

ANTITRUST: UPDATING EXTRATERRITORIALITY

jurisdiction lies. The article examines how to reflect world welfare more cautiously in other cases.

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Abstract: *Updating Extraterritoriality argues that a global economy requires extraterritorial reach, and that nations have been too timid in restraining themselves from condemning international cartels on grounds of indirectness of effects. The article poses five sets of real-life fact problems, analyzes what is or is not a legitimate outreach of national law, and proposes that, in cases of world consensus principles, notably hard core cartels, the national and world interest in a global economy free of restraints of competition (the world commons of competition) should be a factor in deciding whether*

1. INTRODUCTION

Markets are global but there is no global competition law or framework. Nations apply their own laws to conduct or transactions that hurt them, with different degrees of outreach and restraint. The dominant norm is a presumption against extraterritoriality, and jurisdictional restraint.² But is this always the right norm in the age of a global economy when international cartels are rampant, global value chains are frequent, companies are bigger than nations, and nations and multinationals play strategic games to put themselves above the law?³

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This article is based on my essay for Hon. Douglas H. Ginsburg, forthcoming in Vol. II of Concurrences' Liber Amicorum in his honor.

² See Luca Prete, On Implementation and Effects: The Recent Case-law on the Territorial (or Extraterritorial?) Application of EU Competition Rules, J. European Competition Law & Practice 2018 (tracing EU law on extraterritoriality, with historical background); Roger Alford, then Deputy Assistant Attorney General, US Antitrust Division, Antitrust Enforcement in an Interconnected World (Seoul, South Korea January 29, 2018) (in cases of pure conflict, divergences produce uncertainty and coordination and cooperation are critical).

Compare Pierre-Hugues Verdier, The New Financial Extraterritoriality, 87 Geo. Washington L. Rev. 239

(2019), challenging the presumption against extraterritoriality in cases of economic law with prevalent cross-border impacts and no comprehensive international law (as applied to financial crimes such as manipulating the LIBOR).

See, for an overarching history, evolution, and forward-looking perspective on extraterritorial enforcement of regulatory laws in the world, Diane P. Wood, EXTRATERRITORIAL ENFORCEMENT OF REGULATORY LAWS (2018 Hague Lectures) (Hague Academy of International Law, in publication).

³ Brief of Amicus Curiae, Economists and Professors in Support of Petitioner, in Motorola Mobility LLC v. AU Optronics Corp., filed April 15, 2015. The economist amici include John M. Connor, the leading researcher on cartels, their frequency and their detection.

In areas of substantive conflict and no international consensus, restraint is needed.⁴ But a large portion of international antitrust litigation concerns hard core cartels, which are world-consensus wrongs, and strategic games to by-pass the importing country's law.

Our norms of restraint are generally traceable to rules from a different era before global effects of routine transactions were the norm. What rules and conventions would we adopt if we start from the baseline of the world today? This essay reexamines appropriate reach and restraint of national law and enforcement in the age of a global economy.⁵ The principal contribution of this essay concerns the area of substantive consensus among nations – notably, for antitrust, hard core cartels. That is the category in which benefits of global vision can outweigh costs of nation-to-nation conflict.

The essay argues that traditional analysis is outdated in five respects, and suggests a paradigm fitting for the 21st century. First, traditional analysis contains a presumption against extraterritorial reach of the law. This essay contends that, in the many areas in which

the effects of acts are global, the presumption is anachronistic and unhelpful. Second, traditional analysis assigns to separate silos what is essentially the same problem – extraterritorial jurisdiction, foreign sovereign compulsion, and treatment of foreign firms. These are sister problems, and this essay applies the same analytical framework. Third, in many litigations, traditional analysis sees the private firms as the principal stakeholders whose interests are centrally invoked to determine the reach of the law. This essay argues that the proper vantage for considering reach-of-law issues is the state as opposed to private party defendants; that deference to the interests of private litigants may get in the way of reaching the wisest resolution. Fourth, traditional analysis invokes a laundry list of factors to balance in the case of conflict. Laundry lists fail to prioritize and they give undifferentiated weight to all factors, both critical and trivial. This paper jettisons the laundry list in favor of a structured rule.

Fifth, traditional antitrust sees the sovereignty problem (disparate interests of sovereigns) as a two-player game. This paper identifies a super-

⁴ The concern is that “decisions made in one country can set the norm for global operations.” Makan Delrahim, Assistant Attorney General, US Antitrust Division, “With a Little Help from My Friends”: Using Principles of Comity to Protect International Antitrust Achievements, Remarks at 46th Annual Fordham Competition Law Institute Conference on International Antitrust Law and Policy, September 12, 2019. When that is the case, comity (drawing back) can avoid unnecessary conflict and it can avoid the “legal imperialism” that occurs when a nation imposes policies outside of its territory that “could not win their way in the marketplace for . . . ideas.” Delrahim, *supra*, quoting from *F. Hoffmann LaRoche v. Empagran*, 542 U.S. 155 (2004).

marketplace of ideas, and the conduct harms consumers in the regulating state's market. Giving attention to the global norm is not unilateralism but a form of multilateralism, because the application of law is rooted in international consensus.

⁵ I use the term jurisdiction, subject matter jurisdiction, and reach of the law interchangeably, and not in the sense that entails procedural consequences of burden of proof and the point in the proceedings at which the issue must be raised. See *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), for the technical procedural usage in the United States.

This article presents the converse case in most of its examples: The policy has won its way in the global

national concept – the “global commons of competition.” It treats the global commons as a player on issues of world consensus that certain conduct is wrong; notably, hard core cartels.⁶ From the earliest days, the extraterritorial problem was seen as involving a universe of two sovereign players; for example, Turkey and France (*the Lotus*),⁷ or the United States and the UK (*British Airways/Laker*).⁸ It is fitting at last to recognize the global commons of competition. The world has an interest in preserving the global commons, unclogged by undue public or private restraints. The old standby comity cases *Timberlane*⁹ and *Mannington Mills*¹⁰ both literally and figuratively miss the bigger picture;¹¹ perhaps understandably for they were decided before the modern reality of relatively open world trade and commerce as embedded in the rules of the World Trade Organization, and before the adoption of global governance in areas of law rife with externalities where solely national regulation is no longer efficient.¹²

My methodology is to work from ground up, looking closely at fact-sets and considering national interests and world interests, in order to assess the legitimacy of national enforcement against off-shore acts. Because the exercise needs a structure, I suggest standards for the analysis. I derive four standards from a common or evolving understanding (1) that nations have the right to protect themselves from economic harms to their citizens, and when other nations’ legitimate interests are at stake nations must apply their regulation proportionately so as not to intrude unreasonably on the other nations’ legitimate interests to regulate their own economies, and, (2) in a global economy and interdependent world with many possibilities for externalities, analysis at world community level is necessary to help maximize the common good of the nations.

