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Foreign State's entanglement in anticompetitive conduct

Marek Martyniszyn *

Abstract

Transnational competition cases pose numerous challenges— from accessing foreign-based evidence to effectively enforcing decisions or judgments in their aftermath. Some of such cases are quite special in that the underlying conduct involves or implicates a foreign State. This article makes an original contribution to the scholarship by filling the existing gap and developing a typology of State's entanglement in conduct causing competitive harm abroad. It also examines the way in which foreign State's involvement or implication can be addressed in the adversely affected forum. Moreover, the key broader considerations which need to inform policies and approaches toward such cases are identified and evaluated. It is argued that competitive harm resulting from commercial dealings should be pursued under competition laws regardless of the character of the parties involved, unless there are overriding reasons justifying abstention. States should not enjoy immunity for competitive harm resulting from their commercial dealings. Agencies and courts in the affected fora should strive to clarify this matter. A clear State's policy on dealing with inbound competitive harm may also make foreign partners more receptive to concerns about policies which facilitate competitive harm which they may be pursuing.

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(1). Introduction

In the interconnected world, the conduct of entities in one jurisdiction may, and often does, have direct effects in another. The same applies to competitive harm, which often stretches beyond one country and may even focus solely on foreign markets. As the international community has yet to develop a multilateral solution to transnational anticompetitive conduct,¹ it is currently being pursued by the competition agencies (which often coordinate their actions with foreign counterparts²) and / or private plaintiffs in the affected jurisdictions.

Transnational competition cases pose numerous challenges— from accessing foreign-based evidence to effectively enforcing decisions or judgments in the aftermath. An additional layer of complexity arises when a foreign State becomes involved or implicated in the underlying anticompetitive conduct. The existing scholarship examines this phenomenon predominantly through two lenses. The first strand of research focuses on and investigates the defences and doctrines of abstention (such as foreign State compulsion or the act of state doctrine) which come to play in competition law cases involving States.³ The second strand analyses the applicability of domestic competition laws to anticompetitive acts and measures of a State and State-owned firms internally, within a home jurisdiction.⁴

This article makes an original contribution to the scholarship by filling the existing gap and developing a typology of State's entanglement in conduct causing competitive harm abroad. In Part 2 it identifies the key types of policies and measures, both inbound and outbound oriented, which lead to such harm on foreign markets, ranging from State's purely commercial conduct to its core sovereign activities. In this process the article also distinguishes between potentially actionable State involvement and non-actionable facilitation, pointing to the limits of competition law and the need to seek remedies in other systems of law or beyond it. In order to facilitate a detailed analysis with wide resonance the typology is supplemented with examples of relevant cases drawn from various jurisdictions, showing that State entanglement in anticompetitive conduct is both not a matter of past and not a feature of only other than free market economies. Subsequently, in Part 3, the article examines the way in which a foreign State's involvement or implication can be addressed in the adversely affected forum. Finally, in Part 4, it identifies and evaluates the key broader considerations which need to inform

¹ There were numerous attempts to develop global competition law—from the discussions at the conference of the League of Nations in the 1920s, over inclusion of competition law in the later abandoned agreement establishing International Trade Organisation after the World War II (the Havana Charter), to more recent failed attempts to include competition law in the framework of the World Trade Organisation. For discussion see David J. Gerber, *Global Competition: Law, Markets, and Globalization* (OUP 2010), 19-54, 101-107.

² See below notes 82-85 and the accompanying text.

³ See, for example, Marek Martyniszyn, *A Comparative Look on Foreign State Compulsion as a Defence in Antitrust Litigation*, 8(2) *Competition Law Review* 143 (2012); Eric Blomme, *State Action as a Defence Against 81 and 82 EC*, 30(2) *World Competition* 243 (2007); Fernando Castillo de la Torre, *State Action Defence in EC Competition Law*, 28(4) *World Competition* 407 (2005); Spencer Weber Waller, *Suing OPEC*, 64 *University of Pittsburgh Law Review* 105 (2002); Joseph P. Griffin, *Special International Antitrust Doctrines and Defenses*, 60 *Antitrust Law Journal* 543 (1992); Spencer Weber Waller, et al., *Special Defenses in International Antitrust Litigation* (ABA Antitrust Section 1995).

⁴ See, in particular, Eleanor M Fox and Deborah Healey, *When the State Harms Competition—The Role for Competition Law*, 79 *Antitrust Law Journal* 769 (2014), which was informed by a survey of 35 jurisdictions conducted in the framework of the UNCTAD Competition and Consumer Policies Branch's Research Partnership Platform. See also contributions in Thomas Cheng, et al., *Competition and the State* (Stanford University Press 2014); Malin Thunström, et al., *State Liability Under the EC Treaty Arising From Anti-Competitive State Measures*, 25(4) *World Competition* 515 (2002).

policies and approaches toward cases with foreign State entanglement (including some of the possible legal and extra-legal responses to adjudication in the affected forum). The State-related defences available in competition cases, while identified, are not the focus of this contribution. Similarly, the issue of extraterritorial jurisdiction is taken for granted.

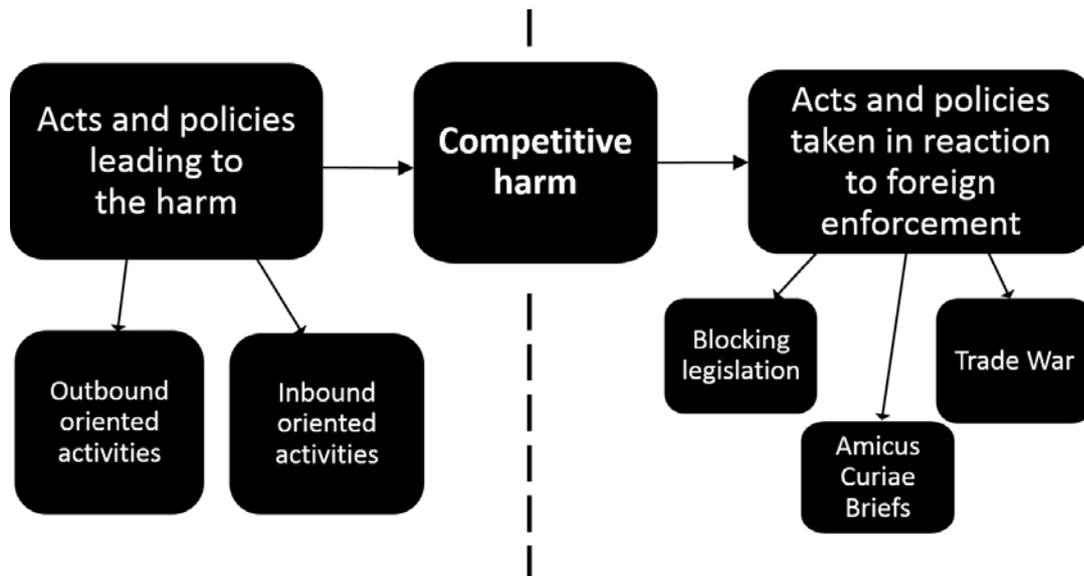
The article demonstrates that State involvement or implication— through a variety of measures— in anticompetitive conduct causing harm abroad remains both a topical and problematic issue, with significant practical consequences. It is argued that competitive harm resulting from commercial dealings should be pursued under competition laws regardless of the character of the party involved (be it a firm or a foreign State), unless there are overriding reasons justifying abstention (for example, relating to national security, or a State’s strategic interests). States should not enjoy immunity for competitive harm inflicted within other jurisdictions and resulting from their commercial dealings. Agencies and courts in the adversely affected fora should strive to clarify this matter. A clear State’s policy on dealing with inbound competitive harm may also make foreign partners more receptive to concerns about policies facilitating such harm which they may be pursuing. Extraterritorial enforcement in particularly sensitive, or allegedly borderline (commercial v sovereign) cases should be informed by broader considerations relating to the transfer of wealth resulting from transnational competitive harm and the possibility of adverse reactions of States affected by such enforcement.

