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Antitrust Enforcement and State Restraints at the Mainland China-Hong Kong Interface: The Importance of Bilateral Antitrust Co-operation

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Abstract
This article argues that effective co-operation between the antitrust authorities of Mainland China and Hong Kong in antitrust enforcement and the removal of anti-competitive state restraints is essential to the promotion of market competition in, as well as free trade and economic integration between, the two regions. This entails the careful design and conclusion of a bilateral co-operation agreement embracing not only comity co-peration in antitrust enforcement, but also the adoption of a diplomatic solution of mutual self-restraint for the removal of anti-competitive state restraints at the Mainland China-Hong Kong interface. This would also require the co-operation of Mainland Chinese and Hong Kong government authorities. Only with such bilateral cooperation can anti-competitive business practices and state restraints obstructing free trade and economic integration between the two regions be eliminated.

This article addresses the fundamental issues of bilateral co-operation in antitrust enforcement and state restraints elimination at the Mainland China-Hong Kong interface. It argues that effective co-operation between the antitrust authorities of Mainland China and Hong Kong in antitrust enforcement and the removal of anti-competitive state restraints is essential to the promotion of market competition in, as well as free trade and economic integration between, the two regions. Specifically, this article explores two significant aspects of potential bilateral antitrust co-operation between Mainland China and Hong Kong: (1) comity co-operation arrangements in antitrust enforcement; and (2) co-operation between antitrust and government authorities in both regions to resolve complex and contentious situations of anti-competitive state restraints, in particular state compulsion, at the Mainland China-Hong Kong interface.

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After examining the political and economic relationship between Mainland China and Hong Kong and their competition law developments (Part I), this article considers the significance of bilateral antitrust co-operation, and the way forward for the negotiation and conclusion of such co-operation arrangements between the two regions, drawing on the experience of established competition law jurisdictions including the European Union (EU), the United States (US), and Australia (Part II). The article then considers – by drawing on relevant US and EU cases – how difficult cases of state restraints (in particular state compulsion) at the Mainland China-Hong Kong interface can be effectively resolved by active co-operation between the antitrust and government authorities in both regions (Part III).

I. RELATIONSHIP BETWEEN MAINLAND CHINA AND HONG KONG AND THEIR DEVELOPMENTS IN TRADE AND COMPETITION LAW

Hong Kong, as a former British colony for over a century, has reunited with Mainland China and become part of the People's Republic of China (PRC) since 1 July 1997. Nevertheless, pursuant to the 'One Country, Two Systems' framework under the Basic Law – the local 'constitution' that has defined the relationship between Mainland China and Hong Kong since the 1997 handover[1] – Hong Kong has maintained its common law system as a Special Administrative Region of the PRC, which is distinguished from the civil law system in Mainland China. The legal systems of Mainland China and Hong Kong are hence separate from each other; each jurisdiction has its own legislative system, competition legislation, and antitrust authorities. The existing arrangements under the Basic Law are expected to continue at least for 50 years after the handover in 1997 (i.e. until 2047), as Article 5 of the Basic Law explicitly provides that 'the previous capitalist system and way of life [in Hong Kong] shall remain unchanged for 50 years'.[2]

Despite their separate legal systems, Mainland China and Hong Kong have an intimate economic relationship which began long before the 1997 handover. In 2003, the Mainland and Hong Kong Closer Economic Partnership Arrangement[3] (CEPA) was reached to accelerate economic integration between the two regions.[4] CEPA creates a free trade area consisting of Mainland China and Hong Kong, and because China and Hong Kong are both members of the World Trade Organization (WTO), the arrangement is governed by Article XXIV of the General Agreement on Tariffs and

1. Basic Law, Preamble, Chapter II; *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300, 344 ('The Basic Law is the constitution of the Hong Kong Special Administrative Region of the People's Republic of China established under the principle of "one country, two systems".'); C L Lim and Johannes Chan, 'Autonomy and Central-Local Relations' in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2011) 49.

2. See discussion below on the future development of the relationship between Mainland China and Hong Kong as we gradually approach 2047.

3. 'Mainland and Hong Kong Closer Economic Partnership Arrangement' (*Trade and Industry Department (TID)*, 29 June 2003) <www.tid.gov.hk/english/cepa/files/main_e.pdf> accessed 31 October 2015.

4. Trade and Industry Department (TID), 'Overview of CEPA: What is CEPA?' (TID) <www.tid.gov.hk/english/cepa/cepa_overview.html> accessed 31 October 2015.

Trade (GATT).[5] The arrangements on trade liberalization under CEPA go far beyond what is required of Mainland China and Hong Kong pursuant to their WTO obligations. As the first Mainland China-Hong Kong free trade agreement,[6] CEPA aims 'to strengthen trade and investment co-operation between the Mainland and the Hong Kong Special Administrative Region … and promote joint development of the two sides'.[7] This is achieved through the gradual removal of trade barriers as well as the advancement of trade and investment facilitation.[8] Ten supplements to CEPA were introduced over the subsequent decade to enhance the existing liberalization arrangements.[9] These culminated in the Agreement between the Mainland and Hong Kong on Achieving Basic Liberalisation of Trade in Services in Guangdong, 'a subsidiary agreement under CEPA', in late 2014.[10]

CEPA has facilitated cross-border trade in goods: since 2006, manufacturers in Hong Kong have benefited from CEPA's zero tariff arrangement for goods produced locally and exported to Mainland China.[11] Meanwhile, Hong Kong-based service providers have profited from measures facilitating their entry into about 50 Mainland service industries.[12] CEPA has also enabled professional qualifications in the areas of construction, securities and futures, insurance, patent agency, accounting, and estate agency to be reciprocally accepted in both regions.[13] Besides, CEPA has provided for 10 different co-operation areas for trade and investment facilitation.[14]

Recent trade figures provide a snapshot of the increasingly close trade relationship between Mainland China and Hong Kong since the conclusion of CEPA. For more than three decades, Mainland China has been the largest product supplier to Hong Kong, and was responsible for USD 255.9 billion (49%) of the latter's aggregate imports in the year of 2015.[15] As Mainland China's second largest export destination,

5. Y S Lee, 'Bilateralism under the World Trade Organization' (2006) 26 Northwestern Journal of International Law & Business 357, 363, citing GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Text* (GATT Secretariat 1994) 522-525.
6. ibid.
7. CEPA, art 1.
8. ibid.
9. Trade and Industry Department (TID), 'Overview of CEPA: Latest Development' (TID) <www.tid.gov.hk/english/cepa/further_liberal.html> accessed 31 October 2015.
10. ibid.
11. CEPA, art 5(3); Trade and Industry Department (TID), 'Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA): Trade in Goods' (TID) <www.tid.gov.hk/english/cepa/tradegoods/tradegoods_intro.html> accessed 7 March 2017.
12. Trade and Industry Department (TID), 'Overview of CEPA: Trade in Services' (TID) <www.tid.gov.hk/english/cepa/tradeservices/trade_services.html> accessed 31 October 2015; Trade and Industry Department (TID), 'Information on Database on CEPA Service Sectors: Measures and Regulations (by Service Sector)' (TID) <www.tid.gov.hk/english/cepa/tradeservices/trade_services_requirement.html> accessed 31 October 2015.
13. Trade and Industry Department (TID), 'Overview of CEPA: Mutual Recognition of Professional Qualification' (TID) <www.tid.gov.hk/english/cepa/mutual/mutual.html> accessed 31 October 2015.
14. CEPA, arts 16-17; TID, 'Mainland and Hong Kong Closer Economic Partnership Arrangement' (n 3); Trade and Industry Department (TID), 'Overview of CEPA: Trade and Investment Facilitation' <www.tid.gov.hk/english/cepa/facilitation/summary_invest.html> accessed 31 October 2015.
15. Trade and Industry Department (TID), 'The Mainland of China and Hong Kong Special Administrative Region Some Important Facts' (TID) <www.tid.gov.hk/english/aboutus/publications/factsheet/china.html> accessed 26 March 2016.

Hong Kong was the destination of USD 331.6 billion (14.6%) of Mainland China's aggregate exports that year.[16] Meanwhile, Mainland China, as Hong Kong's largest domestic export destination, purchased USD 2.6 billion (43.6%) of Hong Kong's aggregate domestic exports in the same year.[17] The bulk (i.e. 89.4% or USD 410.3 billion) of Hong Kong's aggregate re-exports in 2015 were represented by products re-exported to and from Mainland China via Hong Kong.[18]

Economic integration by stronger trade ties between Mainland China and Hong Kong is, in part, facilitated by the gradual convergence in economic policies in both regions. While Hong Kong is well-known internationally for its free market economy,[19] the gradual liberalization of Mainland China's 'socialist market economy' over the past decades means that the two regions have increasingly similar economies that stress the importance of free trade and competition.[20] In 2013, following the success of CEPA, Mainland China announced its 'One Belt, One Road' Initiative (the OBOR Initiative), which, amongst other things, seeks to encourage free trade between China and other nations in Asia, Europe and Africa,[21] with Hong Kong playing a pivotal role in facilitating the free trade initiatives.[22] In the decades leading up to 2047, we would expect an increasing emphasis on trade liberalization and co-operation with other nations, as well as encouraging entrepreneurship and innovation, as part of Mainland China's economic policies in tandem with the consistently laissez-faire policies of Hong Kong. Despite the concerns expressed by some commentators that 2047 might mark the end of the capitalist system in Hong Kong, or even the principle of 'One Country, Two Systems',[23] it appears more likely that Mainland China will prefer to preserve the status quo,[24] which is consistent with its interest to continue 'using an economically free Hong Kong to assist the industrialization, internationalization, and financial development of its own provinces'.[25] While some adjustments and improvements are inevitable,[26] it is expected that many of the existing economic arrangements under the Basic Law and

16. ibid.
17. ibid.
18. ibid.
19. Eric C Ip, *Law and Justice in Hong Kong* (2nd edn, Sweet & Maxwell 2016) 321.
20. Daniel Gittings, 'What Will Happen to Hong Kong after 2047' (2011) 42 California Western International Law Journal 37, 40.
21. National Development and Reform Commission (NDRC), Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road' (NDRC 28 March 2015) <http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html> accessed 13 September 2016.
22. Kin-chung Lam, *Hong Kong in the Belt and Road Initiative* (Joint Publishing (HK) 2016); Lan-cheong Lau and Yik-man Ho, *Will Hong Kong Bounce Back under 'Belt & Road' Initiative?* (City University of Hong Kong Press 2016).
23. See Kenneth KL Chan, 'Taking Stock of "One Country, Two Systems"' in YC Wong (ed), *'One Country, Two Systems' in Crisis: Hong Kong's Transformation Since the Handover* (Lexington Books 2007) 35, 54; Robert J Morris, 'The "Replacement" Chief Executive's Two-Year Term: A Pure and Unambiguous Common Law Analysis' (2005) 35 Hong Kong Law Journal 17, 22, 24, as discussed in Gittings (n 20) 39.
24. Ip (n 19) 88-89.
25. Eric C Ip, 'The Constitution of Economic Liberty in Hong Kong' (2015) 26 Constitutional Political Economy 307, 323.
26. Gittings (n 20) 51-54.

CEPA which support Hong Kong's free market, capitalist economy will likely be extended beyond 2047.

The proper functioning of the market economy in both Mainland China and Hong Kong will require active steps to curb the anti-competitive behaviour of business entities, which includes their participation in cartels or other restrictive agreements and abuse of market power to impair rivalry. This provided the impetus for the recent adoption of comprehensive competition legislation in both regions. In 2007, the *Anti-Monopoly Law* of Mainland China (*AML*)[27] was passed with a view to 'preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the interests of the society as a whole, and promoting the healthy development of socialist market economy'.[28] Developed with substantial reference to EU competition law,[29] the *AML* provides for prohibitions against 'monopoly agreements' (Chapter II), 'abuse of dominant market position' (Chapter III), 'concentration of undertakings' (i.e. anti-competitive mergers) (Chapter IV), and 'abuse of administrative power to eliminate or restrict competition' (Chapter V).[30] The responsibilities of enforcement against 'price-related' conduct, non-price conduct, and mergers are delegated to the National Development and Reform Commission (NDRC), the State Administration for Industry and Commerce (SAIC), and the Ministry of Commerce (MOFCOM) respectively.[31]

Five years later, in 2012, the *Competition Ordinance* (CO) was passed in Hong Kong to, *inter alia*, 'prohibit conduct that prevents, restricts or distorts competition in Hong Kong'.[32] The two conduct rules of the CO – the first conduct rule[33] (concerning 'anti-competitive agreements, concerted practices and decisions') and the second conduct rule[34] (concerning 'abuse of market power') – are substantially based on Articles 101 and 102 of the *Treaty on the Functioning of the European Union* (TFEU). However, unlike the relevant provisions in the *Merger Regulation* of the European Union[35] and the *AML*, the merger rule in the CO only renders anti-competitive mergers in telecommunications markets illegal.[36] The Hong Kong Competition Commission (Hong Kong Commission), as the primary antitrust enforcement authority in Hong Kong,[37] published six guidelines on both substantive and procedural aspects of the

27. Zhonghuarenmingongheguo Fanlongduanfa (中华人民共和国反垄断法) [Anti-Monopoly Law of the People's Republic of China (AML)] (promulgated by the Standing Committee of National People's Congress, 30 August 2007, effective on 1 August 2008).
28. AML, art 1.
29. Angela H Zhang, 'Problems in Following EU Competition Law: A Case Study of Coca-Cola/Huiyuan' (2011) 3 Peking University Journal of Legal Studies 96, 97.
30. Chapter V, AML.
31. H Stephen Harris, Jr and others, *Anti-Monopoly Law and Practice in China* (Oxford University Press 2011) 268,referring to various Mainland Chinese provisions in n 28.
32. Competition Ordinance (c 619) 2012.
33. CO, s 6(1).
34. CO, s 21(1).
35. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.
36. CO, Schedule 7.
37. The Hong Kong Commission shares its enforcement responsibilities with the Communications Authority for cases concerning the telecommunications and broadcasting markets: CO, s 159.

