Extraterritoriality: Approaches Around the World and Model Analysis
(For Concurrences Book Honoring Eleanor Fox)

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Introduction

In the last 25 years, there has been a remarkable proliferation of foreign competition laws and agencies, expanding from 23 jurisdictions with competition laws in 1990 to over 130 jurisdictions to date. Enforcement of these competition laws beyond the boundaries of a jurisdiction's borders has, as a general matter, become uncontroversial, for example when conduct outside the jurisdiction has an adverse effect on competition and consumers in the enforcing jurisdiction. The growth of international commerce, combined with the ever-increasingly global scope of firm conduct, has required courts and agencies to determine when and whether domestic antitrust laws may have extraterritorial application. Relatedly, applying antitrust laws to conduct that occurs outside a jurisdiction can also raise the question of whether the traditional set of remedies remain applicable to the same degree. When competition laws are applied to conduct outside of the enforcing jurisdiction, how (and whether) a court or agency should craft extra-jurisdictional remedies (*i.e.*, prohibitions or requirements on foreign conduct or with respect to foreign assets, such as physical or intellectual property) becomes a more challenging question.

Among Professor Eleanor Fox's contributions to the worldwide antitrust discussion is how to reconcile differences in competition laws around the globe.[1] While extraterritorial enforcement and remedies raise modest issues when competition laws are aligned, they present greater challenges when different jurisdictions have different substantive approaches, if not ones that are diametrically opposed. How these differences might be addressed are therefore highly suitable to discuss in a tribute to Professor Fox.

As introductory examples to how these issues arise, two recent high-profile cases—one involving Intel and the other involving Qualcomm—are illustrative.

The 2017 *Intel* case is an example of extraterritorial application of a domestic competition law. The Court of Justice of the European Union upheld jurisdiction of EU institutions over conduct by an American company (Intel) with respect to, *inter alia*, chip sales to

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[1] *See, e.g.*, Eleanor M. Fox, *Rule of Law, Standards of Law, Discretion and Transparency*, 67 SMU L. REV. 795 (2014); Eleanor M. Fox, *Monopolization and Abuse of Dominance: Why Europe Is Different*, 59 ANTITRUST BULL. 129 (2014).

a Chinese company (Lenovo) in China, when the conduct was alleged to have harmed another American company (Advanced Micro Devices or AMD).[2] As concerns sales of chips to Lenovo, only a few thousand of the finished products (computers assembled by Lenovo in China) were implicated (*i.e.*, they allegedly would potentially have included an AMD chip had Intel not induced the breach of contract), and it was unclear if and how many reached the European Economic Area (EEA). In determining whether Intel's conduct was "capable" of having a "substantial, immediate and foreseeable effect" within the EEA,[3] the Court held that it was sufficient to consider the "probable effects" of the conduct on competition and that "Intel's conduct vis-à-vis Lenovo formed part of an overall strategy aimed at foreclosing AMD's access to the most important sales channels."[4]

The Korea Fair Trade Commission's (KFTC's) 2017 decision against Qualcomm is an example of the use of extra-jurisdictional remedies. Specifically, the KFTC imposed global, portfolio-wide remedies, including prohibiting or requiring certain licensing conduct with respect to non-Korean, foreign patents.[5] The KFTC's remedies extend to licensing agreements with all handset or modem chipset companies "headquartered" in Korea, those that sell handsets in or into Korea, and those that supply modem chipsets to companies that sell handsets in Korea. By comparison, in China's National Development and Reform Commission's 2015 decision against Qualcomm for much the same licensing conduct, the agency approved a rectification plan proposed by the company that limited remedies to Qualcomm's Chinese patents (specifically, its wireless standard-essential patents (SEPs)) for the manufacture of end-user devices in China for sale and use either in China or in a country in which no relevant patents have been issued to Qualcomm.[6]

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[2] Case C-413/14 P, Intel Corp. v. Comm'n ECLI:EU:C:2017:632, ¶ 51 (Sept. 6, 2017), http://curia.europa.eu/juris/document/document.jsf?text=&docid=194082&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8101004 [hereinafter CJEU 2017 Intel Judgment]. This aspect of the ruling diverged from the (non-binding but influential) Opinion of Advocate General Wahl, who concluded that Intel's jurisdiction arguments were "well founded." Opinion ECLI:EU:C:2016:788, ¶¶ 278-327 (Oct. 20, 2016), http://curia.europa.eu/juris/document/document.jsf;jsessionid=60502AFDD726BA2A761894930B664DA4?text=&docid=184682&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=628194.

[3] CJEU 2017 Intel Judgment, *supra* note 2, ¶ 18.

[4] *Id.* ¶¶ 51 and 55.

[5] Korea Fair Trade Comm'n, Case No. 2015SiGam2118, In re Alleged Abuse of Market Dominance of Qualcomm Inc., Decision No. 2017-0-25, Reasoning ¶ 483. (Jan. 20, 2017), *unofficial translation available in English at* http://www.theamericanconsumer.org/wp-content/uploads/2017/03/2017-01-20_KFTC-Decision_2017-0-25.pdf [hereinafter KFTC Order]. In December 2019, the KFTC's Order was upheld by the Seoul High Court with respect to this aspect of the KFTC's decision. Qualcomm has appealed that decision to Korea's Supreme Court.

[6] Rectification Plan Related to NDRC's Investigation of Qualcomm § I.A. (Feb. 9, 2015) ("These rectification measures apply to Qualcomm's licensing of Manufacturers under its Chinese Wireless SEPs to (i) make Devices and sell such Devices For Use in China or (ii) make Devices in China and sell such Devices For Use in a Territory."), translated in Qualcomm's Briefing Ex. C, https://www.qualcomm.com/media/documents/files/reply-in-support-of-motion-for-stay-6-18-19.pdf.; *see also* Press Release, Qualcomm, Qualcomm and China's National Development and Reform Commission Reach Resolution - NDRC Accepts Qualcomm's Rectification Plan - Qualcomm Raises Midpoints of Fiscal 2015 Revenue and Non-GAAP EPS Guidance (Feb. 9, 2015), https://investor.qualcomm.com/news-events/press-releases/detail/672/qualcomm-and-chinas-national-development-and-reform. See Appendix I for a summary of the approved remedies.

