# 1NC – Harvard R5

## OFF

### P – SPEC

#### Interpretation -- In addition to prohibited practices, the aff should specify the agent of antitrust authority and sanctions.

William **KOVACIC** Global Competition Professor of Law and Policy @ George Washington University Law School **’12** “The Institutions of Antitrust Law: How Structure Shapes Substance Substance” 110 MICH. L. REV. 1019 p. 1026

A more complete framework of the institutional elements of antitrust law enforcement might organize the examination of the system around the following questions:

What is the purpose of the statutes? What do the statutes prohibit?

By what means are infringements detected and evidence gathered? Which entities have authority to prosecute violations?

Which body decides guilt or innocence?

What sanctions are imposed for wrongdoers?

A classification scheme cast along these lines would help identify more clearly the volume's examination of the U.S. antitrust system and assist in illuminating connections among its elements.

#### Violation – the plan text does not specify agent, authority, or sanctions.

#### 1 – Negative ground. Institutional structure and agent of implementation key to antitrust outcomes. Any debate over only the preferred outcomes is hopelessly incomplete.

William **KOVACIC** Global Competition Professor of Law and Policy @ George Washington University Law School **’12** “The Institutions of Antitrust Law: How Structure Shapes Substance Substance” 110 MICH. L. REV. 1019 p. 1019-1020

Forty years ago, Graham Allison wrote the Essence of Decision' and transformed the study of foreign policy and public administration.2 Allison's analysis of the Cuban Missile Crisis appeared amid profound concerns about the competence of U.S. government institutions. "Few issues about the American government," he wrote, "are more critical today than the matter of whether the federal government is capable of governing."3 To Allison, better performance required greater insight into how the structure and operations of public institutions shaped policy results. "[B]ureaucracy is indeed the least understood source of unhappy outcomes produced by the U.S. government,"4 Allison wrote. "If analysts and operators are to increase their ability to achieve desired policy outcomes, . . . we shall have to find ways of thinking harder about the problem of 'implementation,' that is, the path between preferred solution and actual performance of the government."5 Essence of Decision quickly appeared on reading lists in political science departments and schools of public administration, and its analytical orientation and vocabulary have become enduring elements of academic discourse.

Daniel Crane's The Institutional Structure of Antitrust Enforcement ("InstitutionalStructure")7 may do for antitrust law what Essence of Decision did for public administration. Unlike most literature on antitrust law, this superb volume does not address pressing issues of substantive analysis (e.g., when can dominant firms offer loyalty discounts?).8 Instead, Institutional Structure studies the design and operation of the institutions of U.S. antitrust enforcement. Professor Crane skillfully advances a basic and powerful proposition: to master analytical principles without deep knowledge of the policy implementation mechanism is dangerously incomplete preparation for understanding the U.S. antitrust system, or any body of competition law. "Institutions," Professor Crane observes, "are a critical and underappreciated driver of an antitrust policy that interacts in many subtle ways with substantive antitrust rules and decisions" (p. xi). Institutional Structure demonstrates that the causes of observed policy outcomes, good and bad, often reside in the institutional framework. Seemingly potent conceptual insights may fizzle, or create mischief, if the institutions that must apply them are deformed. Good policy results depend on the strength of what Allison called "the path between preferred solution and actual performance." In the language of modem technology, one cannot deliver broadband-quality policy outcomes through dial-up institutions.

#### 2 – Voting issue – cross-ex is too late for counterplan competition. 2AC clarification destroys 1NC strategic coherence. Every branch is topical. Rule-making and common law don’t link to any of the same positions and reading both requires contradiction.

### T – Prohibitions

#### Interpretation – “increasing” prohibitions requires making more of them or increasing their severity.

Merriam-Webster no date. https://www.merriam-webster.com/dictionary/increase

Definition of increase (Entry 1 of 2)

intransitive verb

: to become progressively greater (as in size, amount, number, or intensity)

#### Violation – balancing test allows them to say they increase or decrease antitrust laws.

#### Limits and ground – doubles the topic and allows 2AC clarification to get out of all DAs.

### CP – Balancing Test PIC

#### The United States federal judiciary should defer to the executive’s position on whether state-led export cartels are exempt from antitrust litigation and solicit executive opinions in instances where the executive has not initiated action.

#### The executive branch should file an amicus brief in ensuing litigation holding that state-led export cartels do not satisfy the criteria for exemptions from antitrust law.

#### The counterplan allows the executive to pursue mutually exclusive trade remedies that require antitrust law exemptions.

Angela Huyue Zhang, Associate Professor of Law, University of Hong Kong, ’19, "Strategic Comity," Yale Journal of International Law 44, no. 2

A. Weighing Trade and Antitrust

When dealing with export cartels, the United States generally has two options: it can seek help via a multilateral treaty network such as the WTO or through direct diplomatic negotiations with the foreign sovereign or, alternatively, it can bring antitrust actions against the foreign producers. The former is arguably a more efficient mechanism for resolution. First, although antitrust litigation in the United States can be initiated by both public and private actors, it can produce inefficient results. Private enforcement of antitrust litigation will likely involve piecemeal, decentralized, and uncoordinated efforts that aim to maximize plaintiffs' gains from litigation rather than the social welfare of the United States. Second, antitrust cases often involve lengthy discovery, thus heavily straining judicial resources. In comparison, the management of trade cases is coordinated and centralized by the U.S. executive branch, and these cases are usually resolved much more quickly through the WTO proceedings than through antitrust lawsuits.

At the same time, trade and antitrust are mutually exclusive remedies. The success of a WTO proceeding hinges on proving China's imposition of export restraints, whereas the success of an antitrust proceeding hinges on proving the absence of any government restraint (i.e., that the cartel is voluntary). In the Vitamin C Case, the United States did not directly challenge China's trading practice. Instead, the U.S. government filed a complaint with the WTO in 2009 alleging that the Chinese government had imposed export restraints on a number of raw materials.5 3 In its WTO case, the U.S. Trade Representative used MOFCOM's amicus brief in the Vitamin C litigation as evidence of the latter's trade violations. Therefore, a U.S. court holding that the Vitamin C cartel was voluntary would contradict the position of the U.S. Trade Representative and risk undermining the United States' case at the WTO. As it turned out, the United States won the raw materials case in the WTO proceeding even though the appellate panel voided the findings about MOFCOM's amicus brief and decided the case based upon other evidence. 54 With the trade claims settled, the U.S. courts did not have to worry about the spillover effects of this antitrust decision on the United States' trade claims.

#### The counterplan defers to the executive decide on whether exemptions apply in antitrust suits, instead of removing the exemptions all together. The courts should defer because the executive is institutionally best equipped to delicately balance foreign affairs.

Angela Huyue Zhang, Associate Professor of Law, University of Hong Kong, ’19, "Strategic Comity," Yale Journal of International Law 44, no. 2

As illustrated by the U.S. government's contrasting stance in regard to Japanese export cartels in the 1980s and in the recent Vitamin C Case, the optimal response to export cartels is not fixed as a specific formula. Rather, it is contingent upon the changing political and economic conditions. Thus, U.S. courts should be aware of the risks that their judgments in State-led export cartel cases could create for international relations, especially when the underlying factual circumstances are unclear. However, courts are not institutionally well equipped to make such a cost-benefit analysis. In her remarks at an antitrust conference, Judge Diane Wood, Chief Justice of the Seventh Circuit, acknowledged that it is extremely difficult to ask a court to administer comity as 234 the court's hands are often tied. This implies that U.S. courts should generally defer to the position of the executive branch, which possesses the foreign expertise and is in the best position to balance competing interests.

Indeed, in cases involving foreign relations, U.S. courts have traditionally accorded a high level of deference to the executive branch, which is in a superior position to determine strategies for the United States in such cases.235 Prominent legal scholars including Eric Posner and Cass Sunstein have proposed extending the Chevron deference doctrine to executive actions related to international 236 affairs. In a seminal article, they argue that U.S. courts should only defer to foreign sovereigns' interests after a careful assessment of the consequences.237 More specifically, they observe that the cost of deference is the loss of American control over certain regulatory activities.238 In the context of export cartels, granting immunity to foreign producers on the basis of comity implies that the United States would cede control over antitrust regulations, compromising the interests of U.S. consumers. On the other hand, Posner and Sunstein also suggest that the benefits of deference include reciprocal gains from the foreign government's deference to American regulations and the reduction of potential tension with the foreign country.239 In the context of export cartels, there could be other benefits, such as the bailing out of failing domestic producers and the sheltering of them from foreign competition, as illustrated in the Japanese export cartel cases. This approach of deferring to the executive branch would greatly simplify the current case law, which has focused too narrowly on the foreign sovereign compulsion issue. As shown in the Japanese export cartel cases, a foreign sovereign's involvement in the cartels may not even be relevant. Indeed, in certain political and economic circumstances, it might be in the best interest of the United States to encourage export cartels. In fact, the U.S. government concluded a number of VER agreements directly with foreign steel producers in the 1960s, bypassing their governmental counterparts. Nor is the appearance of the foreign sovereign in the U.S. court necessarily decisive, as shown in the Vitamin C Case. The deference analysis ultimately turns on the government's determination of whether the harm on foreign relations as a result of the refusal to defer to the foreign government will outweigh the harm done to domestic consumers if foreign producers are exempt from antitrust litigation. In practice, in cases involving State-led export cartels, the executive branch may have already initiated actions against the foreign sovereign or the foreign exporters, either through trade or antitrust. Therefore, U.S. courts' optimal responses should not be static, rather, they must take into account the specific steps the executive branch has undertaken with regard to the export cartels. More specifically, I propose the following legal framework of comity analysis when courts face inconsistent and ambiguous factual evidence in export cartel cases.

#### Counterplan is goldilocks. Creating an advisory function for the executive prevents states from abusing antitrust immunity while keeping foreign policy as the exclusive domain of the political branches.

Daniel Fahrenthold, JD Candidate @ Columbia Law School, ’19, "Respectful Consideration: Foreign Sovereign Amici in U.S. Courts," Columbia Law Review 119, no. 6 : 1597-1632

B. Deference to the Executive

Under any framework, however, the executive branch should receive considerable deference. Courts have long recognized that the executive plays the central role in forming foreign policy223 and is best positioned to advise a court on whether the risk of offense is negligible enough that the sovereign need not be deferred to.

Revisiting its ruling in Pink, the Court in Animal Science Products distinguished the conclusive effect given to a foreign sovereign's submis-sion in that case from the general rule of respectful consideration based on the reasoning that the declaration in Pink "was obtained by the United States through official 'diplomatic channels."' 224 This seems to suggest, unsurprisingly, that the Supreme Court expects lower courts to give the U.S. government essentially conclusive authority when it is involved in foreign sovereign amici. Whenever the United States actively solicits the amicus, or enters its own amicus to the same effect, the court should consider it conclusive. In contrast, the relevant executive agency-most likely the Department of Justice or State--could eliminate any deference due to a foreign sovereign amicus by disagreeing with it in an amicus of its own.225

This would ensure that foreign policy concerns remain with the political branches. The courts already appear to follow this policy, albeit informally, in the context of treaty interpretation. Even after Pfizer and the shift to filing amicus briefs, the State Department continued to relay the positions of foreign governments in some cases involving treaty interpretation. In Sumitomo Shoji America, Inc. v. Avagliano, for instance, the Court cited to the views of the State Department conveyed in an amicus brief as well as diplomatic cables from the U.S. Embassy in Tokyo indicating that the Japanese and U.S. governments had reached an "identical position" as to the import of a treaty provision in the Friendship, Commerce and Navigation Treaty between Japan and the United States.22 6 The Court found that these combined views were "entitled to great weight." 227 In Abbott v. Abbott, the Supreme Court similarly determined that a foreign sovereign's interpretation was due deference because it was "supported and informed by the State Department's view on the issue." 228 The participation of the executive branch in the litigation performs a "vetting" function, bolstering the court's confidence that a foreign sovereign can be trusted and that a particular course of action is in line with U.S. foreign policy goals. 229

Courts would have to remain careful not to overinterpret the silence of the executive branch, however. The original decision to encourage foreign governments to file amicus briefs, rather than channel their grievances through the U.S. State Department, allowed the United States government to remain neutral and depoliticize litigation involving foreign sovereign interests while also enabling it to intervene when it so chose.23 0 When noninvolvement became the norm, any affirmative act by the U.S. government came to appear more important.23 1 Assuming that courts and the executive do not intend to return to a pre-Zenith Radio era where the executive is solely responsible for representing any government positions, this only underlines the importance of a respectful consideration standard that will ensure courts can autonomously give adequate weight to foreign government interests. A robust analysis under respectful consideration ensures the best of both situations: The executive can keep its conclusive authority when it chooses to intervene, but it can equally rest assured that the courts will treat foreign sovereigns with appropriate respect on their own.

### DA – PQD

#### Separation of powers alive and kicking – *Animal Science* precedent establishes strong deference to the executive’s interpretation of foreign law.

Angela Huyue Zhang, Associate Professor of Law, University of Hong Kong, ’19, "Strategic Comity," Yale Journal of International Law 44, no. 2

In April 2017, the plaintiffs filed a petition for certiorari to the Supreme Court, asking the Court to clarify, among others, two important issues. The first issue presented concerned the level of deference given to a foreign government's interpretation of its own law-specifically, whether a U.S. court should give conclusive deference to a foreign government's interpretation of its own law if the government has appeared in court.160 The second issue presented concerned the longstanding split among circuit courts in how to apply the international comity doctrine. In this case, the Second Circuit applied the balancing test adopted by the Ninth and Third Circuits, selecting the test over different versions employed in other circuits.161 On June 26, 2017, the Supreme Court invited Acting Solicitor General Jeffery Wall to file a brief expressing the views of the United States in the Vitamin C Case.162 The U.S. Solicitor General and the Department of Justice subsequently submitted their amicus brief to the Supreme Court in November 2017, arguing that the Second Circuit had erred by treating MOFCOM's statements as conclusive. 163

In its brief, the U.S. government relied heavily on Federal Rule of Civil Procedure 44.1, which was adopted in 1966 to assist courts in determining issues concerning foreign law.16 4 The government highlighted two aspects of Rule 44.1. First, the determination of foreign law is a "question of law" for the courts rather than a question of fact.165 Second, the Court may consider any relevant material or sources in determining foreign law.166 This affords federal courts great flexibility.167 In addition, the U.S. government argued that federal courts should not treat foreign governments' characterizations as conclusive in all circumstances.168 The executive branch enumerated a list of factors that courts should consider when weighing a foreign government's statements, including "the statement's clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency with past statements; and any other corroborating or contradictory evidence."' 69 The brief then noted that the Second Circuit disregarded other relevant materials, including China's representation to the W.T.O. that it had given up export administration of vitamin C. 17 0 Further, the brief disagreed with the Second Circuit's interpretation of the previous case law, arguing that not "every submission by a foreign government is entitled to the same weight."' 7 ' Last but not least, the brief disputed the Second Circuit's concerns about reciprocity, stating that the United States has never argued before foreign courts that they are bound to accept its characterizations of U.S. law. 172

The final decision of the U.S. Supreme Court was exactly in line with that proposed by the executive branch. In fact, the reasoning and arguments in the Court's final ruling were strikingly similar to those proposed in the government's amicus brief, and in some places it seems to be copied verbatim. 17 Such strong resemblance between the Supreme Court's decision and the amicus brief shows that the Court adopted a highly deferential approach to the executive branch in deciding this case. This represents a fundamental shift from the previous case law, in which courts tended to focus on the factual issue of whether a foreign sovereign had compelled the cartel. As will be illustrated in Part IV, facts are often messy and difficult to ascertain. Even when a foreign government has appeared in U.S. courts to offer its interpretation of its own law, courts still struggle to define a limit for determining whether the foreign sovereign's involvement constituted compulsion.

#### Judicial review of extraterritorial antitrust infringes on the executive’s sole function of managing international relations. A single court ruling can trigger international trade dispute.

Qingxiu Bu, Commercial Law @ University of Sussex, formerly professor of transnational business @ Georgetown Law Center, ’20, ‘“Respectful Consideration, but Not Deference: Chinese Sovereign Amici in the US Supreme Court Vitamin C Judgment” Journal of European Competition Law & Practice, Vol. 11, No. 5–6

1. A variable of foreign relations

The Vitamin C ruling has broader ramifications, since the Supreme Court provided less than full deference to China’s interpretations of its own laws. The application of the standard of respectful consideration may be detrimental to the US foreign relations,115 which could have serious consequences.116 Foreign law could compel the very conduct that US law prohibits, and judicial interference may infringe on the executive function to handle international relations.117 Inevitably, there is an impact on foreign diplomacy and trade relations.118 As Eichensehr observed:

‘it would be amistake for the Court to view the brief as a representation that disagreement with the foreign sovereign’s view of international law would provoke serious foreign policy consequences for the United States.’119

This landmark case ofVitamin C arises during a period of uncertainty and instability in Sino– US relations. The Supreme Court’s decision is sensitive amid the current climate, which could escalate trade tension.120 Given the current ongoing tit-for-tat trade disputes, the possibility exists that the court judgment can serve as a trigger.121 According to a decision in EEOC, US courts should tread carefully in a transnational context to ‘protect against unintended clashes between our laws and those of other nations which could result in international discord.’122 Justice Kennedy in Jesner stressed judicial restraint in the treatment of foreign corporations in order to encourage similar treatment of US corporations abroad.123 Posner and Sunstein even proposed that courts should defer to the executive in dealing comity because ‘the executive branch is in a better position to understand the benefits of foreign reciprocation or the likelihood and costs of retaliation than the judiciary.’124 The Supreme Court once held that it is ‘[T]he political branches, not the Judiciary, that have the responsibility and institutional capacity to weigh foreign-policy concerns.’125 The Vitamin C decision on the reach of a US law may have repercussions for the treatment that US companies receive abroad.126 However, a foreign sovereign’s interest should never outweigh the general national interest of a home state in the conduct of foreign relations.127

#### Comity balancing tests give discretion of foreign affairs to the courts instead of the executive. The plan causes a flood of litigation.

