# 1NC

## OFF

### t prohibit

#### 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 – “alternative fora” makes the plan conditional.

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

### t exemptions

#### The scope of antitrust law is exclusively bounded by exemptions and immunities

Kruse et al. 19, Layne E. Kruse, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Expand’ must make more expansive---NOT merely clarify existing principles

Terry J. Hatter, Jr. 90, Judge, US District Court, California Central, “In re Eastport Assoc.,” 114 B.R. 686, Lexis

[\*\*10] Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would expand the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The AFF just intensifies the application of antitrust to already covered activities---it does NOT curtail an exemption or immunity

#### Vote NEG---eliminating exemptions and immunities provides a limited AND predictable basis for prep, and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity

### executive cp

#### The United States federal judiciary should defer to the executive’s position on whether activities by private cartel practices in cases where foreign plaintiffs cannot secure adequate relief in alternative fora 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 said private cartel practices 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.

### china da

#### 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.

### protectionism da

#### 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.

#### 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.

### ptd cp

#### The United States federal government should find, in cases where foreign plaintiffs cannot secure adequate relief in alternative fora, allowing continuation of anticompetitive practices is an abdication of core public trust responsibilities.

#### Using public interest justifications for anti-monopoly regulations without expanding core antitrust law solves unfair competition

Farah and Otvos 18 – Paolo Davide Farah  is the University Professor at the University of West Virginia. Research Associate at gLAWcal, Master Candidate at College of Europe in Bruges and EU commission  (Competition Law and Trade in Energy vs. Sustainable Development: A Clash of Individualism and Cooperative Partnerships? (June 26, 2018). Competition Law and Trade in Energy vs. Sustainable Development: A Clash of Individualism and Cooperative Partnerships? 2018, Arizona State Law Journal, Vol. 50, No. 2, 2018, pp. 497 – 513, Available at SSRN: <https://ssrn.com/abstract=3227777>) //gcd

For the same reasons, since environmental protection and sustainable development are specific areas of public interest, the approach to antitrust issues should also be adequate to these features as to other social objectives and effects.38 This means that a different balance structure should be applied to assess all the factors in play—including sustainable development, the environmental protection and the fight against climate change—when it comes to determining whether there has been a distortion of competition on a particular product market. This structure should be framed with a higher tolerance for subsidies when their main scope is to effectively support the usage of innovative green technologies during the production and the trading of eco-friendly products. In particular, when it comes to assessing the adverse and damaging effect of environment-focused aid39 generally granted to private companies based on competition law and free market mechanisms, these requirements should step aside, and endure a higher range of limitation for sustainability purposes,40 as for other NTCs.41 As it has been pointed out before, the main goal of the WTO anti-dumping and countervailing regulations is to protect domestic companies from what we can define in general terms as unfair competition, even though competition law is not part of the WTO Agreements. In the framework of the WTO dispute settlement understanding, the decision—whether a subsidy, state aid, or other financial support distorts competition, harms domestic producers, or negatively influences the free market in any other way—should be based not merely on the level of such adverse effect. On the contrary, this decision should be based on the benefits—whether the particular subsidized good provides for sustainable development, and should not be considered in conflict with the WTO case law on extraterritorial effect. In WTO cases like United States—Tuna and Tuna Products from Canada, 43 the Tuna/Dolphin Case I44 and the Tuna/Dolphin Case II of 2011 (“Dolphin-Safe”),45 the principles of extraterritoriality and the extraterritorial effect were examined with a gradual evolution that started in the first two disputes with a very narrow interpretation, stating that a given State’s regulations cannot be enforced in another State’s jurisdiction on the basis of international trade rules under the general exceptions of Article XX of the GATT. According to Article XX of the GATT, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: “necessary to protect human, animal or plant life or health” or “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”46 In the last dispute, Dolphin-Safe, 47 which was actually adopted after the creation of the WTO and after the inclusion of the WTO Preamble, the interpretation favored measures that have the sole objective of protecting the environment and promoting sustainable development. It remains to be seen whether this last interpretation of the extraterritoriality principle will be consistently applied in the future to trade measures adopted for promoting sustainable development, for the protection of the environment, human rights or other areas of NTCs. Simply, sustainable development should be constantly maximized, while proportionally maintaining the basic mechanisms of the market without excessive protectionist tendencies. To sum it up, there needs to be a considerate balance when anti-dumping, subsidy and antitrust cases48 are assessed to include as an additional and important criterion the positive or negative impact of these practices on sustainable development.

#### Ruling on PTD over antimonopoly issues reinvigorates the doctrine

Moses and Blumm 17 – Aurora Paulsen Moses is a faculty member of Vermont Law School. Michael C. Blumm. Lewis & Clark Law School. Professor of Law ("The Public Trust as an Antimonopoly Doctrine." Boston College Environmental Affairs Law Review, vol. 44, no. 1, 2017, p. 1-54. HeinOnline.)//gcd

The Supreme Court of Pennsylvania affirmed the lower court's ruling invalidating provisions of Act 13 that preempted local ordinances, but a plurality of the court did so on PTD grounds . The plurality decided that Pennsylvania's constitutional public trust required the state "to prevent degradation, diminution, and depletion of our public natural resources, which it may satisfy by enacting legislation that adequately restrains actions of private parties likely to cause harm to protected aspects of our environment." 315 Con trary to that public trust directive, the statute's goals were not to "effectuate the constitutional goal to protect and preserve Pennsylvania's natural environment," but instead to "provide a maximally favorable environment for 11316 industry operators to exploit Pennsylvania's oil and gas resources .... As the plurality explained: The public natural resources implicated by the "optimal" accommodation of industry here are resources essential to life, health, and liberty: surface and ground water, ambient air, and aspects of the natural environment in which the public has an interest. As the citizens illustrate, development of the natural gas industry in the Commonwealth unquestionably has and will have a lasting, and undeniably detrimental, impact on the quality of these core aspects of Pennsylvania's environment, which are part of the public trust.... By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse.... Consequently, the court struck down Act 13's preemption of local zoning requirements as unconstitutional, although only a plurality thought that the law had violated the public trust provision in the state constitution. The plurality saw the law's prohibition of new zoning ordinances as inconsistent with the PTD because it prevented local governments from protecting vulnerable trust resources in local neighborhoods.31 9 Chief Justice Castille explained that the effect of Act 13 was to impermissibly harm the properties and communities most affected by the environmental hazards associated with fracking. 3 20 As he declared, "[t]his disparate effect is irreconcilable with the express command that the trustee will manage the corpus of the [public] trust for the benefit of 'all the people.' A trustee must treat all beneficiaries equitably in light of the purposes of the trust., 3 21 Underlying Robinson Township is a strong antimonopoly sentiment affirming local community control over privatization of natural gas resources affecting groundwater. As these decisions illustrate, restraints on government alienation of public resources, first established in Illinois Central, remain alive and vibrant.322 As in Illinois Central, alienation restraints protect public access to trust resources, preventing private monopolies that would interfere with public use.323 They also require public oversight for private uses of trust resources to ensure against unnecessary degradation that harms the public. The American PTD is rooted in long-held antimonopoly sentiment. From its inception in U.S. law in the early nineteenth century, the doctrine has protected the public against state attempts to create private monopolies over natural resources, beginning with oyster harvesting in tidal waters and soon extending inland to navigable waters and wildlife .324 In the United States Supreme Court's seminal decision of Illinois Central Railroad v. Illinois, the Court held that the PTD prevented the state from sanctioning private monopolization of Chicago Harbor, thus preserving the harbor and lakefront for present and future public use.325 Ensuing case law invoked the PTD to combat private threats to other important natural resources, including non-tidal and traditionally non-navigable waters, as well as wildlife and upland resources like beaches and parklands.326 Courts are now being asked to consider antimonopoly protection for additional public resources, including groundwater and the atmosphere .327 The PTD found footing in American jurisprudence nearly two centuries ago.3 28 Although commentators have written extensively about the doctrine's development and significance,329 the antimonopoly roots of the PTD have not been closely examined. Public trust advocates seeking to enforce or expand the scope of the doctrine should ground the PTD in its deep antimonopoly origins, which help to clarify the basis of the widespread sentiment that certain natural resources have public values too significant to be subject to exclusive private control.

#### Flexible PTD resolves ecological existential threats

Harms 16 – J.D. from the University of California, Davis School of Law  (RLG, Preserving the Common Law Public Trust Doctrine: Maintaining Flexibility in an Era of Increasing Statutes, https://law.ucdavis.edu/centers/environmental/files/Doremus%20Writing%20Winners/2015LaGrandeur.pdf)//gcd

Looking to the future, academics, practitioners, and environmental advocates herald the public trust doctrine as one of the greatest tools we possess to help create new protection for natural resources that currently lack sufficient safeguards.64 Applying the public trust doctrine to the atmosphere and to groundwater are examples of contemporary expansions of the public trust doctrine. A team of academic professionals and a handful of trial and appellate courts65 are pushing the boundaries of the public trust doctrine in their attempts to establish an atmospheric trust to help address climate change.66 One of the leaders of this effort is Mary C. Wood, a professor at University of Oregon School of Law. In an essay concerning the atmospheric trust, Professor Wood explains the concept: As a legal doctrine, the public trust compels protection of those ecological assets necessary for public survival and community welfare. Courts have recognized an increasing variety of assets held in public trust on the rationale that such assets are necessary to meet society’s changing needs. The essential doctrinal purpose expressed by courts in these public trust cases compels recognition of the atmosphere as one of the crucial assets of the public trust. The public interests at stake in climate crisis are unfathomable leagues beyond the traditional fishing, navigation and commerce interests . . . . Atmospheric health is essential to all civilization and to human survival across the globe.67 Note how Professor Wood emphasizes the doctrine’s evolutionary nature. She draws on this to argue that the public trust doctrine is capable of expanding to include the atmosphere, and, therefore, to help combat climate change. Many people also hope to expand the public trust doctrine to include groundwater. In fact, in 2000 the Hawaiian Supreme Court held that the state’s public trust doctrine applied to groundwater.68 In California, however, the effort to expand the public trust doctrine to include groundwater has proven more challenging.69 The California Court of Appeal declined to apply the public trust doctrine to groundwater because of groundwater’s lack of connection to navigable waterways.70 This lack of connection is widely recognized as legal fiction (meaning, in reality there is a well-documented hydraulic connection between groundwater and surface water), but one the courts honor nonetheless.71 However, California Governor Jerry Brown signed a package of bills—AB 1739, SB 1168 and SB 1319—that are beginning to help dissolve this legal fiction by linking surface water and groundwater.72 AB 1739 states, “Sustainable groundwater management in California depends upon creating more opportunities for robust conjunctive management of surface water and groundwater resources.” 73 Prior to these bills, the legal fiction that groundwater and surface water were not connected acted as a barrier to efforts to apply the public trust doctrine to groundwater. With the help of these bills, the public trust doctrine now stands at the ready—flexible and capable of expanding to include groundwater, should a court be willing to take that step. Efforts to expand the public trust doctrine to include the atmosphere and groundwater are concrete examples of how people rely on the flexibility and evolutionary nature of the public trust doctrine to assist them in their quest to create additional protections for natural resources. These examples demonstrate the hope many people place in the public trust doctrine’s ability to assist us in a future where pressure placed on our limited natural resources will only increase. But rather than rely on being able to invoke the public trust doctrine in the future, it is critical to pause and evaluate whether the evolution of the doctrine will result in a version that is indeed capable of accomplishing what many hope it will.

### cil cp

The United States federal government should substantially increase its prohibitions on anticompetitive private cartel practices in cases where foreign plaintiffs cannot secure adequate relief in alternative fora by expanding the scope of its interpretive obligations under customary international law.

#### Competes and solves – it renders the same conduct equally unlawful but expands CIL rather than antitrust statute. That signals U.S. adherence to international economic law.

Banks ’12 [Ted; 2012; Scharf President, Compliance & Competition Consultants; Denver Journal of International Law & Policy, “40th Anniversary Edition: The International Law of Antitrust Compliance,” 368]

Introduction

It was not so long ago that the concept of international criminal law was an idea with which lawyers struggled. In 1987, Ved Nanda and M. Cherif Bassiouni put together what may have been the first one-volume compendium of information on antitrust, securities, extradition, tax, and other subjects that made up the developing area of international criminal law. Today, it is well-accepted that there are certain standards of behavior that are the norm in practically all nations, and through national laws and multinational treaties, these principles are entering the realm of customary international law.

Developments in the area of competition law, or antitrust as it is known in some countries, have been particularly dramatic. Countries understand that the encouragement of competition is a key to economic development, and national laws have been enacted where they did not exist before, along with enforcement cooperation agreements among increasing numbers of countries. 1 Enforcement of criminal antitrust laws takes place against both individuals and businesses, 2 and while it is clear that there are situations where business entities must be held responsible for actions of their employees, there are other situations where the intent of the corporation may be contrary to the actions of the employee. Throughout the world, in competition law, as well as in other areas of law, there is a consensus that it is appropriate for companies to adopt compliance and ethics programs to utilize management techniques to foster compliance with law. So, as standards of corporate [\*369] conduct become more universal, they reflect adherence to what is essentially an international law - the international law of competition. At the same time, more national authorities recognize that companies are expected to have compliance programs, and that a bona fide compliance program reflects a corporate intent not to violate the law, and therefore should be a positive factor in how authorities treat such companies, including as a mitigating factor for any penalty that might be imposed based on the ultra vires act by an employee.

It is well accepted that compliance and ethics programs are an expected part of corporate activity, and while no program can always guarantee human behavior, these programs do work to mitigate violations of law. Indeed, it can be said that it is now a standard for companies to have compliance programs or at least some elements of such programs such as codes of conduct. We submit that this growing recognition of the purpose of compliance and ethics programs has reached broad-based acceptance and should now be recognized in the competition law field by the United States and other governments as a standard of international law.

The Concept of Organizational Liability

Under many legal regimes, a corporation cannot be criminally punished for the actions of its employees, and until relatively recently (at least if you consider a century relatively recent), under the common law, a corporation was viewed as a legal fiction, 3 which could not be held liable for the criminal conduct of its employees. In the United States, it was not until 1909, in New York Central & Hudson River Railroad v. United States, 4 that the Supreme Court ruled that because the great majority of business transactions were conducted by corporations, it was time to abandon the "old and exploded doctrine" that a corporation was not indictable. 5 The Court reasoned that, as a matter of public policy, because a corporation could be held civilly liable, criminal liability should also follow. 6

This concept of corporate liability has been extended to the point where the business is often held liable for acts of employees even if the [\*370] company was not aware of the violation, 7 prohibited the conduct that led to the violation, 8 or there was no actual benefit to the corporation through the acts of the employee. 9 So even if none of the three justifications for corporate liability are present, i.e., knowledge, benefit, or authority, corporate liability for the acts of an employee - in addition to the liability of the employee - may still be found. A number of reasons have been given for this approach, but a consistent argument is that this type of liability will have an in terrorem effect on the corporation and force the entity to make certain that employees obey the law. 10 As a practical matter, it also reflects the reality that employees working through a corporation, whether or not their actions are authorized, can cause harm far beyond the abilities of one person. Therefore, according to this line of reasoning, it is appropriate that the entity be punished criminally (and pay civil damages).

The usual rule in the United States and other common law countries is that a corporation is liable for acts of agents and employees acting within the scope of their employment and, in most cases, with the intent to benefit the company. 11 This approach derives from the common law doctrine of respondeat superior, which held that a master is generally liable for the actions of servants, but may escape liability if the servant acts outside the scope of employment (i.e., takes action for [\*371] which there is no actual or apparent authority). 12 The concept of apparent authority, the authority that outsiders would normally assume the agent to possess judging from his or her position in the company and the circumstances surrounding previous instances of conduct, is often the foundation for a finding of corporate liability. 13 Employees are assumed to be acting within the scope of their employment 14 if they are doing acts on the corporation's behalf in the performance of their general line of work. 15 An agent must be "performing acts of the kind which he is authorized to perform, and those acts must be motivated - at least in part - by an intent to benefit the corporation." 16 It is not necessary that the acts actually benefited the corporation, only that they were intended to do so.

The court decisions and statutes that led to these multiple bases for finding enterprise liability grew up in an era where there was recognition of the power of the "faceless" corporation and the need to control its activities. Courts would impute knowledge or intent to the corporation, even where there was no benefit to the enterprise by the wrongful acts of the employee and the activities did not benefit the corporation, although some courts are willing to consider whether the violation was foreseeable. 17 In other situations, liability might be imputed to a corporate officer or director for failure to exert their authority to ensure that the corporation (i.e., acting through employees) did not do wrong. 18

But it is also an inescapable fact of our human existence that people are fallible, and that in some cases people will ignore instructions and do things that they were expressly forbidden to do. By holding a corporation liable for virtually anything that any employee does, a situation of strict liability is created that may, in fact, be outside the scope of many laws that require an intent to violate the law. [\*372] Notwithstanding the desire to control the power of the corporation, there are limits to what it can do. The efforts of the corporation to control the actions of employees are a valid consideration in determining whether the corporation should be held liable for the actions of an employee, as was noted in the instructions to the jury after the trial of Arthur Andersen in connection with the Enron debacle:

If an agent was acting within the scope of his or her employment, the fact that the agent's act was illegal, contrary to the partnership's instructions, or against the partnership's policies does not relieve the partnership of responsibility for the agent's acts. A partnership may be held responsible for the acts its agents performed within the scope of their employment even though the agent's conduct may be contrary to the partnership's actual instructions or contrary to the partnership's stated policies. You may, however, consider the existence of Andersen's policies and instructions, and the diligence of its efforts to enforce any such policies and instructions, in determining whether the firm's agents were acting within the scope of their employment. 19

The key here is "diligence." Was a compliance program something that existed only on paper, 20 or were there indicia of sincerity on the part of the corporation that showed that it legitimately tried to enforce its policy of compliance? The diligence of the corporation in enforcing its policy should be a key factor in determining if it is the kind of program that should entitle the corporation to some measure of mitigation from legal penalties imposed as a result of the actions of an employee that disobeyed the policy. 21

[\*373] Competition law imposes certain standards of behavior that are accepted because of an understanding that society benefits from competition. Therefore, in most cases, cartels are prohibited, as is abuse of market power or dominance. There is a recognition in many areas of law that transparency is beneficial, and thus bribes or secret rebates are prohibited for their disruptive impact on competition, as well as their inherent corruptness.

But how do these standards become accepted? It is not sufficient only to implement national laws and multinational agreements. Enforcement authorities recognize that there must also be private action to enforce policies within corporations and to demonstrate that noncompliance with law will not be tolerated. As will be discussed below, there are benchmarks of what is an "effective" compliance and ethics program that have received broad-based acceptance. Standards of international competition law cannot have their desired impact without international standards and efforts for compliance. Companies need to be able to know that what they do to implement compliance standards does matter so that they will make a diligent effort to prevent cartel behavior from happening. If a company has taken serious action to enforce its standards, such as by discharge of employees who violate the law, 22 this level of corporate compliance, which is expected by enforcement authorities, should be recognized when deciding how to treat corporations, including charging and penalty decisions.

