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MODERNIZING “EXTRATERRITORIALITY”  
through the window of antitrust  
  
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This essay is about the appropriate reach of national competition law in a globalized and interdependent world. It is well known that one nation’s laws may be constrained by another nation’s prerogatives. This is the traditional horizontal nation-to-nation view of the world. In the age of globalization and interdependence, there is another player in the game. It might be called global welfare or the global commons of competition. In the wake of the new economic realities of global interdependence, it is time to reconceptualize the traditional “flat” notion of “extraterritorality.”

The essay is about extraterritoriality but the canvas is larger. It broadly addresses the notion of clashes of sovereigns versus a shared community of sovereigns. The essay includes how to treat a foreign sovereign’s orders to its nationals to violate another nation’s laws (foreign sovereign compulsion). It includes the use by one nation of strategic industrial policy to resolve its own antitrust cases against foreign firms, and the misuse by one nation of laws or process to penalize foreign firms. These are all part of a central problem – clash or community of sovereign interests. I urge that clash has been overstated, that community has been underappreciated, and that in any event this range of issues should be brought under one roof.

The essay is not centrally concerned with the law as it is; thus, we are not drawn into the catechism of the convoluted US statute ­– the FTAIA.[[2]](#footnote-2) Rather, the essay is an invitation to reconceptualize appropriate and inappropriate spheres for national antitrust enforcement in a world of cross-border effects and in the absence of international antitrust law.

The essay argues that traditional analysis is outdated in five respects, and suggests a paradigm fitting for the 21st century.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 extraterritoriality, at least after a first direct sale into a nation. This essay contends that the presumption is an anachronism. Second, traditional analysis assigns to separate silos what is essentially the same problem – extraterritorial jurisdiction,[[3]](#footnote-3) foreign sovereign compulsion, and a nation’s treatment of foreign firms. The essay unites these sister problems. Third, in many litigations, traditional analysis sees the private-firm defendants as the principal stakeholders whose interests should determine the reach of the law. This essay posits state and community interests as more significant and suggests handling any resulting unfairness to a defendant as a subsidiary problem. Fourth, traditional analysis invokes a laundry list of factors to balance in the case of conflict in the name of comity. This analysis treats jurisdiction over acts that have significant effects in the enforcing nation as presumptively legitimate, defeasible only in narrow circumstances. Comity is over-used and not often instructive. Fifth, traditional antitrust sees the sovereignty problem as a two-player game. This analysis identifies the “global commons of competition” as a player especially when nations share the substantive norm, as in the law against cartels.

From the earliest days, the extraterritorial problem was seen as involving a universe of two sovereign players, for example, Turkey and France (*the Lotus*),[[4]](#footnote-4) or the United States and the UK (*British Airways/Laker*).[[5]](#footnote-5) It is fitting at last to recognize the global commons of competition. The world has an interest in preserving the global commons, unclogged by anticompetitive restraints. In this sense the old standby comity cases *Timberlane[[6]](#footnote-6)* and *Mannington Mills[[7]](#footnote-7)* both literally and figuratively miss the bigger picture.[[8]](#footnote-8)

I conceive of clashes of sovereigns broadly. The clash might or might not be justiciable. It might go beyond antitrust law, interfacing with trade, freedom of trade, and due process.

My methodology is to work from ground up, looking closely at the facts of particular cases and considering how the national interests ought to be assessed. The exercise is facilitated by an a priori structure, so I suggest provisional standards or organizing principles for analysis. I pose five fact problems. I test them each against four standards or organizing principles. Based on the analysis, I suggest a framework.

Here are the four organizing principles.

1. The law of a jurisdiction may appropriately reach conduct or transactions that emanate from abroad when the conduct or transaction has a reasonably direct, substantial and foreseeable effect on its territory or its citizens.
2. The enforcement action and relief should not be disproportionate to the interests of the enforcing state.[[9]](#footnote-9)
3. When (1) and (2) are satisfied, the enforcement and relief are presumptively legitimate. A complainant has the burden to prove the contrary.[[10]](#footnote-10)
4. When the subject matter of the enforcement action is one in which there is a world common interest and consensus, as in eradication of world cartels, there is a global commons of competition and a world-welfare interest in its preservation. In such a case the controversy 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 factor in determining appropriate reach and limits of national law.