I pose five fact problems. I test each against my four standards. Based on the analysis, I suggest a new framework for assessing legitimacy of

⁶ Recommendation concerning Effective Action against Hard Core Cartels (OECD 1998).

⁷ S.S. *Lotus* (France and Turkey), 1927 P.C.I.J.

⁸ *Laker Airways, Ltd. v. Sabena, Belgium World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). The United States withdrew a criminal information suit against British airlines for a conspiracy to squeeze out maverick Freddie Laker to accommodate the British, who were privatizing British Airways and did not want to deal with the financial cloud of pending litigation. See *Justice Takes Wing*, *Economist*, Nov. 24, 1984 at 15.

⁹ *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (listing seven factors to consider for jurisdiction).

¹⁰ *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (listing ten factors to consider for comity balancing).

¹¹ See Koren Wong-Ervin, Bruce H. Kobayashi, Douglas H. Ginsburg & Joshua D. Wright, *Extra-Jurisdictional Remedies Involving Patent Licensing* (CPI Dec. 2016), <https://www.competitionpolicyinternational.com/wp-content/uploads/2016/12/CPI-Wong-Ervin-Kobayashi-Ginsburg-Wright-Final.pdf>, giving regard to world welfare in analyzing the appropriateness of extra-jurisdictional remedies not necessary to protect domestic concerns in cases involving patent licensing. The article argues for restraint in imposing extra-jurisdictional remedies, especially, but not only, in cases in which the substantive rule is not clear or varies across countries.

¹² For example, we have international regimes not only in trade but also in environment, intellectual property, and banking.

national enforcement of economic law in the presence of international impacts.

Here are the four standards:

- (1) The law of a jurisdiction may appropriately reach conduct or transactions that emanate from abroad that harm its citizens. To prevent harm to other jurisdictions where there is a threat of jurisdictional clash, the conduct or transaction regulated must have a reasonably direct, not insubstantial, foreseeable effect on its territory or its citizens and residents.
- (2) The enforcement action and relief should not be disproportionate to the interests of the enforcing state.¹³
- (3) When (1) and (2) are satisfied, the enforcement and relief are presumptively legitimate. A complaining nation has the burden to prove the contrary.¹⁴
- (4) When the subject matter of the enforcement action is one in which there is a world common interest and there is consensus as to what is harmful to competition, as in commonly desired eradication of private firm world cartels, we should recognize a global commons of competition and a world-welfare interest in its preservation. In such a case, any particular controversy before national courts is greater than the sum of the interests of the parties (or nations) in the dispute. The world welfare interest is appropriately considered as a referent in

determining appropriate reach and limits of national law.

I apply these four principles to the five following problem sets: potash, input cartels, the Chinese vitamin C export cartel, the European *Intel* case and its Lenovo/Acer incidents, and China's enforcement: the Chinese Anti-Monopoly litigation against Qualcomm and China's merger clearance conditionalities. The values of business certainty and sovereigns' interests in regulating their own commercial affairs are taken into account in the analysis.

The potash fact set and the component-input fact set concern whether the anticompetitive cause is sufficiently close to the anticompetitive effect. This problem is commonly encapsulated by the word "direct" and the question what "direct" means. The Vitamin C problem concerns when foreign interests may be sufficiently strong to override domestic enforcement against conduct that has clear direct effects in the enforcing jurisdiction. In the European Union *Intel* problem, there is clear jurisdiction over a foreign firm that does multinational business and whose exclusionary strategies hurt European consumers, and the question is whether pieces of the picture that harm the European market derivatively from harming the world market must be shaved out of the case on grounds that the effects of that incident are not direct (or in the European terminology, immediate). The China problems ask whether industrial policy can justify

¹³ Wong-Ervin, Kobayashi, Ginsburg & Wright argue that the only appropriate antitrust interest of the enforcing state is the domestic consumer interest. This article takes a broader view and urges tolerance towards other jurisdictions that have a legitimate stake in protecting their

citizens and their economy and do so proportionally to their interests.

¹⁴ What is legitimate and illegitimate is fleshed out through the case studies below.

extraterritorial antitrust remedies, and they raise issues of legitimacy based on alleged discrimination and lack of due process. In all of these analyses we are considering when and whether a nation oversteps its bounds by a particular extraterritorial reach, and whether there is a world welfare component that may support and even encourage a flexible reach of the law. Because this article is an exploration of what is good law and policy, it does not engage with existing legislation such as the United States' Foreign Trade Antitrust Improvement Act of 1982.¹⁵

2. POTASH: IS THE HARM SUFFICIENTLY DIRECT?

In matters of extraterritorial application of the US antitrust law, jurisdiction does not lie unless the US effects are “direct, substantial, and reasonably foreseeable.”¹⁶

Potash is a mineral used in agricultural fertilizers. The world potash market is highly concentrated; significant reserves are located only in Canada and Russia/Belarus. China is the largest buyer market in the world and the US is second. In developing countries, the farmers are, together, very large buyers. Seven of the most significant potash producers of the world had a price-fixing cartel. It was an open and obvious export cartel

in Canada, centered in the province Saskatchewan. Canadian officials told the press in defense of the cartel that Saskatchewan depends on its potash exports for its economic development. Canada's hefty taxes (35% tax on the export cartel's sales) returned vitally needed revenue to the province.¹⁷ Thus support for the cartel was a nationalistic industrial policy.