CO in July 2015.[38] Apart from the guidelines, the Hong Kong Commission has recently published its Enforcement Policy and Leniency Policy online.[39] Since the full commencement of the CO in December 2015,[40] the Hong Kong Commission has been vested with the power to bring competition law cases before the Hong Kong Competition Tribunal (Hong Kong Tribunal), which serves as the first instance antitrust court in Hong Kong.[41] The Hong Kong Commission aside, the Hong Kong Communications Authority, which regulates the telecommunications and broadcasting sectors in Hong Kong, also has enforcement authority under the CO.

In light of these post-handover initiatives, there is now a need to sustain the benefits of liberalization and further promote competition in, as well as free trade and economic integration between, the two regions by bilateral antitrust co-operation. We will proceed to consider the importance of bilateral co-operation between the antitrust authorities of Mainland China and Hong Kong in this regard. Given the limited scope of the merger rule and the absence of an 'abuse of administrative power' prohibition in Hong Kong, this article will only discuss extraterritorial enforcement by the Mainland Chinese and Hong Kong authorities of the prohibitions against anti-competitive agreements and abuse of private economic power (i.e. Chapters II and III of the *AML* and the first and the second conduct rules of the CO).

II. TOWARDS A BILATERAL ANTITRUST CO-OPERATION AGREEMENT BETWEEN MAINLAND CHINA AND HONG KONG

A. *The Importance of Bilateral Antitrust Co-operation*

Free market competition and free trade are *complementary* policies which share the common goal of advancing economic efficiency.[42] Active competition law

38. Hong Kong Competition Commission, 'Legislation & Guidance: Guidance' (Hong Kong Competition Commission) <www.compcomm.hk/en/legislation_guidance/guidance/guidance.html> accessed 7 February 2017. These guidelines include: the Guideline on the First Conduct Rule, the Guideline on the Second Conduct Rule, the Guideline on the Merger Rule, the Guideline on Complaints, the Guideline on Investigations, and the Guideline on Applications for a Decision under ss 9 and 24 (Exclusions and Exemptions) and s 15 Block Exemption Orders.

39. Hong Kong Competition Commission, 'Enforcement Policy' and 'Leniency Policy for Undertakings Engaged in Cartel Conduct' (Hong Kong Competition Commission November 2015) <www.compcomm.hk/en/legislation_guidance/policy_doc/policy_doc.html> accessed 13 September 2016.

40. 'Government plans to fully commence Competition Ordinance on December 14, 2015' (Press Release, Hong Kong Government 16 July 2015) <www.info.gov.hk/gia/general/201507/16/P201507160731.htm> accessed 31 October 2015.

41. CO, Part 6. For more details of the Hong Kong competition regime, see Kelvin HF Kwok, 'The New Hong Kong Competition Law: Anomalies and Challenges' (2014) 37 World Competition 541.

42. Maher M Dabbah, *International Law and Comparative Competition Law* (Cambridge University Press 2010) 367, 594-595; World Trade Organization (WTO), 'Working Group on the Interaction between Trade and Competition Policy - Communication from Hong Kong, China' (WTO 10 September 1997), para 6 <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=28491,26452,28590,28568,5405,38233,38234,5290,10979,9763&CurrentCatalogueIdIndex=1&FullTextHash=> accessed 8 February 2017; World Trade Organization (WTO), 'Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth' (WTO 18 September 1998), para 29 <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/WGTCP/W80.DOC> accessed 7 February 2017; World Trade Organization (WTO), 'Working Group on the Interaction between Trade and Competition Policy - Submission by the European Community and its Member States'

enforcement against anti-competitive practices hindering free trade between Mainland China and Hong Kong helps to promote competition in both regions. It has been observed that:

> Trade negotiators have been tireless in their efforts to eliminate, reduce, or limit governmental barriers of all kinds, so that sellers will have the chance to compete in all potential markets. … Once deregulation occurs, it is vitally important to have a strong competition policy in place, so that the newly freed markets will not succumb to monopolization, cartelization, or other anticompetitive strategies. … [T]he existence of strong and sound competition laws, and the effective enforcement of those laws, is an important component of an open and free international trading system.[43]

Indeed, anti-competitive behaviour of businesses may thwart the free trade policies under CEPA and result in economic inefficiency in Mainland China and/or Hong Kong.[44] For instance, despite CEPA's ambitions to liberalize Mainland Chinese service sectors by encouraging entry of Hong Kong-based firms,[45] Mainland China-based businesses may act in an anti-competitive manner to prevent foreign entry and competition. Specifically, firms based in Mainland China may protect their market positions by anti-competitive practices – such as predatory pricing or tying up local retailers by exclusive dealing arrangements – which seek to foreclose entry by Hong Kong and foreign service providers.[46] Such practices have the effect of raising the costs of new entrants, which will have to sustain losses during a period of below-cost pricing (in the case of predatory pricing) or to accept limited distribution options for their products (in the case of exclusive dealing). In the long term, the engagement or threats of such anti-competitive conduct by Mainland Chinese firms will dissuade Hong Kong and foreign entities from exploiting new business opportunities in Mainland China, and call for vigorous competition law enforcement against the Mainland Chinese firms.

Abusive practices, such as predatory pricing and exclusive dealing, of dominant firms which have a negative effect on competition in Mainland China fall squarely within the relevant prohibition under Article 17 of the *AML*. It is also beyond question that such practices are within the jurisdiction of the relevant Mainland Chinese antitrust authorities, namely the NDRC and the SAIC. However, as the authorities 'have massive networks of corresponding bureaus at various levels of the regional governments' and frequently entrust enforcement authority to such regional bureaus, incentives to enforce the *AML* against the anti-competitive firms may be contorted by local protectionism, by which local governments seek to shield domestic firms from

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(WTO 24 November 1997), 4 <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=18644,33911,20028,37447,40140,54031,43051,66442,41978,39801&CurrentCatalogueIdIndex=3&FullTextHash=> accessed 8 February 2017.

43. Diane P Wood, Antitrust Division, U.S. Department of Justice (USDOJ), Address, 'Antitrust: A Remedy for Trade Barriers?' (USDOJ 24 March 1995) <www.justice.gov/atr/speech/antitrust-remedy-trade-barriers> accessed 31 October 2015.

44. Dabbah (n 42) 582; WTO, 'Synthesis Paper' (n 42) paras 31-32.

45. Trade and Industry Department (TID), 'Trade in Services: Measures and Regulations (by Service Sector)' (TID) <www.tid.gov.hk/english/cepa/tradeservices/trade_services_requirement.html> accessed 31 October 2015.

46. Dabbah (n 42) 584-585.

outside competition by suboptimal enforcement of competition law.[47] As we shall see below, bilateral co-operation between the Hong Kong Commission and the Mainland Chinese antitrust authorities may help to alleviate problems of local protectionism.

A more perplexing question is how to address anti-competitive conduct that takes place abroad but adversely affects competition in the local jurisdiction, the classic example being a cartel over exports. If the cartel also covers products distributed to local consumers, as in the case of suppliers based in Mainland China fixing prices for products that they sell both locally and abroad, then such a cartel, being harmful to competition and consumers in Mainland China, will undoubtedly be caught by the prohibitions against price-fixing 'monopoly agreements' under the *AML*.[48] But what about a 'pure' export cartel that fixes the price for exports only?

A 'pure' export cartel that only covers products sold abroad, but not within the region, may have a negative effect on competition in that region.[49] Consider the EU case concerning Centraal Stikstof Verkoopkantoor (CSV),[50] a joint sales agent established by two manufacturers of nitrogenous fertilizers in the Netherlands for the distribution of their products outside the EU (apart from within the Netherlands).[51] CSV determined the price of such joint sales, but not the independent sales made by the two manufacturers.[52] Nevertheless, the EU Commission concluded that the joint venture arrangement violated EU competition law by restricting competition across the EU Member States, given the manufacturers' sharing of elaborate production and sales information via CSV 'ma[de] the two firms interdependent … and [led] them to coordinate their sales policy even on markets which they d[id] not supply jointly through CSV'.[53] The Commission also observed that the two manufacturers 'must inevitably refrain from competing with one another in markets not included in their pooling arrangements in order to safeguard the joint sales policy they pursue[d] through CSV'.[54] This statement reflects the alternative anti-competitive theory by which an export cartel acts as a facilitator of local tacit collusion, and therefore has local anti-competitive effects.[55] Under this theory, the export cartel itself dissuades the cartelists from cheating on their tacit agreement on the price of local sales, as such cheating is punishable by the outbreak of a price war over both local and export sales, leading to the dismantling of the export cartel, to the disadvantage of all cartelists.[56] Both the information sharing theory and the retaliation theory are plausible

47. Angela H Zhang, 'Bureaucratic Politics and China's Anti-Monopoly Law' (2014) 47 Cornell International Law Journal 671, 700-706; United States Chamber of Commerce, 'Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy' (US Chamber of Commerce 9 September 2014), 1-2, 53-56 <www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf> accessed 7 February 2017.
48. AML, arts 13 and 14.
49. Stephen Martin, *Industrial Organisation in Context* (Oxford University Press 2010) 552-554.
50. *Centraal Stikstof Verkoopkantoor (CSV)* [1978] OJ L242/15, as discussed in Martin (n 49) 553-554.
51. ibid paras 1, 62.
52. ibid paras 60, 62.
53. ibid ss IIA-IIC, in particular para 71.
54. ibid para 68, as cited in Martin (n 49) 554.
55. Martin (n 49) 552-554.
56. ibid 552.

explanations for why a 'pure' export cartel between Mainland Chinese manufacturers may come with anti-competitive effects in Mainland China, and thereby infringe the *AML*.

The question of legality becomes more difficult when a 'pure' export cartel does not have any local anti-competitive effect. In this regard, the position under the *AML* is somewhat unclear. On the one hand, the *AML* does not make it clear whether the law only applies to conduct harmful to competition in Mainland China. Instead, one of its general provisions, namely Article 2 of the *AML*, provides that the *AML* has general application to 'monopolistic conducts in economic activities within the territory of the People's Republic of China'.[57] 'Economic activities within … China' would appear to include production in Mainland China, hence implying that export cartels on products made in Mainland China are within the scope of the *AML*. Meanwhile, both Articles 13 and 14 of the *AML*, which contain the prohibitions against 'monopoly agreements', are ambiguous as to whether the prohibitions only apply to agreements which harm competition in Mainland China; in fact, the phrase 'monopoly agreements' is generally defined as 'agreements, decisions or other concerted actions which eliminate or restrict competition'.[58] This seems to suggest that the *AML* forbids cartels generally, irrespective of the geographic scope of their effects.