I apply these principles to the five following problem sets: potash, input cartels, the Chinese vitamin C export cartel, the European *Intel* case, and China’s enforcement: the litigation against Qualcomm and China’s merger clearance conditionalities.

As always, political economy perspectives influence views of appropriate legal intervention. Policy-makers and scholars who are more trusting in markets and more skeptical of government interventions would surely prefer different organizing principles. They may require direct effects, not just reasonably direct effects, in the regulating jurisdiction. (See principle 1.) They are likely to prioritize businesses’ interest in certainty as well as nations’ interests in regulating their own commercial affairs.[[11]](#footnote-11) Business certainty and sovereigns’ regulatory interests are taken into account in the analysis in this essay, which aims not so much to defend the principles and presumptions as to put a common roof over problems of sovereign clash and the prospect of community and to demonstrate how the principles can be implemented. The four principles provide one methodology for organizing the facts. The same problem sets can be analyzed under an alternative framework: a general presumption of antitrust restraint, a nation-centered vision, and no room for a global commons, but that is not how I spend my time in this paper.

I. Potash - directness

Potash is a mineral used in agricultural fertilizers. The world potash market is highly concentrated with reserves confined to Canada and Russia/Belarus. China is the largest buyer market in the world and the US is second. The farmers in developing countries are, together, very large users. The potash producers (seven of them) had a price-fixing cartel. It was an open and obvious export cartel in Canada. Officials told the press in defense of the cartel: Saskatchewan (the Canadian province rich in potash) depends on its potash exports for its economic development; the large tax on the export sales (35% tax) returned vitally needed revenue to the Saskatchewan economy.[[12]](#footnote-12)

The cartel’s modus operandi for sales into the United States was simple: The cartel negotiated a high price on sales to China; after this cartel price was established outside of the United States, the producers, separately, sold into the US at the cartel price. The US buyers sued. The defendants moved to dismiss the case on grounds that the US effect was not direct (for under the usual test “effects” jurisdiction requires that the effect of the offending conduct in the regulating nation be direct, substantial, and reasonably foreseeable). The district court denied the motion. 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. Sitting en banc on 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 directness. The court, by Judge Diane Wood, made the case for a flexible, instrumental construction of the word “direct”:

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.[[13]](#footnote-13)

*Potash* is an anchoring example of the thesis of this paper. The price-raising effect on the US market was substantial and foreseeable. It was not a mere “ripple effect.” The selling nation profited from the cartel and supported it – since it hurt only foreigners. A buying country – the US – had the incentive to punish the cartel.

The United States would handicap itself and would undermine world welfare (including the big needy populations in developing countries) by choosing a narrow construction of the word “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 Canadians are injured.) Enforcement against the cartel in the US is proportionate to US legitimate interests and is important to exonerate them. The desire for cartel profits is not a legitimate justification, especially in a world 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 business certainty, and allowing, even expecting, harmed nations to condemn the cartel does not interfere with the exporting nation’s right to regulate its own economy.

II. Foreign input cartels with assembly abroad

*Motorola Mobility* is a good example of attempted enforcement against foreign price-fixers of components that are assembled into finished products abroad, and the finished products are sold to the world. Motorola Mobility makes smartphones. It procures the important liquid crystal display panels from Korea and Taiwan. It sets up wholly owned subsidiaries in China to assemble the phones. It arranges for the sale of the LCD panels to its Chinese subsidiaries, and for its Chinese subsidiaries to sell the finish product, 42% to Motorola Mobility in the US and most of the rest directly into the world market. Unknown to it, Korean and Taiwanese manufacturers fixed the price of the liquid crystal display panels. They sold the panels at the illegally inflated price to the Chinese Motorola subsidiaries, who incorporated them into smartphones in China and sold the smartphones to their parent and to the world. Motorola Mobility and, separately, the United States sued the Asian price-fixers under the Sherman Act.[[14]](#footnote-14) Were the suits impermissibly extraterritorial? Did they predictably create clashes that warranted deference to Korea, Taiwan or China, either on grounds that Korea and Taiwan have a legitimate interest in shielding their firms from the relatively harsher consequences of US liability or because China might be offended by the diversion of litigation from its emerging antitrust legal system?

To win its case, Motorola Mobility would have to prove that it paid an inflated price because of the cartel, and let’s assume that it could. Indeed, US buyers almost surely had to pay more for their smartphones because of the price fix.