The cartel's modus operandi for sales into the United States was simple: The cartel negotiated a high price to China. After the cartel price was established outside of the United States, the producers sold potash into the US at the high cartel price. US buyers sued the cartelists. The defendants moved to dismiss the case on grounds that the effect in the United States was not direct. The district court denied the motion to dismiss. A panel for the Seventh Circuit Court of Appeals reversed, agreeing with defendants that the effects of the cartel agreement in the United States were not direct because the cartel did not sell directly to US buyers. Sitting en banc on a motion for reconsideration, the Seventh Circuit court vacated the panel ruling and held that the effects in the United States were sufficiently direct. “Direct” does not mean only “immediate consequence,” the court said. Directness is a relative term that is integral with the phrase “direct, substantial and reasonably foreseeable.” The US effects of the potash cartel were clearly substantial and foreseeable; therefore less work was required of the factor

¹⁵ 15 U.S.C. § 6a.

¹⁶ See Antitrust Guidelines for International Enforcement and Cooperation, Department of Justice and Federal Trade Commission (2017), Section 3.

¹⁷ See Brenda Bouw and Andy Hoffman, “Sask. weighs in on Potash deal,” Vancouver, September 1, 2010. The

Saskatchewan government opposed a takeover by a Chinese SOE of a leading Canadian potash firm, where the offering company had the incentive to break the cartel and increase production. It said: “The fear is that the new owner's primary motive - to supply food and fertilizer for their populations - would conflict with the province's goal of supporting its people through higher potash prices.” Id.

“directness.” The court, by Judge Diane Wood, held that a flexible, instrumental construction of the word “direct” was required. Thus:

Foreign cartels, especially those over natural resources that are scarce in the United States and that are traded in a unified international market, have often been the target of either governmental or private litigation. The host country for the cartel will often have no incentive to prosecute it. Canada and Russia ... would logically be pleased to reap economic rents from other countries; their losses from higher prices for the potash used in their own fertilizers are more than made up by the gains from the cartel price their exporters collect. . . . It is the U.S. authorities or private plaintiffs who have the incentive – and the right – to complain about overcharges paid as a result of the potash cartel, and whose interests will be sacrificed if the law is interpreted not to permit this kind of case.

The world market for potash is highly concentrated, and customers located in the United States account for a high percentage of sales. This is not a House-that-Jack-Built situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States. To the contrary: foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) sold that product to U.S. customers. The payment of overcharges by those customers was objectively foreseeable, and the amount of commerce is plainly substantial.¹⁸

Potash is an anchoring example of the thesis of this article. The price-raising effect on the US market was substantial and foreseeable. It was not indirect in the sense of being a mere ripple-effect. The selling jurisdiction profited from the

cartel and supported it – since it hurt only foreigners. The US as a big buying country had the incentive to punish the cartel. Yet there is a split of the circuits in the United States on how literal and restrictive is the requirement for directness.¹⁹

The United States would handicap itself, as well as the big needy populations in developing countries, and would undermine world welfare, by choosing a narrow construction of “direct.” Saskatchewan’s interest in supporting Saskatchewan’s taxpayers by export cartel profits should be entitled to no weight. Canada’s implicit support for the cartel was a frontal assault on competition itself (Canada has laws against cartels and applies them when Canada is injured). Enforcement in the US is proportionate to US interests and is important to exonerate those interests. The desire for cartel profits is not a legitimate justification, especially in a country that prohibits cartels at home. The world welfare interest is clearly on the side of the US enforcement.

Since every antitrust nation has an anti-cartel law, allowing US jurisdiction does not impair certainty regarding how firms should conduct their businesses; and allowing, even expecting, harmed nations to condemn the cartel does not interfere with the exporting nation’s right to regulate its own economy.

¹⁸ Minn-Chem, Inc. v. Agrium, Inc., 683 F3d 845 (7th Cir. 2012).

¹⁹ See note 20 infra.

3. FOREIGN INPUT CARTELS WITH ASSEMBLY ABROAD: DOES ASSEMBLY ABROAD DEFEAT THE DIRECTNESS REQUIREMENT?

The case *Motorola Mobility* is a good example of attempted enforcement against foreign producers of components who fix the price at which they sell to buyers in a second foreign country. The buyers assemble the components into finished products and sell the finished products to the world. The price-fixing in this case took place in Korea and Taiwan. Korean and Taiwanese firms fixed the price of liquid crystal display panels and sold them at the illegally inflated price to Chinese manufacturer/assemblers, who were wholly owned subsidiaries of the US firm Motorola Mobility. The Chinese subsidiaries incorporated the panels into smartphones in China and sold the smartphones to the world market. They shipped 42% of the phones to the US; indeed, directly to their parent, Motorola Mobility, which had actually organized the LCD sales

from Korea and Taiwan to its Chinese subsidiaries. Motorola Mobility and separately the United States sued the Asian price-fixers under the Sherman Act.²⁰ Were the suits impermissibly extraterritorial? Did they create clashes that warranted deference to foreign sovereigns, either because Korea and Taiwan wanted to help their nationals by shielding them from US liability or because China might be offended by diverting litigation that might notionally have been brought in China by the Chinese direct purchasers of the price-fixed panels?²¹

To win its case, Motorola Mobility must have suffered an inflated price because of the cartel, and let's assume that it did.²² Surely, US buyers had to pay more for their smartphones because of the illegally inflated price of the major input; thus the price-fixing caused a significant, foreseeable anticompetitive effect in the United States.

The defendant price-fixers claimed that the US public and private litigations against them

²⁰ *United States v. Hui Hsiung*, 778 F.3d 738 (9th Cir.); *Motorola Mobility v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015); cert denied in both, 135 S. Ct. 2837(2015).

²¹ That there was no market harm in China would have been an obstacle.

²² Another obstacle faced by Motorola Mobility was the doctrine of *Illinois Brick*, holding that only direct purchasers can sue for damages. But recent Supreme Court jurisprudence has weakened the doctrine. *Apple Inc. v. Pepper*, 587 U.S. --- (Supreme Court, May 13, 2019). Motorola Mobility should be able to overcome *Illinois Brick*. As the Supreme Court said, ambiguities in the doctrine should be resolved in favor of injured buyers. The doctrine certainly was not intended to disadvantage American firms. By definition in the component price-fixing cases with assembly abroad, the American buyer of

the assembled device was not the most direct purchaser of the component. In this particular case Motorola Mobility was a direct purchaser of the assembled device and the first American purchaser. If *Illinois Brick* barred the suit, it would bar all American private actions in foreign component price-fixing cases with assembly abroad. Moreover, Motorola Mobility set up its Chinese subsidiaries and arranged for their purchase of the components from the foreign sellers, who turned out to be price fixers. Dismissal on *Illinois Brick* grounds would, in the words of the Supreme Court in *Apple v. Pepper*, “draw an arbitrary and unprincipled line ... based on [firms'] financial arrangements with their manufacturers and suppliers.” Slip op. p. 8.

created a clash of sovereigns that warranted deference to their countries, and that their price-fixing acts were beyond reach of US law. Who had the better claim?