On the other hand, it is provided under Article 15(6) of the *AML* that 'Article[s] 13 and 14 … shall not be applicable to the agreements … concluded for … safeguarding legitimate interests in foreign trade and in economic co-operation with foreign counterparts'. The ambiguity that lies in the meaning of 'legitimate interests' renders the scope of this exemption indefinite.[59] Nevertheless, one of the leading *AML* texts notes that '[t]he provision … seems likely to have been included to permit export cartels'.[60] There is indeed some force in this argument, given the manifold of competition law jurisdictions that do not render unlawful export cartels without any domestic anti-competitive effects.[61] For example, Hong Kong – like Singapore and the United Kingdom which have competition laws based on the EU model – has a pair of conduct rules under the CO that only apply to conduct the 'object or effect' of which is 'the prevention, restriction or distortion of competition *in Hong Kong*' (emphasis added).[62] Some other jurisdictions have gone further to create a specific exemption for export cartels.[63] For instance, there is a carve-out provision under US antitrust law for export associations and their agreements to the extent that they are, amongst other things, 'not in restraint of trade within the United States'.[64]

Even if 'pure' export cartels without domestic anti-competitive effects are indeed exempt under the *AML*, extraterritorial application of competition law in the export

57. At the same time, Article 2 of the AML also provides that 'it is applicable to monopolistic conducts outside the territory of the People's Republic of China, which serve to eliminate or restrict competition on the domestic market of China'.

58. AML, art 13.

59. Harris (n 31) 84-85.

60. ibid 85.

61. ibid.

62. CO, ss 6 and 21; Brendan Sweeney, *The Internationalisation of Competition Rules* (Routledge 2010) 67.

63. Harris (n 31) 85.

64. Webb-Pomerene Act of 1918 of the United States, 15 United States Code s 62; Harris (n 31) 85 (citing and discussing this section).

destination may still provide a legal solution.[65] Mainland China and Hong Kong are amongst the numerous competition law jurisdictions in the world with conduct prohibitions having extraterritorial application.[66] In particular, sections 8 and 23 of the CO specifically clarify that its conduct rules extend to concerted and unilateral action which restricts competition in Hong Kong notwithstanding that it takes place outside Hong Kong or that any infringer is situated abroad.[67] Indeed, the Hong Kong Commission may be under considerable public pressure to take enforcement action against the cartelists, given the detrimental effects of the cartel on Hong Kong purchasers,[68] and, as noted above, Hong Kong's huge dependency on imports from Mainland China.

Yet if the Hong Kong Commission decides to take action against the cartel members, it will likely encounter difficulties in gathering evidence in Mainland China, a legal jurisdiction separate from Hong Kong.[69] On the one hand, the business premises of the cartel members – in which incriminating evidence of cartelization might be found – will be primarily situated in Mainland China.[70] This is likewise the case for persons employed or property owned by the cartel members that may form the subject of an enforcement order.[71] Such difficulties, which are typically encountered in extraterritorial antitrust enforcement, provide yet another justification for bilateral co-operation between the Hong Kong Commission and the Mainland Chinese antitrust authorities.[72]

The above analysis reveals two instances where bilateral co-operation between the Mainland Chinese and Hong Kong antitrust authorities assumes significance in tackling anti-competitive practices with a cross-border element. In the first situation, as in the case of an anti-competitive exclusion of Hong Kong entrants by an existing domestic entity in Mainland China, the concern is inactive enforcement of the *AML* because of local protectionism. As discussed below, this concern can possibly be addressed by bilateral co-operation, specifically by establishing a positive comity mechanism by which the Hong Kong Commission may exert pressure on the NDRC to investigate and sanction the Mainland Chinese entities under the *AML*. In the second scenario, where the Hong Kong Commission wishes to take enforcement action against

65. Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (2nd edn, Hart Publishing 2011) 1138.

66. CO, ss 8 and 23; AML, art 2.

67. Section 8 of the CO states:
'The first conduct rule applies to an agreement, concerted practice or decision that has the object or effect of preventing, restricting or distorting competition in Hong Kong even if—
(a) the agreement or decision is made or given effect to outside Hong Kong;
(b) the concerted practice is engaged in outside Hong Kong;
(c) any party to the agreement or concerted practice is outside Hong Kong; or
(d) any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.'
Section 23 of the CO states:
'The second conduct rule applies to conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong even if—
(a) the undertaking engaging in the conduct is outside Hong Kong; or
(b) the conduct is engaged in outside Hong Kong.'

68. Elhauge and Geradin, (n 65) 1138.

69. ibid 1139.

70. ibid

71. ibid. See also CO, ss 93-94, sch 3.

72. Elhauge and Geradin (n 65) 1139.

participants of an export cartel based in Mainland China, it faces the difficulties typically encountered in extraterritorial enforcement of competition law. Again, as discussed below, these difficulties can possibly be overcome by bilateral co-operation, whereby the Hong Kong Commission may seek the assistance of the relevant Mainland Chinese authorities in gathering evidence about the cartel participants, and receive such evidence under arrangements for information exchange.

As Professor Maher Dabbah has observed, bilateral co-operation in antitrust enforcement is important for it is 'likely to enhance market access and promote the growth of flows of trade and investment in the global economy'.[73] As Mainland China and Hong Kong place stronger emphasis on the protection of competition and the need to facilitate free trade and economic integration between the two regions, such bilateral co-operation will have an increasingly important role to play in removing restraints of trade originating from business entities. In order to develop effective bilateral antitrust co-operation between Mainland China and Hong Kong, we turn to Mainland China's and Hong Kong's existing co-operation arrangements with other regions as the starting point of this analysis.

B. *Mainland China's and Hong Kong's Existing Co-operation Arrangements with Other Regions*

Since the inception of the *AML* in 2007, Mainland China has signed memoranda of understanding on co-operation with, amongst other regions,[74] the EU,[75] Korea,[76] and the US.[77] These memoranda are largely similar in content, contemplating information to be exchanged and different areas of co-operation between the Mainland Chinese and overseas antitrust authorities.[78] Some of the memoranda expressly provide for the

73. Dabbah (n 42) 597.

74. Including Brazil, Canada, Japan, Korea, Portugal, Romania, Russia, and the United Kingdom: see the Organisation for Economic Co-operation and Development (OECD), 'Competition co-operation and enforcement: Inventory of Co-operation Agreements: List of Agency-to-agency Memoranda of Understanding' (OECD 2016) <www.oecd.org/daf/competition/competition-inventory-list-of-MOUs-interagency-agreements-cooperation.pdf> accessed 13 September 2016.

75. 'Memorandum of Understanding on Cooperation in the area of anti-monopoly law between the European Commission and the NDRC and the SAIC of the People's Republic of China' (European Commission September 2012) <http://ec.europa.eu/competition/international/bilateral/mou_china_en.pdf> accessed 31 October 2015 (EU Memorandum).

76. 'Memorandum of Understanding on Competition Cooperation between the Fair Trade Commission of the Republic of Korea and the SAIC of the People's Republic of China' (Korea Fair Trade Commission (KFTC) 30 May 2012) <www.ftc.go.kr/eng/solution/solution.jsp?file_name1=/files/bbs/2014/&file_name2=MOU(KFTC-SAIC).pdf> accessed 23 February 2017; 'Memorandum of Understanding on Antimonopoly and Antitrust Cooperation between the Fair Trade Commission of the Republic of Korea and the NDRC of the People's Republic of China' (KFTC 30 May 2012) <www.ftc.go.kr/eng/solution/solution.jsp?file_name1=/files/bbs/2014/&file_name2=MOU(KFTC-NDRC).pdf> accessed 23 February 2017 (collectively the 'Korean Memoranda').

77. 'Memorandum of Understanding on Antitrust and Antimonopoly Cooperation between the United States Department of Justice and Federal Trade Commission and the People's Republic of China NDRC, MOFCOM, and SAIC' (Federal Trade Commission 27 July 2011) <www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/110726mou-english.pdf> accessed 31 October 2015 (US Memorandum).

78. 'Memorandum of Understanding on Cooperation between the SAIC of the People's Republic of China and the Australian Competition and Consumer Commission' (Australian Competition and Consumer Commission 18 September 2012), art 2 <www.accc.gov.au/system/files/Memorandum%20of%

possibility of enforcement co-operation. The relevant provisions in the memoranda with the EU and the US, respectively, are rather open-ended. The EU one stipulates that, for 'enforcement activities concerning the same or related matters', the NDRC, the SAIC and the EU Commission 'may exchange non-confidential information, experiences [and] views on the matter and coordinate directly their enforcement activities, where appropriate and practicable'.[79] The US one also recognizes that, 'when … investigating related matters, it may be in [the US and the PRC] agencies' common interest to cooperate in appropriate cases, consistent with those agencies' enforcement interests, legal constraints, and available resources'.[80] By contrast, the memoranda with the Korean Fair Trade Commission are more explicit and detailed, specifying that the relevant authorities 'will carefully consider the essential interests of the other … in every law enforcement phase including their decision on enforcement commencement, scope of enforcement and the essential aspects of sanctions and relief measures to be taken in each case'.[81] This is an example of a 'traditional comity' provision which seeks to minimize conflicts and duplication of resources arising from overlapping enforcement activities of two different jurisdictions.[82]

The Hong Kong Commission, which is still at an early stage of implementing the new CO, recently concluded a memorandum of understanding with the Competition Bureau of Canada in early December 2016.[83] The memorandum is intended to 'promote cooperation, coordination, and information sharing' amongst the two authorities.[84] The provisions on co-operation and coordination are less elaborate than those on the exchange of information.[85] On the former, paragraph 6 requires one

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20understanding%20between%20the%20SAIC%20of%20the%20PRC%20and%20the%20ACCC.pdf> accessed 13 September 2016 (Australia-SAIC Memorandum); EU Memorandum (n 75) paras 2.1, 2.3; US Memorandum (n 77) 2.

79. EU Memorandum (n 75) para 2.3.

80. US Memorandum (n 77) 2-3.

81. Korean Memoranda (n 76), art 3 (for both).

82. Dabbah (n 42) 496-498; Martyn D Taylor, International Competition Law: A New Dimension for the WTO? (Cambridge University Press 2006) 107-113; 'Memorandum of Understanding on Cooperation between the NDRC of the People's Republic of China and the Australian Competition and Consumer Commission' (Australian Competition and Consumer Commission 30 October 2015 and 5 November 2015), art 4 <www.accc.gov.au/system/files/Memorandum%20of%20understanding%20between%20the%20National%20Development%20and%20Reform%20Commission%20and%20the%20Australian%20Competition%20and%20Consumer%20Commission.pdf> accessed 13 September 2016 (Australia-NDRC Memorandum); Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws [1995] OJ L95/47, art VI <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21995A0427(01)&from=EN> accessed 31 October 2015 (1991 EU/US Agreement).

83. 'Memorandum of Understanding between the Competition Commission of the Hong Kong Special Administrative Region of the People's Republic of China and the Commissioner of Competition, Competition Bureau of the Government of Canada Regarding the Application of Competition Laws And the Sharing of Information' (Hong Kong Competition Commission 2 December 2016) <www.compcomm.hk/en/about/inter_agency/files/MOU_CCB_signed.pdf> accessed 7 February 2017 (HK-Canada Memorandum); Hong Kong Competition Commission, 'Competition Commission Signs MOU with Canadian Competition Bureau to Strengthen Cooperation in Competition Policy and Enforcement' (Hong Kong Competition Commission 5 December 2016) <www.compcomm.hk/en/media/press/files/20161205_Competition_Commission_signs_MOU_with_Canadian_Competition_Bureau_e.pdf> accessed 7 February 2017. The rest of this paragraph is based on these sources.

84. HK-Canada Memorandum (n 83) para 1.

85. On exchange of information, see HK-Canada Memorandum (n 83) paras 13-20.

authority, upon the other authority's 'communicat[ion] that a specific activity of the [former authority] may affect the informing [authority's] interests in the application of the competition laws of its territory', to 'endeavour to provide … timely notice of significant developments … and an opportunity to provide input … in respect of the matter'. Paragraph 10 also requires both authorities to 'notify [each] other with respect to its activities that may affect the other [authority's] interests in the application of the competition laws of its territory'. These provisions merely require the authorities to keep each other informed of relevant enforcement action, but fall short of creating 'positive comity' co-operation whereby one authority may '*proactively … request* enforcement action' to be taken by another authority.[86]

Overall, the memoranda of understanding on co-operation discussed above suffer from two significant defects. First, because the memoranda are not legally binding,[87] they fall short of a formal bilateral agreement between two jurisdictions which sets out binding obligations of, and detailed mechanisms for, co-operation and coordination in antitrust enforcement. Second, they lack proper provisions for 'positive comity' co-operation which, as one commentator describes it, help to 'mitigate under-regulation by an enforcing [region] and may be perceived as creating a form of deputised law enforcement'.[88] Going forward, both Mainland China and Hong Kong are advised to cultivate more established bilateral co-operation relationships with other regions to ensure more effective enforcement against cross-border anti-competitive activities. The case for bilateral co-operation between Mainland China and Hong Kong is particularly strong, as they are two regions of the same country with an increasingly intimate economic relationship under the liberalization arrangements of CEPA and the OBOR Initiative. We shall now turn to instructive examples of bilateral co-operation between the EU, the US and Australia for guidance.