Similarly, in the European Commission's (EC's) 2014 decisions against Samsung and Motorola, the Commission limit its remedies to preclude the companies from certain conduct (seeking injunctive relief for infringement of certain SEPs for which the companies had made a commitment to license on fair, reasonable, and nondiscriminatory (FRAND) terms) only in the EEA, and only with respect to patents granted in the EEA.[7]

This Article seeks to explore the issues raised by extraterritorial enforcement and the remedies used in those circumstances first by discussing the approaches taken in major jurisdictions around the world (specifically, Brazil, Canada, China, the European Union, India, Japan, Korea, the United States, and Taiwan), and then providing model analysis in the context of common situations that have arisen or may arise. In this way, we hope to expand upon Professor Fox's insightful and informative work in this area in order to provide guidance for courts and agencies.[8]

Approaches in Major Jurisdictions

Most major jurisdictions apply some sort of effects test when determining whether to apply their domestic antitrust laws to foreign conduct, as summarized in Appendix I of this Article. The approaches are comparable to that specified in the U.S. Foreign Trade Antitrust Improvements Act (FTAIA), which provides that foreign conduct is outside the scope of the Sherman Act unless it "has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce and "such effect gives rise to a claim under" the Sherman Act.[9] Other countries take similar approaches, although in different words. For example, China's Antimonopoly Law provides that the law is "applicable to monopolistic conducts outside the territory of the People's Republic of China, which serve to eliminate or restrict competition on the domestic market of China."[10] The European Union applies either a "qualified effects" test

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[7] European Comm'n, Antitrust Decisions on Standard Essential Patents (SEPs) - Motorola Mobility and Samsung Electronics - Frequently Asked Questions (Apr. 29, 2014) (MEMO/14/322), http://europa.eu/rapid/press-release_MEMO-14- 322_en.htm. *See also* Case AT.39939—Samsung, Comm'n Decision (Apr. 29, 2014) (summary at 2014 O.J. (C 350) 8), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf; Case AT.39985—Motorola, Comm'n Decision (Apr. 29, 2014) (summary at 2014 O.J. (C 344) 6), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

[8] *See* Eleanor M. Fox, *Extraterritorial Jurisdiction, Antitrust, and the EU Intel Case: Implementation, Qualified Effects, and the Third Kind*, 42 FORDHAM INT'L L.J. 981 (2019); Eleanor Fox, *Antitrust: Updating Extraterritoriality*, ANTITRUST & PUBLIC POLICIES REVIEW, vol. 0/2019 (inaugural issue) (Italian Competition Authority) [hereinafter Fox, *Updating Extraterritoriality*]; Eleanor M. Fox, *Extraterritoriality and Input Cartels: Life in the Global Value Lane—The Collision Course with* Empagran *and How to Avert It*, CPI ANTITRUST CHRON. (Jan. 2015), https://www.competitionpolicyinternational.com/assets/Uploads/FoxJAN-152.pdf.

[9] Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a(1). Section 5(a)(3) of the Federal Trade Commission Act closely parallels the FTAIA. *See* 15 U.S.C. § 45(a)(3).

[10] [Anti-monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007), art. 2, http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml. A court in China held that this provision included conduct outside China that "directly ha[s] a major, substantial and reasonably foreseeable effect of impairing and restricting the domestic production activities, export opportunity and export trade of domestic enterprises." Huawei Jishu Youxian Gongsi Su Jiaohu Shuzi Tongxin Youxian Gongsi (华为技术有限公司诉交互数字通信有限公司)[Huawei Tech. Co. v. InterDigital Commc'n, Inc. (Huawei v. IDC)], Section II ,

(reasonably "foreseeable" of having "immediate and substantial" effects in the European Union) or an "implementation" test (focusing on where the conduct is implemented, rather than the location of the undertaking). The Court of Justice of the European Union in *Intel* clarified that the two tests pursue the "same objective, namely preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market."[11]

Applying a country's competition law at least implicitly allows for the use of extra-jurisdictional remedies in certain circumstances. What those circumstances are is a matter of how expansively a country's courts and competition enforcement agencies seek to assert their authority, or are limited by either the principles of competition law or broader principles of international relations in doing so.

In addition to applying some sort of effects test, most major jurisdictions also take into consideration comity concerns, both in deciding whether to apply domestic laws to foreign conduct and whether to impose extra-jurisdictional remedies.[12] Comity refers to the "broad concept of respect among co-equal sovereign nations and plays a role in determining 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.'"[13] In applying principles of international comity, jurisdictions consider whether significant interests of foreign sovereigns would be affected.

By way of example, the U.S. Antitrust Agencies consider and weigh the following factors:

2013 Yue Gao Fa Min San Zhong Zi No. 306 (Guangdong High People's Ct. No. 306 2013) (China). Application of antitrust laws to export commerce finds a parallel in the U.S. FTAIA. *See* 15 U.S.C. § 6a(1)(B).

[11] Case C-413/14 P, Intel Corp. v. Comm'n, ¶ 45 (Sept. 6, 2017), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CJ0413. *See also id*. ¶¶ 40-44.

[12] *See, e.g.*, Organisation for Economic Co-operation and Development (OECD) Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the European Union ¶ 7 (Nov. 30, 2017) ("The Commission applies the principle of international comity and cooperates on competition cases on the basis of international agreements concluded between the EU and third countries and memoranda of understanding entered into with other agencies."), https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)35/en/pdf; OECD Roundtable on the Extraterritorial Reach of Competition Remedies - Note by Korea ¶ 32 (Nov. 23, 2017) (stating that, in its 2017 Qualcomm decision, the KFTC "took into account facts that various countries are paying attention to this case, and there might be efforts to find different solutions due to differences in national systems"), https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)37/en/pdf [hereinafter Korea 2017 OECD Note]; OECD Roundtable on the Extraterritorial Reach of Competition Remedies - Note by Chinese Taipei ¶ 10 (Nov. 22, 2017) (the TFTC "uses the principle of effect as the basis for its law enforcement in extraterritorial merger cases . . . and then limits the applicability of the principle of effect while giving consideration to the comity of nations, principle of interest balancing, and principle of reasonable jurisdiction"), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2017)45&docLanguage=En [hereinafter Chinese Taipei 2017 OECD Note]; OECD Roundtable on the Extraterritorial Reach of Competition Remedies - Note by Brazil ¶ 8 (the Brazilian Competition Authority's international cooperation documents allow for "the grant of negative or positive comity considerations") (Dec. 3, 2017), https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)42/en/pdf.

[13] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION 27 (Jan. 13, 2017) (quoting Hilton v. Guyot, 159 U.S. 113, 164 (1895)), https://www.justice.gov/atr/internationalguidelines/download [hereinafter US INT'L GUIDELINES].

- the existence of a purpose to affect or an actual effect on U.S. commerce;
- the significance and foreseeability of the effects of the anticompetitive conduct on the United States;
- the degree of conflict with a foreign jurisdiction's law or articulated policy;
- the extent to which the enforcement activities of another jurisdiction, including remedies resulting from those enforcement activities, may be affected; and
- the effectiveness of foreign enforcement as compared to U.S. enforcement.[14]

Additional factors that have been considered by U.S. courts include:

(1) the nationality or allegiance of the parties and the locations of principal places of business of corporations;

(2) the extent to which enforcement by either state can be expected to achieve compliance (*e.g.*, whether the court can make its order effective);

(3) the relative significance of effects on the United States as compared with those elsewhere;

(4) the extent to which there is explicit purpose to harm or affect American commerce;

(5) the foreseeability of such effect;

(6) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad;

(7) the possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

(8) if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country;

(9) whether an order for relief would be acceptable in the United States if made by the foreign nation under similar circumstances; and

(10) whether a treaty with the affected nations has addressed the issue.[15]

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[14] *Id.* at 28.