The LCD panels were made for US phones. The effect in the US of the price-fixing was foreseeable; the higher price to be paid by US buyers would predictably be substantial. The US effect was reasonably direct (although the degree of directness was a big point of contention). No Chinese consumers were hurt. In the home countries of the price fixers, price fixing is illegal when it hurts their nationals. Offering a remedy in US courts is without question proportionate to US interests and important to exonerate US interests. The world welfare interest aligns with enforcement. China and the Chinese manufacturers could not be counted on to sue the price-fixers, and indeed China was probably not hurt. If all nations into which the assembled product was sold took a hands-off approach for cartels of components of products assembled abroad, China would become the jurisdiction of choice for assembling – and laundering – price-

fixed inputs, and global welfare would be much diminished. As in the *Potash* case, neither business certainty nor a sovereign right to regulate its home market is implicated and all relevant countries have an anti-cartel rule.

What was the legal resolution of the public and private litigations in the United States? Motorola's case was dismissed for lack of jurisdiction.²³ Ironically, the US criminal²⁴ prosecution of Korean price-fixers was allowed.²⁵ The Supreme Court denied the petitions for certiorari,²⁶ and the contradiction has not been resolved.

In Motorola's private damages action, defendants raised the possibility of double counting damages and imposing excessive fines whenever more than one nation can assert jurisdiction over a set of practices.²⁷ Double counting might be unfair (although probably not over-deterrent, for the various schemes of enforcement worldwide are significantly under-deterrent).²⁸ If double-counting is the problem, we simply need a rule of no double-counting.

²³ The Court of Appeals for the Seventh Circuit dismissed the case by Motorola Mobility as impermissible under the Foreign Trade Antitrust Improvements Act of 1982. The court held that Motorola Mobility was not injured by the cartels' effect in the United States. If it was injured at all, it was injured by the effect in China, the court said. Moreover, the court thought, Motorola Mobility had elected China as its forum when it created the Chinese subsidiaries. Also the court said that Motorola Mobility was presumed to be not injured by reason of the Illinois Brick doctrine (431 U.S. 720, 1997) – it was an indirect purchaser. See note 22 supra. The court's holding is not material to this article, which is not concerned with the FTAIA and with the limits that nations put upon themselves, but rather with constructing a forward-looking framework for considering appropriate reach of national law.

²⁴ Criminal prosecution is more severe than civil litigation. Criminal prosecution punishes for wrongdoing. Civil litigation would require compensation for harm.

²⁵ *United States v. Hui Hsiung*, 778 F.3d 738 (9th Cir. 2015).

²⁶ 135 S. Ct. 2837 (2015).

²⁷ In numerous cases the laws of a number of jurisdictions apply to the same conduct or transaction because numerous jurisdictions are affected. This is so in the case of mergers, abuse of dominance and cartels where effects cross borders.

²⁸ See John M. Connor, *Sanctions In Antitrust Cases*, OECD Global Forum on Competition Dec. 1-2, 2016, DAF/COMP/GF(2016)9.

Is the fact that Korea and Taiwan want to shield their nationals from the consequences of price fixing into America entitled to weight? Such a nationalistic contention rubs against the grain of a community of nations respecting one another's laws, and totally undermines the integrity of the global commons.

4. CHINESE VITAMIN C EXPORT CARTEL: CAN A FOREIGN SOVEREIGN IMMUNIZE ITS COMPANIES FROM THE IMPORTING NATION'S ANTI-PRICE-FIXING LAW?

A limited foreign sovereign compulsion defense is available under US antitrust law. Defendants can defend that they did the violative act solely on their own soil, they had to do it because their government ordered them to do it, and the penalties they faced from violating the order were so great that they could not afford to violate the order.²⁹

There is also the possibility of dismissal of a private action on comity grounds. It is unclear and much debated as to whether this ground is available in antitrust cases where the anticompetitive effects in the U.S. are direct,

substantial and foreseeable, and indeed the intended and the only harm is local.³⁰ Comity is a domestic law concept and, if available, is intended to be applied where foreign interests outbalance US interests and assertion of the US interests will interfere with the foreign relations of the United States.³¹

The Chinese vitamin C makers fixed the export price of vitamin C to the United States. They admitted it. The price fixing took place within the Chinese trade association, the Association of Importers and Exporters of Medicines and Health Products. Trade associations in China were infused with the presence of government officials, who typically guided the firms in the interests of China.³² US direct buyers sued. The defendants pled foreign sovereign compulsion and comity. The Chinese Ministry of Commerce (MOFCOM) told the federal district court that it ordered the firms to fix their export prices. MOFCOM explained: The firms needed to adjust to a market economy, and MOFCOM wanted them to avoid a US antidumping action.

Did MOFCOM *really* order the firms to fix prices? The jury found that it had not; a Chinese notice invited industry self-regulation, and the notice did not appear to be an order. The jury returned a large award to the overcharged buyers. The Court of Appeals for the Second

²⁹ Antitrust Agency International Guidelines, *supra* note 16, Section 4.2.2

³⁰ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); Brief Amici Curiae of Professors William S. Dodge and Paul B. Stephan in Support of Petitioners on Petition for Writ of Certiorari in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, <https://www.soctusblog.com/wp-content/uploads/2017/05/16-1220-amicus-brief-Dodge-and-Stephan.pdf>.

³¹ See Restatement Fourth of the Foreign Relations Law of the United States, Part IV, especially section 401 (2018).

³² See *United States v. Socony Vacuum Co.*, 310 U.S. 150 (1940) (government officials were helping the oil companies ease their way out of the Depression; government officials' knowledge and guidance held not a defense to a price-fixing violation).