Qingxiu Bu, Commercial Law @ University of Sussex, formerly professor of transnational business @ Georgetown Law Center, ’20, ‘“Respectful Consideration, but Not Deference: Chinese Sovereign Amici in the US Supreme Court Vitamin C Judgment” Journal of European Competition Law & Practice, Vol. 11, No. 5–6

A federal court should defer to reasonable positions taken by a foreign sovereign in private cases.77 Although the Second Circuit articulated that a foreign government’s interpretation of its own law must be ‘reasonable under the circumstances,’78 it did not elucidate what to do if the testimony was not reasonable. Neither is clear as to whether courts have any leeway on evaluating reasonableness.79 It is unreasonable in all cases to abstain on comity grounds from asserting jurisdiction at the motion to dismiss stage. To determine whether a court should abstain from asserting jurisdiction, a ‘comity balancing test’ is normally applied, which was established in Timberlane. 80 The balancing approach was reflected in the Restatement (Third) of Foreign Relations Law,81 which likely sparks complex foreign discovery.82 Apparently, open-ended abstention may supplant the narrower act of state doctrine and foreign-state compulsion defence.83 The Second Circuit’s conclusive deference standard is inconsistent with analogous standards for treating submissions from US states in construing state laws.84 Even within the USA, such category of conduct cannot be shielded under, that is, a state may not order private price fixing and declare the conduct immune from the federal antitrust laws.

1. Public actors vis-à-vis private actors

The act of state doctrine refers to a defence designed to avoid judicial inquiry into state officials’ conduct as opposed to private actors.86 The long-standing doctrine precludes courts from ruling on the validity of the public acts of a foreign sovereign within its own territory.87 In Vitamin C, the privately set price does not qualify as state action, and thus the doctrines of act of state should not bar plaintiffs’ suit. It may not meet the test of reasonableness, neither is the decision equitable. Otherwise, the effect would be to substantially impair antitrust enforcement and impose significant costs on US consumers.88 In the case of a foreign government ordering its firms to fix prices, the victims are at the will of the foreigners’ power and have no recourse.89 In order to apply the foreignstate compulsion defence, the Restatement (Fourth) 2018 clarifies that, the sanctions for failing to comply with the foreign law must be severe, and the person in question must have ‘acted in good faith to avoid the conflict’.90 The threshold is unlikely to be met given the intertwining of public and private actions inChina. In terms of the private actors’ price fixing, the defendants in Vitamin C had strong incentive to maximise their profits at the expense of US consumers, who have even benefited from the mandate.91 This happens when Chinese MNCs operating in a hybrid state capitalism pursue conduct in violation of the US antitrust laws.92 Such a scenario takes place more often in some key industries that the Chinese government firmly controls. It is rare in China for the government to use plausibly state-sanctioned coordination.93

Fromthe view of the Second Circuit, foreign sovereign briefs are likely a superior source on foreign law than the Court undertaking its own analysis.94 The overwhelming limitations on the court’s jurisdiction may create a substantial loophole in dealing with foreign deference. With the defendants’ conduct immunised, those Chinese firms’ interests have been outweighed over theirUS counterparts. 95 Requiring absolute deference would virtually allow MOFCOM to shield the Chinese defendants from the reach of US antitrust law.96 In this vein, a conclusive deference standardmakes it easier for defendants to prove foreign sovereign compulsion.97 It would be difficult for the US plaintiffs to gain remedies if a federal court stuck to a ‘bound to deference’ approach.98

2. Foreign entities vis-à-vis domestic entities

Comity does not mean a negative doctrine of forbearance, but sometimes refers to positive approaches.99 A foreign entity is generally entitled to sue and to be sued in the US courts upon the same basis as a domestic one might do.100 To deny a person this privilege would manifest the spirit of the doctrine of international comity.101 As Justice Ginsburg observed:

‘an overly strict presumption against extraterritoriality ‘might spark, rather than quell, international strife,’ for ‘[m]aking such litigation available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests.’102

It requires a federal court to consider whether and when their own domestic law should give way to the legislative interests of a foreign sovereign.103 The Supreme Court’s new standard provides a judge with sufficient discretion to decide whether the element of foreign relations should be heightened.104 It remains to be seen whether the Supreme Court’s ruling could open the floodgate to US antitrust litigation against Chinese defendants. Even though the ultimate resolution of the Vitamin C case still takes time, a new legal landscape seems to come in shape.

#### USTR WTO-leadership key to maintain global non-discriminatory vaccine supply chain management.

Naotaka Matsukata, Ph.D. was a senior USTR official in the George W. Bush Administration, ‘20, "Forget the WHO — where is US leadership at the WTO?," TheHill, https://thehill.com/opinion/healthcare/504099-forget-the-who-where-is-us-leadership-at-the-wto

WTO rules are designed to protect both the exporter and importer of goods from arbitrary actions that interrupt the flow of trade. Established in 1994, the World Trade Organization organized around the principles of non-discrimination, reciprocity, binding and enforceable commitments, transparency, and safety values — all principles that must be present in any commercial distribution plan for the COVID-19 vaccine. Once already, the United States, working with the private sector and the WTO, crafted a compromise on trade-related intellectual property rights to address AIDs. The result was President George Bush’s President’s Emergency Plan for AIDS Relief (PEPFAR). The program is credited with saving millions of lives. As of now, the prospects of an encore performance — an approach to COVID that benefits from what was learned through PEPFAR — appear to be grim. The WTO has been adrift for several years, its negotiating role moribund. In May, the WTO’s director-general, Roberto Azevedo, unexpectedly resigned, leaving the WTO leader-less and searching for a replacement. Self-inflicted wounds and unilateral actions by key members have marginalized the trade body, which today is a mere shell of its former self. The question of the WTO’s relevance, as opposed to its proven potential, has unfortunately come to dominate our conversations about trade. Instead, with a diminished international trade system, the COVID crisis has ignited a “vaccine arms race”. There are 13 World Health Organization-recognized clinical evaluations underway for a COVID-19 vaccine. Over half of the trials are based outside of the United States. There is a good chance that the United States ends-up as an importer of the vaccine — instead of the world’s supplier. Under such circumstances, the specter of a dysfunctional WTO — and the lack of other international coordination mechanisms — should be of great concern to our national interest. What if another country decides to ban the export of its vaccine? The United States has taken important steps to coordinate the development of a COVID-19 vaccine, and PEPFAR’s Supply Chain Management System (SCMS) may provide a roadmap for in-country vaccine deployment. The National Institutes of Health on April 7, 2020, announced the Accelerating COVID-19 Therapeutic Interventions and Vaccines (ACTIV) partnership to coordinate and help fund the development of vaccines. The initiative includes 16 companies representing Europe, Asia, and North America. PEPFAR’s SCMS, an infrastructure delivery system, familiar to Dr. Anthony Fauci and Ambassador Deborah Birx, has for years supplied critical medicines and technical assistance to developing nations. To ensure that these efforts are successful, the United States must also develop and coordinate a non-discriminatory global distribution plan that is WTO compliant and is supported by the private sector. Whether the next president is President Trump or former U.S. vice president and presumptive Democratic nominee Joe Biden, orderly vaccine distribution will be a high and early priority for his administration. Global access and distribution of the COVID-19 vaccine may be our own lifetime’s greatest moral and ethical challenge. To avoid a Sophie’s Choice moment of who gets or doesn’t get the vaccine, the United States should immediately declare our intention to abide and enforce existing WTO rules and pledge to extinguish any form of vaccine nationalism. A strong WTO led by a committed United States is the answer to the distribution challenge. Our recovery and the world’s economic recovery depends upon non-discriminatory access to a vaccine. U.S. leadership at the WTO has never been more important.

#### Extended COVID causes multilateral meltdown – causes nuclear war, climate change, arctic and space war.

Strategic Partners Marsh McLennan SK Group Zurich Insurance Group, Academic Advisers National University of Singapore Oxford Martin School, University of Oxford Wharton Risk Management and Decision Processes Center, University of Pennsylvania, ’21, “The Global Risks Report 2021 16th Edition” “http://www3.weforum.org/docs/WEF\_The\_Global\_Risks\_Resport\_2021.pdf

Forced to choose sides, governments may face economic or diplomatic consequences, as proxy disputes play out in control over economic or geographic resources. The deepening of geopolitical fault lines and the lack of viable middle power alternatives make it harder for countries to cultivate connective tissue with a diverse set of partner countries based on mutual values and maximizing efficiencies. Instead, networks will become thick in some directions and non-existent in others. The COVID-19 crisis has amplified this dynamic, as digital interactions represent a “huge loss in efficiency for diplomacy” compared with face-to-face discussions.23 With some alliances weakening, diplomatic relationships will become more unstable at points where superpower tectonic plates meet or withdraw.

At the same time, without superpower referees or middle power enforcement, global norms may no longer govern state behaviour. Some governments will thus see the solidification of rival blocs as an opportunity to engage in regional posturing, which will have destabilizing effects.24 Across societies, domestic discord and economic crises will increase the risk of autocracy, with corresponding censorship, surveillance, restriction of movement and abrogation of rights.25 Economic crises will also amplify the challenges for middle powers as they navigate geopolitical competition. ASEAN countries, for example, had offered a potential new manufacturing base as the United States and China decouple, but the pandemic has left these countries strapped for cash to invest in the necessary infrastructure and productive capacity.26 Economic fallout is pushing many countries to debt distress (see Chapter 1, Global Risks 2021). While G20 countries are supporting debt restructure for poorer nations,27 larger economies too may be at risk of default in the longer term;28 this would leave them further stranded—and unable to exercise leadership—on the global stage.

Multilateral meltdown Middle power weaknesses will be reinforced in weakened institutions, which may translate to more uncertainty and lagging progress on shared global challenges such as climate change, health, poverty reduction and technology governance. In the absence of strong regulating institutions, the Arctic and space represent new realms for potential conflict as the superpowers and middle powers alike compete to extract resources and secure strategic advantage.29 If the global superpowers continue to accumulate economic, military and technological power in a zero-sum playing field, some middle powers could increasingly fall behind. Without cooperation nor access to important innovations, middle powers will struggle to define solutions to the world’s problems. In the long term, GRPS respondents forecasted “weapons of mass destruction” and “state collapse” as the two top critical threats: in the absence of strong institutions or clear rules, clashes— such as those in Nagorno-Karabakh or the Galwan Valley—may more frequently flare into full-fledged interstate conflicts,30 which is particularly worrisome where unresolved tensions among nuclear powers are concerned. These conflicts may lead to state collapse, with weakened middle powers less willing or less able to step in to find a peaceful solution.

### DA – China

#### Decoupling is on the brink.

Leonardo Dinic, NYU Alumnus, China-US Focus, 2-2-2021, "US-China Competition – Semiconductors and the Future of Tech Supremacy," https://www.chinausfocus.com/foreign-policy/us-china-competition-semiconductors-and-the-future-of-tech-supremacy

While Chinese investment in the U.S. slowed down during the Trump administration, goods and services trade volumes were less than 3 percent down from 2016 to 2019. The U.S. portfolio more than doubled from the end of 2016 to the end of 2019. So, we see a $13 billion trade decrease and a $120 billion increase in U.S. investment in China. Therefore, the two countries are still intimately tied. There is undoubtedly a threat of decoupling in tech if China can separate and develop a self-reliant ecosystem. Thus, the biggest losers from 'tech decoupling' are U.S. firms, which are heavily reliant on revenue from China. The U.S. could subsidize American firms to keep their R&D levels steady, but this might not be easy in the immediate post-pandemic environment. The U.S. could tax businesses instead of taxpayers, but this could also prove to be a hurdle.

#### China retaliates to US pressure tit-for-tat. Revisionism is irrelevant because cooperation is possible even amongst antagonists.

Angela Huyue Zhang, Professor of Law, University of Hong Kong, ’21, Chinese Antitrust Exceptionalism., Chapter 5: Weaponizing Antitrust During the Sino- US Tech War, Oxford University Press (2021). DOI: 10.1093/ oso/ 9780198826569.003.0006

In response to US hostility, China has chosen to retaliate tit- for- tat. Such a strategy simultaneously consists of a promise and a threat: if the United States does nothing, then neither will China; conversely, if the United States attacks, so will China. One of the most famous examples of this strategy is the ‘liveand- let- live’ system that emerged during the trench warfare in the First World War.46 There, it was observed that cooperation is possible even amongst antagonists. Soldiers on the frontline defied orders from their higher command and refrained from shooting at the enemy as long as their opponents reciprocated. To deter America’s aggressive strategy of stifling Chinese leading technology companies, China has a few regulatory tools at its disposal. One of them is the AML which has emerged as a powerful economic weapon allowing the Chinese authority to exercise extraterritorial jurisdiction over foreign multinationals. The coercive capacity of the AML is expected to increase, given that a pending amendment to its powers would enhance its punitive capacities.

2.1 The Folk Theorem

To illustrate China’s tit- for- tat strategy, consider the following hypothetical game between the United States and China.47 In this game, the United States makes the first move, and it must decide whether it will maintain the status quo of accommodating the rise of China or take a more aggressive stance in order to deter China from acting in a way that would harm US interests. In this hypothetical game, if the United States keeps to the status quo, both countries will receive the same payoff score of 10. However, if the United States takes an aggressive approach, it will receive a score of 15 and China will obtain a score of 1. China must then decide whether to punish the United States, which will harm both itself and the United States. If China chooses to punish the United States, then both countries gain nothing. While the cooperative outcome yields the highest joint payoffs for the two countries, this equilibrium cannot be achieved in a one- shot game. If the game is only played once, then the United States’ dominant strategy will be one of aggression in which it will receive the largest advantage. In this scenario, United States will obtain the maximum payoff of 15. China will not be content but it is better off acquiescing and collecting a payoff of 1 instead of being left with zero gain. However, in reality, the United States and China are repeatedly and continuously interacting with each other in this relationship. Given that this game involves an infinite number of interactions, China will opt for a different strategy to fulfil its objectives. It will choose to punish the United States, in which case the United States will obtain nothing. In anticipation of being punished by China, the United States will modify its strategy to tolerate China’s rise, as a result of which China will acquiesce, achieving a payoff of 10 for both players. The key to maintaining this equilibrium is the implicit threat of punishment, and peace is only possible if China has the capacity to retaliate against any US aggression. This logic applied during the Cold War. In his Nobel Peace Prize lecture, Robert Aumann said: ‘In the long years of the cold war between the US and the Soviet Union, what prevented “hot” war was that bombers carrying nuclear weapons were in the air 24 hours a day, 365 days a year. Disarming would have led to a war.’48

But there is one important caveat: the discount rates for the two countries cannot be too high. For example, if the United States is very impatient, then it will still be worthwhile for it to attack Chinese technology companies. For instance, if America’s discount rate is over 67 per cent, the entire punishment at its present value is worth less than 5, which is all that the United States can gain today by attacking China. Therefore, if we assume that the parties engaged in an infinitely repeated game are patient and far- sighted enough, the cooperative outcome is achievable in equilibrium. Repeated interaction acts as an enforcement mechanism for a cooperative outcome.49 This is also known as the folk theorem because it was widely known among game theorists. A key insight of the folk theorem is that any player who does not carry out his punishment will be punished by the other player for its failure to do so.50 This motivates players to carry out the punishments, making their threat more credible while keeping each other on edge.

Accordingly, there are three important lessons that can be drawn from this hypothetical scenario. First, China must strike back in the event of US aggression, otherwise it might be punished for its failure to do so and in turn face heightened US aggression in the future. This, indeed, echoes the official line from the highest echelon of China’s Communist Party. Second, the Chinese threat must be large enough to deter US aggression. If, however, China appears to lack commitment to execute its threat, the United States may then decide that it is still better off attacking China today. For instance, if the costs and the risks associated with carrying out the punishment are very high, and China might back down, then the threat will appear less tenable to the United States. Third, China must react quickly so that the United States promptly senses the pains, since the Trump Administration appears impatient and near- sighted. Given China’s limited capacity to strike back with its own tariff sanctions, China needs to sharpen its economic weapons in order to swiftly retaliate against US aggression.

In the past, China has leveraged its expansive market access for its reprisals against other countries. As described by Barry Naughton, a renowned China expert: “China has established almost a kind of tit- for- tat machinery so that carefully calibrated punishment can be meted out to counterparts’.51 The example Naughton provided was China’s retaliation against South Korea. In July 2016, South Korea made a public announcement that it was installing an American anti- missile system to intercept missiles from North Korea. This move irked the Chinese government which perceived the deployment as a security threat and a way for the United States to extend its interests into Asia. In response, China imposed a number of economic sanctions on South Korea. Lotte, a company that agreed to allow its golf course in South Korea to be converted into a missile base, was directly targeted in this particular backlash. In December 2016, Lotte was obliged to suspend the construction and development of a large theme park project in Shenyang after the local government claimed that the project had not followed administrative procedures properly. In early 2017, Lotte was also fined for its advertising practices, and it was also forced to shut down 80 per cent of its supermarkets in China due to fire code violations. South Korea endured many such casualties in the aftermath of the installation of the anti- missile system. The Chinese government later imposed a travel ban on South Korea, boycotted South Korean products, and refused to provide licence approvals to South Korean online games for a year. The two countries reached a détente in late 2017. However, it was not until May 2019 that the Shenyang government lifted sanctions. Notably, none of these economic sanctions on South Korean businesses were imposed formally or as part of a bilateral negotiation. They were part of a tacit bargain where the punishment was delivered under the guise of violations of Chinese laws. In other words, China weaponized its various administrative regulations to levy informal economic sanctions on South Korean businesses. These Chinese measures constituted a credible threat sufficient enough to cause South Korea to back down. After all, China is South Korea’s primary export market, receiving almost a quarter of all South Korea’s total exports.

In theory, China could take a similar retaliatory strategy against the United States. Foreign direct investment from the United States to China amounted to USD 284 billion between 1990 and 2019, so China possesses an immense capacity to damage American businesses.52 Since the start of the trade war, US businesses have complained about the tighter scrutiny they undergo in Chinese customs clearance, as well as more stringent regulation of labour, advertising, and environment matters. For example, it has been reported that Chinese customs officials inspected 100 per cent of the imports of one US car manufacturer, as opposed to just 2 per cent in earlier years. US food importers are also subject to a longer quarantine period at airports, resulting in food spoiling or goods being sent back to the United States.

#### Semiconductor supply chain decoupling causes Taiwan war – brink is now.

George Calhoun, Quantitative Finance Program Director, at Stevens Inst. of Technology, 9-12, "War With China? The Economic Factor That Could Trigger It," Forbes, https://www.forbes.com/sites/georgecalhoun/2021/09/12/war-with-china-the-economic-factor-that-could-trigger-it/?sh=29524bc45d26

To step back – If there is to be a war, an open war, with China – and we may stipulate that this scenario is at the far end of the spectrum of possibilities, and yet not an impossibility – if there is to be a war, it will not arise from Western outrage at human rights violations in Xinjiang, or Chinese outrage at Western outrage, or cyber-crime, or technology theft, or currency manipulation, or security crackdowns in Hong Kong, or indignities visited upon the Filipinos or the Vietnamese or the Australians.

