

~~SEP and~~ extraterritorial  
competition law enforcement

# The issue

- **Nearly all antitrust agencies have the power to apply remedies outside their territory**
  - Qualified effects/sufficient connection
  - Application of antitrust to foreign commerce **'an essential component'**
    - DOJ/FTC *Guidelines for Int'l Enforcement & Cooperation* (2017)
- **No agency is keen to rein in this power in a clear manner**
  - **International comity**
    - No conflict 'if a person subject to the laws of two sovereigns can comply with both'
  - **Foreign compulsion defence**
    - No bar if just a 'strong policy in favor of conduct in question'
    - Foreign government statements have no conclusive effects (*Animal Science Products v Hebei*)
  - **Does foreign enforcement solve the domestic antitrust problem?**

# Agencies: significant discretion

- **Federal Trade Commission**

- *Intel (2010) and Victrex (2016)*: prohibition of exclusionary conduct outside the US
  - Does the remedy just affect the US market or does it generate global welfare when one regulates a supply chain?
    - **whose business is global welfare?**
- *Polypore v FTC (11<sup>th</sup> Cir 2012)*: merger divestiture in Austria
  - FTC has 'broad discretion to formulate' remedies – no discussion of impact of divestiture on EU market

- **European Commission**

- *Standard & Poor's*: 'In some circumstances remedies may have to be worldwide in scope in order to ensure fair competition inside the EEA.'
- *Gencor/Lonrho*: relevance of 'the vital economic and/or commercial interests of the Republic of South Africa' – moot point
- *Showa/Denko*: cartel fines set irrespective of other agencies' fines

# Solutions: what and where

## **Convergence**

- ICN best placed to devise standards?

## **Comity** (sounds good & does very little work, Fox)

- Negative comity (who interprets it?)
- Positive comity (bilateral agreements)

## **Collaboration**

- In parallel cases (e.g. *UTC/Goodrich* – five agencies cooperate, divestitures in US, Canada and UK)
  - NB repeated agency interaction, parallel processes/similar enforcement priorities
- Notification, policy exchange (bilaterals, ICN, OECD)

## **Self-control**

proportionality principle