(2). How a state may be entangled in an antitrust case in a foreign jurisdiction?

Various State and State-related actions and policies may lead to its entanglement in an antitrust case in a foreign jurisdiction. These can be divided into acts and policies which lead to or facilitate foreign harm, and those which were taken in reaction to a foreign investigation or adjudication in a given case (see Figure 1 below).⁵ This section focuses on the former category. Such acts and policies can be mapped out into a spectrum ranging from State’s own purely commercial to its core sovereign activities. Moreover, these actions be generally divided into outbound and inbound oriented activities.

⁵ Acts taken in a reaction to a foreign investigation or adjudication include submitting amicus curiae briefs to foreign courts, or enacting so-called blocking legislation in response to foreign proceedings. The latter category is discussed in Part 4 of this article. For analysis of the potential and the role fulfilled by amicus curiae briefs see Marek Martyniszyn, *Foreign States’ Amicus Curiae Participation in U.S. Antitrust Cases*, 61(4) Antitrust Bulletin 611 (2016).

Figure 1 Ex ante and ex post State entanglement in an antitrust case in a foreign forum



(a). Outbound oriented activities

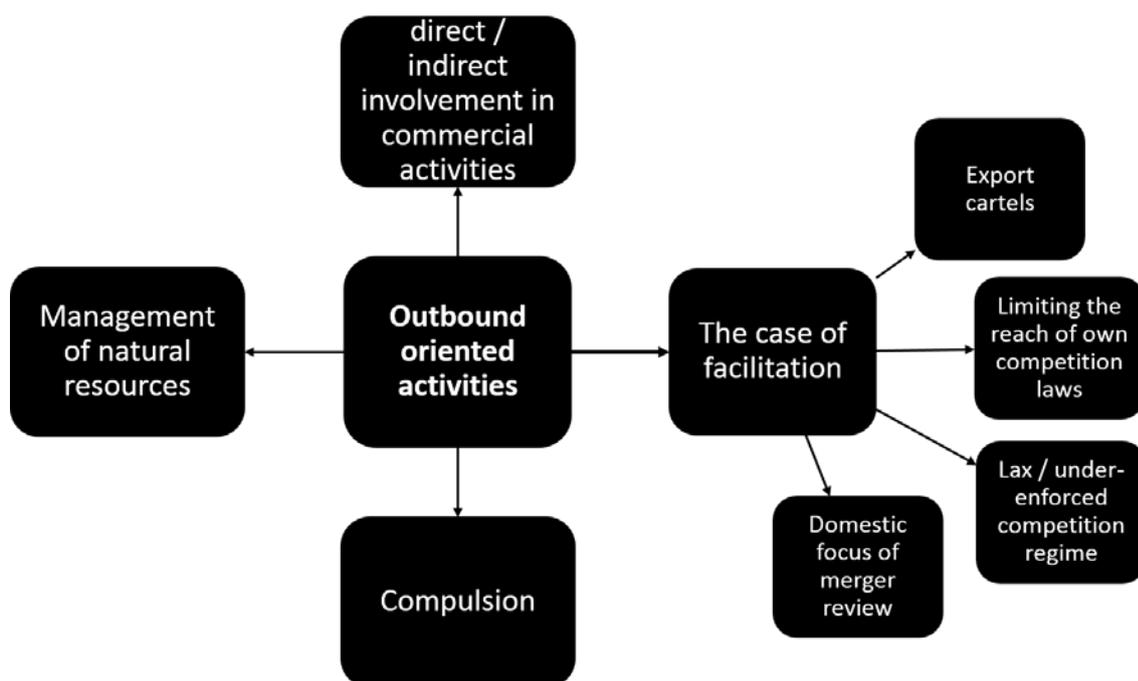
First, a State itself—directly, or indirectly through its organs or State-owned (State trading) enterprises—may be involved in commercial activities. If this is the case and the conduct at stake causes competitive harm in some other jurisdiction, a State may be implicated or even become a defendant in a foreign forum. There is no logical reason why a foreign State, in its commercial dealings, should receive some special treatment as compared to other market participants. Recent comparative research on these issues shows that many jurisdictions subject their own State-owned enterprises to domestic competition laws.⁶ Moreover, most jurisdictions now follow a restrictive doctrine of State immunity, which limits immunity to governmental acts (*acta de jure imperii*), and does not extend any special protection from jurisdiction beyond that category.⁷ The *Aluminium Imports* case, from 1985, serves as a good illustration. The European Commission dealt with price-fixing and market-sharing of aluminium involving some Western European firms and foreign trade organisations from then socialist Eastern European States. In its decision, the Commission rejected any claims of State immunity, relying on the doctrine of restrictive immunity. It noted that even if the socialist entities ‘were indistinguishable under Socialist law from the State, no sovereign immunity would attach to their participation ... since this was an exclusively commercial activity.’⁸

⁶ E. Fox and D. Healey, *supra* n. 4.

⁷ For discussion see, for example, Malcolm N. Shaw, *International Law*, (6th ed., CUP 2008) 704-08. The US formally embraced the restrictive doctrine already in 1952. See the letter from Jack Tate, an Acting Legal Adviser for the Secretary of State to the Attorney General, reprinted in *Alfred Dunhill of London, Inc. v. Republic of China*, 425 U.S. 682, App. 2 (1952).

⁸ European Commission, 85/206/EEC, Decision of 19 December 1984, IV/26.870- Aluminium Imports from Eastern Europe (Aluminium Imports), OJ L 92, 1 (1985), 9.2.

Figure 2 State entanglement in anticompetitive conduct: outbound oriented activities



State immunity is a principle of international law. Related to it are the concepts of non-justiciability or act of State.⁹ These are doctrines of domestic law recognized by some jurisdictions, which often come to play in cases raising State immunity. Both doctrines reflect the fact that domestic courts lack competence to sit in judgment on international activities of sovereign foreign States.¹⁰ The interplay between State immunity, non-justiciability, and act of State—in the antitrust context—is well-illustrated by the private suits brought against the Organization of the Petroleum Exporting Countries (OPEC) in the United States. Although, in one of the earlier cases a district court dismissed the suit relying on the principle of State immunity, the Appeal Court affirmed the judgment on the basis of the act of State doctrine, which it considered a prudential doctrine, allowing courts to avoid ‘judicial action in sensitive areas’.¹¹ In the more recent antitrust challenge to OPEC in the US, the lower court dismissed the suit relying on the act of State doctrine and non-justiciability.¹² This outcome was confirmed on appeal on the basis of non-justiciability only.¹³ State immunity was not raised. The general inference from these cases is that domestic courts are likely to find themselves not competent, on a non-justiciability basis, to adjudicate on international dealings of foreign States, if the underlying activities are not considered commercial.

⁹ The principle of non-justiciability, in essence, applies when there is no legal standard allowing for determination of the issue in question, or when it falls within the competence of the government and concerns policy choices. In the US, it is known as the political question doctrine. The act of state doctrine provides that courts shall not examine validity of acts of foreign States within the boundaries of their territories. For a review of the act of State doctrine and non-justiciability in a comparative context see Marek Martyniszyn, *Avoidance Techniques: State Related Defences in International Antitrust Cases* (CCP Working Paper No. 11-2, 2011), <http://ssrn.com/abstract=1782888> (accessed 20 Dec. 2016).

¹⁰ M. N. Shaw, *supra* n. 7, at 699.

¹¹ *Int'l Ass'n of Machinists v. OPEC (IAM II)*, 649 F.2d 1354, 1359 (9th Cir. 1981).

¹² *In re Refined Petroleum Products Antitrust Litigation (RPP)*, 649 F.Supp.2d 572 (S.D. Tex. 2009).

¹³ *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011).