Defendants claimed that US public and private enforcement against the price fixers created a clash of sovereigns that warranted deference to their countries; that their input cartel was beyond the reach of US law. Who had the better claim?

The chips were made for US phones. The effect in the US 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 point of contention). The home countries ban price fixing when it hurts their nationals. Providing 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. Indeed, if China or the Chinese manufacturers could not be counted on to sue the price-fixers (which is probably the case), and if all nations into which the assembled product is sold adopted a hands-off approach for cartels of components into products assembled elsewhere, China would become the jurisdiction of choice for assembling – and laundering – price-fixed inputs, and global welfare would be much diminished.[[15]](#footnote-15) As in *Potash*, neither business certainty nor a sovereign right to regulate the home market is implicated. All relevant countries have an anti-cartel rule.

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.[[16]](#footnote-16) Double counting might be unfair (although probably not over-deterrent, for the various schemes of enforcement worldwide are significantly under-deterrent).[[17]](#footnote-17) If that is the problem, we simply need a rule of no double counting. 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, let alone the integrity of the global commons.

III. Chinese Vitamin C export cartel – a foreign sovereign defense

The Chinese vitamin C makers fixed the export price of vitamin C to the United States. They admitted it.[[18]](#footnote-18) The price fixing took place within the Chinese trade association, 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; thus, the trade associations were not all private, as they are in the United States today.[[19]](#footnote-19) US direct buyers sued the price-fixing firms. The defendants pled foreign sovereign compulsion and comity. Primed on the US foreign sovereign compulsion defense, which applies only if the foreign government *ordered* the offending conduct (and imposes serious dissuasive penalties for violating the order), 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 wanted to avoid a US antidumping action. Did MOFCOM *really* order the firms to fix prices? The jury found that it had not and it returned a large award to the overcharged buyers. The Court of Appeals for the Second Circuit reversed. It held that comity required the court to accept China’s word that Chinese law compelled the price-fixing, and that the Chinese interests outweighed the US interests, and it dismissed the case on grounds of comity without reaching the foreign sovereign compulsion defense.[[20]](#footnote-20) The Supreme Court reversed and remanded on grounds that China’s interpretation of its law was entitled to respectful consideration but not conclusive effect. The case is now, again, before the Court of Appeals. [[21]](#footnote-21)

*Vitamin C* was not about the reach of US antitrust law. The law clearly reaches direct imports. But whether framed in terms of comity or the scope of the affirmative defense, it is about a clash of sovereigns. The analysis applicable in the cases of extraterritoriality is equally applicable.

1. Were the effects of the price-fixing direct, substantial and reasonably foreseeable? Yes, without question.

2. Was the US enforcement proportionate to the interests of the United States? Yes, without question.[[22]](#footnote-22)

3. Where did the world welfare interests lie? This was a naked export cartel. World welfare lay with the enforcement.

4. There was a conflict of sovereigns. How should it be resolved? China wanted to shield its firms from the US antitrust system. But so did Saskatchewan and maybe Canada (in *Potash*), and Korea and Taiwan (in *LCD* panels); they just did not say: “I order.”

Should a country’s order to its exporting firms to violate the regulating country’s law be enough to differentiate *Potash* and to immunize the price-fixers? What gives China an interest in shielding its firms from the US anti-price-fixing law greater than the US interest in enforcing its anti-price-fixing law?

The easy but unsatisfactory answer is, the US law gives the foreign nation such a right, under certain conditions. But is this the law we want? The foreign sovereign compulsion defense is meant to provide a narrow gateway to do acts that would otherwise violate the law, based on respect for the clear will of the foreign sovereign.[[23]](#footnote-23) The defense is narrow in deference to US law; a firm cannot justify violating US law just because it was acting pursuant to its own government’s policy and encouragement;[[24]](#footnote-24) it 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;[[25]](#footnote-25) they had to do the act even against their will.[[26]](#footnote-26)

If China did order its firms to fix prices in violation of US law (and the corresponding law of all other jurisdictions into which the price-fixing exporters sold), this was a frontal assault on US law and world norms. China’s own domestic law not only prohibits price-fixing but prohibits government officials from ordering price-fixing.[[27]](#footnote-27) Even if there was a clash of sovereigns, it would seem that the US and world interests easily outweigh China’s;[[28]](#footnote-28) but this was not in the view of the appellate court.