It will arise from acute economic pain, inflicted on China by actions of the United States to deprive them of the most essential physical resource of the 21st century: semiconductors.

“China’s aspiration to become a true technological rival to the U.S. faces a foundational challenge: The country doesn’t control the semiconductors that are the building blocks for everything from smartphones to automated cars…. ‘For our country,’ Vice Premier Liu He told the country’s top scientists in May, ‘this technology is not just for growth. It’s a matter of survival.’” – Bloomberg

“American leadership in semiconductors is vital to the technological superiority of the U.S. military.” – The National Research Council (NRC) of the United States National Academies of Sciences, Engineering, and Medicine

“Modern wars are fought with semiconductors.” - a U.S. Senator

GERMANY-AUTOMOBILE-SEMICONDUCTORS-BOSCH

The semiconductor problem, and the increasing vulnerability of China’s economy – and its military – to supply constraints, is what will lead China to consider, finally, outright military action against Taiwan.

In fact, there is a strong historical parallel: China in 2021 finds itself in a situation very much like the situation of Japan in 1941.

The Japanese Precedent

It’s pretty clear that Japanese military aggression in 1941 was driven by the need to secure the country’s oil supply.

“A recently discovered diary from one of Emperor Hirohito’s aides makes clear how the Japanese viewed oil’s importance in the Pacific war. It quotes the late emperor as saying, after the war, that Japan went to war with the United States because of oil — and lost the war because of oil.”

“The Japanese military was obsessed with oil. The Japanese military machine was almost entirely dependent upon imported oil — and that meant the United States, which supplied about 80 percent of Japan’s consumption in those days. ‘If there were no supply of oil,’ one admiral said, ‘battleships would be nothing more than scarecrows.’”

Japan sought to address its vulnerability by investing in new technology. But it was unsuccessful, as detailed in a peer-reviewed article entitled “Synthetic fuel production in prewar and World War II Japan: A case study in technological failure,” published in 1993 in the journal Annals of Science.

“To achieve independence in petroleum, the Japanese [sought to] establish a synthetic fuel industry for the conversion of coal to oil. Actually, the Japanese had begun research on synthetic fuel in the 1920s, only a few years after other countries, such as Germany and Britain, that lacked sources of natural petroleum. They did excellent laboratory research on the coal hydrogenation and Fischer-Tropsch conversion processes, but in their haste to construct large synthetic fuel plants they bypassed the intermediated pilot-plant stage and failed to make a successful transition from small- to large-scale production.”

Japan’s only other “solution” involved military expansionism. After the Fall of France in 1940, Japan moved to occupy French Indochina, as a steppingstone to oil producing regions in Malaysia and the Dutch East Indies.

This led the U.S. to retaliate economically, in June 1941.

“Roosevelt froze all Japanese assets in America. Britain and the Dutch East Indies followed suit. The result: Japan lost access to 88 percent of its imported oil. Japan’s oil reserves were only sufficient to last three years, and only half that time if it went to war.”

From that point on, the sequence leading to Pearl Harbor was essentially deterministic, given the objectives and psychologies of the parties involved.

In short – Japan in 1941 found itself in a position of acute strategic vulnerability, intolerable in light of its geopolitical ambitions.

### CP – WTO

#### The US Trade Representative should launch a formal claim in the WTO DSB alleging that state-led export cartels are organized by a foreign sovereign and violate WTO obligations under the GATT and WTO accession protocols.

#### The Congress of the United States should launch a suit applying prohibitions on state-led export cartels under the FTAIA and other relevant statute.

#### The US judiciary should stay antitrust investigation pending resolution of trade dispute.

#### The counterplan conditions the plan on the failure of the WTO proceedings. Antitrust is worth pursuing only once the executive exhausts their diplomatic strategy.

Weimin Shen, L.L.M, J.S.D., Washington University School of Law, ’20, "The Role of Transnational Legal Process in Enforcing WTO Law and Competition Policy," Journal of Transnational Law & Policy 30 (2020-2021): 59-118

"Export cartel" refers to a collusive behavior between exporting firms "to charge a specified export price or to divide export markets among themselves."1 The purpose is often to enhance domestic firms' welfare at the expense of foreign consumers.2 Antitrust and the World Trade Organization ("WTO") are mutually exclusive remedies when dealing with an export cartel. The difference is that a successful antitrust proceeding depends on showing the absence of government involvement. In contrast, a WTO proceeding's success depends on showing the State's participation in export restraints. Lately, the lines have blurred when certain export cartels wind their way through U.S. courts. In such cases, the extent to which U.S. courts should enforce antitrust laws against foreign export cartels has been controversial, as defendants often invoke foreign-sovereignty-related defenses. This issue has become more prominent than ever with involved litigants who are at times unable to apply their antitrust laws extraterritorially to international cartels because of the difficulty of obtaining evidence that is located outside of their jurisdiction. Similarly, litigants at the WTO complained about the government's role in the administrative and judicial system, including the use of verbal demands and informal notices on export cartels. This intervention undermines the ability to show that a WTO-inconsistent measure exists. Several recent U.S. antitrust litigations involving Chinese export cartels highlight this challenge.

In In re Vitamin C Antitrust Litigation ("Vitamin C"), 3 the Chinese defendants moved to dismiss the complaint of pricefixing on the ground that Chinese law required them to fix the price and quantity of vitamin C exports, shielding them from liability under U.S. antitrust law. The defendants invoked comity, sovereign compulsion, and the act of state doctrines. 4 The Chinese Ministry of Commerce ("Ministry") took the unprecedented step of intervening as amicus curiae in the proceeding. The Ministry explained that the China Chamber of Commerce of Medicines & Health Products Importers & Exporters ("CCCMHPIE") is a "[m]inistry-supervised entity authorized by the Ministry to regulate vitamin C export prices and output levels." 5 Thus, the Chinese defendants were compelled under Chinese law to collectively set a price for vitamin C exports.6

Two similar antitrust cases were brought in the U.S. courts against Chinese export cartels. In Resco Products, Inc. v. Bosai Minerals Group, 7 private litigants alleged price-fixing and other anti-competitive behavior by certain Chinese exporters of bauxite. As the members of the China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters ("CCCMC"), the Chinese defendants relied on the amicus brief filed by the Ministry in Vitamin C and argued that CCCMC was a government entity that directed them to coordinate their price. 8 Similarly, in Animal Science Products, Inc. v. China National Metals and Minerals Import and Export Corp, 9 private litigants alleged price-fixing and other anti-competitive behavior by certain Chinese exporters of magnesite in a separate U.S. court proceeding. The defendants asserted that their trade chamber, CCCMC, was an instrument of the Chinese government to regulate export trade.10

On June 23, 2009, with the blessings of the Obama Administration, the U.S. government requested WTO consultations with China regarding China's export restraints on several raw materials. 11 In its first written submission, the U.S. government cited the above three cases, arguing that based upon representations already made by the Chinese Ministry, "the European understands that the CCCMC's export-price related functions and responsibilities . . . are attributable to China." 12 On December 21, 2009, the Dispute Settlement Body ("DSB") established a single panel to examine the complaints. 13

The above cases fostered a perception that antitrust and WTO meet when private anticompetitive conduct is mixed with state conduct. Emblematic of this viewpoint is Professor Eleanor M. Fox and Professor Merit E. Janow's argument that "[t]rade and competition rules sympathetic to markets are important in today's world of deep economic globalization."14 Both of the scholars were astonished by the opportunities for nations to play one system (trade) against the other (competition). They also cautioned that U.S. courts involved with foreign export cartels need to flexibly interact with the international regime to form a coherent approach to legal challenges over foreign regulatory systems.

What academics and other commentators have missed is that the involved U.S. courts and the executive branch's stance in the above litigations perfectly illustrates a pervasive Transnational Legal Process. The U.S. not only represents all antitrust nations' interests when it is anti-cartel. The transnational actors generated interactions that led to WTO law and competition policy interpretations that become internalized, thereby binding under domestic law (in this Article, China law).

This Article assesses the roles of Transnational Legal Process by examining transnational actors engaged in antitrust litigation and evaluating their relationship to transnational actors participating in the WTO litigation. My central thesis is that essential synergies exist between trade and competition, in which Transnational Legal Process will largely prove a positive role in constraining state-sponsored export cartels and international cartels. To avert gaming by the litigants due to ambiguous factual evidence in cartel cases, U.S. courts and the executive branch should become active transnational actors. They therefore stimulate each other to participate in a dynamic process of Transnational Legal Process. Under the condition that cartel action is attributable to State in the antitrust proceeding, as defendants invoke foreign-sovereignty-related defenses, transnational actors in the competition system promote WTO obedience by sending a strong signal to the executive branch. Under the condition that cartel action is attributable to private parties in the WTO proceeding, transnational actors in the competition system should perform a gap-filling role that the WTO system precludes. 16 The resulting tendency is to suggest a synergistic relationship between transnational actors to play by rules of free trade (not to restrain exports) and competition (not to cartelize). Having described the most basic features of Transnational Legal Process, my Article partly confirms that Transnational Legal Process could somewhat fix the potentially worrying issue of nations' opportunities to play one system (trade) against the other (competition).

#### Solves the case – WTO will rule for the US.

Weimin Shen, L.L.M, J.S.D., Washington University School of Law, ’20, "The Role of Transnational Legal Process in Enforcing WTO Law and Competition Policy," Journal of Transnational Law & Policy 30 (2020-2021): 59-118

While export cartels are consistently outlawed in established competition law regimes, virtually every state with a meaningful competition law acknowledges export cartels either explicitly or implicitly. 19 The rules of the General Agreement on Tariffs and Trade ("GATT") generally prohibit quantitative restrictions on exports and recognize that quantitative restrictions must not be imposed through direct government action and purchases of state trading enterprises ("STEs").20 Notably, WTO rules do not prevent these entities from exerting market power in export markets through the prices they charge abroad. 21 In that regard government-sponsored export cartels might potentially breach the GATT rules generally prohibiting quantitative export restrictions. Further guidance concerning export restraints is provided in Article 11.1(b), the WTO Agreement on Safeguards, which requires WTO Members to "not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side." 22 These include actions taken by a single Member as well as actions under agreements, arrangements, and understandings entered into by two or more Members. 23 In the same Article, it further requires Members not to encourage or support the adoption or maintenance by public and private enterprises of equivalent non-governmental measures, recognizing that it is sometimes difficult to establish the degree of government involvement in such measures. 24

#### The counterplan alone avoids the signal of unilateralism.

Dingding Tina Wang, \* J.D. Candidate 2012, Columbia Law, ’12, “WHEN ANTITRUST MET WTO: WHY U.S. COURTS SHOULD CONSIDER U.S.-CHINA WTO DISPUTES IN DECIDING ANTITRUST CASES INVOLVING CHINESE EXPORTS” Columbia Law Review , JUNE 2012, Vol. 112, No. 5 (JUNE 2012), pp. 1096-1142

1. Bauxite Case. — In Resco Products, Inc. v. Bosai Minerals Group, the 2010 case in the Western District of Pennsylvania, a U.S. plaintiff sued Chinese bauxite exporters for price-fixing.128 The Chinese defendants ar gued that their trade association, CCCMC, was a government entity that directed them to coordinate their prices.129 The court decided to stay the proceedings pending a final ruling in the U.S.-China WTO dispute over export restrictions on raw materials, including bauxite.130 The U.S. plain tiff protested that "no court has stayed an otherwise valid action pending the conclusion of WTO proceedings, and deference to the WTO is not required."131 The court acknowledged that it was "aware that decisions to stay cases usually involve pending lawsuits and not pending WTO pro ceedings,"132 so it took pains to justify its order of a stay.

The court emphasized the similarity of factual and legal inquiries between its case and the WTO case.133 It posited that the overlap between the antitrust case and the WTO dispute touched upon separation of powers, the merits of the bauxite claim, and judicial economy goals. First, the court clearly expressed its aversion to the possibility of issuing a decision conflicting with the assertions in the WTO made by the USTR, the executive branch agency that conducts WTO litigation for the United States: "This potential conflict between the judicial and executive branches could implicate separation of powers concerns if decisions of this court were to embarrass the executive branch in the conduct of for eign affairs."134 If the case proceeded, the court might "resolve the pend ing motion to dismiss or future dispositive motions in a manner that may be inconsistent with the position of the USTR and the eventual decision rendered by the WTO panel."135 Second, the court stated that while it recognized that WTO decisions are not binding, "the findings of fact and conclusions of law made by the WTO panel may at the very least simplify the analysis of the act of state doctrine here."136 It claimed that if the WTO panel agreed with the United States, "that finding may favor the defendants' arguments in this case," and a "contrary holding likewise could impact whether the act of state doctrine applies."137 Third, the court was reluctant to duplicate fact-finding efforts between the court and the USTR, as well as between the court and the WTO.138 It noted that in the interests of judicial economy, "substantial time, effort, and sources may be saved by waiting until a final WTO decision, particularly given the massive complexity of international antitrust cases.139 Thus, the court paid much attention to the U.S. position in the WTO, and addi tionally thought it valuable to wait for WTO findings in order to be able to take them into account. It did not explicitly say whether it would ac cord greater weight to the U.S. WTO position or to the WTO ruling. Nor did it elaborate on what it would do if the U.S. position and the WTO ruling conflicted, an issue that this Note addresses in a later section.

## ADV – Cartels

### Frontline – 1NC

#### 1. Balancing test is the squo – the supreme court rejected the second circuit court of appeals conclusive deference standard.

Tessa V. Mears, JD Candidate @ Miami, ’20, "How Animal Science Products, Inc. Plays a Role in the China and U.S. International Relations Saga," University of Miami Inter-American Law Review 51, no. 1 (Winter/Spring 2020): 185-216

The district court's decision was then reversed by the Second Circuit Court of Appeals. 33 The Second Circuit reasoned that when a foreign government provides an official statement that interprets its contested law, federal courts are "bound to defer" to the foreign government's interpretation as long as the interpretation is reasonable. 34 The court solely relied on the amicus brief submitted by the Chinese government.35 Because of this high level of deference, the appellate court did not reach the other evidence presented by the American buyers at the district court-most notably, the Chinese government's failure to point to a specific law or regulation that required the Chinese suppliers to engage in price-fixing and quantity-fixing. Instead, the court was concerned with principles of international comity and reciprocity in reaching its decision. 36 The appellate court began its analysis with the first factor of the comity balancing test: the degree of conflict with foreign law.37 Much like the district court had done, the appellate court centered its analysis on FRCP 44.1; however, the appellate court determined that merely because FRCP 44.1 tells a court what it can review when interpreting foreign law, does not mean it tells a court how it must examine the foreign law. 38 Keeping principles of international comity in mind, the appellate court reasoned that the international comity factors favor refraining from further intervention. Ultimately, "China's strong interest in its protectionist economic policies," outweighed any antitrust enforcement interests of the United States.39

On appeal to the Supreme Court, in June of 2018, Justice Ginsburg delivered the opinion of an unanimous Court in favor of the American buyers. 4 0 The Court reasoned that the Second Circuit was incorrect to find that American courts are bound to defer to a foreign government's interpretation of its own laws, and emphasized that FRCP 44.1 does not provide a level of deference as guidance for these matters.41 Further, Justice Ginsburg wrote that consideration of a foreign government's interpretation of its own laws must be on a case-by-case basis-rather than a bright-line rule.4 2 Justice Ginsburg noted that some appropriate considerations for evaluating a foreign government's interpretation of its own law include, "the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions." 4 3 These considerations center on the quality and the trustworthiness of the statement, rather than pure deference alone. Further, Justice Ginsburg noted that FRCP 44.1 logically requires a court to consider the foreign law as a "question of law," not of fact.4 Therefore, the Court should not be restricted on the evidence it reviews, and it should consider all relevant evidence in making its determination of the foreign law. Because the Court determined that the Chinese government's statement was not bound to absolute deference, it remanded the case for consideration of relevant materials. 4

#### 2. Circumvention – act of state doctrine.

Qingxiu Bu, Commercial Law @ University of Sussex, formerly professor of transnational business @ Georgetown Law Center, ’20, ‘“Respectful Consideration, but Not Deference: Chinese Sovereign Amici in the US Supreme Court Vitamin C Judgment” Journal of European Competition Law & Practice, Vol. 11, No. 5–6

1. Public actors vis-à-vis private actors

The act of state doctrine refers to a defence designed to avoid judicial inquiry into state officials’ conduct as opposed to private actors.86 The long-standing doctrine precludes courts from ruling on the validity of the public acts of a foreign sovereign within its own territory.87 In Vitamin C, the privately set price does not qualify as state action, and thus the doctrines of act of state should not bar plaintiffs’ suit. It may not meet the test of reasonableness, neither is the decision equitable. Otherwise, the effect would be to substantially impair antitrust enforcement and impose significant costs on US consumers.88 In the case of a foreign government ordering its firms to fix prices, the victims are at the will of the foreigners’ power and have no recourse.89 In order to apply the foreignstate compulsion defence, the Restatement (Fourth) 2018 clarifies that, the sanctions for failing to comply with the foreign law must be severe, and the person in question must have ‘acted in good faith to avoid the conflict’.90 The threshold is unlikely to be met given the intertwining of public and private actions inChina. In terms of the private actors’ price fixing, the defendants in Vitamin C had strong incentive to maximise their profits at the expense of US consumers, who have even benefited from the mandate.91 This happens when Chinese MNCs operating in a hybrid state capitalism pursue conduct in violation of the US antitrust laws.92 Such a scenario takes place more often in some key industries that the Chinese government firmly controls. It is rare in China for the government to use plausibly state-sanctioned coordination.93

Fromthe view of the Second Circuit, foreign sovereign briefs are likely a superior source on foreign law than the Court undertaking its own analysis.94 The overwhelming limitations on the court’s jurisdiction may create a substantial loophole in dealing with foreign deference. With the defendants’ conduct immunised, those Chinese firms’ interests have been outweighed over theirUS counterparts. 95 Requiring absolute deference would virtually allow MOFCOM to shield the Chinese defendants from the reach of US antitrust law.96 In this vein, a conclusive deference standardmakes it easier for defendants to prove foreign sovereign compulsion.97 It would be difficult for the US plaintiffs to gain remedies if a federal court stuck to a ‘bound to deference’ approach.98

#### 3. No enforcmeent – no mechanism, countries won’t cooperate, and impossible to discover evidence of collusion.

Weimin Shen, L.L.M, J.S.D., Washington University School of Law, ’20, "The Role of Transnational Legal Process in Enforcing WTO Law and Competition Policy," Journal of Transnational Law & Policy 30 (2020-2021): 59-118

Concerns, however, may arise in the case of export cartels with similar effects. For example, suppose authorities in these importing jurisdictions are unable to cooperate effectively in investigating cartels. In that case, their investigative efforts may not easily yield necessary evidence on the producers' conduct in exporting jurisdictions. 60 Multiple jurisdictions may repeat the same investigative steps, resulting in extra costs for business subject to investigations. 61 Meanwhile, cooperation with the authorities of those jurisdictions may be hampered by the fact that they may not perceive an immediate interest in tackling the cartel if it does not create harmful effects for the national economy. 62 Some countries specifically exempt "export cartels" from competition law, while many others will only investigate cartels if there are adverse effects within their jurisdictions. 63 Some international cartels may be beyond the effective reach of the laws in the countries where they have their most pernicious effects.64 According to the Organization for Economic Co-operation and Development ("OECD") report, most countries in which violations occur may not have access to the evidence necessary to determine the guilt or innocence of the parties involved. 65 Therefore, cartels may at times remain undiscovered due to lack of cooperation. Harmful cartel activity could go unpunished in these importing jurisdictions when enforcing national competition law against such cartels.