Circuit reversed. It held that comity required the court to accept China's word (China's interpretation of its notice) and that the Chinese interests outweighed the US interests, and it dismissed the case. The Supreme Court vacated the decision and remanded the case because the appellate court improperly treated as conclusive China's declaration to the court that it ordered the cartel.³³

The *Vitamin C* case – also called *Animal Science* – is not about extraterritorial jurisdiction. There was clearly jurisdiction. The case is about an alleged clash of sovereigns. The analysis applicable to the cases of extraterritoriality is equally applicable to resolve the clash.

1. Were the effects of the price-fixing direct, substantial and reasonably foreseeable? The answer is, yes, without question.
2. Was the US enforcement proportionate to the interests of the United States? Again, yes, without question.³⁴
3. Where did the world welfare interests lie? This was a naked export cartel – to the US and the other countries as well. World welfare lay with the enforcement.

³³ *Vitamin C Antitrust Litigation*, 837 F.3d 175 (2d Cir. 2016), vacated and remanded sub nom., *Animal Science Products, Inc., Hebei Welcome Pharmaceutical Co.*, 585 U.S.--, 138 S. Ct. 1865 (2018).

³⁴ Moreover, enforcing the price-fixing law would create no business uncertainty. The Chinese firms would surely have known of the strict US law and the uncertainty of a foreign sovereign compulsion defense, and must have taken the risk. If they did not want to take the risk, they could have refrained or (if really compelled) asked for a business review letter rather than keeping their conduct secret. In a credible case for China's overriding interest, a favorable business review letter should issue; transparency would facilitate the process of clarifying the law.

4. How should the conflict of sovereigns be resolved? China wanted to shield its firms from the US antitrust system. But so did Saskatchewan and maybe Canada (in the potash situation), and so did Korea and Taiwan (in LCD panels); they just did not claim that they said to their firms: "I order you to cartelize."

Why should a country's order to its firms (let alone its *claim* that it ordered its firms) to violate the regulating country's law be enough to differentiate the *Potash* case (where the US-harming conduct was not even as direct) and to immunize the price-fixers? What gives China a greater interest in shielding its firms from the US anti-price-fixing law than the US interest in enforcing its world-standard law against price-fixing?³⁵

If China did order its firms to fix prices in violation of US law and in violation of the principles of all antitrust jurisdictions including its own internal market rules, this was a frontal assault on US law and world norms. China's own domestic law not only prohibits price-fixing but even prohibits government officials from ordering firms to price-fix.³⁶ Even if there was a clash of sovereigns in *Vitamin C*, the US

³⁵ A foreign sovereign compulsion defense is meant to provide a narrow gateway to violators. A firm cannot justify violating US law just because it was acting pursuant to its own government's policy and encouragement; Hartford must be compelled to do the anticompetitive act. The defense applies only in the rare case in which the foreign firms had no choice but to breach the US law; they had to do the act even against their will to further their sovereign's policy.

³⁶ *Vitamin C*, note 33 supra. See the Chinese Anti-Monopoly Law, Articles 13, 36. The prohibition of state action to order a cartel was enacted after the conduct in point.

and world interests easily outweigh China's, in the view of this author³⁷ (albeit not in the view of the Court of Appeals of the Second Circuit, which is now reconsidering the case on remand from the Supreme Court).³⁸

5. INTEL (EU): THE GEOGRAPHY OF CONSTITUENT ACTS – WHAT IF THE TERRITORIAL EFFECTS FROM ONE PIECE OF THE PREDATORY PUZZLE ARE NOT IMMEDIATE OR DIRECT?

Intel makes the chip that is inside most personal computers; it is “the nervous system” of the computer. Intel sells about 95% of all such chips in the world. AMD was its one competitor of significance. AMD had not been a strong competitor; its chip was not as good as Intel's; but finally AMD invented a great new chip. Intel was galvanized into action. Intel masterminded various strategies (as the European Commission found) to keep the AMD chip from getting traction in the critical period – the first six months after launch. One set of Intel's strategies was called “naked restraints,” and the other set was exclusivity (loyalty) rebates. The naked restraint category included telephone calls from

an Intel official to the firm's biggest customers, some of whom had already signed contracts with AMD for its new chip. The Intel official would say in effect: We want you to breach your contract with AMD. We will buy you out of the contract and give you a very good deal if you switch back to Intel and do not buy the AMD chip for six months. As for those customers not already under contract with AMD, Intel took an equivalent approach. It offered payments or rebates to customers conditional on their delaying the launch of the AMD chip. The customers accepted the deals. The big customers included Lenovo in China and Acer in Taiwan. Geographically, the relevant conversations and sales were between Silicon Valley and Beijing or Taipei. Both Lenovo and Acer agreed to Intel's proposition. They breached contracts with AMD or delayed the launch, and continued to use the Intel chip in their tablets and laptops. They shipped the finished product to buyers all over the world, including Europe. The European Economic Area accounts for about 32% of purchases of devices with the chip inside. It is impossible to know which of the devices that went to Europe contained the almost-diverted chips. The almost-diverted chips represented a relatively small portion of all chips of the kind.

³⁷ See Eleanor M. Fox, *China, Export Cartels, and Vitamin C: America Second?*, Competition Policy International (March 14, 2018); Eleanor M. Fox & Merit E. Janow, *China, the WTO, and State-Sponsored Export Cartels: Where Trade and Competition Ought to Meet*, in 2 William E. Kovacic *An Antitrust Tribute* 319 (Nicolas Charbit & Elisa Ramundo eds. 2014).

The Chinese agency asserted that its firms needed to adjust to a market economy and that it wanted to protect them from falling afoul of anti-dumping law.

³⁸ China's agency MOFCOM averred in the litigation that it had ordered the Chinese vitamin C producers to fix their export prices. The trial court found that MOFCOM had not ordered the price fixing. The Court of Appeals held that it had the obligation to take China at its word in interpreting its law; that MOFCOM ordered the price fix. On this basis it held that comity required dismissal of the case. The Supreme Court held that China's word was not conclusive, and it remanded the case to the Court of Appeals.