[15] *See, e.g.*, *In re* Vitamin C Antitrust Litig.*,* 837 F.3d 175, 193 (2d Cir. 2016) (setting forth a non-exhaustive list of factors for comity analysis), *vacated on other grounds and remanded sub nom.* Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018); Timberlane Lumber Co. v. Bank of Am. Nat.l Tr. & Sav. Ass'n, 749 F.2d 1378, 1384 (9th Cir. 1984) (holding that a comity determination "***requires*** that a district court consider [the] seven factors" set forth in *Timberline I*) (emphasis added); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979) (setting forth a non-exhaustive list of factors).

In *Timberlane II*, the court applied the factors as follows:

In weighing comity considerations, many jurisdictions provide relief in the case of direct conflicts with foreign decisions. For example, in its 2017 decision against Qualcomm, the KFTC stated that comity may "be considered in cases where there is any conflict between the Corrective Order issued [against Qualcomm] by KFTC and any law enforcement of another country."[16] The Order states that Qualcomm "may request" a reconsideration of the KFTC's Order "if the final and binding judgment, measure or order of a foreign court or competition authorities affirms, after the date of this Corrective Order, conflicts with this Corrective Order, making it impossible to comply with both at the same time."[17]

In 2017, the Canadian Competition Tribunal in *The Commissioner of Competition v. HarperCollins Publisher LLC et al.* rejected a jurisdictional challenge where the allegations were that HarperCollins U.S. formed an anticompetitive arrangement in the United States with other U.S. publishers of electronic books and Apple, which ultimately led to higher prices for Canadian consumers.[18] The Tribunal held that the principle of international comity (which, in Canada "calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity") "cannot be offended when there is a 'real and substantial connection' between an offence or a conduct and Canada, even when persons or acts outside Canada are affected."[19] The Tribunal reasoned that "[t]here is no offence to international comity in these circumstances because the exercise of jurisdiction does not primarily affect a foreign conduct or person, but a legal situation which has a significant link with Canada."[20] The Court went on to say that:

> In the current case, the US Judgment does not address the Canadian situation. It only deals with the expression of the Arrangement in the United States and with remedial measures affecting E-book publishers and

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> [A]ll but two of the factors in *Timberlane I*'s comity analysis indicate that we should refuse to exercise jurisdiction over this antitrust case. The potential for conflict with Honduran economic policy and commercial law is great. The effect on the foreign commerce of the United States is minimal. The evidence of intent to harm American commerce is altogether lacking. The foreseeability of the anticompetitive consequences of the allegedly illegal actions is slight. Most of the conduct that must be examined occurred abroad. The factors that favor jurisdiction are the citizenship of the parties and, to a slight extent, the enforcement effectiveness of United States law. We do not believe that this is enough to justify the exercise of federal jurisdiction over this case.

749 F.2d at 1386.

[16] KFTC Order, *supra* note 5, Reasoning, ¶ 483.

[17] *Id.*; *see also* Korea 2017 OECD Note, *supra* note 13, ¶ 18 ("The issue of an [sic] international comity related to the enforcement of laws in other countries is a matter to be considered when the corrective measure for a case is in conflict with the law enforcement of foreign countries and is not a matter caused simply by including an act conducted overseas into the subject to the corrective measure.").

[18] The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Ltd., 2017 Comp Trib 10, https://www.ct-tc.gc.ca/CMFiles/CT-2017-002_Order%20and%20Reasons%20for%20Order%20dismissing%20a%20motion%20for%20summary%20dismissal_72_66_7-24-2017_6050.pdf.

[19] *Id.* at ¶¶ 171-72.

[20] *Id.* at ¶ 172.

> retailers in the United States. The Tribunal's jurisdiction is anchored on the substantial connection between Canada and the activities of HarperCollins resulting in alleged anti-competitive effects in this country, not on any extraterritorial application of [Canada's Competition Act]. Recognizing the Tribunal's jurisdiction over the alleged anti-competitive effects of the Arrangement in Canada, not in the United States, does not infringe on the sovereignty of foreign states or courts. Nor could it lead to the violation of the US Judgment or of the laws of the United States.[21]

In other words, in considering international comity, the Tribunal analyzed whether there was a direct conflict with a foreign judgement.

Other agencies such as the Taiwan Fair Trade Commission (TFTC) and the U.S. Antitrust Agencies expressly consider not only direct conflicts of law, but also policy conflicts. For example, the TFTC's *Disposal Directions on Extraterritorial Mergers* states that, in determining whether to assert jurisdiction over extraterritorial mergers, the TFTC "shall" consider a number of factors including "the likelihood of creating conflicts with the laws ***or policies*** of the home countries of the combining enterprises."[22] Similarly, the Joint U.S. Department of Justice (DOJ) and U.S. Federal Trade Commission (FTC) *Antitrust Guidelines for International Enforcement and Cooperation* state that, in performing a comity analysis, the Agencies consider a number of factors, including "the degree of conflict with a foreign jurisdiction's law ***or articulated policy***."[23] The Guidelines go on to say that, "[i]n determining whether to investigate or bring an enforcement action regarding an alleged antitrust violation, the Agencies consider the extent to which a foreign sovereign encourages or discourages certain courses of conduct or leaves parties free to choose among different courses of conduct."[24] Such policy considerations may include respect for intellectual property rights and honoring an intellectual property right holder's core right to exclude others from using its technology.[25]

The United States' 2017 OECD Note on Extraterritorial Reach of Remedies states:

> In the limited number of civil non-merger cases in which the Agencies find that the licensing of intellectual property is necessary to remedy

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[21] *Id.* at ¶ 173.

[22] *Fair Trade Commission Disposal Directions (Guidelines) on Extraterritorial Mergers* Point 3 (Dec. 10, 2019) (emphasis added), https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=744&docid=2720; *see also* Chinese Taipei 2017 OECD Note, *supra* note 13, ¶ 10 ("It is clear from Subparagraphs 5, 7 and 8 of the Disposal Directions that the FTC gives consideration to potential conflicts with foreign laws ***or policies*** when determining jurisdiction over extraterritorial merger cases") (emphasis added).

[23] US INT'L GUIDELINES, *supra* note 14, at 29 (emphasis added).

[24] *Id.* at 29.

[25] *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 6 (Apr. 2007) ("Antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections. Antitrust liability for refusals to license competitors . . . would restrict the patent holder's ability to exercise a core part of the patent—the right to exclude."), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf.