IV. Intel (EU): the geography of constituent acts

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. This event galvanized Intel. Intel put in place various strategies (as the European Commission found) to try to keep the AMD chip from getting traction in the period that mattered – the first six months after launch.

One set of Intel’s strategies were called “naked restraints,” and the other, exclusivity (loyalty) rebates. The naked restraint category comprised calls from an Intel official to its biggest customers, some of whom had already signed contracts for the new AMD chip. The Intel official would say in effect: 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 in contract with AMD, Intel made an equivalent approach. It offered payments or rebates conditional on delaying the launch of the AMD chip. The customers accepted the deals. The big customers included Lenovo in China. Geographically, the relevant conversations and sales were between Silicon Valley and Beijing. Lenovo agreed to Intel’s proposition. It breached its contracts with AMD and continued to use the Intel chip in its computer notebooks. It shipped the finished product to buyers all over the world, including Europe. The European Economic Area accounts for about 32% of purchases of the devices with the chip inside. It is impossible to know which of the devices that went to Europe contained the diverted chips, and indeed these diverted chips were only a few thousand and a very small share of the market.

The European Commission found that Intel violated EU’s abuse of dominance law. The General Court affirmed. The European Court of Justice affirmed the holding that Intel’s Lenovo-related acts were properly within the reach of EU law.[[29]](#footnote-29) While purporting to apply the qualified effects test (foreseeable substantial and immediate effects in the European Economic Area), the Court in fact justified jurisdiction on grounds that Intel’s conduct towards Lenovo was part of a holistic global strategy and to exclude it from the case would artificially fragment comprehensive conduct capable of affecting the market structure in the EEA.

Does the *Intel* problem pose a clash of sovereigns? It would not do so if the law on abuse of dominance 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 is divergent (and also if due process deficiencies impugn the fact-finding), the US might be heard to complain. Substantively, the US argument would be/could be:[[30]](#footnote-30) Intel is a US company acting on US soil. Its conduct was low pricing and competition. When AMD introduced its new chip, Intel was entitled to respond. Intel responded by charging a low price; but it was not a predatory one. This was competition itself.

Let’s assume that Intel’s conduct 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.

Did the European Court have jurisdiction over the Lenovo incident? Under the proposed framework it should be able to reach the incident unless the EU enforcement is an unreasonable intrusion into US space and world welfare.

Until the EU *Intel* judgment, the European Court of Justice grounded extraterritorial jurisdiction on the proposition that the offending conduct was *implemented* in the EU.[[31]](#footnote-31) Intel argued that its conduct with Lenovo was implemented in China and was therefore impermissibly included in the case. The Court of Justice in *Intel* took the occasion to enlarge the jurisdictional test. It endorsed the “qualified effects” test, and held it was met.

Under the framework, analysis of appropriateness of EU jurisdiction over the Lenovo segment would proceed as follows:

1. Intel caused the Lenovo chip-switch, and the chip-switch had a reasonably foreseeable effect all over the world, including although not uniquely in the EU. Combined with the rest of this global strategy of Intel, the predicted effect (monopolizing a chip market) was substantial; it is not possible to separate out the Lenovo effect from the effect of the entire holistic strategy. But was the effect of Intel’s conduct towards Lenovo in the EU sufficiently direct?

If the conduct was an offense, it was a world market offense. The EU is a significant part of the world market. If Intel harmed competition in the chip, the EU has a significant interest to exonerate. The Lenovo incident was a piece of a larger puzzle; of a single infringement that (the European Commission found) was intended to foreclose Intel’s sole significant competitor from the world market.[[32]](#footnote-32) By embracing 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 disproportionate to the interests of the EU? The factors in point 1 above are equally relevant and would point in the same direction: towards jurisdiction. However, if there is a significant question about whether the challenged acts are procompetitive or anticompetitive and if there is concern that the EU institutions will prohibit procompetitive conduct, the potential US interest in EU’s exclusion of these incidents would become part of the equation, and proportionality is less clear.[[33]](#footnote-33)

3. If the European Commission proved sufficient directness, substantiality and foreseeability and no lack of proportionality, then, according to the proposed framework, 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. EU has no direct connection. The EU effect 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.