Also, the extraterritorial reach of competition law, the "effect doctrine," is a sensitive issue and jurisdictional conflicts may occur. For example, two different countries may assert their own jurisdiction in the same case, leading to potential divergent assessments. 66 In such circumstances, "positive comity" provisions are now included in many bilateral cooperation agreements between countries, whereby competition authorities can request another jurisdiction to address anti-competitive conduct that might best be fixed with an enforcement action in the country that is the recipient of the request.67 However, as I will illustrated in the following Chapter, international cartels could in theory be carried out either by the State or by State controlled firms. In examining their legitimacy both under WTO treaty obligations and under antitrust laws, there could be opportunities for nations to play one system against the other.

In sum, numerous changes in enforcement activity against international cartels have occurred over the past two decades: the adoption of antitrust policies prohibiting hardcore cartels by countries around the globe, vastly increased enforcement against international cartels by antitrust authorities, increased use of leniency policies, application of extraterritoriality, and a slow but growing trend toward criminalization of price-fixing. The net effect of these changes is that numerous competition policy agencies now vigorously pursue and successfully prosecute international cartels, levying increasingly large fines. However, even where international cartel activity can be tackled effectively by national competition laws, inefficiencies may occur during the investigation of international cartels and lead to underenforcement of competition policy and laws. In the absence of well-functioning and institutionalized cooperation mechanisms, multiple jurisdictions may repeat the same investigative steps, resulting in extra costs related to the investigations for business and costs to competition authorities from unnecessary duplication. As a result, harmful cartel activity could go unpunished, consumers would be harmed, and future harmful behavior will not be deterred.

### AT: Econ Impact – 1NC

#### Countries will exercise restraint.

Christina L. Davis & Krzysztof J. Pelc 17. \*Professor of Politics and International Affairs at Princeton. \*\*Associate Professor of Political Science at McGill University. “Cooperation in Hard Times: Self-restraint of Trade Protection.” *Journal of Conflict Resolution* 61(2): 398-429. Emory Libraries.

Conclusion Political economy theory would lead us to expect rising trade protection during hard times. Yet empirical evidence on this count has been mixed. Some studies find a correlation between poor macroeconomic conditions and protection, but the worst recession since the Great Depression has generated surprisingly moderate levels of protection. We explain this apparent contradiction. Our statistical findings show that under conditions of pervasive economic crisis at the international level, states exercise more restraint than they would when facing crisis alone. These results throw light on behavior not only during the crisis, but throughout the WTO period, from 1995 to the present. One concern may be that the restraint we observe during widespread crises is actually the result of a decrease in aggregate demand and that domestic pressure for import relief is lessened by the decline of world trade. By controlling for product-level imports, we show that the restraint on remedy use is not a byproduct of declining imports. We also take into account the ability of some countries to manipulate their currency and demonstrate that the relationship between crisis and trade protection holds independent of exchange rate policies. Government decisions to impose costs on their trade partners by taking advantage of their legal right to use flexibility measures are driven not only by the domestic situation but also by circumstances abroad. This can give rise to an individual incentive for strategic self-restraint toward trade partners in similar economic trouble. Under conditions of widespread crisis, government leaders fear the repercussions that their own use of trade protection may have on the behavior of trade partners at a time when they cannot afford the economic cost of a trade war. Institutions provide monitoring and a venue for leader interaction that facilitates coordination among states. Here the key function is to reinforce expectations that any move to protect industries will trigger similar moves in other countries. Such coordination often draws on shared historical analogies, such as the Smoot–Hawley lesson, which form a focal point to shape beliefs about appropriate state behavior. Much of the literature has focused on the more visible action of legal enforcement through dispute settlement, but this only captures part of the story. Our research suggests that tools of informal governance such as leader pledges, guidance from the Director General, trade policy reviews, and plenary meetings play a real role within the trade regime. In the absence of sufficiently stringent rules over flexibility measures, compliance alone is insufficient during a global economic crisis. These circumstances trigger informal mechanisms that complement legal rules to support cooperation. During widespread crisis, legal enforcement would be inadequate, and informal governance helps to bolster the system. Informal coordination is by nature difficult to observe, and we are unable to directly measure this process. Instead, we examine the variation in responses across crises of varying severity, within the context of the same formal setting of the WTO. Yet by focusing on discretionary tools of protection—trade remedies and tariff hikes within the bound rate—we can offer conclusions about how systemic crises shape country restraint independent of formal institutional constraints. Insofar as institutions are generating such restraint, we offer that it is by facilitating informal coordination, since all these instruments of trade protection fall within the letter of the law. Future research should explore trade policy at the micro level to identify which pathway is the most important for coordination. Research at a more macro-historical scope could compare how countries respond to crises under fundamentally different institutional contexts. In sum, the determinants of protection include economic downturns not only at home but also abroad. Rather than reinforcing pressure for protection, pervasive crisis in the global economy is shown to generate countervailing pressure for restraint in response to domestic crisis. In some cases, hard times bring more, not less, international cooperation.

### AT: Chem Impact – 1NC

#### Chem innovation is about solving resource constraints – resource shortages don’t cause war.

Kenny 20 Charles Kenny, Charles Kenny is a senior fellow and the director of technology and development at the Center for Global Development. He is the author of “Close the Pentagon: Rethinking National Security for a Positive Sum World.” 2-10-2020, "Why war for wealth has fallen out of fashion," TheHill, <https://thehill.com/opinion/national-security/481607-why-war-for-wealth-has-fallen-out-of-fashion> - BS

As the conflicts in Afghanistan and Iraq drag towards their third decade, and Syria’s civil war ticks towards 400,000 dead, it may seem trite to observe that nobody really “wins” a war. But it nonetheless represents a significant historic change, and one that can help account both for the fact that the number of wars is declining as well as the type and location of wars that remain. War always has been “negative sum,” in that any resource gain to the victor was matched by an equal loss to the loser and both sides paid in lives and arms. But those who prevailed on the battlefield could more than compensate for their military costs through occupation, plunder and enslavement. Anthropologist James Scott discusses the earliest wars in his book “Against the Grain.” He suggests that city-states such as Umma and Lagash in Mesopotamia fought over land and water, but most of all people, and that was still the case when Caesar brought back as many as a million slaves from his invasion of Gaul. People, land and resources remained prizes worth fighting over well into the 20th century. Germany’s demand for Lebensraum (“living space”) and Japan’s obsession with obtaining an independent oil supply helped motivate World War II, for example. But economic change means that land and the stuff on or under it no longer is the key to prosperity and power worldwide. The World Bank calculates a measure of global wealth that divides it into natural capital — land, oil, gold — physical capital, including roads and factories, and “intangible capital.” That last category includes education and the institutions and knowledge from double entry bookkeeping to phonics-based literacy programs that allow economies to produce more value with the same amount of physical inputs. In 2014, natural capital accounted for 9 percent of planetary wealth, according to the World Bank. That compared to 27 percent for physical capital and 64 percent — almost two-thirds — in intangible capital. The fact that wealth is driven by intangible ideas, institutions and relationships, rather than tangible goods and land, means that it can’t be expropriated by an invader. So even winning on the battlefield simply can’t pay off. Take one recent example: The Iraq war has cost the U.S. alone around $2.2 trillion, according to the Watson Institute at Brown University. Oil revenues earn the Iraqi government less than $100 billion a year. Even if President Trump carried out his one-time plan to expropriate the country’s oil, and despite Iraq’s huge share of global reserves, the war would not pay off economically. At the same time, intangible capital is “positive sum” — unlike a barrel of oil, if I use the technology of the internet, you can use it too — indeed, we both benefit from more people using it at the same time. That strengthens the payoff to peaceful cooperation and trade. For all of the continued horror of Syria, Iraq and Afghanistan, the changed basis of wealth and power helps to account for the global decline of war. Since 1975, an average of less than two interstate conflicts have been ongoing in the world each year, and recent years have seen even fewer. No major power war has erupted since 1939 — an 80-year stretch. Most of the wars that remain are in regions where resources still have an outsized share of wealth: The low-income countries most at risk of civil conflict see an average share of natural capital in total capital of just under one-half, for example. Territorial disputes in richer regions of the world have not gone away, from the South China Sea through Ukraine, the West Bank, Gibraltar and The Falklands. And wars often are launched for reasons of domestic politics or ideology disconnected from calculations of power or wealth. But that no developed country could ever “win” a war, in terms of wealth, may help explain why interstate conflict is so much out of fashion. And it also suggests a powerful solution for those who would like to see even greater global peace: Help the poorest countries grow out of resource dependency.

### AT: Tech Innovation Impact – 1NC

#### Poverty alt cause.

1AC Matthews 18 [Dylan. Co-Founder of Vox, citing Nick Beckstead @ Rutgers University. 10-26-2018. "How To Help People Millions Of Years From Now." Vox. https://www.vox.com/future-perfect/2018/10/26/18023366/far-future-effective-altruism-existential-risk-doing-good]

If you care about improving human lives, you should overwhelmingly care about those quadrillions of lives rather than the comparatively small number of people alive today. The 7.6 billion people now living, after all, amount to less than 0.003 percent of the population that will live in the future. It’s reasonable to suggest that those quadrillions of future people have, accordingly, hundreds of thousands of times more moral weight than those of us living here today do. That’s the basic argument behind Nick Beckstead’s 2013 Rutgers philosophy dissertation, “On the overwhelming importance of shaping the far future.” It’s a glorious mindfuck of a thesis, not least because Beckstead shows very convincingly that this is a conclusion any plausible moral view would reach. It’s not just something that weird utilitarians have to deal with. And Beckstead, to his considerable credit, walks the walk on this. He works at the Open Philanthropy Project on grants relating to the far future and runs a charitable fund for donors who want to prioritize the far future. And arguments from him and others have turned “long-termism” into a very vibrant, important strand of the effective altruism community. But what does prioritizing the far future even mean? The most literal thing it could mean is preventing human extinction, to ensure that the species persists as long as possible. For the long-term-focused effective altruists I know, that typically means identifying concrete threats to humanity’s continued existence — like unfriendly artificial intelligence, or a pandemic, or global warming/out of control geoengineering — and engaging in activities to prevent that specific eventuality. But in a set of slides he made in 2013, Beckstead makes a compelling case that while that’s certainly part of what caring about the far future entails, approaches that address specific threats to humanity (which he calls “targeted” approaches to the far future) have to complement “broad” approaches, where instead of trying to predict what’s going to kill us all, you just generally try to keep civilization running as best it can, so that it is, as a whole, well-equipped to deal with potential extinction events in the future, not just in 2030 or 2040 but in 3500 or 95000 or even 37 million. In other words, caring about the far future doesn’t mean just paying attention to low-probability risks of total annihilation; it also means acting on pressing needs now. For example: We’re going to be better prepared to prevent extinction from AI or a supervirus or global warming if society as a whole makes a lot of scientific progress. And a significant bottleneck there is that the vast majority of humanity doesn’t get high-enough-quality education to engage in scientific research, if they want to, which reduces the odds that we have enough trained scientists to come up with the breakthroughs we need as a civilization to survive and thrive. So maybe one of the best things we can do for the far future is to improve school systems — here and now — to harness the group economist Raj Chetty calls “lost Einsteins” (potential innovators who are thwarted by poverty and inequality in rich countries) and, more importantly, the hundreds of millions of kids in developing countries dealing with even worse education systems than those in depressed communities in the rich world.

### AT: Biotech Resources Impact – 1NC

#### Bioeconomy is also just about conserving resources – answered above.

## ADV – Development

### Turn – Protectionism – 1NC

#### International norms of free trade recovering now post-trump and COVID.

By Alessandra Migliaccio And William, Al Jazeera, 7-8-2021, "G-20 set to redefine world economic order post Trump, pandemic," No Publication, https://www.aljazeera.com/economy/2021/7/8/g-20-set-to-redefine-world-economic-order-post-trump-pandemic

Global finance chiefs this week will make their most concerted effort yet to redefine the world economic order in the era after Donald Trump and the coronavirus pandemic.

With trade tensions no longer bedevilling the Group of 20 economies in the way they did during the former US president’s tenure, the first in-person meeting of its finance ministers since the disease struck last year will attempt to forge consensus on unfinished business ranging from climate change to corporate taxation.

Alongside those issues, the July 9-10 gathering is likely to take stock of an incomplete global recovery, clouded by the persistent threat of setbacks from new variants of the coronavirus. That may focus minds on the need for continued fiscal efforts to support growth, amid mounting inflation concerns and oil prices that remain elevated following this week’s breakdown in OPEC+ talks.

“The global economies are working together again,” said Rosamaria Bitetti, an economist at Luiss University in Rome. “This is a huge opportunity for the G-20 to think about how this pandemic showed that in our interconnected world, problems are global and need to be addressed together, leaving nationalism behind.”

With Italy hosting the meeting in Venice as chair of the group, the symbolism of convening in a former hub for trade between continents won’t be lost on participants. They can also look to the name of the city’s fire-cursed opera house — La Fenice, or the Phoenix — for inspiration on what to strive for in the embers of an unprecedented global crisis.

The risk is that the scars of discord that haunted international meetings during the Trump years might persist, including echoes of his frequently touted suspicion of China.

For Bruno Le Maire, the French finance minister, the onus is now on the group to build on the consensus it achieved during early stages of the pandemic.

“The G-20 must show in Venice that it can still meet its responsibilities and be able to provide concrete, new and radical responses to the challenges ahead in a continuation of what it has succeeded in doing since February 2020,” he told reporters Tuesday.

#### Extraterritorial Sherman act application prompts blocking statutes across the globe. Ensuing uncertainty will devastate global trade, innovation, and economic growth.

SAMUEL F. KAVA, JD/MBA Candidate @ JHU/UofM, ’19,"The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization: The Need to Amend the Foreign Trade Antitrust Improvements Act (FTAIA) & Vigorously Apply International Comity," Journal of Business and Technology Law 15, no. 1 (2019): 135-164,

Before the FTAIA was enacted, in 1982, many of the United States' closest allies were disgruntled by the U.S. courts' expansive extraterritorial application of the Sherman Anti-Trust Act. 152 These nations confided in the territorial principle, and believed it "axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack."153 The United Kingdom, one of the most outspoken allies against the United States' "attempt[] to impose [its] domestic laws on persons and corporations who are not U.S. nationals and who are acting outside the territory of the United States," viewed the extraterritorial application of the Sherman Anti-Trust Act as ironic given the fact "the United States was founded by those who took exception to little matters of taxation being imposed extraterritorially." 154 Thus, in an attempt to "protect their nationals from criminal [and civil] proceedings in foreign courts where the claims to jurisdiction [were] excessive and constitute[d] an invasion of sovereignty," foreign nations enacted blocking statutes to resist the extraterritorial application of the Sherman Act.155

The blocking statutes of each nation varied, but all served to "block the discovery of documents located in their countries and bar the enforcement of foreign judgements."156 The United Kingdom achieved these goals with the Protection of Trading Interests Act, France with the French Blocking Law, Canada with the Foreign Extraterritorial Measures Act, and Australia with the Foreign Proceedings Act.157 The conflicting laws between the United States and its foreign counterparts created tremendous uncertainty regarding what nation's laws would be applied in the event of a cross-border dispute. According to Nuno Lim o and Giovanni Maggi, economists from the University of Maryland and Yale University, "as the world becomes more integrated, the gains from decreasing trade-policy uncertainty should tend to become more important relative to the gains from reducing the levels of trade barriers."158

Essentially, for trade to prosper, it is more important to provide producers and consumers with predictability and certainty (regarding the rule of law) rather than enacting laws that focus on free trade economics. Accordingly, it is in the best interest of governments to focus on unifying its laws before negotiating for the elimination of tariffs or quotas. This is not to say that eliminating trade barriers is not vital to the health of the economy-in fact, tariffs, quotas, and other trade barriers are proven to adversely affect all parties involved in the chain of distribution-however, it is more important to unify laws before focusing on the elimination of any trade barriers.159

As mentioned in Part I.C., the complaints of U.S. exporters and foreign governments were heard, and the United States Congress enacted the FTAIA "to address the concerns of foreign governments that the effects test established in the Alcoa case had not made clear the magnitude of the U.S. effects required to support a claim under the Sherman Act." 160 Thus, the FTAIA was implemented to bring certainty to consumers and producers by requiring that "conduct must have a 'direct, substantial, and reasonably foreseeable effect"' for the Sherman Anti-Trust Act to apply extraterritorially. 161 This language provided the foreign community with temporary relief, and gave producers and consumers the certainty and predictability needed to establish confidence in the markets and continue trading. However, since the passage of the FTAIA in 1982, the world has witnessed a remarkable increase in globalization, such that most conduct that takes place today has a "direct, substantial, and reasonably foreseeable effect" 162 on the U.S. economy. Epitomizing the obscureness of the FTAIA, is the fact that U.S. enforcement agencies-i.e. the U.S. Department of Justice and the Federal Trade Commission-have taken an aggressive approach to pursuing international antitrust claims. In 2017, the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") published the International Guidelines-a publication "explaining how the agencies intend to enforce U.S. antitrust laws against conduct occurring outside the United States." 163 The International Guidelines have taken the broadest approach in determining if conduct is "direct"-finding if there is a "reasonably proximate causal nexus between the conduct and the effect" conduct is "direct"-and the narrowest view that international comity bars enforcement of U.S. antitrust laws only when it is impossible for the actor to comply with both U.S. law and its foreign nation's law.164 Thus, because the FTAIA has become ineffective and there is a risk of further expansion of the extraterritorial application of the Sherman Anti-Trust Act with Apple v. Pepper, foreign nations will almost certainly strive to adopt modern and effective blocking statutes. These blocking statutes will revitalize uncertainty in the markets, and the global economy will be adversely affected.