So, there is a combination of factors at work here. Competition law standards are virtually universal in their acceptance. 23 To get those standards to actually be implemented by corporations, there need to be corporate compliance and ethics programs in place. Standards of culpability recognize that factors such as intent, knowledge, and benefit are relevant to findings of corporate liability. A number of countries do specifically encourage compliance and ethics programs, including in the antitrust area. 24 Therefore, this growing, worldwide acceptance, combined with universal necessity, has established an international law not just for antitrust, but for antitrust compliance. The countries that do not formally recognize the value of bona fide compliance programs as relevant to corporate liability, perhaps seduced by the possibility of collecting huge fines from a corporate piggy-bank, are out-of-step with the reality of what is necessary to truly promote the principles of competition law.

#### U.S. commitment prevents the disintegration of international economic law – extinction.

Arcuri ’20 [Alessandra; 2020; Full Professor of Inclusive Global Law and Governance at the Erasmus School of Law, Journal of International Economic Law, “International Economic Law and Disintegration: Beware the Schmittean Moment,” vol. 23]

Introduction

There was a time when national sovereignty was out of fashion. In the nineties, international lawyers were engaged in imaging the global order beyond the nation-state. Theories to make this order possible were proliferating: from Global Administrative Law to global constitutionalism.1 International Economic Law (IEL) played an important role in the journey toward the global order. Our markets could be integrated through an almost brand new organization, the World Trade Organization (WTO). The WTO was created and endowed with a powerful set of new agreements, promoting the harmonization of health and safety law—through the Sanitary and Phytosanitary (SPS) Agreement—and technical regulation—Technical Barriers to Trade (TBT) Agreement—and establishing (relatively uniform) Intellectual Property Rights regimes worldwide (the TRIPS Agreement). The WTO also included a brand new dispute settlement system, considered by many as a manifestation of the rule of law at the international level. Similarly, organizations such as the World Bank and the International Monetary Fund (IMF) were indirectly spreading (de-)regulatory policies throughout the developing world.2 Globalization, nudged by a global technocratic elite, was alive and kicking, back then.

Today we face a crisis of the regime of international economic law and, more broadly, global economic governance. The system appears broken for its incapacity to face some of the most daunting challenges of our time: the widespread and dramatic process of environmental degradation and the unacceptable inequalities between poor and rich. On its face, the phenomenon of far-right populists, partly reflected in Brexit and Trump politics, and spreading across the Atlantic is shaking the system of international economic law, by hailing nationalist policies. The idea that the nation-state may be a desirable source of disintegration of the global (legal) order is gaining traction across the political spectrum. It appears clear that the answer to the legitimacy crisis of the system of international economic law and governance offered by progressives3 resorts also to entrusting the nation state with more political space—a space that allegedly has been unduly constrained by the global economic order.

Not only politicians but also progressive academicians, such as Professor Dani Rodrik, have defended the importance of national sovereignty,4 as one of the necessary paradigms to fix our broken world order. The gist of the reasoning is simple: global institutions went too far in eroding national sovereignty, which is the real basis for democratic liberal regimes. Without the nation-state, environmental, industrial, and redistributive policies cannot be realized. As Rodrik put it: ‘So, I accept that nation-states are a source of disintegration for the global economy.’5

This article critically engages with the idea that the nation-state is a legitimate force of disintegration of the international economic order, with particular attention to trade and investment agreements. There are disparate circumstances, from the realm of food safety regulation to the regulation of capital flows,6 in which it is arguably desirable that domestic institutions (re-)gain more power. Most importantly, the nation-state is today an important site of democracy and, only for that reason, it is worth defending. Yet, in times of raising authoritarianism, it is crucial to reflect on some of the limits of the nation-state and on the necessity to develop alternative paradigms for integrating economies and societies.

This article presents a two-fold critique of the idea that an expansion of national sovereignty is going to achieve a better socio-economic world order per se. The first critique is internal, showing that the nation-state does not possess intrinsic characteristics to facilitate democracy, equality, and sustainability. The second is external and focuses on the necessity to look reflexively at the goals of the system of international economic law, to re-imagine it as capable to address questions of inequality and environmental degradation.

In a more pragmatic fashion, this article posits that more nation-state may be a misleading and possibly dangerous response to today’s daunting challenges. It is misleading in so far as it promises solutions that nation-states alone cannot deliver. It is dangerous in so far as the rhetoric of the nation-state paradoxically facilitates the turn toward an expansion of the ‘rule of exception’ and, eventually, authoritarianism. Above all, in advocating for disintegration through the nation-state, we need to reckon with our haunting past where economic autarchy has been deeply intertwined with the ascent of fascism and Nazism. If today the nation-state may appear as a beacon of democracy, the role of nationalism in generating the nemesis of democracy should not be neglected. In short, and at the risk of oversimplification, ‘America first’ echoes too closely fascist slogans.7

I. A PROGRESSIVE DEFENSE OF THE NATION-STATE AND THE RISK OF A ‘SCHMITTEAN MOMENT’

Let me start by rehashing the two interconnected and equally formidable challenges we are facing today: the question of environmental degradation and the unacceptable level of inequalities whereby a large part of the population in the world lives in poverty (both in developing and developed countries, but still overwhelmingly concentrated in so-called developing countries) vis-à-vis a small elite enjoying incredible wealth. Economic integration that does not deal with these challenges is not only doomed to fail; it is a type of economic integration that we should not aspire to.

It is plausible that Brexit and the disintegrationist economic policy of Trump have been partly enabled by the growing inequalities in the Anglophone nations. It is no brainer that a large fraction of Brexiteers and Trump voters are the ‘left behind.’8 In wealthy countries, the working class often felt left behind by thriving globalization, which has benefited only the elites. The—often labelled—‘populist turn’ rests on the idea that the ‘other’, the ‘foreigner’ has stolen ‘our’ welfare and a more nationalistic policy is needed to protect the losers of the current state of affairs. This is evident from Trump’s slogan ‘Buy American, Hire American.’ It is worrying how this type of nationalism is entrenched in racism and in the othering of the non-American.

However, as mentioned earlier, the case for more nation-state has also been made by ‘progressive’ politicians and intellectuals. Among progressive economists, Dani Rodrik stands out for having defended the nation-state with compelling arguments. Let me quote him at length: ‘When it comes to providing the arrangements that markets rely on, the nation-state remains the only effective actor, the only game in town. Our elites’ and technocrats’ obsession with globalism weakens citizenship where it is most needed—at home—and makes it more difficult to achieve economic prosperity, financial stability, social inclusion, and other desirable objectives.’9 Not only is the nation-state the only game in town, when it comes to issues of redistribution, social security and safety, the nation-state is also desirable because it can deliver institutional diversity which is needed to realize the social contract: ‘Developing nations have different institutional requirements than rich nations. There are, in short, strong arguments against global institutional harmonization.’10 The nation-states can meet different preferences, and ‘[i]nsufficient appreciation of the value of nation-states leads to dead ends.’ Rodrik also concedes that international market liberalization is the offspring of well-functioning nation-states rather than international institutions: ‘Domestic political bargains, more than GATT rules, sustained the openness that came to prevail.’11 Against this background, Rodrik defends ‘economic populism’ in so far as it constitutes a form of resistance to ‘liberal technocrats’ imposing undue restraints on domestic economic policy.12 The rigid focus on price stability in low-inflation environments is a clear example of global or EU-driven policies largely insensitive to the effects on employment and paradoxically even growth.13

Many of Rodrik’s arguments are compelling, such as his critique of the economic profession’s misleading analysis of trade and investment agreements. Some of his reform proposals, such as the strengthening of green industrial policy,14 are arguably desirable. Most crucially, the nation-state may be at present one of the most developed sites of democracy, albeit an imperfect one. When global institutions constrain nation-state policies formed following democratic decision-making, this may legitimately be seen as a threat to democracy. Rodrik’s work has had a wide echo in legal circles, as evidenced by the publication of a book with the goal of reimagining trade and investment law, 15 which is opened by several chapters all commenting—in overwhelmingly positive terms—on Rodrik’s Straight Talks on Trade. The nation-state and, more generally, sovereignty is (re-)gaining traction also among progressive political theorists. In times of economic and existential uncertainties, sovereignty is there to offer protection ‘from unfettered markets and from permanently incumbent austerity’ and it constitutes a ‘refusal of a “liquid society” and of its very solid … inequalities.’16 Some of the most lucid analyses of the current international economic order point at the dramatic consequences of an increase of capitalist power that has incapacitated states to act in defense of its own people.17 The attention on sovereignty is also partly reflected in recently negotiated provisions of new trade and investment agreements, where states are explicitly endowed with a ‘right to regulate.’ Despite the unclear practical implications of such jargon, its symbolic value is unambiguously bearing witness to the shared view that states ought to maintain (or regain) political space. Against this background, Trump’s claims to defend the Ohio steel workers by whatever trade measures it takes may appear more acceptable. Could we then read in this reinvigorated faith in sovereignty a ‘Grotian moment’?18

Without indulging on this question, this article posits that we should beware the ‘risk’ of entering a ‘Schmittean moment’.19 This term is here used to refer to a major shift toward an ideal of unfettered national sovereignty as the chief paradigm to re-orient the international (economic) order. Under such ideal, any international normative benchmark is brushed away by an allegedly more intellectually honest ‘political’ dimension, which can find its realization only in the decisionist state.20 To understand the risk of a ‘Schmittean moment’, it is important to recognize that the move toward more nation-state is partly animated by the legitimate concerns over the existing international legal order; legitimate concerns, which have eloquently been articulated by Schmitt himself.

Carl Schmitt’s work offers a lucid critique of the ‘exclusionary character of liberal universalism.’21 His critique exposes the hypocrisy underpinning many universalisms, most prominently the legal canon of ‘just’ war.22 In fact, it is the very core of the contemporary international legal project that gets questioned: ‘The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form, it is a specific vehicle of economic imperialism. Here, one is reminded of a somewhat modified expression of Proudhon’s: whoever invokes humanity wants to cheat.’23 This argument has direct relevance for the domain of international economic law. In an endnote to this claim—discussing the extermination of Indians in North America—Schmitt explains the danger to use certain moral canons as exclusionary devices: ‘As civilization progresses and morality rises, even less harmless things than devouring human flesh could perhaps qualify as deserving to be outlawed in such a manner. Maybe one day, it will be enough if people were unable to pay its debts.’24 This consideration is of extreme actuality in relation to the current international legal order, which seems to have crystallized structures of annihilation of debt states, and their very peoples.25 In decrying how the economical is rescinded by the political, Schmitt unveils the absent ‘presence’ of (mostly American) politics in the economy. In short, Schmitt’s analysis cogently engages with the problem of depoliticization that the international liberal order yields.26 It is at this juncture that the thoughts of Schmitt and Rodrik may intersect. In some sense, Schmitt’s critique resonates with the critique of ‘hyper-globalization’ articulated by Rodrik:27 ‘one type of failure arose from pushing rule making onto supranational domains too far beyond the reach of political debate and control.’28

Before elaborating on this intersection, it is key to rehash some flaws of Schmitt’s analysis. While he has certainly a point in showing how liberal universalism can be used to arbitrarily exert hegemonic power in the name of humanity (and has so been used in such way by the US and other predominantly Western countries), the alternative he implicitly propounds rests on a nostalgia for a mythical past—a golden age based on the jus publicum Europaeum. Regrettably, this age has been golden only for some; the jus publicum Europaeum for all its glory was made of colonial relations, exploitation, and violence. It has also been noted how Schmitt’s historical analysis, which portrays the times of the jus publicum Europaeum as times where war gets domesticated by the modern state eclipses the fact that the ‘development of the modern state apparatus … helped bring about unprecedented capacities for organized state violence, even if such violence was no longer typically unleashed against fellow Europeans.’29 His conception of sovereignty, which finds essential realization only in the ‘unlimited jurisdictional competence’ normalizes the rule of exception. A related trouble with Schmitt’s core normative ideas is the totalizing enemy-friendship antithesis: ‘the distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation.’30 This is particular fatal to an ideal of nonviolent international law, as it denies even the aspiration of solidarity beyond borders.31 In other words, Schmitt conceptualization of the international legal order crystallizes nation-state borders in deeper existential structures, leaving no hope for common projects of different communities inhabiting the earth. In exposing the violence of allegedly humanitarian projects, Schmitt is de facto hollowing out the concept humanity, reducing its essence to violence in potentia: ‘the entire life of a human being is a struggle and every human being symbolically a combatant. The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing.’32 In denouncing the hypocrisy of moralism, Schmitt seems to negate the possibility of morality altogether. The Nomos of the earth, starting with the act of appropriation—nehmen (take)—and continuing with dividing the land—nemein (divide)—does not engage with the morality of the first act of appropriation nor with its division. And this is also what Hanna Arendt contests to Schmitt: ‘to remove justice from the content of the law.’33

### lpe k

#### The 1AC’s construct of the firm as the locus of competitive innovation reproduces neoclassical economic orthodoxy. Antitrust is justified as an intervention to correct “market failures.” Market failure relies on the ideal of perfect competition.

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­ “[T]oo often discourse about ‘the market’ conveys the sense of something definite—a space or constitution of exchange...when in fact, sometimes unknown to the term’s user, it is being employed as a metaphor of economic process, or an idealisation or abstraction from that process.” – E.P. Thompson2 Introduction To those who study governance of the labor relationship, it is obvious that the relationship between business and labor must be governed, and that stability in this social relation is something valued by labor, business, and society writ large.3 Strangely, the idea that governance is necessary and price stability is good are both obscure interlopers to the study of competition law. To bridge the gap between these two areas of law--and incidentally give labor a greater role and stature in theorizing competition law--we aim to provide a general “market governance” framework for understanding how markets are governed in the context of the legal rules that allow and disallow certain forms of coordination. This framework draws from multiple heterodox traditions in political economy, but is particularly oriented toward building out the emerging framework of Neochartalist microeconomics.4

[Insert Footnote 4 – Turner]

Neochartalism, or Modern Monetary Theory (MMT), began as a macroeconomic framework for understanding how legal institutions produce and reproduce money and monetary value, particularly the acceptance of monetary objects in payments of taxes and court-ordered obligations. In developing over the last twenty-five years, Neochartalism has become an interdisciplinary perspective for understanding and reinterpreting a variety of social phenomena. Some scholarship, particularly the path-breaking work of the late economist Fred Lee (who we rely on in conceptualizing issues in this chapter) builds up a microeconomic framework that is uniquely consistent with--and reliant on--MMT insights. We hope others choose to follow Lee and ourselves in making contributions to Neochartalist Microeconomics and expanding the reach of Neochartalism in a variety of subfields that remain dominated by mainstream microeconomics.

While it is beyond the scope of the current chapter to identify all the ways in which our current perspective accords with unique insights of Neochartalism, our focus on potential financial and market instability, money prices and money income as a focus of analysis rather than relative prices and “real variables'' reflect our Neochartalist lens. Our focus on the legal construction of markets also adds to Neochartalism’s emphasis on the legal construction of a monetary production economy in general. Our focus on inherent and irreducible mediated social interdependence also accords with the scholarly perspective that Neochartalist humanities scholars bring to Neochartalism e.g. SCOTT FERGUSON, DECLARATIONS OF DEPENDENCE: MONEY, AESTHETICS, AND THE POLITICS OF CARE (2018).

[End footnote 4]

Arriving at a theory of market governance requires rejecting economic common sense. Far too much economics scholarship--both among orthodox scholars and their critics--treats “perfect competition” as the analytical (and often normative) baseline for all markets, including labor markets. Under perfect competition, prices (including wages) are arrived at entirely via the uncoordinated matching of bids and asks, assumed to result in settled equilibriums represented by intersecting supply and demand curves. If all markets are perfectly competitive (and certain other conditions obtain), then each input and output has its proper price which sends “signals” throughout the economy and results in a perfectly “efficient” allocation of resources. From this perspective, coordination, especially coordination over prices (again, including wages), appears as an unnatural intervention, a way for those acting collectively to collect “rents” above the “real” value of their contribution to society. If coordination is to be justified, it is usually to correct for some other deviation from perfect competition: workers might bargain collectively to capture some of a monopsonist's rents, for example. And, indeed, many of those trained in economics who advocate for collective bargaining or other worker-empowerment measures appeal to one or more “market failures”.5 In doing so, they reproduce the idea— intentionally or not—that if competition were finally left to do its work it would reveal the prices that reflect the allocation of goods and services that perfectly matches relative scarcity, that markets would work “better” if they were moved “closer” to (or to “resemble” or “approximate”) the “competitive” ideal.6 Collective bargaining is a distortion, but it is the best we can do in our distorted world.

But here's the rub: collective bargaining is not a distortion of a preexisting “labor market”. More generally, coordination between market participants (over price or other matters) is not in itself a distortion of any market. There is not and has never been a market without coordination, including over prices.

#### Neoclassical paradigm will destroy humanity and the biosphere.

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If the main starting point of this book is the severe environmental crisis we are facing and the natural planet-wide collapse toward which we are heading, today’s ecological reality is powerfully connected to other issues such as growing socioeconomic inequalities, the erosion of democratic institutions, the organized apathy of citizens, the loss of power of nation-states in favor of corporations, the progressive disappearance of the notion of common good, and the economic colonization of the social, cultural, and political life by economic objectives. The global ecological crisis reveals these interlinked disasters caused by the core components of capitalism that include: an excessive exploitation of nature, the rise of industrialism, the self-destructive over- confidence in human-technical power, the arrogant anthropocentric mind- set, and denial of ecological limits, as well as the narrow rationalism and materialism that develop within a reductionist predominant form of science.

Neoliberalism as a ‘global system’ threatens societies as a whole and more especially the core values of social communities and democracy, such as justice, ‘common decency,’ civic virtue, or citizenship. In neoliberal patterns, economic efficiency, market values, employability, consumer freedom, and instrumental rationality are favored over democratic participation, civic values, personal autonomy, active citizenship, intellectual development (‘enlightenment’1), and moral rationality (reasonability2). Institutions dedicated to the common good are systematically turned into competitive structures to satisfy the interests of markets and greedy elites. Pluralism is disappearing under the assault of a one-dimensional consumer pattern which treats humans and non-humans as commodities under the hegemony of private interests. Civil society, an essential element of the agonistic and critical democracy defended in this book, is losing out to ‘spectator democracy.’ Indeed, citizens are more and more passive and self-centered in part because existing political and democratic structures leave them with few opportunities to participate and make collective decisions. As a consequence, the link between democratic politics and citizens is being critically weakened. Neoliberal individuals end up being overtaken by lassitude and resignation, indifference, and loss of interest for the shared common world. What defines neoliberal society is, indeed, a widespread disaffection for democracy and social bonds entailed by the loss of political agency and self-determination. In such a system, propaganda is necessary to manufacture consent3 and to shape the fundamental values to ensure that individuals see themselves as consumers, workers, or owners of capital, rather than citizens, spiritual or relational individuals, friends, or members of social and ecological communities. In order to be fully operational, such a system must also rely on high doses of cynicism and the value of relativism cultivated by deconstructive postmodern views.