The next activity potentially implicating a foreign State is that of facilitation. Through its actions and policies a State may be facilitating or even encouraging outbound anticompetitive conduct. The classic and almost universally occurring example is the case of export cartels' exemptions. Virtually all States make their competition laws applicable only to conduct (domestic or foreign) harming domestic markets. This means that export cartels (that is, cartels harming only foreign markets) do not face any threat in their domestic fora. They enjoy a safe harbour at home and may safely reap supra-competitive profits from foreign markets.¹⁴

Similarly, a State may more broadly limit the reach of its own antitrust laws so that entities operating in the forum are shielded from domestic challenges relating to any competitive harm inflicted abroad. The most prominent example is the US 1982 Foreign Trade Antitrust Improvements Act (FTAIA)¹⁵ which 'cut back the reach of the Sherman Act ... principally to protect US sellers from challenges ... for their activity abroad'.¹⁶ Policies facilitating outbound anticompetitive conduct may be even more nuanced. It may be a matter of a very lax or under-enforced competition regime, which allows for activities that, while also negatively affecting the domestic market, lead to predominantly foreign harm due to a chiefly outward-focused domestic economy or its important sector. Potash production in Canada provides a good illustration. Canada is the world leading producer of potash. It sells most of it through an export cartel,¹⁷ which allegedly coordinates prices with other potash producers. Simultaneously, less than five per cent of Canadian potash is sold domestically. Even if the Canadian market is also affected by higher potash prices, the domestic economy as a whole is likely to benefit greatly, even if only through the collected royalties and profit taxes of its exports.¹⁸

Similar—albeit subtler—is the case of merger review. A State may allow for concentrations which cause no or little harm on the domestic market, while leading to competitive harm on foreign markets. Motivations may be various, including a protectionist attempt to strengthen the competitive position of domestic industry versus foreign competitors.¹⁹ Often such an outcome is a corollary of the fact that the domestic agencies are mandated to consider only the *domestic*, rather than the overall effects of a concentration. Moreover, while cooperation between competition agencies in merger cases is growing, it does not rule out the possibility of divergent outcomes of the review. The attempted concentration between South African Gencor and Lonrho, cleared by the South African authorities and blocked by the European Commission may serve as an illustration.²⁰ The attempted merger between General Electric

¹⁴ For discussion of export cartels in more details see Marek Martyniszyn, *Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law*, 15(1) *Journal of International Economic Law* 181 (2012); D. Daniel Sokol, *What do We Really Know About Export Cartels and What is the Appropriate Solution?*, 4(4) *Journal of Competition Law and Economics* 967 (2008).

¹⁵ 15 U.S.C. § 6(a).

¹⁶ Eleanor M. Fox and Daniel A. Crane, *Global Issues in Antitrust and Competition Law* (Thomson/West 2010) 455.

¹⁷ Under subsection 45(5) of the Canadian Competition Act, agreements or arrangements relating only to the export of products from Canada are permitted, subject to certain exceptions.

¹⁸ For discussion of the potash cartel see Frederic Jenny, *Export Cartels in Primary Products: The Potash Case in Perspective* in Simon J. Evenett and Frederic Jenny (eds), *Trade, Competition, and the Pricing of Commodities* (Centre for Economic Policy Research 2012).

¹⁹ Ariel Ezrachi, *Globalization of Merger Control: A Look at Bilateral Cooperation through the GE/Honeywell Case*, 14 *Florida Journal of International Law* 397 (2001), at 406-08.

²⁰ European Commission, 97/26/EC, Decision Declaring a Concentration to be Incompatible with the Common Market and the Functioning of the EEA Agreement, IV/M.619- Gencor, OJ L11, 30-72 (1996); *Case T-102/96, Gencor Ltd v. Commission*, [1999] ECR II-753; *Case T-210/01, General Electric Co. v. Commission*, [1999] ECR II-753.

and Honeywell, which was hailed to be the largest industrial merger in the world's history—cleared by the US and Canadian authorities, was subsequently prohibited by the European Commission²¹—remains the prime example of persisting differences between regimes and it gave impetus to much of the cooperation between agencies which followed.

However, cases involving foreign State facilitation typically either do not end up in foreign courts or do not implicate a foreign State itself. This is because facilitation, or even encouragement will be seen, in the majority of cases, as an economic policy—which is a sovereign choice. As such, economic policies are generally non-actionable in foreign fora. They will also not violate any international 'competition' norms since any consensus in this area relates only to certain types of *private* conduct, not to State policies. However, some such policies may violate voluntarily assumed, treaty-based obligations (for example, under WTO agreements). In this regard, it is worth noting that a broad consensus has already emerged as to the harmful nature of international hardcore cartels.²² Yet, these are always defined as *private, prohibited* agreements and not cartels created by States.²³ Also, the consensus does not extend to condemnation of export cartels, even those which are private agreements.

Facilitation is a very broad and diversified category of acts. Yet a State may go further than facilitating anticompetitive conduct. It may eliminate scope for autonomous conduct in certain aspects on a particular market, compelling entities involved to follow the given instructions and to act anticompetitively. For example, a State may create a compulsory export cartel and set an export price from which firms will not be permitted to deviate. The Norwegian gas export cartel is a good example. From about 1989, Norwegian natural gas producers were compelled by the Norwegian government to sell gas jointly through a specially created body—Gas Negotiation Committee (GFU), which allegedly fixed prices and the quantities sold. The GFU's main task was to negotiate supply contracts with buyers located in the EU.²⁴ Noteworthy, gas from Norway accounted for about ten per cent of EU gas consumption. The European Commission open an investigation. Initially the Norwegian government argued that EU competition law should not be applied as the Norwegian gas producers were compelled to sell gas through the GFU.²⁵ Later the investigation prompted a political response. Norway issued a royal decree discontinuing the GFU scheme in relation to the EU. This led to settling of the case, with the gas companies offering various commitments.²⁶ Although the scheme was

²¹ European Commission, 2004/134/EC, Decision Declaring a Concentration to be Incompatible with the Common Market and the Functioning of the EEA Agreement, COMP/M.2220- General Electric/Honeywell, OJ L48, 1-85 (2001).

²² The 1998 Recommendation of the Organisation for Economic Cooperation and Development (OECD) defines hardcore cartels as anticompetitive agreements, concerted practices or an arrangements among competitors to fix prices, submit collusive tenders, restrict outputs, or share markets. OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, C(98)35/FINAL (March 1998), I(A)2(a), <http://www.oecd.org/dataoecd/39/4/2350130.pdf> (accessed 20 Dec. 2016).

²³ For example, the 1998 OECD Recommendation specifies that the category of the condemned agreements 'does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws.' *ibid*, at I(A)2(b).

²⁴ Maarit Lindroos, et al., *Liberalisation of European Gas Markets: Commission settles GFU case with Norwegian gas producers*, 3 Competition Policy Newsletter 50 (2002), http://ec.europa.eu/competition/publications/cpn/2002_3_50.pdf (accessed 20 Dec. 2016).

²⁵ *Ibid*.

²⁶ European Commission, IP/02/1084, Commission successfully settles GFU case with Norwegian gas producers (17 July 2002), http://europa.eu/rapid/press-release_IP-02-1084_en.pdf (accessed 20 Dec. 2016).

dismantled, it serves as a good illustration of a compelled, outbound-oriented, anticompetitive conduct.

While the principle of compelling is straight-forward,²⁷ what actually amounts to compulsion may be perceived differently in different legal cultures. In Western regimes, generally characterized by a strong rule of law and transparent processes and application of rules, only a clear and binding *order* of a State to act in a particular way under a credible threat of sanctions is likely to qualify. However, in one case in past the US authorities recognized *de jure* non-binding directives as sufficient evidence of compulsion.²⁸ In other jurisdictions, governmental guidance or even State pressure may be used to achieve the same end—*de facto* compelling conduct. Such a clash of cultures surfaced prominently in the past in the US-Japan context,²⁹ and more recently in the private actions in the US against Chinese export cartels.³⁰

As long as the entities involved are not actually compelled to act anticompetitively, there is no reason why they could not be challenged and sanctioned in the harmed jurisdictions. Where compulsion is established, the role of competition law—versus the entities directly involved—ends. The defence should be applied carefully to limit possible abuse. Its lax application would create incentives for foreign entities to lobby their home State in order to secure either—*ex ante*—an act compelling their earlier-agreed outbound anticompetitive actions, or—*ex post*—a statement to that effect, in order to enable reliance on the defence in foreign fora. In *Vitamin C*—a case involving a Chinese price-fixing export cartel—a US district court, when faced with contradicting factual records considered the Chinese official assertion of compulsion, submitted directly to the court by means of amicus curiae briefs, to be ‘a post-hoc attempt to shield defendants’ conduct from antitrust scrutiny.’³¹ However, on appeal the judgement in favour of plaintiffs was vacated.³² In September 2016 the Court of Appeals found itself bound to defer to the official Chinese representations, despite the reservations made by the lower court.³³ In effect, it held that the defendants were compelled by the Chinese

²⁷ See further M. Martyniszyn, *supra* n. 3.

