperium*,<sup>109</sup> which itself is grounded in the principles of the

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<sup>108</sup> Fox, *The Law of State Immunity*, p. 56.

<sup>109</sup> The maxim itself can be traced back to fourteenth century *Tractatus Represaliarum*, a work of an Italian jurist Bartolus of Sassoferrato, who is considered one of the originators of the doctrine of state's sovereignty. CNS Woolf, *Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought* (Cambridge

independence, sovereign equality and dignity of states.<sup>110</sup> Yet not all scholars share this view. For example Lauterpacht did not find support for it among the classical writers on international law, and suggested that it is rather rooted in the theories concerning the personal immunity of heads of state.<sup>111</sup> Sinclair shared that view, noting that the concept of immunity of heads of state was also little discussed in the classical literature.<sup>112</sup> Even today there is no consent as to the origin of this principle.

The traditional view, based on *par in parem*, considered the doctrine of state immunity- the doctrine of absolute state immunity- as one of the basic principles of international law. However it remains doubtful whether there was ever such a rule. As Lauterpacht points out, the fact that in some states the grant of immunity from jurisdiction was made dependent upon reciprocity questions such as an inference and shows that some countries did not recognize any binding rule of international law on this matter. If there was a rule, the adherence thereto could not be made dependent upon reciprocity, which is common in the case of concessions or privileges.<sup>113</sup>

Other strands of legal thought do not see the roots of the doctrine of state immunity in principles of international law, but consider it to have evolved into a principle, therefore acquiring a binding force, by virtue of international custom.<sup>114</sup> Yet, taking into consideration the significantly different approaches towards state immunity among jurisdictions<sup>115</sup> it transpires that the grounds of the principle of state immunity should not be sought within international customary laws.

It seems that the doctrine of state immunity emerged from the practice of national courts, which has been far from uniform. Moreover, the practice at national level reflected the views of national judges on the position of international law on the matter that did not have to be correct or up-to-date. Furthermore, as Lauterpacht points out, national courts, especially in

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University Press, London 1913), p. 154 et seq, and for the direct quotation from the original text see p. 205 et seq.

<sup>110</sup> Such a common belief is pointed out by *inter alia*: Sinclair, p. 121; H Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 BYIL 220, p. 221.

<sup>111</sup> Lauterpacht, p. 228.

<sup>112</sup> Sinclair, p. 121.

<sup>113</sup> Lauterpacht, p. 228.

<sup>114</sup> *Ibid.*, p. 221.

<sup>115</sup> See *infra*, p. 29 et seq.

the US, often relied on the notion of dignity as underpinning the doctrine of immunity.<sup>116</sup> In fact it can be argued that it enhances the dignity of the states to submit itself to the judgment of impartial judiciary. As Lord Denning observed ‘(i)t is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction.’<sup>117</sup>

Lauterpacht offers also another possible explanation of the doctrine of the absolute state immunity of a foreign state. In his opinion it may be the traditional immunity of a state from suit in its own courts that was transposed into the international arena.<sup>118</sup> In his view the concept of state immunity, in turn, is a reminiscence of *legibus solutus*, the principle placing a personal sovereign above the law. Therefore a sovereign was immune in her/his country, and accordingly in foreign states. Later on this personalization was replaced by the abstract concept of state sovereignty,<sup>119</sup> and then extended to encompass the immunity of foreign states.

Yet, at present the acceptance of a suit against a home state simply does not justify anymore an exemption from jurisdiction of a foreign state. Taking into consideration the plentiful possibilities for an individual of bringing her own state into national or even international courts or tribunals, the argument in favour of retention of foreign state immunity based on analogy does not hold.<sup>120</sup>

Given the uncertainty as to the origin of the doctrine it is not surprising that its legal character also seems to be historically unclear. Generally it is considered a principle of international law, but some, most notably the US, consider it a matter of discretion. This important question lost some of its significance with the introduction of national legislation in different

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<sup>116</sup> Lauterpacht, p. 230 et seq.

<sup>117</sup> *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, p. 418.

<sup>118</sup> Lauterpacht, pp. 230, 232-236.

<sup>119</sup> Shaw, p. 698.

<sup>120</sup> For example Lord Denning used this argument in *Rahimtoola v Nizam of Hyderabad* when supporting the acceptance of the doctrine of restrictive immunity: ‘In all civilized countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts (...). Foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign Governments an immunity which we do not grant our own’ *Rahimtoola v Nizam of Hyderabad*, p. 419.

jurisdictions concerning the scope and breadth of foreign state immunity.<sup>121</sup> Similarly, the international conventions on state immunity made this issue partly redundant, especially the codification of the rules in the 2004 UN Convention on Jurisdictional Immunities of States and their Property<sup>122</sup> when it enters into force it will provide a very strong argument for the recognition of rules on state immunity as part of international law.

### **1.5.2 The formulation of absolute immunity**

Fox distinguishes three phases in the development of the state immunity doctrine in general: (1) a time of almost universal acceptance of the doctrine of absolute immunity, when the relationships were seen as only between states, (2) the move towards a restrictive doctrine, allowing a state to be brought in front of a court with respect to non-sovereign activities, characterised by private party involvement in the proceedings and (3) a post-modern era, wherein the immunity ‘may be rendered unnecessary or detached from the state’.<sup>123</sup> This last phase seems to be marked by the growing rights of individuals, pressing for abandoning of state immunity in all cases involving state conduct. At the same time Fox argues in favour of an expansion of the doctrine given that the pooling of national powers in non-state entities necessitates their protection to make their operations in the public interest possible.<sup>124</sup> The time frames of those three phases can be outlined in the following way: the first phase in general lasted until the early XX century, with various, sometimes significant, deviations depending on a country; the subsequent second phase is either on the decline or already an issue of history; in effect the third phase has already begun or it is imminent.

In Anglo-American jurisprudence it is the judgement of Chief Justice Marshall in *Schooner Exchange*,<sup>125</sup> which is considered as the first judicial expression of the doctrine of absolute state immunity. The case, as in many early cases dealing with state immunity, concerned ownership of a vessel: originally owned by some private parties in the US, it was forcibly overtaken under the decrees of Napoleon, and subsequently transformed into a warship. When subsequently brought into a US port, the prior owners sought to attach the vessel and restore their ownership. The case found its way up to the Supreme Court, where it was

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<sup>121</sup> See for example the analyses of the US Foreign Sovereign Immunities Act, *infra*, p. 37 and the UK State Immunity Act, *infra*, p. 39.

<sup>122</sup> For analysis of the Convention in this context see p. 41.

<sup>123</sup> Fox, *The Law of State Immunity*, pp. 2-5.

<sup>124</sup> *Ibid.*, p. 5.

<sup>125</sup> *The Schooner Exchange v. McFaddon (Schooner Exchange)* 11 US 116 (US Supreme Court 1812).

dismissed on the grounds that the vessel was an armed ship in the service of a sovereign and as such benefited from the exemption from local jurisdiction. In this case, Marshall, J. first of all articulated the exclusive and absolute territorial jurisdiction of a state, subject only to the exceptions traced up to the consent of the nation itself, be it express or implied.<sup>126</sup> Therefore he considered jurisdiction to be a rule and immunity to be an exception thereto. Furthermore, he found that taking into consideration the full and absolute territorial jurisdiction of every sovereign and their perfect quality, a sovereign is understood to restrain itself from exercising its jurisdiction over a foreign sovereign or its sovereign rights.<sup>127</sup>

*Schooner Exchange* is often considered the authority establishing the doctrine of absolute state immunity. Proponents of this approach emphasise the claim that every sovereign is understood to grant immunity. As Bröhmer notes this case was decided at a time when international law was still considered to fully depend on the free will of states.<sup>128</sup> Yet a careful reading of this case allows alternative interpretations. Sinclair points out that it is also consistent with the proposition that immunity extends only to protection of sovereign rights exercisable by a foreign sovereign.<sup>129</sup> But even more generally Marshall, J. arrived at his conclusion having underlined the absolute character of territorial jurisdiction as well as pointing out that the granted immunity may be reversed, pointing to its discretionary nature.<sup>130</sup> Moreover, he neither referred to any rule of international law, nor did he even consider existence of such a rule. Finally, but no less importantly, as Badr suggests, it may be that the outcome of *Schooner Exchange* was influenced if not dictated by significant political factors.<sup>131</sup> This said, it becomes clear that the often expressed firm belief in the importance of *Schooner Exchange* as a strong authority supporting the doctrine of absolute immunity may be misplaced. Nonetheless, it set the analytical framework for thinking about the state immunity, at least in the Anglo-American world.

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<sup>126</sup> *Ibid.*, p. 136.

<sup>127</sup> *The Schooner Exchange v. McFaddon (Exchange)* 11 US 116 (US Supreme Court 1812), pp. 137-138.

<sup>128</sup> J Bröhmer, *State Immunity and the Violation of Human Rights* (International Studies in Human Rights, v. 47, Martinus Nijhoff Publishers, The Hague 1997), p. 15.

<sup>129</sup> Sinclair, p. 122.

<sup>130</sup> *The Schooner Exchange v. McFaddon (Schooner Exchange)*, p. 147.

<sup>131</sup> Badr points out that when *Schooner Exchange* was decided the war between the US and the UK seemed imminent and the improvement of the relationships between the US and France was of great importance to the former. See: GM Badr, *State Immunity: an Analytical and Prognostic View* (M. Nijhoff, The Hague 1984), p. 14.

It was the UK who became the leading practitioner of the theory of absolute immunity.<sup>132</sup> While there was some authority for a more limited state immunity, this was not followed in the leading case of *Parlement Belge*. Thus, in *the Charkieh Phillimore, J.* found neither a principle of international law, nor a dictum of jurists, that would allow a sovereign, engaged in trade for his own benefit, to claim the jurisdictional benefits, otherwise attributable to him, to the injury of a private person.<sup>133</sup> In *Parlement Belge*, in the first instance, Phillimore, J. held that a state-owned vessel engaged in a commercial activity did not enjoy immunity.<sup>134</sup> The case arose out of a collision of the boat, which was state-owned and state-operated. It shipped mail between Dover and Ostend, and additionally it commercially carried merchandise and passengers. The finding of Phillimore, J. was reversed on appeal. Brett, L.J. held that absolute independence of states and international comity require the court to decline to exercise jurisdiction over *inter alia* the public property of any state that is destined to public use.<sup>135</sup> The fact that the property was used partly for commercial purpose did not deprive it of immunity.<sup>136</sup> This became an authority on the position of English law in respect of state immunity for many years to come.

The high watermark of the doctrine of absolute immunity can be seen in *Porto Alexandre*.<sup>137</sup> There, a vessel of the Portuguese government, which was employed in ordinary trade, had failed to pay for the services provided by local tugs, in an English port. The writ and any further proceedings were opposed by the Portuguese government, partly supported by the communication of the British Secretary of State for Foreign Affairs, that *Porto Alexandre* was in possession, public use and service of the Portuguese government. At first instance the court found that the vessel was engaged in ordinary commerce and the only interest of the Portuguese government was in its earnings, yet relying on the *Parlement Belge* it set aside the writ and further proceedings against the vessel.<sup>138</sup> This decision was upheld on appeal, where the court trusted without any contestation in the statements of the Portuguese government's representatives assuring that the vessel was in a public service. Thus even though a vessel was in fact engaged in exclusively commercial activity, the court found itself constrained by the terms of the *Parliament Belge* and accorded immunity.

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<sup>132</sup> Shaw, p. 702.

<sup>133</sup> *The Charkieh* LR 4A & E59 (High Court of Admiralty 1873), pp. 99-100.

<sup>134</sup> *Parlement Belge* 4 PD 129 (Probate Divorce and Admiralty Division 1879), pp. 148-149.

<sup>135</sup> *Parlement Belge* 5 PD 197 (Court of Appeal 1880), pp. 214-215.

<sup>136</sup> *Ibid.*, p. 220.

<sup>137</sup> *Porto Alexandre* P. 30 (Court of Appeal 1920).

<sup>138</sup> *Porto Alexandre* 1 Ll. L. Rep. 84 (Probate, Divorce & Admiralty Division 1919).

### 1.5.3 The twilight of absolutism and the rise of the doctrine of restrictive immunity

The doctrine of absolute state immunity was uncomplicated. A state was completely immune in a foreign jurisdiction in all cases regardless of circumstances.<sup>139</sup> The state could always consent to adjudication and waive its immunity, but it could not have been forced to do so. Nonetheless the increasing involvement of states and state's agencies in the commercial field created a situation where the adherence to absolute immunity placed public companies at a privileged position vis-à-vis private companies. This led to a gradual departure in many jurisdictions from adherence to the old doctrine in favour of the doctrine of restrictive immunity, under which immunity was available only with respect to governmental acts of a state and its organs. The distinction was introduced between governmental acts (*acta de jure imperii*), which were covered by state immunity, and private or commercial acts (*acta de jure gestionis*), which were not entitled to any special protection from a state's jurisdiction. Yet, the equal treatment of a private party and a state in the court was not the only rationale justifying the restrictive doctrine. Adherence thereto furthers commercial interests of states. Fox perceptively points out to the other scenario- 'a state which persistently evades its commercial obligations is likely to suffer in its reputation for commercial integrity'.<sup>140</sup>

However intuitively appealing, the doctrine of restrictive state immunity contains an inherent puzzle, which has not yet been successfully resolved: the issue of the distinction between governmental and commercial acts. The first comprehensive treatment of this matter was undertaken by Weiss, at that time a judge at the Permanent Court of International Justice. He offered a test based on the nature of the acts, not the purpose. Therefore, in cases where an object of the given transaction was public, if its nature was such that a private person could enter into them, they fell within *jure gestionis* category and state immunity was not available.<sup>141</sup> This approach was criticized by a number of scholars, with Lauterpacht noting that it only 'postpones the difficulty', as all the contracts entered by the state would have to be considered as private acts, because private persons could make a contract. In his opinion if the borderline cases were to be left for the courts to decide, that would lead to uncertainty and

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<sup>139</sup> Shaw, p. 701.

<sup>140</sup> Fox, *The Law of State Immunity*, p. 65.

<sup>141</sup> A Weiss, 'Compétence ou Incompétence des Tribunaux 'al'égard des États Etrangers' (1923) 1 Recueil des Cours 521, p. 525.

inconsistencies.<sup>142</sup> Despite this objection, the case-by-case approach with the distinction between acts *jure imperii* and *de jure gestionis* became common, partly alleviated in recent decades by the introduction of national and international legislation on the issue, narrowing the scope for uncertainty, but not eliminating it. Although the restrictive doctrine has been embodied in various legal acts,<sup>143</sup> no uniform solution has been found to distinguish between governmental and commercial acts beyond doubt.

The progressive drift from the absolute doctrine towards the restrictive doctrine of immunity gives the best evidence of the shift from the immunity *ratione personae*, ie from a personal immunity of a state, towards immunity *ratione materiae*, the immunity with respect to the subject-matter involved.<sup>144</sup> It stops being important *who* behaves in a certain way and the issue *what is being done* gains significance.

The restrictive doctrine of foreign state immunity was being gradually accepted in different jurisdictions, but even now some states still do not recognize it.<sup>145</sup> Three main channels facilitating of the shift to the new doctrine can be identified. First, the executive clarified its position on the issue and the judiciary gradually shifted in that direction. This is what happened in the US. Second, the doctrine was introduced by the courts through their jurisprudence, as was the case in the UK. Third, the new approach could have been introduced by a new law, be it national legislation or international agreement, as it happened in Hungary.<sup>146</sup>

### 1.5.3.1 US

To better understand the way in which the restrictive doctrine was introduced in the US, one needs to note the significant difference between US and English courts with respect to the deference given to the executive. In the US courts considerable weight is attached to the view of the executive and the Department of State often provides its opinion with respect to the

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<sup>142</sup> Lauterpacht, p. 225. At this point it should be underlined that Lauterpacht in his landmark article called for the complete abolition of state immunity.

<sup>143</sup> Eg the European Convention on State Immunity, the US Foreign Sovereign Immunities Act or the US State Immunity Act, which are discussed later in this text.

<sup>144</sup> I Brownlie, *Principles of Public International Law* (7th edn Oxford University Press, Oxford 2008), p. 331.

<sup>145</sup> For example Hungary and Japan only recently recognized the restrictive doctrine, China and India recently became signatories of the UN Convention possibly adhering to the restrictive doctrine in future, whereas the Russian Federation still does not recognize it. More on this issue see p. 33.

<sup>146</sup> Law No. CX of 2000 amending Certain Legislative Acts Concerning Jurisdiction and the Recognition and Enforcement of Foreign Decisions, amending Law Decree No. 13 of 1979 on International Private Law.

availability of the immunity in particular cases. This trend was initiated in *The Schooner Exchange* and was subsequently generally followed by the US courts.<sup>147</sup> Hence it was significant when the Department of State issued the famous Tate Letter<sup>148</sup> in 1952, marking its departure from the adherence to the doctrine of absolute immunity in favor of the doctrine of restrictive immunity.

Jack Tate, an Acting Legal Adviser for the Secretary of State in his letter to the Attorney General distinguished two ‘conflicting’ concepts of state immunity – the theories of absolute and restricted immunity. The latter recognized state immunity with respect to a state’s sovereign or public acts (*acta de jure imperii*), but not in case of private acts (*acta de jure gestionis*). After discussing the positions taken in different jurisdictions Tate stated that in the face of growing engagement of states in commercial activities the Department of State would follow from now on the restrictive approach.<sup>149</sup> Although the main message was clear, the letter was at the same time very general. Most importantly, it did not provide any guidance in terms of distinguishing public from private acts. Moreover, it did not specify whether the shift in approach concerned only adjudicative immunity or was also extended to enforcement immunity. Fox notes that the Tate letter placed the Department of State in a difficult position at the time, where it had to pronounce on immunity in cases already subject to litigation. Yet, it was up to the foreign state to decide which path to follow. It could plead immunity either directly in front of the court or alternatively it could refer to the State Department. It was one of the factors that strengthen the movement towards shifting the decision-making power with respect to availability of immunity from the executive to the judiciary.<sup>150</sup> It is noteworthy that

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<sup>147</sup> The suggestion of the Department of State with respect to immunity was exceptionally not followed by the Supreme Court in *Berizzi Bros. Co. v. S.S. Pesaro (Pesaro)* 271 US 562 (US Supreme Court 1926), but later in *Ex parte Peru* the Supreme Court clarified that ‘(t)he certification and the request (...) must be accepted by the courts as a conclusive determination by the political arm of the Government’, *Ex parte Peru* 318 US 578 (US Supreme Court 1943), p. 589. Shortly afterwards in *Mexico v. Hoffman* the Supreme Court denied immunity in the absence of the recognition of the immunity by the Department of State. It noted that ‘(i)t is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize. (...) [the] recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations.’ *Mexico v. Hoffman* 324 US 30 (US Supreme Court 1945), p. 35.