C. *Comity Co-operation between the EU and the US*

It is instructive to look at the co-operation experience between the EU and the US for a number of reasons. First, the EU and the US are widely regarded as the most significant competition law jurisdictions globally;[89] it is therefore common for other jurisdictions to seek comparative guidance from the EU and US. Second, the EU and the US have detailed provisions in their bilateral antitrust co-operation agreements representing the best practices for 'traditional comity' and 'positive comity' co-operation from which many other competition law jurisdictions may draw reference. Third, their co-operation in the investigation concerning SABRE, which will be considered below, provides a paradigmatic example of comity co-operation in antitrust enforcement.

It all began with the 1991 EU/US Competition Cooperation Agreement[90] (1991 EU/US Agreement). It contains articles for notification of enforcement activities (Article II),

86. Taylor (n 82) 111-112 (emphasis added).

87. See, e.g. Australian-SAIC Memorandum (n 78) art 6; EU Memorandum (n 75) paras 5.2-5.3; US Memorandum, (n 77) 3.

88. Taylor (n 82) 111.

89. 'Competition Law' (Wikipedia) <https://en.wikipedia.org/wiki/Competition_law> accessed 13 September 2016.

90. 1991 EU/US Agreement (n 82).

information exchange between the EU and US antitrust authorities (Article III), consultations (Article VII), and protection of confidential information (Article VIII), which are commonly found in bilateral antitrust co-operation agreements. In addition, regular, bi-annual (or more frequent) meetings are held between their staff for this purpose.[91] Article VI contains a provision for 'avoidance of conflicts over enforcement activities', which is similar to the 'traditional comity' provision contained in the memoranda between Mainland China and Korea as discussed above, but it makes reference to a number of considerations for 'traditional comity' co-operation.

Article V establishes a policy of 'positive comity'[92] which operates as follows:

> If a Party believes that anticompetitive activities carried out on the territory of the other Party are *adversely affecting its important interests*, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities.[93]

The EU/US Positive Comity Agreement[94] (1998 EU/US Agreement) concluded in 1998 provides detailed guidance on the operation of this article.[95] Pursuant to Articles I and III of the 1998 EU/US Agreement, the EU and US authorities will assist each other in the investigation and rectification of anti-competitive behaviour which takes place substantially in one region (i.e. that of the 'Requested Party') but harms the other (i.e. that of the 'Requesting Party').[96] Assistance will be rendered by the Requested Party's authorities even if the anti-competitive behaviour does not infringe the competition law of the Requesting Party and/or there is or will be enforcement action by the Requesting Party's authorities.[97] In fact, the Requesting Party's authorities are likely to 'defer or suspend their own enforcement activities' while those of the Requested Party's authorities are underway.[98]

The 1998 EU/US Agreement has an explicitly trade-related objective, namely:

> [t]o … help ensure that *trade and investment flows between the Parties* and competition and consumer welfare within the territories of the parties are *not impeded by anti-competitive activities* for which the competition laws of one or both Parties can provide a remedy.[99]

'Positive comity' co-operation offers a solution to the problem of inactive antitrust enforcement. This may be a problem in cases where a business entity from one region is

91. 1991 EU/US Agreement (n 82) art III, paras 1-2.
92. European Commission (EC), 'Bilateral Relations: United States of America' (EC) <http://ec.europa.eu/competition/international/bilateral/usa.html> accessed 31 October 2015.
93. 1991 EU/US Agreement (n 82) art V, para 2 (emphasis added).
94. Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws [1998] OJ L173/28 <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:21998A0618(01)> accessed 31 October 2015.
95. ibid, preamble.
96. ibid, art I, para 1(a), art III.
97. ibid, art III.
98. ibid, art IV.
99. ibid, art I, para 2(a) (emphasis added).

foreclosed from entering a new foreign market, an anti-competitive practice which disrupts 'trade and investment flows' across the two regions and 'adversely affect[s]' the former's 'important interests'.[100] In these circumstances, the first region may submit a precise request to the foreign region in which the anti-competitive conduct takes place, thereby triggering the operation of the 'positive comity' mechanism, by which the antitrust agencies of the foreign region will have to decide whether to 'initiate appropriate enforcement activities' against such conduct.[101] Due to the collective interest of the two regions to eliminate anti-competitive practices and promote free 'trade and investment flows between [them]', the recipient of a 'positive comity' request can be expected to respond positively to such request where the legal and practical realities permit.[102]

The operation of the 'positive comity' mechanism under the 1995 and 1998 EU/US Agreements is well-illustrated by the investigation concerning SABRE,[103] a computer reservation system (CRS) that belonged to airlines in the US, which complained to the US Department of Justice (DOJ) that it was refused access to 'air fare information and functionality' by the EU airlines which controlled Amadeus, a competing CRS that was dominant in the EU.[104] As announced in the relevant DOJ press release,[105] this represented 'the first formal request – also known as a "positive comity" request – made under [the] 1991 agreement'. This promptly resulted in a preliminary investigation by the EU Commission of the relevant EU airlines, followed by a formal abuse of dominance investigation of Air France, being one of the EU airlines. The investigation ceased in light of Air France's undertaking to provide 'equal treatment between CRSs and airlines' pursuant to a 'code of good behaviour'. 'Positive comity' co-operation between two regions can therefore help prevent anti-competitive foreclosure of a foreign firm by its dominant local competitor, thereby assisting the former to break into a new region.[106]

The 'positive comity' mechanism nevertheless has inherent limitations. First, an antitrust agency subject to limited resources may naturally prioritize anti-competitive practices affecting its own region ahead of those affecting other regions. Second, and

100. ibid; 1991 EU/US Agreement (n 82), art V, para 2.

101. 1991 EU/US Agreement (n 82), art V(2) and (3).

102. 1998 EU/US Agreement (n 94) art I, para 2; 1991 EU/US Agreement (n 82) art V.

103. As discussed in Dabbah (n 42) 514-515.

104. US Department of Justice (USDOJ), 'Justice Department Asks European Communities to Investigate Possible Anticompetitive Conduct Affecting US Airlines' Computer Reservation Systems: First Formal Investigation Request by Department to European Communities' (Press Release, USDOJ 28 April 1997) <www.justice.gov/archive/atr/public/press_releases/1997/229081.htm> accessed 13 September 2016; European Commission (EC), 'Commission Opens Procedure Against Air France for Favouring Amadeus Reservation System' (Press Release, EC 15 March 1999) <http://europa.eu/rapid/press-release_IP-99-171_en.htm> accessed 13 September 2016; European Commission (EC), 'Commission Acts to Prevent Discrimination between Airline Computer Reservation Systems' (Press Release, EC 25 July 2000) <http://europa.eu/rapid/press-release_IP-00-835_en.htm> accessed 13 September 2016. The rest of this paragraph is based on these sources.

105. US Department of Justice (USDOJ), 'Justice Department Asks European Communities to Investigate Possible Anticompetitive Conduct Affecting US Airlines' Computer Reservation Systems: First Formal Investigation Request by Department to European Communities' (Press Release, USDOJ 28 April 1997) <www.justice.gov/archive/atr/public/press_releases/1997/229081.htm> accessed 13 September 2016.

106. Dabbah (n 42) 515.

more importantly, an agency may not be empowered under the laws of its own region to address the conduct in question, as in the case of a 'pure' export cartel without any domestic anti-competitive effects (as discussed above).[107] At the same time, the agency's lack of power to investigate such cartels means that it may be unable to offer much investigatory assistance to a foreign antitrust agency contemplating extraterritorial enforcement action against the cartelists.[108] As to an export cartel with domestic anti-competitive harm of which the agency has found incriminating evidence, the agency will have difficulty sharing such evidence with a foreign agency because of its confidential nature.[109] Notably, the EU/US co-operation arrangements do not mandate the sharing of confidential information which is 'prohibited by the law of the Party possessing the information'.[110] The cartelists may understandably be reluctant to provide consent to such sharing (which would have rendered it legitimate) to facilitate the foreign agency's antitrust enforcement against themselves.[111] An effective solution to these obstacles would require a more proactive response, as illustrated by the US/Australia Agreement on Mutual Antitrust Enforcement Assistance which we will now turn to.

D. *The Agreement on Mutual Antitrust Enforcement Assistance between the US and Australia*

In 1999, the US and Australia signed the Agreement on Mutual Antitrust Enforcement Assistance[112] (the US/Australia MLA). This represented an unprecedented move by both countries to foster more proactive enforcement co-operation in competition law. As mentioned earlier, under a simple 'positive comity' arrangement such as that under the 1995 and 1998 EU/US Agreements, an agency's authority to act will necessarily be constrained by the scope of illegality under domestic competition law and legal restrictions on the sharing of confidential business information. Hence, as the first step towards more proactive enforcement co-operation, both regions will have to amend their laws to broaden their agencies' scope of authority and to remove the relevant confidentiality legal restrictions. As further discussed below, US and Australia have made such legal amendments which made the US/Australia MLA possible. Under the agreement, the two countries are to 'cooperate on a reciprocal basis in providing or obtaining antitrust evidence that may assist in determining whether a person has violated … their respective antitrust laws'; more importantly, it is expressly agreed that '[a]ssistance may be provided whether or not the conduct underlying a request would constitute a violation of the antitrust laws of the Requested Party'.[113]

107. ibid 521.
108. ibid.
109. ibid 517-518; Taylor (n 82) 112-113; Christine Laciak (ed.), *International Antitrust Cooperation Handbook* (Chicago: ABA, Section of Antitrust Law 2004) 76.
110. 1991 EU/US Agreement (n 82) art III.
111. Dabbah (n 42) 517-518; Taylor (n 82) 112-113; Laciak (n 109) 76.
112. 'USA/Australia Mutual Antitrust Enforcement Assistance Agreement' (Federal Trade Commission April 1999) <www.ftc.gov/policy/cooperation-agreements/usaaustralia-mutual-antitrust-enforcement-assistance-agreement> accessed 13 September 2016.
113. ibid, art II, A and F.

The US/Australia MLA does not place restrictions on the sharing of confidential business information, although both countries agree to 'maintain the confidentiality of any request and of any information communicated … in confidence' by one country to the other.[114]

The US/Australia MLA is the very first agreement concluded by the US after its adoption of the International Antitrust Enforcement Assistance Act (IAEAA) in 1994.[115] The IAEAA effectuated the necessary legal amendments mentioned above to make the US/Australia MLA a possibility for both countries. As the former US Federal Trade Commission (FTC) Chairman, Robert Pitofsky, noted in the relevant press release, the agreement was 'an important step forward in international antitrust enforcement'. As Pitofsky explained:

> Efforts to unlawfully monopolize markets and conspiracies to fix prices, rig bids, or otherwise illegally restrain competition often have an international dimension in today's globalized economy, and effective enforcement often requires evidence from more than one country[.] ... Congress adopted the IAEAA to improve our ability to obtain evidence located abroad in antitrust investigations. … Before enactment of the IAEAA, the inability to discuss or share confidential information with foreign antitrust authorities severely limited international cooperation in policing the global marketplace[.] … This new agreement will ensure that information, evidence, and witnesses, which may be in Australia yet needed to prove an antitrust case that hurts U.S. consumers, are available to antitrust officials here.

Importantly, the IAEAA authorizes the US antitrust agencies to 'obtain antitrust evidence relating to a possible violation of the foreign antitrust laws administered or enforced by the foreign antitrust authority with respect to which [an antitrust mutual assistance agreement] is in effect'.[116] The Act specifically provides that such authority exists 'without regard to whether the conduct investigated violates any of the [US] Federal antitrust laws'.[117] The Act has also effectuated amendments to remove certain legal restrictions on the sharing of confidential business information as between the US and the overseas antitrust agencies.[118] Similar amendments have been made in Australia under the Mutual Assistance in Business Regulation Act 1992, which was passed by the Australian Parliament to generally 'enable certain Commonwealth business-regulating authorities to provide assistance to certain foreign business-regulating authorities or agencies'.[119]

Indeed, as Pitofsky has observed, the US/Australia MLA and its enabling provisions under the IAEAA (collectively, the MLA Arrangements) have provided a much-needed solution to the enforcement difficulties created by anti-competitive conduct with 'an

114. ibid, art VIA.

115. Federal Trade Commission (FTC), 'First International Antitrust Assistance Agreement under New Law Announced by FTC and DOJ' (Press Release, FTC 17 April 1997) <www.ftc.gov/news-events/press-releases/1997/04/first-international-antitrust-assistance-agreement-under-new-law> accessed 13 September 2016. The rest of this paragraph is based on this source.

116. International Antitrust Enforcement Assistance Act of 1994 of the United States, s 6202(b).

117. ibid s 6202(c).

