

# ANTITRUST AND THE CLASH OF SOVEREIGNS: Extraterritoriality and Community

---

ELEANOR FOX

PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW

13<sup>TH</sup> CRESSE CONFERENCE, COMPETITION POLICY AND REGULATION

JUNE 30, 2018, HERAKLION – CRETE, GREECE    REVISED JULY 5, 2018

# Outline

---

## I. Resetting the spheres of proper reach of national law

## II. Framework for analysis

## III. Problem sets

- 1 “Ordinary” extraterritoriality cases – Wood pulp
- 2 A step removed – Potash: Minn-Chem
- 3 Two steps removed – component cartels -> assembled products (LCD)
- 4 Foreign sovereign compulsion defense – Chinese Vitamin C (US)
- 5 Abuse of dominance: when constituent acts span the world (Intel)
- 6 Mega mergers: wherein each nation examines its foot of the elephant
- 7 (Claims of) Bad law spilling beyond borders, global remedies, IP aggression, targeting foreigners

## IV. Common principles and implementation

# I. Resetting the spheres - The global world and what it requires for coherence

---

We are in a new world, different from the days of “billiard ball” foreign relations



Older approaches to extraterritoriality and negative comity are outdated; they fail to take account of community

- We need a new conception
  - - **preserving the global commons of competition**

Cont'd

# We are trying to ascertain:

---

## What is legitimate enforcement

- such that the world should allow?

## What is illegitimate enforcement

- such that the world should condemn?

How do the nations fit and work together to maximize competition policy in the service of consumers and robust markets in the world?

What reach of enforcement should the world encourage as necessary to protect the global commons of competition from unnecessary restraints?

## II. Framework for analysis (1) – cosmopolitan and integrative

---

(1) Does the conduct/transaction have a **reasonably direct, substantial and foreseeable effect** on its territory or its citizens.

(2) Are enforcement/remedies **proportionate** to the interests of the state

- and fair process granted

(3) When (1) and (2) are satisfied: (I argue) the enforcement and relief are **presumptively legitimate**. A complaining nation has the burden to prove illegitimacy [*unreasonable intrusion into the legitimate sphere of the complaining nation*].

(4) If the subject matter is one of world consensus (cartels), protecting the **global commons** supports legitimacy of the enforcement

[There is an **alternative: Framework (2) – an isolationist model**: “direct” means “absolutely direct”; “legitimate interest” in antitrust enforcement is limited to consumer welfare interests; “preserving global commons” is not recognized lest we beg for a clash; therefore all nations should draw inwards, narrowing their spheres so as to minimize overlap]

### III. The problem sets

#### 1. Wood pulp (EU) – ordinary off-shore cartel

- Sovereign interests aligned in favor of EU jurisdiction

#### 2. Potash – one step (at least) removed

- The cartel and deposits are in Canada + Belarus
- Export cartel establishes [a monopoly] price by sales outside the US
  - The cartelists, knowing US is a big market, then sells at the monopoly price to the US

Were the effects in US reasonably direct, substantial, foreseeable? Was US enforcement proportionate to US interests?

Is there a global commons?

If so, the enforcement is legitimate unless sovereign interests ostensibly predominate

Do they? (What is the interest of Canada?)

Suppose Canada files an amicus brief in US court: Saskatchewan needs the cartel.

IS US enforcement any less legitimate?

I argue No and develop the view that, in this world with a norm against cartels, and with Canada prohibiting cartels at home, Canada has no cognizable interest to weigh against US enforcement

# 3. Input cartel, assembly abroad

## Motorola Mobility US (damage action)

AU Optronics US (criminal prosecution)

Liquid crystal display panels

- Price fix in Taiwan, assembly in China by Motorola subs, smart phones shipped to Motorola-  
US and world; can Motorola sue in US?
  - **Judge Posner says this is “rampant extraterritoriality”**

[Ignore the FTAIA]

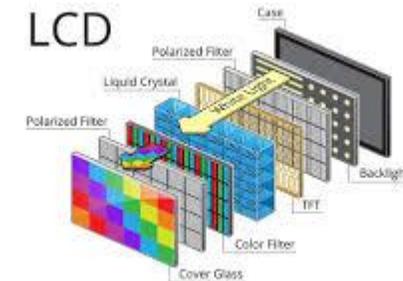
Were US effects reasonably direct, substantial, foreseeable?

Was enforcement proportionate to US interests?

- Was there a global commons? (all Yes, despite argument about directness)

Legitimacy: What are the sovereign interests against enforcement? (Taiwan-treble damages; double counting. China-This is *our* case) How weighty?

- Not much – We should have a rule against double counting. If AUO wants to make LCD for US and other significant markets, it should follow US (and world) rule against cartels and accept US consequences



# 4. Foreign sovereign compulsion as affirmative defense



## Chinese vitamin C (Animal Science)

- The Chinese vitamin C firms fix export prices into the US+ through their trade association (which has a heavy government presence)
- MOFCOM publishes notice to manufacturers: fix the price for export and MOFCOM will place seal and verification for export. Reasons (after the fact): To protect the Chinese firms from anti-dumping suits and ease their transition to a market economy
- Direct US buyers sue
- MOFCOM says: I ordered the firms to fix export prices; therefore the firms have a FSC defense; and it unprecedentedly says so by amicus in the US court

Is US enforcement Direct, Substantial, Foreseeable, Proportionate? No question. No question of lack of jurisdiction because of extraterritorially. The big question is foreign sovereign compulsion as a defense. Is there a global commons to be protected (consensus rule)? Yes

District court finds no compulsion and finds liability, but Second Circuit thinks the first (and last) question is comity; that China's interests clearly outweigh US interest, and dismisses

Should China be allowed to say "I compel you" and immunize its firms from US anti-cartel law?