<sup>148</sup> , *Letter from Jack B. Tate, Acting Legal Adviser for the Secretary of State, to the Attorney General, Appendix to Alfred Dunhill of London, Inc. v. Republic of China*, 425 US 682, App. 2 (1952).

<sup>149</sup> ‘Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.’ *Ibid.*, pp. 4a-5a.

<sup>150</sup> Fox, *The Law of State Immunity*, p. 221.

the US Department of State itself has not followed the principles declared in the Tate letter as closely as one would expect.<sup>151</sup>

The Tate letter seems to have served its purpose. In *Dunhill*,<sup>152</sup> a case which itself dealt with the act of state doctrine,<sup>153</sup> four justices of the Supreme Court, in a plurality opinion, endorsed the restrictive approach.<sup>154</sup> Shortly afterwards the Foreign Sovereign Immunities Act 1976 was enacted, which incorporated the restrictive doctrine.

### 1.5.3.2 UK

In the UK the adherence to the doctrine of absolute state immunity lasted much longer than in the US. In fact, the approach was ultimately changed with the enactment of the State Immunity Act in 1978, where the doctrine of restrictive immunity was incorporated. Nevertheless, in the period after the Second World War there were some attempts to restrict the scope of the doctrine, especially by denying immunity in cases *in rem* against the property of the state.<sup>155</sup> It seems *Tass Agency*<sup>156</sup> (1949) significantly stimulated the discussion on the need to depart from the absolute immunity doctrine. The case itself was an action for damages for an alleged libel in a published article. The Court of Appeal held that Tass, a news agency, was immune as a department of the soviet state. This outcome caused a stir, leading to debates in the British parliament about the unfairness of this approach<sup>157</sup> and to appointment of the committee to investigate the situation, yet due to significant differences of views of its members the committee's work was halted without producing a final report.<sup>158</sup> The interim report was never published.<sup>159</sup>

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<sup>151</sup> Niehuss pointed out, having analyzed the practice of the Department of State in the following years, that the foreign policy considerations still played a significant role. The Department of State was more willing to stick to the new rules in cases involving states with whom the US had amicable relations, whereas in cases involving countries from behind the Iron Curtain the Department was more willing to accord the immunity. See: JM Niehuss, 'International Law: Sovereign Immunity: The First Decade of the Tate Letter Policy' (1962) 60 Mich.L.Rev. 1142, pp. 1144-1145.

<sup>152</sup> *Alfred Dunhill of London, Inc. v. Cuba (Dunhill)* 425 US 682 (2th Cir. 1976).

<sup>153</sup> For the facts and the act of state doctrine context see: p. 49.

<sup>154</sup> *Alfred Dunhill of London, Inc. v. Cuba (Dunhill)*, pp. 701-706.

<sup>155</sup> More on this issue: Fox, *The Law of State Immunity*, p. 212.

<sup>156</sup> *Krajina v. Tass Agency (Tass Agency)* [1949] 2 All ER 274.

<sup>157</sup> 'Parliamentary Debate, HL Deb 23 November 1949 vol 165 cc926-42'

<<http://hansard.millbanksystems.com/lords/1949/nov/23/news-agency-and-diplomatic-privilege>> accessed 07/10/2010.

<sup>158</sup> 'Parliamentary Debate, HC Deb 13 February 1953 vol 511 cc81-2W'

<[http://hansard.millbanksystems.com/written\\_answers/1953/feb/13/committee-on-state-immunities](http://hansard.millbanksystems.com/written_answers/1953/feb/13/committee-on-state-immunities)> accessed 07/10/2010.

<sup>159</sup> *Interim Report of Interdepartmental Committee on State Immunities, Cabinet Papers, CAB 134 (120)*.

However it was not until 1976 in *Trendtex*,<sup>160</sup> that the English courts recognized the restrictive doctrine of immunity. In this case the majority decided that international law does not recognize adjudicative immunity of a government department with regard to its commercial transactions. The case was a suit against the Central Bank of Nigeria with regard to the due payments under a letter of credit, issued in payment for a purchase of cement. At first instance Donaldson J. supported the arguments of the Bank and considered it to be ‘an emanation, an arm, an alter ego and a department of the state’ and therefore entitled to the state immunity.<sup>161</sup> The Court of Appeal disagreed and decided the case on two grounds. The court unanimously considered that the bank was not a government department, and therefore not entitled to immunity. Second and most importantly, the majority<sup>162</sup> found that even if the Bank was part of the government, it was not entitled to immunity in respect of an ordinary commercial transaction.<sup>163</sup> The governmental acts (*de jure imperii*) were distinguished from the acts commercial in nature (*de jure gestionis*). Developing the commercial exception to immunity Lord Denning underlined that when deciding whether the immunity should be accorded the nature and not the purpose of the transaction in question was determinative.<sup>164</sup> In this particular case the issue at stake was not the contract of purchase, but the letter of credit, viz. a ‘straightforward commercial transaction’. Lord Shaw agreed noting that the ‘intrinsic nature’ of a transaction rather than its object was the matter for consideration in such determination.<sup>165</sup> *Trendtex* marks a tipping point in the approach of English courts towards the doctrine of state immunity.

### 1.5.3.3 Other jurisdictions

In the late XIX century civil law jurisdictions also accorded immunity to a foreign state. There were differences in the approaches taken, but most civil law jurisdictions started recognizing the doctrine of restrictive immunity in the XX century, although the timing of the change differed greatly.<sup>166</sup> Italy was the first jurisdiction that adopted the distinction between

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<sup>160</sup> *Trendtex Trading Corp v Central Bank of Nigeria (Trendtex)* [1977] Q.B. 529.

<sup>161</sup> *Trendtex Trading Corp v Central Bank of Nigeria (Trendtex)* [1976] 1 W.L.R. 868.

<sup>162</sup> Lord Denning MR and Shaw LJ.

<sup>163</sup> Lord Stephenson in his dissent claimed that the court was bound by previous decisions (holding that the absolute immunity is a rule of international law) so long as it is not altered by the House of Lords or the legislature. *Trendtex Trading Corp v Central Bank of Nigeria (Trendtex)*, pp. 571-572.

<sup>164</sup> ‘If a government department goes into the market places of the world and buys boots or cement - as a commercial transaction - that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods.’ *Ibid.*, p. 558.

<sup>165</sup> *Ibid.*, p. 579.

<sup>166</sup> For a detailed overview of the approaches taken in different jurisdictions up to mid nineteenth century see: Appendix in Lauterpacht.

commercial and governmental acts, already in 1886, soon followed by Belgium and the Mixed Courts of Egypt.<sup>167</sup> On the other side of the timeline lie Spain and Portugal who accepted the restrictive doctrine only in 1986 and 1997.<sup>168</sup> The Soviet Union and countries under soviet occupation, among them Poland and the Czech Republic, observed an absolute doctrine and they still adhere to it, with the exception of Hungary which, since an amendment of its legislation on private international law in 2000 recognizes the restrictive doctrine.<sup>169</sup>

China adheres to the absolute doctrine, but in 2005 it signed the UN Convention on the Jurisdictional Immunities of States and their Property.<sup>170</sup> The Japanese Supreme Court officially recognized the restrictive doctrine in 2006, and in 2007 Japan signed the UN Convention.<sup>171</sup> India signed the UN Convention in early 2007, so it seems possible that the Indian courts will be more favourable to the application of the restrictive doctrine in the future.<sup>172</sup> Egypt was the first to apply the doctrine in Africa, followed later by South Africa, Madagascar and Togo, but the general response of African states towards the restrictive doctrine is not favourable.<sup>173</sup>

#### **1.5.4 The national and international codifications of the law of state immunity**

The adoption of the UN Convention on the Jurisdictional Immunities of States and their Property<sup>174</sup> in 2004 is clearly a step in the direction of achieving common rules on state immunity. Although not yet in force, the Convention is an expression of the broad compromise on the standing of international law in the field. The first international agreement on the matter was the 1926 Brussels Convention on the Immunity of State Owned Vessels.<sup>175</sup> It had a restricted scope, dealing with the immunity and liability of the state-owned ships used commercially. The only other multilateral agreement on state immunity in force is the

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<sup>167</sup> Ibid., pp. 251-256.

<sup>168</sup> Fox, *The Law of State Immunity*, p. 227.

<sup>169</sup> Law No. CX of 2000 amending Certain Legislative Acts Concerning Jurisdiction and the Recognition and Enforcement of Foreign Decisions, amending Law Decree No. 13 of 1979 on International Private Law. See also: Ibid., pp. 230-231.

<sup>170</sup> Ibid., pp. 233-234.

<sup>171</sup> Ibid., pp. 234-235.

<sup>172</sup> Ibid., p. 222.

<sup>173</sup> Bankas provides an excellent analysis of the practice of African states in the field of immunity. See: EK Bankas, *The State Immunity Controversy in International Law. Private Suits Against Sovereign States in Domestic Courts* (Springer, Berlin 2005), chapter 6, pp. 133-174. He notes that 'most developing countries consider the doctrine of restrictive immunity as a Trojan gift horse from the West.' Bankas, p. 171.

<sup>174</sup> 'The United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004' <[http://untreaty.un.org/ilc/texts/instruments/english/conventions/4\\_1\\_2004.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf)> accessed 02/07/2010.

<sup>175</sup> Officially known as , 'The International Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels of 1926 with Additional Protocol of 1934' <[http://untreaty.un.org/unts/60001\\_120000/19/4/00036177.pdf](http://untreaty.un.org/unts/60001_120000/19/4/00036177.pdf)> accessed 02/07/2010.

1972 European Convention on State Immunity.<sup>176</sup> It is an important document because it was the first successful legislative attempt to agree on rules in this area,<sup>177</sup> supporting the restrictive doctrine and giving momentum to similar steps in various jurisdictions.<sup>178</sup> In addition, in the international context, some rules concerning state immunity exist in various multilateral or bilateral agreements.<sup>179</sup>

In relation to national legislation, two examples of codification of law on state immunity are discussed below: the US Foreign Sovereign Immunities Act of 1976<sup>180</sup> and the UK State Immunity Act of 1978.<sup>181</sup> The US law is especially interesting not only because the US is the leading economic power, but also because it led the way in introducing national legislation on the law of sovereign immunity, incorporating the restrictive doctrine. The UK Act is equally significant, because it served as an example and was followed in many common law jurisdictions.<sup>182</sup>

#### 1.5.4.1 European Convention on State Immunity (ECSI) of 1972

In 1964 against the background of growing support for the restrictive doctrine among Western European states, the Austrian delegation suggested studying the question of state immunity within the framework of the legal programme of the Council of Europe. This initiative met with interest and a special committee was created to investigate the matter. After about 14 meetings the Convention became open for signature in 1972.<sup>183</sup> It entered into

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<sup>176</sup> 'The European Convention on State Immunity of 1972'

<<http://conventions.coe.int/treaty/en/Treaties/Html/074.htm>> accessed 02/07/2010.

<sup>177</sup> It is worth mentioning that, as Sinclair notes, the issue of state immunity was already considered within the framework of the League of Nations Committee of Experts for the Progressive Development and Codification of International Law. This body considered it ready for codification, but when it reported back to the Council of the League in 1928 the matter was left with no further action. Similarly, after the Second World War the International Law Commission placed the issue of state immunity on its codification agenda already in 1949. See: IM Sinclair, 'The European Convention on State Immunity' (1973) 22 ICLQ 254, p. 261.

<sup>178</sup> Most notably in the UK, see *infra*, p. 39.

<sup>179</sup> For example the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) providing for the direct enforceability of the ICSID arbitration tribunals awards, but also bilateral investment treaties. See: W-M Choi, 'The Present and Future of The Investor-State Dispute Settlement Paradigm' 10 J. Int. Econ. Law 725, G Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' 56 ICLQ 371.

<sup>180</sup> 'Foreign Sovereign Immunities Act 1976' (§§ 1602-1611 U.S.C.)

<<http://uscode.house.gov/download/pls/28C97.txt>> accessed 02/07/2010.

<sup>181</sup> 'State Immunity Act 1978' <[http://www.opsi.gov.uk/acts/acts1978/pdf/ukpga\\_19780033\\_en.pdf](http://www.opsi.gov.uk/acts/acts1978/pdf/ukpga_19780033_en.pdf)> accessed 02/07/2010.

<sup>182</sup> Fox lists in this respect Singapore, Pakistan, South Africa, Canada, and Malawi. See: Fox, *The Law of State Immunity*, p. 241.

<sup>183</sup> Sinclair, 'The European Convention on State Immunity', p. 266.

force in 1976, but was ratified only by eight states.<sup>184</sup> Fox suggests three grounds leading to the failure of the Convention to be more widely ratified: (1) its complexity, (2) the requirement that the activities enjoying no immunity are to be closely linked with the forum state, and (3) the introduction in the Convention of an optional regime for execution of judgements.<sup>185</sup> This is partly explained by Sinclair, who was a member of the Committee of Experts. He noted that the Convention is complex because it sought to not only deal with the issue of immunity, but also with the matter of recognition and enforcement of judgements. In doing so the Convention had to address the issue of connecting factors which would allow to establish sufficient jurisdictional bases to warrant recognition and enforcement in the international arena. This seemed necessary to raise the interest in the Convention of those states, which were already adhering to the restrictive doctrine.<sup>186</sup>

Article 27 provides a dual nature test distinguishing which legal entities fall outside the notion of a 'Contracting State'. Those are entities which are (1) legally distinct from the state and which (2) have the capacity of suing and being sued, 'even if (...) entrusted with public functions'. Proceedings may be instituted against such an entity- immunity is denied, but not in respect of acts performed in the exercise of sovereign capacity (*acta jure imperii*). But no definition of sovereign acts is provided. Moreover, it is clarified that proceedings may be instituted against such entity if, in corresponding circumstances, proceedings could have been brought against a Contracting State.

In relation to the acceptance of the restrictive doctrine of immunity, three different approaches were contemplated: (1) assimilation of the position of the foreign state to the position of the state of the forum before its own courts, (2) creation of an indicative or exhaustive lists of acts *jure imperii* and *jure gestionis*, (3) preservation of the immunity of a foreign state in general, apart from activities falling within certain well-defined categories.<sup>187</sup> After consideration<sup>188</sup> the third option was adopted. Article 15 contains the rule of absolute immunity, whereas Articles 1 to 14 contain a catalogue of cases, where immunity is not

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<sup>184</sup> Austria (1976), Belgium (1976), Cyprus (1976), Germany (1990), Luxembourg (1987), the Netherlands (1985), Switzerland (1982) and the United Kingdom (1979). The Convention was also signed by Portugal, but until July 2010 it was not ratified in this country. Compare: <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=8&DF=02/07/2010&CL=ENG>> accessed 02/07/2010.

<sup>185</sup> Fox, *The Law of State Immunity*, p. 187.

<sup>186</sup> Sinclair, 'The European Convention on State Immunity', pp. 266-267.

<sup>187</sup> *Ibid.*, p. 267.

<sup>188</sup> Sinclair explains that the first option was refused as it would have put a foreign state in a legally different position in different fora. The second approach was not followed due to the difficulty in distinguishing with sufficient clarity acts *jure imperii* from acts *jure gestionis*. See: *Ibid.*, p. 267.

available (*acta jure gestionis*) and incorporate the restrictive doctrine of immunity. It is especially worth noting Article 6 which addresses a state's participation in 'a company, association or other legal entity' (but it does not encompass international organizations) and Article 7 which addresses industrial, commercial or financial activity of a Contracting State in the forum state, engaged in the same manner as a private party.

The Convention due to a small number of ratifications is of limited practical value. At the same time seen as an effort to achieve an international consensus on the matter of state immunity, the Convention was an important step and a valuable experience, which clearly helped to prepare the ground for the later endeavours of the International Law Commission.<sup>189</sup> Four years after the Convention was signed an important development with respect to the state immunity took place in the US- the Foreign Sovereign Immunities Act was enacted.

#### **1.5.4.2 US Foreign Sovereign Immunities Act (FSIA) 1976**

The American codification of the law on the foreign state immunity was an enactment of the policy declared earlier by the Department of State in the Tate letter. One of the key purposes of the Act, equally important as the incorporation of the restrictive doctrine, was a shift of the burden of determining availability of the immunity from the executive to the judiciary, thereby limiting the future political implications in foreign relations and providing more predictability.<sup>190</sup>

The FSIA operates with a notion of a 'foreign state', which is said to include also subdivisions of a state, its agencies or instrumentalities. A state itself is not defined. To fall within the category of state agency or instrumentality an entity needs to fulfil three conditions: (1) to have separate legal personality, (2) be closely linked with a foreign state, and (3) cannot be incorporated in the US or in a third state (a presumption linking a foreign incorporation with activities of commercial or private nature).<sup>191</sup> In consequence of such a

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<sup>189</sup> See *infra*, p 41.

<sup>190</sup> *Legislative History of the Foreign Sovereign Immunities Act 1976* H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 1976, reprinted in 1976 U.S. Code Cong. & Ad. News 6604, pp. 6605-6606.

<sup>191</sup> 28 USC 1603(b): An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and  
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and  
(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

broad definition of a foreign state the defence of immunity shifts from the status of the actor to the activity involved.

The restrictive immunity doctrine- the commercial activity exception to immunity- is incorporated under Section 1605(a)2: ‘A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case (...) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.’ The commercial activity is described as ‘a regular course of commercial conduct or a particular commercial transaction’, and legislative history provides that it encompasses carrying on of ‘a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation’.<sup>192</sup> It is to be determined with reference to the nature and not the purpose of the acts involved.<sup>193</sup> The commercial activity must have a substantial nexus with the US.<sup>194</sup> The notion of direct effect is not defined, but the legislative history expressly refers to Section 18 of the Restatement (Second), which required a direct, substantial, and foreseeable effect within the US before asserting jurisdiction over foreign conduct.<sup>195</sup> This was later rejected by the Supreme Court, which replaced the last two requirements with a requirement that the effect should be more than *de minimis*, whereas ‘direct’ was defined as following “as an immediate consequence of the defendant's (...) activity”.<sup>196</sup>

The Supreme Court interpreted the commercial activity exception of the FSIA on two occasions in *Weltover*<sup>197</sup> and in *Nelson*,<sup>198</sup> in two very different contexts. In the former case, it considered the question whether Argentina was entitled to immunity with respect to its refusal to repay the bonds it issued as a part of a plan to stabilize its currency. The court recognized that bonds are a debt instrument, which may be held by private parties and traded

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<sup>192</sup> *Legislative History of the Foreign Sovereign Immunities Act 1976*, pp. 6614-6615.

<sup>193</sup> 28 USC 1603(d).

<sup>194</sup> 28 USC 1603(e).

<sup>195</sup> Compare: *Legislative History of the Foreign Sovereign Immunities Act 1976*, p. 6618; , *Restatement of the Law (Second): Foreign Relations Law of the United States* (American Law Institute, Philadelphia 1965), Section 18(b): ‘(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory (...)’.