The European Commission found that Intel violated EU's abuse of dominance law. The General Court affirmed. On appeal to the Court of Justice, Intel asserted among other things that the Court (and EU law) had no jurisdiction over the Lenovo and Acer scenarios. The European Court of Justice disagreed. It affirmed the holding that the acts were properly within the jurisdiction of EU law.³⁹

Does the *Intel* problem pose a clash of sovereigns and thus a difficult jurisdictional problem? It would not do so if the substantive antitrust law were exactly the same on both sides of the ocean, in which case the EU enforcement would complement and boost the US law. But if the law should be divergent (or if a jurisdiction should enforce antitrust law without due process, especially if process deficiencies impugn the fact-finding), the US (in this case) might be heard to complain. Substantively, the US argument would be/could be (hypothetically and fancifully, for no such assertions were made):⁴⁰ Intel is my company. Its conduct was all about low pricing and competition. AMD introduced a competitive new chip, and Intel was entitled to respond. Intel responded by charging a very low price; but it was not below cost. This was competition itself. Don't chill Intel's competition.

Let's assume that Intel's conduct to forestall AMD's new chip had or threatened to have a significant anticompetitive effect. Assume that it

marginalized AMD's new chip, which otherwise would have made impressive inroads; that a rule of law allowing Intel's conduct would chill innovative efforts by AMD and other possible challengers, who now confront a rocky path for launching innovative products; that Intel's conduct kept the price of the Intel chip higher than it otherwise would have been, and that Intel's conduct had this effect all over the world, of course including Europe. At least, let us assume, this is a credible story and one that a court could reasonably believe – as the European Commission and courts did.

Did the European Court have jurisdiction over the Lenovo and Acer incidents? This is a matter of EU law. And that should be so unless the EU enforcement is an unreasonable intrusion into US space and world welfare.

EU law required, for legitimacy of extraterritorial reach, that the offending conduct be *implemented* in the EU or European Economic Area (EEA).⁴¹ Intel argued that its conduct with Lenovo and Acer was implemented in China and Taiwan and was therefore impermissibly included in the case. The Court of Justice, in *Intel*, took the occasion to enlarge the jurisdictional test in line with international standards. It endorsed a “qualified effects” test, asking whether the conduct was capable of having an immediate, substantial and foreseeable effect in the European Economic Area. The Court held that it was. The analysis

³⁹ Intel v. Commission, Case C-413/14 P, ECLI:EU:C:2017:632, remanding the case to the General Court for reexamination of the anticompetitive effects of the conduct. The discussion centered on the chips purchased by Lenovo.

⁴⁰ I am intentionally creating a conflict to pose a question with which the world should grapple.

⁴¹ A. Ahlstrom Osakeyhtio v. Commission (Woodpulp), Cases C-89, 104, 114, 116-17, 125-129/85, ECLI:EU:C:1988:5193.

was fairly cursory; the Lenovo incident was an integral piece of a larger picture and slicing off the incident would prevent appreciation of the whole course of conduct.⁴²

A sound analysis of appropriateness of EU jurisdiction over the Lenovo and Acer segments would proceed as follows:

1. The Lenovo/Acer chip-switch (back to the Intel chip) had an incremental, reasonably foreseeable effect all over the world, including significantly although not uniquely in the EEA. The question is: Was the effect in the EEA sufficiently direct?

The conduct of Intel was a world market offense. The EU is a significant part of the world market. If Intel harmed competition in the chip, thus inflating the price of devices, the EU has a significant interest to exonerate.

Moreover (and this is the sole argument on which the ECJ relied): the Lenovo/Acer incidents are pieces of a larger puzzle; they are part of a single, continuous infringement that (the European Commission found) was intended to foreclose Intel's sole significant competitor from the highly concentrated world market.⁴³ By filling out the picture rather than fragmenting it, the European Commission and then the courts could better appreciate the scope and effects of Intel's acts.

2. Is the enforcement action against Intel with regard to Lenovo and Acer disproportionate to

the interest of the EU? The factors above (paragraph 1) are equally relevant and would point in the same direction: towards jurisdiction. However, if there is a significant question about whether the challenged acts underlying the two incidents are procompetitive or anticompetitive and if there is concern that the EU institutions will prohibit procompetitive conduct, the potential US interest in EU's non-inclusion of these incidents would become part of the equation, and proportionality is less certain.

3. Let us assume that the European Commission proved sufficient directness, substantiality and foreseeability and no lack of proportionality. Then, according to the standards proposed in this article, Intel would have the burden to prove illegitimacy of the enforcement. How would it do so? It might induce the United States to file an amicus brief in European proceedings to say: The Lenovo incident is a matter between the US and China and the Acer incident is a matter between the US and Taiwan. EU has no direct connection. The effect in the EU is only derivative from the world effect. Indeed, it would be argued (given the different appreciation of what is anticompetitive according to two different substantive models): World competition is enhanced by freedom of firms to engage in competition just as Intel did.

To be clear, there was no such US brief.⁴⁴ The theoretical arguments are still available. The clash of sovereigns is just under the surface.

⁴² The Advocate General, Nils Wahl, had advocated a more robust effects analysis, which the Court did not follow.

⁴³ See Intel, General Court judgment, T-286/09, ECLI:EU:T:2014: 547 at paras. 260-273; ECJ judgment at paras.

40-60. On appeal to the ECJ, only the Lenovo incident remained as a jurisdictional issue in the case.

⁴⁴ Indeed, in the United States, the Federal Trade Commission opened an investigation against Intel, challenging more conduct than the European

Whether or not there is a burden-shift as proposed, the arguments are the same. Underneath the technocratic conversation, there is a question of political philosophy and contested presumptions about how well markets work, what induces innovation, and how effective is antitrust intervention.

The more aggressive reach of EU's (and most nations') abuse of dominance law compared with the US Sherman Act does create uncertainty for business. There is world debate about whether expansiveness or narrowness of abuse of dominance law is the better approach, even within the EU and within the US. In *Intel*, the enforcement by the EU institutions was intricately related to EU's regulation of its own economy (unlike China's claim in *Vitamin C*, or Saskatchewan's notional claim in *Potash*); but no one nation owns the problem. It is a problem of and for the world.

4. Since this is a world problem, it is fitting to ask: On which side of the equation does the world competition interest lie? The answer depends both on the facts and on point of view. Were Intel's acts an abusive use of leverage undermining an innovative challenger and thereby entrenching a dominant firm, or were they low price competition that improved the market process?