In addition, because our world is more integrated, compared to the time when the FTAIA was implemented, the adverse economic effects may be worse if foreign nations pursue modern blocking statutes. To hedge against judicial uncertainty, corporations will likely react by hiring more robust legal teams. By re-allocating money to legal costs, with the hopes of avoiding potential litigation and ensuring compliance with all nations' laws, corporations would have foregone the opportunity to spend time and money on: (1) scaling its current line of products (which would decrease the price of goods for consumers), (2) enhancing the capabilities of its current line of products (which improve consumer capabilities and increase corporate profits), or (3) creating new and innovative products (which would benefit both consumers and producers). Thus, because corporations would be forced to spend more resources on avoiding litigation rather than research and development with the new blocking statutes, consumers, producers, distributors, and the economy as a whole will be adversely affected.

Overall, there is a significant risk that foreign nations will look towards blocking statutes to limit the extraterritorial application of the Act. The conflicting laws of the United States and international community will lead to judicial uncertainty, which will have an adverse impact on the global economy. Businesses will spend more time and money to avoid disputes; thus, undermining corporate profits, a customer's ability to purchase low cost goods, and the overall health of the global economy. The only certainty is that trade will slow down as a result of trade policy uncertainty. To avoid these adverse economic effects, it would be advantageous for the United States Congress to amend the FTAIA in a way that limits the effects of the extraterritorial application of the Sherman Anti-Trust Act. Specifically, Congress should limit the effects of the extraterritorial application of the Sherman Anti-Trust Act by expressly providing courts with a robust international comity analysis.

#### National antitrust silos promise the end of the economic order and liberal peace.

Steven S. Nam, Distinguished Practitioner, Center for East Asian Studies, Stanford University, ’18, Our Country, Right or Wrong: The FTC Act's Influence on National Silos in Antitrust Enforcement, 20 U. PA. J. Bus. L. 210 (2018).

National antitrust silos are not a novel phenomenon. Former European Commissioner for Competition Joaquin Almunia warned of them years ago, 5 2 and scholarship touching upon the furtherance of nationalist goals by various antitrust agencies dates back decades. 53 However, a creeping loss of public confidence in open markets-coupled with the obstacles to coherent global antitrust enforcement that bear the FTC Act's influence, as illustrated in this Article-risks amplifying the problem. As anti-free trade agendas continue to garner more mainstream popularity for formerly counter-establishment parties, a proliferation of protectionist silos could tempt even governments that, for the most part, had moved past them. Why, American officials may ask, should the U.S. continue championing the liberal international economic order when an illiberal China or an ostensibly liberal South Korea bends regulatory rules to disadvantage American companies, workers, and consumers? Skepticism towards a liberal democratic "end of history"'54 in general, and failures of economic liberalism in particular, are threatening to motivate political circles accordingly. Even perennial norms and conventions of the U.S. competition regime which evolved to safeguard regulator independence at home are no longer above disruption; the ambiguous statutory articulations that carried over abroad to empower strong executives are likewise playing a paper tiger role domestically of late.'55 Protectionist policies designed to compromise market competition-for all its documented excesses and inadequacies-would sap its creative vitality and the concurrent liberal peace 5 6 often taken for granted. Economic liberalism ails not so much from the intrinsic failings of core tenets, but from their more egregious nation-state and corporate violators. Proposals for greater accountability and harmonization have ranged from presumption of an underlying coordination scheme in antitrust investigations of a culpable country's companies,157 to an international competition regime binding on member states in at least some areas of antitrust.158 Each has associated costs, but their very debate harnesses polycentric dialogue lacking in nationalist regulatory agendas and calls for "our country, right or wrong" protectionist silos. It should be emphasized to policymakers and politicians collectively that lasting convergence in antitrust enforcement is unachievable without global coherence in regulator autonomy, and the FTC Act's formative influence is not above scrutiny or reproach. Still-elusive realization of the liberal economic international order's intended form will require an expanded constellation of independent competition regulators empowered to enforce antitrust laws consistently.

### AT: SDGs Impact – 1NC

#### No development impact

Kareiva and Carranza, 18—Institute of the Environment and Sustainability, University of California, Los Angeles (Peter and Valerie, “Existential risk due to ecosystem collapse: Nature strikes back,” Futures, available online January 5, 2018, ScienceDirect, dml)

The interesting question is whether any of the planetary thresholds other than CO2 could also portend existential risks. Here the answer is not clear. One boundary often mentioned as a concern for the fate of global civilization is biodiversity (Ehrlich & Ehrlich, 2012), with the proposed safety threshold being a loss of greater than 0.001% per year (Rockström et al., 2009). There is little evidence that this particular 0.001% annual loss is a threshold—and it is hard to imagine any data that would allow one to identify where the threshold was (Brook, Ellis, Perring, Mackay, & Blomqvist, 2013; Lenton & Williams, 2013). A better question is whether one can imagine any scenario by which the loss of too many species leads to the collapse of societies and environmental disasters, even though one cannot know the absolute number of extinctions that would be required to create this dystopia. While there are data that relate local reductions in species richness to altered ecosystem function, these results do not point to substantial existential risks. The data are small-scale experiments in which plant productivity, or nutrient retention is reduced as species numbers decline locally (Vellend, 2017), or are local observations of increased variability in fisheries yield when stock diversity is lost (Schindler et al., 2010). Those are not existential risks. To make the link even more tenuous, there is little evidence that biodiversity is even declining at local scales (Vellend et al., 2013, 2017). Total planetary biodiversity may be in decline, but local and regional biodiversity is often staying the same because species from elsewhere replace local losses, albeit homogenizing the world in the process. Although the majority of conservation scientists are likely to flinch at this conclusion, there is growing skepticism regarding the strength of evidence linking trends in biodiversity loss to an existential risk for humans (Maier, 2012; Vellend, 2014). Obviously if all biodiversity disappeared civilization would end—but no one is forecasting the loss of all species. It seems plausible that the loss of 90% of the world’s species could also be apocalyptic, but not one is predicting that degree of biodiversity loss either. Tragic, but plausible is the possibility of our planet suffering a loss of as many as half of its species. If global biodiversity were halved, but at the same time locally the number of species stayed relatively stable, what would be the mechanism for an end-of-civilization or even end of human prosperity scenario? Extinctions and biodiversity loss are ethical and spiritual losses, but perhaps not an existential risk.

### AT: Amazon Impact – 1NC

#### Even completely unchecked deforestation takes 200 years and won’t cause extinction.

Hannah Voak 16, Assistant Ecologist, Nurture Ecology Ltd., 4/22/16, “A world without trees,” <http://www.scienceinschool.org/content/world-without-trees>

There are approximately 3.04 trillion trees on planet Earth (Crowther et al 15), covering 31% of the world’s land surfacew1. Today, for Earth day, we’re taking a look at trees. Around 15 billion trees are cut down each year. So, hypothetically speaking, it would take just over 200 years for the world’s forests to completely disappear. While this scenario is unlikely, what would be the consequences of a tree-free planet? Let’s start with perhaps the most obvious difference – oxygen concentration. A lack of oxygen? Oxygen makes up roughly 21% of the Earth’s atmosphere, but you probably know that already. What you might be surprised to find out, however, is that only half of this oxygen is produced through photosynthesis in trees and other plants on land. The other half is produced in oceans, by microscopic marine organisms called phytoplankton. The environment would not be devoid of oxygen if all trees were lost but the oxygen level would be lower. Would it be sufficient for humans to survive? In one year, a mature leafy tree produces as much oxygen as ten people breathe. If phytoplankton provides us with half our required oxygen, at current population levels we could survive on Earth for at least 4000 years before the oxygen store ran empty. However, that’s not considering a number of other factors: increasing population size, for example, would reduce the amount of oxygen available, whilst phytoplankton blooms due to an abundance of carbon dioxide could increase oxygen levels. Suffocating smog Whilst there may be enough oxygen for humans to survive on Earth, at least to begin with, the air we breathe could still be responsible for our demise. Like giant filters, trees help to cut down on pollution levels. Leaves intercept airborne particles and ozone, carbon monoxide, sulfur dioxide and other greenhouse gases are absorbed through the leaves stomata. In 2012, outdoor air pollution was estimated to cause 3.7 million premature deaths worldwidew2. Imagine the impact removing these environmental sieves would have on humankind. Air-pollution masks would become a necessity and bottled ‘clean air’ could come at a premium. Full of hot air? Armed with pollution masks, would the climate and temperature still be suitable for us? One important consideration is carbon dioxide. In one year, an acre of mature trees soaks up the same amount of carbon dioxide that we produce by driving the average car 26 000 miles. Since human activities like this increase the normal level of carbon dioxide in the atmosphere, cutting down trees would tip the balance even further, not to mention the enormous amount of stored carbon that would be released from doing so. Deforestation is already responsible for up to 15% of global greenhouse gas emissions and you might think that an overwhelming increase in carbon dioxide would result in a much warmer planet. However, the relationship between trees and global temperature is much more complicated. Energy and water fluxes between trees and the atmosphere also play a role and a tree’s colour, for example, can affect the amount of the Sun’s energy that is absorbed or reflected. Studies have shown that Europe’s trees have actually caused a slight increase in regional temperatures since 1750w3, while transpiration from plants in tropical forests cools the surface temperature. Therefore, whether the temperature becomes too hot to handle could depend on many factors, although a recent study concluded that reducing forest size increases average air surface temperatures in all climate zones (Alkama & Cescatti 16).

### AT: Food Impact – 1NC

#### South Africa obviously not key to food – other countries are huge exporters.

#### Cross-apply resource wars impact D.

#### No escalation – Africa doesn’t have nukes.

# 2NC

## CP

### 2NC – OV

#### CP solves better than the AFF because of exec info gatherin

Ma. Joy V. Abrenica, Professor of Economics @ UPH, ’19, “Sovereign determination or disguised protectionism?: the Vitamin C Case” The Philippine Review of Economics 2019 56(1&2):147-172.

The defendants did not refute the allegations of the complainants but argued that they have immunity from antitrust liability because their government forced them to engage in the very acts that violated the US law. They asked the court to dismiss the complaint based on legal doctrines of act of state, foreign sovereign compulsion, and international comity. These defences are interrelated and stand on respect for the sovereignty of other nations. They provide a basis for a court to abstain from exercising jurisdiction and allow the matter to be resolved through diplomacy. By abstaining, courts avoid condemning the conduct of a foreign government, which could affect the amicable relationship between two sovereign states. Because of separation of powers between the executive and judicial branches of government, matters of foreign relation are left to the executive branch. It is also prudent for courts to abstain so they could avoid being dragged into the political agenda of the executive.10

### 2NC – CP Amendment

#### The United States federal judiciary should defer to the executive’s position on whether foreign cartels are exempt from antitrust litigation and solicit executive opinions in instances where the executive has not initiated action.

#### The executive branch should file an amicus brief in ensuing litigation holding that foreign cartels do not satisfy the criteria for exemptions from antitrust law.

### 2NC – AT: Perm Plan + “Defer to the executive’s position”

#### The perm lacks express representation included in plank 2. That’s key to avoid courts from stepping into political disputes.

Dingding Tina Wang, \* J.D. Candidate 2012, Columbia Law, ’12, “WHEN ANTITRUST MET WTO: WHY U.S. COURTS SHOULD CONSIDER U.S.-CHINA WTO DISPUTES IN DECIDING ANTITRUST CASES INVOLVING CHINESE EXPORTS” Columbia Law Review , JUNE 2012, Vol. 112, No. 5 (JUNE 2012), pp. 1096-1142

The Vitamin C court made some effort to reconcile its 2011 opinion with the U.S. arguments in the WTO and the WTO panel's findings in the U.S.-China WTO dispute, which had not yet been decided by the Appellate Body when the district court wrote its opinion. In a section on "Relevance of the WTO Proceeding," the court noted that the WTO panel had concluded that China imposed minimum export price re quirements on certain raw materials, that the government's charter for CCCMC directed the CCCMC to coordinate export prices, and that the government enforced such export price levels through, inter alia, penal ties imposed on noncompliant exporters.124 The court also noted that the WTO panel had found that, based on information filed by China's Ministry of Commerce in the court's own case, CCCMC's minimum ex port price requirements are "attributable to China."125 But the court de cided that the "WTO panel's conclusions do not alter my interpretation of Chinese law," because the WTO findings showed that China had not denied that minimum export prices existed, that China did not say whether CCCMC membership was voluntary, and that the panel had not addressed the "deficiencies" with the Ministry of Commerce's filings to the Vitamin C court.126 Additionally, the court acknowledged the U.S. Trade Representative's (USTR) reliance in WTO filings on the Ministry of Commerce statements, but noted that the executive branch had made no express representation to the court about this reliance and so declined to consider the executive branch's WTO position in its decision.127 In contrast to the Vitamin C court, other district courts have taken differ ent approaches to the WTO dispute, according greater weight to the relevance of the U.S. executive branch position in the WTO or to the ul timate disposition of the WTO Case.

### 2NC – AT: Perm Do Counterplan

#### Congress and the courts can ‘expand the scope’ of those statutes, agencies enforce the statute. The counterplan merely has courts defer to the agencies enforcement policy.

Ryan ’17 [John W; president and CEO of the Conference of State Bank Supervisors; 4/13/17; “Comptroller’s Licensing Manual Draft Supplement: Evaluating Charter Applications From Financial Technology Companies”; Conference Of State Bank Supervisors V. Otting Et Al, Exihibit H; <https://dockets.justia.com/docket/district-of-columbia/dcdce/1:2018cv02449/201140>; accessed 7/22/21; TV]

The following OCC regulations apply to “national banks” and implement laws applying only to insured banks: 12 C.F.R. Part 3 (regulatory capital requirements), Part 6 (prompt corrective action requirements), Part 11 (securities exchange act disclosure rules), Part 12 (recordkeeping and confirmation requirements for securities transactions), Part 14 (consumer protection in sales of insurance), Part 16 (securities offering disclosure rules), Part 26 (management official interlocks), Part 31 (extensions of credit to insiders and transactions with affiliates), Part 34 (real estate lending and appraisals). In addition, the portions of 12 C.F.R. Part 5 implementing the Change in Bank Control Act and the Bank Merger Acts and the portions of 12 C.F.R. Part 19 implementing the anti-tying provisions of the BHCA (12 U.S.C. 1971 et. seq.) apply to “national banks” and implement laws applying only to insured banks. Again, to the extent that the OCC declares that these regulations apply to the proposed nonbanks, the regulations themselves are overbroad and invalid. When Congress clearly defines the scope and applicability of a law, a federal agency cannot simply expand the scope of the law through regulatory implementation. See, e.g., Metro. Sch. Dist. of Wayne Twp. v. Davila, 969 F.2d 485, 488-89 (7th Cir. 1992) (if an interpretive rule creates a new duty, it functions like a legislative rule and is, therefore, unlawful).

#### (B) Prefer legal definitions in resolutional context.

Starek ’93 [Roscoe B; former member of the Federal Trade Commission, Deputy Assistant to the President and Deputy Director of Presidential Personnel at the White House; 7/30/93; “HOW REGULATORS DECIDE WHOM TO PROSECUTE: ONE VIEW FROM THE FEDERAL TRADE COMMISSION”; FTC TODAY; Lexis; accessed 7/22/21; TV]

THE NATURE AND BREADTH OF PROSECUTORIAL DISCRETION Of course, the easiest way for me to discuss these concepts is in the context of my own agency, the Federal Trade Commission. To give you a brief frame of reference, let me first describe the structure and statutory authority of the Commission. The FTC is an independent federal agency, established nearly eighty years ago, to enforce the federal antitrust and consumer protection laws. The five commissioners are nominated by the President, appointed with the advice and consent of the Senate, and serve staggered seven year terms. [Some would say we stagger through our seven-year terms.] The Chairman, currently Janet Steiger, is selected by the President from among the sitting commissioners, and serves at his pleasure. In Washington, there are approximately a dozen similar independent regulatory agencies, generally authorized to regulate a broadly defined industrial sector, such as securities, communications, or energy. By contrast, our antitrust and consumer protection jurisdiction at the FTC applies to virtually every sector of the economy.

Like many other independent federal agencies, the Commission has adjudicatory, prosecutorial, and regulatory functions. It acts as a court when it hears appeals from decisions of the agency's administrative law judges. It acts as a regulatory body when, as authorized by Congress, it issues regulations that have the force and effect of law. But the Commission's primary function is that of a civil law enforcement agency. The Commission acts as a prosecutor in determining which cases to file in either the United States courts or before its own administrative tribunal. In this role, the Commission acts in the same fashion as would the primary decisionmaker in any other prosecuting agency, such as the Department of Justice or the San Francisco D.A.'s office.

The Commission enforces twenty-one different statutes. The heart of the Commission's power, however, lies in Section 5 of the FTC Act. As originally written in 1914, Section 5 declared unlawful "unfair methods of competition." In 1938, Congress expanded Section 5 jurisdiction to proscribe "unfair or deceptive acts or practices." In general, the FTC's antitrust mission derives from the "unfair methods of competition" language and its consumer protection mission is based on the "unfair or deceptive acts or practices" language. In its breadth, Section 5 is similar to other U.S. antitrust statutes. These laws often have been described as "constitutional" in nature: that is, they were formulated with an expectation that the courts would "give shape to the [statutes'] broad mandate by drawing on common-law tradition." Congress left these broad prohibitions undefined so that the parameters of the Commission's authority and the scope of its functions could be responsive to a wide variety of business practices.

This mandate permits the FTC to exercise broad discretion. By enacting broad statutes to effect a common law approach to antitrust and consumer protection law, Congress determined that the executive branch would play a role separate from that of the courts in interpreting the law. Of course, the agency must yield to interpretations of judges in cases before the courts; but the same is not true in determining what constitutes an offense and in deciding whether or not to prosecute. For example, where the agency is convinced that conduct falls within the proscription of the statute, even though no precedent exists involving similar conduct, the agency can initiate an enforcement action. This may appear to expand the scope of the law; however, I think it reflects the agency's application of the law to new circumstances. Of course, any attempt to test the boundaries of the law will be subject to judicial review. The courts, and ultimately the Supreme Court, will say whether the agency's action exceeds the scope of the statute it is supposed to be enforcing.