# 5 Abuse of dominance - Geography of acts

Some constituent acts span the world

---

## **EU *Intel*:** naked restraints & loyalty rebates by Intel to block new AMD chip

- Lenovo episode: phone calls and sales of the chip from Silicon valley (Intel) to Beijing:
  - “Breach your contract with AMD and we’ll pay you well.” Lenovo breaches & reverts to the Intel chip.
  - Lenovo sells the tablets to the world; 30%+ normally go to the EEA
- Is the Lenovo incident a proper part of the EU case against Intel?

Reasonably direct, Substantial, Foreseeable, Proportionate, Legitimate?

All are questions here; no consensus global commons; different from the cartel examples

Suppose US assesses the conduct differently from the EU?

US: This is price competition; Intel must be allowed to compete.

[I agree with CJEU; this is an integral part of a larger picture with quite connected links; but Framework 2 would put the Lenovo incident out of reach]

# 6 Mega-Mergers

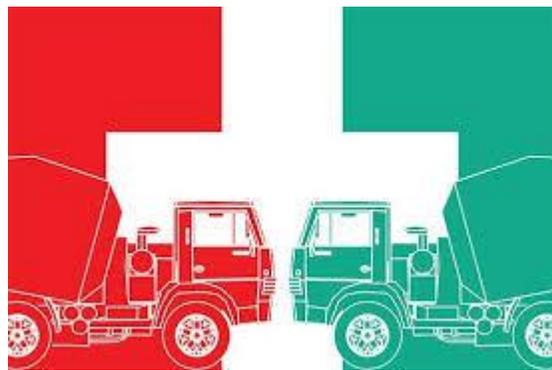
where the world is the market; nations attend to their own silos; developing countries are left “in the cold”

---

E.g., cement: Holcim LaFarge

Has historical extraterritorial analysis made our authorities too timid, lest we create conflict?

When does world welfare require an injunction?



# 7 Law beyond borders: claims of bad law and excessive remedies

China – Qualcomm – royalty rate “too high”; NDRC forces settlement

- Qualcomm & US: China is stealing our IP; Qualcomm Korea- global relief

China – merger conditionality, e.g. Glencore/Xstrada

- Is the remedy (Peruvian copper for China) industrial policy?
  - Both fail Framework 2: not proportionate; beyond consumer welfare

EU+ against Google

- “Wrong” principles of law?

Direct Substantial Foreseeable Proportionate Global commons

Legitimacy: What sovereign interests?

Framework 1 would tolerate all (but disproportionate relief or discrimination)

But Framework 2 would condemn all of the above enforcement as impermissibly extraterritorial

**Question: What should we tolerate; what do we have a right to call “wrong”**



# IV.A. Going forward

---

- I propose Framework 1 to national authorities (and regional – EU)
  - This resets the presumption against extraterritoriality and unwarranted comity deference
- All of the critiques must be and can be answered:
  - Too expansive; recipe for conflict (Intel; Motorola Mobility; Potash)
  - Risks double counting of damages, fines (Intel, Vitamin C; Motorola Mobility)
    - Invites damage calculations and punishments inconsistent with home country law (AU Optronics, Motorola Mobility)
  - Too tolerant of bad antitrust, IP kleptocracy, industrial policy (China, Qualcomm+)
  - Disrespects sovereign interests (Vitamin C)
  - Unfair to the companies caught in the middle (Vitamin C)
  - Uncertainty, lack of clarity and predictability

## B. Principles to start the world conversation

➤ **1 In areas of substantial consensus** (hard core cartels, hard core abuse of dominance, world mergers that substantially increase economic power):

➤ **Take account of the global commons; work towards accommodation of nations' legitimate interests in view of world welfare**

### **2 Certain state acts are illegitimate and do not require deference and retreat:**

- i Nations' **nakedly shielding their cartels** from importing nations' anti-cartel law
- ii (Other) **Industrial policy that directly imposes externalities** for strategic advantage: export cartels, creating national champions to exploit beyond borders
- iii Lack of fair process in proceedings
- iv Discriminatory rules or application

# C. Consensus building

---

- OECD, UNCTAD, ICN as fora for consensus building
- But **we do not need to develop a new world consensus to start**
  - Consider Vitamin C – Foreign sovereign compulsion defense is national law. Whether a nation provides the defense and under what circumstances is a matter of national law
  - No nation needs to give a foreign jurisdiction the right to immunize their firms from its anti-cartel law
  - The US Supreme Court has remanded the Vitamin C case to the Second Circuit (in view of its error in treating as conclusive China's word as to whether it compelled the price fix)
  - On remand the court could take a much more skeptical view of the primacy of China's interests in freeing its firms from US anti-cartel law

# C. Conclusions

---

Comity and extraterritoriality are over-emphasized and can Balkanize the world.

- This is especially clear regarding cartels; the law against cartels is both world-wide accepted and notoriously under-enforced

Community (notional world welfare) is under-appreciated.

International antitrust – even without a center – depends on the two prongs:

- Resetting the comity/extraterritoriality mantra, and
- Accommodating legitimate sovereign interests with a view towards community.

## The world we want



OR