<sup>196</sup> *Republic of Argentina v. Weltover (Weltover)* 504 US 607 (US Supreme Court 1992), pp. 617-618.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Saudi Arabia v. Nelson (Nelson)* 507 US 349 (US Supreme Court 1993).

internationally, and, instructed by the FSIA to disregard the purpose of the conduct, it considered the issuance of a bond a commercial activity. It observed that the issue was not whether the state was acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives, but whether the action performed by the state was a ‘type’ of action ‘by which a private party engages in “trade and traffic or commerce”’.<sup>199</sup>

In *Nelson* a US engineer monitoring facilities for a hospital in Saudi Arabia was beaten, tortured and imprisoned in horrible conditions by the Saudi police, after he had placed complaints concerning the safety of some installations. He brought a case for damages claiming the commercial activity exception, but the majority in the Supreme Court held that the acts he complained of were not of commercial nature and that Saudi Arabia was immune. It considered that fact that Nelson’s mistreatment was retaliation for his way of performing the commercial contract was irrelevant, as relating to the purpose not the aim of the acts involved. This decision of the court, reached by a narrow majority (five to four) was strongly criticized.<sup>200</sup>

The enactment of the FSIA freed the US government from *ad hoc* diplomatic pressures in cases involving or implicating foreign states brought in the US. It depoliticized the applicable standards and clarified the law on the matter. From an international law perspective it provided a strong signal that the era of absolute state immunity is passé and it helped to further crystallize the standing of the international law in this area.

#### **1.5.4.3 UK State Immunity Act (SIA) of 1978.**

Unlike the US FSIA, the UK legislation did not fully replace the common law, therefore the SIA is not an exclusive source of law on foreign state immunity in the UK. The common law restrictive rule can be still applied in cases excluded from the scope of the Act.<sup>201</sup>

The State Immunity Act was enacted with two main purposes. First, to confirm adherence to the restrictive doctrine of immunity, already adopted earlier by the Court of Appeal in *Trendtex* and confirmed by the Lords in *I Congreso del Partido*.<sup>202</sup> Second, to enable the UK to ratify the European Convention on State Immunity, as well as the older Brussels

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<sup>199</sup> *Republic of Argentina v. Weltover (Weltover)*, pp. 614-617.

<sup>200</sup> The other issue in the case was the issue of nexus with the US, as the contract was performed in Saudi Arabia. *Saudi Arabia v. Nelson (Nelson)*. See: Fox, *The Law of State Immunity*, pp. 345-346.

<sup>201</sup> Fox, *The Law of State Immunity*, pp. 239-240.

<sup>202</sup> *I Congreso del Partido* [1981] 3 WLR. 328 [1983] 1 AC 244.

Convention with the Additional Protocol.<sup>203</sup> The SIA follows the approach adopted in the ECSI: foreign state immunity is a rule (Section 1), subject to exceptions listed in Sections 2 to 11. It is significant as it was later used as a model in many Commonwealth countries, including Singapore, Pakistan, South Africa, Canada and Australia.<sup>204</sup>

Section 14 of the SIA defines a 'state', as apart from the government, including also government departments, but not a 'separate entity' which is 'distinct from the executive organs' and has the capacity of suing and being sued. A separate entity may be immune only if (1) the case concerns acts performed in the exercise of sovereign capacity, and (2) a state in such a case would be immune.

The restrictive doctrine of immunity is embodied into Section 3. It mirrors exception provided in Articles 4 to 7 of the ECSI. Subsection 3(3) provides a definition of commercial transaction,<sup>205</sup> listing two categories of non-immune transactions and providing, in (c), a residual category: 'any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority', therefore the distinction between acts *jure imperii* and *jure gestionis* ultimately remains to be delineated on a case-by-case basis. Moreover, by removing immunity in respect of all contracts, whether commercial or not, partly or wholly performed in the UK<sup>206</sup> SIA departs from the *jure imperii* v. *jure gestionis* distinction, further limiting the category of cases where immunity would be accorded.

Unlike the ECSI or the US FSIA, the SIA generally does not require a nexus with the UK. It stipulates the requirement of jurisdictional link for some exceptions, but not in case of commercial transactions. As a consequence in cases of those exceptions where no link is required, as in case of commercial transactions entered into by a state,<sup>207</sup> if the plaintiff

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<sup>203</sup> Fox, *The Law of State Immunity*, p. 237. The Brussels Convention relating to the Immunity of State Owned Vessels and the 1934 Additional Protocol submits state-owned or state-operated ships and their cargoes engaged in trade to the jurisdiction of national courts as in case of private ships and their cargo. See: Fox, *The Law of State Immunity*, pp. 185-187.

<sup>204</sup> Fox, *The Law of State Immunity*, p. 241.

<sup>205</sup> Section 3(3): 'In this section "commercial transaction" means (a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.'

<sup>206</sup> Section 3(1)b.

<sup>207</sup> Section 3(1)a.

satisfies the procedural requirements relating to service out of jurisdiction,<sup>208</sup> the jurisdiction of the English courts is governed by the same rules as those relating to litigation between private parties,<sup>209</sup> possible allowing for far-reaching jurisdiction of English courts in such cases.

#### **1.5.4.4 UN Convention on the Jurisdictional Immunities of States and their Property of 2004**

The variety of approaches towards the law on state immunity brought about the growing need for codification in the form of an international convention. The first such attempt which found its way into a binding regime, namely the ECSI, met with very limited interest.<sup>210</sup> The sustained support for the broad codification project came from the UN, in which framework the International Law Commission (ILC) worked on the issue, leading to the adoption of the Draft Articles on Jurisdictional Immunities of States and Their Property in 1991.<sup>211</sup> The Draft Articles after further amendments were incorporated into the UN Convention on the Jurisdictional Immunities of States and their Property, adopted by the UN General Assembly in 2004.<sup>212</sup> As of July 2010 28 states had signed the Convention. Ten states ratified it, including three ratifications that took place in 2010.<sup>213</sup> According to Article 30, the Convention shall enter into force shortly after being ratified by thirty states. Despite not being in force, the Convention may serve as a point of reference for national courts trying to discern rules of international law. This has already happened in the Japanese Supreme Court<sup>214</sup> and the English House of Lords.<sup>215</sup>

Similarly to ECSI, US FSIA and UK SIA, the Convention provides a rebuttable presumption of immunity: a state is immune from jurisdiction (Article 5), subject to the exceptions for

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<sup>208</sup> Under Civil Procedures Rules 6.20.

<sup>209</sup> Fox, *The Law of State Immunity*, pp. 268-271.

<sup>210</sup> See *supra* p. 35.

<sup>211</sup> 'Draft Articles on Jurisdictional Immunities of States and their Property, with Commentaries' (1991) II(II) YILC 13, or online: <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1991\\_v2\\_p2\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1991_v2_p2_e.pdf)> accessed: 05/07/2010.

<sup>212</sup> For a general overview of efforts for the codification of the law on state immunity within the framework of the UN see: <[http://untreaty.un.org/ilc/summaries/4\\_1.htm](http://untreaty.un.org/ilc/summaries/4_1.htm)> accessed: 05/07/2010.

<sup>213</sup> The Convention was ratified by: Norway (2006), Austria (2006), Portugal, (2006), Romania (2007), Iran (2008), Lebanon (2008), Sweden (2009), Kazakhstan (2010), Japan (2010) and Switzerland (2010). See: <[http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg\\_no=III-13&chapter=3&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg_no=III-13&chapter=3&lang=en)> accessed 03/07/2010.

<sup>214</sup> *Case No. 1231 [2003] 1416 Saibansho Jihō 6* (Supreme Court of Japan 2006), reported and analyzed by Jones: CPA Jones, 'Case No. 1231 [2003] 1416 Saibansho Jihō 6' 100 AJIL 908.

<sup>215</sup> *Jones v. Ministry of Interior of Kingdom of Saudi Arabia* [2006] UKHL 26; [2006] 2 WLR 1424; see also: J Oliver, 'Jones v. Ministry of Interior of Kingdom of Saudi Arabia: An Exercise in Interpretation' 11 S.Y.B.I.L. 163.

non-immune acts (Articles 10 to 17). Unlike ECSI, the Convention provides that the immunity is to be raised by the court *proprio motu* (Article 6). ‘State’ itself is defined in Article 2. The definition, apart from organs of the government, a state’s constituent units, and state representatives, encompasses also ‘agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State’.<sup>216</sup>

The restrictive doctrine of immunity- the commercial transaction exception- is incorporated into Article 10.<sup>217</sup> As articulated in Para 2, the commercial transaction exception does not apply to commercial transactions between states. The term ‘commercial transaction’ is itself defined in Article 2.<sup>218</sup> Fox noted that the issue of whether the nature or the purpose of the transaction should be determinative of its character was the most intractable problem faced when working on the text of the Convention.<sup>219</sup> After much disagreement on the issue a compromise approach was adopted whereby when determining if a particular contract or transaction is a ‘commercial transaction’ reference should be made ‘primarily’ to the nature thereof, but the purpose cannot be disregarded and should be also taken into consideration.

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<sup>216</sup> Article 2, para 1, (b), iii.

<sup>217</sup> Article 10. Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

- (a) in the case of a commercial transaction between States; or
- (b) if the parties to the commercial transaction have expressly agreed otherwise.

3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:

- (a) suing or being sued; and
- (b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

<sup>218</sup> Article 2. Use of terms

1. For the purposes of the present Convention: (...) (c) “commercial transaction” means:

- (i) any commercial contract or transaction for the sale of goods or supply of services;
- (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;
- (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a “commercial transaction” under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

(...)

<sup>219</sup> Fox, *The Law of State Immunity*, p. 537.

This suggests that subsequent state practice may not be uniform, but as Fox carefully notes,<sup>220</sup> the preceding sub-paragraph lists as commercial a very wide categories of acts, limiting the possible freedom of interpretation. Denza suggests that the provided list may be of more presentational than real importance.<sup>221</sup> It should be also pointed out that the commercial transaction exception to immunity does not apply also to transactions between states (Article 10(2)a).

The Convention provides its own dispute settlement mechanism. Article 27 states that in case of dispute concerning the interpretation or application of the Convention states are obliged to enter into negotiation, then if the matter is not settled, into arbitration. If the parties cannot agree on arbitration, the Convention provides for the compulsory jurisdiction of the International Court of Justice.

### **1.5.5 The state immunity in antitrust cases**

Thanks to the growing support for the restrictive doctrine of immunity the availability of state immunity in antitrust cases has been significantly limited. In cases involving state-owned companies engaged in anticompetitive arrangements the immunity from jurisdiction is not available in most cases and they are treated as a private party. For example in *Pezetel*,<sup>222</sup> a state-owned company, an instrumentality of a state, accused of undercutting prices of golf carts on the US market, was subjected to the US antitrust laws under the commercial activity exception of the FSIA.

The unquestionably most famous antitrust case raising the issue of state immunity was the *OPEC*<sup>223</sup> litigation in the US. The members of the International Association of Machinists and Aerospace Workers (IAM) brought a case against Organization of the Petroleum Exporting Countries (OPEC) and OPEC's members for causing the high prices of oil and petroleum-derived products in the US, alleging a price-setting in violation of antitrust law.<sup>224</sup> Although the case was decided by the Court of Appeals on the basis of the act of state

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<sup>220</sup> H Fox, 'In Defence of State Immunity: Why the UN: Convention on State Immunity is Important' 55 ICLQ 399, p. 400.

<sup>221</sup> E Denza, 'The 2005 UN Convention on State Immunity in Perspective' (2006) Ibid.395, p. 397.

<sup>222</sup> *Outboard Marine Corp. v. Pezetel (Pezetel)* 461 F. Supp. 384 (D. Del. 1978).

<sup>223</sup> Organization of the Petroleum Exporting Countries (OPEC) is, *de jure*, an intergovernmental organization, and *de facto* a cartel formed by the oil exporting countries with two main objectives: to stabilize the world oil prices and to foster the economic development of its members. This is being achieved by setting oil production quotas. See further: J Noguera and RA Pecchecchino, 'OPEC and the International Oil Market: Can a Cartel fuel the Engine of Economic Development?' 25 International Journal of Industrial Organization 187, AC Udin, 'Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC' (2001) 50 Am.U.L.Rev. 1321

<sup>224</sup> See the discussion of this case in the context of act of state doctrine: p. 50.

doctrine, the District Court in its opinion relied on state immunity to deny the motion. In determining the nature of the OPEC activities, to see whether they fell within the commercial activities exception under FSIA, the court referred to various resolutions of the UN General Assembly endorsing the principle that the control over a state's natural resources is a sovereign activity. This, together with the US states practice with respect to the management of oil resources, led the court to a conclusion that 'the terms and conditions for removal of natural resources from its territory, when done by a sovereign state, individually and separately, is a governmental activity.'<sup>225</sup> The price-fixing element of the conduct was not convincing for the court. It was considered incidental.<sup>226</sup> Ultimately, the OPEC activities were found not to fall within the commercial activities exception under FSIA, and thus they were entitled to state immunity. The reasoning of the District Court was not questioned on appeal. As noted above, the Court of Appeal upholding the decision, based its decision on the act of state doctrine instead.

The *Prewitt* case<sup>227</sup> was another attempt to sue OPEC (but not its members) for price-fixing in violation of the Sherman Act, this time on behalf of oil consumers in the US. In this case the District Court for the Northern District of Alabama found that the OPEC and OPEC members do not enjoy any immunity. In the court's opinion the agreements at stake concerned output restriction, and therefore were 'plainly' commercial in nature, and could have been performed by private parties or sovereign states.<sup>228</sup> Therefore, OPEC actions were found to fall within the commercial activity exception to the FSIA. In subsequent appeals OPEC successfully moved to dismiss the case for the lack of proper service and the courts did not express a view on the issue of state immunity.<sup>229</sup>

Waller suggests,<sup>230</sup> more generally, that if a case was brought against OPEC in the US and would get to the stage of trial with no procedural deficiencies, it could be successful. First of all, it seems that a state may be brought to court under the Sherman and Clayton Acts. Secondly, it seems that OPEC activities fall within the commercial activity exception to state

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<sup>225</sup> *International Ass'n of Machinists v. OPEC (OPEC-District)*, p. 567 et seq.

<sup>226</sup> *Ibid.*, p. 566.

<sup>227</sup> *Prewitt Enterprises v. Organization of the Petroleum Petroleum Exporting Countries (Prewitt I)* 2001-2 Trade Cas. (CCH) P73,246 (N.D. Ala. 2001).

<sup>228</sup> *Ibid.*, Conclusions of the Law, para. 6.

<sup>229</sup> Compare: *Prewitt Enterprises v. Organization of the Petroleum Petroleum Exporting Countries (Prewitt II)* 224 FRD 497 (N.D. Ala. 2002), *Prewitt Enterprises v. Organization of the Petroleum Petroleum Exporting Countries (Prewitt II)* 353 F.3d 916 (11th Cir. 2003).

<sup>230</sup> SW Waller, 'Suing OPEC' (2002) 64 U. Pitt. L. Rev. 105, but also *inter alia* SW O'Donnell, 'Antitrust Subject Matter Jurisdiction over State Owned Enterprises and the End of Prudential Prophylactic Judicial Doctrines' (2003) 26 Suffolk Transnat'l L. Rev. 247.

immunity under FSIA, as over time the US courts have become more and more focused on the nature of the activities when dealing with the cases implicating foreign states. Moreover, internationally there has been a major shift from public towards private ownership in the field of extractive industries, proving their commercial nature.<sup>231</sup> The clarification of the act of state doctrine in *Kirkpatrick*, where the court underscored that the doctrine cannot be used to avoid politically sensitive issues makes it unlikely that it would succeed as a defence in case against OPEC.<sup>232</sup> Moreover, the fact that the courts<sup>233</sup> started recognizing the commercial exception to the doctrine disadvantages OPEC. This said, Waller, who himself considers a suit against OPEC contrary to US foreign policy, also notes that the ‘doctrine is not so inflexible that existing defences and immunities cannot be revived, twisted, applied by analogy, or simply tortured into dismissing or abstaining from deciding the suit.’<sup>234</sup>

At the same time it is worth noting that in the US numerous attempts were made to introduce a No Oil Producing and Exporting Cartels Act (NOPEC). This legislation is aimed at amending the Sherman Act. It expressly makes the sovereign immunity and the act of state doctrine unavailable in cases involving foreign states restraining trade in oil, natural gas, or any petroleum products. NOPEC was originally introduced in the Senate and in the House of Representatives during the 106<sup>th</sup> session of the Congress (1999-2000). The first attempt was unsuccessful. It was reintroduced on a number of occasions with varied levels of success.<sup>235</sup> Recently it was introduced anew in early 2009 and after two readings it was referred to the Committee on the Judiciary.<sup>236</sup> Those legislative initiatives, even putting all the strong and strictly political motivations aside, prove that not all are convinced that the suit against such a public cartel like OPEC would be successful in the present legal framework. At the same time it is noteworthy that no ruling administration ever attempted to sue OPEC and the NOPEC-like legislation never gained White House support.

The issue remains, at least with respect to states parties to the ECSI or following the rules of the UN Convention, whether states are entitled to immunity in cases of international public

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<sup>231</sup> Waller, p. 122.

<sup>232</sup> *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. (Kirkpatrick)* 493 US 400 (US Supreme Court 1990). See *infra*, p. 53.

<sup>233</sup> *Alfred Dunhill of London, Inc. v. Cuba (Dunhill)*.

<sup>234</sup> Waller, p. 154.

<sup>235</sup> In 2007 it managed to pass the House of Representative, with a vote of 345 in favour and 72 against. In Senate it was read twice but the vote was not held. Compare:

<<http://www.govtrack.us/congress/bill.xpd?bill=h110-2264>> and for more on the related legislation:

<<http://www.govtrack.us/congress/bill.xpd?bill=s111-204&tab=related>> accessed 05/07/2010.

<sup>236</sup> <<http://www.govtrack.us/congress/bill.xpd?bill=s111-204>> accessed 05/07/2010.

cartels, which as such are agreements between states. The UN Convention<sup>237</sup> and ECSI<sup>238</sup> exclude the transactions between states from the scope of exception to the immunity.<sup>239</sup>

## 1.6 Act of state doctrine

### 1.6.1 The US jurisprudence

The act of state doctrine is a rule of national law, present in Anglo-American jurisprudence. It is virtually non-existent in civil law countries.<sup>240</sup> The doctrine provides that municipal courts shall not examine the validity of the acts of foreign states within the boundaries of their territories. It can be seen as a judge-made rule of abstention, even though the US Supreme Court did not favour such understanding.<sup>241</sup> The *fons et origo* of this doctrine comes from the decision of the US Supreme Court in *Underhill*,<sup>242</sup> although some trace it back to a much earlier English case.<sup>243</sup>

General Hernandez was a civil and military leader during a revolution followed by the government of Crespo.<sup>244</sup> He was sued by Underhill for damages for his detention caused by the refusal to issue a passport, as well as for false imprisonment and assaults. In this case the lower courts found that acts of the general were acts of the government, and that he was not civilly responsible. The Supreme Court affirmed those findings and refused to examine the legality of the acts involved, ie to sit in judgement on the acts of a foreign government within its own territory. It considered that such issues should be settled between states themselves.<sup>245</sup>

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<sup>237</sup> Article 10, para 2, (a): [the commercial transaction exception to immunity does not apply] ‘in the case of a commercial transaction between States’.