But if the agency seeks to expand the scope and reach of the law based on new insights into business behavior, it should also take actions to reverse or restrict old doctrines that prohibit conduct now recognized as socially beneficial. This is hardly controversial: the common law approach assumes that judicial decisions are not immutable, that mistakes will be made and that they will be corrected as the law evolves. For example, the Supreme Court's early interpretations of the Sherman Act held that all "restraints of trade" violated the Sherman Act. Later, the Court recognized that almost any conceivable contract, joint venture, or merger in some way restrains trade. It therefore modified its earlier position and found that the Act prohibited only "undue" restraints when measured against a "rule of reason."

When it enforces these broad statutory mandates, an agency has a special responsibility to apply the law in a manner that comports with not just the letter but also the spirit of the law. This is particularly true because limited resources do not permit the luxury of attacking every technical violation that may come to its attention.

### 2NC – AT: Certainty Deficit

#### The counterplan creates clarity for lower courts.

Daniel Fahrenthold, JD Candidate @ Columbia Law School, ’19, "Respectful Consideration: Foreign Sovereign Amici in U.S. Courts," Columbia Law Review 119, no. 6 : 1597-1632

In light of these risks, it is critical that respectful consideration be reformed to ensure a consistent and formalistic treatment of foreign sovereign submissions. If the Supreme Court were to elaborate a more substantive respectful consideration standard using a multistep deference analysis, district and circuit courts would have helpful guidance on what international comity factors the Court believes are relevant to the analysis, while still retaining ultimate discretion in any particular case. 206 This Note does not advocate that foreign sovereign submissions be accorded conclusive deference, or that the Supreme Court was wrong in Animal Science Products to reject the more deferential approaches the courts of appeals had taken when considering foreign sovereign submissions. In many cases it will be inappropriate to side with a foreign sovereign. In Animal Science Products, for instance, China's submission directly contradicted previous statements China had made about its competition law to the WTO.20 7 There is always a risk that a foreign sovereign could abuse a position of absolute deference. Moreover, the respectful consideration standard reflects the views of the U.S. Justice and State Departments, which advocated for this standard in an amicus brief to the Court in Animal Science Products.208 The problem with the respectful consideration standard is not that it is wrong, but that it is incomplete. A robust multistep framework under the standard would ensure that courts consistently identify and analyze the relevant considerations. Even if a court ultimately concludes that the foreign sovereign submission is not to be credited, a less vague standard would assure all parties-including the court itself-that the decision has been properly considered.

#### Deference to the executive improves legal clarity for international businesses.

Qingxiu Bu, Law @ Sussex, ’15, “Neither Rock Nor Hard Place? The Foreign Sovereign Compulsion Defence in Antitrust Litigation” Journal of International Dispute Settlement, 2015, 6, 427–453 doi: 10.1093/jnlids/idv013

There are no well-established criteria thus far to address the inconsistent approaches by the judicial and executive branch. In case of contradictory arguments, the court may need to exercise its discretion following the principle of estoppel to avoid injustice. 222 It is feasible that the courts defer to the executive branch on foreign policy and international trade matters due to their broader power and greater competence in this realm. A court might well allow for some level of deference to the executive branch’s position, in spite of the constitutional separation of powers. This could help develop a more coherently reliable regime in response to potential legal challenges.

### 2NC – AT: Effects-Test

#### Globalization makes all commerce directly effect US consumers. Effects-test poses no barrier to extraterritorial application of antitrust.

SAMUEL F. KAVA, JD/MBA Candidate @ JHU/UofM, ’19,"The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization: The Need to Amend the Foreign Trade Antitrust Improvements Act (FTAIA) & Vigorously Apply International Comity," Journal of Business and Technology Law 15, no. 1 (2019): 135-164,

The FTAIA temporarily eased the concerns of both the international community and U.S. based exporters; however, the legislation failed in terms of unifying the standard to determine whether U.S. anti-trust law applies to foreign transactions. The clause "direct, substantial, and reasonably foreseeable," has become a product of "judicial interpretation...[which] has created significant circuit splits." 68 Specifically, the word "direct" has been construed differently among the Ninth and Seventh Circuits.69 The Ninth Circuit Court of Appeals "has interpreted the term 'direct' to require that the effect on U.S. commerce follow as an 'immediate consequence' of the defendant's conduct." 70 Conversely, the Seventh Circuit has broadly "construed the term 'direct'...to denote a 'reasonably proximate causal nexus."' 71 Nevertheless, as the global economy becomes more integrated the split in the way courts define "direct" has become irrelevant. Most trades that take place today have a direct impact that is both: (1) of immediate consequence, and (2) the reasonable proximate causal nexus. Especially with C2C e-commerce platforms, which serve to create "liquidity" in the market by connecting sellers with many buyers, it is foreseeable that this platform will proximately cause a multi-national transaction that causes an immediate consequence to a U.S. producer.72 For example, if Alibaba were selling adidas sneakers on its platform, at an anti-competitive price, Nike would be instantly harmed because a customer (whether a U.S. or foreign citizen) will buy the cheaper and similar product on the platform rather than purchase through Nike. This harm is of immediate consequence to the Nike's of the world, and Alibaba certainly is able to foresee it being the proximate causal nexus to this harm. Thus, the FTAIA has become an obsolete and toothless statute in the age of globalization. The United States Department of Justice has exemplified the ease of proving a transaction has a "direct, substantial, and reasonably foreseeable effect on commerce in the United States." 73 The success of the Justice Department has led to its aggressive pursuit of criminal anti-trust claims against foreign companies operating outside the United States. 74 Since 1999, "about 90 percent of fines of $10 million for criminal violations of U.S. antitrust laws [] have been levied against non- U.S. defendants for conduct occurring outside the U.S. Twenty-eight percent of those fines have been in excess of $100 million, with the largest, a fine of $650 million, levied in 2017."75

## CASe

### XT 1NC 1 : Status quo solves

#### This case was quite literally a resolution to the precise circuit split that the aff evidence is about.

Louise Ellen Teitz, Roger Williams University School of Law, ’18, "Must a United States Federal Court Defer to a Foreign Sovereign's Interpretation of Its Law in a Suit in U.S. Federal Court (16-1220)," Preview of United States Supreme Court Cases 45, no. 7 (April 16, 2018): 221-224

Hebei appealed to the Second Circuit, arguing the same three defenses, and the Ministry iled an additional amicus brief in the appellate court, asserting for the irst time that it “has unquestioned authority to interpret applicable Chinese law.” The Second Circuit, reversing the district court, remanded with directions to dismiss, based on the determination that it was “bound to defer” to the Ministry’s “reasonable” interpretation of Chinese law and that, based on the amicus “sworn evidentiary proffer,” that price ixing was required. This interpretation of the content of the Chinese law then meant that there was a direct conlict with U.S. law. Once there was a conlict, under existing precedent, particularly the multi-factor balancing test developed by the Ninth and Third Circuits in Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976) and Mannington Mills, Inc. v. Congoleum Corp., 595 F.3d 1287 (3rd Cir. 1979), the comity factors pointed in favor of dismissal. Animal Science petitioned for certiorari on the basis of three questions: one that was procedure based, whether you could review a pretrial order (motion to dismiss) after full trial on merits; and another that was procedural but with substantive aspects of what limits a court’s determination of foreign law when a foreign sovereign appears to offer testimony; and one that was substantive as to the use of comity as a basis for abstention. The third question, concerning abstention from exercising jurisdiction over a Sherman antitrust case of domestic injury due to the discretionary doctrine of international comity, is perhaps the most controversial because it raises the issue of what bases exist for abstaining and when a U.S. court should defer to another country’s laws when there is overlapping jurisdiction. These cases have been controversial, as has the Timberlane balancing test of reasonableness under the prior Restatement (Third) of Foreign Relations Law Section 403. The Supreme Court chose to grant certiorari not on the substantive issue of international comity but only on the preliminary step necessary to determine if the foreign law conlicts with U.S. law. In fact, as discussed below, the Supreme Court could vacate and remand, leaving open the further question of whether to abstain once the proper determination of Chinese law is applied.

### XT 1NC 2: Circumventon

#### Countries have a strong incentive to immunize their entities post-hoc and appeal the trial.

Qingxiu Bu, Commercial Law @ University of Sussex, formerly professor of transnational business @ Georgetown Law Center, ’20, ‘“Respectful Consideration, but Not Deference: Chinese Sovereign Amici in the US Supreme Court Vitamin C Judgment” Journal of European Competition Law & Practice, Vol. 11, No. 5–6

A. Neutrality, accuracy, and consistence

A foreign sovereign would unlikely be wholly impartial and could be liable to make false or inconsistent representations to federal courts.66 One of the possible risks is that it may not be neutral, which results from a strong incentive to shield its domestic entities from antitrust liability abroad.67 In Vitamin C, MOFCOM may have been motivated to shielddomesticfirms fromtrebledamages.68 As Sweeney observed, the gains from the uncompetitive behaviour would accrue to their home state,while the victims are foreign purchasers.69 This is reflected in the Chinese government’s allegedly inconsistent position regarding its regulation of Vitamin C exports in front of the World Trade Organisation (WTO).70 China’s submission directly contradicted previous statements it had made about its competition law to theWTO.71 It is inferred that MOFCOM’s positionwas a post hoc attempt to shield the Chinese defendants’ conduct from antitrust scrutiny.72 Being inconsistent and self-serving, MOFCOM’s statement is due limited deference.73 The lack of consistency with earlier positions is not dispositive; however, it can compromise the reliability of the litigants’ position. As Godi said: ‘In fact, when a foreign government wishes to intervene as a third party to a dispute, its objective is rather clear: self-interest.’74 Opening the door to this kind of manipulation of American lawsuits would be selfevidently unwise.75 The Court should assess the extent to which the foreign sovereign’s litigation position is consistent with the positions it has taken in earlier briefs.76

#### Foreign compulsion is an obvious defense used by lawyers worldwide.

Wu, Bangyu, LLM @ Texas, ’18, The 'Foreign Compulsion' Defense in U.S. Anti-Trust Law---A Possible Rectified Unification of its Current Divergence (April 18, 2018). Available at SSRN: https://ssrn.com/abstract=3165165 or http://dx.doi.org/10.2139/ssrn.3165165

U.S. Anti-trust law has been applied exterritorially to protect United States corporations and customers from the monopoly of foreign enterprises since the Alcoa1 case, in which the presumption against extraterritoriality was excluded and left many unsolved issues for the later courts’ practice-one of the sharp divergences among them is the “Foreign Compulsion” (or Foreign Sovereign Compulsion--FSC) defense in U.S. Anti-trust law. The statement of the defense can be quite simple: A person should not be required to comply with two contradictory orders. A foreign state has its sovereign power to regulate its individual’s actions; some of these regulations might require the individual to act in a way that violate U.S. Anti-trust law, under this situation, the individual shall not be responsible for its action because it is compelled by the foreign state.

Because the idea is so obvious and compelling, the FSC defense has been considered to be an absolute defense under the Sherman Act. 2 Without question, it is widely employed by smart lawyers all over the world, trying to circumvent the punishment of Sherman Act for their clients, yet U.S. courts, as usual, diverge sharply over the essences of this defense, shadowing great unpredictability over it.

#### Cartels will claim foreign sovereign immunity.

Ma. Joy V. Abrenica, Professor of Economics @ UPH, ’19, “Sovereign determination or disguised protectionism?: the Vitamin C Case” The Philippine Review of Economics 2019 56(1&2):147-172.

Various case laws define the conditions that could give rise to the application of sovereignty-based defences. The act of state defence is recognized when a foreign government commits an anti-competitive conduct within its territorial jurisdiction, and the conduct is related to its governmental, not commercial, function.11 On the other hand, private parties may put up a foreign sovereign compulsion defence if they were compelled by their government to commit anti-competitive conduct under threat of severe sanction. Courts admit compulsion defence out of fairness to the defendant caught between conflicting legal obligations of two sovereign states.12 Finally, international comity is the principle of recognizing within the territory of one nation the legislative, executive or judicial acts of a foreign sovereign. Such recognition leads to court abstention over those acts, after weighing the value of foreign relation against the interest of domestic consumers. Comity is considered in cases of “true conflict between domestic and foreign law”, which happens when the defendant is required by foreign law to act in a manner prohibited by domestic law, or when it is impossible for the defendant to comply with the laws of both countries.13

## ADV 2 – T/L

### 2NC – AT: Non Unique

#### International free trade and set to rebound – our evidence assumes COVID and trump.

NicoláS Albertoni and Carl Wise, Poli Sci Profs @ USC, ‘20, "International Trade Norms in the Age of Covid-19 Nationalism on the Rise?," PubMed Central (PMC), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7519384/

This special issue on nationalism and Covid-19 goes to press at a time of intense flux. The world community faces three important unknowns. The first is the Covid-19 pandemic. Among experts, there is an emerging consensus that the end of the virus will require a vaccine, which has yet to happen. In the meantime, the shutdown of borders and entire economies has quelled the spread of Covid-19 in Europe and parts of Asia. The Trump administration has refused to take similarly strict measures, haphazardly delegating responsibility to the states. Here, commitments and resources have been uneven, and US infection rates continue to surge. This delay on the part of the world’s largest economy will surely prolong the pandemic and wreak further havoc on global markets. What will the international political economy look like once the pandemic is finally under control? Are we in for another 6 months of social distancing and sheltering at home? Another year? The fact that there is no answer to these questions has wrought a level of uncertainty and insecurity on par with the Great Depression, which lasted a full decade.

The second unknown concerns the collapse of US leadership under the weight of populist-nationalist politics. Will the combination of the November 2020 US presidential election and the pandemic bring about a significant change? Under Trump, for example, the USA has withdrawn from the WHO, the Climate Change Treaty, the TPP, and the Iran deal, and the administration has repeatedly threatened to leave NATO, the WTO and the United Nations. Even those multilateral institutions to which the USA still formally belongs have suffered from cuts and delays in the usual US financial contributions. Allies and alliances are on ice, as Washington has acted unilaterally on any number of global issues. The degree of abdication has been such that a mere change in political party or a shifting majority in either house of congress may be neither necessary nor sufficient for the kind of major reset that the current juncture demands. As the prospect of a prolonged economic depression and a longer horizon on the pandemic looms, we reiterate that the world community may be looking at a set of challenges on par with those faced in the 1930s. Although the G-7, the G-20 and the OECD bloc have been hollowed out by US populist nationalism, the blueprint for cooperation and collaboration still exists.

A third unknown is the change of directorship now underway at the WTO. Our focus in this article has been on the effect of nationalism and Covid-19 on global trade norms and patterns. While the WTO has been in place for 25 years, it seems fair to say that this entity has still not taken off as a bona fide multilateral institution. We have spoken to the deadlock between North and South that derailed the Doha Round, and to the stagnation in rules, processes and procedures that has carried over from the GATT. The WTO needs better leadership, pure and simple. The futility of the US trade war on China and the damage done to cross-border production networks and GVCs has illuminated the risks of rash unilateralism within the global trade regime. In Fig. 1, we demonstrate how China has thrived since becoming a WTO member since 2001; however, in Table 2 we also see that the East Asia–Pacific region—led largely by China—has displaced North America as the source of illiberal trade policies and predatory trade practices. These asymmetries call for a coordinated collective action coalition of like-minded countries willing to hold China’s feet to the fire in following through on its earlier commitments.

In Figs. 2, ​,3,3, and ​and4,4, we see that patterns of commercial exchange and globalization have continued in spite of all the distortions that the USA, China, Brazil, India, and other large economies have inflicted on the global trade regime. The dynamic structures persist, although agency and initiative are in short supply. In terms of avenues for future research, this question of WTO reform, and how to go about it, is a crucial one. A second line of inquiry is the virus, itself. The pandemic has elicited numerous calls for studies and special issues such as this one. As we stated at the outset of this article, once it is under control Covid-19 presents the opportunity to conduct a natural field experiment that can accurately measure the full impact of the virus on the global trade regime. A third rich avenue for future research is the phenomenon of populist nationalism in the USA. Have the erratic, antiquated policies of the Trump administration done lasting damage to the image and political capital of the USA in the global community? Has the USA passed the point of no return in its ability to rally a cohesive leadership coalition and revive the spirit of multilateralism?

We argue that the destructive confluence of protectionism, nationalism and the pandemic has opened up a critical opportunity to institute real change. The question remains as to who will lead this charge and what will it look like several years down the road. As for the future of China–US relations, we take our cue from Mohamed El-Erian (2020), who writes optimistically of the possibility of a “rivalry partnership” between the two powers in the post-Trump era, “whereby healthy competition does not preclude the cooperation and shared responsibility that are critical to tackling major global challenges such as climate change and pandemics.”

#### Free trade norms high now.

Weimin Shen, L.L.M, J.S.D., Washington University School of Law, ’20, "The Role of Transnational Legal Process in Enforcing WTO Law and Competition Policy," Journal of Transnational Law & Policy 30 (2020-2021): 59-118

On the surface, it may appear that faith in Transnational Legal Process has collapsed in the domain of international trade. Critics argued that the world is experiencing a new situation where there is no international law to apply, or the existing WTO law may not precisely cover this new situation. I contend, however, that the influence of Transnational Legal Process is still at work, even as the world experiences its longest-ever trade tensions. Transnational Legal Process remains standing in good faith among the opportunities for the United States to strengthen free trade and competition-by translating the spirit and intent of existing law to govern it

### AT Balancing Now

#### International development of jurisdiction-specific competition law high now. Increased international antitrust enforcement re-popularizes the US led model.

Waller, Spencer Weber, Professor of Competition Law @ Loyola Chicago, ’20, "The Omega Man or the Isolation of U.S. Antitrust Law" (2020). Connecticut Law Review. 438.