²⁸ That was the case of Japanese auto restraints in the early 1980s. The US car industry was struggling with import competition, especially from Japan. In response, Japan introduced an oversight system to limit exports. This was to be achieved by means of *de jure* non-binding directives. Non-compliance was to lead to introduction of licencing, fines, and other sanctions. The potential application of US antitrust laws to the scheme was identified as a potential difficulty. Yet, the US Attorney General reassured the Japanese side that in the view of the Department of Justice the adopted measure would not give rise to violations of US antitrust laws and the compliance with such limitations would be viewed as having been compelled by Japan. ‘Correspondence Between the U.S. Attorney General and Ambassador of Japan on U.S. Antitrust Laws and Japan’s Restraints on Automobile Exports, reprinted in’, *U.S. Import Weekly (BNA)*, 13 May 1981. For in-depth analysis of this case see Spencer Weber Waller, *Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond*, 14 *Law and Policy in International Business* 747 (1982).

²⁹ That was particularly the case in *Matsushita*, a private action in the US against Japanese TV manufacturers, who argued that their conduct was compelled by the authorities. The case made its way to the Supreme Court. Japanese government, in an *amicus curiae* intervention, supported defendants. Sadly, the Court did not address the issue of compulsion after finding that the alleged conduct did not cause injury to the plaintiffs. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

³⁰ *In re Vitamin C Antitrust Litigation* 2016 WL 5017312 (2nd Cir. 2016); *Animal Science Products v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320 (D.N.J. 2010); *Resco Products v. Bosai Minerals Group*, 2010-1 Trade Cases P 77,061 (W.D. Pa. 2010).

³¹ *In re Vitamin C Antitrust Litigation*, 810 F.Supp.2d 522, 552 (E.D.N.Y. 2011).

³² *In re Vitamin C Antitrust Litigation*, 2016 WL 5017312 (2nd Cir. 2016).

³³ That said, the Court noted that such deference need not be inappropriate when there is no documentary evidence or reference of law supporting the proffered interpretation of foreign state’s own laws. *Id.* at 9, n 8.

authorities to engage in price-fixing and that the lower court erred by not abstaining from adjudication on international comity basis.

Finally, a State may manage its own natural resources in a manner which negatively affects their prices on world markets, for example, by limiting the pace or scope of exploitation. Such changes, in certain circumstances, may be seen as anticompetitive. That said, the traditional view is that States have complete sovereignty over their natural resources.³⁴ The sovereignty encompasses the notion of control, and therefore includes also practical decisions on whether to extract a particular resource and, if so—how to manage that process, removing such decisions from the foreign antitrust purview. In the antitrust context, this view was restated by a US district court in a litigation challenging OPEC—itsself an inter-governmental organisation—and its member States.³⁵ A similar view was expressed by the European Commission which recognized that while some OPEC's activities are cartel-like, they also relate to management of exhaustible resources and hence they are not purely commercial and are not challengeable under competition laws.³⁶

Management of natural resources may cover the strategic decisions on the scale and volume of extraction, exploitation. However, implementation of State's long-standing extraction-management policy is very different from a situation in which a State grants its organ or State-owned enterprise a licence to extract a particular resource, without any underlying exploitation plan and subsequently that entity joins an international price-fixing cartel or abuses its dominant position. While the first case is clearly sovereign activity, there is no particular reason why the latter two cases should not be challenged and sanctioned in harmed jurisdictions as commercial and anticompetitive. The key difficulty lies in delineating the sovereign decisions and policies concerning the management of natural resources from the State's commercial activities. Yet, there may be cases, in which such distinction can be made. For example, this should not present a difficulty in the ongoing *GAZPROM* case—a European Commission's investigation of GAZPROM practices, allegedly including abuse of its dominant position in the EU.³⁷ Categorisation of the underlying conduct should not be problematic given numerous reassurances of the firm's top executives of its commercially-driven character and pricing strategy.³⁸

Cases involving management of natural resources often require close analysis of the factual framework to draw the distinction between sovereign and commercial acts. For example, in a recent potash cartel case a US court found a Belarusian State agency's decision to reduce potash exports to be a sovereign, rather than commercial one. In effect, the entity was entitled to

³⁴ For discussion of permanent sovereignty over natural resources and its emergence as a principle of international law see Nico J. Schrijver, *Natural Resources, Permanent Sovereignty over* in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2010).

³⁵ 'The control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes. The defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples.' *Int'l Ass'n of Machinists v. OPEC (IAM I)*, 477 F.Supp. 553, 568 (C.D. Cal. 1979).

³⁶ European Commission, EC Competition Policy and the Motor Fuel Sector, MEMO/00/55 (20 September 2000), 2, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/00/55> (accessed 20 Dec. 2016).

³⁷ European Commission, IP/12/937, Antitrust: Commission Opens Proceedings Against Gazprom (4 September 2012), http://europa.eu/rapid/press-release_IP-12-937_en.htm (accessed 20 Dec. 2016).

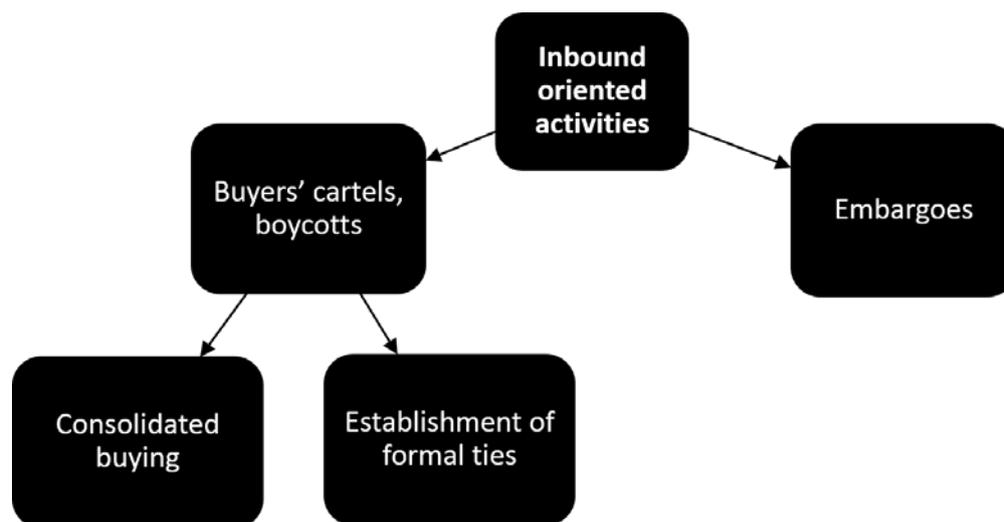
³⁸ See, for example, Alexander Medvedev, 'Is Gazprom's Strategy Political?', *Europe's World*, Summer 2008, http://www.europeworld.org/portals/0/PDF_version/EW9_FINAL_ENG.pdf (accessed 20 Dec. 2016).

immunity from suit. Simultaneously, the court did not extend any foreign State-related protection to BPC Minsk—an exclusive international distributor for that Belarussian entity and another Russian potash producing company, jointly owned by the two entities—since it found no evidence showing that the involved acts were those of, or compelled by, Belarus. Hence, BPC Minsk was able to face consequences for its participation in the coordinated supply restrictions and price manipulations.³⁹

(b). Inbound oriented activities

The types of acts and policies discussed so far may, directly or indirectly, relate to competitive harm accompanying different types of predominantly *outbound* economic activities. While *outbound* conduct and *selling* is what typically leads to a legal challenge in a foreign jurisdiction, there may be *inbound*-oriented acts and policies, related to *buying*, which may cause competitive harm on foreign markets. That is the case of buyers’ cartels (buying consortia, clubbing) and importers’ cooperation, including boycotts.⁴⁰ Embargoes constitute another category of *inbound*-focused acts potentially causing competitive harm abroad.