<sup>238</sup> Article 4, para 2, (A): [the commercial transaction exception to immunity does not apply] ‘in the case of a contract concluded between States’.

<sup>239</sup> Similar provision is found in UK SIA, Section 3, para 2 provides that the exception to immunity ‘does not apply if the parties to the dispute are States’. No similar provision can be found in the US FSIA.

<sup>240</sup> Fox, *The Law of State Immunity*, p. 112; Mann, p. 15.

<sup>241</sup> Compare *Kirkpatrick* later discussed in this text.

<sup>242</sup> *Underhill v. Hernandez (Underhill)* 168 US 250 (US Supreme Court 1897).

<sup>243</sup> To *Blad v. Bamfield*. E.g. Mann, p. 16. Also the court in *Sabbatino* considered the latter case to be a root of the doctrine. See: *Banco Nacional de Cuba v. Sabbatino (Sabbatino)* 376 US 398 (US Supreme Court 1964), p. 416.

<sup>244</sup> For more on the general historical context see: *Venezuela* [in] *Encyclopædia Britannica Online* <<http://www.search.eb.com/eb/article-32705>> accessed 14/07/2010.

<sup>245</sup> “Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.” See: *Underhill v. Hernandez (Underhill)*, p. 252.

This was the first formulation of the act of state doctrine. The act of state was thereafter applied in numerous cases.<sup>246</sup>

The doctrine was further developed in a landmark *Sabbatino* case.<sup>247</sup> A US commodity broker ordered sugar from an American-held Cuban company. The company became nationalized and so as to receive the shipment, the broker entered into an identical contract with the now-nationalized company. Yet, it paid the price to Sabbatino, a legal representative of the original owner of the company. Thereafter Cuba sued the broker and Sabbatino for conversion. This met with the defence that Cuba's seizure was in violation of international law and that therefore the original company had the right to the title of the sugar. The Department of State officially considered the nationalization to be manifestly in violation of international law.<sup>248</sup>

In *Sabbatino* the Supreme Court declared that US courts will not examine the validity of a taking of property by a foreign sovereign within its own territory "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."<sup>249</sup> Moreover, it was noted that the act of state doctrine is neither compelled by international law,<sup>250</sup> nor it is required by the Constitution.<sup>251</sup> At the same time, the doctrine was found to have 'constitutional underpinnings', arising 'out of the basic relationships between branches of government in a system of separation of powers.'<sup>252</sup> The court noted also that the greater the degree of

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<sup>246</sup> One of the most shocking examples was the *Bernstein* case. See: *Bernstein v. Van Heyghen Freres SA (Bernstein I)* 163 F.2d 246 (2th Cir. 1947). Bernstein, a Jew, was a victim of the Nazi regime. He was forced in a concentration camp to transfer his possessions to a third party, who later transferred it to the defendant. The plaintiff sought to recover the property (a ship), damages and the insurance proceeds. The action was dismissed on two grounds. The first one being the strict application of the act of state doctrine. The court noted it is not to assess the validity of the acts of a foreign state. The second reason was the lack of clarity with respect to the position of the US government on this issue: "the only relevant consideration is how far our Executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar; some positive evidence of such an intent being necessary." *Bernstein v. Van Heyghen Freres SA (Bernstein I)*, p. 251. This issue changed a few years later, when Jack B. Tate, the Acting Legal Advisor to the Department of State wrote a letter (known as the Bernstein Letter) clarifying the position of the US government, which was "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials". See: *Bernstein v. N.V. Nederlandsche- Amerikaansche Stoomvaart - Maatschappij (Bernstein II)* 210 F.2d 375 (2th Cir. 1954), p. 376. This was one of the early exceptions to the act of state doctrine.

<sup>247</sup> *Banco Nacional de Cuba v. Sabbatino (Sabbatino)*.

<sup>248</sup> *Ibid.*, pp. 402-403.

<sup>249</sup> *Ibid.*, p. 428.

<sup>250</sup> *Ibid.*, p. 421.

<sup>251</sup> *Ibid.*, p. 423.

<sup>252</sup> *Ibid.*, p. 423.

codification or consensus concerning a particular area, the more appropriate it is for judicial examination. Furthermore, the less important the issue at stake for foreign relations, the weaker the justification for exclusivity of the executive.<sup>253</sup> Therefore, *Sabbatino* departed from *Underhill* introducing a case-by-case test, before declaring the act of state doctrine applicable.

Patterson provides an interesting political argument in the historical context to explain the change offered in *Sabbatino*. It is argued that the drastic changes in the international framework, the growing ties between Western regimes, both politically and economically, the growth of international organizations, like GATT, OECD, or NATO, made it possible to bring minor disputes in front of courts.<sup>254</sup> The more understanding there was within the international system, the less likely states were to shelter themselves behind the veil of sovereignty in non-controversial commercial disputes. This was also interestingly and more generally hypostatized by Burley. She notes that liberal states created a 'zone of law', whereas the other states operated in a 'zone of politics'.<sup>255</sup> *Sabbatino*, offering more flexibility, allowed the court to be responsive in both respects.

In response to *Sabbatino* Congress enacted so-called Second Hickenlooper Amendment (1964),<sup>256</sup> which *de facto* reversed *Sabbatino*. It made the act of state doctrine inapplicable to takings of property in violation of international law, with the exception that the President may suggest to the court that the application of the doctrine in a particular case is required by the US foreign policy interests.

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<sup>253</sup> *Ibid.*, p. 428.

<sup>254</sup> AD Patterson, 'Act of State Doctrine is Alive and Well: Why Critics of the Doctrine are Wrong' (2008) 15 U. C. Davis J. Int'l L. & Pol'y 111, pp. 120-121.

<sup>255</sup> A-M Burley, 'Law among Liberal States: Liberal Internationalism and the Act of State Doctrine' (1992) 92 Columbia Law Review 1907, pp. 1909-1910.

<sup>256</sup> 22 USC § 2370(e)(2): "Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, that this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."

The act of state doctrine can be seen both as a shield and as a sword. As Fox points out after Born,<sup>257</sup> while the political question doctrine serves as a bar, requiring judicial abstention, the act of state doctrine may confer a positive cause of action.<sup>258</sup> In *Sabbatino* this allowed for a judgement in Cuba's favour.

In *Dunhill*<sup>259</sup> the Supreme Court dealt with the applicability of the act of state doctrine to purely commercial conduct of a foreign state. The Cuban government in 1960 nationalized businesses of some Cuban cigar manufacturers, and then named new parties to take possession and conduct the business. The new parties continued exportation of products to the US. The importers also paid the new owners for the shipments received prior to the nationalization. The prior owners of the Cuban businesses brought in the US actions against importers for trademark infringements and for the purchase price of the cigars shipped from the nationalized businesses. The Court of Appeal recognized the right of the former owners to receive payments for the pre-nationalization shipments, but considered that the repudiation of that obligation by the Cuban side constituted an act of state.<sup>260</sup> The Supreme Court did not agree. The majority of five, of the divided court, considered that no proof was offered to consider an act of state the repudiation of the obligation to make repayments. 'No statute, decree, order, or resolution of the Cuban Government' was presented, showing that Cuba treated this issue as a sovereign matter.<sup>261</sup>

What is more, the plurality of four justices went even further and recognized, in general, a commercial activity exception to the act of state doctrine.<sup>262</sup> In that respect they were supported by the amicus from the Department of State. This was important, as the plurality underlined the underpinning of the doctrine- the threat of embarrassment of the government in the conduct of foreign relations. Taking into consideration the executive's opinion, the justices did not find any reason to consider an act of state the purely commercial conduct of a foreign state. Furthermore, the plurality pointed to the recognition of the commercial activities exception to the state immunity and suggested it should be extrapolated to an act of state, as otherwise a foreign sovereign thanks to the act of state doctrine 'would enjoy an

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<sup>257</sup> G Born, *International Civil Litigation in United States Courts: Commentary & Materials* (3rd edn Kluwer Law International, The Hague 1996), p. 684.

<sup>258</sup> Fox, *The Law of State Immunity*, p. 107.

<sup>259</sup> *Alfred Dunhill of London, Inc. v. Cuba (Dunhill)*.

<sup>260</sup> *Ibid.*, p. 689.

<sup>261</sup> *Ibid.*, p. 695.

<sup>262</sup> *Ibid.*, part III of the Opinion, p. 695 et seq.

immunity which our Government would not extend them under prevailing sovereign immunity principles in this country'.<sup>263</sup>

This finding of the court in *Dunhill* seems especially pertinent to antitrust cases, which are in general commercial in nature. Yet it should be kept in mind that recognition of a commercial activities exception to the act of state doctrine was only a plurality opinion, joined by four justices. The dissenting opinion of Justice Marshall was joined by three other justices.<sup>264</sup> The divided court in *Dunhill* clearly shows how unsettled the doctrine was at that stage in relation to the issue of recognition of the commercial activities exception, despite the clear view of the Department of State on the matter. After *Dunhill* courts were split as to whether the act of state doctrine applies to purely commercial acts of foreign sovereign states within their territories, and the Supreme Court until now has not solved this puzzle.<sup>265</sup> This is an issue of considerable practical importance, because US companies contracting with foreign states or foreign state-owned companies, in the normal course of business, run the risk of reliance by their partners in any litigation on the act of state doctrine to their detriment.<sup>266</sup>

The act of state doctrine was most frequently applied in expropriation cases, yet the famous *OPEC* case<sup>267</sup> revealed the doctrine's full potential and importance, also in antitrust. It was a litigation brought by a labour union against OPEC and OPEC members for price fixing of oil

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<sup>263</sup> Ibid., pp. 698-699.

<sup>264</sup> Ibid., pp. 724-730.

<sup>265</sup> For more on this issue see: JE Prince, 'Does Act of State Mean Out of Luck?: The Perils of Doing Business with Foreign States and Their State-Owned Companies' (*The Advocate* October 2009).

<sup>266</sup> The *World Wide Minerals* case one such example. World Wide Minerals (WWM), an American company, entered into series of agreements with the government of Kazakhstan and its instrumentalities (within the meaning of the FSIA, ie an entity having a separate legal personality, an organ or subdivision of the state or being in majority ownership of the state), concerning management of Kazak uranium complexes and the exportation of uranium to the US. After considerable engagement of WWM in Kazakhstan, including lending Kazakhstan according to the signed agreement a considerable amount of money for the restoration of the facilities, Kazakhstan refused to issue an export license to WWM and subsequently nationalized its property. WWM brought an action against Kazakhstan, its instrumentalities and another American company which was granted the export licence before the nationalization of WWM. The Court of Appeals for the District of Columbia dismissed the majority of the claims against Kazakhstan due to the lack of subject-matter jurisdiction, after finding the theory of sovereign immunity applicable. With respect to the rest of the claims against Kazakhstan, the court found that the act of state doctrine bars them from the court's adjudication. The first claim concerned the failure to issue an export licence by Kazakhstan, and any relief would require the court to question the legality of that denial, a sovereign act within the state's own territory. The other claim concerned the expropriation of the property of WWM- a classical example of act of state doctrine. Interestingly, the court referred also to the issue of a pure commercial activity exception from the act of state doctrine, and noted that its existence is still 'an unsettled question'. Compare: *World Wide Minerals, Ltd. v. Republic of Kazakhstan* (*World Wide Minerals*) 296 F.3d 1154 (D.C. Cir. 2002).

<sup>267</sup> *International Ass'n of Machinists v. OPEC* (*OPEC*).

in violation of the Sherman Act. The district court entered a judgement in favour of OPEC.<sup>268</sup> It found that the defendants had immunity from suit based on the state immunity doctrine.<sup>269</sup> Moreover, it noted that even if immunity was not available, the foreign state could not be sued for violation of US antitrust, as a foreign state may be a 'person' within the meaning of Sherman Act only for the purpose of bringing a suit.<sup>270</sup> It was also stated that the plaintiff did not prove proximate causation between OPEC's activities and US high oil prices. Although the Court of Appeals affirmed the judgment of the district court, it did so on different grounds, relying on the act of state doctrine.

The Court of Appeals did not answer the question whether the doctrine of state immunity was applicable in this case. It considered that this issue did not need to be decided as the judicial remedy sought was inappropriate in any case.<sup>271</sup> It relied instead on the act of state doctrine, which it restated as providing that the US courts will not adjudicate a politically sensitive dispute which would require the court to examine the legality of sovereign acts of a foreign state.<sup>272</sup> It focused its attention on the separation of powers and the need for the US to speak with one voice. According to the court in 'piecemeal' adjudication of the legality of the sovereign acts of a foreign state, it would risk disruption of the US international diplomacy and an international embracement of the US.<sup>273</sup>

The court also distinguished the act of state doctrine from the doctrine of sovereign immunity. It provided that the former is not a jurisdictional, but a prudential doctrine, designed to avoid 'judicial action in sensitive areas'.<sup>274</sup> Moreover, it found that the act of state doctrine is 'not diluted' by the commercial activity exception limiting the doctrine of sovereign immunity. It acknowledged, referring to the plurality opinion in *Dunhill*, that a purely commercial activity may not rise to the level of an act of state, but it found that OPEC's price-fixing had 'a significant sovereign component'. Furthermore, it considered that when the state in the capacity of state acts in the public interest, its sovereignty is asserted and the court 'must proceed cautiously to avoid an affront'.<sup>275</sup> In such a case the act of state

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<sup>268</sup> *International Ass'n of Machinists v. OPEC (OPEC- District)*, pp. 575-576.

<sup>269</sup> This aspect of the case is discussed more generally at p. 43 above.

<sup>270</sup> *International Ass'n of Machinists v. OPEC (OPEC- District)*, p. 570 et seq. See more specifically: p. 5.

<sup>271</sup> *International Ass'n of Machinists v. OPEC (OPEC)*, pp. 1361-1362.

<sup>272</sup> *Ibid.*, p. 1358.

<sup>273</sup> *Ibid.*, p. 1358.

<sup>274</sup> *Ibid.*, p. 1359.

<sup>275</sup> *Ibid.*, p. 1360.

doctrine remains available, regardless of any commercial element involved. The question arises when the state is not acting in the public interest, but this issue was not addressed by the court.

This said, the court considered that the possible insult to the OPEC states and the interference with the executive's efforts to seek favourable relations with them were apparent in the instant case. After referring to *Sabbatino*, it pointed out that there was no international consensus condemning cartels, and that any injunction against OPEC would require condemnation of cartels, internationally not condemned, and this was additional argument for the court to abstain from adjudication. It was also pointed out that the US and other nations support the principle of supreme state sovereignty over natural resources.<sup>276</sup>

Furthermore, the court noted that the act of state doctrine does not compel dismissal as a matter of course. Yet, in a situation as in the instant case, where the core issue is the legality of a sovereign act and where the remedy is barred by the doctrine, the dismissal is appropriate.<sup>277</sup>

Regrettably, the court in *OPEC* created also some unnecessary confusion.<sup>278</sup> It noted that the act of state doctrine is similar to the political question doctrine. Surprisingly, it considered that the latter requires the court to defer a case involving a politically sensitive question to the legislature or the executive, which are better equipped to deal with it.<sup>279</sup> This seems to go much further than what was envisaged in *Baker v. Carr*,<sup>280</sup> where the Supreme Court provided for rather narrow application of the doctrine, based on certain inextricable factors, after noting that not political cases, but only political questions are non-justiciable.<sup>281</sup> It should be underlined that non-justiciability, if present, simply cannot be removed, whereas the act of state defence could be lifted by the executive, as it was done e.g. in *Bernstein II*.<sup>282</sup>

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<sup>276</sup> *Ibid.*, p. 1361.

<sup>277</sup> *Ibid.*, p. 1361.

<sup>278</sup> In this vein also Mann, p. 25.

<sup>279</sup> *International Ass'n of Machinists v. OPEC (OPEC)*, p. 1358.

<sup>280</sup> *Baker v. Carr*.

<sup>281</sup> For more on the political question doctrine see: p. 9.

<sup>282</sup> *Bernstein v. N.V. Nederlandsche- Amerikaansche Stoomvaart - Maatschappij (Bernstein II)*.

The extent of the act of state doctrine was reexamined by the Supreme Court in *Kirkpatrick*.<sup>283</sup> The case was brought by an unsuccessful bidder for a Nigerian construction contract, against the successful bidder who bribed Nigerian officials. The court unanimously held that the validity of a foreign government act was not an issue in the instant case, regardless of what the findings may suggest as to the legality of the concluded contract.<sup>284</sup> It clarified that the act of state doctrine does not operate as an exception allowing avoidance of cases and controversies potentially embarrassing foreign states. It only requires that an act of a foreign state on their own soil shall be deemed valid in the process of deciding a case. Consequently, the court found no application of the doctrine in the instant case as the validity of a foreign sovereign act was not an issue.<sup>285</sup> This reassessment of the doctrine is significant, because it underlined that it does not allow courts to avoid politically difficult or potentially embarrassing cases, it just requires courts to consider acts of foreign sovereigns within their own borders valid. The motives behind the acts are irrelevant. This can be seen as a narrowing down of the doctrine, and therefore a limitation of the scope of judicial abstention. Nonetheless, the question at the very core of the doctrine- what does it precisely mean ‘to question the validity of the act’ remained unanswered. This is an issue of pertinence, because there may be potentially cases implicating foreign states and requiring examination of acts of states, therefore better understanding of the notion of ‘questioning the validity’ would provide more predictability for the parties. A particularly welcome development would be determination of a minimal level or character of a state involvement in a particular conduct that brings it within the scope of the act of state doctrine.

In 2000 a class action was brought against OPEC (not its members)<sup>286</sup> by Prewitt Enterprises on the behalf of oil consumers in the US, for the breach of the Sherman Act by price-fixing.<sup>287</sup> Interestingly, the plaintiffs sought an injunction and not treble damages.<sup>288</sup> The court entered a judgement in default against OPEC and awarded an injunction. Reaching this decision, it considered OPEC’s operation as ‘plainly commercial’, and therefore not

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<sup>283</sup> *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. (Kirkpatrick)*.

<sup>284</sup> *Ibid.*, p. 406.

<sup>285</sup> *Ibid.*, pp. 409-410.

<sup>286</sup> OPEC was considered an ‘unincorporated association’ within the meaning of Fed. R. Civ. P. 17(b)(1) (at present Fed. R. Civ. P. 17(b)(3)(A)), therefore capable of being sued "in its common name for the purpose of enforcing (...) against it a substantive right existing under the Constitution or laws of the United States" in this case, the Sherman and Clayton Acts.