118. ibid s 6205; Laciak (n 109) 77; Dabbah (n 42) 517-518; Taylor (n 82) 114.

119. Laciak (n 109) 76, 81.

international dimension in today's globalized economy',[120] the prime example being export cartels. For instance, the MLA Arrangements would now enable the US agencies to gather confidential information on export cartelists and share such information with the Australian Competition and Consumer Commission (ACCC).[121] Given the utility of such mutual assistance arrangements, Pitofsky anticipated that the US/Australia MLA would be 'the first of many with other countries'.[122] Unfortunately this has not come true, and such mutual legal assistance arrangements remain rare in today's global antitrust arena for the following reasons.[123] First, not many countries or regions have the necessary legal framework for the conclusion of mutual assistance arrangements with others.[124] Second, willingness to enter into mutual assistance arrangements is often premised upon there being sufficient protection against leakage or misuse of confidential business information that is gathered and shared.[125] Understandably, a country or region will be reluctant to come to an agreement where there is a high risk of leakage or misuse.[126]

E. *Bilateral Antitrust Co-operation between Mainland China and Hong Kong: The Way Forward*

The above experiences of the EU, the US and Australia, as jurisdictions with a relatively long history of competition law enforcement and cross-border co-operation, provide instructive guidance to Mainland China and Hong Kong going forward. In fact, for the reasons below, the case for a bilateral co-operation agreement between Mainland China and Hong Kong is even stronger than most instances of cross-border bilateral antitrust co-operation between two regions.

Politically, as Mainland China and Hong Kong are part of the same country, namely the PRC, they should be willing to account for each other's economic interests and assist each other in the elimination of cross-border anti-competitive activities. Legally, despite the different legal traditions of the Mainland Chinese (civil law) legal system and the Hong Kong (common law) legal system, there is a considerable degree of convergence in their competition laws in terms of *ex post* control of anti-competitive behaviour encompassing anti-competitive arrangements and abuse of economic power. Although enforcement authority is shared between the Hong Kong Commission and the Hong Kong Communications Authority under the CO in Hong Kong, and between the NDRC (being responsible for 'price-related' conduct) and the SAIC (being responsible for non-price conduct) under the *AML* in Mainland China,[127] co-operation and coordination among these authorities should not be a

120. FTC (n 115).
121. US/Australia MLA, arts II and III.
122. FTC (n 115).
123. Taylor (n 82) 115; Dabbah (n 42) 517-520.
124. FTC (n 115); Laciak (n 109) 71, 76 (citing at page 71, Christine Varney, 'Cooperation Between Enforcement Agencies: Building Upon the Past', (Federal Trade Commission, 25 July 1995) <www.ftc.gov/es/public-statements/1995/07/cooperation-between-enforcement-agencies-building-upon-past> accessed 8 February 2017.
125. FTC (n 115); Taylor (n 82) 115.
126. Taylor (n 82) 115.
127. Harris (n 31) 268.

problem, and these can be achieved by a joint bilateral co-operation agreement with a clear demarcation of responsibilities.

In terms of co-operation experience, Mainland China and Hong Kong already have a number of criminal and civil enforcement co-operation arrangements in place. On the criminal side, the police forces of Mainland China and Hong Kong have, since the days prior to the handover of Hong Kong, been assisting each other under a 'police cooperation mechanism' for decades.[128] Under the mechanism, one region's police force may, upon the specific request of the other region's police force, 'gather information relevant to the case through legal means and provide such information to the requesting party'. The mechanism also enables members of one region's police force to travel to the other region 'for investigation purpose', but, unlike the police force in the other region, they do not have enforcement powers and may not arrest anyone who is a suspected criminal. The mechanism has proven useful to the investigation of various criminal cases ranging from dealing in dangerous drugs to violent crimes, with around 5,500 requests made by both sides in the period from 2011 to 2015. In addition to the said co-operation mechanism, the police offices of Mainland China and Hong Kong also have a 'reciprocal notification mechanism' in respect of criminal matters and unnatural deaths involving the residents of the other region.[129] On the civil side, the two regions have entered into arrangements for the 'mutual service of judicial documents', 'mutual enforcement of arbitral awards', and 'reciprocal recognition and enforcement of judgments' following the handover of Hong Kong.[130] Such co-operation experiences in both criminal and civil legal enforcement provide the confidence that a co-operation agreement in antitrust enforcement will work effectively to the advantage of both Mainland China and Hong Kong.

Economically, with its gradual liberalization of its 'socialist market economy', Mainland China, similar to Hong Kong, is increasingly guided by principles of market competition and free trade,[131] thus providing a conducive environment for the vigorous enforcement of competition law. Mainland China's economy, which was initially a state-owned economy, has undergone considerable market-based reforms since 1978 when Deng Xiaoping became the head of the Chinese Communist Party.[132] The early stage of such reforms took place in 1980s when price controls became less extensive and private firms entered various sectors to compete with state-owned enterprises.[133] Starting from the early 1990s, the economic reforms have gradually shifted to changes in law, institutions and foreign policies, from the introduction of the

128. 'LCQ2: Police co-operation mechanism between Hong Kong and Mainland' <www.info.gov.hk/gia/general/201601/27/P201601270512.htm> (Press Release, HKSAR Government 27 January 2016) accessed 13 September 2016. The rest of this paragraph is partly based on this source.

129. Hong Kong Department of Justice (HKDOJ), 'Arrangements on the Establishment of a Reciprocal Notification Mechanism between the Mainland Public Security Authorities and the Hong Kong Police' (HKDOJ) <www.doj.gov.hk/eng/topical/pdf/mainlandmutual3e.pdf> accessed 13 September 2016.

130. Hong Kong Department of Justice (HKDOJ), 'Mainland Related Projects and Cooperative Arrangements' (HKDOJ) <www.doj.gov.hk/eng/topical/mainlandlaw.html> accessed 13 September 2016.

131. Gittings (n 20) 40.

132. Owen Cox, Marcy N Moody, and Graeme Johnston, 'Mainland China: Introduction' in Graeme Johnston (ed), *Competition Law in China and Hong Kong* (Sweet & Maxwell 2009) 26-28.

133. ibid 29-31.

Anti-Unfair Competition Law and the Price Law (as predecessors of the *AML*) to the accession of China to the WTO in 2001 and, eventually, to the commencement of the *AML* in 2008.[134] At that time, it was widely believed that the *AML* would help to curb anti-competitive conduct of private entities and further strengthen Mainland China's economic growth.[135] This would entail the Mainland Chinese authorities taking active steps to enforce the *AML*, or facilitating enforcement by foreign antitrust authorities, against anti-competitive conduct which affects the interests of Mainland China and its trading partners, including Hong Kong. This in turn provides the impetus for Mainland China to actively cooperate in antitrust enforcement with Hong Kong and other trading partners on a regular basis.

The above-mentioned political, legal, historical, and economic factors altogether provide a supportive environment for the negotiation and conclusion of a bilateral co-operation agreement in competition law enforcement between Mainland China and Hong Kong. Drawing on the overseas experiences analysed in previous sections, a roadmap is presented below for future antitrust co-operation between the two regions, taking into account their unique circumstances.

As an initial step, preliminary discussions of bilateral co-operation may be crystallized into a memorandum of understanding between the Mainland Chinese and Hong Kong antitrust authorities. They should then, however, take negotiations further towards the conclusion of a formal bilateral co-operation agreement. Apart from the agreements between the EU, the US and Australia as already discussed above, another instructive example is provided by the bilateral co-operation agreement between Australia and New Zealand in 2007.[136] This is an example where economic integration between two closely located regions began with a free trade agreement, namely the Australia New Zealand Closer Economic Agreement, and was strengthened through structured bilateral co-operation arrangements between their antitrust authorities under the 2007 agreement.[137] Mainland China and Hong Kong are in a similar situation, in which the benefits from free trade and economic integration as accelerated through CEPA can be secured and augmented by a firm commitment to bilateral antitrust co-operation between the two regions.

Like any well-structured bilateral co-operation agreement in antitrust enforcement, the agreement between Mainland China and Hong Kong should provide for mechanisms for, and confidentiality protections over, information exchange between their antitrust authorities. The agreement should also include comity co-operation arrangements similar to those under the relevant EU/US Agreements. In order to minimize conflicts and duplication of resources arising from a possible overlap in enforcement activities undertaken by the Mainland Chinese and Hong Kong antitrust authorities, there is a need for 'traditional comity' co-operation between the authorities

134. ibid 31.

135. ibid 32.

136. 'Cooperation Agreement between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission' (Australian Competition and Consumer Commission 31 July 2007) <www.accc.gov.au/system/files/Cooperation%20agreement%20between%20the%20ACCC%20%26%20the%20NZCC.pdf> accessed 13 September 2016 (2007 Australia/New Zealand Agreement).

137. ibid; Dabbah (n 42) 505-506.

of both regions.[138] In this respect, a well-designed provision for conflict avoidance would indicate clearly the source of each region's significant interests (e.g. under the law and policy documents of a region,[139] or interests specifically communicated to each other[140]), and require the proactive consideration of each other's interests throughout the course of enforcement.[141] As to the latter requirement, it would be helpful if the provision contains specific points for mandatory consideration by each region's antitrust authorities, similar to those set out in Article VI(3) of the 1991 EU/US Agreement as discussed above.

As explained above, to address concerns of protectionism or inactive enforcement in cases involving a foreign entrant being excluded by a dominant local competitor in an anti-competitive manner, there ought to be 'positive comity' co-operation between Mainland China and Hong Kong to effectively tackle exclusionary behaviour that hinders free trade and investment across the two regions. Such co-operation, which goes beyond mere exchange of information between antitrust authorities, entails both active investigation by and remedial measures from the authority that is proximate to the exclusionary conduct upon the specific request from the other region.[142] In order not to undermine the effectiveness of 'positive comity' co-operation and encourage more frequent use of such a provision, 'double illegality' (i.e. the conduct being illegal under both the *AML* and the CO) should not be made a pre-requisite for such co-operation.[143]

Once the two regions have accumulated experience in traditional and positive comity co-operation at the basic level, they should then consider whether to strengthen their co-operation by entering into further arrangements on mutual legal assistance similar to that under the US/Australia MLA. If an MLA between two countries across the Pacific can be justified by its benefits in tackling anti-competitive behaviour with a cross-border element (particularly 'pure' export cartels), the case for an MLA between Mainland China and Hong Kong is even stronger given their close political and economic relationship as described above. In fact, as key trading partners, we can expect both Mainland China and Hong Kong to be frequently exposed to the risk of consumer harm resulting from export cartels that originate from the other region.[144] An MLA similar to the one between the US and Australia would enable the Hong Kong Commission to seek the investigative assistance of the Mainland Chinese antitrust authorities in gathering evidence of (pure) export cartels affecting Hong Kong consumers.

However, the conclusion of such an MLA will require fundamental changes to the laws of both Mainland China and Hong Kong to broaden the investigative powers of

138. Dabbah (n 42) 496-498; Taylor (n 82) 107-113; Australia-NDRC Memorandum (n 82) art 4; 1991 EU/US Agreement (n 82) art VI.

139. 1991 EU/US Agreement (n 82) art VI(1).

140. 2007 Australia/New Zealand Agreement (n 136) para 10.2.

141. 1991 EU/US Agreement (n 82) art VI.

142. 1998 EU/US Agreement (n 94) art III.

143. Dabbah (n 42) 503. Note that 'double illegality' is not a pre-requisite for positive comity co-operation between the EU and the US, according to art III of the 1998 EU/US Agreement: Dabbah (n 42) 503.

144. See n 15-18 and accompanying text.

their antitrust authorities[145] and to remove confidentiality restraints on the sharing of information. The latter is a particularly difficult task for Mainland China, which has long treated certain kinds of trade secrets as 'state secrets', including the product cost and profit margins of 'substantial enterprises' and the pricing policies of general products.[146] Such information may be highly relevant to an antitrust investigation but, given its classification as 'state secrets', cannot be shared with the Hong Kong (or overseas) authorities even with the consent of the business entities under investigation.[147] It would not be easy to persuade Mainland China to create exceptions for such information for the purposes of an MLA with the Hong Kong antitrust authorities. The reluctance to share information with the Hong Kong authorities may also extend to confidential business information that does not constitute 'state secrets', as they might end up in the hands of a Hong Kong complainant with regional or international business operations.[148] Hence, despite the utility of an MLA in antitrust enforcement between Mainland China and Hong Kong in light of their intimate trade relationship, it appears unlikely that such an agreement will materialize in the near future.