> allegedly anticompetitive conduct, the Agencies generally rely on a domestic-only licensing remedy because the license can be tailored to permit use of the intellectual property only in the domestic markets affected by the conduct. However, in rare cases, when a broader license may be necessary to provide effective relief, the Antitrust Agencies seek a remedy that is no broader than necessary.[26]

In a 2018 speech, then DOJ Deputy Assistant Attorney General Roger Alford further expanded on the U.S. approach, stating that it is not "enough to ask whether the parties are between a rock and a hard place, unable to comply with competing commands. Comity also requires a degree of policy cooperation as to the interests of other affected jurisdictions."[27] He went on to articulate the following standard, stating that "transparency demands" that, before imposing extraterritorial remedies, antitrust enforcers must "clearly articulate the harm to its commerce and consumers and describe how the proposed remedy is necessary to address that harm" and "why that remedy is narrowly tailored to achieve the desired ends."[28]

Similarly, in a 2017 speech, then Acting FTC Chairman Maureen Ohlhausen emphasized the limits on extra-jurisdictional remedies set forth in the DOJ-FTC *International Guidelines*.[29] Specifically, she explained that the Guidelines provide that the Agencies "will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency's international comity analysis."[30]

It should also be noted that the DOJ-FTC *International Guidelines* state that a foreign government policy alone, without sovereign compulsion, would not bar application of U.S. antitrust law when the conduct at issue has a sufficient connection with United States. In the case of sovereign compulsion (*i.e.,* when a foreign sovereign compels the very conduct U.S. antitrust law would prohibit), the United States will recognize and consider the foreign sovereign compulsion as a defense when determining whether to bring, or the appropriate scope of, an enforcement action. The defense will not apply when it is possible for a party to comply with both the foreign and U.S. laws.[31] In such circumstances, the U.S. Antitrust Agencies will still consider any policy conflicts when conducting a comity analysis.

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[26] OECD Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the United States ¶ 24 (Dec. 1, 2017), https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)41/en/pdf.

[27] Roger Alford, Antitrust Enforcement in an Interconnected World, Address Before the American Chamber of Commerce in South Korea 11 (Jan. 29, 2018), https://www.justice.gov/opa/speech/file/1034976/download.

[28] *Id.* at 10.

[29] Maureen Ohlhausen, Guidelines for Global Antitrust: The Three Cs – Cooperation, Comity, and Constraints, Address Before the IBA 21st Annual Competition Conference 5 (Sept. 8, 2017), https://www.ftc.gov/system/files/documents/public_statements/1252733/iba_keynote_address-international_guidelines_2017.pdf.

[30] US INT'L GUIDELINES, *supra* note 14, at 47 (citations omitted).

[31] *Id.* at 32-33.

Lastly, pursuant to a cooperation agreement, the EU and the U.S. competition authorities have agreed to respect and cooperate pursuant to comity principles in competition cases, with the aim of safeguarding trade and investment between and consumer welfare within their respective territories, and avoiding enforcement conflicts. In addition to notifying each other of cases concerning the other's important interests, one of the authorities may request the other to investigate and remedy anticompetitive behavior that adversely affects the former's interests (so-called "positive comity"), and the authorities will consider the important interests of the other when taking measures to enforce its competition rules (so-called "traditional comity").[32] The European Union also cooperates with competition authorities in other jurisdictions,[33] and may request parties to an investigation to authorize cooperation with other competition authorities that goes beyond that provided by applicable international agreements.

Model Analysis to Common Situations

There are a wide range of scenarios in which comity considerations may come into play. While variations are potentially infinite, there are three basic scenarios that can arise when two competition agencies are evaluating the same merger or course of conduct.[34] The following taxonomy helps to lay the foundation for how comity considerations might be evaluated. Our analysis of these scenarios assumes that the conduct at issue satisfies the relevant jurisdiction's effects test (or, in Europe, the alternative "implementation" test) as the threshold requirement for extraterritorial application of domestic competition law.[35]

- First, the competition agencies in countries A and B are both pursuing an investigation of the same or similar conduct or transaction.

- Second, the competition agency in country A is pursuing an investigation of conduct or a transaction, and, while the agency in country B generally holds the same views and is supportive, it is not pursuing an investigation whether because of resource limitations or pragmatic considerations (including reliance on country A's authority to address concerns).[36]

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[32] Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws ("1991 EU/US Competition Cooperation Agreement"), 27 April 1995, OJ L 95, pp. 47-52, and Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws ("1998 EU/US Positive Comity Agreement"), 18 June 1998, OJ L 173, pp. 28-31. The antitrust cooperation agreement between the United States and Japan has some similar provisions, in particular an agreement to consider coordination of enforcement actions and take into account the important interests of the other in enforcement activities. *See* Agreement Between the Government of the United States and the Government of Japan Concerning Cooperation on Anticompetitive Activities, Art. IV(4) (Oct. 7, 1999), https://www.ftc.gov/system/files/agree_japan.pdf.

[33] *See* https://ec.europa.eu/competition/international/bilateral/index.html.

[34] For simplicity, we have limited the discussion to two countries (A and B), although the same scenarios could occur with three or more jurisdictions and the considerations would be similar for each scenario.

[35] *See* Appendix I, identifying the standards used in various major jurisdictions.

[36] This could arise in two different ways. First, relevant burdens of proof might lead one agency to conclude that, while its evidence and theories of harm are sound, it would face difficulties successfully proving its case in

- Third, the competition agency in country A is pursuing an investigation of the conduct or transaction, but the competition agency in country B has decided affirmatively not to take action.[37]

The first two scenarios present relatively uninteresting comity questions, at least at the enforcement stage (differences may arise at the remedies stage, in which case the scenario may fall into the third scenario). Indeed, there is little need for resort to comity considerations in the first two scenarios as the two jurisdictions are basically aligned in their views of the ultimate merits of the investigation, even if they may not both pursue enforcement.

The third situation can be further divided into several variants.

Variant (a) involves differences in factual circumstances, such as different degrees of market power or likely anticompetitive effects in the two jurisdictions. These cross-country differences raise minimal comity concerns in themselves. For example, if conduct or a transaction has substantial effects in country A, perhaps because the companies involved have a significant market presence but a minimal presence in B, then there is no real conflict that calls for comity considerations.

Variant (b) involves legal or policy differences that could result in different views. These could be one (or more) of several types:

i. Disagreement on cartel policy;

ii. Disagreement on merger policy;

iii. Disagreement on unilateral conduct policy;

iv. Different policy objectives, such as a greater or lesser emphasis on the importance of intellectual property rights or a different balancing of competition with industrial

court or before the relevant decision-maker (or having its decision upheld on appeal). A second scenario might involve different applicable legal standards – for example the law in one country might deem the conduct under investigation presumptively unlawful or *per se* illegal, whereas the other might require evaluation under the rule of reason or other balancing test. As a result, an agency required to meet a more challenging burden might opt not to bring the case for prudential reasons even if it believed the conduct to be unlawful.

Notably, however, this is distinct from a scenario in which policy differences that lead to different burdens of proof alter an agency's approach to a particular case. For example, with respect to resale price maintenance (RPM), some countries' laws call for assessment of the conduct under the rule of reason whereas others evaluate it as a *per se* (or by object) offense. These differences may reflect policy determinations regarding whether RPM should generally be permitted or whether it should generally be regarded with suspicion.