Figure 3 State’s entanglement in anticompetitive conduct: inbound oriented activities



Buying consortia or alliances are arrangements between buyers to pursue collaborative purchasing. They can take the form of either consolidated buying—with separate entities buying jointly— or of the establishment of formal ties—such as joint ventures. In many cases such arrangements will not raise foreign antitrust concerns. Yet, if a particular State is a sufficiently important purchaser of a given commodity or a resource, a domestic buyers’ cartel may be able to exert sufficient pressure on foreign suppliers to depress prices and benefit from

³⁹ *In re Potash Antitrust Litigation*, 686 F.Supp.2d 816 (N.D. Ill. 2010).

⁴⁰ For general discussion of buying consortia and buyers cartels see Peter C Carstensen, *Buyer cartels versus buying groups: legal distinctions, competitive realities, and antitrust policy*, 1 William & Mary Business Law Review 1 (2010). See further Jing Hao, *Buyers ‘Cartels: An Empirical Study of Prevalence and Economic Characteristics* (Purdue University 2011).

what economists call a monopsony rent.⁴¹ Such behaviour between private parties, in a domestic context, would normally be prohibited under competition laws.⁴² The transnational context adds an additional layer of complexity, yet it does not rule out such cases (so long as the domestic jurisdictional provisions allow for it⁴³). In the past, one such case involved a Japanese buyers' cartel among paper manufacturers created in order to countervail an international cartel of wood chip suppliers (which, *nota bene*, included a US export cartel, duly registered as a Webb-Pomerene association).⁴⁴ The US cartel successfully sued, in the US, to enjoin the Japanese importers which attempted to depress prices and boycotted them. Another case involved a Japanese import cartel which aimed to fix prices of Alaskan crabs and other seafood. The Antitrust Division of the US Department of Justice brought a civil case against the Japanese firm, which was ultimately settled by a consent decree.⁴⁵ A more recent case involving a buyers' cartel—factually, but not legally—was *Telmex*. While the US, in the WTO framework, challenged certain Mexican rules concerning export of phone termination services (an export cartel), the arrangement involved also a buyers' cartel, which operation apparently originally led to the involvement of the US Trade Representative.⁴⁶ The Mexican operator, as the ring-leader, was able to fix prices at which phone termination services in the US would be purchased by all Mexican operators. Neven and Mavroidis suggest that the US might have considered it had a stronger case against the export cartel and that its dismantling would also result in dissolution of the buyers' cartel.⁴⁷

The legal position of foreign buying consortia under competition laws is bound to be analysed more closely in light of the growing interest, in various parts of the world, in different forms of import cooperation in relation to fossil fuel resources, especially gas. This is particularly visible in the Asian countries, which absorb a large part of global liquefied natural gas (LNG) exports and which would like to secure better contract terms and pricing. First joint purchases

⁴¹ The same outcome can be achieved if the buying State imposes a tariff on the imported commodity/resource. In such a case instead of the buyers' cartel, the State coffers benefit from the monopsony rent. Frederic M Scherer, *Competition Policies for an Integrated World Economy* (Brookings Institution 1994) 55-56.

⁴² As Waller and Fiebig point out, in the United States the principal decision of the Supreme Court holding price fixing to be illegal *per se* involved an agreement between buyers, not sellers. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940), reh'g denied, 310 U.S. 658, 60 S. Ct. 1091, 84 L. Ed. 1421 (1940). See further Spencer Weber Waller and Andre Fiebig, *Antitrust and American Business Abroad* (West Group 2014) § 10:3. In regimes which do not follow the *per se* approach the overall effect of a joint buying agreement would be analysed. For example, in *Gottrup-Klim* the European Court of Justice held that a joint purchasing agreement which prohibited its members from participating in other forms of cooperative buying did not necessarily restrict competition and it might, in fact, have beneficial effects on competition. *Case C-250/92 Gottrup-Klim Grovvareforeninger v Dansk Landsbrugs Grovvareselskab AmbA*, [1994] ECR I-5641, paras 32-34.

⁴³ It is worth recalling that in its 1988 International operations Guidelines the US DoJ had restrained itself from challenging foreign conduct harming US exporters, such as foreign buyers' cartels. *Department of Justice, Antitrust Enforcement Guidelines for International Operations (1988)*, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391, n 159. In 1992 the DoJ reverted to its earlier, more expansive approach. US Department of Justice, 'Justice Department Will Challenge Foreign Restraints on U.S. Exports Under Antitrust Laws, 3 April 1992, http://www.justice.gov/atr/public/press_releases/1992/211137.pdf (accessed 20 Dec. 2016). For analysis see Marina Lao, *Jurisdictional Reach of the US Antitrust Laws: Yokosuka and Yokota, and Footnote 159 Scenarios*, 46 Rutgers Law Review 821 (1993).

⁴⁴ *Daishowa Int'l v. North Coast Export Co.*, 1982-2 Trade Cas. (CCH) P64,774 (N.D. California 1982).

⁴⁵ *United States v. C. Itoh & Co., Ltd.*, 1982-83 Trade Cas. (CCH) P65,010 (W.D. Washington 1982).

⁴⁶ Philip Marsden, *Trade and Competition: WTO decides first competition case - with disappointing results*, Competition Law Insight (2004), at 3, http://www.ucl.ac.uk/laws/conferences/regulated-industries/R04_marsden.pdf (accessed 20 Dec. 2016).

⁴⁷ See Damien J Neven and Petros C Mavroidis, *El mess in TELMEX: a comment on Mexico-measures affecting telecommunications services*, 5(2) World Trade Review 271 (2006), at 276.

have already taken place.⁴⁸ On top of this sprouting cooperation, the media reports ongoing discussions on creating a broader LNG buying club among Asian buyers.⁴⁹ Similar ideas of joint buying are being considered in the EU. In April 2014, Donald Tusk—then Polish Prime Minister, now the President of the European Council—called on the EU to ‘develop a mechanism for jointly negotiating energy contracts with Russia’.⁵⁰ It seems that currently the discussion has shifted towards exploring possibilities of private joint purchasing schemes.⁵¹ In the EU, such ideas are considered in an attempt to seek more equal footing in negotiations with Gazprom, which is allegedly selling gas to the EU at often much inflated prices (and which practises are currently under investigation⁵²). From a competition law perspective, if any joint purchasing activities were to reach a sufficiently large scale to exert significant market power, they may become a focus of foreign antitrust scrutiny in allegedly harmed exporting countries.