Neoliberal competitive market-state systems have colonized all aspects of life, but mainly, they have subjugated nature and used it as an ‘unlimited’ spring of profit and resources intended to feed the logic of growth. The globalized neoliberal framework behaves as if nature were only a neutral background for profit-seeking and economic development. In order to push back the ecological limits that are more and more visible, neoliberals argue that those limits can be transcended through decoupling and technological innovations (Chapter 5). Indeed, constructivist neoliberal governments act as if the biosphere were a mere component of the socioeconomic sphere. As an anti-ecological ideology, neoliberalism denies the existence of natural limits and promotes unlimited material wants vs. limited resources, a cult of endless consumption (consumerism), and techno-fixes (techno-optimism) as the solution to social and ecological problems. The appropriation and commodification of nature undertaken by this form of economic ideology and the freedom it enshrines—understood mainly as the legitimate exercise of extractive power—entail that the environment is viewed only as an instrumental source of raw material and sinks of fossil fuels rather than as an ethically valuable physical, biological, and chemical context of life. Inevitably, this type of economy has supported an insatiable extraction that is today overwhelming ecosystemic capacities. Neoclassical economics is certainly the instrumental form of rationality ‘that most actively opposes the ethical valuation of the environment’ (Smith, 2001: 26).

The neoliberal capitalist agenda, associated with an arrogant anthropocentrism and the technological optimism of many political leaders, experts, techno-scientists, academics, and citizens, has transformed nature and people into raw materials (‘natural’ and ‘human resources’). It has replaced democratic and republican institutions—defined by their concern for the common good—by structures aiming at facilitating the activities and profits of corporations and markets. It has deprived Western political structures of substantial democratic energy by turning citizens of wealthy liberal nations into demoralized and nihilist homo oeconomicus (‘neoliberal citizens’), that is, passive consumers as opposed to active citizens. More than that, neoliberalism, through mass media, entertainment, information, and educational systems, has incrementally converted all the spheres, activities, and dimen- sions of life into economic ones (‘economization’ or ‘marketization’ of life). Private and public institutions are used as ways to transmit the values of capitalism.4 As an unethical and unsustainable model of commercialization, ultraliberal capitalism supports crass commodification, intensifies ine-ualities and transforms everything in its way—from non-human nature to human beings—into replaceable, dispensable and disposable products. As a global threat, neoliberalism leads to ‘environmental stresses (water shortages, deforestation, soil erosion or climate change), food and energy insecurity, peak oil, rising poverty and inequalities within and between societies, increasing passivity of citizens within democracies and the inexorable rise of corporate power within and over the democratic state’ (Barry, 2008: 3).

The price we, humans, are socially, politically and ecologically paying and will continue to pay in the future for the triumph of the neoliberal ideology is disproportionate with anything humankind has experienced so far (see Fig. 1.2). However, human relatively recent history already shows that the popular passivity and political apathy (mentioned above) fostered by cynical and disempowering systems of ideas have the potential to favour the rise of dictatorial regimes in which a father figure or ‘strong man’ could take upon the conduct of public affairs. At a time when chauvinistic, racist, anti-elitist, and macho-ist parties are dangerously rising in all Western countries, this fear is taking a serious turn, which includes the risk of an authoritarian ecology.

#### We should use the framework of challenge-driven political economy instead of a competitiveness framework. Using the power of the state to make and shape markets is key to direct policy to solve inequality and climate change.

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Twenty-first-century policymaking is increasingly defined by the need to respond to major social, environmental, and economic challenges. Sometimes referred to as ‘grand challenges’, these include threats like climate change, demographic, health, and well-being concerns, as well as the difficulties of generating sustainable and inclusive growth. Against this background, policymakers are increasingly embracing the idea of using industrial and innovation policy to tackle these ‘grand challenges’. Examples of challenge-led policy frameworks include the United Nation’s Sustainable Development Goals (SDGs; Borras,­­ 2019), the European Union’s Horizon Europe research and development programme (Mazzucato, 2018a), and the UK’s 2017 Industrial Strategy White Paper (HM Government, 2018).

Challenge-driven policy frameworks are emerging in parallel to well-established modernization and competitiveness frameworks**.** While 1 2 modernization, and in particular competitiveness frameworks, rely on the idea that government should first and foremost fix market failures,3 a challenge-driven agenda does not have such clearly defined theoretical origins and analytical lenses. As Richard Nelson argued in 1977 in his seminal book The Moon and the Ghetto, getting man to the moon and back is not the same as solving the problem of ghettos in American cities. Put differently, the nature of our knowledge about socio-economic challenges differs from our perception of strictly technical challenges. We can discover answers to technical puzzles; socio-economic issues do not have a single correct discoverable solution. Such issues require continuous discussion, experimentation, and learning.

We believe challenge-led growth requires a new conceptual and analytical framework that has at its core the idea of confronting the direction of growth with growth that is, for example, more inclusive and sustainable. Such a framework should focus on market shaping and market co-creating (Mazzucato, 2016). This is a question of both theory and policy practice. In theory, challenge-driven innovation policy questions both established neoclassical and evolutionary concepts (Schot and Steinmueller, 2018). In policy practice, directed policies require rethinking what is meant by ‘vertical policies’.

Industrial policies have always been composed of both a horizontal and a vertical element. Horizontal policies have historically been focused on skills, infrastructure, and education, while vertical policies have focused on sectors like transport, health, energy, or technologies. These two traditional approaches roughly embody differing schools of economics: neoclassical economics-inspired horizontal policies focusing on supply-side factors and inputs; and evolutionary economics-inspired policies putting emphasis on demand-side factors and systemic interactions (Nelson and Winter, 1974; Hausmann and Rodrik, 2006 for a synthesis). Although certain sectors might be more suited to sectorspecific vertical strategies, the ‘grand challenges’ expressed in SDGs are cross-sectoral by nature and hence we cannot simply apply a vertical approach to them. Both neoclassical and evolutionary approaches to industrial policy have relied on the idea that the best policy outcome is economy-wide development, without specifying its nature. In policy this has led to managing economies according to GDP growth rates, competitiveness indices and rankings, or other macro indicators (e.g. exports, patents) (Drechsler, 2019). Yet, many SDGs are only indirectly related to the economy and hence many of the key issues around SDGs have not been theorized in the context of innovation and industrial policy (see, e.g., Zehavi and Brenzitz, 2017).

In this chapter we argue that through well-defined goals, or more specifically ‘missions’, that are focused on solving important societal challenges, policymakers have the opportunity to determine the direction of growth by making strategic investments, coordinating actions across many different sectors, and nurturing new industrial landscapes that the private sector can develop further (Mazzucato, 2017; Mazzucato and Penna, 2016). The result would be an increase in cross-sectoral learning and macroeconomic stability. This ‘mission-oriented’ approach to industrial policy is not about top-down planning by an overbearing state; it is about providing a direction for growth, increasing business expectations about future growth areas, and catalysing activity—self-discovery by firms (Hausmann and Rodrik, 2003)—that otherwise would not happen (Mazzucato and Perez, 2015). It is not about de-risking and levelling the playing field, nor about supporting more competitive sectors over less (Aghion et al., 2015), since the market does not always know best, but about tilting the playing field in the direction of the desired societal goals, such as the SDGs. However, we argue, to achieve this requires a new analytical framework based on the idea of public value and a policymaking framework aimed at shaping markets in addition to fixing various existing failures. Indeed, we argue that if we want to take grand challenges such as the SDGs seriously as policy goals, market shaping should become the overarching approach followed in various policy fields.

### bizcon da

#### The plan creates a chilling effect that crushes business confidence and investment

Hathout 21 – Ahmad Hathout, reporter focusing on the tech and telecommunications industries, citing a panel event hosted by the Institute for Policy Innovation, “Washington’s Antitrust Push Could Create ‘Chilling Effect’ on Startups, Observers Say,” 9/23/21, https://broadbandbreakfast.com/2021/09/washingtons-antitrust-push-could-create-chilling-effect-on-startups-observers-say/

WASHINGTON, September 23, 2021 – Advocates for less government encroachment on big technology companies are warning that antitrust is being weaponized for political ends that may end up placing a “chilling effect” on innovative businesses.

The Institute for Policy Innovation held a web event Wednesday to discuss antitrust and the modern economy. Panelists noted their concern that antitrust law may be welded with political aims that will ultimately create a precedent whereby the federal government will stifle innovators who get too big.

Jessica Melugin, the director of the Center for Technology and Innovation, said technology companies could see what’s happening in Washington – with lots of talk of breaking up companies deemed too big – and be uncertain of the future.

She noted that growing companies largely seek one of two things to make it big: grow to file an initial public offering, where the company’s shares are publicly traded, or wait until a large company buys you out. She said talk emanating from the White House and Washington generally about regulating the industry could deter larger companies from acquiring them, and onerous financial regulations could put a damper on IPO dreams.

“If you start robbing companies of other smaller companies they purchased, it’s going to give a lot of entrepreneurs and a lot of funders in Silicon Valley pause,” Melugin said. “If another path to success gets blocked – the IPO is now harder, and now acquisitions are a little bit questionable…that’s a chilling effect.”

President Joe Biden has made a number of appointments to key positions that is bringing more attention on Big Tech, including known Amazon critic Lina Khan to chair the Federal Trade Commission, which recently filed an amended case against Facebook for alleged anticompetitive practices. He also appointed antitrust expert and Google critic Jonathan Kanter as assistant attorney general in the Justice Department’s antitrust division.

FTC could set a bad precedent if focus is ‘big is bad’

Christopher Koopman, the executive director at the Center for Growth and Opportunity at Utah State University, said he’s concerned about the precedent Khan could set for big companies.

He said the odds are that once Khan starts, she will continue down “this path of ‘big is bad’ because that’s a prior that she has and she’s continued to operate on her entire professional career. It just so happens that the focus of this is on tech companies.

“We may be building a regulatory apparatus that will continue to burrow a hole right down the middle of the American economy before we even have a chance to ask if that’s really what we want,” Koopman added. “We just have to recognize that it doesn’t matter, really, who is running the FTC – once we tell the FTC to go break up big companies, they’re going to go break up big companies.”

#### Unpredictable shifts ruin biz con and overall growth

Cambon 21 – Sarah Chaney Cambon, reporter on The Wall Street Journal's Economics Team, “Capital-Spending Surge Further Lifts Economic Recovery”, 6/27/2021, https://www.wsj.com/articles/capital-spending-surge-further-lifts-economic-recovery-11624798800

Business investment is emerging as a powerful source of U.S. economic growth that will likely help sustain the recovery.

Companies are ramping up orders for computers, machinery and software as they grow more confident in the outlook.

Nonresidential fixed investment, a proxy for business spending, rose at a seasonally adjusted annual rate of 11.7% in the first quarter, led by growth in software and tech-equipment spending, according to the Commerce Department. Business investment also logged double-digit gains in the third and fourth quarters last year after falling during pandemic-related shutdowns. It is now higher than its pre-pandemic peak.

Orders for nondefense capital goods excluding aircraft, another measure for business investment, are near the highest levels for records tracing back to the 1990s, separate Commerce Department figures show.

“Business investment has really been an important engine powering the U.S. economic recovery,” said Robert Rosener, senior U.S. economist at Morgan Stanley. “In our outlook for the economy, it’s certainly one of the bright spots.”

Consumer spending, which accounts for about two-thirds of economic output, is driving the early stages of the recovery. Americans, flush with savings and government stimulus checks, are spending more on goods and services, which they shunned for much of the pandemic.

Robust capital investment will be key to ensuring that the recovery maintains strength after the spending boost from fiscal stimulus and business reopenings eventually fades, according to some economists.

Rising business investment helps fuel economic output. It also lifts worker productivity, or output per hour. That metric grew at a sluggish pace throughout the last economic expansion but is now showing signs of resurgence.

The recovery in business investment is shaping up to be much stronger than in the years following the 2007-09 recession. “The events especially in late ’08, early ’09 put a lot of businesses really close to the edge,” said Phil Suttle, founder of Suttle Economics. “I think a lot of them said, ‘We’ve just got to be really cautious for a long while.’”

Businesses appear to be less risk-averse now, he said.

After the financial crisis, businesses grew by adding workers, rather than investing in capital. Hiring was more attractive than capital spending because labor was abundant and relatively cheap. Now the supply of workers is tight. Companies are raising pay to lure employees. As a result, many firms have more incentive to grow by investing in capital.

Economists at Morgan Stanley predict that U.S. capital spending will rise to 116% of prerecession levels after three years. By comparison, investment took 10 years to reach those levels once the 2007-09 recession hit.

Company executives are increasingly confident in the economy’s trajectory. The Business Roundtable’s economic-outlook index—a composite of large companies’ plans for hiring and spending, as well as sales projections—increased by nine points in the second quarter to 116, just below 2018’s record high, according to a survey conducted between May 25 and June 9. In the second quarter, the share of companies planning to boost capital investment increased to 59% from 57% in the first.

“We’re seeing really strong reopening demand, and a lot of times capital investment follows that,” said Joe Song, senior U.S. economist at BofA Securities.

Mr. Song added that less uncertainty regarding trade tensions between the U.S. and China should further underpin business confidence and investment. “At the very least, businesses will understand the strategy that the Biden administration is trying to follow and will be able to plan around that,” he said.

#### Extended COVID economic decline causes nuclear war

McLennan 21 – 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, “The Global Risks Report 2021 16th Edition” “http://www3.weforum.org/docs/WEF\_The\_Global\_Risks\_Report\_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.

### wto cp

#### The US Trade Representative should launch a formal claim in the WTO DSB alleging that anticompetitive private cartel practices 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 anticompetitive private cartel practices 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.

## adv1

### AT: internal link

#### 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

#### 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: growth impact

#### 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: middle east

#### Mutual checkmating prevents the impact.

Hinnebusch 15—Professor of IR and Director of Centre for Syrian Studies at the University of St. Andrews [Raymond, “Chapter 8: Structure over Agency: The Arab Uprising and the Regional Struggle for Power,” in S. N. Litsas & A. Tziampiris eds. *The Eastern Mediterranean in Transition: Multipolarity, Politics and Power*, p. 129-131]

Global Competitive Interference: Mutual Checkmating The Uprising provoked a “New Cold War” among global great powers. After its failed attempt under George W. Bush to impose a Pax Americana on the region, US power appeared by mid-2000s, to be receding as the invasion of Iraq inadvertently empowered Iran and fatigue at highly costly interventions led the Obama’s administration to retreat to off-shore balancing. In parallel, Russia and China developed regional stakes in arms sales, energy and trade. The loss of Mubarak, a key Western client and later the empowerment of Al Qaeda in failed states were further challenges to the West. Yet no further rollback of the West in the region was in the cards. Even where pro-Western presidents were toppled (Egypt, Tunisia, Yemen), the countries were too economically dependent to go over to the resistance axis and the West benefited from the relative empowerment of the GCC within inter-Arab politics as a result of the Uprising. The Uprising, insofar as it was a revolt against global neo-liberalism, was a threat to the West but because the economic collapses accompanying it made regional states more economically vulnerable, Western dominated IFIs and cash rich Gulf states combined to further pry open regional economies to global finance capital, which severely limited the policy options of dependent states (Hanieh 12). The Uprising in Libya presented an opportunity to demonstrate the utility of US military force after the costly failure in Iraq and that in Syria to debilitate the Resistance axis. However, the result of the Libya intervention, a failed state, empowered Al Qaeda in North Africa. For the US (and Israel), a failed state in Syria where Hezbollah and Al Qaeda wore each other down, was more cost effective than another Iraq type effort at “nation-building,” but the spread of jihadism and the spillover of Syria’s conflict to its neighbors (Iraq and Lebanon) showed the costs of such neglect. The West saw the Uprising as an opportunity to roll back the regional influence of Russia and China as their clients in Libya and Syria came under pressure. Russia and China saw the norm of sovereignty and the authority of the UN Security Council as key to constraining such Western expansion into MENA (Blank 11); thus, after the West used a UN humanitarian intervention to effect regime change in Libya, Russia blocked a similar intervention in Syria. Their opposition to international intervention in Syria cost Russia and China standing in the region, but the West was unable to capitalize on this as long as its economic troubles constrained its interventionist impulse. Conclusion: The Resilience of Structure Three years into the Arab Uprising the regional order, although under unprecedented strain, remained resilient and the power bids of movements and regimes had largely checkmated each other. The Uprisings had unleashed street politics and sectarian conflicts that weakened states, which in several cases lost control of their territory and borders (Syria, Libya) to armed trans-state movements, which attained unprecedented agency (Hezbollah, ISIS). Yet, deep states and external dependencies were left standing as the high tide of mass peaceful protest receded, notably in Egypt, Bahrain and Yemen. The power balance between the two opposing pre-uprising alliances was not decisively upset: the Iran-led Resistance axis had lost key allies (Qatar, Turkey, Hamas) and soft power but still survived. The weak spots of the opposing axes, Bahrain and Syria, had not changed sides; Egypt and Iraq, although loosened from their American moorings, avoided full alignment with either side. The traditional Arab powers, Egypt and Syria (and earlier Iraq) were debilitated, yet aspirant non-Arab regional hegemon, Sunni Turkey, initially expected to fill the gap, was checked by Iranian/ Hezbollah balancing in Syria and also, despite a potent synthesis of Islam and democracy congruent with rising Islamist movements, foundered on the rocks of deep state establishments, exemplified in Egypt. The GCC was empowered by the debilitation of the republics and its money and media power penetrated every Uprising state; but this provoked reactions and possible blowback and its cohesion unraveled. Thus, power balancing, entrenched state apparatuses and increasing fragmentation made it very hard for any regional power to sweep the board. Rival outside powers also found management of the region’s conflicts intractable, and settled for preventing victory by the other side. Deep structure appeared to have defeated agency.

### AT: latin america

#### No Latin American instability – democracy consolidation, macroeconomic stability, and international law.

Feinberg et al. 15—Richard Feinberg is a professor of international political economy at the Graduate School of IR and Pacific Studies, UC San Diego [Richard, “Better Than You Think: Reframing Inter-American Relations; Harold Trinkunas is a senior fellow and director of Brooking’s Latin America Initiative am; Emily Miller is a Research Assistant at Brooking’s Latin America Initiative [“Better Than You Think: Reframing Inter-American Relations,” *Latin America Initiative in Foreign Policy at Brookings*, March, <https://www.brookings.edu/wp-content/uploads/2016/06/Better-Than-You-Think-Reframing-InterAmerican-Relations.pdf>]

Much of the contemporary U.S. policy toward the hemisphere has its roots in the 1990s. In the wake of the end of the Cold War, the regional agenda became crowded with new initiatives and institutions: the Summit of the Americas, the Free Trade Area of the Americas (FTAA), the Conference of Defense Ministers of the Americas, a reoriented Organization of American States (OAS) focused on democracy promotion and a reinvigorated Inter-American Court of Human Rights. At its core, this agenda was intended to consolidate and give regional institutional weight to core U.S. interests in the region, namely free elections, free markets, free trade and cooperative security. In the wake of the 9/11 attacks, the United States redoubled efforts to secure regional cooperation on combating terrorism and controlling the proliferation of weapons of mass destruction.