[37] A fourth scenario, in which country B's enforcer is agnostic on the merits, is possible but irrelevant to the discussion here. In such a circumstance the agency likely has no views because the impact of the conduct or transaction on competition in the jurisdiction is *de minimis*. If the conduct or transaction has minimal if any impact, then any remedies imposed by another jurisdiction also are likely to have minimal impact on the jurisdiction.

policy goals, such as elevating the interests of certain productive sectors through exemptions to the antitrust laws[38]; and

v. Protectionism (whether explicit or tacit) of domestic companies by not pursuing an investigation (or, when reversed, an investigation motivated by protectionism when the foreign counterpart agency does not see a basis in antitrust laws to proceed).

The first three variants (3.b.i-iii) present common issues, although they are not identical. In particular, with respect to variant 3.b.i., most jurisdictions condemn cartel conduct under their domestic competition laws. As such, only in rare instances is there likely to be a genuine conflict, such as when one country formally has a policy of promoting cartel behavior (*e.g.,* with respect to export cartels).[39]

Variants 3.b.ii and 3.b.iii (disagreement on merger or unilateral conduct policy) present somewhat trickier situations. This arises in large part because there appear to be greater divergence in merger approaches around the world, and even more so with monopolization or abuse of dominance. Unlike for cartels, which are (nearly) universally condemned, merger policy has greater variation that may fall within reasonable policy differences. For example, Europe has placed greater emphasis on "conglomerate effects" as a theory of merger harm, whereas the United States does not recognize the theory as such.[40] Similarly, monopolization or abuse of dominance has a range of approaches that remain subject to significant international debate, including on such matters as essential facilities and excessive pricing.[41] (For purposes of this discussion, we include within abuse of dominance non-cartel vertical agreements, on which there is similar variation.)

In all these circumstances (variants 3.b.i-iii), a divergence between enforcers that results from policy differences potentially can (and should, when possible) be avoided by appropriately limiting the scope of enforcement (and remedy). This can be facilitated through cooperation

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[38] For example, conduct that otherwise might constitute a cartel may be immunized from antitrust scrutiny (*e.g.*, in the agriculture industry). *See, e.g.*, Agriculture Marketing Agreement Act of 1937, 7 U.S.C. §§ 608b-608c.

[39] One possible approach is to take into consideration the general consensus that cartel conduct is rightly condemned by any sound competition law. As Professor Fox has argued:

> 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.

Fox, *Updating Extraterritoriality*, *supra* note 9, at 8.

[40] It is beyond the scope of this paper to assess whether aspects of conglomerate effects theory as applied in Europe and some other jurisdictions (including China) is instead treated as a type of vertical foreclosure by the U.S. antitrust enforcement agencies.

[41] *See* Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance Standards, ABA ANTITRUST LAW SECTION (Sept. 1, 2019), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/october-2019/report-sal-dominance-divergence-10112019.pdf.

between the involved agencies in order to understand the basis for their potentially different outcomes. In such circumstances, for example, a merger infringement finding might be specifically confined to a given jurisdiction. When a court is involved in rendering a decision, it would be sensible for the court to consider the possible conflicts with the other jurisdiction's policy in rendering its decision and determining the scope of any remedy. Importantly divergence in enforcement with a broad remedy, without restraint based upon comity, could lead to the most stringent law or enforcement approach establishing the approach for the entire world.

Likewise, a course of conduct that one jurisdiction determines to be anticompetitive but another considers not to violate the law (whether it is affirmatively procompetitive or just competitively ambiguous or neutral) can be addressed through agency-to-agency exchanges. When the conduct is global, developing remedies that minimize the effects in the other jurisdiction would be appropriate. For example, the EC's 2017 Google Search (Shopping) decision finding a violation of EU competition law is in substantial tension with the conclusion reached by the U.S. FTC in its 2013 decision to close its investigation without taking action.[42] The EC's remedy was limited to the EEA. Specifically, the EC ordered that corrective measures "should apply to all users of Google situated in the thirteen EEA countries in which the Conduct takes place, irrespective of the Google domain that they use (including Google.com)."[43] As a result, Google was not prohibited from continuing conduct in the United States that the FTC had concluded did not on balance harm competition.[44]

Variant 3.b.iv. involving divergent policy objectives presents more difficult challenges, yet also may be addressed by narrowing both enforcement reach and the jurisdictional scope of remedies. The most significant challenge with remedies occurs when a global remedy is necessary because a global market makes it difficult to limit the scope only to conduct in a country while still crafting an effective remedy for domestic harm. Examples include situations involving global supply chains or where a company's having global scale is necessary for effective competition. For instance, a global remedy may be appropriate when an agency is able to show that it is necessary to allow rivals to achieve minimum-efficient scale in order to compete effectively. That said, the first essential step prior to imposing an extra-jurisdictional remedy should be an evidentiary determination that such a remedy is necessary to address harm to domestic competition and consumers. If so, any remedy must then be narrowly tailored to protect domestic consumers, not national champions or other domestic industry.

Variant 3.b.v. involving pure protectionism is an easier case in that comity considerations should not be relevant. Comity is not appropriately considered because a purely protectionist

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[42] Case AT.39740 Google Search (Shopping) Decision ¶ 700(b) (June 27, 2017), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf [hereinafter EC Google Search (Shopping) Decision]; In the Matter of Google Inc., FTC File Number 111-0163 (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf. Google did voluntarily change certain conduct to address concerns identified by the FTC.

[43] EC Google Search (Shopping) Decision, *supra* note 43, ¶ 700(b).

[44] Although the remedy applied to google.com—the Google domain typically presented to U.S.-based users—we understand that geolocation technology allows Google to provide compliant results only with respect to EU-based consumers.

approach to competition law is outside the bounds of legitimate competition enforcement. As Professor Fox has said, using industrial policy "as 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 . . . should be recognized as an illegitimate use of antitrust law. It violates the general cosmopolitan principles embedded in the WTO [World Trade Organization]" agreements.[45] In short, protectionism is not a legitimate basis for competition enforcement (even if it may form a basis for other policies) and thus is not properly regarded as a legitimate policy consideration worthy of deference by an enforcer.

Conclusion

Determining when to apply domestic antitrust laws to foreign conduct or when and how to impose extra-jurisdictional remedies can be challenging. It is our hope that the principles and model analysis in this Article serve as useful guidance to courts and agencies in making sound decisions that allow them to protect domestic competition and consumers while respecting international comity.