Private joint buying agreements do not pose any additional competition law challenge, beyond the usual hurdles of transnational enforcement. The situation is quite different in case of a compelled centralized buying organized by the importing State. Such schemes, falling within the broad range of economic policies, would not be actionable under foreign competition laws, yet they could potentially violate voluntarily assumed treaty-based obligations. Purely private and compelled joint buying arrangements mark the opposing ends of the spectrum. There may be other, intermediate solutions. For example, a State may also put in place a joint buying scheme which, while limiting competition, does not exclude it altogether. In such cases, per analogy to the State compulsion defence, entities involved would still be responsible for their conduct beyond that mandated by the State. There may also be potentially more nuanced arrangements, which while ultimately involving authorities’ approval, rely on market forces. For example, in the EU, the Euratom Supply Agency has an exclusive right to conclude

⁴⁸ In 2014, State-run Korea Gas Corporation (KOGAS), reportedly the world’s largest LNG buyer, teamed up for a joint gas purchase with State-run Japan Oil, Gas and Metals National Corporation (JOGMEC). Jane Chung, ‘Japan firm buy gas together; more joint deals to come’, *Reuters*, 24 March 2014, <http://reut.rs/1gsxphc> (accessed 20 Dec. 2016). KOGAS was reported planning to begin joint purchases with Tokyo Gas Corporation. Osamu Tsukimori and James Topham, Tokyo Gas, Kogas may start joint gas purchases, investments, *Reuters*, 25 September 2014, <http://af.reuters.com/article/energyOilNews/idAFL3N0RQ20420140925> (accessed 20 Dec. 2016). Japanese Tokyo Electric Power Corporation (Tepco) and Chubu Electric Power Corporation (Chubu)—world’s second and third biggest LNG buyers—were recently, in January 2015, reported to be awaiting a government’s approval to jointly tender for gas. Sarah McFarlane and Oleg Vukmanovic, Tepco, Chubu expected to buy 6 LNG cargoes from Vitol, GDF Suez-traders, *Reuters*, 23 January 2015, <http://reut.rs/1EBtjMk> (accessed 20 Dec. 2016). Moreover, in March 2014 Japanese Chubu signed an agreement with India’s GAIL to consider joint purchasing of LNG. Osamu Tsukimori, Japan’s Chubu in deal with India’s GAIL to consider joint LNG buy, *Reuters*, 24 March 2014, <http://reut.rs/1juNbWx> (accessed 20 Dec. 2016).

⁴⁹ J. Chung, *supra* n. 48.

⁵⁰ Donald Tusk, A united Europe can end Russia’s energy stranglehold, *Financial Times*, 21 April 2014, <http://on.ft.com/1ffQ7na> (accessed 20 Dec. 2016). Similar idea, of various scope, have been circulating in the EU for some time. For a proposal to have the governments of the Visegrad countries set up a gas buyers’ consortium see Pavlo Szalai, *Central Europe’s Energy Security After Nabucco* (CEPI Policy Brief 2013), http://www.cepolicy.org/sites/cepolicy.org/files/attachments/central_europes_energy_security_after_nabucco_final_0.pdf (accessed 20 Dec. 2016).

⁵¹ The EU’s Energy Commissioner Miguel Arias Cañete was quoted saying that ‘We [the Commission] are not discussing the idea of the Commission buying on behalf of nation states. Not at all ... The question is whether we could generate interest among private companies to consider the possibility of working together.’ Christian Oliver, ‘New EU energy chief shifts focus to building common power market’, *Financial Times*, 13 November 2014, <http://on.ft.com/1v6Ago1> (accessed 20 Dec. 2016). See further European Commission, *Energy Union Package: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*, COM(2015) 80 final (25 February 2015), http://ec.europa.eu/priorities/energy-union/docs/energyunion_en.pdf (accessed 20 Dec. 2016).

⁵² See notes 37-38 and accompanying text.

contracts relating to trade in nuclear materials (including ores).⁵³ That said, normally the price negotiations take place directly between the interested parties,⁵⁴ although the Agency does not have to approve the proposed pricing.⁵⁵

The last type of *inbound*-oriented acts and policies potentially harming foreign markets are State-enacted embargoes. As sovereign acts in nature, they are not actionable under foreign competition laws. A useful competition law related example is the US embargo on the importation of foreign uranium in the 1960s. The embargo was introduced in order to protect and develop the US domestic uranium industry. It was lobbied for by the US uranium producers. Before the cut-off, two-thirds of uranium produced in the West was absorbed by the US. The embargo led to a significant drop in uranium prices on the world market, and then to creation of an international uranium cartel under the patronage of a number of States.⁵⁶

This section has identified and mapped out various actions and policies, both outbound and inbound oriented, potentially leading to a State's entanglement in antitrust proceedings in a foreign forum. A general distinction was drawn between various commercial and sovereign activities of a State. The following section builds on it and asks the question of how such involvement or implication can be addressed in the harmed jurisdiction.

(3). How a foreign state's entanglement can be addressed in the adversely affected forum?

The previous section identified different types of actions and policies potentially leading to a foreign State's entanglement in an antitrust case. This section looks into the ways in which such entanglement can be addressed in the host state.

First, a distinction needs to be made between cases involving competitive harm caused by commercial conduct and other situations. As explained above, there is no general legal justification as to why a commercial activity causing competitive harm in the domestic market should avoid antitrust scrutiny, or benefit from a competition law exemption. An involvement of, for example, a State-owned enterprise should make no difference. The situation is likely to be more complicated if, instead of a foreign State-owned firm, one of the alleged violators is a foreign State itself. This raises a question of whether provisions of a particular competition law regime would be at all applicable. The answer in the negative would mean that a particular regime implicitly permits for anticompetitive commercial activities of a foreign State in the forum— generally an unacceptable conclusion.

In the US, this issue was touched upon in *Pfizer*.⁵⁷ The question was whether a foreign government was a 'person' within the meaning of Section 4 of the Clayton Act, enabling it to bring a private suit for treble damages. While the case concerned the possibility of *bringing* a suit, the interpretation of the term 'person' is important as Section 4 of the Clayton Act is an unchanged re-enactment of Section 7 of the Sherman Act, which specifies to whom

⁵³ Art 52(2)(b) of the Euratom Treaty.

⁵⁴ If the Agency agrees with the reached agreement, it will conclude the contract by co-signing it. André Bouquet, *How current are Euratom provisions on nuclear supply and ownership in view of the European Union's enlargement?*, 68 Nuclear Law Bulletin 7 (2001), at 9-10.

⁵⁵ Art 67-69 of the Euratom Treaty. See also A. Bouquet, *supra* n. 54, at 22-23.

⁵⁶ See generally Douglas E. Rosenthal and William M. Knighton, *National Laws and International Commerce: the Problem of Extraterritoriality* (the Royal Institute of International Affairs, Routledge & Kegan Paul 1982) 20.

⁵⁷ *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978).

prohibitions contained in the Sherman Act apply. In *Pfizer* the US Supreme Court found that the definition of the word ‘person’ was ‘inclusive rather than exclusive, and does not by itself imply that a foreign government, any more than a natural person, falls without its bounds.’⁵⁸ Yet, notwithstanding *Pfizer*, in one of the *OPEC* cases a district court held that a foreign State cannot be a defendant in an antitrust case,⁵⁹ albeit the underlying logic adopted by the Court was arguably flawed.⁶⁰ Hovenkamp shows that neither statutes, nor their legislative history support a restrictive reading, removing foreign States’ commercial conduct from the scrutiny under antitrust laws.⁶¹ More recently, in *Flamingo Industries*, a case dealing with an issue of antitrust liability of a US Postal Service as an arm of a federal government, the Supreme Court observed that ‘corporate or governmental status in most instances is not a bar to the imposition of liability on an entity.’⁶²

The EU competition law regime relies on the concept of an ‘undertaking’. The European Court of Justice takes a functional approach in its interpretation. It is concerned with the activity at stake, not the nature of the entity involved. In *Höfner* the Court clarified that ‘the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.’⁶³ As mentioned above, in *Aluminium Imports* the European Commission did not see a problem in applying EU competition law provisions to commercial activities of foreign entities, even if they were to be indistinguishable from their home State under foreign law.⁶⁴ In *Cali*, the Court of Justice noted that for the sake of application of the EU competition rules a distinction needs to be drawn between a State acting *qua* State, ‘in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market’.⁶⁵ EU competition law applies to the latter, but not to the former.

It may be difficult to differentiate clearly between situations where a foreign State is involved in commercial activities and where it is acting in its sovereign capacity, but such an effort should be made. Antitrust agencies and courts in the adversely affected fora should not shy away from looking into commercial activities of a foreign State. Bringing such cases can not only reinstate competition on the market, or redress the suffered harm. An assertion of a clear policy towards competitive harm arising from all types of commercial conduct may also make foreign partners more receptive to concerns about policies facilitating such harm which they may be pursuing. For example in the *GFU* case, the European Commission was able to address what was essentially a State-created compulsory gas export cartel.⁶⁶ Noteworthy, no fines were imposed in *GFU*. Settlements of cases implicating foreign States, also without imposition of fines if warranted, may be one of the ways in which domestic markets can be safeguarded and the pro-competitive signals sent, without excessive inter-State controversies.