Even if some specific initiatives have run aground, such as the FTAA, or have been troubled, such as recent Summits, the hemispheric agenda of the United States has by and large been achieved. In country after country, international and domestic actors have aligned to produce the triumph of democracy and sustainable market-based economies, leading a wave of democratization and liberalization that has swept the globe since the 1970s. The region experienced its last (brief) interstate conflict between Ecuador and Peru in 1995, and the probability of war in Latin America is vanishingly small, an astounding achievement when compared to present troubles in Europe, Asia and the Middle East. In addition, although international terrorism and proliferation have not vanished from the region, Latin America is far better off than any other part of the world on this security dimension.22

In contrast to 1980, democracy is now by and large consolidated, with only a few exceptions of backsliding (shown in Figure 5),23 and military coups have become increasingly rare. Latin American democracies have pioneered new forms of political and social inclusion, such as participatory budgeting and conditional cash transfer programs. Civil society has flourished across much of the region, and there is a vibrant media in many countries.

Across Latin America, we have generally witnessed stronger economic growth and better macroeconomic management during the past decade than in the previous two. In the wake of the 1980s debt crisis, bouts of hyperinflation and financial crises in the 1990s, regional political and economic leaders have been much more cautious, accumulating substantial international reserves and keeping close watch on inflation. By 2011, the nine largest economies in Latin America had, on average, accumulated reserves equivalent to 16 percent of GDP.24 At the end of 2013, Brazil was sitting on $376 billion and Mexico on $177 billion (Figure 6). Inflation has fallen dramatically from over 200 percent between 1990 and 1995 to an average of six percent since 2010.25

This improved macroeconomic management has produced significant reductions in poverty and improvements in social inclusion. The size of the middle class in Latin America has also nearly doubled since 2002,26 contributing to economic growth and new demands for improved governance. Figure 727 illustrates the sustained GDP per capita growth and poverty reduction beginning in 2003, which contrast with the income stagnation of the 1980s and modest improvements of the 1990s. Similarly, Figure 8 demonstrates consistent downward trends in inequality in some of the region’s largest economies.28 While Latin America remains the most unequal region of the world,29 it is clear that sound macroeconomic policies have contributed to improved social equity, either directly through broad-based growth, or indirectly through enabling states to finance targeted redistributive policies. The region’s rapid recovery from the 2008 global financial crisis is evidence of the strength of the macroeconomic policies and institutions that have prevailed thus far. This has meant that much of the region has needed fewer loans and external assistance, and also that Latin American leaders have less need to adhere to external conditions for financial support. For example, in 2014 the Brazilian economy slowed down but its external reserves are so large that it does not need to revert to the multilateral institutions for funds or advice. Rather, international markets and competitive pressures are tilting the internal debate in Brazil toward more market-friendly policies, as signaled by the recent appointments of a more orthodox finance minister, Joaquim Levy, and market-oriented politicians to the agriculture and industry portfolios.

Latin America has also expanded its participation in global trade and its range of trading partners. In conjunction with a fall in average tariffs from 39 percent in 1985 to 10 percent in 2005, Latin America’s export volume quadrupled.30 There is now a broad array of free trade agreements in place across the region, not only among Latin American states but also with China, Europe and the United States. This tangible multi-polarity offers nations more options for economic development and export-led growth. For example, growing commodity exports toward China during the 2000s (Figure 9) reflects rising demand relative to traditional Latin American export markets such as Europe and the United States. Latin America’s diversified trade is not the “fault” of U.S. policy inattention but rather a reflection of structural shifts in the global economy. For Latin America, this is a healthy development because it reduces the risks of being tied to the economic prospects of any one region of the world; vulnerabilities of course remain, as South America depends heavily on commodity exports and Central America and Mexico are subject to the ups and downs of the U.S. economy.

Inter-state peace in Latin America has become the status quo. States in the region rarely militarize disputes, and civil conflicts have declined as well; Figure 10 plots civil and international conflicts as measured by magnitude scores that reflect “societal-systemic impact.”31 According to Figure 10, the only nations currently plagued by major episodes of civil violence are Colombia and Mexico, both drug-fueled conflicts.32 Even though most states in the region continue to share some disputed borders, such sources of friction are by and large the province of diplomats and lawyers arguing cases at the International Court of Justice in The Hague rather than of armies.33 Latin America has in place a nuclear-weapon-free zone, and the two leading nuclear technology powers, Argentina and Brazil, have a longstanding non-proliferation institution, the Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials (ABACC), that monitors their mutual rejection of the pursuit of nuclear weapons.34 While fears about international terrorism in the region have occasionally made headlines in the United States post 9/11, the last major incidents occurred in 1992 and 1994 when Hezbollah agents attacked the Israeli Embassy and Jewish Cultural Center in Buenos Aires. In its most recent report on terrorism in the region, the U.S. State Department maintained that the majority of terrorist attacks in Latin America were committed by the Revolutionary Armed Forces of Colombia (FARC). However such tactics by transnational criminal organizations and insurgents in the hemisphere are largely aimed at domestic audiences rather than linked to international terrorist networks.35

The bottom line is that since the end of the Cold War, Latin America has advanced far and fast along a number of political, security, economic and social dimensions. It is impossible to untangle the relative weight of the external and internal factors contributing to this felicitous outcome, but it is safe to say that Latin American countries have made themselves much more democratic, peaceful and prosperous, and that past instruments of U.S. influence, when smartly deployed, have largely worked themselves out of a job. These achievements are deeply compatible with longrange core U.S. interests in regional peace, democracy and human rights, market-based economies and free trade. As such, a return to a mid-20th century interventionist foreign policy is neither feasible nor desirable.

### AT: democracy

#### Trump. Capitol. Voting rights.

## adv2

### AT: resource wars

#### Digital shift means this won’t happen.

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: food war

#### Warming’s not existential---framing it as such undermines solvency.

Zeke Hausfather & Glen P. Peters 20. \*Director of climate and energy at the Breakthrough Institute in Oakland, California. \*\*Research director at the CICERO Center for International Climate Research in Oslo, Norway. "Emissions – the ‘business as usual’ story is misleading". Nature. 1-29-2020. https://www.nature.com/articles/d41586-020-00177-3

In the lead-up to the 2014 IPCC Fifth Assessment Report (AR5), researchers developed four scenarios for what might happen to greenhouse-gas emissions and climate warming by 2100. They gave these scenarios a catchy title: Representative Concentration Pathways (RCPs)1. One describes a world in which global warming is kept well below 2 °C relative to pre-industrial temperatures (as nations later pledged to do under the Paris climate agreement in 2015); it is called RCP2.6. Another paints a dystopian future that is fossil-fuel intensive and excludes any climate mitigation policies, leading to nearly 5 °C of warming by the end of the century2,3. That one is named RCP8.5.

RCP8.5 was intended to explore an unlikely high-risk future2. But it has been widely used by some experts, policymakers and the media as something else entirely: as a likely ‘business as usual’ outcome. A sizeable portion of the literature on climate impacts refers to RCP8.5 as business as usual, implying that it is probable in the absence of stringent climate mitigation. The media then often amplifies this message, sometimes without communicating the nuances. This results in further confusion regarding probable emissions outcomes, because many climate researchers are not familiar with the details of these scenarios in the energy-modelling literature.

This is particularly problematic when the worst-case scenario is contrasted with the most optimistic one, especially in high-profile scholarly work. This includes studies by the IPCC, such as AR5 and last year’s special report on the impact of climate change on the ocean and cryosphere4. The focus becomes the extremes, rather than the multitude of more likely pathways in between.

Happily — and that’s a word we climatologists rarely get to use — the world imagined in RCP8.5 is one that, in our view, becomes increasingly implausible with every passing year5. Emission pathways to get to RCP8.5 generally require an unprecedented fivefold increase in coal use by the end of the century, an amount larger than some estimates of recoverable coal reserves6. It is thought that global coal use peaked in 2013, and although increases are still possible, many energy forecasts expect it to flatline over the next few decades7. Furthermore, the falling cost of clean energy sources is a trend that is unlikely to reverse, even in the absence of new climate policies7.

Assessment of current policies suggests that the world is on course for around 3 °C of warming above pre-industrial levels by the end of the century — still a catastrophic outcome, but a long way from 5 °C7,8. We cannot settle for 3 °C; nor should we dismiss progress.

Plan for progress

Some researchers argue that RCP8.5 could be more likely than was originally proposed. This is because some important feedback effects — such as the release of greenhouse gases from thawing permafrost9,10 — might be much larger than has been estimated by current climate models. These researchers point out that current emissions are in line with such a worst-case scenario11. Yet, in our view, reports of emissions over the past decade suggest that they are actually closer to those in the median scenarios7. We contend that these critics are looking at the extremes and assuming that all the dice are loaded with the worst outcomes.

Asking ‘what’s the worst that could happen?’ is a helpful exercise. It flags potential risks that emerge only at the extremes. RCP8.5 was a useful way to benchmark climate models over an extended period of time, by keeping future scenarios consistent. Perhaps it is for these reasons that the climate-modelling community suggested RCP8.5 “should be considered the highest priority”12.

We must all — from physical scientists and climate-impact modellers to communicators and policymakers — stop presenting the worst-case scenario as the most likely one. Overstating the likelihood of extreme climate impacts can make mitigation seem harder than it actually is. This could lead to defeatism, because the problem is perceived as being out of control and unsolvable. Pressingly, it might result in poor planning, whereas a more realistic range of baseline scenarios will strengthen the assessment of climate risk.

# 2NC

#### Combining common law PTD rulings and statutory change over the same area renders PTD stagnant – this evidence describes the permutation

Harms 16 – J.D. from the University of California, Davis School of Law  (RLG, Preserving the Common Law Public Trust Doctrine: Maintaining Flexibility in an Era of Increasing Statutes, https://law.ucdavis.edu/centers/environmental/files/Doremus%20Writing%20Winners/2015LaGrandeur.pdf)//gcd

The Common Law as Key to Maintaining the Doctrine’s Evolutionary Nature and, thus, its Future Utility Law created through judicial decisions (common law) and as part of the legislative process (statutes) represent two very different lawmaking mechanisms. The advantages and disadvantages associated with these two methods have been the subject of debate since antiquity.79 Those who favor statutory law, such as the famous philosophers Aristotle, Thomas Hobbes, and Jeremy Bentham, emphasized the certainty and legitimacy of laws enacted by the sovereign authority and, in modern societies, by democratic representatives of the people.80 They argue that statutes provide precisely formulated rules that bring certainty to society.81 On the other hand, those who favor case law, such as the famous philosophers Cato the Younger, Edmund Burke, and Friedrich Hayek, championed the advantages associated with the ability of case law to evolve slowly through a series of court decisions.82 In their paper Case Law versus Statute Law: An Evolutionary Comparison, Giacomo A. M. Ponzetto and Patricio A. Fernandez developed a mathematical model to test the merits of case law versus statutory law. They summarize their results as follows: Posner’s claim that common law tends toward efficiency has been one of the most influential ideas in law and economics. In this paper, we have provided a formal model that confirms this convergence hypothesis. The evolution of case law is beneficial because it generates a sequential interaction between a series of judges with different preferences, whose idiosyncrasies then balance one another. Stare decisis implies that rulings that deviate from precedent are personally costly to the judge. Through the decisions of judges with heterogeneous biases, case law develops as a never-ending process that evolves toward greater predictability and efficiency. Legislatures are expected to be more democratically representative than are individual judges, whose decisions may reflect the pressures of powerful litigants. Moreover, statutes provide the short-run certainty of written law. But the evolution of case law provides better outcomes in the long run, unless the efficient rule is changing over time. When the optimum is highly mutable, common law should include a role for statutes to correct the rigidity of binding precedent. Yet statutes should be integrated in the body of case law and interpreted by precedent-bound courts.83 Ponzetto and Fernandez’s discussion regarding the ever-evolving nature of case law is true of any common law doctrine. However, when it comes to the public trust doctrine, its ability to evolve is one of its most important and advantageous features. As a result, preservation of the doctrine’s common law tradition is of utmost importance if we wish to utilize it effectively in the future. The cases discussed in Part IV above teach us that courts in California do not hesitate to recognize both the common law and statutory public trust doctrines in their decisions. In practice, however, their analyses and holdings show that when both the common law and statutory public trust doctrine are at issue, the statutory doctrine may subsume the common law one. National Audubon Society held that the common law public trust doctrine has value that is separate and independent of a general statutory scheme.84 However, the Supreme Court of California in Environmental Protection Information Center chose not to extend that logic when confronted with the intersection between the common law doctrine and a statute incorporating similar principles. In that case, the Court ruled that there was no separately actionable claim under the common law public trust doctrine. Although not a perfect fit for our analysis, Citizens for East Shore Parks taught us that the common law doctrine does not require an agency to engage in any further consideration beyond what the statute requires—even if public trust concerns were brought up during public comment. These decisions suggest that statutes embodying public trust principles may subsume, or at least heavily deemphasize, the common law doctrine. If these two decisions portend a larger trend, the common law public trust doctrine may fade in importance as the doctrine becomes chiefly statutory. When discussing the common law and statutory public trust doctrine, Sax noted that “nothing could be more mistaken than to conceive the problem as one in which it is necessary to choose a single branch of government to develop and administer the policies which will produce optimum results.” 85 This paper does not stand for the proposition that the public trust doctrine should solely consist of common law, or that there is no meaningful role for statutes. Instead, this paper is intended to emphasize the unique utility of the public trust doctrine in its original common law form. For instance, Part II of this paper discussed how the common law doctrine has been able to expand to cover more natural resources and public uses. If the doctrine continues to become a chiefly statutory one, then it may lose this flexibility and halt the historical trend towards including more natural resources and public uses. The doctrine may then fail to rise to the occasion and help tackle the environmental issues as many have hoped, and instead become merely another stagnate statutory principle.

#### Ruling on a test case is necessary to PTD expansion – permutation robs that

Keller 19 – (Deirdre, "Limiting Lessons from Property: Reimagining the Public Domain in the Image of the Public Trust Doctrine," Kentucky Law Journal: Vol. 107 : Iss. 4 , Article 4. Available at: <https://uknowledge.uky.edu/klj/vol107/iss4/4> 2019)//gcd

C. Public Trust Principles as Ameliorative of Over-Protection Impulses Professor Sax's groundbreaking 1970 article envisioned a public trust doctrine expansive enough to embrace the stewardship of not just natural resources but also, perhaps, cultural resources." The recreational access public trust doctrine cases center human flourishing as the theoretical underpinning of the public trust doctrine and provide a model for how we might fashion a public trust doctrine for the public domain."' This model is appealing for a number of reasons. First, it is easy to map the issues presented in the beach access cases unto the issues presented in some of these public domain cases. In both instances, the central question is the public's access to a longstanding commons-navigable waters, on the one hand, and the public domain, on the other. And, in both instances, Courts are called upon to decide the extent to which the public should be able to access that commons in light of asserted private rights. Moreover, the factors distilled in Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc. provide a workable framework for taking the public's interest in access to a commons into account when potentially conflicting private rights are asserted. There, the New Jersey Supreme Court considered: (1) location of the dry sand area in relation to the foreshore; (2) extent and availability of publicly-owned upland sand area; (3) nature and extent of the public demand; and (4) usage of the upland sand land by the owner." While these considerations don't map perfectly onto the public domain context, they certainly suggest some factors courts ought to take into account. These might include (1) the use the copyright owner is making of the protected work; (2) the ubiquity of the public domain work in the culture, i.e., the nature and extent of the public demand; and (3) the extent to which the follow-on users proposed use is likely to deprive the copyright owner of a reasonable return on investment in the protected work. I believe that this framework could provide far more balanced determinations in cases like Klinger v. Conan Doyle Estate, Ltd., 18 and, hopefully, avoid altogether suits like Code Revision Comm'n v. Pub.Resource.org, Inc.1 1 9 There are, of course, challenges here. The most obvious of these is figuring out how the diffuse parties interested in access to public domain content might effectuate adoption of such a framework. The simplest way forward in that regard is likely a test case. But, of course, content owners certainly have the resources at their disposal to fight such a case vigorously. That means, I think, that the onus is on those interested in access to organize and strategize before works like Steamboat Willie enter the public domain and users find themselves on the defensive. CONCLUSION: A CALL TO ACTION There is no question in my mind that the major content owners, like Disney, are considering a strategy for limiting access to their content that is imminently entering the public domain. Even if you don't agree with the prescription I have offered here - importing the public trust doctrine's protections for access into the copyright context - it would certainly behoove those of us interested in ensuring such access to think broadly about the ways that may be accomplished. There is no question that content owners are far better organized and resourced. Unless those interested in access strategize, even without legislation like the Copyright Term Extension Act, content owners who have copyrights on related content can, and very likely will, tie those who seek to use the new public domain content up in expensive and time-consuming litigation.