It is therefore suggested that Mainland China and Hong Kong take a step-by-step approach to their bilateral antitrust co-operation, starting with preliminary negotiations towards a brief memorandum of understanding establishing a broad framework for co-operation, before proceeding to hammer out detailed traditional and positive comity arrangements as part of the bilateral co-operation agreement. After some years of co-operation experience, the two regions may consider initiating discussions on more proactive co-operation via an MLA of the kind concluded between the US and Australia, if there is sufficient support for the necessary background legal amendments in both regions. We now turn to a significant issue that should be addressed as part of bilateral antitrust co-operation between Mainland China and Hong Kong: state restraints at the interface of the two regions.

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145. In respect of 'pure' export cartels, the position is clear under Hong Kong law: they do not violate the first conduct rule (under s 6 of the CO) insofar as they are originated from Hong Kong but only harm competition outside Hong Kong, and hence fall outside the investigative powers of the Hong Kong Commission under the CO: see s 39(2) of the CO (which provides that 'the Commission may only conduct an investigation under this Part if it has reasonable cause to suspect that a contravention of a competition rule has taken place, is taking place or is about to take place'). The position is less clear under the *AML* in Mainland China: as discussed above, it is not clear whether 'pure' export cartels with harmful effects external to Mainland China constitute an infringement of the *AML*; but assuming they do not (because of the exemption under Article 15(6)), it would appear that the Mainland Chinese authorities do not have authority to investigate such cases: see art 38, AML (which provides that '[t]he authority for enforcement of the Anti-monopoly Law shall investigate any suspected monopolistic conduct according to law').

146. Shangye Gongzuo Zhong Guojia Mimi Ji Miji Juti Fanwei De Guiding (商业工作中国家秘密及密级具体范围的规定) [Rules on Specific Definition of State Confidentiality and Its Coverage in Commercial Activities] (promulgated by the Ministry of Commerce of the People's Republic of China, 29 September 1989, effective 29 September 1989).

147. Zhonghuarenmingongheguo Baoshouguojiamimifa Shishi Tiaoli (中华人民共和国保守国家秘密法实施条例) [Regulation on the Implementation of the Law of the People's Republic of China on Guarding State Secrets] (promulgated by the State Council of the People's Republic of China, 17 January 2014, effective 1 March 2014) Order No 646, art 5.

148. Taylor (n 82) 115.

III. STATE RESTRAINTS AT THE MAINLAND CHINA-HONG KONG INTERFACE

A. *The Perplexity of State Restraints at the Mainland China-Hong Kong Interface*

To understand how state restraints (in particular state compulsion) at the Mainland China-Hong Kong interface adds to the complexity of an export cartel case, consider the following scenario. Several Mainland Chinese producers come together to fix prices on a product that they produce domestically and export to another region. Consumers who purchase that product for direct consumption will be harmed by such an export cartel. If the product is a raw material that is used by the buyer in the manufacturing of another (end) product, the buyer may have passed on the higher materials costs to players down the supply chain, eventually leading to higher prices paid by end consumers. As explained above, the importing region's antitrust authorities may wish to take enforcement action against the Mainland Chinese producers, and in doing so, would benefit from the assistance of the Mainland Chinese antitrust authorities pursuant to a bilateral co-operation agreement between Mainland China and that importing region. What if, however, the Mainland Chinese producers claim that they are required under domestic law or state policy to fix prices for the exported product? Should the Mainland Chinese producers be exempt from antitrust liability on the basis of such state compulsion, and if so, are there any alternative means – other than antitrust enforcement – that would enable the consuming jurisdiction to dismantle the cartel?

This is a complicated situation in which extraterritorial competition law enforcement meets state compulsion at the interface between Mainland China and Hong Kong. It is not an uncommon scenario in the context of cross-border trade with Mainland China. Despite progressive efforts in trade liberalization over the years, Mainland China has continued to exercise tight control over a broad spectrum of products exported to foreign regions. These products have encompassed fruits, vegetables, livestock, seafood, health products, and various raw materials.[149] Mainland Chinese producers of such products may have no choice but to comply with the price and quantity restrictions imposed by the relevant government authorities in Mainland China. As Mainland China continues to be the largest product supplier to

149. Duiwaimaoyijingjihezuobu Guanyu Gongying Gangao Xianhuolengdongshangpin Zhudongpeieguanli Zanxingguiding (对外贸易经济合作部关于供应港澳鲜活冷冻商品主动配额管理暂行规定) [Provisional Regulations of the Ministry of Foreign Trade and Economic Cooperation on the Administration of Voluntary Quotas of Fresh, Live and Frozen Commodities Supplied to Hong Kong and Macao] (promulgated by the Ministry of Commerce of the People's Republic of China, 1 July 1995); Xinhuanet, 'Sharp Increase in the Prices of Chinese Medicine Resulted from Mainland Chinese Export Restrictions' *Xinhuanet* (China, 10 October 2011) <http://news.xinhuanet.com/world/2011-10/10/c_122136791.htm> accessed 31 October 2015; General Administration of Customs of the People's Republic of China, 'What Kinds of Goods Have been Added to the "Catalogue of Export Forbidden Items"?' (30 August 2005) <www.customs.gov.cn/publish/portalo/tab3400/info5329.htm> accessed 31 October 2015; Permanent Mission of the People's Republic of China to the United Nations and other International Organizations in Vienna (PRC Permanent Mission), 'Certain Chemicals and Related Equipment and Technologies Export Control List' (PRC Permanent Mission 19 January 2002) <www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/fks/t127630.htm> accessed 9 March 2017.

Hong Kong,[150] many Hong Kong consumers will suffer from the artificially inflated prices of the imported products. Nevertheless, given the producers' lack of choice in implementing the export restrictions, extraterritorial antitrust enforcement by the Hong Kong Commission against the Mainland Chinese producers would neither be a fair or an effective solution to the problem, which is rooted in the export restrictions imposed by Mainland Chinese state authorities.

As I shall argue below, a pragmatic solution to this dilemma is to grant antitrust immunity to the Mainland Chinese producers by *recognition of a broad state compulsion defence in Hong Kong* (possibly by non-enforcement by the Hong Kong Commission as a matter of discretion) and to address the root of the problem (i.e. to remove the state-imposed export restrictions) through *diplomatic means with the assistance of bilateral co-operation* between the Hong Kong Commission and Mainland Chinese antitrust agencies. To fully understand this argument, we will first examine the operation of the state compulsion defence as between two different legal jurisdictions through a comparative evaluation of relevant US and EU competition law cases.

B. *The US Foreign Sovereign Compulsion Defence and its Relevance*

Hong Kong is only one of the many key trading partners of Mainland China that may become an easy victim of Mainland Chinese export cartels (as between private entities) or export controls (as imposed by government authorities). In fact, US consumers and businesses have long experienced this problem as frequent purchasers of Mainland Chinese products and inputs. Such products and inputs may be the subject of a price-fixing export cartel between Mainland Chinese sellers as well as export control measures imposed by Mainland Chinese authorities. Under US antitrust law, the question becomes whether the sellers, if sued in the US, may rely on such measures (i.e. state compulsion) as defence to their legal liability for price fixing. This issue was examined in the recent case of *Vitamin C*.[151] The case concerns the scenario just described, with the cartelized product being Vitamin C and the defendants alleging that 'they were compelled by the [Mainland] Chinese government to fix prices'.[152] The District Court in that case stated that:

> The defense of foreign sovereign compulsion ... focuses on the plight of a defendant who is subject to conflicting legal obligations under two sovereign states ... [and] recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's. ... In addition to fairness concerns, the [foreign sovereign compulsion] defense also acknowledges comity principles by accommodating the interests of equal sovereigns and giving due deference to the official acts of foreign governments.[153]

150. See n 15 and accompanying text.

151. *In re Vitamin C Antitrust Litigation* 837 F.3d 175, 180 (2d Cir. 2016) (*Vitamin C* (Second Circuit)), overturning the decision of the United States District Court for the Eastern District of New York in *In re Vitamin C Antitrust Litigation* 810 F Supp 2d 522 (EDNY 2011) (*Vitamin C* (District Court)).

152. *Vitamin C* (District Court) (n 151) 524.

153. ibid 544.

This is consistent with the Antitrust Enforcement Guidelines for International Operations (US Guidelines),[154] which point to comity and fairness as the justifications for the defence:

> There are two rationales underlying the defense of foreign sovereign compulsion. First, Congress enacted the US antitrust laws against the background of well recognized principles of international law and comity among nations, pursuant to which US authorities give due deference to the official acts of foreign governments. A defense for actions taken under the circumstances spelled out below serves to accommodate two equal sovereigns. Second, important considerations of fairness to the defendant require some mechanism that provides a predictable rule of decision for those seeking to conform their behavior to all pertinent laws.[155]

The defence first received recognition under US law in *Interamerican Refining Corp v Texaco Maracaibo, Inc.*[156] In that case, the plaintiff, an oil refinery based in the US, sued a number of oil companies for being part of a boycott to cut off the plaintiff's supply of crude oil from Venezuela.[157] The defendants claimed that the boycott was due to state compulsion by Venezuela, and the District Court accepted the defence.[158] According to the District Court:

> When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. … Anticompetitive practices compelled by foreign nations are not restraints of commerce … because refusal to comply would put an end to commerce. … Commerce may exist at the will of the government, and to impose liability for obedience to that would eliminate for many companies the ability to transact business in foreign lands.[159]

The foreign sovereign compulsion defence was traditionally rather stringent in its requirements, as the District Court emphasized in *Vitamin C*.[160] First, the defence only applies if the foreign government or legal order 'coerced the defendant into violating American antitrust law' rather than simply authorized the defendant's acts.[161] Secondly, the defence 'is not available for conduct beyond what the foreign sovereign compelled'.[162] Thirdly, the defence will only be accepted if the compulsion is not the result of procurement by those who act in an anti-competitive manner.[163] Fourthly, the

154. US Department of Justice (USDOJ) and Federal Trade Commission (FTC), 'Antitrust Enforcement Guidelines for International Operations' (USDOJ April 1995) <www.justice.gov/atr/public/guidelines/internat.htm> accessed 31 October 2015.

155. ibid, section 3.32.

156. 307 F Supp 1291 (D Del 1970).

157. ibid 1292.

158. ibid 1296.

159. ibid 1298.

160. *Vitamin C* (District Court) (n 151) 544-545.

161. *Mannington Mills, Inc v Congoleum Corp* 595 F 2d 1287, 1293 (3rd Cir 1979).

162. Spencer W Waller, *Antitrust and American Business Abroad* (3rd edn, Thomson/West 2011) para 8:23, fn 6, as cited in *Vitamin C* (District Court) (n 151) 544.

163. *Vitamin C* (District Court) (n 151) 548, fn 33. See also *United States v Sisal Sales Corp* 274 US 268, 276 (1927); *Mannington Mills* (n 161) 1293; *Timberlane Lumber Co v Bank of America* 549 F 2d 597, 606-607 (9th Cir 1976); *Interamerican Refining Corp* (n 156) 1297.

defence is only justified in the presence of 'penal or other severe sanctions … for refusing to comply with the foreign government's command' or 'where refusal to comply … would be futile'.[164]

The Second Circuit Court of Appeals nevertheless preferred to address the defendants' argument in *Vitamin C* under the broader principle of 'international comity' rather than within the rubric of the traditional foreign sovereign compulsion defence, thereby effectively relaxing the requirements for a successful defence.[165] The Second Circuit Court found the District Court to have erred in not finding 'a true conflict between U.S. law and Chinese law' on the basis of MOFCOM's amicus brief, to which the District Court was 'bound to defer'.[166] According to the Second Circuit Court, 'a U.S. court [should] not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations, even if that representation is inconsistent with how those laws might be interpreted under the principles of [the US] legal system'.[167] This is consistent with 'the tradition of according respect to a foreign government's explication of its own laws',[168] and is especially justified by 'the unique and complex nature of the Chinese legal- and economic-regulatory system and the stark differences between the Chinese system and [the US system]'.[169] The Second Circuit Court considered it 'irrelevant' whether the defendants 'benefited from, complied with, or orchestrated the mandate' or whether their 'specific conduct was … compelled'.[170] The Court also referred to other 'comity factors' in support of its decision, including the significant fact that 'complaints as to China's export policies can adequately be addressed through diplomatic channels and the World Trade Organization's processes'.[171]

The traditional foreign sovereign compulsion defence is arguably a derivative of the 'act of state' defence, also known as foreign sovereign immunity, as a well-recognized international law principle.[172] It was held in the Hong Kong case of *Intraline Resources Sdn Bhd v The Owners of the Ship or Vessel 'Hua Tian Long'*[173] (*Hua Tian Long*) that a Mainland Chinese government entity (including a state-owned enterprise) may not rely on foreign sovereign immunity as a defence to a civil claim before Hong Kong courts, because the Mainland Chinese government (i.e. the Central People's Government of the PRC) is not a 'foreign sovereign' with respect to Hong Kong.[174] However, the non-applicability of the foreign sovereign immunity in this instance is