APPENDIX I:
APPROACHES IN MAJOR JURISDICTIONS AROUND THE WORLD

Brazil	Article 2 of the Brazilian Competition Law states that the law "applies, without prejudice to the conventions and treaties of which Brazil is a signatory, to practices performed, in full or in part, on the national territory, or that produce or may produce effects thereon."[i] Brazil's Administrative Council for Economic Defense (CADE) has explained that, pursuant to Article 2, "CADE is entitled by law with competence, within the administrative level, over practices whose effects can cause harm, at least potentially, in the Brazilian market. In these terms, the effects doctrine is adopted."[ii] With respect to remedies, CADE has required global commitments in merger cases (*e.g.*, in Dow-Dupont) that were not directly related to the concerns identified in Brazil. For a discussion of this (and other) cases, see Brazil's 2017 OECD Note at https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)42/en/pdf.
Canada	In 2017, the Canadian Competition Tribunal held that jurisdiction under Section 90.1 of Canada's Competition Act depends upon the existence of a "real and substantial

[45] Fox, *Updating Extraterritoriality*, *supra* note 9, at 22. By way of example, the United States is a party to seven trade agreements with competition chapters that generally include provisions aimed at non-discriminatory and fair treatment in antitrust proceedings of each party. For a discussion of (and links to) these agreements, see the United States' 2019 OECD Contribution on Competition Provisions in Trade Agreements at https://one.oecd.org/document/DAF/COMP/GF/WD(2019)3/en/pdf.

	connection" between the challenged conduct and Canada.[iii] Section 90.1 is a non-criminal provision prohibiting any person from doing anything under an existing or proposed agreement or arrangement between competitors that "prevents or lessens, or is likely to prevent or lessen, competition substantially in a market."[iv] Section 90.1 does not expressly address the Act's territorial jurisdiction. The territorial scope of Section 90.1 and similar reviewable conduct provisions of the Act (including mergers and abuse of dominance) had not previously been expressly addressed in a contested Tribunal decision. Although the Tribunal took care to indicate that it was not ruling on the geographic scope of the criminal conspiracy offence, it did suggest that its analysis applies to other reviewable conduct provisions in the Act, including mergers and abuse of dominance. With respect to remedies, at the OECD's 2017 Roundtable on the Extraterritorial Reach of Competition Remedies, the Canadian Competition Bureau reported on a non-competition decision of the Supreme Court of Canada (*Google Inc. v. Equustek Solutions Inc.*), in which the Court held that Canadian courts have discretion to issue injunctions with extraterritorial application.[v] Specifically, the Supreme Court held that Canadian courts may enjoin conduct anywhere in the world if necessary to ensure the injunction's effectiveness.[vi] The Competition Bureau also said that the Bureau may adopt extraterritorial remedies if necessary to ensure that the anticompetitive conduct does not substantially lessen competition in Canada. The Bureau went on to say that it "gives careful consideration to the remedies it imposes on a case-by-case basis; one of its primary concerns is to prevent conflicts that may arise when a remedy has extraterritorial effects. In their assessment, the Bureau considers other jurisdictions' interests and policies and co-operates with them."[vii] With respect to merger remedies in particular, the Bureau's *Information Bulletin on the Communication of Confidential Information under the Competition Act* states that: "While enforcement decisions are made on a case-by-case basis, the Bureau is more likely to formalize negotiated remedies within Canada when the matter raises Canada-specific issues, when the Canadian impact is particularly significant, when the asset(s) to be divested reside in Canada, or when it is critical to the enforcement of the terms of the settlement. In contrast, the Bureau may rely on the remedies initiated through formal proceedings by foreign jurisdictions when the asset(s) that are subject to divestiture, and/or conduct that must be carried out as part of a behavioural remedy, are primarily located outside of Canada. However, the Bureau will do so only if it is satisfied that the actions taken by foreign authorities are sufficient to resolve the competition issues in Canada."[viii] For a discussion of important mergers involving cross-border remedies, see the 2013 Competition Bureau Submission to the OECD Competition Committee Roundtable on Remedies in Cross-Border Merger Cases at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03771.html.
China	Article 2 of China's Anti-Monopoly Law provides: "This law is applicable to monopolistic conduct outside the territory of the People's Republic of China which has an eliminative or restrictive impact on competition in the domestic market."[ix]

	With respect to remedies, in the National Development and Reform Commission's (NDRC's) 2015 decision against Qualcomm, the agency stated that Qualcomm's "licensing of Wireless SEPs outside the territory of the People's Republic of China that does not result in significant effect on elimination or restriction of the competition in China shall not be subject to th[is] decision."[x] In connection with its decision, the NDRC approved a rectification plan proposed by Qualcomm under which: (1) Qualcomm will offer licenses to its current 3G and 4G essential Chinese patents separately from licenses to its other patents and will provide patent lists during the negotiation process; (2) if Qualcomm seeks a cross license from a Chinese licensee as part of such offer, it will negotiate with the licensee in good faith and provide fair consideration for such rights; (3) for licenses of Qualcomm's 3G and 4G essential Chinese patents for branded devices sold in China for use in China (or made in China and sold for use in a country in which no patents have been issued to Qualcomm), Qualcomm will "charge a royalty equal to 5%" for 3G devices (including multimode 3G/4G devices) and 3.5% for 4G devices (including 3-mode LTE-TDD devices) that do not implement CDMA or WCDMA, in each case using a royalty base of 65% of the net selling price of the device; (4) Qualcomm will give its existing licensees an opportunity to elect to take the new terms for sales of branded devices for use in China as of January 1, 2015; and (5) Qualcomm will not condition the sale of baseband chips on the chip customer signing a license agreement with terms that the NDRC found to be unreasonable or on the chip customer not challenging unreasonable terms in its license agreement.[xi]
EU	In light of case law of the Court of Justice of the European Union, the Treaty on the Functioning of the European Union and the EU Merger Regulation allow for extraterritorial application if an agreement is implemented within the internal market or when it is foreseeable that the conduct will have an immediate and substantial effect in the European Union.[xii] The Court of Justice in the *Woodpulp* judgment found that the decisive factor of the applicability of EU law is the place where the conduct is implemented, rather than the location of the undertaking.[xiii] The Court did not rule on whether the effects doctrine applies. Subsequently, the Court of Justice held in *Intel* that the "qualified effects test pursues the same objective [as the implementation test], namely preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market."[xiv] Under the qualified effects test, EU competition law can apply to conduct outside the European Union "when it is foreseeable that the

	conduct in question will have an immediate and substantial effect in the European Union."[xv] In *Gencor*, the General Court held that EU competition law applies to concentrations of undertakings conducting operations outside the European Union, consistent with the (predecessor of the) EU Merger Regulation and public international law "when it is foreseeable that a proposed concentration will have an immediate and substantial effect" in the European Union.[xvi] With respect to remedies, in the EC's 2014 commitments decision involving Samsung, the Commission accepted that Samsung limit its commitments (which restricted Samsung's ability to seek injunctive relief on FRAND-committed SEPs) to the seeking of injunctions in the EEA, and only in respect of patents granted in the EEA.[xvii] For further discussion of the EU's approach to extra-jurisdictional remedies, see the EU's 2017 OECD Note at https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)35/en/pdf.
India	Section 32 of India's Competition Act states that the Competition Commission of India (CCI) has the "power to inquire . . . into [an] agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India," and to "pass such orders as it may deem fit in accordance with the provisions of this Act." Section 32 specifies that CCI has this power "notwithstanding that": (a) an agreement referred to in section 3 has been entered into outside India; or (b) any party to such agreement is outside India; or (c) any enterprise abusing the dominant position is outside India; or (d) a combination has taken place outside India; or (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.[xviii]
Japan	Japan has traditionally taken a restrictive approach towards extraterritorial application of its competition laws. Until January 1999, Japan's merger review laws applied only to transactions taking place "in Japan," *i.e.* one of the merging parties had to be a Japanese company to trigger the application of Japan's Antimonopoly Act. A 1998 Amendment removed the territorial nexus, making it possible to review foreign transactions.[xix] The Japan Fair Trade Commission's 1990 Study Group Report states that, when foreign firms engage in activities such as exporting to Japan and the said activities are sufficient to constitute a violation of the Antimonopoly Act, then the Act applies.[xx]