### 2NC – AT PDCP – CC

#### This is a non-argument

#### The CP is plan minus and has a net benefit based off that distinction – we are a PIC out of core antitrust laws and expand the scope and have reasons why replacing those with PTD is net beneficial – gold standard of competition

#### Public trust regulatory regime competes both textually and functionally with antitrust

Regan 17 – Professor in the Schar School of Policy and Government at George Mason University (Priscilla, "Reviving the Public Trustee Concept and Applying It to Information Privacy Policy." Maryland Law Review, vol. 76, no. 4, 2017, p. 1025-1043. HeinOnline)

In this final Part of the Essay, I will argue that the public trustee regulatory regime, rather than the anti-trust regime or the environmental externality regulatory regime, will provide a more robust path to effective information privacy protection. Three arguments provide the rationale for this conclusion: First, the large online players are operating at the scope and scale where "public interest, convenience, and necessity" demand that they be more regulated. Second, a public trustee approach avoids the somewhat messy issues of proving "concentration" and anti-competitive behavior entailed in antitrust regulation. Third, thepublic trustee approach draws upon the link between privacy and trust that has emerged from public opinion surveys and the academic literature on privacy. The first argument for a public trustee type of regulatory regime entails a realistic recognition, as noted above, of the size, scale, and influence of these so-called "edge players." Evidence for this comes in sheer numbers alone. Facebook reported in November 2016 that about 1.8 billion people around the world log on to Facebook every month. According to a Pew survey, forty-four percent of adults in the United States report that they get their news from Facebook.58 The implications of the role of platforms or edge providers have been most starkly apparent in the recent debates regarding the role that Facebook and Google played in spreading "fake news" during the 2016 election. News report after news report59 criticized the influence these companies had and the fact that that influence was generated by algorithms that few understand and by a business model that would appear to enable, if not reward, fake news. Zeynep Tufekci pointed out in an op-ed in the New York Times that: Only Facebook has the data that can exactly reveal how fake news, hoaxes and misinformation spread, how much there is of it, who creates and who reads it, and how much influence it may have. Unfortunately, Facebook exercises complete control over access to this data by independent researchers. It's as if tobacco companies controlled access to all medical and hospital records.6 0 Similarly, Farhad Manjoo wrote: "It's time to start recognizing that social networks actually are becoming the world-shattering forces that their boosters long promised they would be-and to be unnerved, rather than exhilarated, by the huge social changes they could uncork." 6 1 To this point, platforms have themselves assumed some responsibility for policing or controlling the content on their sites. In the mid-2000s, the deputy general counsel at Google had the authority and responsibility for determining, both for Google in the United States and Google in other countries,-what content could be displayed and what could not.62 This role, referred to as the "Decider," placed enormous decisionmaking power over what people around the world would see and not see, and control over when and how people could speak or when they would be censored. Although this power was generally used rather wisely at the time, as Jeffrey Rosen argues: "You might be uncomfortable with the idea of allowing a single woman, a Decider, to make these incredibly contextual and difficult free speech decisions for the globe, but the truth is that this Decider model, as inadequate as it may be, may be better than the alternatives."63 From a policy options perspective, the alternatives have not been fully explored yet, for a number of reasons, the time for exploring options seems to be now. Both privacy protections and content regulation are central to the principles of "social responsibility" that underlined the original rationale for public trustee regulation. The evidence seems to demonstrate that selfregulation and a system of privacy notices does not effectively protect information privacy. The evidence also seems to show that self-regulation or no regulation is not effective to ensure content that does not undermine the integrity of something as fundamental to the democratic process as a presidential election. Thus, some regulation to ensure that companies serve the "public interest, convenience and necessity" seems justified. A second argument for a public trustee type of regulatory regime is that it avoids the often-messy arguments entailed in antitrust regulation. Such arguments often get entangled in lengthy court cases and settlements, rely on detailed and unfathomable financial analyses, and are opaque for the American public. Beginning in 2010, both the FTC and the European Union ("EU") engaged in a number of antitrust investigations, including whether Google was acting in an anticompetitive manner and prioritizing search results towards Google-owned companies. Given the difficulties of finding clear and convincing evidence of discriminatory behavior and practices towards competitors, and the difficulties of predicting the dynamics of the innovative information marketplace, antitrust allegations are fraught with challenges.6 4 Such challenges played out in the FTC investigation of Google which, after three years of gathering evidence, holding hearings, and analyzing the complex record, resulted in some minor concessions on Google's part but no formal charges. By 2016, the European Commission had pursued five different antitrust investigations into Google, three of which resulted in formal charges. All indications are that the EU will not back off its inquiries and that countries such as France, where there is litigation over the "right to 65 be forgotten," and Italy will continue to scrutinize Google's activities. In mid-2016, the FTC appeared to be considering reopening its investigation as a result of criticisms that Google is not a neutral gateway to information on the Internet. At an April 2015 congressional hearing, Senator Richard Blumenthal (D-Conn.) spoke as follows to the possibility of renewed FTC investigations: "While the company is a great American success story, their position in the marketplace has led to legitimate questions about whether they have used their market power to disadvantage competitors unfairly and ultimately limit consumer choice." 6 6 Given the enormous time investment and significant financial and personnel costs that antitrust investigations entail for both government regulators and companies such as Google and Facebook, it may be to the advantage of both to pursue a less adversarial path to resolving these questions. In this sense, both regulators and companies may prefer to consider whether a public trustee style regime provides advantages. The FCC's recent actions with regard to privacy requirements for ISPs based on the sensitivity of the information-as well as requirements for transparency, data security, and data breach notifications-may provide a trial assessment to see whether an alternative such as this would be more advantageous than the antitrust route. 67 Both Google and Facebook successfully resisted being included in the FCC's privacy actions, but depending on how the FCC regulations play out, it is possible that a change on the companies' part and/or on the part of consumer and privacy advocates may result in inclusion of such edge players. A third argument for the public trustee approach is that it acknowledges the importance of the fundamental connection between privacy and trust that has been demonstrated to be necessary in the information economy and Internet landscape more generally. Neil Richards and Woodrow Hartzog make an interesting argument, consistent with my proposal here, to refocus privacy from a protection against bad things to an enabler of trust relationships, which would benefit both data subjects and data holder.68 They apply the principle of "fiduciary duties" in much the way that I am thinking of public trustee in that they would similarly move privacy principles "from procedural means of compliance for data extraction towards substantive principles to build trusted, sustainable information relationships."69 As they convincingly point out: Rather than encouraging trust, modern American privacy law encourages companies to profit in short-sighted ways by extracting as much value as possible from personal data in the short term. As long as companies don't cause a narrow set of legally recognized, l argely financial harms, they are essentially free to set up the terms of information relationships any way they wish. Public opinion surveys from the 1980s onwards reveal that the public does not trust organizations "to collect and use information about people like you in a responsible way," with the lowest levels of trust in sectors that Americans associate with data collection and monitoring. Such trust is not only important to individuals who are data subjects but also to the organizations collecting this information and is critical to both overall trust in government and trust in the digital economy. As Hirsch points out: Overall user trust in the digital economy is not only a vital resource; it is also an open-access, partially rivalrous one. No one can fence it off. Particular companies may enhance, or deplete, overall user trust in society. . . . But, in the absence of laws or other forms of social control, [particular companies] cannot prevent others from dipping into the well of overall user trust, or from diminishing it through abusive behaviors.7 2 The asymmetries in the data subject-data holder dynamic and the essential role that trust plays in this relationship have long been recognized, have gotten worse over time, and need to be readdressed. In analyses of a number of complex systems designed for purposes of surveillance or transparency, we found, "trust relationships are often ill defined or incompletely understood and trust is often compromised .... The individual becomes caught in a web of cascading mirrors, sending her into relationships over which she has no control, no expectations, and no basis of trust." 7 3 With an emphasis on data holders as public trustee, a concern with identifying and justifying "privacy harms" would not be part of policy discussions, as also pointed out by Richards and Hartzog.74 Rather than focusing on the negative effects of information collection and use, policy discussions would shift attention to determining what kinds of information practices serve a public interest in an information economy Finally, I will consider some of the implications of an information privacy regulatory regime based on public trustee principles of "public interest, convenience and necessity." As noted above, the current privacy protection regime based on the FIPs and self-regulation overburdens the individual with tasks that are unrealistic, resulting in a system that is ineffective, causes cynicism and frustration among individuals, requires episodic prodding by federal regulators with inadequate power, and oftentimes leaves companies in a defensive and uncertain position. Under such circumstances, no one wins-not the individual, not the government, and not the companies. At the same time, further analysis of the personal information environment leads many to conclude that information privacy actually has many of the characteristics of a public good, which provides a rationale for rethinking a public trustee approach for protecting information privacy. So how might this play out? First, it is important to recognize that, to some extent, such a shift actually entails something of a rethinking of Internet governance more generally. The development of the Internet has been something of a work in progress-without top-down planning and largely dependent on cooperative arrangements among self-identified affected private and public parties. The principles and regulations guiding this organic development have largely emerged through the process of development-first, by primarily addressing administrative (such as, system of domain names) and technical (such as, interoperability) concerns. More social principles were regarded as unwise and irrelevant, as perhaps best articulated in John Perry Barlow's A Declaration of the Independence of Cyberspace, which says to the governments of the world: We believe that from ethics, enlightened self-interest, and the commonweal, our governance will emerge. Our identities may be distributed across many of your jurisdictions. The only law that all our constituent cultures would generally recognize is the Golden Rule. We hope we will be able to build our particular solutions on that basis. But we cannot accept the solutions you are attempting 75 to impose. The reality that evolved over the twenty years since this was written is quite different than what the pioneers of Cyberspace envisioned. Rather than a parallel universe for virtual communities providing more freedom and creativity than the physical world, Cyberspace has developed as an adjunct of the physical world dominated and organized by the same large organizations that exist in that world. Second, perhaps more appropriately termed "hopefully," the process of formulating information privacy policies-as well as those for free content regulation and law enforcement or intelligence access-would be less adversarial under a public trustee regime. Rather than long drawn out lawsuits with zero-sum stakes, a focus on the social responsibility of large Internet players might redirect attention from particular, competing stakeholder interests to the broader common or shared interests of all parties. To a certain extent, the development and roles of privacy officerS76 in private and public organizations illustrate the type of dynamic that might emerge under a public trustee regime-but with their role elevated and substantiated by government sanctions and oversight in a more cooperative corporatist process than either self-regulation or government regulation entail. How this might develop will require more research and analysis, but seems to be a path worth pursuing.

#### Sherman, Clayton, and FTC are the core laws.

Gibbs ‘ND [Gibbs Law Group; “The Sherman Antitrust Act”; https://www.classlawgroup.com/antitrust/federal-laws/sherman-act/; AS]

The Sherman Antitrust Act is one of three core federal antitrust laws, along with the Clayton Antitrust Act and the Federal Trade Commission Act.

#### Expanding the scopre mandates changing the range of what is covered by the Big 3

Cambridge Dictionary. "scope". https://dictionary.cambridge.org/us/dictionary/english/scope

scope noun [U] (RANGE)

C1

the range of a subject covered by a book, program, discussion, class, etc.:

* I'm afraid that problem is beyond/outside the scope of my lecture.
* Oil painting does not come within the scope of a class of this kind.
* We would now like to broaden/widen the scope of the discussion and look at more general matters.

#### Public trust regulation is a distinct policy intervention than antitrust

Napoli and Graf 20 – (Napoli, Philip M. and Graf, Fabienne, Social Media Platforms as Public Trustees: An Approach to the Disinformation Problem (December 14, 2020). TPRC48: The 48th Research Conference on Communication, Information and Internet Policy, Available at SSRN: <https://ssrn.com/abstract=3748544> or [http://dx.doi.org/10.2139/ssrn.3748544](https://dx.doi.org/10.2139/ssrn.3748544))//gcd

Other policy interventions that appear to be gaining traction, such as antitrust enforcement against the dominant digital platforms (see, e.g., House Judiciary Committee’s Subcommittee on Antitrust, Commercial, and Administrative Law, 2020; United States v. Google, 2020), have no clear relationship to addressing the disinformation problem. How does breaking up Facebook or Google, or forcing them to share data with competitors, counteract the disinformation problem? Perhaps the fragmentation of the social media audience would contribute to a reduction in the spread of disinformation. Or perhaps a more competitive social media marketplace would incentivize individual platforms to police disinformation more aggressively, as a means of attracting and retaining users. Such indirect effects may be a possibility, but these relationships are purely speculative. Historically, media policymakers have opted to use structural regulation as a means of indirectly affecting content, as a strategy for circumventing First Amendment challenges. So, for example, the FCC has employed broadcast license allocation criteria that favor locally-based applicants in an effort to assure that communities receive more content that meets their particular needs and interests. Similarly, the FCC has adopted regulations designed to increase ownership of media outlets by under-represented groups in an effort to diversify the content available to audiences (Napoli, 2001). Such diversity goals could, in theory, be addressed by breaking up large platforms such as Facebook and Google; however, any logical grounds for a connection between breaking up these large platforms and diminishing the prominence of disinformation (or even increasing the prominence of news/information that effectively combats disinformation) are not at all clear. The bottom line is that even indirectly addressing the disinformation problem is not a core goal of the antitrust efforts directed at digital platforms. In the 450-page report on competition in digital markets just released by the House Judiciary Committee’s Subcommittee on Antitrust, Commercial, and Administrative Law (2020), the term “disinformation” appears exactly once. One could even make the argument that a more fragmented social media landscape could make the policing of disinformation more erratic and piecemeal (Aral, 2020), given the substantial resources that are needed to police disinformation effectively (something that even the largest and most well-resourced platforms have yet to achieve). And so, tackling the disinformation problem on social media remains purely within the completely voluntary efforts undertaken by the platforms themselves (Nunez, 2020). Given their disappointing track record thus far, many have questioned whether the platforms are sufficiently incentivized to perform as well as they could (Barrett, 2020; Chakravorti, 2020; Goodman & Kornbluh, 2020; Marantz, 2020); which raises the question of whether some sort of government oversight could provide further incentive. Despite the broad First Amendment protections provided to false speech described in the previous section, there is in fact a precedent for such efforts. Federal Regulation of Disinformation: The FCC’s Broadcast Hoax and News Distortion Rules Exploring this precedent involves revisiting a medium that is of steadily diminishing importance within the contemporary media ecosystem – terrestrial broadcasting. In an era of 500+ cable networks, online streaming of music and video, and countless mobile device applications, terrestrial broadcasting represents a shrinking slice of the overall media pie. Broadcasting as a means of accessing media content is practically alien to young people today (try explaining rabbit years to a university undergraduate). Viewers of broadcast television are, for the most part, approaching or past retirement age. Even these viewers are, in most cases, not accessing broadcast signals directly, but rather through an intermediary such as a cable service provider or online streaming service, making the broadcast transmission largely superfluous. So it is, admittedly, a bit odd to be looking to broadcasting for guidance as to how to regulate social media, a medium that would seem to have little in common with broadcasting. But within the vast array of differences between broadcasting and social media there are also some important similarities. Each, at their peak, has represented the most far-reaching and immediate distribution platform available. From a structural standpoint, each represents a model in which substantial gatekeeping authority is invested with a fairly limited number of gatekeepers. And the early history of each is inextricably intertwined with some of modern history’s most significant advances in technologically-driven propaganda campaigning (broadcasting in the case of the rise of Nazi Germany [see Bytwerk, 2004] and social media in the case of 21st century election interference in the U.S., the U.K., and many other national contexts [see Napoli, 2019a]). As technology journalists Julia Angwin (2020) recently stated, “social media platforms are the broadcasting networks of the 21st century” (p. 1). In sum, drawing upon models of broadcast regulation to inform current thinking about social media regulation may seem anachronistic at first blush; but the reality is that many analysts have come to recognize the ways in which social media have “transformed the internet into something more like television” (Kay, 2019, p. 12). Therefore, looking to the broadcast medium for guidance may not be as outlandish as it initially seems (see Samples & Matzoko, 2020), particularly in light of the fact that broadcasting represents the only medium in which regulations that directly address the dissemination of disinformation are in place. The first of these regulations – the broadcast hoax rule – prohibits broadcast licensees from knowingly broadcasting false information concerning a crime or catastrophe, if the licensee knows beforehand that “broadcasting the information will cause substantial ‘public harm’” (Federal Communications Commission, n.d.). This public harm must be immediate and cause direct and actual damage to the property, health, or safety of the general public, or divert law enforcement or public health and safety authorities from their duties. From the standpoint of contemporary debates about disinformation, these restrictions reflect a fairly narrow range of what might be considered identifiable fake news. However, the references in this regulation to the health and safety of the American public naturally call to mind the current coronavirus pandemic. Indeed, the public interest advocacy organization, Free Press (2020), recently petitioned the FCC to investigate the possibility that broadcasters who disseminated false coronavirus information, through the broadcast of false statements uttered by President Trump during his coronavirus task force appearances, or through the distribution of programming containing similar falsities, such as the Rush Limbaugh Show, were in violation of this regulation. The FCC (2020) immediately denied Free Press’s petition, contending that it is not the Commission’s role to act as a “self-appointed, free-roving arbiter of truth in journalism” (p. 2) and that the concerns raised by Free Press extended beyond the narrow parameters of the broadcast hoax rule. Since the late 1960s, the FCC (2008) has also maintained a more general policy that it will “investigate a station for news distortion if it receives documented evidence of such rigging or slanting, such as testimony or other documentation, from individuals with direct personal knowledge that a licensee or its management engaged in the intentional falsification of the news” (p. 11). According to the Commission, “of particular concern would be evidence of the direction to employees from station management to falsify the news. However, absent such a compelling showing, the Commission will not intervene” (Federal Communications Commission, 2008, p. 11). Indeed, news distortion investigations have been rare (especially since the deregulatory trend that began in the 1980s), and have seldom led to any significant repercussions for broadcast licensees (Raphael, 2001). 2 That being said, we have seen the FCC’s news distortion policy re-emerge recently. Specifically, in 2018, a dozen Democratic members of Congress wrote a letter to the FCC seeking a news distortion investigation of the Sinclair Broadcast Group (Cantwell, et al., 2018). Sinclair, which owns nearly 200 television stations across the U.S., received a substantial amount of attention at the time for requiring anchors for the local newscasts that it produces across the country to read from the same centrally-produced scripts and for distributing to its stations highly polarizing, and often factually questionable “must run” news/editorial segments (Fortin & Bromwich, 2018). As the members of Congress noted in their letter, “Sinclair may have violated the FCC’s long-standing policy against broadcasters deliberately distorting news by staging, slanting, or falsifying information” (Cantwell, et al., 2018). This request was also promptly declined, the very next day, with FCC Chairman Ajit Pai (2018) citing his commitment to the First Amendment and freedom of the press. As marginalized and largely inconsequential as these regulations have been through much of their history,4 their existence still runs counter to the expansive First Amendment protections for falsity outlined in the previous section. How can this contradiction be reconciled? The answer lies in a statement made by the FCC (1949) when the concept of the news distortion policy was first introduced in 1949: a broadcaster “would be abusing his position as a public trustee of these important means of mass communications were he to withhold from expression over his facilities relevant news of facts concerning a controversy or to slant or distort the news” (p. 1246, emphasis added). It is this notion of broadcaster as public trustee that is key to understanding why, in certain contexts, federal regulation of the dissemination of disinformation through electronic media is actually permissible within the highly protected standards for intentional falsity that have been established under the First Amendment. Public Resources and Public Trustees in Electronic Media Regulation When we think about why we regulate media, it is important to recognize that there are two components to how we answer that question. The first component has to do with the underlying motivations. By motivations we mean the underlying problems being addressed and/or principles being pursued. Media regulations have, of course, been implemented on behalf of a wide range of motivations, ranging from protecting children from adult content, to preserving and promoting competition, to protecting domestic cultural expression, to enhancing the diversity of sources and content available to media users (see Napoli, 2019a). In the United States, with its strong First Amendment tradition, motivations alone are seldom adequate for facilitating regulatory interventions. These motivations must be accompanied by compelling rationales. Rationales, in this case, refers to technologicallyderived justifications for imposing regulations that, to a certain extent, infringe on media outlets’ speech rights. The logic here is that certain characteristics of a medium may justify a degree of regulatory intervention. The underlying premise of this approach is that particular characteristics of a medium may warrant a greater emphasis on collective speech rights over individual speech rights; or that the medium may have a capacity for influence or harms that make some intrusion on speech rights permissible. These rationales serve as a mechanism for pursuing regulatory objectives within the context of a free speech tradition that is intrinsically hostile government intervention, regardless of the broader public interest values that these interventions might serve. So, for instance, electronic media regulation in the U.S. has been justified by a wide range of medium characteristics. Broadcasting (and, to a lesser extent, cable television) have been regulated in part on the basis of these media being uniquely pervasive (Wallace, 1998). Failed efforts were even made to apply this uniquely pervasive characterization to the Internet back in the 1990s, when Congress was attempting to impose strict indecency regulations on online content providers (Napoli, 2019b). Within these contexts, the notion of pervasiveness appears to relate to the distinctive reach, ease of access, and/or impact that certain media may have – particularly in relation to allowing children to be exposed to adult content. Media such as cable and satellite television have been regulated on the basis that their functionality is reasonably ancillary to the functionality of other, more heavily regulated media (i.e., broadcasting). The logic here is that, to the extent that one medium serves an important role in the distribution of – and audience access to – another, more heavily regulated medium, then that more heavily regulated medium’s regulatory framework may, to some extent, be imposed on the other medium. Looking specifically at broadcasting, the most frequently utilized (as well as most frequently criticized) rationale for regulation is the notion that broadcasters utilize a scarce public resource (see Logan, 1997). Here, the key contention is that broadcasters’ use of the broadcast spectrum represents the use of a publicly held resource for which there are more parties seeking access than the spectrum can accommodate – thus justifying a governmental role in allocating the spectrum and, to some extent, dictating behavioral guidelines for those privileged few granted access. These rationales that have justified the regulation of previous generations of media have, over the years, been analyzed and critiqued in-depth (see, e.g., Krattenmaker & Powe, 1994; Spitzer, 1989). Most of them do not hold up particularly well under scrutiny – a pattern that would suggest that the typical approach to media regulation is for policymakers to move forward on regulatory interventions on behalf of specific motivations, with the consideration and articulation of rationales being something of an afterthought to buttress these regulatory interventions against critiques of government overreach and any accompanying legal challenges. In the U.S., what may be the most sound and resilient rationale that has been put forth for the regulation of broadcasting is the notion that broadcasters utilize a public resource, and as privileged users of this publicly-held resource, must abide by certain fiduciary responsibilities that take the form of government-crafted and enforced public interest obligations. These public interest obligations can take the form of impositions on broadcasters’ speech rights, but such impositions are, to some extent, permissible as conditions of access to the resource to which the broadcasters have been granted. As articulated by Logan (1997), “in return for receiving substantial benefits allocated by the government, broadcasters must abide by a number of public interest conditions that, in the absence of government allocation, would be found unconstitutional” (p. 1732). This model is built upon the well-established notion that the broadcast spectrum is “owned by the people” (Berresford, 2005). This public resource, or quid pro quo rationale, as it is sometimes called (see, e.g., Graham, 2003; Spitzer, 1989) has been described as being “overshadowed” (Logan, 1997, p. 1691) in legal discussions evaluating the constitutionality of broadcast regulation by scholars’ and critics emphasis on dissecting the logic of the associated scarcity rationale. It is important to distinguish between this scarcity rationale and the related public resource/quid pro quo rationale. As much as the two rationales are interconnected through the notion of the broadcast spectrum as a “scarce public resource,” it is important to emphasize that the public resource rationale can operate independently of the notion of scarcity. That is, as much as the logic of regulating a medium on the basis of its use of a resource that is “scarce” is subject to a wide range of critiques (exploring these critiques is beyond the scope of this paper; but see, e.g., Krattenmaker & Powe, 1994; Spitzer, 1989), the logic of regulating the medium on the basis of its use of a resource that is publicly-owned is inherently much more sound.5 Even staunch opponents of media regulation have acknowledged that the public resource rationale is fundamentally stronger than the range of other, more fragile, rationales that have been proffered over the years (see, e.g., Krattenmaker & Powe, 1994). And so, obligations such as those described above that require broadcasters to abstain from the dissemination of disinformation, are permissible under the lower standards of First Amendment protection that are afforded to public trustees of a public resource – broadcast licensees. And, as much as broadcasting and social media are dramatically different communications technologies, as the next section illustrates, social media platforms may in fact merit classification as public trustees of a very different public resource. And as public trustees, they then may be similarly prohibited from knowingly and intentionally disseminating disinformation. Social Media Platforms as Public Trustees Treating social media platforms as public trustees is not a new idea. The idea has been suggested elsewhere, though it has not been explored in much detail (see, e.g., Regan, 2017; Whitney, in press; Wu, in press). 6 Indeed, what has been missing thus far from these discussions is a detailed exploration of the established characteristics and criteria of the public trust model, and how those might apply in developing a regulatory framework for social media platforms. In the approach outlined here, I propose treating the massive aggregations of user data that serve as the economic foundation of these platforms as a public resource. Within the context of the public trust framework, this means treating aggregate user data as the trust property which effectively triggers the classification of the digital platforms as public trustees. As a starting point for this analysis, it is important to flesh out the public trustee concept and the broader public trust doctrine in which it is embedded (see Sax, 1970), since the public trustee terminology has a tendency to be used somewhat loosely and indiscriminately. The public trust doctrine has its origins in English common law, but with roots dating back to ancient Rome, where concepts such as res publica (a common asset) and res communis (property that is open to all) were first developed (Epstein, 2016).