164. *Vitamin C* (District Court) (n 151) 544, citing US Guidelines (n 154) s 3.32; Brief for the United States as Amicus Curiae Supporting Petitioners, *Matsushita Electric Industrial Co v Zenith Radio Corp* (No. 83-2004), 1985 WL 669667, 24-25.
165. *Vitamin C* (Second Circuit) (n 151) 182-194.
166. ibid 180, 186, 189.
167. ibid 189.
168. ibid.
169. ibid 190.
170. ibid 192.
171. ibid 193.
172. *Timberlane Lumber* (n 163) 606-607; *Mannington Mills* (n 161) 1292-1293.
173. [2010] 3 HKLRD 611.
174. ibid [27]-[31].

purely technical in nature, as the Hong Kong Court of First Instance held in the same case that a Mainland Chinese government entity may, in appropriate circumstances, rely on the so-called 'Crown immunity' as a defence (which, prior to the handover of Hong Kong, belonged to the British government, and since the handover, has belonged to the Mainland Chinese government).[175] As the decision of the Court of Appeal of Alberta, Canada in *Athabasca Chipewyan First Nation v Canada (Minister of Indian Affairs and Northern Development et al)*[176] observes:

> The rationale for sovereign immunity is that, since states are equal, one cannot exercise jurisdiction over another. It will be immediately apparent that, while sovereign and Crown immunity are distinct concepts, there is a strong resemblance between them. … [However,] [t]o the extent that the rationale underlying sovereign immunity has any importance in a federal state, that function is already fulfilled by Crown immunity.[177]

The fact that justifications such as 'comity and mutual respect'[178] cut across both foreign sovereign immunity and Crown immunity perhaps explains why a number of Canadian decisions[179] seem to support a '"modified" sovereign immunity' that applies as between different provinces of Canada.[180] In fact, both defences boil down to the simple idea that the courts of one legal jurisdiction should respect the government of another jurisdiction (whether it is another country, or another region within the same country) and should not interfere with its acts by declaring them illegal. This is what justifies state immunity (whether in the form of foreign sovereign immunity or Crown immunity), and the justification extends to private entities which are forced to behave in certain ways (e.g. forced to fix prices) under the compulsive acts of a local or foreign state, whether by legislation or government order. Hence, the fact that a Mainland Chinese government entity may avail itself of Crown immunity under Hong Kong common law would suggest that Hong Kong courts should develop the law further, by reference to the US and Canadian cases discussed above, to recognize a 'Crown compulsion' defence (as a derivative of Crown immunity). However, as further explored below, it may not be easy to persuade Hong Kong courts to recognize such a defence as a matter of common law given the CO already provides for a general exclusion that applies primarily to compulsion under Hong Kong legislation.

Despite the proliferation of successful private entities over the decades of market reforms in the Mainland China,[181] there remains a large number of state-owned enterprises in different industries across the country.[182] As confirmed by the Hong Kong

175. ibid [54]-[90].

176. [2001] ABCA 112.

177. ibid [45] and [55], as cited in *Hua Tian Long* (n 173) [40].

178. *Hua Tian Long* (n 173) [43].

179. *Western Surety Co v Elk Valley Logging Ltd* (1985) 23 DLR (4th) 464 (BCSC); *Phillips (Guardian ad litem) v Beary* (1994) 29 CPC (3d) 258 (BCSC)); *Bouchard v JL Le Saux Ltee* (1984) 45 OR (2d) 792, as cited in *Hua Tian Long* (n 173) [36].

180. *Hua Tian Long* (n 173) [36].

181. Cox, Moody and Johnston, (n 132) 31-32. The authors noted (at 32) that '[a]s of 2007, China's private sector accounted for more than 40 percent of GDP, 60 percent of growth and 75 percent of new jobs'.

182. Cox, Moody and Johnston (n 132) 32-33.

Court of First Instance in *Hua Tian Long*, the Mainland Chinese state-owned enterprises can possibly benefit from Crown immunity in proceedings before Hong Kong courts subject to their satisfaction of the 'control' test, which primarily depends on 'whether the corporation in question is able to exercise independent powers of its own'.[183] It is entirely possible that 'a corporation [would] enjoy immunity for one purpose and not for another'.[184] In ascertaining the degree of control/independence, it will be relevant to consider whether the state-owned enterprise in question 'enjoy[s] powers of independent management and freedom from interference, with ownership of its assets and the capacity independently to assume civil liabilities'.[185] On the facts of *Hua Tian Long*, it was held that the Guangdong Salvage Bureau, as a state-owned enterprise, did not enjoy such independence; it was 'not a separate legal entity' but rather belonged to the Ministry of Communications (Guangdong Salvage Bureau), which was under the ultimate control of the Central People's Government the PRC. Accordingly, the Guangdong Salvage Bureau, as the defendant in *Hua Tian Long*, could benefit from Crown immunity under the 'control' test.[186] It is important to note that state-owned enterprises which operate independently of Mainland Chinese government authorities and hence cannot rely on Crown immunity before Hong Kong courts, insofar as they are subject to the compulsive legal or administrative orders of Mainland Chinese government authorities that require their participation in anti-competitive activities, should be able to claim the benefit of a state compulsion defence to liability under the CO, just like any private business entity subject to Mainland Chinese state compulsion. The question is how to give effect to such a defence within the Hong Kong competition law regime, which is an issue to be further explored below.

C. *The EU State Compulsion Defence and its Relevance*

We now turn to cases under EU competition law for comparative guidance on the appropriate solution to state compulsion at the Mainland China-Hong Kong interface. There is a long-established defence of state compulsion under the EU competition law which the Court of Justice (CJ) described in *Commission v Ladbroke Racing*[187] as follows:

> If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles [101] and [102] do not apply. In such a situation, the restriction of competition is not attributable … to the autonomous conduct of the undertakings.[188]

It has been recognized by the EU Commission in *Franco-Japanese Ballbearings Agreement*[189] that the defence can be relied upon by a defendant subject to compulsion

183. *Hua Tian Long* (n 173) [52].
184. ibid.
185. ibid [112].
186. ibid [118] and [125].
187. Cases C-359/95 P, C-379/95 P [1997] ECR I-6265.
188. ibid [33].
189. [1974] OJ L343/19.

by a *non-EU* state, and accordingly 'measures imposed on Japanese undertakings by the Japanese authorities' would be 'outside the scope of Article [101]'.[190] Similarly, the EU Commission acknowledged in its recent *Airfreight*[191] decision that the defence is 'equally applicable to third country regulations'.[192] Therefore, the EU state compulsion defence may provide the legal solution in cases where the compulsive state orders of an outside jurisdiction force private entities into behaviour which harms competition in the home region by exempting the entities from liability under domestic competition law.

The EU state compulsion defence shares some common requirements with the US foreign sovereign compulsion as traditionally formulated. First, there is no state compulsion 'if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct',[193] as in the case where a foreign enactment 'merely exempts the conclusion of export cartels from the application of United States anti-trust laws but does not require such cartels to be concluded'.[194] Second, it follows from the first requirement that 'residual field[s] of competition' remain subject to the competition provisions.[195] Third, similar to the position under the traditional US defence, undertakings are prevented from breaching competition law of their own free will and subsequently securing a legal or government order which 'mandates' the breach.[196] As elucidated in *Asia Motor France v Commission*,[197]

> [I]f a State measure encompasses the elements of an agreement concluded between traders in a given sector or is adopted after consulting the traders concerned and with their agreement, those traders cannot rely on the binding nature of the rules in order to escape the application of Article [101](1).[198]

Fourthly, one must show either 'a binding regulatory provision capable of affecting the free play of competition'[199] or absent which, 'the exercise of irresistible

190. ibid, s II.1. The Commission nevertheless held that: 'The facts ... do constitute measures ... imposed on Japanese undertakings by the Japanese authorities nor even, to the Commission's knowledge, authorized by those authorities; these are bilateral measures of a private nature, which have not been the subject of any government intervention from either the French or the Japanese side. These measures may, therefore, come within the terms of Article [101]': s II.1. Cf Vivien Rose and David Bailey (eds), *Bellamy & Child: European Union Law of Competition* (7th edn, Oxford University Press 2013), para 11.004 ('Although the question of whether mandatory measures by a non-Member State may shield an agreement or conduct from the application of competition law has not been conclusively decided, it seems that the same principle should be applied in such a case.').

191. Case COMP/39258, provisional non-confidential version of the Commission decision of 9.11.2010 published on 08.05.2015.

192. ibid footnote 1198.

193. Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, para 82.

194. Cases 89/85, 104/85, 114/85, 116/85, 117/85, 125-129/85 *Ahlström Osakeyhtiö and Others v Commission (I)* [1988] ECR 5193, para 20.

195. Cases 40-48/73, 50/73, 54-56/73, 111/73, 113-114/73 *Suiker Unie v Commission* [1975] ECR 1663, para 24. See also *Deutsche Telekom* (n 193) para 80; Rose and Bailey (eds) (n 190) para 11.006.

196. See n 163 and accompanying text.

197. Case T-387/94 [1996] ECR II-961.

198. ibid para 60.

199. ibid para 61.

pressures [by national authorities], such as … the threat to adopt State measures likely to cause [undertakings] to sustain substantial losses'.[200] This is unlike the traditional US defence which requires the showing of 'penal or other severe sanctions' for (or the futility of) non-compliance in every case,[201] irrespective of whether there is a 'binding regulatory provision'. The EU defence is therefore less stringent than the traditional US defence insofar as the *degree* of compulsion is concerned. However, the recent Second Circuit Court decision in *Vitamin C* (as discussed above) suggests that defendants are no longer bound by the stringent requirements of the traditional US defence if they fit their case under the broader principle of 'international comity'.[202]

The defence of state compulsion was rejected by the EU Commission in the recent case of *Airfreight*,[203] concerning the fixing of surcharges between airlines operating across Europe, Asia and other parts of the world.[204] Specifically, the airlines failed to convince the EU Commission that they were compelled by the relevant laws or regulators in non-EU regions (including Hong Kong) or the Air Service Agreements between EU and non-EU regions to fix surcharges.[205] The EU Commission emphasized the importance of concrete, documentary evidence of the alleged state compulsion when discussing the case of Japan:

> [t]he parties have provided no written agreement, guidance, memorandum or email from any authority which records this position. No satisfactory contemporaneous documentary evidence has been submitted to substantiate the claim that [Japanese Civil Aviation Bureau] required coordination of the carriers' [fuel surcharge] implementation. It is based rather on simple assertions of the parties which is not sufficient to substantiate a defence of state compulsion.[206]

Insofar as there was encouragement under any non-EU regime to engage in collusion with other airlines, this could only amount to a 'mitigating factor' resulting in a reduction of fines.[207]

Given the substantive provisions in the CO in Hong Kong are substantially modelled on EU competition law, it is no surprise that the state compulsion defence developed by the EU courts has found its way into the CO, except it was enacted as part of the CO in a much more restrictive form than the EU counterpart. The Hong Kong version of the defence exists under section 2 of Schedule 1 to the CO as a general exclusion for 'compliance with legal requirements'.[208] It is, however, not a

200. ibid para 65.
201. See n 164 and accompanying text.
202. *Vitamin C* (Second Circuit) (n 151) 182-194.
203. *Airfreight* (n 191) para 1013.
204. ibid paras 1, 12-64, 966, 1006.
205. ibid paras 966-1013.
206. *Airfreight* (n 191) para 1004.
207. ibid para 1014.
208. Section 2 of Schedule 1 to the CO states that:
'(1) The first conduct rule does not apply to an agreement to the extent that it is made for the purpose of complying with a legal requirement.
(2) The second conduct rule does not apply to conduct to the extent that it is engaged in for the purpose of complying with a legal requirement.

general state compulsion defence which applies to all legal and government orders; instead, it is only a 'legal compulsion' defence confined to compulsion by a 'legal requirement' which is 'imposed by or under any enactment in force in Hong Kong' or 'any national law applying in Hong Kong'.[209] The latter refers to Mainland Chinese laws 'applied in Hong Kong pursuant to the provisions of Article 18 of the Basic Law',[210] which are 'confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of [Hong Kong]'.[211] However, many Mainland Chinese state requirements, such as export controls, are not, and cannot be, extended to Hong Kong by way of Article 18 of the Basic Law. Such requirements nevertheless affect the price and volume of products imported from Mainland China into Hong Kong, and thus have anti-competitive effects in Hong Kong. The question remains as to how to address such state requirements at the interface of Mainland China and Hong Kong in the absence of a general statutory defence for state compulsion as in the EU.