⁵⁸ *Ibid*, at 312, n 9.

⁵⁹ *IAM I*, *supra* n. 35, at 570-72.

⁶⁰ In this vein, for example, Herbert Hovenkamp, *Can a Foreign Sovereign Be an Antitrust Defendant*, 32 *Syracuse Law Review* 879 (1981), at 898.

⁶¹ *Ibid*.

⁶² *United States Postal Service v. Flamingo Industries*, 540 U.S. 736, 744-45 (2004).

⁶³ *Case C-41/90, Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] ECR I-1979, para 21.

⁶⁴ See above note 8 and accompanying text.

⁶⁵ *Case C-343/95, Diego Cali & Figli v. Servizi ecologici porto di Genova SpA (SEPG)*, [1997] ECR I-1547, para 16.

⁶⁶ See above notes 24-25 and accompanying text.

Some cases involving or implicating a foreign State may be particularly sensitive. They may raise considerations relating to the affected State's strategic interests or even its security. This is where the distinction between public and private enforcement becomes particularly relevant. The competition agencies have discretion in relation to their enforcement priorities. They make conscious choices when deciding whether a particular, potentially sensitive, case should be brought. They can and should be presumed to consider wider implications both before launching an investigation and before making a final decision. To illustrate, Sir Leon Brittan, when he was the EU Competition Commissioner, once observed 'a Commission decision on competition policy reflects the totality of the Commission's views and policies. My colleague in charge of external relations sits near me in Commission when decisions are taken and his department talks to mine.'⁶⁷ Therefore, potentially controversial investigations are unlikely to be launched without prior factoring in of the wider context.⁶⁸ Moreover, agencies may also avail of the existing inter-agency or even inter-governmental channels to resolve or iron-out any sensitive issues. One can only speculate on how many State-related competition concerns have been addressed extralegally, through dialogue between States, as negotiation remains the primary means of dispute settlement between States.

The case of private enforcement is altogether different. Private plaintiffs' primary concerns are the likelihood and the level of a damages award and probability of its satisfaction. If a private suit challenges foreign sovereign activity, the State-related defences will come into play to appropriately shield the foreign State. Such defences will, of course, also apply in case of an ill-conceived public enforcement, challenging foreign sovereign activity. Moreover, in all such cases foreign States—whenever concerned— should be permitted to and may consider communicating their views directly to the hearing court, as it has been practised since the late 1970s in the US.⁶⁹ Any such representations should be accorded a high level of deference, as long as they are not contradicted by admissible evidence. In cases warranting judicial abstention from adjudication on the broader security or strategic interests' grounds, the forum's executive should use amicus briefs to communicate any such reasons to the relevant courts. That was the case, for example, in the recent challenge to OPEC in the US, in which the US Departments of Justice, State, Treasury, and Energy filed a joint brief underlying the sovereign nature of the decisions concerning exploitation of natural resources, challenged by the plaintiffs in the private suit.⁷⁰ Domestic legal frameworks should make judicial abstention in such rare cases possible.

⁶⁷ Leon Brittan, *Competition Policy and Merger Control in the Single European Market* (Cambridge University Press, 1991) 16-17.

⁶⁸ In the EU context the College of Commissioners as a whole adopts most formal decisions (including decisions finding an infringement) in line with the principle of collegiality enshrined in art 17(6) of the Treaty on European Union). However, the decision-making power in measures of management and administration can be delegated by the College to individual Commissioners and the Competition Commissioner has been empowered to adopt the decisions opening proceedings. Yet, even prior to adoption of such a measure, other parts of the Commission (other departments) need to be informed and their views need to be taken into account. See European Commission, Antitrust: Manual of Procedures (March 2012), c 1, paras 64-65; c 10, para 14, http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf (accessed 20 Dec. 2016).

⁶⁹ The US practice of having foreign States communicate their views directly to the relevant courts in relation to any pending suits was first time outlined in the Solicitor General's letter to the Legal Advisor of the State Department and the State Department's diplomatic note to the chiefs of foreign missions in Washington. See reprinted in Marian Lloyd Nash, *Digest of United States Practice in International Law: 1978* (Department of State 1980) 560-63.

⁷⁰ *Brief of the United States as Amicus Curiae Supporting Affirmance, Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, No. 09-20084 (5th Cir. 16 August 2010).

It has been argued that under competition laws a foreign State should not enjoy immunity for competitive harm arising from its commercial dealings. It does not mean that the affected forum should remain indifferent to competitive harm stemming from foreign States' sovereign activities. However, in such instances domestic competition laws offer no direct help. Their existence and consistent enforcement may, nevertheless, serve as an argument in any inter-State dialogue in relation to the underlying foreign acts and policies enabling, facilitating, or even mandating, anticompetitive conduct.

This section outlined how a foreign State's involvement or implication in anticompetitive conduct may be addressed in the affected jurisdiction. In particular, it was argued that competition laws should be read in a way allowing to pursue all competitive harm stemming from commercial dealings, including that caused by a foreign State. The following section looks into some broader considerations relating to a foreign State's entanglement in anticompetitive conduct affecting markets in other jurisdictions.

(4). The broader considerations relating to a foreign state entanglement in anticompetitive conduct

There is a number of broader considerations which need to inform policies and approaches both towards extraterritorial competition law enforcement in general, and towards cases involving or implicating a foreign State in particular. This section raises three of them. First, it points to the issue of a transfer of wealth relating to any transnational competitive harm. Second, it looks into potential adverse reactions which may follow transnational enforcement. Third, attention is drawn to the growing international cooperation between competition agencies, which shows that tolerance for transnational anticompetitive conduct is fading away.

The issue of the transfer of wealth between States provides a general backdrop in contextualising transnational anticompetitive conduct. Competitive harm in one jurisdiction translates into supra-competitive profits in another. It is a transfer of wealth from consumers (both natural persons—consumers of the final products, and firms—consumers of inputs, intermediate products) in one jurisdiction to producers in another. It often takes place because States act predominantly in their own interests. As explained earlier, most regimes prohibit anticompetitive conduct harming domestic markets, but permit conduct causing outbound competitive harm. In other words, States look after *domestic*, not *global* consumer welfare. The overall, *global* economic inefficiencies, or harm caused in foreign markets are generally of no concern. The 'cosmopolitan conception' is missing.⁷¹

Moreover, the domestic focus of competition laws is only one (and not a particularly significant one) of many facets influencing competition between States in fostering domestic welfare. States use various tools at their disposals—within and sometimes also outside the remits provided by international law and voluntarily assumed treaty-based obligations. Antidumping legislations, subsidies and other protective industrial policies⁷² of some States often make it impossible for other States to exploit fully their comparative advantages. This realisation

⁷¹ Eleanor M. Fox, *Can we Solve the Antitrust Problems of Globalization by Extraterritoriality and Cooperation? Sufficiency and Legitimacy*, 48(2) Antitrust Bulletin 355 (2003), at 366.

⁷² For discussion of the relationship between industrial policy and competition see Eleanor M. Fox and Dennis Davis, *Industrial Policy And Competition- Developing Countries As Victims And Users*, Fordham Corporate Law Institute 151 (2006).

should inform the domestic policies on how to approach foreign competitive harm, also when it entangles a foreign State.

These general observations need to be followed by a more specific one. Domestic efforts to address competitive harm arising from foreign conduct may be seen as the forum's attack on the foreign State's policies or even its sovereignty. This may be particularly so if the underlying anticompetitive conduct's qualification as commercial is not straight-forward. The dealings in natural resources are particularly prone to such controversies. The foreign State may react in various ways to protect its prerogatives.