Korea	In 2004, Korea's Monopoly Regulation and Fair Trade Act (MRFTA) was modified to address "Application to Overseas Act[s]," stating: "This Act shall apply to cases where any act committed outside the country affects the domestic market." Korea interprets the Act to enable "not only the extraterritorial application of the MRFTA in a general meaning, but also the extraterritorial application of competition remedies."[xxi] The KFTC's 2005 *Guidelines for Remedies* set forth principles including effectiveness, correlation, clarity and specificity, possibility of implementation, and proportionality. In its 2017 OECD submission, Korea stated that "when there is an extraterritorial application of the MRFTA, the scope of remedies should be designed in accordance of the principle of proportionality within the scope of an act judged to be illegal, while ensuring the effectiveness."[xxii] In its 2017 decision against Qualcomm, the KFTC imposed global remedies, including on foreign patents.[xxiii] Specifically, the KFTC required Qualcomm to renegotiate existing license agreements upon request, including with respect to non-Korean patents, and to offer exhaustive worldwide licenses to suppliers of modem chipsets. Both remedies extend to all handset or modem chipset companies "headquartered" in Korea, that sell handsets in or into Korea, or supply modem chipsets to companies that sell handsets in Korea. The order provides that Qualcomm "may request" a reconsideration of the KFTC's order "if the final and binding judgment, measure or order of a foreign court or competition authorities affirms, after the date of this Corrective Order, conflicts with this Corrective Order, making it impossible to comply with both at the same time."[xxiv] For further discussion of Korea's approach to extra-jurisdictional remedies, see Korea's 2017 OECD Note at https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)37/en/pdf.
U.S.	The Foreign Trade Antitrust Improvements Act (FTAIA) provides that foreign conduct is outside the scope of the Sherman Act unless it "has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce and "such effect gives rise to a claim under" the Sherman Act.[xxv] Section 5(a)(3) of the Federal Trade Commission Act closely parallels this provision.[xxvi] Section 3 of the DOJ-FTC 2017 *Antitrust Guidelines for International Enforcement and Cooperation* states that, "[a]lthough the FTAIA clarified the reach of the Sherman Act and the FTC Act, it did not address the reach of the Clayton Act. Nevertheless, the Agencies would apply the principles outlined . . . [in these Guidelines] when making enforcement decisions regarding mergers and acquisitions involving trade or commerce with foreign nations."[xxvii] In the United States, an effect is "direct" if there is a reasonably proximate causal nexus. In other words, an effect is direct if, in the natural or ordinary course of events, the alleged anticompetitive conduct would produce an effect on commerce. The substantiality requirement does not provide a minimum pecuniary threshold, nor does it require that the effects be quantified. The "reasonable foreseeability"

	requirement is an objective test, requiring that the effect be foreseeable to "a reasonable person making practical business judgments."[xxviii] Section 4.1 of the *International Guidelines* states that, in performing a comity analysis, the Agencies consider a number of factors, including "the degree of conflict with a foreign jurisdiction's law or articulated policy."[xxix] "In determining whether to investigate or bring an enforcement action regarding an alleged antitrust violation, the Agencies consider the extent to which a foreign sovereign encourages or discourages certain courses of conduct or leaves parties free to choose among different courses of conduct."[xxx] With respect to remedies, Section 5.1.5 of the *International Guidelines* states: "The Agencies seek remedies that effectively address harm or threatened harm to U.S. commerce and consumers, while attempting to avoid conflicts with remedies contemplated by their foreign counterparts. An Agency will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency's international comity analysis."[xxxi] With respect to intellectual property remedies in particular, the United States' 2017 OECD Note on Extraterritorial Reach of Remedies states: "In the limited number of civil non-merger cases in which the Agencies find that the licensing of intellectual property is necessary to remedy allegedly anticompetitive conduct, the Agencies generally rely on a domestic-only licensing remedy because the license can be tailored to permit use of the intellectual property only in the domestic markets affected by the conduct. However, in rare cases, when a broader license may be necessary to provide effective relief, the Antitrust Agencies seek a remedy that is no broader than necessary" (referring in a footnote to the FTC's 2013 decision against Google/Motorola Mobility (MMI)).[xxxii] In Google/MMI, the FTC prohibited the companies from seeking or enforcing "injunctive relief" on FRAND-committed SEPs, defined as "a ruling of any legal or administrative tribunal, whether in or outside of the United States,"[xxxiii] on any "patent claim" on a patent "issued or pending in the United States or anywhere else in the world."[xxxiv]
Taiwan	Point 3 of the TFTC's *Disposal Directions on Extraterritorial Mergers* states: > The following factors shall be taken into account while determining the Fair Trade Commission's jurisdiction over extraterritorial merger cases: (1) whether the merger will have a direct, substantial, and reasonably foreseeable effect on the domestic market; (2) the relative importance of the merger's effects on the relevant domestic and foreign markets; (3) the residence and main business places of the combining enterprises;

(4) the degree of explicitness and the possibility of a foreseeable consequence on the impact of the market competition in the Republic of China;
(5) the likelihood of creating conflicts with the laws or policies of the home countries of the combining enterprises;
(6) the feasibility of enforcing administrative dispositions;
(7) the impact of enforcement on the foreign enterprises;
(8) what the rules of international conventions and treaties, or the regulations of international organizations say;
(9) whether any of the combining enterprises has production or service facilities, distributors, agents, or other substantive sales channels within the territory of the Republic of China;
(10) other factors deemed important by the Fair Trade Commission.[xxxv]

For case examples, see Chinese Taipei's 2017 OECD Note at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2017)45&docLanguage=En.

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[i] Law 12,529/2011, http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-%20english-version-from-18-05-2012.pdf/view.

[ii] OECD Roundtable on the Extraterritorial Reach of Competition Remedies - Note by Brazil ¶ 2 (Dec. 3, 2017), https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)42/en/pdf.

[iii] The Commissioner of Competition v. HarperCollins Publishers LLC and HarperCollins Canada Ltd., 2017 Comp Trib 10, https://www.ct-tc.gc.ca/CMFiles/CT-2017-002_Order%20and%20Reasons%20for%20Order%20dismissing%20a%20motion%20for%20summary%20dismissal_72_66_7-24-2017_6050.pdf. The Tribunal credited the Commissioner's claims that a "real and substantial connection" existed because: (1) HarperCollins and the other U.S. publishers always contemplated that the alleged Arrangement would be implemented in Canada and has indeed been implemented in this country; (2) HarperCollins U.S., through its affiliate HarperCollins Canada, carried on business in Canada; and (3) the alleged Arrangement caused harm in the market for the retail sale of E-books in Canada. *Id.* at ¶¶ 5, 8, 159-65.