There is a robust and ongoing conversation among governments and non-governmental experts about competition law, policy, institutions, remedies, and norms. That conversation takes place in international organizations, bilateral consultations, cooperation between agencies on individual enforcement matters, technical assistance with newer and smaller competition agencies, bar associations, industry groups, universities, think tanks, conferences, legal publications, and in legal, business, and general interest publications.485 The United States is, and should be, part of that conversation. We have a proud history and a record of great accomplishment. However, the rest of the world is less subject to U.S. pressure and less interested in U.S. recommendations that are rooted in the history and present policies of the United States if these ideas do not meet the needs of the other jurisdictions. At the same time, the rest of the world has an increasingly deep and impressive track record of enforcement, as well as legal and policy innovations of their own. If the antitrust community is going to continue to have a productive dialogue and not a series of one-way speeches, then a number of changes must occur. These changes include a recognition of difference, a greater appreciation for listening, the need for two-way learning, a recognition of the limits of deep harmonization, and a fundamentally different role for the United States on the international stage. 1. Look Before You Leap For decades, the United States has been a vigorous salesman for the principles embodied in the Sherman Act.486 It is not clear how successful it has been of late. It is also not clear why most jurisdictions should adopt a particular position or practice of the United States in their own competition law without great care and caution. The slow, complicated adoption of criminal cartel enforcement in certain jurisdictions (and rejection in others) illustrates the need to tailor concepts appropriate to one legal culture before implementation in another setting. 2. Avoid Bullying There is a significant difference between not understanding how the United States approaches a particular competition issue and fully understanding what is being advocated, but not agreeing with the proposal. The knowledge and sophistication of enforcers, practitioners, and academics around the world suggest that the latter is the case far more than the former. As Oliver Wendell Holmes once observed: “[Y]ou can not argue a man into liking a glass of beer.”487 The United States has made its case forcefully and often to the international antitrust community. It should continue to do so when it believes that the national interest so dictates. But decades into the international antitrust game, the world is now pretty much divided into those who like the U.S. beer and those who do not. There is a different model that derives from the field of community organizing of social work. In past decades, well-meaning community organizers were often the voice of oppressed or powerless communities, teaching them what they needed and how to get it. In more recent times, a newer model has emerged where the goal is not to be the voice for another community but to support them in finding their voice and be an ally as they advocate on their own behalf.488 3. Learn to Listen Perhaps it is time for the United States in the international antitrust arena to “talk less, smile more.”489 Building on the analogy from the world of community organizing, we are at, or rapidly arriving at, the point in global antitrust discourse where the United States should advocate less for what it wants and listen more to the hopes and needs of other jurisdictions and how to help them achieve their own goals. There is still an important role for the United States (and other developed jurisdictions) to play in providing technical assistance and other forms of training to the smaller, newer, and poorer antitrust jurisdictions around the world. These jurisdictions seek to enforce their laws often with minimal resources and experience. Bilateral, regional, and international fora can be a vital tool for workshops on how to do the work of competition enforcement better. But better often means actively listening to determine the needs of beneficiaries and helping them find their voice, not echoing the voice of another.

### AT – We Turn It

#### Enforcement of international antitrust requires intrusive discovery, jeopardizing reciprocal respect for US industry.

Daniel Fahrenthold, JD Candidate @ Columbia Law School, ’19, "Respectful Consideration: Foreign Sovereign Amici in U.S. Courts," Columbia Law Review 119, no. 6 : 1597-1632

2. International Discovery Rules. - Another area of U.S. law prone to draw the ire of foreign countries is discovery.193 United States discovery rules are alien to most jurisdictions, which adopt far less permissive approaches to evidence gathering by private litigants.1' Some jurisdictions resist the application of U.S. discovery rules,1 9 5 often through "blocking statutes" or secrecy laws, 196 and many governments reserve an active role for themselves in the approval or denial of discovery requests sent by U.S. litigants or courts.1 97

The United States has ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which the parties drafted with the purpose of harmonizing international discovery procedures among signatory states.1 98 The Supreme Court has determined, however, that U.S. courts are able to compel foreign parties to provide evidence in accordance with ordinary U.S. rules of discovery, rather than through the Convention procedures, even if this means overriding the foreign country's domestic law.1 99 Not surprisingly, foreign sovereigns have found this rule somewhat disturbing. The Swiss government, for instance, strongly opposed this interpretation of the Hague Evidence Convention and threatened that enforcement of U.S. discovery rules would jeopardize the future of Swiss compliance with the Convention.2 0 A decision to ignore a country's blocking statute or secrecy law and order discovery is subject to a balancing test, however. The Court has emphasized the importance of looking at the extent to which compliance with discovery would undermine the interests of the foreign state involved (as well as where noncompliance with discovery would under-mine important interests of the United States);201 this factor "directly addresses the relations between sovereign nations."202 Foreign sovereigns often enter amicus briefs to resist discovery orders and to underline the importance of their government interests in the litigation. 203 A court's ruling that gives weak deference to foreign sovereigns in this area risks upsetting the foreign government and jeopardizes reciprocity in international discovery rules. 204 A court's disregard of arguments pertaining to foreign criminal law might also, not unlike McNab, leave those subject to U.S. discovery orders stuck between the threat of foreign prosecution and contempt orders from U.S. courts.

#### The result is the reversal of regulatory harmonization, coordination and cooperation. That independently takes out case solvency by making enforcement impossible.

Weimin Shen, L.L.M, J.S.D., Washington University School of Law, ’20, "The Role of Transnational Legal Process in Enforcing WTO Law and Competition Policy," Journal of Transnational Law & Policy 30 (2020-2021): 59-118

Concerns, however, may arise in the case of export cartels with similar effects. For example, suppose authorities in these importing jurisdictions are unable to cooperate effectively in investigating cartels. In that case, their investigative efforts may not easily yield necessary evidence on the producers' conduct in exporting jurisdictions. 60 Multiple jurisdictions may repeat the same investigative steps, resulting in extra costs for business subject to investigations. 61 Meanwhile, cooperation with the authorities of those jurisdictions may be hampered by the fact that they may not perceive an immediate interest in tackling the cartel if it does not create harmful effects for the national economy. 62 Some countries specifically exempt "export cartels" from competition law, while many others will only investigate cartels if there are adverse effects within their jurisdictions. 63 Some international cartels may be beyond the effective reach of the laws in the countries where they have their most pernicious effects.64 According to the Organization for Economic Co-operation and Development ("OECD") report, most countries in which violations occur may not have access to the evidence necessary to determine the guilt or innocence of the parties involved. 65 Therefore, cartels may at times remain undiscovered due to lack of cooperation. Harmful cartel activity could go unpunished in these importing jurisdictions when enforcing national competition law against such cartels.

#### Unilateral application of extraterritorial antitrust law highlights US hypocrisy. Pro-development countries will backlash to the international trading system to protect national champion industry.

Waisberg, Ivo, Professor @ Catholic University of Sao Paolo, ’19, "International Antitrust Approaches and Developing Countries." Available at SSRN 3424274 (2019).

If the comity to respect or analyze the interests of other nations was an important ingredient in the extraterritorial application of antitrust laws, the harms caused by this system could be mitigated. Because of the little weight given to comity in the US, and in large extent in the EU, developing countries must seek alternative frameworks to mitigate extraterritoriality. Conversely, countries that can impose their interests through an efficient application of their laws in relation to conducts occurring elsewhere are not supporters of comity principles. This is the reason why American scholars argue in favor of abandoning comity and increasing extraterritoriality based purely on American interests.39 This makes sense from a purely unilateral point of view.

The point is that the current unilateral enforcement system, from a developing country perspective, is a one-way street. Powerful antitrust agencies can decide to enforce their laws whenever they see fit, and, like many trade measures, antitrust enforcement can be strongly influenced by political decisions. For the developing country, this will represent an overenforcement by the developed country agency. On the other hand, if the developed country underenforces its law for its national, there is nothing the developing country can do. Of course, it can be argued that underenforcement of antitrust laws by a developing country creates the need for extraterritorial measures by other agencies. Even if we agree that an underenforcement problem exists in most developing countries, it would be useful for them to fight for an international system that enables them to contest developed countries for both overenforcement and underenforcement, which is something they cannot do in the unilateral system unless a developed country decides to show some goodwill.

### 2NC – FTC Link

#### Extraterritorial application of the FTC act does get modeled – the FTC is a bad role model that poses the “central obstacle” to international competition.

Steven S. Nam, Distinguished Practitioner, Center for East Asian Studies, Stanford University, ’18, Our Country, Right or Wrong: The FTC Act's Influence on National Silos in Antitrust Enforcement, 20 U. PA. J. Bus. L. 210 (2018).

The International Competition Network's founding in October 2001, with the aim of "formulat[ing] proposals for procedural and substantive convergence" among its stated goals,5 sought to usher in a future with more cosmopolitan and coherent global antitrust enforcement. Although U.S. regulatory leadership maintained that "consistently sound antitrust enforcement policy cannot be defined and decreed for others by the U.S., the EU, or anyone else," many countries looked to the U.S. as a role model while developing their competition regimes. 6 It is ironic, then, that to this day a central obstacle to the aspired international "culture of competition" can be found in none other than the influence of the U.S.'s own FTC Act.' American antitrust priorities around the time of the legislation's passage oscillated between tempering trusts and shepherding business to further national economic strength, all towards the domestic interest. They shaped a regulatory environment that would reemerge abroad in many later developing countries.

The deepening global retreat from internationalism and free market principles in the present day, with the specter of trade wars looming, is exacerbated by nationalist competition regimes that are derivative of a U.S. model predating the modem world economy. Domestic critics of open markets often overlook the U.S.'s own past vis-A-vis protectionist governments today. Illiberal or nominally liberal, they walk the kind of dirigiste path once treaded by the American School through the early twentieth century.8 In and of itself, pure economic liberalism does not create biased regulatory forces that imbalance "open door" trade policies; they are largely the product of politics. An antecedent of today's national antitrust silo can be traced back to the U.S. political climate leading up to the FTC Act's passage.

Beneath his trustbuster image long perpetuated in mainstream discourse, 9 President Theodore Roosevelt harbored more nuanced beliefs regarding competition enforcement. They proved consistent with a nationalistic streak exhibited since the publication of his earliest book, a naval military history depicting the U.S. as a resourceful underdog.'° During his presidency, Roosevelt formed the first antitrust-focused office within the Department of Justice ("DOJ"),1 ' and a Bureau of Corporations within the newly established Department of Commerce and Labor. 12 He used these two prototype enforcement agencies as his big sticks for holding accountable corporations which had better "show that they have a right to exist." 3 Yet Roosevelt also faulted the Sherman Act's nascent application for preventing businesses from working to their potential under modem business conditions. 14 Even the leviathan trusts, after all, were American trusts. He stressed the importance of protecting the country's global competitiveness and voiced his opposition to a blanket prohibition on questionable combinations and concentration. Instead, he preferred oversight and control. 5 According to the former Federal Trade Commission ("FTC") attorney and historian Marc Winerman, Roosevelt wanted to "use a commission to supplement (or supersede) antitrust," while the firm "that 'voluntarily' accepted its regulation and obeyed [government] orders in good faith would be shielded from antitrust prosecution." 16 Consistent with Roosevelt's regulatory hedging and predilection for strong executive control, President Woodrow Wilson in 1914 signed into law the Federal Trade Commission Act ("FTC Act") that established the FTC. Wilson underscored his desire for the agency to be transparent and accountable to him, with ''powers of guidance and accommodation" meant to relieve "businessmen of unfounded fears and set them on the road of hopeful and confident enterprise.""

There is little evidence to suggest that either presidents or their legislative allies in the early twentieth century could have foreseen the ramifications of their formative roles in shaping competition regimes worldwide. American competition laws, including the FTC Act, came to serve as a template for foreign governments that freely transplanted many elements while modifying others. A cognizant DOJ and FTC issued their Antitrust Enforcement Guidelines for International Operations in 1995, stating: "Throughout the world, the importance of antitrust law as a means to ensure open and free markets, protect consumers, and prevent conduct that impedes competition is becoming more apparent."'" But these guidelines do not paint the full picture. Inspired foreign states modeled their regulatory regimes after foundations originally shaped under the auspices of Roosevelt and Wilson, both powerful executives with aforementioned hands-on preferences in matters of antitrust. At the FTC's launch, "Wilson emphasized assistance to business rather than the investigative functions highlighted in the House or the prosecutorial functions highlighted in the Senate."' 9 The language of the U.S. antitrust laws inevitably allowed leeway for presidential influence on industry-level economic direction.

All the same, the enforcers of old were watchmen for a U.S. economy which, then as now, operated within a market economy framework. Many countries that followed the United States' regulatory lead have been less beholden. As the prominent international relations scholar Michael W. Doyle confirms:

The most striking rates of growth of the post-war period appear to have been achieved by the semi-planned capitalist economies of East Asia-Taiwan, South Korea, Singapore, Japan, and now China and India. Indicative planning, capital rationing by parastatal development banks and ministries of finance, managed trade, and incorporated unions--capitalist syndicalism, not capitalist libertarianism-seemed to describe the wave of the capitalist future.

The close coordination between government and big business common to state-sponsored capitalist economies is also conducive to mercantilist thinking and dependent on the incumbent administration's economic worldview. Originating from a "historical association with the desire of nation-states for a trade surplus... whether it is labeled economic nationalism, protectionism,,,21 or the like today, mercantilism is characterized by the subservience of economy to the state and its interests, and a willingness to give home-grown business enterprises an extra competitive advantage. 22 Thus-inclined governments view international economic relations as conflicting, zero-sum, and better overseen through state-private sector coordination than left to wholly free markets.23 Nor is the mercantilist phenomenon limited to illiberal states that feature stateowned enterprises and other such overtly hybrid forms of corporate governance. As political leaders continue to promote economic growth and highlight personal expertise to justify and fortify their democratic legitimacy, an expansion of governments' coordination with the private sector has followed.24 When their major industries face dismal market conditions, countries inured to "capitalist syndicalism" per Doyle are not above protectionist adjustments at the expense of their neighbors. Together with the standard mercantilist strategies of prioritizing exports and frequent use of various non-tariff barriers to thwart competitive imports,25 selective antitrust enforcement offers another tool.

This Article contends that the FTC Act's outmoded openness to strong presidential direction, where adapted abroad, has helped detract from antitrust regulator independence. Even advanced players in the liberal international economic order such as South Korea have made use of the United States' original blueprint for unitary executive-stamped antitrust enforcement without sharing its long historical evolution of counterbalancing regulatory norms. Strong executive direction in antitrust enforcement is particularly suited to capitalist economies helmed by administrations with mercantilist policies, given their belief that the state and big business must cooperate in the face of zero-sum international competition. South Korean President Lee Myung-Bak's term (2008-2013) serves as an apt recent case study, featuring dirigiste calibration of antitrust enforcement against a backdrop of global recession. This Article examines the parallels between the FTC Act and the South Korean Monopoly Regulation and Fair Trade Act ("MRFTA") before scrutinizing the enabled silo-like enforcement patterns of the Korean Fair Trade Commission under the Lee administration. Increasingly widespread erosion of public confidence in free and competitive trade demands a better understanding of the forces preventing global convergence in antitrust enforcement, and of their roots.

#### Legally ambigious presidential removal power is unique to the FTC act, and it does get modeled.

Steven S. Nam, Distinguished Practitioner, Center for East Asian Studies, Stanford University, ’18, Our Country, Right or Wrong: The FTC Act's Influence on National Silos in Antitrust Enforcement, 20 U. PA. J. Bus. L. 210 (2018).

Section 1 of the FTC Act provides that "[a]ny Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office., 49 The removal power originates from the U.S. Constitution, which tasks the President with the duty to "take Care that the Laws be faithfully executed."5 ° The first United States Congress consequently endorsed plenary presidential power over officers appointed by the President, rejecting a legislative removal power in favor of the Senate's advice and consent.5 ' Independent agencies including the FTC were later crafted in accordance with this position. The original language of the FTC Act did not clearly distinguish between at-will and for-cause commissioner removal by the President, nor did it expressly permit or prohibit the former.

Two decades after the FTC Act's passage and in a blow to unfettered executive branch control over FTC commissioners, the Supreme Court issued the landmark decision of Humphrey's Executor v. United States. Humphrey's Executor clipped the presidential removal power by distinguishing between executive officers that could be removed at will by the President, and quasi-legislative and/or quasi-judicial officers in whose case Congress possesses the authority "to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. 54 The Court asserted that FTC commissioners belong to the latter category.5 After President Franklin D. Roosevelt had moved to fire Commissioner William Humphrey due to Humphrey's allegedly lukewarm support for his New Deal policies,5 6 the Court ruled that FTC commissioners could not be removed from their posts solely for political reasons, by virtue of their quasi-legislative and quasi-judicial status.

Humphrey's Executor remains in force today, although successive Supreme Court decisions have stressed the fine line between the independent agency's autonomy and potential extra-constitutional infringement of the President's powers under Article II of the Constitution. In Morrison v. Olson, the Supreme Court upheld a for-cause removal provision for an independent counsel performing special investigatory and prosecutorial functions. 7 However, the Morrison court emphasized that this removal limitation was allowable only because the independent counsel acted in the narrow, unusual, and limited capacity of investigating the conduct of highranking executive branch officials 8 Moreover, according to the Court, the limitation on the removal power did not unconstitutionally infringe on the President's Article II powers due to the independent counsel's direct line of accountability to the President through the Attorney General. 9 This carvedout exception came to coexist with the Court's Bowsher v. Synar decision6 " two years prior in 1986, where it had held that the Gramm-Rudman-Hollings Act was unconstitutional for empowering Congress rather than the President with the power to terminate the U.S. Comptroller General for inefficiency, neglect of duty, or malfeasance. Bowsher nonetheless noted that these terms, identical to those found in the FTC Act, "are very broad and ... could sustain removal of a Comptroller General for any number of actual or perceived transgressions.' Per the Ninth Circuit's interpretation of Humphrey's Executor, "[t]he power to remove is the power to control,, 62 and it further extrapolated from Bowsher that "the removal power need not be exercised to exert effective control, [as] the mere existence of removal authority is likely to influence behavior" 6 3-a reality as applicable to the FTC as it has been to any independent agency. In the wake of the FDR administration, the U.S. for its part benefited from a gradual development of regulatory norms discouraging excessive presidential interference with the FTC, which has contributed to a lack of removal flashpoints since. Without the luxury of time to organically foster such conventions, foreign governments inspired by the FTC Act were left to transplant the legal ambiguity of its removal power, the likes of which had so bedeviled the American judiciary.