There was no such US brief.[[34]](#footnote-34) The theoretical arguments are still available. The clash of sovereigns is just under the surface. [[35]](#footnote-35)

4. This is a world problem. 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 should not be restrained?

These questions could hardly have been resolved at the point at which the European Commission asserted jurisdiction over the Lenovo incident as it launched its investigation. Nor could they easily have been resolved as the case proceeded. This observer agrees with the European Court of Justice that the incident was too integral with the common core to be sliced out of the case. But those who believe in national restraint, not global commons, and especially who believe that single-firm conduct is virtually always good for consumers, will disagree.

V. China: *Qualcomm*, and merger remedies: industrial policy and claims of “bad law”

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 the licensed technology. Many 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 remove expired patents from its packages, reducing the royalty base to 65% of the finished product, and, among other things, agreeing to pay a fine of nearly US$1 billion.[[36]](#footnote-36) Soon after, it was announced that Qualcomm agreed to a joint venture with a Chinese firm.[[37]](#footnote-37)

*Glencore/Xstrata*[[38]](#footnote-38) 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 competition authority (MOFCOM) simply used the opportunity of the merger and of the parties’ need for China’s clearance to extract conditions that would assure China a supply of copper.

The *Qualcomm* matter and the several merger clearances on 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.[[39]](#footnote-39) These matters are redolent with a clash of sovereigns, with US, and perhaps UK, Switzerland and other nations 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.[[40]](#footnote-40) *Glencore/Xstrada* 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 (*Glencore/Xstrada*). But the merger relief in *Glencore/Xstrada*, as an example, was both extraterritorial and unrelated to competition.
2. Was the enforcement or relief disproportionate to the legitimate 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 on 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. Where the issue of excessive intrusion is credibly raised, according to the framework suggested, [[41]](#footnote-41) 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 (Legitimacy) below.

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 may be 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, leading to very high royalties. As China regulates its own economy, it has the right to balance competition and intellectual property in a way that favors competition (or lower rates) more than it favors protection of IP holders’ exclusive rights[[42]](#footnote-42) – as long as it applies its rules transparently and non-discriminatorily.[[43]](#footnote-43) China’s law prohibits excessive pricing – which US law does not. Its foray into this area is not illegitimate, even though attacking royalty rates of technology licensing as excessive is a complex project. 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.[[44]](#footnote-44) If, however, China has denied due process to foreign firms, it would fail to meet the test of presumptive legitimacy on that ground.

1. Legitimacy. This is the point of principal concern in this problem.

For the *Qualcomm* case: The two points of possible illegitimacy are lack of due process and discrimination, if those could be proved. Illegitimacy is not proved by the claim 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 (and China made no relevant reservations on its accession to the WTO). In a better world, China would be required to defend and justify its conditions. But there is no law to require it to do so.

1. 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. 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 may be more at stake), the argument of illegitimate intrusion is difficult to sustain absent lack of due process or discrimination.

VI. Conclusions

I draw several observations from this set of problems.

First, as to “extraterritoriality”: Extraterritoriality is not always a helpful term. Semantically it may imply illegitimacy, but most often a nation’s reach beyond borders to conduct that harms it is perfectly natural and proper. A more constructive question is: Is the reach of a regulating nation’s law excessive in view of other the nations’ legitimate interests and world welfare?

Second, world welfare is a helpful referent, especially useful in areas in which there is consensus. The anti-cartel rule is the paradigm case.

Third, enforcement actions that could give rise to claims of sovereign conflict are legitimate when the conduct’s effects within the regulating nation’s territory 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 complainant should have the burden to prove that the enforcement action is illegitimate as an excessive intrusion into the sovereignty of the other.

Fourth, the *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 illegitimate[[45]](#footnote-45) 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 principle 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 antitrust case all parts of the problem. The alternative is to fragment the parts so that no jurisdiction can grasp the whole. For this reason, the Lenovo segment was 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”[[46]](#footnote-46) is a perverse rule. The 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*. These should be simple cases. “Direct, substantial and foreseeable” is properly treated as an iterative category, as the Court of Appeals for the Seventh Circuit did in *Minn-Chem*.[[47]](#footnote-47) When cartelists 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, which is a major offense to the global commons. Double counting of damages should be prohibited but separately addressed.

By dissecting the clashes of sovereigns and giving regard to community, this paper has constructed a coherent modern framework for conceptualizing laws’ reach and nations’ constraints in an interdependent world.