[iv] Competition Act (R.S.C., 1985, c. C-34), https://laws.justice.gc.ca/eng/acts/C-34/index.html.

[v] OECD Summary of Discussion of the Roundtable on the Extraterritorial Reach of Competition Remedies at 5 (Oct. 5, 2018), https://one.oecd.org/document/DAF/COMP/WP3/M(2017)2/ANN2/FINAL/en/pdf [hereinafter "OECD Summary"].

[vi] Google Inc. v. Equustek Solutions Inc. (2017 SCC 34). The Court upheld the issuance of a worldwide interlocutory injunction prohibiting Google from indexing certain websites anywhere in the world. Google had agreed to an order on consent to de-index certain web pages from google.ca, but the court concluded that was insufficient.

[vii] OECD Summary, *supra* note v, at 5.

[viii] Information Bulletin on the Communication of Confidential Information under the Competition Act, Competition Bureau ¶ 78 (Oct. 10, 2007), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html.

[ix] [Anti-monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007), art. 2,

http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml. A court in China held that this provision included conduct outside China that "directly ha[s] a major, substantial and reasonably foreseeable effect of impairing and restricting the domestic production activities, export opportunity and export trade of domestic enterprises." Huawei Jishu Youxian Gongsi Su Jiaohu Shuzi Tongxin Youxian Gongsi (华为技术有限公司诉交互数字通信有限公司)[Huawei Tech. Co. v. InterDigital Commc'n, Inc. (Huawei v. IDC)], Section II , 2013 Yue Gao Fa Min San Zhong Zi No. 306 (Guangdong High People's Ct. No. 306 2013) (China). Application of antitrust laws to export commerce finds a parallel in the U.S. FTAIA. *See* 15 U.S.C. § 6a(1)(B).

[x] Nat'l Dev. & Reform Comm'n, Administrative Penalty Decision No. [2015] 1 § III.A. (Feb. 9, 2015), http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html, translated in Freshfields & Fangda, Unofficial Translation, Administrative Penalty Decision: Fa Gai Ban Jia Jian Chu Fa No. [2015] 1.

[xi] Rectification Plan Related to NDRC's Investigation of Qualcomm (Feb. 9, 2015), translated in Qualcomm's Briefing Ex. C, https://www.qualcomm.com/media/documents/files/reply-in-support-of-motion-for-stay-6-18-19.pdf; Press Release, Qualcomm, Qualcomm and China's National Development and Reform Commission Reach Resolution - NDRC Accepts Qualcomm's Rectification Plan - Qualcomm Raises Midpoints of Fiscal 2015 Revenue and Non-GAAP EPS Guidance (Feb. 9, 2015), https://investor.qualcomm.com/news-events/press-releases/detail/672/qualcomm-and-chinas-national-development-and-reform.

[xii] *See, e.g.*, Case C-22/71, Béguelin Import Co. v. S.A.G.L. Import Exp. ECLI:EU:C:1971:113, ¶ 11; and Case C-413/14 P, Intel Corp. v. Comm'n ECLI:EU:C:2017:632, ¶¶ 43-44 (Sept. 6, 2017).

[xiii] Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, A. Ahlström Osakeyhtiö v. Comm'n, ECLI:EU:C:1988:447, ¶ 16.

[xiv] Case C-413/14 P, Intel Corp. v. Comm'n ECLI:EU:C:2017:632, ¶ 45 (Sept. 6, 2017), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CJ0413.

[xv] *Id.* ¶ 49.

[xvi] Case T-102/96, Gencor Ltd v. Comm'n ECLI:EU:T:1999:65, ¶ 90.

[xvii] Case AT.39939—Samsung, Comm'n Decision, (Apr. 29, 2014), ¶ 76, https://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf and Samsung's commitments, ¶ 1 and definition of "Mobile SEP," https://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1502_5.pdf.

[xviii] The Competition Act, 2002, § 32 (Jan. 2003), https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf.

[xix] For discussion, see K. Yamaguchi, *Extra-territorial application of Japanese anti-monopoly law to pure non-Japanese M&As*, 5(4) INT'L TRADE L. & REG. 100, 100 (1999).

[xx] Dumping Regulations and Competition Policy, Extraterritorial Application of the Antimonopoly Act – Report of the Study Group of the Antimonopoly Act on External Affairs Issues (Summary), FTC/JAPAN VIEWS, No 9, July 1990, at 27 (on file with author).

[xxi] OECD Roundtable on the Extraterritorial Reach of Competition Remedies - Note by Korea ¶ 5 (Nov. 23, 2017), https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)37/en/pdf.

[xxii] *Id.* ¶ 8; *see also* Korea Fair Trade Comm'n, Case No. 2015SiGam2118, In re Alleged Abuse of Market Dominance of Qualcomm Inc., Decision No. 2017-0-25, Decision and Order, ¶ 6 (Jan. 20, 2017), *unofficial translation available in English at* http://www.theamericanconsumer.org/wp-content/uploads/2017/03/2017-01-20_KFTC-Decision_2017-0-25.pdf [hereinafter KFTC Order].

[xxiii] KFTC Order, *supra* note xxii, Reasoning ¶ 483.

[xxiv] *Id*; *see also* Press Release, Qualcomm, Qualcomm Responds to Announcement by Korea Fair Trade Commission (Dec. 27, 2016), https://www.qualcomm.com/news/releases/2016/12/27/qualcomm-responds-announcement-korea-fair-trade-commission; Press Release, Qualcomm, Qualcomm Stay Appeal Denied by Seoul High Court on Absence of Irreparable Harm; Appeal to Seoul High Court on Merits of the Case to Proceed (Sept. 4,

2017), https://www.qualcomm.com/news/releases/2017/09/04/qualcomm-stay-appeal-denied-seoul-high-court-absence-irreparable-harm.

[xxv] 15 U.S.C. § 6a(1).

[xxvi] 15 U.S.C § 45(a)(3).

[xxvii] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION 18 (Jan. 13, 2017), https://www.justice.gov/atr/internationalguidelines/download.

[xxviii] *Id.* at 21-22 (internal citations omitted).

[xxix] *Id.* at 28.

[xxx] *Id.* at 29.

[xxxi] *Id.* at 47.

[xxxii] OECD Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the United States ¶ 24 (Dec. 1, 2017), https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)41/en/pdf.

[xxxiii] Decision and Order, *Motorola Mobility LLC & Google Inc.*, FTC File No. 121-0120, at 4 (July 24, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf.

[xxxiv] *Id*. at 5.

[xxxv] *Fair Trade Commission Disposal Directions (Guidelines) on Extraterritorial Mergers* Point 3 (Dec. 10, 2019), https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=744&docid=2720. *See also* OECD Roundtable on the Extraterritorial Reach of Competition Remedies - Note by Chinese Taipei ¶ 10 (Nov. 22, 2017), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2017)45&docLanguage=En.