These questions could hardly have been resolved at the point at which the European

Commission asserted jurisdiction over the Lenovo and Acer incidents as it launched its investigation (even if the US antitrust authorities had raised this hypothetical claim of clash). Nor could these questions easily have been resolved as the case proceeded. I agree with the European Court of Justice that the incidents were too integral with the common core to be sliced out of the case.⁴⁵ Those who start with the premise of national restraint and especially who prefer a libertarian view of single-firm conduct violations will disagree.

6. CHINA: QUALCOMM, AND MERGER REMEDIES: INDUSTRIAL POLICY – THE LEGITIMACY OR NOT OF INDUSTRIAL POLICY

Qualcomm owns critical technology used inside smartphones. Most of the smartphones are manufactured in China. The manufacturers complained about the high licensing fees. China's National Development and Reform Commission investigated Qualcomm's practices and eventually accused it of charging royalties based on a portfolio including expired patents, bundling non-essential patents with essential patents, forcing licensees to agree not to challenge the patents, and keying the royalty to the entire finished device, not just the value of

Commission challenged. The case was settled. Matter of Intel, decision and order at https://www.ftc.gov/sites/default/files/documents/cases/2010/08/100804inteldo_0.pdf (2010).

The United States is well known for a *laissez faire* view of the offense of monopolization. See, e.g., *Verizon v. Trinko*, 540 U.S. 398 (2004).

⁴⁵ See Eleanor M. Fox, *Extraterritorial Jurisdiction, Antitrust, and the EU Intel Case: Implementation, Qualified Effects, and the Third Kind*, 42 *Fordham International L.J.* 981 (2019).

the licensed technology. Some observers understand the case to be essentially a claim of excessive royalties. After a lengthy period of investigation in which Qualcomm complained of serious due process violations, Qualcomm settled, agreeing to exclude expired patents from its packages, reducing the royalty base to 65% of the finished product, among other things, and agreeing to pay a fine of nearly US\$1 billion.⁴⁶ Soon thereafter, Qualcomm announced that it agreed to a joint venture with a Chinese firm.⁴⁷

Glencore/Xstrata⁴⁸ was a merger of two Anglo-Swiss trading and mining companies with a relatively small percentage of sales of the relevant products in China. China cleared the merger on condition that the firms divest a copper company in Peru to a Chinese firm and that the merged firm continue to sell a specified amount of copper to China. The merger had no anticompetitive effect in China. It appeared to outsiders that the authority (MOFCOM) simply used the opportunity of the merger and the parties' need for Chinese merger clearance to extract conditions that would assure China a supply of copper.

The *Qualcomm* matter and the several merger clearances with conditions unrelated to competition problems have fed an American claim that Chinese authorities are using the Chinese Anti-Monopoly Law to lower the value of Americans' intellectual property, to appropriate natural resources for China, and otherwise to advance its own industrial policy.⁴⁹ There is a clash of sovereigns, with US, and perhaps UK, Switzerland and others, wanting to protect their companies and their technological advantages from appropriation. How does the Chinese enforcement fare under the suggested framework?

1. The *Qualcomm* case raises no issues of extraterritorial jurisdiction. The licensing was directly into China, and the remedy was not extraterritorial.⁵⁰ *Glencore/Xstrata* does not raise extraterritorial issues with respect to the vetting of the merger. It is common cause today that a merger that has effects or even a sufficient stream of revenues into a country is subject to the jurisdiction of that country for purposes of premerger notification and clearance. There were sufficient contacts with China to warrant investigation of the conduct (*Qualcomm*) and vetting of the merger

⁴⁶ See Qualcomm press release, NDRC Accepts Qualcomm's Rectification Plan, Feb 9, 2015, http://files.shareholder.com/downloads/QCOM/3864235320x0x808060/382E59E5-B9AA-4D59-ABFF-BDFB9AB8F1E9/Qualcomm_and_China_NDRC_Resolution_final.pdf.

⁴⁷ For Qualcomm's more recent activity in China, see David Barboza, How This U.S. Tech Giant Is Backing China's Tech Ambitions, *New York Times*, August 4, 2017.

⁴⁸ See Mayer Brown, MOFCOM Orders Extraterritorial Divestiture of Key Mining Asset in Glencore/Xstrata, May 6, 2013.

⁴⁹ See Report and Recommendations, International Competition Policy Expert Group, March 2017, US Chamber of Commerce, https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf.

⁵⁰ See Wong-Ervin, Kobayashi, Ginsburg & Wright. See *FTC v. Qualcomm*, –F. Supp. 3d– (Judge Koh, May 21, 2019), implementation of remedy stayed pending appeal, – F.3d – (Aug. 23, 2019). The Koh decision reveals some similarities between Chinese and US law.

(*Glencore/Xstrada*). But the merger relief was both extraterritorial and unrelated to competition.

2. Was the enforcement or relief disproportionate to the interests of the state? In the merger case, the relief was disproportionate to a Chinese *antitrust* interest. But the Chinese Anti-Monopoly Law requires the authorities to consider mergers' effects on "national economic development"; not just consumers. This is a broad industrial policy clause and the relief was not disproportionate to the nationalistic industrial policy interest (if that is the standard). Does the relief excessively intrude upon other nations' interests? It may do so, by burdening companies with excessive obligations. Where the issue of excessive intrusion is credibly raised, according to the framework suggested,⁵¹ China would have to justify. It would have the burden to show that the relief was legitimate in view of the conflicting sovereign and world welfare interests. We revisit this question under point 3 below (Legitimacy).

Is the action against Qualcomm disproportionate to China's antitrust interest? to its industrial policy interest in "promoting the healthy development of the socialist market economy" (AML Section 2)? Let us first examine the antitrust interest, for

if that is satisfied we need not turn to more amorphous industrial policy.