1. \* Eleanor Fox is Walter J. Derenberg Professor of Trade Regulation, New York University School of Law. She thanks Koren Wong-Ervin for her helpful comments.

   This paper is based on my essay for Hon. Douglas H. Ginsburg, forthcoming in Vol. II of Concurrences’ Liber Amicorum in his honor. [↑](#footnote-ref-1)
2. Foreign Trade Antitrust Improvements Act of 1982. [↑](#footnote-ref-2)
3. I use the terms jurisdiction, subject matter jurisdiction, and reach of the law interchangeably. This paper is not concerned with the procedural consequences of jurisdiction such as burden of proof and the stage of a proceeding 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. [↑](#footnote-ref-3)
4. S.S. Lotus (France and Turkey), 1927 P.C.I.J. [↑](#footnote-ref-4)
5. 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. [↑](#footnote-ref-5)
6. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). [↑](#footnote-ref-6)
7. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979). [↑](#footnote-ref-7)
8. See Koren Wong-Ervin, Bruce H. Kobayashi, Douglas H. Ginsburg & Joshua D. Wright, Extra-Jurisdictional Remedies Involving Patient 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 that are 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. [↑](#footnote-ref-8)
9. Wong-Ervin, Kobayashi, Ginsburg & Wright, among others, argue that the only appropriate antitrust interest of the enforcing state is the domestic consumer interest. This essay takes a broader view and suggests a stance of tolerance: that it is for the state to decide what interests it protects; for example, it might include rights of entrepreneurs to unfettered markets. The limiting principle is, as developed below: The state must not unreasonably interfere with the rights of other states. It does unreasonably interfere when it imposes costs on others for the sake of aggrandizing its own economic power. [↑](#footnote-ref-9)
10. What is legitimate and illegitimate is fleshed out through the case studies below.  [↑](#footnote-ref-10)
11. SeeJosh Hazan and Douglas H. Ginsburg, Extraterritoriality and Intra-Territoriality, U.S. Antitrust Law (June 13, 2016), New Frontiers of Antitrust, 7th International Concurrences Review Conference, Concurrences No. 3 – 2016, pp. 32-38, <https://ssrn.com/abstract=3042670> (<https://ssrn.com/abstract=3042670>). [↑](#footnote-ref-11)
12. 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. [↑](#footnote-ref-12)
13. Minn-Chem, Inc. v. Agrium, Inc., 683 F3d 845 (7th Cir. 2012). [↑](#footnote-ref-13)
14. United States v. AU Optronics Corp., 778 F.3d 738 (9th Cir. 2015); Motorola Mobility v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015); cert denied in both. [↑](#footnote-ref-14)
15. 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 – a test required by the US Supreme Court’s construction of the FTAIA. If Motorola Mobility was injured at all, it was injured by the effect in China. Moreover, the court thought, Motorola Mobility had selected China as its forum when it created the Chinese subsidiaries. Also the court said that Motorola Mobility was presumed not to be injured, by reason of the *Illinois Brick* doctrine (431 U.S. 720, 1997) – it was an indirect purchaser. The court’s holding is not material to this essay, which is not concerned with the FTAIA and with the limits that nations put upon themselves, but rather with constructing a framework for considering appropriate reach and bounds of national jurisdiction in general. [↑](#footnote-ref-15)
16. The laws of a number of jurisdictions may apply to the same conduct or transaction because the conduct affects numerous jurisdictions. This is so in the case of mergers, abuse of dominance and cartels where effects cross borders. [↑](#footnote-ref-16)
17. See John M. Connor, Sanctions In Antitrust Cases, OECD Global Forum on Competition Dec. 1-2, 2016, DAF/COMP/GF(2016)9. But see Wong-Ervin, Kobyashi, Ginsburg & Wright, supra, concerned with over-deterrence even of cartels in the event of double counting. [↑](#footnote-ref-17)
18. If a firm’s price was at or above the agreed price, a Chinese official would certify it for export. [↑](#footnote-ref-18)
19. This was not always the case. 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; but this was no defense to the price-fixing). [↑](#footnote-ref-19)
20. Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. (Vitamin C Antitrust Litigation), 837 F.3d 175 (2d Cir. 2016), reversed and remanded, – U.S. – (2018). [↑](#footnote-ref-20)
21. – U.S. – (2018). [↑](#footnote-ref-21)