### 2NC – AT PTD Insufficient

#### The CPs standard sets a clear path for challenging federal, state and private actors increasing emissions as failing to protect water resources. Solves emissions.

**Kelly ’19** — Carolyn Kelly, Assistant District Counsel at the New York District of the U.S. Army Corps of Engineers, J.D., NYU School of Law, B.A. from the University of Chicago; (2019; “ARTICLE: WHERE THE WATER MEETS THE SKY: HOW AN UNBROKEN LINE OF PRECEDENT FROM JUSTINIAN TO JULIANA SUPPORTS THE POSSIBILITY OF A FEDERAL ATMOSPHERIC PUBLIC TRUST DOCTRINE”; University of Michigan Libraries, Nexus Uni; *New York University Environmental Law Journal*, Vol. 27; //LFS—JCM)

The courts will certainly continue to define the scope and applicability of the public trust doctrine as Juliana and its sister atmospheric public trust cases advance or are dismissed in the federal and state courts. There are no easy answers when it comes [\*237] to the public trust doctrine, but history, science, and law point to the possibility of including air within a federal public trust doctrine. Air has been included as a public trust resource since the time of the Institute of Justinian, 410 and U.S. courts have treated it as a public resource. 411 Modern science, which has shaped the evolution of the public trust doctrine in this country, has shown a clear connection between air and water quality. Specifically, science has shown a connection between increased atmospheric concentrations of greenhouse gases and warmer oceans and navigable waters, greater ocean acidity, and lower oxygen levels. 412 Elevated levels of greenhouse gases have also been directly linked to compromises in public resources held in trust by the federal government. 413 Puerto Rico and the U.S. Virgin Islands have been devastated by stronger storms made more probable by a warmer, wetter world. 414 These territories' navigable waters, which are held in trust by the federal government for the benefit of the people and potential future states, have been threatened by the risk of flooding of superfund sites. 415 Additionally, traditional public trust uses including navigation and fishing have been compromised by the storm. 416 Elevated levels of greenhouse gases also raise the temperature of the territorial seas, affecting the fish population at every stage of the life cycle. 417 This puts additional stress on deep sea fisheries at a time when fish stocks are already falling. 418 Climate change is threatening one of the most traditional of public trust uses - the right to fish the seas. 419 In this scenario, the federal government is [\*238] the sovereign and trustee of the territorial seas, with a concomitant responsibility to preserve the seas in trust for the people. 420 When considering these issues together - the traditional inclusion of air within the public trust, the connection between air and navigable waters and other well-established public trust resources, and federal authority over trust resources in the U.S. territories and territorial seas - points to the existence of a federal atmospheric public trust. With the retirement of Justice Kennedy from the Supreme Court, it is difficult to know whether the plaintiffs will prevail if their case is appealed all the way to the Supreme Court. But they have, in any case, fleshed out the nexus between water and sky, between aquatic public trust resources and the atmosphere. 421 They have shown how the concentration of CO2 and methane in the atmosphere has endangered the water they drink and the fish they eat. 422 They have shown that we cannot safeguard the aquatic public trust without protecting the atmospheric public trust. 423 This connection between the aquatic and the atmospheric public trust has also laid the groundwork for other plaintiffs. For example, the fishing industry might sue federal or state government agencies for failing to restrain the fossil fuel industry. They could credibly argue that high concentrations of CO2 in the atmosphere acidify the ocean, decimating oysters, crabs, mussels, and any sea creature that grows a shell. Similarly, the fishing industry could argue that warming air leads to warming waters, which threatens already faltering fish stocks. Furthermore, communities hit by hurricanes could sue federal or state governments for failing to rein in the fossil fuel industry. These communities can now point to emerging science showing [\*239] that rising atmospheric temperatures lead to high ocean surface temperatures, which fuel more powerful and destructive hurricanes. 424 They can trace the damage to their waterways, as storm surge and inland flooding causes the sewers to overrun and the manure lagoons to overflow, fouling surface waters and threatening the supply of drinking water and fresh water fish.

### 2NC – Resolves CC

#### A flexible PTD resolves climate change

Harms 16 – J.D. from the University of California, Davis School of Law  (RLG, Preserving the Common Law Public Trust Doctrine: Maintaining Flexibility in an Era of Increasing Statutes, https://law.ucdavis.edu/centers/environmental/files/Doremus%20Writing%20Winners/2015LaGrandeur.pdf)//gcd

The public trust doctrine is widely recognized as a flexible doctrine, and it is this flexibility that fosters the doctrine’s evolutionary nature.6 In the United States, the public trust doctrine originally and most traditionally only encompassed submerged lands and navigable waterways.7 In connection with these trust resources, the government was obligated to protect the public’s right to use these resources for fishing, navigation and commerce—now known as the “traditional uses.” 8 For example, in 1842 the Supreme Court of the United States decided Martin v. Waddell’s Lessee, in which Waddell’s lessee sought to eject Martin and others from harvesting oysters on one-hundred acres of submerged lands allegedly owned by Waddell in Raritan Bay, New Jersey.9 The Court held that Waddell could not exclude Martin or others wishing to harvest oysters because submerged lands are held in public trust to be “freely used by all for navigation and fishery, as well for shellfish as floating fish.” 10 The public trust doctrine has been steadily expanding not only to include more natural resources, but also to protect additional public uses of those trust resources. For instance, most states now consider an intermittently dry sand beach, up to the mean high tide line, as a resource covered by the trust (as opposed to including only the water or the land under that water as a trust resource).11 The New Jersey Supreme Court famously set forth this notion in Matthews v. Bay Head Improvement Association in which the court stated, “Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water’s edge.” 12 Many states, including California, have expanded the doctrine to protect use of trust resources for recreational purposes such as “the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.” 13 California, along with Hawaii, is carving the leading edge of the doctrine with court decisions asserting that ecological protection or preservation is also a “use” protected by the public trust doctrine.14 In California, this concept was pioneered in Marks v. Whitney, in which the Supreme Court of California stated: There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.15 There are legal academics, legal practitioners, and environmental advocates who hope that the evolutionary nature of the common law public trust doctrine will help them tackle some of our future’s most challenging environmental problems. For example, there is a movement based upon the notion that the public trust doctrine could be invoked to help combat climate change.16 To render this feasible, the courts would need to expand public trust resources to include the air and atmosphere.17 In fact, one state trial court, in Texas, and one state court of appeal, in New Mexico, have held that the air is a public trust resource.18 As these decisions demonstrate, the common law public trust doctrine has been steadily expanding to include more natural resources and more uses of those resources.

## Solvency

### XT 1NC 1: Circumventon

#### Antitrust and the plan only apply to private conduct – states can immunize cartels by claiming they are state led, hence circumventing the plan. 1NC evidence cites more recent precedent finding that the immunity is an overwhelming loophole.

#### 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

### XT 1NC 2: No Solvency

#### The plan is diplomatic censure and nothing more. Regardless of how many laws China violates, the US lacks an enforcement arm for compliance. That’s Bradley.

#### Discovery is too difficult to make enforcement feasible – other countries can’t and won’t cooperate to procure evidence for trial.

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.

#### Every innovative enforcement mechanism begets innovative blocking statutes. Changing interpretation of “true conflict” in foreign sovereign compulsion encourages states to pass new legislation that establishes a true conflict. [duplicated on protectionism DA/don’t read with enforcement CP].

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 broad application of the Sherman Anti-Trust Act, and the narrow exception to barring the Act through international comity, led many foreign nations to enact blocking statutes to "protect their nationals from criminal [and civil] proceedings in [the United States] where the claims to jurisdiction by those courts [were] excessive and constitute[d] an invasion of sovereignty." 60 Many of the United States' closest allies-the United Kingdom, Australia, Canada, France, Italy, South Africa, the Netherlands-enacted blocking statutes that:

[T]riggered the issuing of conflicting injunctions, [] given rise to a spate of foreign statutes designed to thwart discovery in the United States proceedings...[and] the most extreme example of outrage at the extraterritorial application of our anti-trust law is the United Kingdom's 'Clawback Act.' This statute goes far beyond simply denying recognition to the United States decrees and permits suits in the United Kingdom to recover any part of the judgement already paid that exceeds compensatory damages. 61

In addition, even U.S. companies opposed the broad application of the Act because they felt it "handicapped [them] in competing for off-shore business against foreign firms that were not subject to the strict antitrust constraints imposed by U.S. law." 2

To quell the concerns of both foreign nations and domestic companies, the United States Congress enacted the FTAIA. The FTAIA, which went into effect in 1982, provided protection for export transactions by "imposing additional requirements for establishing a Sherman Act claim involving foreign commerce that is not import trade or import commerce." 3 Specifically, in order to bring an antitrust claim, the FTAIA required "the conduct to have a direct, substantial, and reasonably foreseeable effect on commerce in the United States." 64 In other words, a foreign exporter would not be subject to prosecution under the Sherman Anti- Trust Act if it engaged in an anticompetitive act (i.e. price fixing) that did not "have a direct, substantial, and reasonably foreseeable effect on commerce in the United States." 65 As is apparent by the FTAIA statute, corporations that are engaged in import commerce are "unaffected by the FTAIA and remain[] subject to the Sherman Act." 66 Nevertheless, the FTAIA was a good faith effort by the legislative branch to: (1) improve the nation's international relations, (2) ensure U.S. domestic companies were not disadvantaged, and (3) provide "a unified legal standard to determine whether the U.S. antitrust law applies to foreign transactions." 67

#### Even if they do manage to collect the evidence, China will present contrary evidence blaming price-fixing on WTO antitrust remedies. The plan can’t solve that because it becomes state led conduct instead of private sector practice.

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

In sum, China's economic problem is not that there is too little competition, but that there is too much. As a preemptive measure against anti-dumping investigations, China's policymakers see a positive role in its trade associations regulating market order. Policies like "industrial self-discipline" and "advance approval" imposed restrictions on competition and functioned as price cartels reflecting the government's concerns with perceived excessive competition problems. Equally importantly, this governmentagencies-turned-trade associations model demonstrated that "the boundary between state and private ownership of enterprise is often blurred in contemporary China." 177 It also provides ample opportunity for state-led coordination of international trade action. When examining their legitimacy, both under WTO treaty obligations and under domestic antitrust law, related fact-finding are usually uncertain and difficult to discern. 178 States could in theory engage in the opportunities to play one system against the other.

#### Empirics prove – establishing state control is too difficult for courts to discover.

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

As illustrated in the Vitamin C Case and Matsushita Electric, the challenges for courts in taking the fact-specific approach lie in the inherent difficulty of identifying the extent of State control over domestic companies.220 On the one hand, even if the State imposes a mandatory export restraint over its own companies, it may fail to coordinate an export cartel. After all, firms that participate in a cartel may have incentives to cheat in order to line their pockets. Thus, the effectiveness of the State's policing system directly impacts the success of the State-led cartel. On the other hand, the State is no ordinary legal actor. Even if the State does not issue any binding administrative law or order, it can threaten to penalize a firm if the firm does not voluntarily comply with the State's request. In other words, the State could have de facto control over the firms, even without clear de jure control. In the Vitamin C Case, neither MOFCOM nor any other government department imposed a mandatory requirement on the Chinese manufacturers to coordinate prices, but the Chinese government may have been able to obtain de facto control over these exporters via other administrative means. However, the extent of such de facto control is very difficult for a court to discern through discovery.

#### Any residual solvency arguments demonstrate the link to our DA – to effectively enforce, the US must engage in unprecedented, lengthy discovery and trial that alienates allies.

## 1

### Development

The internal link to this impact is tiny

1. Cortright – it is about small armed conflicts between small nations not large countries nor any line about going nuclear
2. Squo thumps – proxy wars in Yemen, Libya etc is what their evidence is about. Those have literally been occurring since Arab spring and there is no flashpoint now
3. No middle east impact – countries are too tied together to go to war, the amount of oil in the region has decreased AND states lack the power to cause a large conflict – that’s the 1NC evidence
4. Countries their internal link evidence are about is Ecuador, Ukraine and XX – none of these are sufficient nor are they in the middle east. Ecuador doesn’t have fucking enemies

### XT – AT: MENA War

#### No Middle East war – lower relevance of energy, increased political stability, and muffled disputes prove – that’s Karlin.

#### Even if, great powers aren’t drawn in – Russian economic problems, lack of Chinese will, and no regional hegemon mean the balance of power is stable – that’s Glaser.

#### Proxies don’t escalate.

Imran ’19 [Myra Imran, writer for The News International. Citing the international seminar on “Strategic Dimensions of Peace and Conflict in South Asia and the Middle East”. Seminar on ‘Strategic dimensions of peace and conflict in South Asia, Middle East’. 2/6/19, https://www.thenews.com.pk/print/428298-seminar-on-strategic-dimensions-of-peace-and-conflict-in-south-asia-middle-east]

Islamabad : There is a need to study the causes of proxy wars, and what are the potential impacts of such wars on the overall conflict. These thoughts in a daylong international seminar on ‘Strategic Dimensions of Peace and Conflict in South Asia and the Middle East,’ organised by Pak Institute for Peace Studies (PIPS), an Islamabad-based think tank, participated by prominent national and international scholars.

Prof. Shahram Akbarzadeh, Deakin University, Australia, argued there is significant gap in the literature on non-state actors. He called for empirical research, along with concrete policy suggestions, on the topic, so as to mitigate the conflicts in the region, in particular South Asia and Middle East.

Speakers grappled at the notion of non-state actors and proxy wars: PIPS director Muhammad Amir Rana said non-state actors often evoke memories of violent elements. This despite that as per definition, non-state actors include organizations working for human rights.