<sup>287</sup> *Prewitt Enterprises v. Organization of the Petroleum Exporting Countries (Prewitt I)*.

<sup>288</sup> This was clearly due to the Supreme Court’s interpretation of the Clayton Act in *Illinois Brick*, where it found that indirect purchasers cannot recover treble damages for antitrust violations. See: *Illinois Brick Co. V. Illinois (Illinois Brick)* 431 US 720 (US Supreme Court 1977).

covered by the sovereign immunity. Similarly, it found that the court in *OPEC* did not give the right weight to the plurality opinion in *Dunhill*, providing a commercial activities exception to the act of state doctrine, which in its opinion would command a majority of the Supreme Court at present. Moreover, it pointed out that in any case the acts in question were performed outside the territories of OPEC's members, and therefore outside the territorial limitation of the doctrine, as it concerns only acts committed within state's boundaries.

The injunction captured OPEC's attention, who did not participate beforehand, and it brought a motion to dismiss.<sup>289</sup> OPEC's argument was procedural in nature. It claimed it was not properly served in the case and the court agreed.<sup>290</sup> On appeal this decision was upheld.<sup>291</sup>

In the more recent *Altman* case,<sup>292</sup> dealing mainly with the problem of state sovereign immunity,<sup>293</sup> the Supreme Court offered some more thoughts on its understanding of the act of state doctrine. First of all, it distinguished the act of state from the state immunity, clarifying that the former is a substantive defence on merits, whereas the latter is a jurisdictional doctrine. Interestingly, it stated, referring to *Underhill* and *Sabbatino*, that under the act of state doctrine courts will not question the validity of 'public acts (acts *jure imperii*)' performed within the state's borders. This is noteworthy, as the court used the language of the distinction between public and private (*ergo* commercial) acts used in the doctrine of restrictive state immunity.<sup>294</sup> Moreover, the court noted as well that the act of state doctrine is unaffected by the Foreign State Immunities Act,<sup>295</sup> making it clear that failure of the claim of immunity, still allows a state to successfully claim the act of state doctrine.<sup>296</sup>

In recent years the US courts were again faced with the OPEC-related litigation- *RPP*. In January 2009 the district court dismissed the case on the basis of the act of state and the

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<sup>289</sup> *Prewitt Enterprises v. Organization of the Petroleum Exporting Countries (Prewitt II)*.

<sup>290</sup> According to the Federal Rules of Civil Procedure - Rule(4)(f)(2)(C)(ii), the service to the defendant in a foreign country may take place by mail, unless prohibited by the foreign law. In this case the OPEC's Headquarter Agreement, which was enacted by the Austrian Parliament, expressly prohibited certified direct mail to OPEC headquarter, without consent of OPEC's Secretary General.

<sup>291</sup> *Prewitt Enterprises v. Organization of the Petroleum Exporting Countries (Prewitt II)*.

<sup>292</sup> *Republic of Austria v. Altmann (Altmann)* 541 US 677 (US Supreme Court 2004).

<sup>293</sup> For the general discussion of the case see: C Vazquez, 'Altmann v. Austria and the Retroactivity of the Foreign Sovereign Immunities Act' (2005) 3 ICJ 207.

<sup>294</sup> *Republic of Austria v. Altmann (Altmann)*, p. 700.

<sup>295</sup> For more on FSIA see: p. 37.

<sup>296</sup> *Republic of Austria v. Altmann (Altmann)*, p. 701.

political question doctrines.<sup>297</sup> While an appeal is pending, in August 2010 the US DOJ submitted an amicus brief supporting defendants and providing its views on the matter.<sup>298</sup>

*RPP* is composed from a number of complaints. In late 2006 five companies filed an antitrust class action against CITGO Petroleum, wholly owned and controlled by Venezuela (later referred to as *Spectrum Complaint*).<sup>299</sup> They alleged that CITGO played a critical role in Venezuela's and OPEC's price-fixing of oil and oil-based products on the US market in breach of US antitrust. They sought treble damages and injunction, and represented the class of all businesses in the US that acquired gasoline directly from CITGO since 2002. Soon afterwards similar actions were brought in other states. In late 2007 all the cases were transferred to the Southern District of Texas and consolidated.<sup>300</sup> In 2008 other plaintiffs brought a similar complaint against CITGO, but also against its parent company and Saudi Arabian (Saudi Aramco) and Russian (Lukoil) state-owned oil companies and their subsidiaries involved in production and distribution of petroleum products on the US market.<sup>301</sup> This complaint (*Consolidated Complaint*) was added to the consolidated action. None of the actions were explicitly brought against a foreign state- all defendants were companies.

The district court found the existence of the factual predicate for the application of the act of state doctrine because the acts which caused the alleged price-fixing were the governmental acts undertaken by foreign states within their own territories.<sup>302</sup> In the court's view, if the action was to proceed, it would turn on the legality of those acts. The complaints differed as the *Spectrum Complaint* directly saw the acts of defendants as part of OPEC activities, whereas *Consolidated Complaint* was described by the court as 'artfully worded to limit reference to the actions performed by sovereign members of the conspiracy'.<sup>303</sup> Nevertheless, the court recognized that the collusive acts for which the redress was sought, ie which caused the price-fixing, were decisions of foreign governments to limit the production of crude oil

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<sup>297</sup> *In re Refined Petroleum Products Antitrust Litigation (Complaints Consolidation)* 528 F.Supp.2d 1365 (US Jud.Pan.Mult.Lit.2007). For the analysis of the reliance on the political question doctrine in this case see: p. 11 et seq.

<sup>298</sup> *In re Refined Petroleum Products Antitrust Litigation- Brief of the United States as Amicus Curiae Supporting Affirmance.*

<sup>299</sup> *Spectrum Stores v. CITGO (Spectrum Complaint)* C.A. No. 4:06-3569 (S.D. Tex. 2006).

<sup>300</sup> *In re Refined Petroleum Products Antitrust Litigation (Complaints Consolidation).*

<sup>301</sup> *Fast Break Foods v. Saudi Arabian Oil Co.* Docket Entry No. 131 in H-07-04409, Docket Entry No.110 in H-07-04413, Docket Entry No. 52 in H-07-04415, and Docket Entry No. 48 in H-08-00241 (S.D. Tex. 2008).

<sup>302</sup> *In re Refined Petroleum Products Antitrust Litigation (RPP)*, p. 584.

<sup>303</sup> *Ibid.*, p. 586.

and to enter into agreements with each other to do likewise. The actions attributed to the defendants were merely in support of that conspiracy.<sup>304</sup> Furthermore, referring to the judgment of the district court in *OPEC*,<sup>305</sup> the court underscored that the “(d)ecisions of foreign sovereigns about production levels of natural resources produced within their territorial boundaries- including crude oil- are sovereign acts regardless of whether the decisions are products of unilateral deliberation or consultation with others.”<sup>306</sup>

The court investigated as well whether the act of state doctrine is applicable in this case in light of *Kirkpatrick*,<sup>307</sup> where it was clarified that the doctrine requires only to declare valid the foreign sovereign governmental acts taken within its territory. The plaintiffs held that the court could look only to the acts of the named defendants, *ergo* not to the acts of foreign states, to decide if the act of state doctrine applies. The court disagreed. It noted that the acts of the defendants alone could not constitute a violation of the Sherman Act, unless they were part of the alleged price-fixing conspiracy among foreign states. It found therefore the requirement of *Kirkpatrick* satisfied, as the plaintiffs’ claims could not be resolved without court’s ruling on the *legality* of the decisions and agreements of foreign states within their territories.<sup>308</sup>

Furthermore, the court was not convinced by the argument that the act of state doctrine concerns only foreign states acts *within their territories*, based on *Kirkpatrick* and *Allied Bank*.<sup>309</sup> It considered that there is no strict territorial limitation precluding the application of the act of state doctrine. Reliance on *Allied Bank* is noteworthy, as the court held therein that a foreign sovereign act is to be considered as occurring only in its territory if it is able to “come to complete fruition within the dominion of the [foreign] government.”<sup>310</sup> This case concerned a defaulted debt of Costa Rican banks in New York. The court found the act of state doctrine non-applicable as, analogizing the default to taking of property, it found the *situs* of the property, ie the debt, in New York. In this regard, the court relied also on *Sabbatino* which provided that the act of state doctrine is not available in case of takings of

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<sup>304</sup> *Ibid.*, pp. 587-588.

<sup>305</sup> *International Ass’n of Machinists v. OPEC (OPEC- District)*. Discussed at p. 51.

<sup>306</sup> *In re Refined Petroleum Products Antitrust Litigation (RPP)*, p. 588.

<sup>307</sup> *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. (Kirkpatrick)*. See p. 53 of this text.

<sup>308</sup> *In re Refined Petroleum Products Antitrust Litigation (RPP)*, p. 589.

<sup>309</sup> *Allied Bank Intern. v. Banco Credito Agricola de Cartago (Allied Bank)* 757 F.2d 516 (2nd Cir. 1985).

<sup>310</sup> *Ibid.*, p. 521, citing *Tabacalera Severiano Jorge v. Standard Cigar (Tabacalera)* 392 F.2d 706 (5th Cir. 1968), pp. 715-716.

property outside state's own territory.<sup>311</sup> In the instant case, *RPP*, the court referring to *Allied Bank* noted that it was the *situs* of the property and not the *situs* of the decision to act which played a decisive role with respect to availability of the act of state doctrine. In this light, the court did not share the view of the plaintiff alleging that the act of state doctrine cannot apply to the crude oil production decisions and agreements of the foreign states due to the fact that they were taken outside their territories.<sup>312</sup> The court offered here rather overly simplistic analysis, which is far from convincing, as the state-owned companies involved in this case had industrial properties in many states and conducted their activities not only within home states frontiers. The court seems to have conflated decisions concerning exploitation of natural resources with those aimed at price-fixing of crude oil on global markets. The former category can be seen as coming to fruition within a state territory, using the language of *Allied Bank*, whereas the latter, with its inseparable element of participation in transnational agreement to this aim, by its very nature exceeds the limits of national borders.

The court addressed also the claim of the commercial activity exception to the act of state doctrine, arguably making it unavailable in the instant case. The plaintiffs supported this argument with the plurality opinion in *Dunhill*,<sup>313</sup> yet the court remained unconvinced whether the commercial activity exception to the act of state exists. However, assuming the existence of such an exception the court considered the acts at issue in the instant case, i.e. decisions of foreign states on the levels of oil production and their agreements in that regard, as inherently sovereign.<sup>314</sup> It did not relate it specifically to oil, but generally to the management of natural resources. Such categorization makes the possible reliance on the commercial activity exception proposed by the plurality in *Dunhill* unwarranted.

In August 2010 the DOJ submitted an amicus curiae brief supporting the defendants on appeal and opting for the affirmation of the judgment of the district court both on the basis of the act of state and the political question doctrines.<sup>315</sup> In its brief DOJ underlined the US long-standing policy of state-to-state cooperation with the oil-producing states, pointing out

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<sup>311</sup> *Banco Nacional de Cuba v. Sabbatino (Sabbatino)*. See p. 47.

<sup>312</sup> *In re Refined Petroleum Products Antitrust Litigation (RPP)*, p. 594.

<sup>313</sup> *Alfred Dunhill of London, Inc. v. Cuba (Dunhill)*. For facts and analysis of *Dunhill* see: p. 49.

<sup>314</sup> *In re Refined Petroleum Products Antitrust Litigation (RPP)*, p. 596.

<sup>315</sup> *In re Refined Petroleum Products Antitrust Litigation- Brief of the United States as Amicus Curiae Supporting Affirmance*. More on the arguments raised in the brief in support of the application of the political question doctrine see: p. 12 et seq.

the lack of any attempt of the executive, including the Obama Administration, to bring an antitrust case against OPEC.<sup>316</sup>

In the view of the DOJ the act of state doctrine is applicable in the case and bars its adjudication, as to resolve it the court would have to determine illegality of foreign states decisions setting oil production quotas based on an international agreement to restrict oil output among oil producing states.<sup>317</sup> Furthermore, the DOJ claims that the territorial limitation of the act of state doctrine is not triggered in this case, as the acts in the case at bar- decisions to restrict oil production- were taken within the states respective territories. In its opinion the creation of an international organization limiting the oil production levels does not change the analysis, pointing to the *situs* of the property, oil natural reserves in this case, as the relevant point of reference.<sup>318</sup> This argument is crowned with a statement that ‘the radical step of finding [OPEC agreement] unlawful under US law (...) could seriously complicate the ability of the President to carry out his foreign-relations duties.’<sup>319</sup> Moreover, the DOJ seems to be downplaying the crucial international dimension of OPEC. It is not a matter of a single state taking decisions affecting its nationals, but an issue of a group of states significantly internationally engaged in trade in oil, who steer the world prices of oil through the production quotas and thus have significant impact on the world economy in general, and on the economies of oil-importing countries in particular. The clear intent and effect of the productions quotas transcends national borders.

Similarly, the DOJ’s brief finds inapplicable in the instant case any possible commercial activity exception to the act of state doctrine.<sup>320</sup> Referring to *Weltover*,<sup>321</sup> where the Supreme Court held that for the purposes of the FSIA an activity is commercial in nature when it is of a type of action by which a private party engages in trade or commerce, DOJ stresses that decisions of foreign states relating to the extraction of oil within their territories are ‘plainly not decisions that a private party could make on its own.’<sup>322</sup> It is claimed that such decisions are ‘quintessentially governmental and cannot be made by private parties.’<sup>323</sup> However

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<sup>316</sup> Ibid., p. 13.

<sup>317</sup> Ibid., pp. 27, 29.

<sup>318</sup> Ibid., pp. 31-33.

<sup>319</sup> Ibid., p. 33.

<sup>320</sup> Ibid., pp. 33-34.

<sup>321</sup> *Republic of Argentina v. Weltover (Weltover)*. More on the case: p. 38.

<sup>322</sup> *In re Refined Petroleum Products Antitrust Litigation- Brief of the United States as Amicus Curiae Supporting Affirmance*, p. 34.

<sup>323</sup> Ibid.

superficially appealing, this argument is not convincing. It is possible to differentiate between various decisions concerning exploitation of natural resources and only some of them bear the characteristics of a sovereign act. The issue of possible exploitation of a particular natural resource itself can be considered sovereign, and likewise the grant of a license to do so. Whereas the successive determination of the strategy of exploitation by the licensee, including the setting of exploitation targets in quantitative terms (*ergo* individual production quotas) could be clearly done by a private party, therefore does not belong to the pool of sovereign acts and ultimately could be considered as commercial in nature. When an entrepreneur opens an aluminum factory, she is free to decide how much aluminum she is going to produce. If a state grants a license to open a mine, the licensee is, generally speaking, free to decide on the pace and scale of extraction. Clearly a state could influence some of the parameters, concerning eg environment, in its sovereign capacity. Yet, determination of the production level for the purposes of fixing a price of crude oil at the global market is not a conduct of particularly sovereign-like type. On the contrary, this is an example of a behavior typical for an international private cartel, which thanks to its market power by means of limitation of supply is able to force upon a market a particular price. From a legal perspective therefore, it is difficult to uphold, as the DoJ does, that price-fixing of oil prices is a quintessentially governmental activity.

One of the particularly important issues from the perspective of addressing international anticompetitive conduct is its *situs*. As repeatedly noted above, the act of state doctrine applies only to acts committed within state's own territory. The obvious concern arises when dealing with foreign anticompetitive arrangements causing economic effects abroad, or even only abroad (eg export cartels). In fact in *OPEC* the court did not even discuss this issue. Later on in *Prewitt* the matter was raised and the district court recognized that the acts were committed abroad. In *RPP* this issue was downplayed by the court and the DOJ in its amicus considered that all the relevant conduct took place within states' territories. Even if this is a correct holding, it is unsatisfactory that in the present regulatory framework we lack clarity whether the act of state doctrine is then available, especially taking into consideration the doctrinal underpinnings of the effects doctrine, allowing for extraterritorial application of US antitrust. The effects doctrine allows the assumption of jurisdiction over foreign conduct, even when fully 'physically' and legally consummated abroad, if it has certain economic effects on the US market. Considering a cartel with significant state engagement (like OPEC), where all the relevant conduct takes place within a state, then despite the economic

consequences being potentially global, the act of state doctrine may still be applicable. This proves an inconsistency with respect to the scope of application of US antitrust. On the one hand, US extraterritoriality may sometimes reach out controversially far after private parties engaged in anticompetitive conduct affecting US market. On the other hand, when foreign states are involved, US antitrust becomes *de jure* impotent.

It is submitted that in the globalizing world, where the market-economy based on private property is the leading, but not the only-significant way of organization of the economic life, this incoherence is not sustainable in the long-run. It seems that within the current legal framework an outcome of a litigation involving foreign states is far from predictable to the detriment of private parties involved. Although the Supreme Court did not resolve the issue, it is suggested that the act of state doctrine would be considered inapplicable to the purely commercial acts of a state, as proposed already by the plurality in *Dunhill*.<sup>324</sup> The Justice and State Departments share this understanding.<sup>325</sup> The US courts have generally recognized that in cases brought by the US government the act of state doctrine is not applicable, since there is no risk that the court adjudication could interfere with the executive.<sup>326</sup> This is significant as disarming this particular defence in case of public enforcement. Yet, the final say of the courts or preferably the legislator on the availability of the act of state doctrine as a defence in clearly commercial cases, irrespective of the nature of the party bringing the case, would provide the much needed assurance and clarification to the system. At the same time it would necessitate further delineation between state commercial and sovereign activities. In face of the growing scarcity of natural resources, this issue will be recurring not only in litigation involving oil-rich states. A firm pronouncement of the legislator or the Supreme Court on the matter whether OPEC like activities are to be seen as sovereign or not would bring much needed predictability to the system. Hopefully, the first step in this direction will be taken on appeal in *RPP*.

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<sup>324</sup> In this vein e.g. Waller. See: Waller, p. 131.

<sup>325</sup> The Department of Justice and The Federal Trade Commission, 'Antitrust Enforcement Guidelines for International Operations' (April 1995) <<http://www.justice.gov/atr/public/guidelines/internat.htm>> accessed 7/06/2010. See section 3.33: "(...) Agencies will not challenge foreign acts of state 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* (emphasis added)."

<sup>326</sup> MR Joelson, *An International Antitrust Primer: a Guide to the Operation of United States, European Union, and Other Key Competition Laws in the Global Economy* (3rd edn International Competition Law Series, Kluwer Law International, Alphen aan den Rijn 2006), p. 75.

## 1.6.2 The act of state doctrine in the UK

The English act of state doctrine dates back to *Luther* case.<sup>327</sup> In this case the plaintiffs had a wood-processing company in pre-revolution Russia. After the Bolsheviks took over power they confiscated and nationalized the factories and stocks, including the plaintiffs property. Afterwards, agents of soviet Russia sold a quantity of the stocks seized to the defendants, who imported it to England. The plaintiffs sought an injunction and damages. They claimed that the soviet government was never recognized by the UK and that the nationalization was pure robbery, and as such it should not be recognized.