The charges that China made and settled against Qualcomm might qualify as mainstream antitrust, even if they are contentious. The case is principally about tying, bundling, and using the leverage of patents beyond the bounds of the patent grant, enabling very high royalties. China has the right to regulate its own economy. Thus, it has the right to balance competition and intellectual property in a way that favors competition (or lower royalty rates) more than it favors protection of IP holders' exclusive rights⁵² – as long as it applies its rules transparently and non-discriminatorily.⁵³ China's law prohibits excessive pricing – which US law does not. China's foray into this area is not illegitimate, even though attacking royalty rates of technology licensing as excessive is a fraught subject. If China were to apply a different rule of law to its domestic firms than it applies to foreign firms, it would then be discriminating against outsiders in violation of the rules of the World Trade Organization. This author does not know of evidence that China has discriminated in this sense in the *Qualcomm* case, even though there is a "feeling" that China was and is targeting high-tech American firms that have technology that China wants.⁵⁴ If, however,

⁵¹ This would be disproportionate enforcement or relief under standard 2. See *supra*, text at note 13.

⁵² The remedy for "bad law" is conversation; dialogue; trying to convince. As more Chinese firms become inventors and patent holders, China may gain the incentive to develop more IP-friendly law.

⁵³ Given the international controversy as to what is the better rule, China should have a duty of restraint against imposing extra-jurisdictional remedies.

⁵⁴ See, e.g., Trump Administration to Begin Probe of Alleged Chinese Technology Theft, *Wall Street Journal*, Aug. 12, 2017. But see Joe Uchill, Trump drops his trade

China has denied due process to outsider firms, it would fail to meet the test of presumptive legitimacy on that ground.

3. Legitimacy. We have now come to the real point of action in this problem. For the *Qualcomm* case: The two points of possible illegitimacy are lack of due process and discrimination, if those failures could be proved. Illegitimacy is not proved by the arguments, standing alone: You (China) have sued “my” firm; you are applying “wrong” principles of law; as a result you are getting valuable US intellectual property cheap.

For *Glencore/Xstrada*: The relief on its face is excessively intrusive. It has no relation to competition and it appears that China is simply using antitrust as a hook to get resources it wants. This maneuver is inconsistent with the spirit of the WTO and China’s WTO accession commitments to free and open export markets except in the case of explicit reservations (none of which is relevant here). In a better world, China would be required to defend and justify its conditions; at least, to be transparent. But no law to requires it to do so.

4. Is there a world common interest in facilitating or preventing these enforcement actions and remedies? On which side does world welfare lie? World welfare lies against imposing costs on outsiders for strategic economic gains (as in *Glencore/Xstrada*). But, as to *Qualcomm*, world welfare includes freedom of experimentation in designing

rules of law, including the competition/IP interface, as long as the nation applies its rules equally at home and abroad, and grants due process, including rights to be heard and transparency. Thus, in the one case (*Glencore*) there does appear to be excessive intrusion into the spheres of other nations, and in the other case (*Qualcomm*) (where there is much more at stake), the argument of illegitimate intrusion is difficult to sustain absent lack of due process or discrimination.

7. CONCLUSIONS

Analysis of the problem sets suggests several observations.

First, “extraterritoriality”: Extraterritoriality is not always a helpful term. Semantically it may imply illegitimacy, but most often a nation’s reach beyond borders when effects of the actors’ conduct extend to the regulating nation’s territory is perfectly natural and proper. A more constructive question is: Is the reach of a regulating nation’s law excessive in view of the nation’s legitimate interests and world welfare? Lack of tight directness between the conduct and its effects should not be disqualifying.

Second, world welfare is a helpful referent, especially useful in areas in which there is consensus. The rule against hard core cartels is the paradigm.

negotiation demand that China stop robbing U.S., <https://www.axios.com/trump-china-tariffs-trade-secrets-eda8dedd-5c61-4aaa-872e-42059a2ff9de.html>, May 2, 2019. One approach to counter perceived targeting

is to merge antitrust complaints with similar complaints in other disciplines such as trade and to treat the matter as a political policy matter rather than an antitrust matter.

Third, enforcement actions that could give rise to claims of sovereign conflict are nonetheless legitimate when the conduct's effects within the regulating nation's jurisdiction are reasonably direct, substantial and foreseeable, the enforcement is proportionate to the regulating nation's legitimate (not parochial) interests, and especially when the enforcement contributes to world welfare. In such a case, a complaining country (e.g. China in *Vitamin C*) should have the burden to prove that the lawsuit (against the cartel) or relief is illegitimate on grounds that it is excessively intrusive into the sovereignty of the other.

Fourth, the China *Qualcomm* problem. Enforcement is illegitimate if it is discriminatory in the WTO sense or if due process has been denied.

Fifth, the *Glencore/Xstrada* problem. The use of industrial policy in antitrust is not itself illegitimate⁵⁵ but where it is part of a strategy to impose costs on outsiders, as by extracting intellectual property or resources in the course of antitrust enforcement but without any relation to competition policy, the strategy should be recognized as an illegitimate use of antitrust law. It violates the general cosmopolitan principles embedded in the WTO.

Sixth, the *Intel* problem. Strategies of multinational firms often encircle the world and the various parts belong to a common core. World welfare is presumptively enhanced by allowing a regulating jurisdiction to include in its

legal case all pieces of the problem. The alternative is to disintegrate the parts so that no jurisdiction can grasp the whole. Therefore, in this author's view, the *Lenovo* and *Acer* segments were a proper part of the EU case.

Seventh, *Vitamin C*. For the sake of the global competition commons, one nation should never be allowed to declare its firms immune from another nation's price-fixing law just because it says so. A rule allowing such a naked shield is a perverse rule. The US foreign sovereign compulsion defense should be limited to sovereign commands that have an integral relationship with the foreign sovereign's regulation of its own economy.

Lastly, *Potash* and *LCD panels*. These should be simple cases. "Direct, substantial and foreseeable" is an iterative category. When cartels fix prices of goods or components intended to exploit markets abroad, public and private actions against the members of the cartel in the harmed nation are fair game and good game. The alternative is a cartelized world; a major offense to the global commons. Double counting of damages should not be allowed but this possible by-product should be separately addressed.

By dissecting the real clashes of sovereigns and highlighting prospects for community, we may construct a coherent framework for laws' reach and nations' restraint, and for deepening common cause.

⁵⁵ For example, when South Africa imposes conditions on mergers that save jobs or build capacities of small suppliers, other countries have no legitimate basis to complain. South Africa undoubtedly judges that the conditions will return more benefits than costs to its

society, and it is willing to pay the costs. The transaction costs that fall on foreign companies seeking to do business in South Africa are mere by-products.

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