### AT: SDGs Impact – 1NC

#### No development impact

Kareiva and Carranza, 18—Institute of the Environment and Sustainability, University of California, Los Angeles (Peter and Valerie, “Existential risk due to ecosystem collapse: Nature strikes back,” Futures, available online January 5, 2018, ScienceDirect, dml)

The interesting question is whether any of the planetary thresholds other than CO2 could also portend existential risks. Here the answer is not clear. One boundary often mentioned as a concern for the fate of global civilization is biodiversity (Ehrlich & Ehrlich, 2012), with the proposed safety threshold being a loss of greater than 0.001% per year (Rockström et al., 2009). There is little evidence that this particular 0.001% annual loss is a threshold—and it is hard to imagine any data that would allow one to identify where the threshold was (Brook, Ellis, Perring, Mackay, & Blomqvist, 2013; Lenton & Williams, 2013). A better question is whether one can imagine any scenario by which the loss of too many species leads to the collapse of societies and environmental disasters, even though one cannot know the absolute number of extinctions that would be required to create this dystopia. While there are data that relate local reductions in species richness to altered ecosystem function, these results do not point to substantial existential risks. The data are small-scale experiments in which plant productivity, or nutrient retention is reduced as species numbers decline locally (Vellend, 2017), or are local observations of increased variability in fisheries yield when stock diversity is lost (Schindler et al., 2010). Those are not existential risks. To make the link even more tenuous, there is little evidence that biodiversity is even declining at local scales (Vellend et al., 2013, 2017). Total planetary biodiversity may be in decline, but local and regional biodiversity is often staying the same because species from elsewhere replace local losses, albeit homogenizing the world in the process. Although the majority of conservation scientists are likely to flinch at this conclusion, there is growing skepticism regarding the strength of evidence linking trends in biodiversity loss to an existential risk for humans (Maier, 2012; Vellend, 2014). Obviously if all biodiversity disappeared civilization would end—but no one is forecasting the loss of all species. It seems plausible that the loss of 90% of the world’s species could also be apocalyptic, but not one is predicting that degree of biodiversity loss either. Tragic, but plausible is the possibility of our planet suffering a loss of as many as half of its species. If global biodiversity were halved, but at the same time locally the number of species stayed relatively stable, what would be the mechanism for an end-of-civilization or even end of human prosperity scenario? Extinctions and biodiversity loss are ethical and spiritual losses, but perhaps not an existential risk.

### AT: Amazon Impact – 1NC

#### Even completely unchecked deforestation takes 200 years and won’t cause extinction.

Hannah Voak 16, Assistant Ecologist, Nurture Ecology Ltd., 4/22/16, “A world without trees,” <http://www.scienceinschool.org/content/world-without-trees>

There are approximately 3.04 trillion trees on planet Earth (Crowther et al 15), covering 31% of the world’s land surfacew1. Today, for Earth day, we’re taking a look at trees. Around 15 billion trees are cut down each year. So, hypothetically speaking, it would take just over 200 years for the world’s forests to completely disappear. While this scenario is unlikely, what would be the consequences of a tree-free planet? Let’s start with perhaps the most obvious difference – oxygen concentration. A lack of oxygen? Oxygen makes up roughly 21% of the Earth’s atmosphere, but you probably know that already. What you might be surprised to find out, however, is that only half of this oxygen is produced through photosynthesis in trees and other plants on land. The other half is produced in oceans, by microscopic marine organisms called phytoplankton. The environment would not be devoid of oxygen if all trees were lost but the oxygen level would be lower. Would it be sufficient for humans to survive? In one year, a mature leafy tree produces as much oxygen as ten people breathe. If phytoplankton provides us with half our required oxygen, at current population levels we could survive on Earth for at least 4000 years before the oxygen store ran empty. However, that’s not considering a number of other factors: increasing population size, for example, would reduce the amount of oxygen available, whilst phytoplankton blooms due to an abundance of carbon dioxide could increase oxygen levels. Suffocating smog Whilst there may be enough oxygen for humans to survive on Earth, at least to begin with, the air we breathe could still be responsible for our demise. Like giant filters, trees help to cut down on pollution levels. Leaves intercept airborne particles and ozone, carbon monoxide, sulfur dioxide and other greenhouse gases are absorbed through the leaves stomata. In 2012, outdoor air pollution was estimated to cause 3.7 million premature deaths worldwidew2. Imagine the impact removing these environmental sieves would have on humankind. Air-pollution masks would become a necessity and bottled ‘clean air’ could come at a premium. Full of hot air? Armed with pollution masks, would the climate and temperature still be suitable for us? One important consideration is carbon dioxide. In one year, an acre of mature trees soaks up the same amount of carbon dioxide that we produce by driving the average car 26 000 miles. Since human activities like this increase the normal level of carbon dioxide in the atmosphere, cutting down trees would tip the balance even further, not to mention the enormous amount of stored carbon that would be released from doing so. Deforestation is already responsible for up to 15% of global greenhouse gas emissions and you might think that an overwhelming increase in carbon dioxide would result in a much warmer planet. However, the relationship between trees and global temperature is much more complicated. Energy and water fluxes between trees and the atmosphere also play a role and a tree’s colour, for example, can affect the amount of the Sun’s energy that is absorbed or reflected. Studies have shown that Europe’s trees have actually caused a slight increase in regional temperatures since 1750w3, while transpiration from plants in tropical forests cools the surface temperature. Therefore, whether the temperature becomes too hot to handle could depend on many factors, although a recent study concluded that reducing forest size increases average air surface temperatures in all climate zones (Alkama & Cescatti 16).

# 1nr – harvard r5

### AT: 7th/9th split – 1nr

#### 1 – There is not a circuit split – the Supreme Court in 2019 resolved it in favor of the Seventh Circuit and aggressively deferred to the executive – their Murray card on this is from 2017, 1NC Zhang is from 2019 and speaks to the circuit split!

Angela Huyue Zhang, Associate Professor of Law, University of Hong Kong, ’19, "Strategic Comity," Yale Journal of International Law 44, no. 2

In April 2017, the plaintiffs filed a petition for certiorari to the Supreme Court, asking the Court to clarify, among others, two important issues. The first issue presented concerned the level of deference given to a foreign government's interpretation of its own law-specifically, whether a U.S. court should give conclusive deference to a foreign government's interpretation of its own law if the government has appeared in court.160 The second issue presented concerned the longstanding split among circuit courts in how to apply the international comity doctrine. In this case, the Second Circuit applied the balancing test adopted by the Ninth and Third Circuits, selecting the test over different versions employed in other circuits.161 On June 26, 2017, the Supreme Court invited Acting Solicitor General Jeffery Wall to file a brief expressing the views of the United States in the Vitamin C Case.162 The U.S. Solicitor General and the Department of Justice subsequently submitted their amicus brief to the Supreme Court in November 2017, arguing that the Second Circuit had erred by treating MOFCOM's statements as conclusive. 163

#### 2 – Our counterplan solves it because it fiats increasing deference to the executive.

### AT: no internal link – 1nr

#### Yes internal link – the counterplan invites a flood of litigation post-plan that ensures the Court further restricts deference to the executive in foreign affairs. AND, the signal of even a single case is sufficient – it signals that the executive and the Court are diverging on foreign policy, which muddles U.S. leadership.

#### Plan’s ruling spills over beyond antitrust.

Qingxiu Bu, Commercial Law @ University of Sussex, formerly professor of transnational business @ Georgetown Law Center, ’20, ‘“Respectful Consideration, but Not Deference: Chinese Sovereign Amici in the US Supreme Court Vitamin C Judgment” Journal of European Competition Law & Practice, Vol. 11, No. 5–6

2. Impact on Chinese MNCs’ behavioural change

The weight the US court should give MOFCOM’s views is pivotal to determining whether the Vitamin C manufacturers can escape liability for their anticompetitive conduct.193 The case has set the ground rules for a broad range of cross-border disputes.194 The implications of the Supreme Court’s decision reach well beyond the confines of antitrust doctrine.195 The ruling will have far-reaching implications on many other cross-border disputes, since similar issues of foreign deference in Vitamin C always arise in a wide context. Vitamin C sheds light on the Supreme Court’s stance on the application of the doctrine of international comity.196 Such presumption of jurisdictional obligation applies squarely to other kinds of transnational litigation as well.197 It does not necessarily mean that the adoption of respectful consideration would increase the exposure of Chinese firms to US liability. The decision is likely to have an enormous impact on the way Chinese MNCs make business decisions on their access to the US markets.

#### Particularly, to trade law.

Daniel Fahrenthold, JD Candidate @ Columbia Law School, ’19, "Respectful Consideration: Foreign Sovereign Amici in U.S. Courts," Columbia Law Review 119, no. 6 : 1597-1632

Although the proper balance between executive and congressional control over trade policy has come under question in recent years,1 85 the President, not the courts, has traditionally been considered the main arbiter of trade policy since at least the mid-twentieth century. 8 6 Because antitrust and trade law are interconnected, 187 courts may create unintended ramifications in trade law as a result of their judgments in antitrust contexts if the respectful consideration standard remains so open ended. Any administration undoubtedly retains the authority to align U.S. trade policy as it wishes, but should courts be perceived as part of a general effort, alongside the political branches, to combat the "predatory" trade policies of particular countries, 188 this may serve to undermine the legitimacy of U.S. courts as independent and unbiased in some countries' views.1 89

#### A single court-ruling can trigger international trade disputes. Countries respond to US antitrust cases tit-for-tat. That’s Bu and

Daniel Fahrenthold, JD Candidate @ Columbia Law School, ’19, "Respectful Consideration: Foreign Sovereign Amici in U.S. Courts," Columbia Law Review 119, no. 6 : 1597-1632

1. U.S. Trade Policy. - The United States' international trade policy is one area in which the risks of disregarding foreign sovereigns, and the corresponding importance of deference to their submissions, are plainly illustrated. Extraterritorial application of U.S. antitrust law attracts foreign sovereign amicus submissions more than perhaps any other body of law,' 77 and it is closely connected with the trade policies of both the United States and foreign countries.1 78

As Animal Science Products itself demonstrates, antitrust law can be treacherous grounds for courts applying foreign law. Since Hartford Fire, antitrust law has frequently been applied extraterritorially, a move that many countries find distasteful. 79 Foreign sovereigns often become involved in order to protect domestic industries from treble damages, an "internationally contentious" practice in U.S. antitrust cases,180 or simply to resist interference with their own competition law. The foreign sovereign compulsion defense to antitrust liability leads foreign governments to submit arguments based on their own domestic law,181 as was the case in Animal Science Products. A foreign government has a natural incentive to protect its industries when they are targeted in antitrust cases given that, in order to have become the target of antitrust litigation in the first place, defendant corporations must be successful outfits in their country of origin almost by definition." 2 Thus the risk of offending foreign sovereigns becomes acute when that sovereign has entered an antitrust case to make its views and interests known.

These concerns are heightened in the current atmosphere around international trade, as the issue has moved into the political mainstream in many countries. As tit-for-tat trade disputes arise between the United States and countries around the world,' 8 ' the possibility exists that a court judgment can serve as the trigger for an unintended trade dispute. Under the respectful consideration standard, even if a foreign sovereign strenuously objects to ongoing litigation, no great weight is given to the possibility of setting off an international incident; that concern is just one factor among many, if it is one at all.' 84

### AT: plan solves tradeoff – 1nr

#### This card is about DOJ resources and letting private litigants fill in – that is an answer to the DOJ tradeoff DA but not this one because our argument is that any ruling spills over to broadly restrict deference and creates divergence between the Court and the executive.

### AT: no case flood – 1nr

#### 1 – Answered by the spillover cards I read above.

#### 2 – This is about antitrust cases – our evidence indicates that the plan causes litigation against the executive outside of the context of antitrust.

### AT: PQD dead – 1nr

#### 1 – PQD is fine in this area – our evidence says the Court copy-pasted the executive’s opinion in its 2019 decision.

#### 2 – This card is speculative – says Zivotovsky could be read as destroying the FTC and author expects Trump to treat it as such, only our evidence speaks to what actually happens.

#### Numerous other rulings confirm – courts defer because lack the capacity to balance their rulings with international diplomacy.

Daniel Fahrenthold, JD Candidate @ Columbia Law School, ’19, "Respectful Consideration: Foreign Sovereign Amici in U.S. Courts," Columbia Law Review 119, no. 6 : 1597-1632

The judiciary does not manage the country's foreign relations. 5 2 For this reason, the courts have adopted a number of doctrines to avoid entangling themselves in foreign affairs. International comity counsels courts to approach cases "touching the laws and interests of other sovereign states" in a "spirit of cooperation."1"5 3

The courts have expressed reluctance to pass judgment on questions of foreign relations. The Supreme Court conceded in Banco Nacional de Cuba v. Sabbatino, for instance, that courts are "hardly. . . competent to undertake assessments of varying degrees of friendliness or its absence" in relations between the United States and other countries. 5 4 In Empagran the Justices questioned the petitioners' counsel as to how they could determine which approach to U.S. antitrust law would be "consistent with not antagonizing our allies."155 When the petitioners' counsel directed the Court's attention to the seven foreign sovereign amicus briefs filed by some of the United States' most significant trading partners,' 5 6Justice Scalia expressed dissatisfaction, wondering what the positions would be of "other partners who have not been heard from"15 7 and whether they would accord with the views of those states which had filed with the Court. Distant as they are from the bodies responsible for conducting U.S. foreign policy, courts have traditionally declined to make decisions that may harm the United States' relations with foreign powers absent more direct guidance.

The impact the courts can have on U.S. foreign relations is not merely hypothetical. The Supreme Court's decisions in Breard and Sanchez-Llamas have brought wide condemnation from the international community for failing to recognize individual rights under the Vienna Convention on Consular Relations and the procedural safeguards necessary to protect those rights.1 58 In McNab, the Honduran government argued that the court's reinterpretation of Honduran law would "dramatically harm the trading relationship between Honduras and the United States" and could "only result in distrust that will produce less cooperation and less trade overall." 159 And the Chinese Ministry of Commerce in its amicus brief to the district court in Vitamin C I directly threatened that, if the court found jurisdiction, "[i] t cannot be denied that the possibility of insult to China is significant."' 60 By lodging an amicus brief with the court in the first place, the foreign sovereign is unequivocally demonstrating that it takes a special interest in the outcome of the litigation. While some judges have argued that to decide cases based on the opinions of foreign sovereigns is itself "conducting foreign policy," 161 the distinct possibility remains that a co decision can easily have unintended foreign policy implications-especially one imposing $147 million in damages, as in Vitamin C 1.162

#### Overall trends outweigh isolated hiccups – the judiciary is moving towards greater deference.

Angela Huyue Zhang, Associate Professor of Law, University of Hong Kong, ’19, "Strategic Comity," Yale Journal of International Law 44, no. 2

In this Article, I attempt to draw. upon the insights from game theory to unravel the complicated dynamics between the importing and exporting country in export cartel cases. In deciding on how to respond to State-led export cartels, the United States does not act alone. Its choices closely interact with the decisions of the exporting country, whose conduct implicates the interests of the United States. The optimal strategy of the United States is contingent on the strategy of the exporting country, whose strategy is also dependent on both the United States' and its own domestic politics and trade policy. Accordingly, the United States' best response to a State-led export cartel not only turns on a calculation of its own payoffs from competition, trade, and politics, but also on a careful assessment of the strategic moves of the exporting country. Comity analysis, therefore, needs to be robust enough to accommodate and adapt to changing economic and political circumstances.

However, much of the judicial response to State-led export cartels has been static, and judges have failed to appreciate the dynamic features of these cases. Judges have also tended to fix their attention on the factual issue of compulsion, while giving inadequate consideration to other dimensions, such as trade and politics. But whether a U.S. court should abstain from exercising its jurisdiction and defer to the interests of the foreign sovereign should depend on the specific circumstances of the particular case, taking into consideration the interests of all players involved, while recognizing the strategic nature of their decisionmaking. Because the executive branch is in the best position to reconcile competing interests, I contend that U.S. courts should accord a high level of deference to the executive branch in cases involving State-led export cartels. The Supreme Court's recent decision in the Vitamin C Case, in which the Court appears to have accorded deference to the executive branch, offers a prime example of a pragmatic judicial resolution of such cases. Viewed in this light, the Supreme Court's decision not only represents a major step forward in clarifying the existing case law on export cartels but also signals the judicial trend towards deference with regard to future comity-related cases.

### AT: not k2 wto – 1nr

#### Courts trample on delicate executive strategy – empirics prove courts may take positions that undermine the US’s case in the WTO.

Michael Sohn and Jesse Solomon, attorneys with the firm of Davis Polk & Wardwell LLP. Mr. Sohn is a former General Counsel of the Federal Trade Commission, ’13, “Lingering Questions on Foreign Sovereignty and Separation of Powers After the Vitamin C Price-Fixing Verdict” Antitrust, Vol. 28, No. 1, Fall 2013.

The Vitamin C case has potentially expansive implications for how the U.S. antitrust laws do and should interact with executive branch and foreign interests on international trade. While courts have discretion to interpret the laws of foreign sovereigns, one issue raised by the case is how that discretion should be exercised when a duly authorized representative of a foreign government represents directly to a court that it has compelled the actions being challenged under U.S. law. Where the United States has diplomatic and trade relationships with that government, the potential im - pact on foreign relations and trade arguably should weigh heavily in the exercise of the court’s discretion. Relatedly, the district court has entered a judgment that is at least in tension with the executive branch’s position, posing a second question about separation of powers: that is, whether the judiciary’s application of the U.S. antitrust laws should defer to the executive branch’s positions on foreign trade.

#### Court abstention forces WTO dispute resolution instead of unilateral jockeying.

Ma. Joy V. Abrenica, Professor of Economics @ UPH, ’19, “Sovereign determination or disguised protectionism?: the Vitamin C Case” The Philippine Review of Economics 2019 56(1&2):147-172.

The US understandably has the right to assert its jurisdiction over conduct that harms its own consumers, even if a foreign government openly approves such conduct. While comity is a valid defence in antitrust cases, it is not a principle of international law; therefore, its application is voluntary. Consequently, the US could treat a sovereign compulsion defence as sui generis, specific to a trading partner or market context.

Yet, comity exists to prevent one state from overzealously applying its own laws (and norms) to conduct that takes place within the borders of another state. By heeding comity, a state does not authorize or encourage a foreign state or its private parties to violate domestic laws. Rather, the exercise of comity is an act of according respect and proper consideration to policy choices made by another state. Court abstention to adjudicate whenever valid sovereignty-based defence exists is not an abdication of jurisdictional authority. Rather, it makes room for diplomacy, which eventually may compel states to address regulatory differences at the multilateral level. Meanwhile, in the absence of multilateral rules on competition enforcement, if courts align their opinions in favor of comity, antitrust cases may have to be resolved using a trade framework within a WTO dispute settlement system. This is not the first-best solution, since it is inferior to a multilateral agreement on competition policy. But it is certainly preferable to a unilateral enforcement that will likely increase tension between the two economic behemoths whose relation is already strained by past neglect of diplomacy.