The Court of Appeal, relying on information from the Secretary of State for Foreign Affairs, recognized that the soviet government was a *de facto* government and that its acts should be recognized as such.<sup>328</sup> Warrington, L.J found that “(i)t is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country.” He continued by observing that the plaintiffs wanted to induce the court to ignore and override legislative and executive acts of the soviet government relating to property in that country, which in his opinion the court is “not at liberty to do.”<sup>329</sup>

*Luther* was followed by the *Princess Olga* case.<sup>330</sup> This case dealt with rather similar circumstances<sup>331</sup> and the court found that English courts are “bound to give effect to the law and acts of that Government so far as they relate to property within that jurisdiction when it was affected by those laws and acts” and that the court will “not inquire into the legality of acts done by a foreign Government against its own subjects in respect of property”<sup>332</sup>

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<sup>327</sup> *Aksionairnoye Obschestvo AM Luther v James Sagor & Co (Luther)* [1921] 3 KB 532.

<sup>328</sup> *Ibid.*, p. 544.

<sup>329</sup> *Ibid.*, p. 549.

<sup>330</sup> *Princess Paley Olga v Weisz (Princess Olga)* [1929] 1 KB 718.

<sup>331</sup> Princess Paley had a house- the Paley Palace at Tsarskoe Selo, near St. Petersburg. During the revolution her property was forcibly taken from her. Later on she managed to flee from Russia. A subsequent order signed by Lenin nationalized the property of Russians who fled the country. In 1928 Princess Paley recognized in London items previously belonging to her, which were bought by the defendant from the Soviet government. She brought an action to recover the movables or damages.

<sup>332</sup> *Princess Paley Olga v Weisz (Princess Olga)*, per Lord Scrutton at p. 725 and per Lord Russell at p. 736.

The more recent authority is *Kuwait Airways*, especially the final judgment of the House of Lords.<sup>333</sup> The case arose from the removal of property of Kuwait Airways and its subsequent transfer to the Iraqi Airways, following the Iraqi invasion and purported annexation of Kuwait in 1990. The doctrine was formulated per Lord Hope: “(t)here is no doubt as to the general effect of the rule which is known as the act of state rule. It applies to the legislative or other governmental acts of a recognized foreign state or government within the limits of its own territory.”<sup>334</sup>

Iraqi Airways, a defendant in this case, claimed that the Iraqi resolution legalizing its ownership of the Kuwaiti airplanes should be recognized and given full effect as an act of state. Their Lordships did not share this understanding. Lord Nicholls recognized that in appropriate circumstances an English court can have regard to the content of international law when deciding whether to recognize a foreign law.<sup>335</sup> In his opinion a blind adherence to a foreign law can never be required.<sup>336</sup> It must have a residual power to disregard provisions of foreign law, when their recognition would affront basic principles of justice and fairness.<sup>337</sup> A fundamental breach of international law should not be recognized as manifestly contrary to the public policy of English law.<sup>338</sup> In effect, Lord Nicholls concurred with Mance J., in the first instance, and the Court of Appeal that the Iraqi decree, being a flagrant breach of international law, should not be recognized, as an exception to the act of state doctrine.

Similarly Lord Steyn considered that as the annexation was a breach of international law, a recognition of the Iraqi resolution would be contrary to English public policy. In his opinion the Court of Appeal was right to extend the public policy exception beyond human rights violation to encompass flagrant breaches of international law. Yet, he noted that not every breach would trigger the policy exception. In this respect he noted the *jus cogens* status of the Charter of the United Nations, and the prohibition of the use of force contained therein.<sup>339</sup> It may be inferred that for Lord Steyn a breach of international law enabling reliance on the exception to the act of state doctrine and disregarding an official act of a foreign state, was a

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<sup>333</sup> *Kuwait Airways Corp. v. Iraqi Airways Co. (Kuwait Airways)*. This case is also an authority on the non-justiciability principle and the aspects relating thereto as well as more detailed facts of the case are discussed elsewhere in this text. See pp. 18 et seq.

<sup>334</sup> *Ibid.*, para. 135.

<sup>335</sup> *Ibid.*, para. 26.

<sup>336</sup> *Ibid.*, para. 16.

<sup>337</sup> *Ibid.*, para. 18.

<sup>338</sup> *Ibid.*, para. 27-29.

<sup>339</sup> *Ibid.*, para. 114.

breach of *jus cogens*. Similar views were also expressed by Lord Hope, who recognized that narrow limits must be placed on any exception to the act of state doctrine.<sup>340</sup> For him a legislative act by a foreign state which is in flagrant breach of clearly established rules of international law ought not to be recognized by the English courts.<sup>341</sup>

Therefore in *Kuwait Airways* their Lordships recognized a public policy exception to the act of state doctrine. The standard is high and not every breach of international law qualifies. The fact that Lord Steyn referred to *jus cogens* provides some guidance as to what level of violation of international law could be recognized as a flagrant or fundamental breach of international law.

*Kuwait Airways* remained settled law<sup>342</sup> until *EnTel*.<sup>343</sup> The case concerned renationalization of EnTel, a Bolivian telecom, which was privatized a few years earlier with half of the shares being acquired by ETI, a Dutch company. ETI considered Bolivian actions illegal and attempted to freeze any transfers of funds from EnTel's London accounts. Its legal action in that respect was unsuccessful, but the bank, aware of the situation, refused to transfer money at EnTel's request.<sup>344</sup> This led to EnTel bringing a legal action, claiming that the legality of the Bolivian action, in this case renationalization, cannot be called into question based on the act of state doctrine.

The court, referring to *Kuwait Airlines*, recognized the public policy exception to the doctrine, noting that it was not limited to the violations of the human rights, but also to the fundamental breaches of international law.<sup>345</sup> The contention concerned applicability of the

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<sup>340</sup> *Ibid.*, para. 138.

<sup>341</sup> *Ibid.*, para. 148-149.

<sup>342</sup> Bhattacharyya, Macdonald and Hoare also note the lack of reported jurisprudence between *Kuwait Airways* and *EnTel*. See: G Bhattacharyya, L Macdonald and G Hoare, 'Case Comment: Empresa Nacional de Telecomunicaciones Entel SA v Deutsche Bank AG: Judicial Restraint and Abstention - a Recent Application of the "Act of State Rule"' (2010) 25(3) JIBLR 140, p. 143.

<sup>343</sup> *Empresa Nacional De Telecomunicaciones SA v. Deutsche Bank AG (EnTel)* [2009] EWHC 2579 (QB).

<sup>344</sup> After the renationalization plans were published, listing among others EnTel, ETI requested arbitration from the International Centre for Settlement of Investment Disputes (ICSID) against Bolivia, but prior to that request Bolivia filled in an application with ICSID withdrawing its membership. On this basis the jurisdiction of the arbitration panel was challenged. Finally, the Bolivian president issued a decree nationalizing EnTel, envisaging some form of compensation. Following the nationalization ETI obtained a freezing order with respect to EnTel's account in London, but it was subsequently discharged on appeal. When that happened ETI officially wrote to the bank stating that in its view the nationalization was invalid, as it was a breach of Bolivian commercial law and constitutions. It urged the bank not to transfer any funds and warned of possible legal action in case of transfers. Aware of the situation the bank primarily refused to recognize the representatives of nationalized EnTel, and then refused to transfer the money. EnTel brought this application for a summary judgment.

<sup>345</sup> *Empresa Nacional De Telecomunicaciones SA v. Deutsche Bank AG (EnTel)*, para. 14-16.

exception to the doctrine in the instant case. The court noted that the factual allegations as well as legal contentions were not clear, the prime issue being the question why ETI did not receive any compensation to date. In any case it was clear to the court that the public policy exception is to be narrowly applied, only in cases of violations of international law and fundamental universal human rights. In that regard the court was not convinced of the existence of a rule of international law prohibiting, in all circumstances, nationalization without compensation, where other factors, like racial discrimination, are not applicable, although it was argued by the bank that no distinction could be made for the purposes of the application of the exception between different rights protected by the European Convention on Human Rights.<sup>346</sup> The court found the public policy exception to the act of state doctrine not applicable, and ultimately the summary judgment was granted to EnTel and the bank was ordered to transfer the funds in accordance with EnTel's instruction.<sup>347</sup> The court in *EnTel* followed the earlier approach of the English courts towards the act of state doctrine. The public policy exception to the act of state doctrine was recognized, but only narrowly limited to the grave violations of fundamental universal human rights and breaches of international law.

### ***1.7 The foreign sovereign compulsion***

The compulsion of a foreign sovereign is a valid defence in antitrust cases, potentially fully removing the liability from the party invoking it. It seems to be universally recognized, yet is it a judge-made rule, not a principle of international law. In the ABA's monograph it is observed that the sovereign compulsion is usually treated as a *sui generis* defence, peculiar either to the international context or even to the antitrust area.<sup>348</sup>

This defence is well-established and recognized in the US and in the EU. Its developments in both jurisdictions are presented and discussed below. Noonan notes that foreign sovereign compulsion as a defence is also recognized in Japan, Australia and New Zealand.<sup>349</sup>

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<sup>346</sup> Ibid., para. 22.

<sup>347</sup> Ibid., para. 23-24.

<sup>348</sup> SW Waller (ed), *Special Defenses in International Antitrust Litigation* (Monograph 20, ABA Antitrust Section, Chicago 1995), p. 78.

<sup>349</sup> Noonan, pp. 335-337.

### 1.7.1 United States

The foreign sovereign compulsion is recognized in the US as a defence in antitrust litigation. Private firms compelled by a foreign government may be relieved from liability for their anticompetitive conduct. Despite rather broad recognition of this principle by the courts, *Texaco*<sup>350</sup> remains the only case where reliance on it was successful. The US authorities recognized foreign sovereign compulsion as a self-standing legal defence only in 1988.<sup>351</sup>

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

The business of oil extraction by foreign companies was tightly-regulated in Venezuela. The ministry responsible established a Coordinating Commission, which supervised all the concessionaires. It had the authority to lay down rules regarding the sale of the extracted oil. The sanctions for non-compliance were severe, including a suspension of the right to export the oil. The officials from the Commission instructed the defendants that no further deliveries were to reach the plaintiff, who was subsequently duly notified about the situation by the defendants.<sup>352</sup>

The court held that the defendants were compelled by regulatory authorities to boycott the plaintiff. More generally, it held that compulsion is a complete defence to an antitrust action.<sup>353</sup> It considered its form irrelevant. In the instant case there was no special legislation, or written order. The fact of compulsion was established on the basis of an informal oral

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<sup>350</sup> *Interamerican Refining Corp. v. Texaco Maracaibo, Inc. (Texaco)*

<sup>351</sup> In this vein see: , 'Report: Analysis of Department of Justice Guidelines - International Operations - Antitrust Enforcement Policy' (1988) 57 Antitrust L.J. 966, p. 866.

<sup>352</sup> *Interamerican Refining Corp. v. Texaco Maracaibo, Inc. (Texaco)*, pp. 1294-1295.

<sup>353</sup> *Ibid.*, p. 1296.

instruction.<sup>354</sup> Moreover, responding to the argument that in cases of compulsion, the compelling acts must be valid under the law of the country involved, the court referring to the act of state doctrine and *Sabbatino*, held that validity is not to be investigated.<sup>355</sup> It should be also pointed out that in *Texaco* the reliance on the foreign sovereign compulsion was upheld by the court without territorial limitation. The defence was recognized despite the fact that Venezuelan authorities compelled defendants not to deal in the US. This issue was not even raised in the case.

The recognition of the foreign sovereign compulsion as a defence can be traced back to much earlier *Sisal*,<sup>356</sup> dealing with the monopolization of the sisal imports from Mexico. In this case the court held that when a private party solicited the government to enact the legislation that led to the private anticompetitive acts, the foreign sovereign compulsion as a defence does not apply. The compulsion was given further recognition in *Swiss Watchmakers*,<sup>357</sup> where the court acknowledged that the compulsion would lift the liability from the compelled companies.<sup>358</sup> This case dealt with state-approved and state-facilitated regulation of the watch-making industry, which aimed at keeping all the know-how, machinery and watch parts in Switzerland, so as to protect the Swiss watch industry from potential competition. Although the regulation was recognized and approved by the government, it was still considered a private agreement, subject to the antitrust rules and the claim of foreign sovereign compulsion was not successful. Despite the state's engagement, the direct foreign government action compelling the defendant's activities was missing. The issue of state engagement was further clarified in *Mannington*,<sup>359</sup> where it was held that the party asserting the defence must prove that the foreign state's involvement was more than merely peripheral

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<sup>354</sup> *Ibid.*, pp. 1295-1296.

<sup>355</sup> *Ibid.*, p. 1299.

<sup>356</sup> *United States v. Sisal Sales Corporation (Sisal)* 274 US 268 (US Supreme Court 1927). Later *Sisal* was referred to in *Continental Ore* where American and Canadian companies were accused of monopolizing trade in vanadium. In this case a particular company was appointed by the Canadian authority as the exclusive agent responsible for vanadium for Canadian industry in wartime. It helped the prime defendant by refusing to buy from the plaintiff. The defendants claimed that they should be released from liability as they acted pursuant to the orders of the government agency. In this respect the court relied on the *Sisal* authority and noted that a company violating antitrust rules may be held liable for its conduct, even if aided by the foreign government. In the instant case, the court found no evidence indicating that the government agency approved or would have approved of the efforts to monopolize the market. See: *Continental Ore Co. v. Union Carbon & Carbide Corp. (Continental Ore)* 370 US 690 (US Supreme Court 1962), pp. 705-707.

<sup>357</sup> *United States v. Watchmakers of Switzerland Information Center, Inc. (Swiss Watchmakers)* 1963 Trade Cases (CCH) 70,600 (S.D.N.Y. 1962), *modified*, 1965 Trade Cases (CCH) 71,352 (S.D.N.Y. 1965).

<sup>358</sup> "If, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another sovereign nation." *Ibid.*, at XLVI.

<sup>359</sup> *Mannington Mills, Inc. v. Congoleum Corp. (Mannington)* 595 F.2d 1287 (3rd Cir. 1979).

to the anticompetitive conduct involved. Therefore simple approval of the state does not meet the threshold necessary for the doctrine to apply. Moreover, the defence is also not available if the defendant could have legally refused the state's wishes.<sup>360</sup>

A major policy consideration underlying the compulsion defence is one of fairness to the defendant. The other rationale usually provided in this respect is the comity consideration.<sup>361</sup> The logic behind it is that fairness should be allowed to justify or excuse the compelled conduct, whereas comity helps determine whether the conduct is justiciable, excused or rather subject to the full range of sanctions.<sup>362</sup> Moreover, apart from those two principle considerations, the ABA suggests also further grounds, and among them the analogy to the domestic state action doctrine,<sup>363</sup> which is significant.<sup>364</sup> Some scholars claim that recognizing the fairness rationale of the foreign state compulsion implies finding its origin in the state action doctrine.<sup>365</sup>

The 1986 Restatement recognized foreign sovereign compulsion in section 441.<sup>366</sup> Comments and Reporter's Notes provide some more insights into the matter. First of all, in the case of contradictory commands of two states, preference is given to the law of the state where the act is to be done.<sup>367</sup> At the same time, in cases where the conduct at stake has direct effects in both the territorial state and the state of nationality, the preference is not as strong.<sup>368</sup> Moreover, the Restatement takes the view that this particular defence requires establishing that the conduct in question was not only tolerated by the state, but required. What is more, contrary to the court in *Texaco* the Restatement generally recognizes the compulsion only

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<sup>360</sup> Ibid., p. 1293.

<sup>361</sup> BE Hawk, 'Special Defenses and Issues, Including Subject Matter Jurisdiction, Act of State Doctrine, Foreign Government Compulsion and Sovereign Immunity' (1981) 50 Antitrust L.J. 562, p. 571. Waller (ed), *Special Defenses in International Antitrust Litigation*, p. 79. The Department of Justice and The Federal Trade Commission, section 3.32.

<sup>362</sup> Waller (ed), *Special Defenses in International Antitrust Litigation*, p. 81.

<sup>363</sup> Ibid., p. 79.

<sup>364</sup> See discussed p. 74 below.

<sup>365</sup> J Leidig, 'The Uncertain Status of the Defense of Foreign Sovereign Compulsion: Two Proposals for Change' (1991) 31 Va. J. Int'l L. 321, p. 328.

<sup>366</sup> Section 441:

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

(2) In general, a state may require a person of foreign nationality (a) to do an act in that state even if it is prohibited by the law of the state of which he is a national; or (b) to refrain from doing an act in that state even if it is required by the law of the state of which he is a national., *Restatement of the Law (Third): Foreign Relations Law of the United States* (American Law Institute, Philadelphia 1986).

<sup>367</sup> Ibid., Comment a.

<sup>368</sup> Ibid., Comment b.

when ‘embodied in binding laws or regulations subject to penal or other severe sanctions’.<sup>369</sup> It is explicitly acknowledged that the defence is not available when the state’s orders are given in the form of guidance, informal communications, or the like. It is fair to conclude that the Restatement does not allow the recognition of foreign sovereign compulsion in a case factually similar to *Texaco*, thus limiting its general availability. Moreover, the real threat of penal or other ‘severe sanctions’ is crucial and the danger of termination of the business, by revocation of the necessary license, is provided as an example thereof. The loss of future opportunities does not meet the standard.<sup>370</sup>

Similar to the Restatement, the Antitrust Enforcement Guidelines of the DOJ and FTC from 1995<sup>371</sup> consider the threat of penal or other severe sanctions indispensable for the recognition of the compulsion.<sup>372</sup> The issue of the form of compulsion is not discussed, therefore it may be that informal pressure may meet the standard in certain cases. Measures short of compulsion will not be able to fall within the scope of the defence. No strict limits are recognized with respect to territorial limitations of the doctrine, nevertheless it is clarified that the defence is available ‘normally’ in cases, where the compelled conduct was accomplished within the compelling state’s territory. It is pointed out that in cases, where the conduct occurs in the US, the defence is not available. The Guidelines also clarify that the defence does not apply in cases falling within the Foreign State Immunities Act’s commercial activity exception.

As Crampton points out the Guidelines narrowed down the applicability of the doctrine in comparison with the Guidelines issued in 1988. For example, the older document did not talk about sanctions but “the imposition of significant penalties or to the denial of specific substantial benefits”. Moreover, with respect to territorial limitation it was previously said that the defence will not be available if the conduct took place in or primarily in the US.<sup>373</sup>

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<sup>369</sup> Ibid., Comment c.

<sup>370</sup> Ibid., Comment c and Reporter’s Note 3.

<sup>371</sup> The Department of Justice and The Federal Trade Commission, the foreign sovereign compulsion is dealt with under section 3.32.