Prof. Syed Rifaat Hussain, Department of Government and Public Policy, NUST, said the term “proxy wars” is a contested notion. There is no universal agreement on its definition, nor on the set of circumstances behind such wars. Interestingly, he said, proxy wars are as old as the phenomena of conventional war itself.

Speakers noted proxy wars are instruments of state power. As to why states go for it, it was argued, it is because they are often cheap undertaking to change the status quo.

Participants noted over the decades, much of the conflict involves non-state actors. Interstate conflict, on the other hand, has declined. In recent times, he said tit-for-tat tactics on behalf of such actors have reduced their appeal.

Dr. Ibrahim Fraihat, Doha Institute of Graduate Studies, Doha, termed proxy war as an arms conflict between two parties, though one of them is not directly involved. This way, domestic conflicts are escalated by external power intervention. At the same time, proxy war, if unresolved, can take the shape of conventional war, the most significant example was of Vietnam War. In contemporary times, he lamented, the Middle East has been rendered a stock market of proxy organizations.

William Gueriache, Associate Professor American University in the Emirates Dubai, said on surface, all states support open diplomacy and multilateralism. Yet the survival of patronage has paved the way for foreign intervention during conflicts in the whole Middle East. Dr. Marwan Kablan, Director Policy Analysis at the Arab Center for Research and Policy Studies Doha, also hinted multiplicity of actors involved in Syrian conflict, calling it as mother of conflicts in the region. It was said that wars cannot be ended unless patron states achieve their interests. Dr. Shaheen Akhtar, Professor National Defence University Islamabad focused on the apprehension of Pakistan about India’s involvement in Afghanistan. She said Pakistan’s uneasy relationship with Kabul reinforces a perception of encirclement while growing US-India strategic cooperation further aggravates these apprehensions.

Dr. Muhammad Riaz Shad, National University of Modern Languages (NUML) Islamabad, said fighting through proxies gives states an opportunity of deniability.

#### Deterrence checks.

Glaser, 17 - associate director of foreign policy studies at the Cato Institute, Master of Arts in International Security at the Schar School of Policy and Government at George Mason University (John, "Withdrawing from Overseas Bases: Why a Forward-Deployed Military Posture Is Unnecessary, Outdated, and Dangerous," *Cato Institute*, 7-18-2017, https://www.cato.org/publications/policy-analysis/withdrawing-overseas-bases-why-forward-deployed-military-posture)

Regionally, the circumstances are similarly advantageous. According to Rovner, “the chance that a regional hegemon will emerge in the Persian Gulf during the next twenty years is slim to none. This is true even if the United States withdraws completely.” 134 There are only three potential major powers in the region: Iraq, Iran, and Saudi Arabia. None of them possesses the capabilities necessary to conquer neighboring territories or gain a controlling influence over Persian Gulf oil resources. In addition to being too weak to make a bid for regional dominance, all three are bogged down and distracted by internal problems. Overall, the region is in a state of defense dominance: the major states are too weak to project power beyond their borders, but they do have the capability to deter their neighbors. Deterrence works well in this environment because the costs of offensive action remain prohibitively high. 135 Some scholars argue that the decreased importance of Persian Gulf oil means the United States should completely phase out its military commitment to the region during the next 10 years. 136 But even if Washington rejects that position and continues to factor in military intervention to deal with supply disruptions and other contingencies, maintaining a peacetime military presence in the region is not necessary. The United States can rely on carrier-based airpower and long-range bombers if military intervention in a crisis becomes necessary. 137

### XT – AT: LA War

#### No Latin American war – great powers don’t have regional allies to draw them in nor the military forces to start a war. Economics also means Russia won’t risk intervention – that’s MacFarquhar.

#### Geography.

Fedirka ’16 [Allison; Senior Analyst @ Geopolitical Futures, Former Latin America Regional Director @ Stratfor, IR MA @ Univeristy of Belgrano; “How South America Has Avoided Interstate War”; 2/15/16; https://geopoliticalfutures.com/how-south-america-has-avoided-interstate-war/]

Lastly, geographic barriers coincide with national borders, thereby naturally and significantly reducing the possibility of conflict. Interdependence between countries breeds war; the natural barriers between countries discourage high degrees of interdependence. The Andes mountain range runs the length of South America and severely impedes any east-west land passage across the continent. The Andes are significantly taller than their northern counterpart, the Rockies. The tallest 100 peaks in the Andes range in height from 19,600 feet to 21,800 feet, while the Rockies’ 100 tallest peaks range from 12,300 feet to 14,400 feet. Just to the west of these mountains along the Pacific coast lies the Atacama Desert, the driest desert in the world. It creates a 600-mile no man’s [human’s] land between Peru and Chile and also includes part of the Bolivian border. To the east of the Andes lies the Amazon rainforest. This thick, impassable rainforest overlaps with the national borders of six South American nations and provides a natural buffer in these border areas. The Pantanal, the world’s largest tropical wetland, lies just south of the Amazon in Brazil. This swampy area also creates physical obstacles for crossing parts of Brazil’s borders with Bolivia and Paraguay. Lastly, the Chaco region, particularly the area where Bolivia’s and Paraguay’s borders meet, is semi-arid and generally inhospitable. The climate fluctuates seasonally between extremely dry weather and flooding

#### Diplomacy checks.

Tass ’19 [“Russia seeks to prevent military intervention in Venezuela - upper house speaker,” March 3, 2019, https://tass.com/politics/1047233]

MOSCOW, March 3. /TASS/. Russia will make every effort to prevent military intervention in Venezuela, Russia’s Federation Council (upper house) Speaker Valentina Matviyenko told a meeting with Venezuela’s Executive Vice-President Delcy Rodriguez, who is paying a working visit to Moscow.

"We are very afraid that the United States may stage any provocations to provoke bloodshed and find a reason and pretext for intervention in Venezuela. But we will do our utmost to prevent this," Matviyenko said.

Russia is absolutely against any external meddling the affairs of sovereign independent states, she stressed.

"I’m sure that you were able to see that Russia feels sympathy with what is happening in Venezuela and solidarity with the people of Venezuela and supports the legitimate government in its fight for sovereignty and the country’s independence," Matviyenko told Rodriguez.

Russia believes that the crisis in Venezuela was artificially created by the United States’ authorities and it can be solved only through dialogue involving all the country’s political forces, Matviyenko said

"We are absolutely sure that the crisis, which was artificially created by the US in Venezuela, can be solved only by peaceful means and only in the framework of the inclusive dialogue of all political forces and the Venezuela people have the right to decide on its present and its future," she said.

### Demoracy

Don’t solve this nor spillover sufccieint

## 2

### AT: Food

#### No food wars.

Vestby ’18 [Vestby, Ida Rudolfsen, and Halvard Buhaug; 5-18-18; Doctoral Researcher at the Peace Research Institute Oslo; doctoral researcher at the Department of Peace and Conflict Research at Uppsala University and PRIO; Research Professor at the Peace Research Institute Oslo (PRIO); Professor of Political Science at the Norwegian University of Science and Technology (NTNU); and Associate Editor of the Journal of Peace Research and Political Geography; “Does hunger cause conflict?” Prio, https://blogs.prio.org/ClimateAndConflict/2018/05/does-hunger-cause-conflict/]

It is perhaps surprising, then, that there is little scholarly merit in the notion that a short-term reduction in access to food increases the probability that conflict will break out. This is because to start or participate in violent conflict requires people to have both the means and the will. Most people on the brink of starvation are not in the position to resort to violence, whether against the government or other social groups. In fact, the urban middle classes tend to be the most likely to protest against rises in food prices, since they often have the best opportunities, the most energy, and the best skills to coordinate and participate in protests.

Accordingly, there is a widespread misapprehension that social unrest in periods of high food prices relates primarily to food shortages. In reality, the sources of discontent are considerably more complex – linked to political structures, land ownership, corruption, the desire for democratic reforms and general economic problems – where the price of food is seen in the context of general increases in the cost of living. Research has shown that while the international media have a tendency to seek simple resource-related explanations – such as drought or famine – for conflicts in the Global South, debates in the local media are permeated by more complex political relationships.

### AT Resource

#### No conflict over resources — cooperation and empirics

Kinney, PhD, & Burrows, MPH, 16—Patrick L. Kinney a professor of environmental health sciences at Columbia // Kate Burrows a PhD student in climate change & health at Yale and a MPH in climate and health from Columbia [“Exploring the Climate Change, Migration and Conflict Nexus,” *International Journal of Environmental Research and Public Health*, Vol. 13, No. 4, p. 8-10]

That underscores the fact that other factors may be more significant than migration in determining whether conflict will occur. For example, sociologist Slettbak argued that populations often unite after natural disasters and that the risk of violent conflict after such an event can be quite low [64]. Slettbak draws from an expansive 1961 study (for which over 16,000 interviews and questionnaires were conducted) about human behavior during disaster situations. The study concluded that most disasters “produced a great increase in social solidarity…[which] reduces the incidence of most forms of personal and social pathology” ([64], p. 165]. Slettbak also notes that disasters may even unify those whose differences might initially be viewed as sources of conflict—for example, ethnic, socioeconomic, or religious differences [64]. This suggests that, for example, even if migration heightened ethnic or racial tensions, a natural disaster might not increase the risk of conflict but might actually result in a more unified population.

Another potential stabilizing factor that has been discussed frequently is general political stability and the ability and capacity of government to maintain peace [61, 65]. If the state has the capacity to provide resources, such as healthcare, education, and livelihood assistance in the event of economic recession, it has a greater capacity to maintain order and stability in the face of environmental change [16]. A state may mitigate potential conflict by providing livelihood assistance when necessary, furthermore a well-developed and functioning government may have adaptation or mitigation plans in place to deal with the challenges of climate change [16]. In particular, the development of early warning systems could aid in early and informed decision-making, which would allow migration to be successfully employed as an adaptation measure, as opposed to a last resort [66].

Thus, despite the added cultural and socioeconomic stress of migration, conflict is not inevitable or even likely in well-established political states. Democracies, in particular, have been shown to be protective against conflict because these states are accountable to their populations and, due to this responsibility, may take steps to conserve water and land in the event of resource depletion [17]. Thus, even with the added stress on resources, a state can perform stabilizing functions to help maintain peace. T

his directly challenges the neo-Malthusian model, which fails to account for stabilizing forces, such as political and economic stability, that may outweigh competition for resources and thus limit conflict [61]. This echoes the findings that democratic states and institutions have the capacity to regulate environmental degradation and preserve peace [17, 67]. Additionally, it has been suggested that human ingenuity and technology have the potential to outweigh the potential dangers of environmental degradation [1].

The potential flaws in the neo-Malthusian model have also been challenged empirically increased resource scarcity and increased population pressure, for example, have only weakly been linked to increased risk of domestic conflict [68]. This suggests that resource scarcity may not have a dramatic impact on risk of conflict, at least domestically. However, current research on this link does not include potential climate projections, which may increase land degradation and resource scarcity on an unprecedented level. Additionally, it is possible that in the context of international conflict the results would be different. However, it is still important to acknowledge that the neo-Malthusian paradigm may not always hold true.

The fact that migration has been linked to increased conflict in the past does not mean that climate-migration will increase the risk of conflict. The primary challenge of linking climate-migration to conflict is the difficulty in determining the relative importance of climate-migration, among the many other drivers, as a potential factor for conflict. Furthermore, it is important to note that the pathway is non-linear and in some cases climate-induced conflict may in turn cause migration. For example, it has been suggested that the current crisis in Syria (beginning in 2011) was due in part to a period of intense drought and water scarcity [69]. By 2015, an estimated 6 million have been displaced, the majority of whom have left the country [70]. This migration may in turn lead to future conflict, indicating that not only are there complexities associated with climate-migration-conflict pathway but also that we must consider the three factors as interacting nonlinearly [71].

#### The countries that matter for their impact are resilient and institutional responses prevent escalation

Sarah Cliffe, IR MA, 16, Director of the Center on International Cooperation at New York University, 3/29/16, “Food Security, Nutrition, and Peace,” http://cic.nyu.edu/news\_commentary/food-security-nutrition-and-peace

However, current research **does not** yet indicate a clear link between climate change, food insecurity and conflict, except perhaps where rapidly deteriorating water availability cuts across existing tensions and weak institutions. But a series of interlinked problems – changing global patterns of consumption of energy and scarce resources, increasing demands for food imports (which draw on land, water, and energy inputs) can create pressure on fragile situations.

Food security – and food prices – are a highly political issue, being a very immediate and visible source of popular welfare or popular uncertainty. But their **link to conflict** (and the wider links between climate change and conflict) is indirect rather than direct.

What makes some countries more resilient than others?

**Many** countries face food price or natural resource shocks **without falling into conflict**. Essentially, the two important factors in determining their resilience are:

First, whether food insecurity is combined with **other stresses** – issues such as unemployment, but most fundamentally issues such as political exclusion or human rights abuses. We sometimes read nowadays that the 2006-2009 drought was a factor in the Syrian conflict, by driving rural-urban migration that caused societal stresses. It may of course have been one factor amongst many but it would be **too simplistic** to suggest that it was the primary driver of the Syrian conflict.

Second, whether countries have strong enough institutions to fulfill a social compact with their citizens, providing help quickly to citizens affected by food insecurity, with or without international assistance. During the 2007-2008 food crisis, developing countries with low institutional strength experienced more food price protests than those with higher institutional strengths, and more than half these protests turned violent. This for example, is the difference in the events in Haiti versus those in **Mexico or the Philippines** where far greater institutional strength existed to deal with the food price shocks and **protests did not spur deteriorating national security** or widespread violence.

# 1NR

### WTO Scenario – 1NR

#### Countries will retaliate by reducing deference to the US interpretation of its own laws in the WTO. Crushes WTO leadership.

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 United States government has itself recognized the importance of proper deference to its own interpretation of U.S. trade laws. The current U.S. administration has refused to permit appointment of new judges to the World Trade Organization's (WTO) Appellate Body, which will leave the WTO unable to enforce international trade law.190 The United States argued that the Organization has "consistently overstepped its authority ... by interpreting WTO members' domestic laws."19' Reciprocity is one of the key objectives of international comity;1 92 if the United States wishes for other countries to defer to its interpretation of its domestic law, it should ensure that other countries' interpretations are treated with a similar degree of deference in its own courts.

#### That independently causes dozens of nuclear wars

Sapiro 14—Visiting Fellow in the Global Economy and Development Program at Brooking, former Deputy US Trade Representative, former Director of European Affairs at the National Security Council, [Miriam Sapiro 14, Visiting Fellow in the Global Economy and Development program at Brookings, “Why Trade Matters,” September 2014, http://www.brookings.edu/~/media/research/files/papers/2014/09/why%20trade%20matters/trade%20global%20views\_final.pdf]RMT

This policy brief explores the economic rationale and strategic imperative of an ambitious domestic and global trade agenda from the perspective of the United States. International trade is often viewed through the relatively narrow prism of trade-offs that might be made among domestic sectors or between trading partners, but it is important to consider also the impact that increased trade has on global growth, development and security. With that context in mind, this paper assesses the implications of the Asia-Pacific and European trade negotiations underway, including for countries that are not participating but aspire to join. It outlines some of the challenges that stand in the way of completion and ways in which they can be addressed. It examines whether the focus on “mega-regional” trade agreements comes at the expense of broader liberalization or acts as a catalyst to develop higher standards than might otherwise be possible. It concludes with policy recommendations for action by governments, legislators and stakeholders to address concerns that have been raised and create greater domestic support. It is fair to ask whether we should be concerned about the future of international trade policy when dire developments are threatening the security interests of the United States and its partners in the Middle East, Asia, Africa and Europe. In the Middle East, significant areas of Iraq have been overrun by a toxic offshoot of Al-Qaeda, civil war in Syria rages with no end in sight, and the Israeli-Palestinian peace process is in tatters. Nuclear negotiations with Iran have run into trouble, while Libya and Egypt face continuing instability and domestic challenges. In Asia, historic rivalries and disputes over territory have heightened tensions across the region, most acutely by China’s aggressive moves in the South China Sea towards Vietnam, Japan and the Philippines. Nuclear-armed North Korea remains isolated, reckless and unpredictable. In Africa, countries are struggling with rising terrorism, violence and corruption. In Europe, Russia continues to foment instability and destruction in eastern Ukraine. And within the European Union, lagging economic recovery and the surge in support for extremist parties have left people fearful of increasing violence against immigrants and minority groups and skeptical of further integration. It is tempting to focus solely on these pressing problems and defer less urgent issues—such as forging new disciplines for international trade—to another day, especially when such issues pose challenges of their own. But that would be a mistake. A key motivation in building greater domestic and international consensus for advancing trade liberalization now is precisely the role that greater economic integration can play in opening up new avenues of opportunity for promoting development and increasing economic prosperity. Such initiatives can help stabilize key regions and strengthen the security of the United States and its partners. The last century provides a powerful example of how expanding trade relations can help reduce global tensions and raise living standards. Following World War II, building stronger economic cooperation was a centerpiece of allied efforts to erase battle scars and embrace former enemies. In defeat, the economies of Germany, Italy and Japan faced ruin and people were on the verge of starvation. The United States led efforts to rebuild Europe and to repair Japan’s economy. A key element of the Marshall Plan, which established the foundation for unprecedented growth and the level of European integration that exists today, was to revive trade by reducing tariffs.1 Russia, and the eastern part of Europe that it controlled, refused to participate or receive such assistance. Decades later, as the Cold War ended, the United States and Western Europe sought to make up for lost time by providing significant technical and financial assistance to help integrate central and eastern European countries with the rest of Europe and the global economy. There have been subsequent calls for a “Marshall Plan” for other parts of the world,2 although the confluence of dedicated resources, coordinated support and existing capacity has been difficult to replicate. Nonetheless, important lessons have been learned about the valuable role economic development can play in defusing tensions, and how opening markets can hasten growth. There is again a growing recognition that economic security and national security are two sides of the same coin. General Carter Ham, who stepped down as head of U.S. Africa Command last year, observed the close connection between increasing prosperity and bolstering stability. During his time in Africa he had seen that “security and stability in many ways depends a lot more on economic growth and opportunity than it does on military strength.”3 Where people have opportunities for themselves and their children, he found, the result was better governance, increased respect for human rights and lower levels of conflict. During his confirmation hearing last year, Secretary John Kerry stressed the link between economic and national security in the context of the competitiveness of the United States but the point also has broader application. Our nation cannot be strong abroad, he argued, if it is not strong at home, including by putting its own fiscal house in order. He asserted—rightly so—that “more than ever foreign policy is economic policy,” particularly in light of increasing competition for global resources and markets. Every day, he said, “that goes by where America is uncertain about engaging in that arena, or unwilling to put our best foot forward and win, unwilling to demonstrate our resolve to lead, is a day in which we weaken our nation itself.”4 Strengthening America’s economic security by cementing its economic alliances is not simply an option, but an imperative. A strong nation needs a strong economy that can generate growth, spur innovation and create jobs. This is true, of course, not only for the United States but also for its key partners and the rest of the global trading system. Much as the United States led the way in forging strong military alliances after World War II to discourage a resurgence of militant nationalism in Europe or Asia, now is the time to place equal emphasis on shoring up our collective economic security. A failure to act now could undermine international security and place stability in key regions in further jeopardy

### UQ – 1NR

#### 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

#### WTO leadership 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

Yet it would be incorrect to assume that Transnational Legal Process is always perfect. As many scholars argued, the enforcement powers of the AML are so weak as to nearly undermine the effort. 273 Nevertheless, it is essential to step back and be clear that China is currently the United States' largest merchandise trading partner, its third-largest export market, and its most significant source of imports. The economic costs of the bilateral economic relationship are genuine. Meanwhile, the WTO is the only international body dealing with trade rules between the U.S. and China that reflect core U.S. values. It "form[s] a baseline ... to build global support to critique and push back against Chinese economic practices." 274 In the context of comprehensively addressing China's challenges, the WTO is still a central system, and subject to the strong leadership of the U.S.