One possibility is the enactment of blocking legislation, that is legislation aimed at hindering or blocking foreign enforcement efforts, also beyond the investigation stage.⁷³ Introduction of such statutes was particularly common between 1976 and 1984, following the antitrust Uranium litigation in the US. In particular, in that period such legislation was adopted in Australia, Canada, France, the New Zealand, South Africa, the UK, and Philippines.⁷⁴ In the past, blocking statutes aimed to limit foreign (essentially the US) discovery, prevent recognition of multiple damages awards and, in some cases, even allowed for recovery of damages paid as a result of foreign antitrust litigation (so-called claw-back statutes). Their actual invocation was rare. A more recent blocking order of the Russian President,⁷⁵ issued in response to the European Commission's investigation of Gazprom practices and applicable to all Russian strategic firms, went further. It made compliance with any foreign-imposed remedies subject to a prior consent of the Russian government, effectively removing any underlying case 'from the sphere of rule-of-law to the realm of politics'.⁷⁶ The latter case shows that States, whose interests become affected by transnational enforcement efforts of other regimes, may decide to adopt a confrontational stance, possibly leading to a significant friction in relations between them.

Blocking legislation, while unfriendly, is still a rather transparent response to foreign enforcement. States may use other, less straight-forward tools. For example, they may act extralegally and engage in an open trade war, or exert all sorts of pressures on the investigating State so as to influence the outcome of an on-going investigation or adjudication, or so as to have it abandoned altogether. The latter had possibly happened in the context of the Indian challenge to the operation of the American Soda Ash Export Cartel (ANSAC).⁷⁷ ANSAC was initially banned from importing to India on the allegations of predatory pricing. Subsequently, it successfully lobbied the US government which, in turn, placed significant pressure on India. In particular, the US Trade Representative announced a review of the US Generalized System of Preferences for India, threatening to withdraw the benefits.⁷⁸ Afterwards, the Indian Supreme Court heard the appeal in the ANSAC case and found that the Indian competition act

⁷³ For discussion of blocking legislation and its typology see Marek Martyniszyn, *Legislation Blocking Antitrust Investigations and the September 2012 Russian Executive Order*, 37(1) World Competition 103 (2014).

⁷⁴ *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980). See also note 56 and accompanying text.

⁷⁵ Executive Order of the President of the Russian Federation No 1285 of 11 September 2012 on Measures to Protect Russian Federation Interests in Russian Legal Entities' Foreign Economic Activities [Указ Президента РФ от 11 сентября 2012 г. N 1285 "О мерах по защите интересов Российской Федерации при осуществлении российскими юридическими лицами внешнеэкономической деятельности"], (2012), <http://text.document.kremlin.ru/document?id=70125938&byPara=1> (accessed 20 Dec. 2016).

⁷⁶ M. Martyniszyn, *supra* n. 73, at 112.

⁷⁷ For more details analysis see M. Martyniszyn, *supra* n. 14, at 199-203.

⁷⁸ 'US to Review Grant of GSP to India', *Businessline*, 31 January 2001.

conferred no extraterritorial jurisdiction, in line with the ANSAC's assertion. ANSAC was able to export to India.⁷⁹ The US Trade Representative considered that outcome a result of his intervention and, overall, a 'success story'.⁸⁰ It is noteworthy that shortly afterwards Indian competition law was amended, providing a clear textual basis for extraterritorial jurisdiction.⁸¹ The Indian ANSAC case is an example of a situation, in which extraterritorial enforcement of competition law may have, or carries prospects of, adverse reactions, spill-over effects in another area.

While a possibility of an adverse reaction of another State to transnational enforcement in a particularly sensitive area or context should be taken into account, the overall picture is not that gloomy. Such responses are rare, especially since—as discussed in the previous section—competition agencies may, and do, select their enforcement priorities consciously and attempts to apply domestic competition laws to foreign sovereign activities are very rare.

Furthermore, the growing international cooperation between competition agencies shows that many States share, at least to a certain extent, a belief that facilitating outbound competitive harm may lead to a similar harm on domestic markets. Given the growth of transnational commerce and the challenges involved in pursuing foreign perpetrators, cooperation between agencies was, to use Robert Pitofsky's—ex Chairman of the US Federal Trade Commission—words, 'born not of ideology but of necessity'.⁸² It became necessary for effective transnational enforcement. Over time cooperation started to materialize also in the sensitive area of evidence collection and exchange.⁸³ Some regimes—for example, Australia—went so far as to introduce so-called information gateways— regulatory frameworks allowing competition agencies to share evidence with foreign counterparts even when reciprocity is missing.⁸⁴ While this type of cooperation is rather sophisticated, contacts and exchanges between different competition regimes became common currency, building trust and understanding among counterparts. The growth and development of the virtual International Competition Network,⁸⁵ with now more than 120 member-agencies, meeting in various formulas and exchanging know-how, standards, and procedures corroborates it best.

The growing international cooperation in competition law in general, and in enforcement in particular, provides hope that safe havens for violators are being reduced. This phenomenon should also inform individual States' approaches towards competitive harm involving or implicating a foreign State and arising from commercial dealings. Better understanding of each

⁷⁹ *Haridas Exports v. All India Float Glass Manufacturers' Assn.*, 6 SCC 600 (The Supreme Court 2002).

⁸⁰ Hearing before the Subcommittee on International Trade of the Committee of Finance, US Senate, 15 April 2004, HRG 108-527, <http://finance.senate.gov/library/hearings/download/?id=f0148a8a-1c78-4e76-9776-485ffbf2ec7a> (accessed 20 Dec. 2016).

⁸¹ See Section 32 of the Competition Act, No. 12 of 2003, as amended.

⁸² Robert Pitofsky, *Competition Policy in a Global Economy- Today And Tomorrow* (The European Institute's Eighth Annual Transatlantic Seminar on Trade and Investment, Washington, 4 November 1998), <http://www.ftc.gov/public-statements/1998/11/competition-policy-global-economy-today-and-tomorrow> (accessed 20 Dec. 2016).

⁸³ For discussion and analysis see Marek Martyniszyn, *Inter-Agency Evidence Sharing in Competition Law Enforcement*, 19(1) *International Journal of Evidence and Proof* 11 (2015).

⁸⁴ *Ibid*, at 26-27.

⁸⁵ See <http://www.internationalcompetitionnetwork.org/> (accessed 20 Dec. 2016). For more on the ICN and other platforms of international cooperation in competition law see Imelda Maher and Anestis S. Papadopoulos, *Competition Agency Networks Around the World* in Ariel Ezrachi (ed), *International Research Handbook on Competition Law* (Edward Elgar 2012).

other's regime, better appreciation of different regulatory frameworks, makes it less likely that extraterritorial enforcement will raise unnecessary concerns or tensions.

(5). Conclusions

Given the non-existence of multilateral mechanisms, transnational competitive harm is being addressed by competition agencies and private plaintiffs in the affected jurisdictions by means of extraterritorial enforcement of competition law. Some such cases carry an additional layer of complexity—when the challenged anticompetitive conduct involves or implicates a foreign State. That is particularly often so in cases involving natural resources.

This article has considered such a subset of transnational cases. It provided a typology of State's entanglement in conduct leading to competitive harm abroad, whenever appropriate pointing to the limits of competition law in some of such cases. A general distinction was drawn between States' commercial and sovereign activities. It was argued that competition laws should be read in such a way as to allow agencies and private plaintiffs to pursue competitive harm stemming from all commercial dealings, including that caused by a foreign State and its organs—thereby narrowing the currently existing enforcement gap. An exception needs to be made for the rare cases raising concerns relating to the affected State's important strategic interests and its security. Local legal frameworks should permit this. States' sovereign activities should continue to be duly shielded from adjudication in foreign fora by State-related defences. Overall, the approach to extraterritorial competition law enforcement should be informed by the occurrence of the transfer of wealth resulting from transnational competitive harm, as well as by the possibility of adverse, unfriendly reactions of a foreign State, whose conduct—directly or indirectly—becomes challenged. This should be seen in the broader context of the growing and deepening international cooperation in competition law, showing that the tolerance for transnational anticompetitive conduct is fading away.