<sup>372</sup> Comparing these documents one should keep in mind that the Restatements, who ever extremely influential in practice, are the effect of a private codification of law in particular fields (*de lege lata*) undertaken by the American Law Institute, whereas the DOJ and FTC Guidelines express the view of the government agencies on the matter. For more information on the Restatements see:

<<http://www.ali.org/index.cfm?fuseaction=projects.main>> accessed 27/11/2010.

<sup>373</sup> Compare: PS Crampton, “The 1995 US Antitrust Enforcement Guidelines for International Operations: a

The foreign compulsion defence was recently invoked in *Vitamin C*.<sup>374</sup> In this case four Chinese manufacturer of vitamin C and their trade association were accused of price-fixing and limiting exports, including those to the US, *ergo* creation of an export cartel. They did not deny the allegations, instead they brought a motion to dismiss the case based on the doctrines of foreign sovereign compulsion, the act of state and international comity.<sup>375</sup> As the court duly noted, all the defences rested on Chinese government involvement: whether it required defendants to fix prices.<sup>376</sup> Ultimately, the court found the evidence too ambiguous and denied the defendants' motion.<sup>377</sup>

The Chinese government placed considerable importance on the case and submitted its first ever *amicus* in front of a US court.<sup>378</sup> In the brief the Chinese ministry argued that the trade association was in fact the Chamber of Commerce, under its direct and active supervision, performing governmental functions authorized under Chinese law. In 1997 Chinese authorities issued a notice requiring strict control of vitamin C production, which required the Chamber to establish a special body to deal with the issue, a Sub-Committee for vitamin C. Only its members had the right to export vitamin C and its charter obliged them to 'voluntarily adjust their production outputs' and to 'strictly execute export coordinated price set by the Chamber and keep it confidential.' There was also a system of sanctions in place, including revocation of the membership or even an indirect threat of a cancellation of the vitamin C export right. Based on the regulatory framework, the defendants and the Chinese ministry argued that the defendants were compelled under Chinese law, and although the ministry itself did not set prices, the defendants were unable to export vitamin C at a non-conforming price level.<sup>379</sup> In relation to the brief, the court concluded that it was entitled to 'substantial deference', but it was not to be regarded as conclusive evidence on compulsion. This was particularly so in the instant case, where the documentary evidence provided by the plaintiffs directly contradicted the brief's position.<sup>380</sup>

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foreign perspective' (1996) 1 IBLJ 99, pp. 103-104. For analysis of the 1988 Guidelines with respect to the foreign sovereign defence see: , 'Report: Analysis of Department of Justice Guidelines - International Operations - Antitrust Enforcement Policy', pp. 996-998.

<sup>374</sup> *In re Vitamin C Antitrust Litigation (Vitamin C)* 584 F. Supp. 2d 546 (E.D.N.Y. 2008).

<sup>375</sup> *Ibid.*, p. 550.

<sup>376</sup> *Ibid.*, p. 552.

<sup>377</sup> *Ibid.*, p. 559.

<sup>378</sup> *Ibid.*, p. 552.

<sup>379</sup> *Ibid.*, pp. 552-554.

<sup>380</sup> *Ibid.*, p. 557.

At the same time, the plaintiffs claimed there was no single law or regulation compelling a price or price agreement at issue. Moreover, some evidence was presented, showing that the defendants were setting the prices by hand voting during a meeting. It was argued that the defendants set the minimum price, but at the same time undercut each other.<sup>381</sup> This part of the evidence suggested, in the court's opinion, a complex interplay between the defendants and the Chamber, making it difficult to determine the degree of their independence with respect to price decisions.<sup>382</sup>

As the court noted, in contrast to such cases like *Texaco*, in this case the parties contested both the origin and even the existence of the compulsion. Due to the non-transparent Chinese legal system, frequently relying on the ministerial regulations, it was not clear 'whether defendants were performing government function, whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens'.<sup>383</sup> Moreover, the court noted that a scenario where the defendants formed the cartel and only then asked for the state recognition was also conceivable, but it refrained from commenting on the availability of the defences claimed in this case. Finally the court considered the records too ambiguous 'to foreclose further inquiry into the voluntariness of defendants' actions' and the motion to dismiss was denied.<sup>384</sup>

*Vitamin C* seems to herald a revival of the reliance on the foreign state compulsion. China, due to characteristics of its economic and legal system and its still increasing importance in international trade provides new, legally challenging scenarios. In the recent *Animal Science* case<sup>385</sup> the plaintiffs, US companies, brought a class action against a number of Chinese companies exporting magnesite-based products to the US for alleged price-fixing in violation

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<sup>381</sup> *Ibid.*, p. 555.

<sup>382</sup> *Ibid.*, p. 556.

<sup>383</sup> *Ibid.*, p. 559.

<sup>384</sup> *Ibid.*, p. 559. As the plaintiffs filed a second amended complaint, adding two more defendants to the case - American corporation, directly purchasing vitamin C from Chinese manufacturer, the court dismissed the complaint with a leave to replead, making allegations against the new defendants. As for November 2010 the case has not been settled.

<sup>385</sup> *Animal Science Products v. China Nat. Metals & Minerals Import & Export Corp. (Animal Science)* 2010 WL 1324918 (D.N.J. 2010).

of the Sherman Act. The defendants brought a motion to dismiss the complain, claiming *inter alia* that they acted under government compulsion.<sup>386</sup>

Discussing more generally the characteristics of compulsion, the district court ‘distilled’ from *Mannington* a three-points test whereby the defendant invoking compulsion should show:<sup>387</sup> (a) the existence of an entity in the defendant’s state qualifying as an arm of the state by enjoying governmental or quasi-governmental powers that are ‘either uniquely peculiar to sovereigns or of essentially sovereign nature’, (b) a direct link between the entity’s powers and the defendant, allowing the entity to compel the defendant, subject to a significant negative repercussions for non-compliance, and (c) the compulsion is the fundamental force causing the defendant’s act, challenged as a violation of US law. Moreover, the court noted that ‘law need not be actually codified in order to be a “real law” that may be enforced’, showing that a formal law as such is not a condition *sine qua non* of the compulsion. Furthermore, it pointed out that the ‘non-compulsory connotations to an American ear’ of the literal translation of a foreign government prescript should not automatically qualify it as non-mandatory.<sup>388</sup> Besides, the court underlined that participation in the framing of the governmental prescript, does not exempt it from compulsion. Therefore the court, in principle, implicitly confirmed the availability of the compulsion defence even if a party participated in the creation of the compelling act.<sup>389</sup> The court dealt also with the issue of the force of the submission of a foreign government. It considered that it warrants a high degree of deference and in the instant case the ministry’s interpretations should be treated as ‘the final authority unless the Courts detect a Chinese legal provision or an alternative [ministry’s] statement that clearly and convincingly establishes the incorrectness of these interpretations.’<sup>390</sup>

In *Animal Science* the court faced a very similar problem to the one in *Vitamin C* case. The Chamber of Commerce (CCCC), empowered to administer the export licenses, was involved in setting the minimum prices for the exported products. Having analyzed the

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<sup>386</sup> The action was originally brought in 2005, but the first two years of the litigation concerned the matter related to the service of process, irrelevant from the perspective of this text. In 2008 the case was reassigned and further proceedings took place, the complaint was repleaded, finally leading to the discussed court’s opinion on the brought motions.

<sup>387</sup> *Animal Science Products v. China Nat. Metals & Minerals Import & Export Corp. (Animal Science)*, p. 49.

<sup>388</sup> *Ibid.*, p. 69.

<sup>389</sup> *Ibid.*

<sup>390</sup> *Ibid.*, p. 72.

evidence the court reached a conclusion that CCCMC was a ‘governmental appendage’.<sup>391</sup> It found also the existence of sufficiently severe possible punishment for non-compliance.<sup>392</sup> It noted, distinguishing the case from *Texaco*, that the government compulsion lasted for a long time and was achieved not by a particular act, but was rather created by a legal regime, employing ‘various regulatory mechanisms producing a composite effect of a never-ceasing correlation between the minimum price requirement and punitive measures for non-compliance with it’.<sup>393</sup> In effect the court found that the Chinese government compelled the companies, and forced upon them ‘a’ minimum price.<sup>394</sup>

This said, two issues remained unresolved. Firstly, the price figures are to be established. If they were never set, or set but left unknown to the defendants and to the Chinese authorities enforcing the minimum price requirement, then from the practical perspective there are to be treated as equal to zero,<sup>395</sup> and any agreement to comply with a price above it is to be considered a private agreement, outside the realm of government compulsion. Secondly, if the prices were known to the defendants and Chinese authorities, it is still possible that the companies could have entered into supra-minimum price (SMP) agreements. In such a case, SMP agreements could be illegal under US antitrust, irrespective of whether the Chinese authorities had the right to enforce them.<sup>396</sup> The case is to be repleaded and the court’s decision with regard to the abstention on the grounds of the government compulsion is reserved. As of November 2010 the case has not been settled.

In *Animal Science* the court took much more elaborated approach compared to *Vitamin C*, being much more sensitive to the peculiarities of the Chinese system, and the role of a formal law in it. This is a welcome development, especially as it may bring more in-depth understanding of the Chinese regulatory framework as such, leading to a more just and consistent application of US law in such cases. If ultimately the defendants in *Animal Science*

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<sup>391</sup> *Ibid.*, p. 78.

<sup>392</sup> *Ibid.*, p. 80.

<sup>393</sup> *Ibid.*, p. 87.

<sup>394</sup> *Ibid.*, p. 95.

<sup>395</sup> The court has established that the Chinese government compelled the defendants and forces upon them ‘a’ minimum price. Yet it is still possible that the factual price- ‘the’ price- was in fact never set by the government (therefore ‘the price’ equals zero), or that it was set, but never communicated to the defendants (therefore, again, ‘the price’ equals zero). In any of such cases, any agreements among the defendants fixing the price on any level would not allow defendants to rely on the sovereign compulsion defence.

<sup>396</sup> *Animal Science Products v. China Nat. Metals & Minerals Import & Export Corp. (Animal Science)*, p. 96.

are successful in their reliance on the sovereign compulsion defence, it will be an interesting development to see if the plaintiffs try to bring the same case directly against China.

Apart from *Animal Science* there is another interesting case concerning government compulsion awaiting resolution in the American court. In *Resco*<sup>397</sup> an American company brought a complaint against Chinese defendants for their alleged price-fixing of exports of bauxite in violation of the Sherman Act. The facts of the case are again similar to *Vitamin C* and *Animal Science*, as are the arguments of the defence, the core being the invocation of government compulsion. Interestingly, in this case the court decided, in June 2010, to stay the proceedings in the anticipation of the Panel Report in the proceedings brought by the US against China within the WTO Dispute Settlement framework concerning China's export restrictions on various raw materials, including bauxite. One of the measures complained of by the US is the very issue of price requirements.<sup>398</sup> The US contends that those are the actions of the Chinese government, as the respondents in *Resco* claim. Although the decisions of the Dispute Settlement Body are not binding upon the court, it considered that Panel's findings may at least simplify the analysis. The outcome of the case remains to be seen, but clearly it offers a rare opportunity to address the issue of the scope of the compulsion defence (is it a complete or only partial defence), as well as broader consequences with respect to the act of state doctrine. In any case *Resco* proves that a single case can be dealt with both as a private-private litigation and public-public dispute. If the case against China is successful within the WTO framework, it may prove that at least with respect to the foreign sovereign compulsion there is an effective mechanism at the multilateral level to address the issue. At the same time it raised the question whether the plaintiffs could bring, in a follow-up, a piggy-bank antitrust action in the US against China, benefiting from the body of evidence analyzed within the WTO dispute settlement framework. It would allow the plaintiffs to win treble damages, but if possible, it would make China responsible twice for the same conduct, against the principle *ne bis in idem*.

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<sup>397</sup> *Resco Products v. Bosai Minerals Group (Resco)* 2010 WL 2331069 (W.D.Pa. 2010).

<sup>398</sup> 'Further, through its ministries and other organizations under the State Council as well as chambers of commerce and industry associations, China administers the price requirements in a manner that restricts exports and is not uniform, impartial, and reasonable.' China- Measures Related to the Exportation of Various Raw Materials, Request for the Establishment of a Panel by the United States, WT/DS394/7, 9 November 2009, <<http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/394-7.doc>> accessed 21/07/2010, p. 6. In December 2009 the single Panel was established to examine this dispute together with similar complaints brought by the European Union and Mexico against China. In March 2010 the Panel was composed. As for November 2010 the outcome of the dispute is yet to be seen. For the current status of the dispute see: <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds394\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm)> accessed 01/11/2010.

The lack of authority from the Supreme Court clarifying the doctrine makes the foreign sovereign compulsion a poorly predictable legal tool. It is unclear whether the conduct must be compelled by a formal law. It is submitted, and the latest positions of district courts suggest, that this is not so. The wider adoption of the test suggested by the district court in *Animal Science* would be a welcome development. In case of recognition of compulsion, it is not settled what kind of role the doctrine should play: whether it is a complete bar to liability, or just an important factor to be weighted in the comity considerations analysis. Those are important questions that await clarification and their salience seems to be on the rise.

### 1.7.1.1 US domestic state action doctrine

The state action doctrine<sup>399</sup> is a defence available in US domestic antitrust cases for private anticompetitive conduct that was undertaken pursuant to and under supervision of a state of the US. It was recognized by the Supreme Court in *Parker* (therefore it is sometimes called the Parker doctrine), where it observed that “(t)here is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations.”<sup>400</sup> The Parker doctrine holds that anticompetitive action by state governments and private conduct in compliance with it are immune from the liability under the Sherman Act.

The DOJ's Antitrust Division disagreed with the American Bar Association on the point whether the state action doctrine should be made applicable internationally, ie ‘foreign government-regulated conduct’, *ergo* the actions of foreign states and the private conduct pursuant to such actions and supervision of a foreign state. The ABA was in favour of such a solution. In its Report on the 1988 Draft Guidelines the ABA similar to the court in *Parker* found nothing in the legislative history of the Sherman Act indicating that it should apply to foreign government-regulated conduct. Moreover, it was pointed out that ‘(s)overeign foreign states, entitled as a matter of international law to equal status with the United States federal government, deserve at least as much respect for their regulatory actions as semi-sovereign

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<sup>399</sup> For more in detail on the US domestic state action doctrine see: S Semeraro, 'Demystifying Antitrust State Action Doctrine' (2000) 24 Harv.J.L.& Pub.Pol'y 203.

<sup>400</sup> *Parker v. Brown (Parker)*, p. 351.

states within our federal system.’<sup>401</sup> In the final version of the 1988 Guidelines the DOJ did not share this logic and considered application of the state action doctrine inappropriate in international cases, citing the federalist concepts behind it and difficulties in establishing ‘clearly articulated state policies and active state supervision’ in an international context. The ABA in response noted that its comments ‘appear to have fallen on deaf ear’.<sup>402</sup> The later Guidelines from 1995 mention the doctrine only briefly in a footnote, where it is distinguished from foreign sovereign compulsion. Yet, this distinction is somewhat ambiguous: “(t)he state action doctrine applies not just to the actions of states and their subdivisions, but also to private anticompetitive conduct that is both undertaken pursuant to clearly articulated state policies, and is actively supervised by the state.”<sup>403</sup>

Was the Parker doctrine available not only in the US domestic context but also in cases involving foreign states and foreign companies, it would systematically solve a number of issues. First of all, the state action doctrine does not require state compulsion as such to remove liability from private companies acting according to a state prescription. Generally speaking it is sufficient that they act pursuant to a clearly established policy of a state, under its supervision. This is significantly less demanding standard to meet and it has the potential to better accommodate foreign regimes where the role of formal law differs from the role it plays in free-market-economy jurisdictions. Particularly, it seems better equipped to handle regimes with more both direct and indirect state involvement in economic affairs. Making the state action doctrine available in the international context would therefore bring more transparency into US antitrust. Furthermore, this would also answer in the negative the outstanding question concerning the possibility of an antitrust suit in the US court against a foreign sovereign. This itself would be a very welcome development from the perspective of international relations and it seems, in light of its recent position in the *RPP*, that the DoJ is in favour of settling sensitive transnational commercial disputes involving a foreign state, and not falling under the WTO regime, through international negotiations rather than in the courtrooms in the US. Was the state action doctrine made applicable in an international context in antitrust cases, the avoidance doctrines would become largely irrelevant in this field.

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<sup>401</sup> ABA Section of Antitrust Law and Section of International Trade and Practice, 'Report to the House of Delegates [on Draft Antitrust Guidelines for International Operations]' (1988) 57 Antitrust L.J. 651, pp. 668-669.

<sup>402</sup> Compare: , 'Report: Analysis of Department of Justice Guidelines - International Operations - Antitrust Enforcement Policy', pp. 667-668.

<sup>403</sup> The Department of Justice and The Federal Trade Commission, fn. 93.

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

### **1.7.2 The European Union: the state action doctrine**

The European Commission and the Court of Justice accepted the sovereign compulsion defence, very narrowly applied, in cases where companies were left by a state with no margin of freedom for autonomous action and competition. The terminology in this case is different than in the discourse in international law, as the defence is called the state action doctrine.<sup>404</sup> It operates in fact as a jurisdictional rule at the EU level. Until now it was raised only in the intra-EU context, but there is no reason why it could not be relied on by a foreign company, in case of extraterritorial application of EU competition law. In scenarios where no autonomous conduct can be found on the part of the undertakings involved in the anticompetitive conduct, then the articles 101 and 102 of the TFEU are not applicable and the undertakings involved are free from liability. In the EU context, a member state forcing companies to act in an anticompetitive would most likely be found in breach of its own obligations under the TFEU.<sup>405</sup>

*Ladbroke Racing*<sup>406</sup> was the first case when the Court of Justice clarified the position of the EU competition law on the matter of compulsion. It noted that the core EU competition law provisions, articles 101 and 102 of the TFEU, apply only to anticompetitive conduct of undertakings carried out on their own initiative. The court expressly noted that if the conduct is required by the legislation, or if the legislation creates a legal framework eliminating competition on the part of the undertakings, then the restrictions of competition are not attributable to the undertakings.<sup>407</sup>

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<sup>404</sup> Compare: OECD, 'Working Party No. 3 on Co-operation and Enforcement- Roundtable on the Application of Antitrust Law to State-Owned Enterprises- European Commission ' DAF/COMP/WP3/WD(2009)42 <<http://ec.europa.eu/competition/international/multilateral/antitrustlaw.pdf>> accessed 14/06/2010, para. 11-14.

<sup>405</sup> Especially under so-called loyalty clause (art. 4(3) TEU), which obliges member states to facilitate the achievement of the Union's tasks and prohibits them to take any measures jeopardizing such endeavors, in conjunction with Protocol 27 on the Internal Market and Competition, annexed to TEU and TFEU, which provides that EU 'includes a system ensuring that competition is not distorted'.