D. *A Diplomatic Solution of Mutual Self-Restraint*

There are a number of possible solutions that can be explored. First, a broader state compulsion defence could possibly be introduced into Hong Kong law through decision-making by the courts. Nevertheless, this would have to wait until a pertinent case is brought before a Hong Kong court. It is also doubtful whether the courts are willing to interpret the conduct rules as being subject to a tacit, general exception for all kinds of state compulsion, in the face of a narrowly-defined 'local' state compulsion defence which the legislature has expressly provided for under the CO. Second, the Chief Executive in Council may exercise its discretion under section 31 of the CO (by making exemptions based on 'exceptional and compelling reasons of public policy') or sections 4 and 5 of the CO (by disapplying the conduct rules in respect of particular persons or activities) to cater for situations of Mainland Chinese state compulsion. However, unless and until the Chief Executive in Council makes a relevant exemption or disapplication on their own initiative or upon request, manufacturers subject to Mainland Chinese state compulsion would face uncertainty as to the legality (under the CO) of their exports to Hong Kong.

To mitigate this legal uncertainty, a diplomatic solution of mutual self-restraint should be considered. Under this proposal, the Hong Kong Commission will issue a clear statement to the effect that they will, as a matter of discretion, not take enforcement action against entities subject to Mainland Chinese state compulsion.[212]

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(3) In this section— "legal requirement" ([Chinese characters omitted]) means a requirement—
(a) imposed by or under any enactment in force in Hong Kong; or
(b) imposed by any national law applying in Hong Kong.'

209. CO, sch 1, para 2(3).

210. Hong Kong Interpretation and General Clauses Ordinance (Cap 1), s 3.

211. Basic Law, art 18, para 3.

212. Shearman & Sterling, 'Vitamin C Purchasers Awarded $162 Million in First-Ever Civil Price-Fixing Verdict Against Chinese Companies' (Shearman & Sterling 1 April 2013) 5 <www.shearman.com/~/media/Files/NewsInsights/Publications/2013/04/Vitamin-C-Purchasers-Awarded-$162-Million-in-Fir__/Files/View-full-memo-Vitamin-C-Purchasers-Awarded-162-__/FileAttachment/Vitamin-C-Purchasers-Awarded-$162-Million-in-Fir__.pdf> accessed 9 August 2014.

The rationale is that issues of Mainland Chinese state compulsion are more appropriately handled by the executive arm of the Hong Kong government, as opposed to the Hong Kong courts, in accordance with the Second Circuit Court's observation in *Vitamin C* that 'the executive branch … is best suited to deal with foreign policy, sanctions, treaties, and bi-lateral negotiations'.[213] Indeed, enforcement under the CO could only have the effect of bringing an end to *voluntary* anti-competitive practices of private entities; it would not have the effect of removing the Mainland Chinese state requirements from which *compelled* anti-competitive business behaviour originates. It is therefore argued that, as a pragmatic solution to the dilemma, the Hong Kong Commission should consider issuing a clearly stated policy of non-enforcement in cases where parties can satisfactorily demonstrate that they are subject to Mainland Chinese state compulsion; such cases should not be resolved by extraterritorial antitrust enforcement, but through diplomatic means *with the assistance of bilateral co-operation* between the Hong Kong Commission and Mainland Chinese antitrust agencies.

Therefore, as part of the bilateral antitrust co-operation agreement between Mainland China and Hong Kong, a system can be set up whereby the Hong Kong Commission may receive evidence of Mainland Chinese state compulsion from entities suspected of anti-competitive behaviour. The Hong Kong Commission, in consultation with the executive arm of the Hong Kong government and with reference to the US and EU experience, can decide on the requirements (including evidentiary requirements) under which it will exercise its non-enforcement discretion. As to the degree of compulsion required, it appears that the EU position, in requiring simply evidence of a compulsive law or regulation without more (e.g. evidence of supporting sanctions), would better promote legal certainty and should be preferred over the position under the traditional US defence.[214] To promote 'mutual respect' and 'fairness',[215] it is suggested that the Hong Kong Commission should adopt a broad interpretation of 'Mainland Chinese state compulsion', in that all legal or government orders which ultimately derive their authority from the Central People's Government of the PRC (whether they are created or imposed by the central, provincial, municipal or county government authorities[216]) and have binding effect shall be accepted as sources of state compulsion. Although state-owned enterprises which satisfy the 'control' test discussed in *Hua Tian Long* may possibly rely on Crown immunity as a possible defence to their liability under the CO, a more effective and proactive solution is to extend the above-mentioned system to antitrust cases involving state-owned enterprises under state control, as they are in a similar position as private entities acting under state compulsion.

If there is sufficient evidence of Mainland Chinese state compulsion or control, the Hong Kong Commission will, on the one hand, inform the relevant entities of its intention

213. *Vitamin C* (Second Circuit) (n 151) 194.

214. See n 164, nn 199-201, and accompanying text.

215. *Hua Tian Long* (n 173) para 43; *Vitamin C* (District Court) (n 151) 544.

216. Mark Williams, *Competition Policy in China, Hong Kong and Taiwan* (Cambridge University Press 2009) 121.

not to enforce the CO against them (perhaps by way of a no-action letter) and, on the other hand, notify the relevant officials of the Hong Kong government. In order to effectively address the underlying Mainland Chinese state compulsion or control affecting Hong Kong, the Hong Kong Commission and Mainland Chinese antitrust authorities should enter into a bilateral antitrust co-operation agreement which specifically deals with state compulsion at the interface of the two regions. The agreement can provide for a mechanism whereby the Hong Kong Commission may make a joint submission with the Hong Kong government to the Mainland Chinese antitrust authorities seeking the removal of the anti-competitive state compulsion or control. Having identified the source of the problem, the Mainland Chinese antitrust authorities would then relay the concern to the relevant Mainland Chinese government authority from which the anti-competitive compulsion or control originates. It is hoped that the state authority will then, out of respect for the Mainland China-Hong Kong bilateral co-operation agreement and the international trade obligations of Mainland China (as discussed further below), eliminate the source of the anti-competitive state compulsion or control.

Such a mechanism should be carefully designed and articulated in the Mainland China-Hong Kong bilateral antitrust co-operation agreement to ensure efficient and effective resolution of antitrust cases complicated by state compulsion at the interface between the two regions. Since this is a reciprocal mechanism, Mainland China will likewise benefit from the removal of anti-competitive state compulsion or control that originates from Hong Kong through this diplomatic solution. Nevertheless, one can reasonably expect that there will be more requests from Hong Kong to remove Mainland Chinese anti-competitive state restraints rather than vice versa, given that business entities operating in Hong Kong are generally less likely to be under state compulsion or control thanks to the city's laissez-faire economy and positive non-interventionist economy policy.

Despite the possible imbalance in the reciprocity of the said arrangement, international trade obligations imposed on China as a member of the WTO may play an important part in incentivizing Mainland Chinese state authorities to review and remove their anti-competitive restraints upon Hong Kong's notification through the Mainland Chinese antitrust authorities. It is noteworthy that export quotas and export price controls are generally prohibited under the WTO obligations to which China is subject. As regards export quotas, GATT Article XI:1 provides that '[n]o prohibitions or restrictions … made effective through quotas, import or export licences or other measures … shall be instituted or maintained by any contracting party [(such as China)] on the importation … or on the exportation … of any product' from/to another contracting party. Furthermore, pursuant to Article 9 of the Protocol on the Accession of the People's Republic of China, China 'shall make best efforts to reduce and eliminate [price] controls', except for price controls applicable to products and services in Annex 4 to the Protocol (which must nevertheless be compatible with GATT Article III and other WTO obligations).

Although Hong Kong, as a member of the WTO, is unlikely to file a complaint to the WTO on China's potential violations of its WTO obligations, China may decide that it is in its interests to remove the notified export restrictions (which are also likely to affect regions other than Hong Kong), as they may eventually trigger complaints from other

trading partners who are WTO members. In fact, China has been the subject of complaints from other countries, and it has twice been found by the WTO panel to have violated its WTO obligations due to the export restrictions placed on different raw materials.[217] One of these is bauxite, the subject of an antitrust complaint against two Mainland Chinese manufacturers in *Resco Products, Inc v Bosai Minerals Group Co, Ltd*.[218] The two manufacturers, which were allegedly engaged in the price fixing of bauxite exported to the US, relied on the defences of foreign sovereign compulsion, and 'international comity' in their motion to dismiss, resulting in a stay by the District Court to avoid potential decisional conflict with the WTO panel, which had yet to hand down its decision at the relevant time.[219] The Court's approach was undoubtedly correct; this case illustrates precisely that difficult situations of state compulsion must ultimately be resolved by going to the root of the problem – that is, the removal of the anti-competitive state orders themselves – instead of antitrust enforcement against private entities subject to such orders. The threat of complaint from other countries against China for breaches of its WTO obligations provides China with the incentive to rectify its anti-competitive legal or government orders upon Hong Kong's notification through the Mainland Chinese antitrust authorities. Bilateral co-operation between the Mainland Chinese and Hong Kong antitrust authorities can provide the underlying mechanism to dismantle state restraints by way of a diplomatic solution of mutual self-restraint.

Finally, while Mainland Chinese private entities free from state compulsion do not warrant lenient treatment as such, the Hong Kong Commission may, in appropriate cases (such as those involving established Mainland Chinese firms with close government ties), consider it desirable to resolve cross-border antitrust cases diplomatically rather than by taking enforcement action against Mainland Chinese firms. The above-suggested arrangements, whereby the Hong Kong Commission (with the assistance of the Hong Kong government and the Mainland Chinese antitrust authorities) notifies the responsible Mainland Chinese government authority (which oversees the relevant industry) and persuades the latter to eliminate the anti-competitive restraints, may apply *mutatis mutandis* to resolve such sensitive cross-border cases diplomatically. In deciding between extraterritorial antitrust enforcement and a diplomatic solution, the Hong Kong Commission will have to make delicate trade-offs between relevant considerations such as long-term effectiveness (i.e. whether diplomacy or enforcement is the more effective long-term

217. United States Trade Representative (USTR), '2013 Report to Congress on China's WTO Compliance' (USTR December 2013), 43 <www.ustr.gov/sites/default/files/2013-Report-to-Congress-China-WTO-Compliance.pdf> accessed 31 October 2015; World Trade Organization (WTO), 'China – Measures Related to the Exportation of Various Raw Materials' (WTO 6 May 2013) <www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm> accessed 31 October 2015; World Trade Organization (WTO), 'China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum: Reports of the Panel' (WTO 26 March 2014) para 7.200 <www.wto.org/english/tratop_e/dispu_e/431_432_433r_e.pdf> accessed 9 August 2014.

218. *Resco Products, Inc v Bosai Minerals Group Co, Ltd* No. 06-235, 2010 WL 2331069, 1 (W D Pa June 4, 2010).

219. ibid 1-4, 6, 8. The stay was subsequently lifted following the WTO panel's decision against China: see *Resco Products, Inc v Bosai Minerals Group Co, Ltd* 158 F Supp 3d 406, 416 (W D Pa 2016); WTO, 'China – Measures Related to the Exportation of Various Raw Materials' (n 217).

solution, taking into account the timeframe and the deterrent effect) and political and reputational repercussions in both Mainland China and Hong Kong (i.e. whether the benefits of avoiding the political embarrassment generated by antitrust enforcement against Mainland Chinese firms are outweighed by the costs of potential accusations of discriminatory treatment as between Mainland Chinese and Hong Kong businesses, political conspiracy with Mainland Chinese authorities, and erosion of the 'One Country, Two Systems' principle, which may ultimately undermine the credibility of the Hong Kong Commission).

IV. CONCLUSION

The fact that Mainland China and Hong Kong – as two regions of the same country, namely the PRC – are in a political and economic relationship which is considerably closer than that between any two countries generally provides strong justification and incentive for seamless bilateral co-operation between their antitrust authorities. This article argues that effective bilateral antitrust co-operation between the two regions entails the careful design and conclusion of a bilateral co-operation agreement. Such an agreement would not only embrace comity cooperation in antitrust enforcement, but also the adoption of a diplomatic solution of mutual self-restraint for the removal of anti-competitive state restraints at the Mainland China-Hong Kong interface. This would also require the co-operation of Mainland Chinese and Hong Kong government authorities. In this respect, bilateral co-operation between Mainland China and Hong Kong would eliminate anti-competitive business practices and state restraints obstructing free trade and economic integration between the two regions. It is important not to overlook the complementary relationship between bilateral antitrust co-operation, market competition, free trade policy, and economic integration.