22. Moreover, enforcing the price-fixing law would not create business uncertainty. The Chinese firms almost surely knew of the strict US law against cartels and the riskiness of relying on 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 case in which China has a legitimate overriding interest, a favorable business review letter should issue. Transparency would facilitate the process of clarifying the law. [↑](#footnote-ref-22)
23. SeeUS Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Enforcement and Cooperation, January 13, 2017, Section 4.2.2. [↑](#footnote-ref-23)
24. SeeHartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). [↑](#footnote-ref-24)
25. Also, penalties for violation must be severe and the conduct must be capable of accomplishment solely on the home territory. Arguably neither was the case. [↑](#footnote-ref-25)
26. It may be doubtful that the United States would thoughtfully allow a foreign sovereign to give its nationals authority to price-fix into the US and to do so no matter how high the firms should fix the price. States of the United States do not have this power. California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). Under EU law, even when firms are compelled by the state to allocate quotas, they are not protected from EU anti-cartel law if they could have set the quotas in a more procompetitive way. Consorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato (Italian matches), Case C-198/01, ECLI:EU:C:2003:430. [↑](#footnote-ref-26)
27. Animal Science, note 19 supra. See the Chinese Anti-Monopoly Law, Articles 13, 36. [↑](#footnote-ref-27)
28. 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). [↑](#footnote-ref-28)
29. 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. [↑](#footnote-ref-29)
30. Hypothetically. I do not know of such response. [↑](#footnote-ref-30)
31. A. Ahlstrom Osakeyhtio v. Commission (Woodpulp), Cases C-89, 104, 114, 116-17, 125-129/85, ECLI:EU:C:1988:5193. [↑](#footnote-ref-31)
32. *Intel*, General Court judgment at paras. 260-273; ECJ judgment at paras. 40-60. [↑](#footnote-ref-32)
33. See Wong-Ervin, Kobyashi, Ginsburg & Wright: Disagreement as to competitive merits should lead to restraint regarding extra-jurisdictional remedies. [↑](#footnote-ref-33)
34. Indeed, in the United States, the Federal Trade Commission opened an investigation against Intel. The alleged offensive conduct was more extensive than the conduct the European 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 posture regarding the offense of monopolization. See, e.g., Verizon v. Trinko, 540 U.S. 398 (2004). [↑](#footnote-ref-34)
35. The big question underlying a possible clash is a question of political philosophy and presumptions about how well markets work; what induces innovation, and how effective is antitrust intervention. Compare, with the analysis in the text, Wong-Ervin, Kobyashi, Ginsburg & Wright, urging restraint on extra-jurisdictional remedies. [↑](#footnote-ref-35)
36. 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>. [↑](#footnote-ref-36)
37. For Qualcomm’s 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. [↑](#footnote-ref-37)
38. See Mayer Brown, MOFCOM Orders Extraterritorial Divestiture of Key Mining Asset in Glencore/Xstrata, May 6, 2013. [↑](#footnote-ref-38)
39. 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>. [↑](#footnote-ref-39)
40. See Wong-Ervin, Kobyashi, Ginsburg & Wright. [↑](#footnote-ref-40)
41. This would be disproportionate enforcement or relief under standard 2. See supra, text after note 7. [↑](#footnote-ref-41)
42. 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. [↑](#footnote-ref-42)
43. Given the international controversy as to what is the better rule, China should have a duty of restraint against imposing extra-jurisdictional remedies. See Wong-Ervin, Kobyashi, Ginsburg & Wright. [↑](#footnote-ref-43)
44. See, e.g., Trump Administration to Begin Probe of Alleged Chinese Technology Theft, Wall Street Journal, Aug. 12, 2017; See Charlene L. Fu and Curtis S. Chin, China is stealing American intellectual property. Trump's tariffs are a chance to stop it, Op Ed, LA Times, Sept. 17, 2018. [↑](#footnote-ref-44)
45. For example, when South Africa imposes conditions on mergers that save jobs or build capacities of small suppliers, it is not the business of other countries 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. [↑](#footnote-ref-45)
46. A “naked shield” implies that the nation has no reason for the order except to shield its firms from another nation’s enforcement. [↑](#footnote-ref-46)
47. See note 12 supra. [↑](#footnote-ref-47)