<sup>406</sup> *Commission of the European Communities and French Republic v Ladbroke Racing Ltd. (Ladbroke Racing)*, Joined cases C-359/95 P and C-379/95 P [1997] ECR I-6265.

<sup>407</sup> *Ibid.*, para. 33.

Van Bael suggests that compulsion as a defence had been already earlier recognized by the Commission with respect to voluntary restraint agreements.<sup>408</sup> The Commission noted that article 101 does not apply to export agreements imposed on firms in non-member states by their governments, apart from scenarios when there was an agreement or concerted practice among firms. At the same time, it was pointed out that in cases when the government only authorizes the export agreements, *ergo* does not force their creation, article 101 applies.<sup>409</sup> Similarly, in its decision in *Aluminium imports*,<sup>410</sup> a case concerning anticompetitive agreements with very broad membership between mostly primary manufacturers of aluminium, the Commission noted that even if a government supported a contract in violation of the competition law, this does not alter the position of the companies involved, therefore it is not a valid defence.<sup>411</sup>

It may be inferred that if a state supports, encourages, or in any other non-obligatory way tries to convince an undertaking to engage in an anticompetitive conduct, the latter is left with no defence. This became particularly clear in *Wood Pulp*<sup>412</sup> where an US export cartel attempted to rely on such a defense. The court noted that the US legislation, in this case the Webb Pomerene Act, only exempts export cartels from the scope of application of US antitrust, but does not require their creation.<sup>413</sup>

The state compulsion does not have to be achieved by legal rules. In *Asia Motors III*<sup>414</sup> the court recognized that even in the absence of any binding regulatory provisions imposing the conduct in question, article 101 will not be applicable if the conduct was unilaterally imposed by the authorities through the exercise of ‘irresistible pressure’. The term was not defined by the court, but it was illustrated by a threat to adopt measures likely to cause substantial losses

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<sup>408</sup> I Van Bael and Van Bael & Bellis, *Competition Law of the European Community* (Kluwer, The Hague 2005), p. 62.

<sup>409</sup> The European Commission, *Third Report on Competition Policy*. (Office for Official Publications of the European Communities, Brussels 1974), p. 27, point 20 and fn. 3.

<sup>410</sup> European Commission, 85/206/EEC, *Decision Relating to a Proceeding Under Article 85 of the EEC Treaty, IV/26.870 - Aluminium imports from eastern Europe (Aluminium imports)*, OJ L92 , 1-76 (1984).

<sup>411</sup> *Ibid.*, at 10.

<sup>412</sup> *A. Ahlström Osakeyhtiö and others v Commission of the European Communities (Wood Pulp)*, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 [1988] ECR 5193.

<sup>413</sup> *Ibid.*, para. 20.

<sup>414</sup> *Asia Motor France SA and others v Commission of the European Communities (Asia Motor III)*, Case T-387/94 [1996] ECR II-961.

for the undertaking involved. This needs to be proved on the basis of objective, relevant and consistent evidence.<sup>415</sup>

The lack of evidence to support the allegation of compulsion was an issue in *Stichting Sigarettenindustrie*.<sup>416</sup> The case dealt with various anticompetitive agreements in the tobacco business in the Netherlands. The applicants claimed that the Dutch authorities ‘decisively influenced’ the agreements and that they threatened to take otherwise unspecified ‘measures’ if their conduct did not comply with expectations. The argument of a threat was not supported by any evidence. The Commission was of the view that the documents available did not show that the agreements at stake were concluded ‘with the approval or at the instigation’ of the Netherlands, who denied such an allegation. In the proceedings the court established that the authorities held meetings with the undertakings involved and, in this forum, they were to ‘indicate certain objectives they wished to see achieved’. Yet, there was no evidence proving that the ‘objectives’ were to be achieved by the conclusion of the anticompetitive agreements found in violation of the competition law.<sup>417</sup>

The exclusion from the scope of the applicability of article 101 is applied restrictively.<sup>418</sup> Therefore, if despite the existence of national legislation or other state-driven means severely limiting competition, there is still a scope for effective competition the provisions of article 101 apply. The court had another opportunity to express its views on the matter in *Strintzis Lines*.<sup>419</sup> The Commission fined shipping companies providing ferry services between Greece and Italy, after finding infringement of article 101. The applicants claimed *inter alia* that the legislative and regulatory framework, and the official policy decisively restricted their autonomy. It was to oblige them to contact each other to consult and negotiate the crucial parameters of their policy, including prices.<sup>420</sup> The court recalled that articles 101 and 102 apply only to anticompetitive conduct engaged in by undertaking on their own initiative. It also reaffirmed, referring *inter alia* to *Ladbroke Racing*, that if the conduct at stake was required by the national legislation, or if a legal framework was such as to eliminate any

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<sup>415</sup> *Ibid.*, para. 61-65.

<sup>416</sup> *Stichting Sigarettenindustrie and others v Commission of the European Communities (Stichting Sigarettenindustrie)*, Joined cases 240, 241, 242, 261, 262, 268 and 269/82 [1985] ECR 3831.

<sup>417</sup> *Ibid.*, para. 38-40.

<sup>418</sup> *Heintz van Landewyck SARL and others v Commission of the European Communities (Van Landewyck)*, Joined cases 209 to 215, 218/78 [1980] ECR 3125, para. 130, 133.

<sup>419</sup> *Strintzis Lines Shipping SA v Commission of the European Communities (Strintzis Lines)*, Case T-65/99 [2003] ECR II-5433.

<sup>420</sup> *Ibid.*, para. 123.

possibility of competition, then articles 101 and 102 do not apply.<sup>421</sup> Similarly, findings from *Asia Motors III* (irresistible pressure notion) were reaffirmed. In the instant case the question was whether the cumulative effect of the regulatory framework and the state policy ‘robbed’ the parties involved of their autonomy in adopting tariff policy on the investigated routes, removing any possibility of competition between them.<sup>422</sup> The court answered in the negative, finding that the undertaking enjoyed autonomy in setting its pricing policy, and that there was no ‘irresistible pressure’ on them to conclude tariff agreements and that their claims were unfounded.<sup>423</sup>

The EU state action doctrine is a jurisdictional judge-made rule. It provides a complete defence in antitrust litigation for parties compelled by a state to act in a violation of EU competition law. It seems that it is applicable to explicit compulsion, as well as to other, less legally obvious but similarly compelling scenarios, wherein a state places an ‘irresistible pressure’ on the party to act in an anticompetitive way, under the threat of substantial losses, or other serious, but not necessarily penal sanctions.

The EU state action doctrine potentially fully frees companies from liability, unlike the US foreign state compulsion, in which case this issue is still not settled. Furthermore, in relation to the US a trend is noticeable, suggesting a limitation of the availability of the defence only to cases where a formal law was the source of compulsion, whereas in the EU context an irresistible pressure of a state, or particular regulatory framework could potentially suffice to make the defence available. Finally, in case of US the foreign state compulsion defence, as the name explains, is available in cases involving foreign states. The domestic scenario is covered by the US domestic state action doctrine. In the EU framework the state action defence is well established in the intra-EU context, but also theoretically applicable in cases involving non-EU states and companies.

### **1.7.3 What happens in case of compulsion?**

The foreign sovereign compulsion doctrine is a defence available for a private party compelled by a government to act in an anticompetitive way. The fact of liberating it from liability does not mean that the injured parties are left with no recourse. As in all state-driven

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<sup>421</sup> Ibid., para. 119.

<sup>422</sup> Ibid., para. 124.

<sup>423</sup> Ibid., para. 138-141.

and trade-relevant scenarios, in cases where states involved belong to the WTO, there is a possibility of opening a trade dispute for nullification and impairment of the long-negotiated trade benefits.<sup>424</sup> This is not a route available directly for private parties involved, as only the WTO member can bring cases within the dispute settlement system, but nothing stands in the way for a private party to lobby their respective authority to open such a case and to sue afterwards, in a follow-up.

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<sup>424</sup> This avenue has been unsuccessfully tried by the US which brought a case against Japan concerning its alleged less favorable treatment of imported photographic paper and film products. The issues at stake were various measures securing exclusive access to the largest wholesale distributors for Japanese Fuji, strengthened by various other measures making it very difficult for Kodak products to penetrate Japanese market. See: *Japan – Measures Affecting Consumer Photographic Film and Paper (Japan- Film)* WT/DS44/R, adopted 22/04/1998.

## *Conclusions*

The international dimension of competition law, although recognized already at the times of the League of Nations, became the focus of attention of policy-makers, researchers, and most importantly courts only in the last few decades of the XX century. At the time when international trading system was being organized, consensus on competition rules was missing. The competition laws were not built into that agenda. Individual states started addressing international antitrust concerns unilaterally, mainly having recourse to extraterritoriality. This approach allowed some states to deal, to a large extent successfully, with the private international antitrust arrangements. Nevertheless, the private-public or purely public conduct and agreements remain a challenge, even for the most powerful states.

In a diversified, multi-polar world, marked by very different levels of state involvement and state engagement in economic affairs, the issue of managing state actors gains importance. This piece analyzed four doctrines allowing to bar litigation of an antitrust case involving or implicating a foreign state. It proves that the present legal framework is ill-suited to handle such cases, to the detriment of the global welfare and the global system itself.

Furthermore, this analysis reveals existing fundamental inconsistencies. Competition laws and competition regimes are built on the plinth of the neo-liberal school of economic thought, focusing on the economic analysis of the effects of particular forms of economic arrangements on total welfare. The doctrines barring litigation of cases involving or implicating foreign states have no connection with these economic principles. Although they have their own, often different roots, they share clearly noticeable respect for a state as a subject of international law, very much in line with the traditional public-international-law way of thinking.

International interdependence is a characteristic of modern trading.<sup>425</sup> This fact requires significant changes in the way international economic relations are perceived and dealt with.

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<sup>425</sup> See generally: F Mégret, 'Globalization' in R Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (online edn, Oxford University Press, 2010), A Mahiou, 'Interdependence' in R Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (online edn, Oxford University Press, 2010). For good overview of this phenomenon see: G de la Dehesa, *Winners and Losers in Globalization* (Blackwell Publishing, Malden, Oxford, Carlton 2006), and for a more questioning approach with regard to an inevitability of further globalization see: BC Greenwald and J Kahn, *Globalization. n. the Irrational Fear That Someone in China Will Take Your Job* (John Wiley & Sons, 2008).

More interdependence necessitates more co-responsibility, if the system is to be sustainable in the long run.<sup>426</sup> This was one of the reasons why the WTO came into existence. Similar redefinition of the regulatory framework needs to take place in the area of international competition law. The present situation where particular states can *de facto* free-ride on the global system through anticompetitive conduct targeting and exploiting some or all, sheltering behind the bulwark of the institution of a state is unacceptable *de lege ferenda*. Should a foreign state enjoy impunity for its anticompetitive conduct and agreements to the detriment of other states and their nationals? The answer from the global perspective must be in the negative. The visible relevant revival of the discussed doctrines shows that those are topical issues. Hopefully it will lead to further clarification of the law on the matter and a more systematic, global approach towards competition, where the states would be recognized as participants of the competitive process.

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<sup>426</sup> See *inter alia*: JE Stiglitz, *Making Globalization Work* (1st edn W.W. Norton & Co., New York 2006), JN Bhagwati, *In Defense of Globalization* (OUP, New York 2004), and more critically: H-J Chang, *Bad Samaritans. The Myth of Free Trade and the Secret History of Capitalism* (Bloomsbury, New York 2007).

## *Appendix: The Avoidance Doctrines Applied*

This section rounds up the whole piece, outlining a hypothetical litigation wherein all the discussed avoidance doctrines are raised. This is a theoretical exercise emphasizing the range and strength of avoidance doctrines available in antitrust cases involving or implicating states.

Let us imagine E, a group of companies in the mining industry, extracting and exporting rare metals operating in countries X, Y, and Z. Assume that high-tech manufacturers M from a state A rely heavily on export from X, Y, Z. Having analyzed market tendencies, M realizes that the prices of the metals are at an artificially high level and that there is no real competition on the market. X, Y, Z export 95% of those rare metals. M decides to bring a case in the local court for damages and injunction against companies from X, Y, Z for price-fixing of export in breach of A's national competition laws.

In this setting defendants, be it E, or X, Y, and Z, could invoke or rely on all the mentioned avoidance doctrines. First of all, the respondents E, if they are private companies, may claim that they were forced to export at a particular price by their respective governments. If this is established, they may be freed from liability. In such a case the question remains open- who would repair the harm done? Could M bring a case against X, Y, and Z? It remains an open question whether national competition laws apply to foreign states. In light of the anti-OPEC litigations in the US and the broad definition of the term 'undertaking' in the EU it seems that important competition regimes seem to answer in affirmative. Alternatively, if E are state-owned they could rely on other available doctrines. The same would happen if their compulsion was not recognized. In case E are recognized as part of a state, then in fact the respondents in the case would be directly X, Y and Z. They could claim that the issue in the case is non-justiciable, because the export price was in fact established by intergovernmental agreement between them and, as concerning management of natural resources, it is sovereign in nature. As a transaction among sovereign states, it is non-justiciable. X, Y, and Z could argue that there is no manageable international standard to judge the agreement of sovereign states with respect to their dealings with regard to their natural resources. If this argument is not recognized by the court, the next logical step would be to claim state immunity. In this case, the most important factor from the respondents perspective would be to underline the sovereign nature of their activities, therefore the management of natural resources and their

importance in the state's economy. Finally, if all above arguments do not suffice to block the litigation, the respondents could argue that the case is barred from adjudication by the act of state doctrine, claiming that when allowed to proceed the court would be forced to judge the legality of agreements and decisions of foreign sovereign states with respect to their decisions concerning the management of natural resources.

This line of argumentation would hold not only in case of natural resources. This is a particularly sensitive, sovereignty-prone area, but all the doctrines discussed above are potent also in other settings, including more clear-cut commercial activities. At the end of the day, the defendants need to succeed only in one point of all raised to bar the litigation. At the same time defendants would in practice invoke all doctrines available in their situation, depending on their nature- be it private or state-controlled companies, when pleading the case, asking the court to consider them alternatively. Furthermore, in case of a suit brought against X, Y, and Z, they would most probably raise an issue of the general applicability of competition laws to a foreign state as a preliminary issue.

**Chart 1 The hypothetical reliance on the avoidance doctrines visualized.**

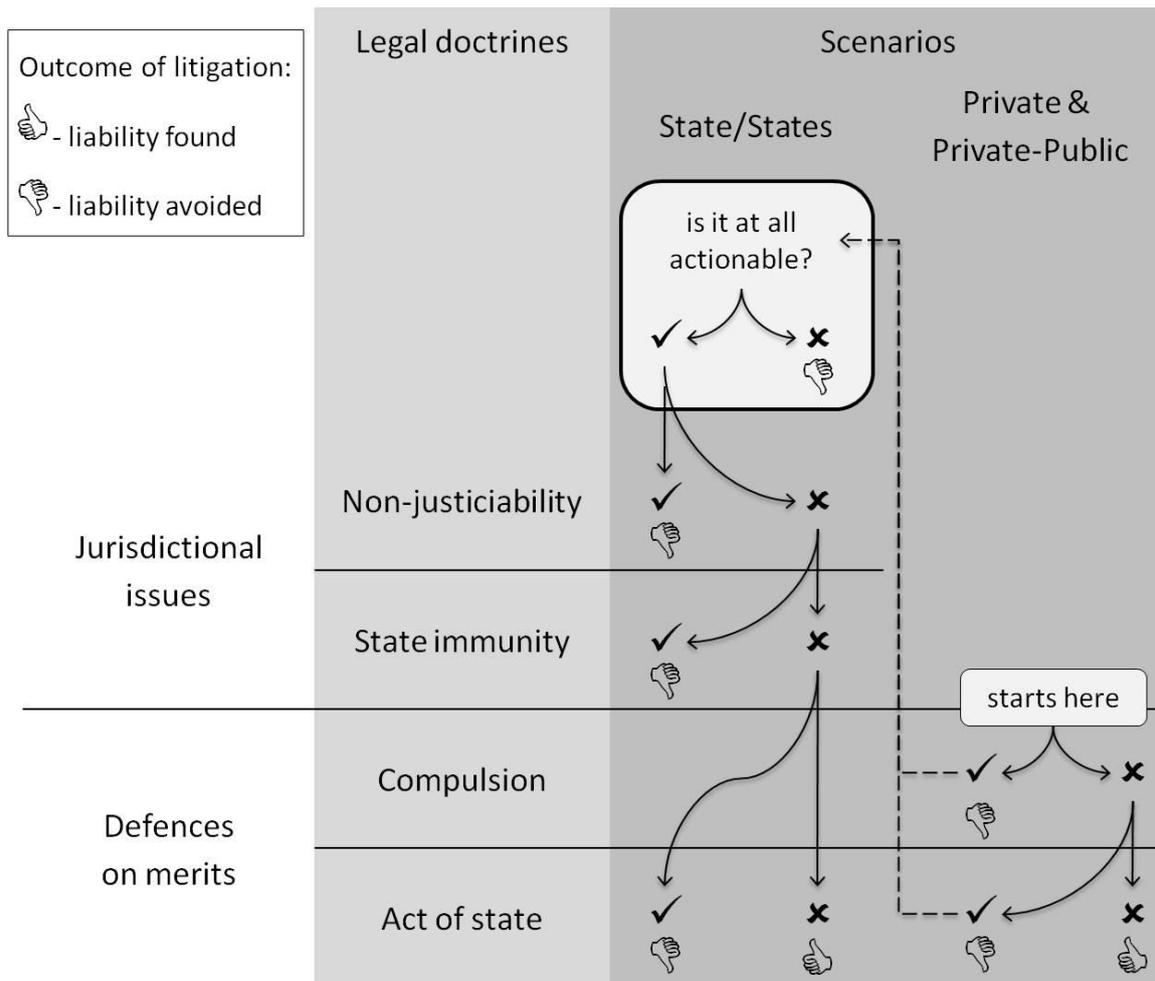


Chart 1 visualises possible developments in such a case. Lines present potential moves in argumentation among avoidance doctrines by the defendants. The continuous lines depict possible developments known to date, whereas dotted lines point out to uncertainties with respect to a possible continuation of the legal battle, where a defendant would change from a private party to a state. The check mark (✓) marks the successful reliance on a particular doctrine, whereas ✗ marks its inapplicability, inviting a subsequent move, when possible, to invoke another doctrine. All of the doctrines have been placed in a logical order of invocation- at the top of the chart we find those relating to the issues of justiciability and jurisdiction, whereas at the bottom there are defences on merits. Thumbs signs point out the outcomes of the litigation. Thumbs up (👍) mark the situation when reliance on the avoidance doctrines was unsuccessful, *ergo* the liability may be found. Thumps down (👎) represent a successful barring of the litigation, preventing further litigation and allowing the anticompetitive conduct to remain legally unaffected and unpunished.

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