#### The liberal order is recovering post-trump—solves a laundry list.

HIRSH, senior correspondent and deputy news editor at Foreign Policy 12-5-20 DECEMBER 5, 2020, 6:00 AMhttps://foreignpolicy.com/2020/12/05/liberal-internationalism-still-indispensable-fixable-john-ikenberry-book-review/

Joe Biden will enter office as America’s 46th president next month in a spirit of confidence for the future—but also with an almost confessional sense of humility about the past. Because Biden and his top advisors seem acutely aware of just how badly they botched things the last time they were in power. One of their chief manifestos for change, as some of the incoming Bidenites have already privately conceded, will be G. John Ikenberry’s new book, A World Safe for Democracy. It is in some ways the crowning achievement of the Princeton University’s scholar’s decadeslong work explaining and defending the liberal international order. Ikenberry’s research traces the origins of the liberal internationalist project—the idea of building a community of nations based on democracy, cooperation, and the rule of law—going back 200 years. He chronicles it from its inception in the Age of Enlightenment and the American and French revolutions to its near-dissolution in the post-Cold War period under the neonationalist banner of its worst nemesis, President Donald Trump. Ikenberry, in an interview, said that his purpose was to “reframe the debate between nationalism and internationalism” and acknowledge that American policymakers are now dealing with a “liberal internationalism for wintertime rather than a Francis Fukuyama-style liberal internationalism for springtime” of two decades ago. (After the collapse of the Soviet Union, Fukuyama, the Stanford political philosopher, famously suggested that the triumph of democratic liberal capitalism over communism was so complete it could constitute a kind of “end of history.” This did not turn out to be the case.) Ikenberry says that it’s long past time for Biden and the Democrats to acknowledge that rampaging American hubris after the Cold War led to some of the worst mistakes ever made by liberal internationalists of the modern era: from a Pollyannaish Reaganite belief that neoliberalism (or capitalist free markets) would solve most problems to the equally self-deluding notion that democracy would achieve the same, especially in the Arab world (hence the disastrous Iraq War). Along the way, he writes in his book, nations and especially Washington lost the “shared narrative” of being a diverse but connected international community and became more of a U.S.-manufactured “public utility” dominated by the interests of multinational corporations. And the former concept is what it must return to, he says. “The book tries to provide the deeper theory of the liberal project that Biden is going to try to renew,” Ikenberry said. “I think it’s the first book that attempts to look at a whole tradition and cull it for usable knowledge we can apply today. And to make the point that the post-1989 years [after the fall of the Berlin Wall] were very much an anomaly. Two centuries on, it’s much more of a world-weary, contested run of democracies struggling to build order.” According to a senior member of the incoming Biden team, speaking on background, the new administration is paying a great deal of attention to Ikenberry’s ideas about readdressing the problems of the American middle class that were sacrificed to overzealous ideas of globalization.According to a senior member of the incoming Biden team, speaking on background, the new administration is paying a great deal of attention to Ikenberry’s ideas about readdressing the problems of the American middle class that were sacrificed to overzealous ideas of globalization. He also said that reinventing liberal internationalism along the lines Ikenberry recommends will be at the forefront of their efforts. The incoming Biden team has already conceded that both they and the Republicans, pre-Trump, lost their way. They erred badly because they “came to treat international economic issues as somehow separate from everything else,” as Biden’s nominee to be national security advisor, Jake Sullivan, wrote in the Atlantic in early 2019. Under both Democrats and Republicans, “U.S. internationalism became insufficiently attentive to the needs and aspirations of the American middle class.” In a remarkable admission, Sullivan, who served as then-Vice President Biden’s national security advisor, confessed: “During the Obama administration, when the national-security team sat around the Situation Room table, we rarely posed the question What will this mean for the middle class? Many other countries have made economic growth that expands the middle class a key organizing principle of their foreign policy.” The United States suffered a dangerous, society-splitting populist backlash because it did not address that same question, instead recklessly embracing global neoliberalism, and engaging in a confident flinging-open of all borders. The result was the loss of any sense that internationalism was also a way of protecting social and economic equity—the kind of compact that existed after World War II. Another result was a series of policies and trade deals that opened the door to the decimation of the American middle class, particularly to Chinese competition. Beyond that, successive administrations, starting with President Bill Clinton (but in which George W. Bush’s administration was particularly culpable in not punishing Chinese dumping and intellectual property theft under World Trade Organization rules) allowed China to flagrantly violate the rules of the game. The post-Cold War internationalists failed equally in thinking they could easily co-opt major illiberal states such as China and Russia fully into the global system, Ikenberry writes. They did not. The answer may be to make liberal internationalism less “offensive” and intrusive. Instead “it must define itself less as a grand vision of a global march toward an ideal society, and more as a pragmatic, reform-oriented approach to making liberal democracies safe.” China, the major rival to the United States, in particular could at least abide such an approach, Ikenberry argues, because even in its rise to global dominance it is still seeking to work within institutions like the United Nations, the International Monetary Fund, and the WTO. “In effect this strategy calls for making the liberal international order friendly to China and Russia by stepping back from the vision of a one-world liberal order,” he writes. “The emphasis instead would be on coexistence, building on the ‘defensive’ liberal principles of self-determination, tolerance, and ideological pluralism. Liberal internationalism would be made more conservative.” Or, some would say, more realist. There is little doubt about the direction the Bidenites will go, because all of them know—as Ikenberry argues—that in the end there really is no alternative. As Sullivan wrote last year: Trump’s neoisolationist approach “is dangerous, but he has surfaced questions that need clear answers. Those of us who believe that the United States can and should continue to occupy a global leadership role, even if a different role than in the past, have to explain why Trump is wrong—and provide a better strategy for the future. … “This requires domestic renewal above all, with energetic responses at home to the rise of tribalism and the hollowing-out of the middle class.” Ultimately, the challenges of modernity will require a reinvented liberal internationalism because, Ikenberry argues, there really is no other system available for dealing with “the problems of interdependence” other than through international cooperation. Climate change, pandemics like COVID-19, nuclear proliferation—all can only be solved through the established global system. “The pandemic is the poster child of that problem,” he said in the interview. But even here the United States must adopt more realist approaches to liberal internationalism. “The problem of liberal internationalism is about managing interdependence, not globalizing the world,” he said. Ikenberry concludes that liberal internationalism must recreate itself as a more restrained version of President Woodrow Wilson’s original vision of making the world “safe for democracy.” But this, again, is likely to be more a defensive than offensive approach. And at home, Ikenberry says, it means finding a brand-new way of making internationalism work for average Americans, especially with labor and environmental protections. The idea of “protectionism” can no longer simply be anathema. Indeed, Trumpist populism will not disappear under Biden. He has already advocated a $700 billion-plus “Buy American” plan and conditioned his return to the Trans-Pacific Partnership he once advocated on greater worker protections. His political platform sounds a not a little Trumpian as well, declaring he will “ensure the future is ‘made in all of America’ by all of America’s workers.” Biden will also continue a campaign begun by former President Barack Obama—but turned into a strident war by Trump—pressuring European allies to pay their fair share of the Atlantic alliance and NATO. In the end, Biden’s return to liberal internationalism will be real, but more demanding of other nations, as was Trump’s. Above all, his approach will focus first at home, on the pandemic and joblessness. “Looking over 200 years,” Ikenberry said, “one of the things I found and which the Biden administration intuitively understands is that in every period where a golden era of internationalism that lifted America to greater heights existed, it was tied to a progressive agenda.” Restoring this vision means going back to the nationalist origins of internationalism, how it arose out of the wars of the 19th century, the industrial revolution, and, in hands of proto-internationalists such as the British politician Richard Cobden, how it became a means to global hegemony and economic prosperity for its first great practitioner, Britain. Cobden spoke of free trade and peace as “one and the same cause,” and at the same time new forms of social internationalism also sprung up, pushing for equanimity for all social classes. The new concept of Adam Smith-conceived free trade presaged “the dissolution of empire, the ending of territorial annexation and the abandonment of aristocratic militarism,” as the British historian Anthony Howe argues. It presaged the modern world, in other words, culminating, ultimately, in the international community institutions proposed by Wilson and imposed and perfected by President Franklin D. Roosevelt. But institutions that were always meant to benefit all Americans. These changes in the international system are now so entrenched they cannot simply be undone. Yet they remain badly misdirected at present. Somewhere along the line the idea of internationalism became, rather than a means to achieve the end of national prosperity and peace, instead an end in itself. And this is where policymakers went wrong. In Washington, especially, the domestic impact of liberalization was consistently played down by both Republican and Democratic administrations. The post-Cold War globalization of free trade did indeed create, as the economists predicted, more global equality and prosperity overall. But in the past few decades far more of that equality and prosperity has accrued to developing nations than to the working classes of the champions of globalization like the United States and Europe, where growing inequality has engendered a long-term populist reaction, one that is unlikely to disappear any time soon. As a result, Ikenberry said, “I think we’re in for a kind of managed openness that allows us to protect environmental and labor standards, so as to shore up the democracies.”

### Link – 1NR

#### Unilateral enforcement is impossible, ensuring jurisdictional fights in the international trading system. The magnitude of this independent link is “huge.”

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

The unilateral extraterritorial application of antitrust law is a huge source of conflicts. The extraterritorial approach, especially when combined with the US effect doctrine, can raise different types of problems:

• It necessarily implies that two or more States will assert jurisdiction over the same conduct;40

• It can cause conflicts between competition policy and trade or industrial policy;41

• It can create tension in the international system;

Concerning the US system, private enforcement is likely to increase the tension, because foreign governments will often refuse to give information or consideration to private lawsuits.42

As Monti noted in relation to the EC extraterritorial application of antitrust law, in what can be taken as a general criticism, this kind of measure causes conflicts or discrepancies with rulings of foreign agencies, gives rise to conflicts with foreign governments, suffers of logistical fact-finding problems and enforcement difficulties.43

Extraterritoriality was established to face international practices that harm competition internally, but that was not enough. Zanettin concluded about its weaknesses:

“The extraterritorial application of competition law is a necessary, but limited, step to tackle foreign anticompetitive practices affecting the domestic market. The shortcomings of the unilateral use of extraterritoriality are all too clear: it is a potential of jurisdictional and political conflicts; it is hampered by the difficulty of obtaining incriminating information located abroad and of asserting jurisdiction over foreign persons; and it is a totally inadequate tool to remedy foreign export foreclosing practices. Its limits are even more obvious now that an increasingly number of countries have recourse to this instrument: enforcing decisions or information requests abroad is an even trickier task for domestic competition agencies that do not have the means and influence of the DOJ, the FTC or the European Commission. Furthermore, the simultaneous application of different national laws to foreign restrictive practices creates an increasingly complex regulatory environment, especially in the area of merger control”.

Furthermore, the difficulties associated with investigating and enforcing national law abroad – because access to information is hard – have also propelled antitrust jurisdictional issues to take the way of cooperation.

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

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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.

#### Empirics prove – the US limited the scope of the Sherman Act because of clawback legislation around the globe.

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 broad application of the Sherman Anti-Trust Act, and the narrow exception to barring the Act through international comity, led many foreign nations to enact blocking statutes to "protect their nationals from criminal [and civil] proceedings in [the United States] where the claims to jurisdiction by those courts [were] excessive and constitute[d] an invasion of sovereignty." 60 Many of the United States' closest allies-the United Kingdom, Australia, Canada, France, Italy, South Africa, the Netherlands-enacted blocking statutes that:

[T]riggered the issuing of conflicting injunctions, [] given rise to a spate of foreign statutes designed to thwart discovery in the United States proceedings...[and] the most extreme example of outrage at the extraterritorial application of our anti-trust law is the United Kingdom's 'Clawback Act.' This statute goes far beyond simply denying recognition to the United States decrees and permits suits in the United Kingdom to recover any part of the judgement already paid that exceeds compensatory damages. 61

In addition, even U.S. companies opposed the broad application of the Act because they felt it "handicapped [them] in competing for off-shore business against foreign firms that were not subject to the strict antitrust constraints imposed by U.S. law." 2

To quell the concerns of both foreign nations and domestic companies, the United States Congress enacted the FTAIA. The FTAIA, which went into effect in 1982, provided protection for export transactions by "imposing additional requirements for establishing a Sherman Act claim involving foreign commerce that is not import trade or import commerce." 3 Specifically, in order to bring an antitrust claim, the FTAIA required "the conduct to have a direct, substantial, and reasonably foreseeable effect on commerce in the United States." 64 In other words, a foreign exporter would not be subject to prosecution under the Sherman Anti- Trust Act if it engaged in an anticompetitive act (i.e. price fixing) that did not "have a direct, substantial, and reasonably foreseeable effect on commerce in the United States." 65 As is apparent by the FTAIA statute, corporations that are engaged in import commerce are "unaffected by the FTAIA and remain[] subject to the Sherman Act." 66 Nevertheless, the FTAIA was a good faith effort by the legislative branch to: (1) improve the nation's international relations, (2) ensure U.S. domestic companies were not disadvantaged, and (3) provide "a unified legal standard to determine whether the U.S. antitrust law applies to foreign transactions." 67

#### low threshold for blocking statutes – globalization.

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,

While the international community has been slow to enact up-to-date and effective blocking statutes, there will certainly be a resurgence by foreign nations to adopt statutes that would limit the scope of the Sherman Anti-Trust Act. For one, with globalization making the FTAIA affectively obsolete, the international community will strive to pressure the United States to adopt a new unified standard that expressly respects international comity. Second, advances in technology, like C2C e-commerce, will exacerbate the likelihood that the international community will: (1) adopt new and effective blocking statutes, and (2) pressure Congress to amend the current FTAIA to be more restrictive in its extraterritorial application. Specifically, with Supreme Court's decision in Apple v. Pepper, the international community will look for ways to protect its e-commerce platforms from litigious activity brought in the United States under U.S. anti-trust law. 73. 15

### Khan Wants AnitTrust Now

#### That provides uniqueness for biz con – losses in court increase business confidence and make the FTC look weak

McLaughlin 21 – David McLaughlin, economics and antitrust reporter for Bloomberg, “Antitrust Crusader Lina Khan Faces a Big Obstacle: The Courts,” 6/23/21, https://www.bloomberg.com/news/articles/2021-06-23/tech-antitrust-lina-khan-faces-courts-as-challenge-to-ftc-s-progressive-agenda?sref=iKB6XOvf

Instead, hours after the Senate confirmed her, Biden put the 32-year-old Khan—one of the most prominent antagonists of big business—in charge of the agency, where she’ll be responsible for challenging mergers and taking on companies when they use their market muscle to snuff out competition.

Now comes the hard part: putting her agenda into action. The biggest hurdle, say antitrust experts, is a judiciary that has made it very difficult for competition watchdogs to win ambitious cases. And to make any change of consequence, whether breaking up a monopoly or stopping a takeover, enforcers must prevail in court.

“None of that is easy, and it’s particularly not easy when courts are very conservative, as they are today,” says Stephen Calkins, a law professor at Wayne State University and a former general counsel at the FTC. “She’s certainly talked about breaking up companies but, my golly, that’s incredibly hard to do.”

Khan made her mark in 2017, with a law review article she wrote while still a student at Yale Law School. Titled “Amazon’s Antitrust Paradox,” it traced how the online retailer came to control key infrastructure of the digital economy and how traditional antitrust analysis fails to consider the danger to competition the company poses. The paper was widely talked about in antitrust circles and was read by senior enforcement officials.

U.S. tech titans are at the center of the antitrust debate in Washington. They are ever more powerful, with Apple Inc., Amazon.com Inc., Alphabet Inc., and Facebook Inc. among the top 10 largest companies in the world, by market value. A House of Representatives investigation last year accused the companies of abusing their dominance to thwart competition, and lawmakers are considering a raft of bills to impose new rules on how the companies operate. Federal antitrust enforcers and state attorneys general have sued Google and Facebook for what authorities say are monopoly abuses.

Khan, who was counsel to the House antitrust committee during its probe, was one of the main authors of the House report. It recommended a series of reforms to antitrust laws that she and anti-monopoly activists have long championed, like restricting which markets the companies can operate in and requiring them to treat other businesses on their platforms fairly and without favoritism.

Khan’s work helped revolutionize competition-policy debates and shift support for a more forceful approach that abandoned the playbook inspired decades ago by Robert Bork, the conservative legal scholar and judge. That framework came to be known as the consumer welfare standard and relies on price effects as the measure of competitive harm. Khan argued in her paper for a new approach, focused on the competitive process and the structure of markets, that she said would more fully capture harms that the consumer welfare standard misses.

Once considered on the fringes of antitrust thinking, Khan and her acolytes—often dubbed the New Brandeis School, after Supreme Court Justice Louis Brandeis—are now firmly mainstream with Khan’s appointment as FTC chairwoman.

The FTC has suffered some stinging defeats recently. Last year, the agency lost a major monopoly case filed against chipmaker Qualcomm. In April, a unanimous Supreme Court eliminated a tool used by the FTC to recover money for defrauded consumers. Later this month, a federal judge in Washington is expected to rule on whether the agency’s monopoly lawsuit against Facebook can proceed.

Still, there’s widespread agreement that the status quo is no longer tenable. Over the last two decades, concentration has risen in industries across the economy. Some economists say dominant companies can use their market power to suppress wages, for example, exacerbating inequality. The worries are bipartisan. Republicans and Democrats alike are pushing for antitrust reforms to rein in the biggest tech platforms, and Khan was confirmed by the Senate with significant Republican support.

Big losses in the courts would eventually hurt Khan’s authority and demoralize her staff, says William Kovacic, a former FTC chairman who now teaches at George Washington University Law School. “You become like a sports team that is known to its opponents as unable to win,” he says. But defeats also could provide the foundation for the kind of sweeping antitrust legislation that Khan and her supporters want.

“If you want to change the world, at some point it goes to the courts or it goes to the legislature,” Kovacic says. “But you can’t do it by yourself.”